Tennessee Capital Case

Bench Book

2nd Ed.

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Chapter 1

Preliminary Considerations

Chapter 1

Preliminary Considerations

A. NOTICE OF INTENT TO SEEK THE DEATH PENALTY

1. Filing

a. Tenn. R. Crim. P. 12.3

A capital case officially begins upon the filing of the State's notice of its intent to seek the death penalty in a first degree murder case. Under Tennessee law, the State must give notice to the defendant that it intends to seek the death penalty. The rule governing this notice is Tennessee Rule of Criminal Procedure 12.3(b).

> **(b) CAPITAL CASES.**
>
> **(1) TIMING.– When the indictment or presentment charges a capital offense and the district attorney general intends to ask for the death penalty, he or she shall file notice of this intention not less than thirty (30) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.**
>
> **(2) CONTENT. – The notice shall specify that the state intends to seek the death penalty and shall specify the *aggravating circumstances* the state intends to rely on at the sentence hearing. The state may specify by referring to the statutory citation of the aggravating circumstance.**

Tenn. R. Crim. P. 12.3(b) (emphasis added).

Subsection (c) of Tenn. R. Crim. P. 12.3 governs the manner of giving notice and provides as follows:

(c) MANNER OF GIVING NOTICE. – Notice under Rule 12.3(a) or (b) shall be in writing, filed with the court, and served on counsel. If the notice refers to a prior conviction or other sensitive matters, the court may permit the notice to be filed under seal.

b. Tenn. Code Ann. § 39-13-208

In addition to Rule 12.3, Tennessee Code Ann. § 39-13-208 also addresses the issue of notices to be filed in capital cases.

> **(a) Written notice that the state intends to seek the death penalty, filed pursuant to Rule 12.3(b) of the Tennessee Rules of Criminal Procedure, shall constitute notice that the state also intends to seek, as a possible punishment, a sentence of imprisonment for life without possibility of parole.**
>
> **(b) Where a capital offense is charged in the indictment or presentment and the district attorney general intends to ask for the sentence of imprisonment for life without possibility of parole, written notice shall be filed not less than thirty (30) days prior to trial. If the notice is filed later than this time, the trial judge shall grant the defendant, upon motion by the defendant, a reasonable continuance of the trial. The notice shall specify that the state intends to seek the sentence of imprisonment for life without possibility of parole, and the notice shall specify the aggravating circumstance or circumstances the state intends to rely upon at a sentencing hearing. Specification may be complied with by a reference to the citation of the circumstance or circumstances. Such notice shall be in writing and filed with the court and served on counsel.**

(c) If notice is not filed pursuant to subsection (a) or (b), the defendant shall be sentenced to imprisonment for life by the court if the defendant is found guilty of murder in the first degree.

(d) The defendant and the state of Tennessee may enter into a plea agreement whereby the defendant is sentenced to imprisonment for life without possibility of parole, pursuant to the provisions of Rule 11 of the Tennessee Rules of Criminal Procedure.

c. Adequacy of Notice

When reviewing the adequacy of a notice in a capital case, there are several issues which must be considered.

i. Whether the notice adequately lists the aggravating circumstances as read in the statute in both language and/or citation to the appropriate statutory section.

ii. Whether the notice includes the proper version of the aggravating circumstance based upon the date of the offense. Due to changes in the language of some statutory aggravating circumstances, the notice should be carefully reviewed to ensure it tracks the actual language of the aggravating circumstance in effect ***at the time of the homicide***.

iii. When the case involves more than one victim, whether the notice adequately indicates which aggravating circumstances apply to which victim.

iv. When the case involves more than one defendant,

whether a separate notice been filed as to each, and, if not, whether the notice is clear as to which factors apply to which defendant.

For example, where there are two codefendants in a capital case and the notice cites to § 39-13-204(i)(2) (prior violent felony), the notice should be specific as to which factor is sought to which defendant or there should be separate notices for each defendant. Both defendants may not have a prior violent felony.

v. When the case involves multiple counts of first degree murder as to a single victim, whether the notice is clear as to which factors apply to which counts.

2. Withdrawal of Notice

In some cases the district attorney general may withdraw the notice seeking the death penalty prior to trial. The court must consider the timing of the withdrawal and its effect on other matters.

- Withdrawal of a death penalty notice: see Tennessee Supreme Court Rule 13, Section 3 for information on what is required when the notice is withdrawn either within thirty (30) days or more than thirty (30) days pretrial and its effect on the payment of counsel and any related motion to continue.

- Withdrawal of a death penalty notice (Effect on Life Without Parole): If the death penalty notice is withdrawn prior to trial, the trial court should consider the effect the withdrawal has on the notice regarding life without the possibility of parole. See State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000) (state's withdrawal of its original notice of its intention to seek the death penalty, without

more, also operated to withdraw notice of its intention to seek life without parole); see also State v. Dych, 227 S.W.2d 21, 45 (Tenn. Crim. App. 2006).

NOTE: Notify your capital case attorney when a notice is filed. The Tennessee Supreme Court (via the AOC) monitors all capital cases at all levels and produces monthly reports to reflect the status of cases for any given time period. Your capital case attorney has the administrative responsibility of providing the AOC with updated information on existing and new cases.

3. Ineligibility for Notice

a. Juveniles

Juveniles are not eligible for the death penalty. Roper v. Simmons, 543 U.S. 551 (2005) (death penalty for those who were under 18 years of age at the time of the commission of the offense constitutes cruel and unusual punishment and hence is barred by the Constitution).

b. Intellectually Disabled Individuals

Though not typically known by the parties at the time of filing notice in a given case as to a specific defendant, an intellectually disabled person is not eligible for the death penalty. Atkins v. Virginia, 536 U.S. 304 (2002). This issue is discussed more thoroughly in Chapter 4.

NOTE: "[F]ederal and state courts have consistently declined to extend the United States Supreme Court's ruling in Atkins, barring the execution of intellectually disabled individuals, to the mentally ill." Faulkner v. State, 2014 WL 4267460, at *84 (Tenn. Crim. App. Aug. 29, 2014) (citing Joshua v. Adams, 231 Fed. Appx. 592, 593 (9th Cir.2007); In re: Neville, 440 F.3d 220, 221 (5th Cir.2006); Lawrence v. State, 969 So.2d

294 (Fla.2007); State v. Ketterer, 111 Ohio St.3d 70, 855 N.E.2d 48 (Ohio 2006); Matheney v. State, 833 N.E.2d 454 (Ind.2005)). See also Christa Gail Pike v. State, 2011 WL 1544207 (Tenn. Crim. App. Apr. 25, 2011), perm. app. denied, (Tenn. Nov. 15, 2011).

B. APPOINTMENT OF COUNSEL

The United States and Tennessee Constitutions guarantee an indigent criminal defendant the right to assistance of counsel at trial. See United States Constitution, Amendment VI; Tennessee Constitution, Article 1, § 9; Martinez v. Court of Appeal of California, 528 U.S. 152 (2000); Gideon v. Wainwright, 372 U.S. 335 (1963); State v. Small, 988 S.W.2d 671, 673 (Tenn. 1999); State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984); see also Tenn. R. Crim. P. 44(a).

Generally, the right to counsel "does not include the right to appointment of counsel of choice, or to special rapport, confidence, or even a meaningful relationship with appointed counsel." State v. Carruthers, 35 S.W.3d 516, 546 (Tenn. 2000).

An important aspect of the capital case[1] is the appointment of counsel. Many times an attorney is initially appointed to represent a defendant charged with first degree murder who is not "qualified" to handle capital cases. Once the notice of intent to seek the death penalty is filed, the Court is required to appoint a **lead counsel** and a **co-counsel** who are "qualified" under Tennessee Supreme Court Rule 13, Section 3 which deals with the minimum qualifications and compensation of counsel in capital cases.

Please note that the AOC maintains a list of capital qualified counsel, but the list is not an exhaustive list of qualified attorneys. Those attorneys who want

[1] Tenn. S. Ct. R. 13, Section 3(a) defines a "capital case" as "a case in which a defendant has been charged with first-degree murder and a notice of intent to seek the death penalty, as provided in Tenn. Code Ann. §39-13-208 and Tennessee Rule of Criminal Procedure 12.3(b), has been filed and no order withdrawing the notice has been filed."

to be included on the list complete a questionnaire indicating they have met the Rule 13 requirements. Other qualified attorneys are likely present in each judicial district who meet the Rule 13 requirements but who for some reason did not wish to be placed on the list or who may not be aware of the list.

Once the Court has located lead counsel and co-counsel, the Court should sign an order officially appointing counsel. The order of appointment should clearly designate who is lead counsel and who is co-counsel. This order will provide a record of the appointment of counsel and will assist counsel in securing payment from the AOC as of the date of the order of appointment.

As noted above, the Court may identify qualified counsel who are not listed on the AOC's list. The appointment order may reflect the Court's findings as to counsel's qualifications (perhaps with counsel even reciting qualifications on the record). Again, this finding will assist counsel in receiving future payment in light of the Rule 13 requirements.

NOTE: Unlike noncapital cases, attorneys in capital cases must submit interim claims for fees. If the claim is beyond 180 days, the AOC will not allow payment. Tenn. S. Ct. R. 13, Section 6(a)(4).

Rule 13 Section 3 [checklist]

<u>Lead Counsel</u> must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice *pro hac vice*;

(2) have regularly participated in criminal jury trials for at least five years;

(3) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter; and

(4) have at least one of the following:

(A) experience as lead counsel in the jury trial of at least one capital case;

(B) experience as co-counsel in the trial of at least two capital cases;

(C) experience as co-counsel in the trial of a capital case and

experience as lead or sole counsel in the jury trial of at least one murder case;

(D) experience as lead counsel or sole counsel in at least three murder jury trials or one murder jury trial and three felony jury trials; or

(E) experience as a judge in the jury trial of at least one capital case.

<u>Co-counsel</u> must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice *pro hac vice*;

(2) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter; and

(3) have at least one of the following qualifications:

(A) qualify as lead counsel; or

(B) have experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

NOTE: If counsel is qualified except for the specialized training requirement, courts have appointed these attorneys with the requirement that the attorney attend the next scheduled specialized training. TACDL provides a two-day seminar annually, one day of which would meet the requirements. Counsel is advised if there are additional motions which he/she finds should be filed following the seminar, he/she will be provided with the opportunity to file such motions.

NOTE: In <u>State v. Hester</u>, 324 S.W.3d 1, 35 (Tenn. 2010), the court held that Rule 13(b)(1) was not a rule of constitutional dimension.

1. Public Defender

Typically, the public defender in your district will be the default counsel for indigent defendants. In fact, Tenn. S. Ct. R. 13, Section 3(b)(1) notes that "[w]henever possible, a public defender shall serve

as and be designated '**lead counsel**.'" Private counsel may be appointed as co-counsel to the public defender.

In some cases, the public defender may not qualify as counsel in a capital case or may only qualify as co-counsel. In addition, as is common, conflicts of interest may result in the withdrawal of that office. Once the death penalty notice is filed, the Court may inquire into the qualifications of the public defender's office. If the public defender's office is not qualified to accept the case or to continue with the case, the Court must look to the Rule 13 list or other qualified private counsel.

2. Self-Representation

A defendant alternatively has a right to represent himself/herself and proceed *pro se* without the assistance of counsel. Farretta v. California, 422 U.S. 806, 819 (1975); Northington, 667 S.W.2d at 60. "[T]he right to counsel and of self-representation . . . are alternatives, with a defendant being able to assert one or the other but not both." Hester, 324 S.W.3d at 30. "An error in denying the exercise of the right to self-representation is a structural constitutional error not amenable to harmless error review and requires automatic reversal when it occurs." Id. (citing State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008)).

In State v. Hester, 324 S.W.3d at 30, the Tennessee Supreme Court addressed the right to self-representation as follows:

> *Article I, Section 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution guarantee not only a right of the accused to be represented by counsel but also a right to self-representation. State v. Small, 988 S.W.2d 671, 673 (Tenn.1999). These two rights—the right to counsel and of self-representation—are alternatives, with a defendant being able to assert one or the other but not both. Lovin v. State, 286 S.W.3d 275, 284 (Tenn.2009); State v. Small, 988 S.W.2d at 673. Respect for individual autonomy when one's liberty has been imperiled through the leveling of an accusation of criminal conduct has led to a general prohibition upon forcing an unwanted attorney on an unwilling client. Lovin v. State, 286 S.W.3d at 285; see*

also Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975).

To exercise a constitutional right of self-representation, an individual must waive his or her constitutional right to counsel. State v. Small, 988 S.W.2d at 673 ; 3 Wayne R. LaFave et al., Criminal Procedure § 11.5(c), at 739 (3d ed. 2009) ("LaFave, Criminal Procedure"). "Just as the right to counsel extends through various stages in the criminal justice process, waiver of that right can occur at each of those stages. In some respects, what is required for a valid waiver will vary with the particular stage." 3 LaFave, Criminal Procedure § 11.3(a), at 678. When balancing the right of self-representation against the right to counsel at the trial stage of proceedings, the courts have assigned a constitutional primacy to the right to counsel over the right of self-representation. See, e.g., Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161–62, 120 S. Ct. 684, 145 L.Ed.2d 597 (2000); United States v. Mackovich, 209 F.3d 1227, 1236–37 (10th Cir.2000); United States v. Singleton, 107 F.3d 1091, 1102 (4th Cir.1997). As stated by the United States Supreme Court, "it is clear that it is representation by counsel that is the standard, not the exception." Martinez v. Court of Appeal of Cal., 528 U.S. at 161, 120 S. Ct. 684. In accordance therewith and given the mutually exclusive nature of the rights, we have observed that "[c]ourts should indulge every presumption against waiver of the right to counsel." Lovin v. State, 286 S.W.3d at 288 n. 15.

a. Defendant Request to Self-Represent

Due to the obviously serious nature of a capital case, it is difficult to imagine a scenario in which an indigent capital defendant should represent himself/herself. However, the right is constitutional in nature. E.g. State v. Jones, 568 S.W.3d 101, 124-25 (Tenn. 2019). Our state supreme court has stated "there are three essential prerequisites that must be present before the right to self-representation becomes absolute: (1) the right must be asserted in a timely manner; (2) the request must be clear and unequivocal; and (3) the defendant must knowingly and intelligently waive the right to counsel." Id. at 125 (citing Hester, 324 S.W.3d at 30-31); see also Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). In making this determination, the trial court needs to ensure the record shows "the defendant made his decision knowing the disadvantages and the dangers of self-

representation." Jones. 568 S.W.3d at 125.

It should be noted that the **competency standard** for waiving counsel is the same as the competency standard to stand trial. In addition, the court must determine that the waiver is both intelligent and voluntary before it can be accepted.

If a defendant requests to represent himself in a capital murder case and waive his right to counsel, the Court should conduct a colloquy with the defendant to ascertain whether he/she is knowingly, voluntarily and intelligently waiving the right to counsel.

(1) Tennessee Rule of Criminal Procedure 44

Tenn. R. Crim. P. 44(b) provides in part as follows:

> **(b) WAIVER. —**
> **(1) ACTIONS BY COURT. — Before accepting a waiver of counsel, the court shall:**
> **(A) advise the accused in open court of the right to the aid of counsel at every stage of the proceedings; and**
> **(B) determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters.**
> **(2) WRITTEN WAIVER. — A waiver of counsel shall be in writing.**
> **(3) RECORD OF WAIVER. — An accepted waiver of counsel shall be in the record.**

(Emphasis added). The colloquy should be "intensive." Jones, 568 S.W.3d at 125.

(2) Some Factors Which Can and Cannot Be Considered

(a) Defendant's Intelligence

Although the trial court's inquiry into the defendant's "background" and "experience" should include a discussion of the defendant's educational history, the fact that the defendant lacks professional capabilities or even basic legal knowledge cannot, standing alone, be used to deny the defendant the right to self-representation.[2] "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." Godinez v. Moran, 509 U.S. 389, 399 (1993); Hester, 324 S.W.3d at 31.

There is a "narrow exception" to the rule whereby a state may "insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'" Hester, 324 S.W.3d at 31-32 (quoting Indiana v. Edwards, 554 U.S. 164, 178 (2008)). "However, in general, an accused's lack of capacity to present an effective defense is not a basis for denying the exercise of the right to self-representation." Hester, 324 S.W.3d at 32.

(b) Capital Proceedings

"A defendant does not lose his or her right to self-representation because he is being tried for a

[2] See also State v. Hester, supra (although self-representation cannot be denied based on lack of experience and the fact it was a capital case, it may be denied based on **explicit** findings about how the defendant's request for self-representation was designed to delay and frustrate the judicial process).

capital offense." Hester, 324 S.W.3d at 32; Jones, 568 S.W.3d at 126.

(c) Obstructing/Manipulating the Court Process

"[T]he United States Supreme Court has recognized the absence of the right to self-representation when a defendant seeks to abuse the dignity of the courtroom or to engage in serious obstructionist misconduct." Hester, 324 S.W.3d at 31 (citing Edwards, 554 U.S. at 171). Defendants are "not entitled to use the right of self-representation as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." United States v. Mosley, 607 F.3d 555, 558 (8th Cir. 2010) (internal quotation omitted).

However, a defendant is "free to seek to invoke a right of self-representation as an alternative should their request for the appointment of a different attorney be denied." Hester, 324 S.W.3d at 33.

(d) Inability to Communicate

There may be some instances in which "a defendant's communication skills may be so limited or impaired that they cannot be appropriately accommodated using means less restrictive than declining to allow a defendant to exercise his or her right of self-representation." Hester, 324 S.W.3d at 32-33. However, in Edwards the Supreme Court refused to adopt a standard whereby a court could deny a defendant's right to self-representation where the defendant could not communicate coherently with

the court or a jury. See Edwards, 554 U.S. at 178.

Illustrative Case:

State v. Hester, 324 S.W.3d 1, 21-34 (Tenn. 2010).

The attorney who would ultimately serve as the defendant's lead counsel at trial was, at various times, removed from the case entirely, reinstated as lead counsel, and demoted to co-counsel. As relevant to this discussion, in September 2004, lead counsel was demoted to co-counsel, with the trial court citing counsel's disregard of scheduling orders and "inconsistencies and potentially misleading omissions" in counsel's requests for continuances. The defendant then wrote letters directly to the trial court expressing displeasure with the court's decision. The defendant stated in one letter that he wanted to fire both attorneys and represent himself.

The trial court held hearings in January and February 2005. At the February hearing, the defendant said that he would prefer to fire both lawyers and represent himself at trial unless he could retain private counsel. The trial court denied the defendant's motion, citing (1) the defendant's delay tactics and frustrating court processes; (2) the petitioner's "problem[s] communicating physically and medically;" (3) the defendant's general lack of understanding of the judicial process; and (4) the nature of a capital case.

The Tennessee Supreme Court held the trial court erred by denying the defendant's waiver based upon the complexity of a capital case, the defendant's perceived communication difficulties, and his lack of understanding of the law.

However, the Supreme Court held that the trial court properly denied the defendant's waiver of the right to counsel based upon the defendant's attempts to manipulate the system.

IMPORTANCE: The conclusion in Hester emphasizes the need for the trial court to conduct a thorough colloquy with a potential pro se defendant, as well as the need to make on-the-record findings as to every potential aspect of the waiver issue, regardless of whether the trial court accepts the defendant's waiver of the right to counsel.

[An example colloquy memo is included in Appendix One and includes matters which must be addressed with the defendant including an understanding of the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments for the various offenses and lesser included offenses, possible defenses, and circumstances in mitigation. In addition, in each case, the colloquy should also include "all other facts essential to a broad understanding of the whole matter." See Jones, 568 S.W.3d at 125 (quoting Von Moltke v. Gillies, 332 U.S. 708, 724 (1948)). These other facts should include specific questions about the heightened nature of a capital case and specific requirements of a capital case (e.g. nature of the punishment, ex parte motion practice, bifurcated nature of a capital case, individual voir dire, right to testify in each phase, possible presentation or waiver of mitigation, etc.).]

NOTE: Some of the issues which should be addressed may be alleviated or at least reduced with the appointment of elbow counsel if a defendant is allowed to self-represent. Elbow counsel is discussed below.

b. Implied Waiver Due to Defendant's Actions/Behavior

A defendant's right to self-representation, however, is not absolute. Hester, 324 S.W.3d at 31 (citing Indiana v. Edwards, 554 U.S. 164, 171 (2008)). In some cases, a defendant may implicitly waive his right to counsel through his own actions. State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000). Where the record reflects that the trial court has advised the defendant that the right to counsel will be lost if the misconduct persists and generally explains the risks associated with self-representation, but the defendant persists in exhibiting inappropriate behavior, the defendant may appropriately be found to have implicitly waived the right to counsel. Id. at 549.

In State v. Carruthers, the defendant was required to represent himself in his capital case following his rather belligerent behavior. The Carruthers court stated "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings." Id. at 549. Various courts have discussed the distinction between implied waiver and forfeiture of the right to counsel and a discussion of this issue is also found in Carruthers. See id. at 546-50.

Later, in State v. Willis, 301 S.W.3d 644 (Tenn. Crim. App. 2009), app. denied, (Tenn. 2009), the court addressed the issue of a capital defendant's right to appointed counsel and how a defendant's behavior may waive that right to counsel. In Willis, there were seven different changes in counsel because of deteriorated relationships due to poor communication, conflicts, or BPR complaints by Defendant Willis. As early as the first change of counsel, the trial court engaged the defendant "in an extensive voir dire of his understanding of the imminence, difficulty, and risks of self-representation." 301 S.W.3d at 652. "Despite the trial court's warnings and explanations of the law, the defendant persisted in intentional conduct that prompted the disqualification of counsel. In these circumstances, the trial

court was justified in holding that the defendant had implicitly waived his right to counsel." Id.

Quoting Carruthers, the Willis court noted the "'right of an accused to assistance of counsel, however, does not include the right to appointment of counsel of choice, or to special rapport, confidence, or even a meaningful relationship with appointed counsel.'" Willis, 301 S.W.3d at 650. The court further stated "the 'essential aim of the Sixth Amendment is to guarantee an effective advocate, not counsel preferred by the defendant.'" Id. (quoting Carruthers). The Willis court went on to quote Carruthers further.

> *The idea that the right to counsel may not be used to manipulate or toy with the judicial system applies equally to indigent and non-indigent defendants. Although an indigent criminal defendant has a constitutional right to appointed counsel, that right may not be used as a license to manipulate, delay, or disrupt a trial. Accordingly, we conclude that an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings. We also hold that the distinction between these two concepts is slight and that the record in this case supports a finding of both implicit waiver and forfeiture.*

301 S.W.3d at 651 (quoting Carruthers, 35 S.W.3d at 549).

c. Forfeiture Due to Defendant's Actions/Behavior

As mentioned in the previous section, a defendant may also forfeit his or her right to the assistance of counsel through actions or behavior.

In certain circumstances where defendant's conduct is extreme and egregious, regardless of the defendant's intent to relinquish the right to counsel and irrespective of the defendant's knowledge of the right, defendant may be deemed to have forfeited the right to counsel. Carruthers, 35 S.W.3d at 550; State v. Holmes, 302 S.W.3d 831, 838 (Tenn. 2010).

Finding of forfeiture is appropriate only where a defendant "egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice." Carruthers, 35 S.W.3d at 550; Holmes, 302 S.W.3d at 838-39.

"Whether a defendant engages in some form of conduct that justifies a ruling of forfeiture may generally be determined only after an evidentiary hearing at which the defendant is present and permitted to testify." Holmes, 302 S.W.3d at 838-39.

> *Factors relevant to the trial court's consideration include (1) whether the defendant has had more than one appointed counsel; (2) the stage of the proceedings, with forfeiture "rarely . . . applied to deny a defendant representation during trial"; (3) violence or threats of violence against appointed counsel; and (4) measures short of forfeiture have been or will be unavailing.*

Id. at 839 (citation omitted). "The State bears the burden of establishing that the defendant committed such actions as to justify a forfeiture." Id.

"[A] criminal defendant's constitutional right to the assistance of counsel is so fundamental, particularly at trial, that only the most egregious misbehavior will support a forfeiture of that right without warning and an opportunity to co conform his or her conduct to an appropriate standard." Id. at 846. Furthermore,

> *[A] defendant should not be found to have forfeited (or implicitly waived) his right to counsel on the basis of a single incident of physical violence unless the violence was extreme and (1) the defendant was previously warned that he could lose the right to counsel for such behavior; (2) there is evidence that the defendant engaged in the violence to manipulate the court or delay the proceedings; or (3) it is not possible to take other measures that will protect the safety of counsel.*

Id. at 847.

A defendant may also forfeit the right to the assistance of elbow or standby counsel. Carruthers, 35 S.W.3d at 552.

It is also noteworthy that in Hester the Tennessee Supreme Court concluded a capital defendant has no constitutional right to two attorneys at trial. See 324 S.W.3d at 35. A week before trial, the trial court permitted one of Hester's attorneys to withdraw for several reasons, including the defendant's supposed threats against counsel and her family. Considering numerous delays in the case (among other things), the trial court denied the defendant's request for a continuance, and the Tennessee Supreme Court concluded this action did not constitute an abuse of discretion. Id. at 35-36. The trial court did appoint new co-counsel, who served at trial despite the relative lack of preparation.

NOTE: Both Carruthers and Willis support the position that a finding of implicit waiver and forfeiture of an indigent defendant's counsel in a capital case is appropriate only where a defendant egregiously manipulates the constitutional right to counsel to delay, disrupt, or prevent the orderly administration of justice and that persons charged with capital offenses should not be afforded greater latitude to manipulate and misuse valuable and treasured constitutional rights.

3. Self-Represented Defendant With Represented Co-Defendant

Tenn. R. Crim. P. 14(c)(2) gives trial judges the discretion to order a severance of defendants if:

> **(A) before trial, the court finds a severance necessary to protect a defendant's right to a speedy trial or appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or**

(B) during trial, with consent of the defendants to be severed, the court finds a severance necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

In the trial of two co-defendants, when one defendant waives his right to counsel and represents himself, a severance is not automatic; rather, trial courts should employ certain precautionary measures to help minimize the possibility of prejudice. Carruthers, 35 S.W.3d at 553. Such precautionary measures include, but are not limited to:

- appointing standby counsel,
- warning the *pro se* defendant that he will be held to the rules of law and evidence and that he should refrain from speaking in the first person in his comments on the evidence;
- instructing *pro se* defendant that he should avoid reference to co-defendant(s) in any opening statement or summation without prior permission of the court and refrain from commenting on matters solely within his personal knowledge or belief, **and**
- instructing the jury prior to the closing remarks, during summation and in final instructions, that nothing the lawyer said is evidence in this case and that anything the *pro se* defendant says in his "lawyer role" is not evidence.

See id.

These measures are merely suggestions and not requirements. In Carruthers, the Court found that in rare cases, even these protective measures will not be sufficient to prevent "the possibility of prejudice from ripening into actuality." Id. (citations omitted).

If this issue arises, you should examine the above factors. Additionally, you should consult the facts in Carruthers and determine if the defendant seeking severance would be prejudiced to the point that a severance is mandated to protect the defendant's right to a fair trial.

4. Hybrid, Standby or "Elbow" Counsel

If the Court determines that the defendant has voluntarily, knowingly, and intelligently waived his/her right to counsel, the issue of hybrid, standby or elbow counsel will be closely tied to the Court's finding. "Advisory" or "elbow" counsel is appointed counsel where the defendant waives his right to counsel, proceeds pro se, and "has the right to conduct his own defense and in the process can confer with what has also been referred to as 'standby counsel.'" Smith v. State, 757 S.W.2d 14, 16 (Tenn. Crim. App. 1988). "Dual" or "hybrid" representation is where the defendant simultaneously "act[s] as co-counsel when he is represented by counsel." Id. Serving under either category can put counsel in a difficult position.

As referenced above, "one has a right either to be represented by counsel or to represent himself, to conduct his own defense." State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982) (emphasis in original). "A defendant has no constitutional right . . . to act as co-counsel when he is represented by counsel." State v. McCary, 119 S.W.3d 226, 258 n.5 (Tenn. 2003) (citing State v. Franklin, 714 S.W.2d 252, 261 (Tenn. 1986)). Accordingly, the Tennessee Supreme Court has concluded, "It is entirely a matter of grace for a defendant to represent himself and have counsel, and such privilege should be granted by the trial court only in exceptional circumstances." Melson, 638 S.W.2d at 359.

Alternate forms of representation should be permitted "sparingly and with caution and only after a judicial determination that the defendant (1) is not seeking to disrupt orderly trial procedure and (2) that the defendant has the intelligence, ability[,] and general competence to participate in his own defense." State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976). However, "[e]ven when the trial judge determines that both factors are satisfied, the judge may nevertheless decline to permit hybrid representation." Smith, 757 S.W.2d at 17 (citing Franklin, 714 S.W.2d at 261). Exceptional circumstances justifying hybrid representation must still be present. "What constitutes

exceptional circumstances cannot be defined; they must be determined on a case by case basis." Franklin, 714 S.W.2d at 259. A case's complexity or status as a capital case, standing alone, does not constitute exceptional circumstances. "These factors are present far too often to be 'exceptional.' If hybrid representation were to be allowed in every lengthy and/or capital case, then by definition it could not be granted 'sparingly and with caution.'" Melson, 638 S.W.2d at 359 (quoting Burkhart, 541 S.W.2d at 371).

In short, "Whether to allow hybrid representation is committed to the discretion of the trial court." Franklin, 714 S.W.2d at 258.

Similarly, in cases involving "elbow" counsel, the Tennessee Supreme Court has concluded, "[T]here is no federal or state constitutional right to [the appointment of advisory counsel] once a defendant has knowingly and intelligently waived the right to counsel." State v. Small, 988 S.W.2d 671, 673 (Tenn. 1999). The decision whether to appoint elbow counsel rests entirely within the trial court's discretion, and such decision will not be overturned on appeal absent an abuse of discretion. See id. at 674.

In cases where advisory counsel or hybrid representation is approved, the Court must take measures to ensure the defendant does not present unsworn testimony in front of the jury. The Court must also be aware of appropriate procedures should the defendant's disruptive behavior cause his removal from the courtroom.

What rates does elbow counsel receive?

If the attorney appointed by the court is designated as lead counsel and the judge approves lead counsel rates on the fee claim, then the AOC will compensate him/her at the lead counsel rates.

If the court designates him/her as co-counsel to the defendant serving as *pro se* lead counsel, then the AOC would compensate him/her at co-counsel rates.

Rule 13 states that a capital defendant is entitled to two attorneys, one as lead and one as co-counsel. If the court feels that the defendant is in need of two attorneys to protect his due process rights, then the AOC would compensate, even though the defendant is acting *pro se*. In this instance, the court should designate if the attorney is acting as lead or as co-counsel pursuant to Rule 13, section 3.

CONSIDERATIONS ABOUT COUNSEL

1. No Attorney "Expert": Only two attorneys may be appointed and receive compensation under Rule 13. Attempts to utilize a third attorney by designating him/her as an "expert" will be unsuccessful.

2. Defendant Suffering from Mental Issue: If a defendant suffers from any type of mental defect/deficiency/disease though not incompetent, insane or intellectually disabled, and the Court concludes the defendant has made a knowing, intelligent and voluntary waiver of his/her right to counsel, then it would be reasonable under those circumstances for the Court to make a finding (at the court's discretion) that elbow or hybrid counsel would be appropriate.

3. Withdrawal of Death Penalty Notice: Tenn. S. Ct. R. 13, Section 3(b)(2) provides that if notice of intent to seek the death penalty is *withdrawn at least thirty (30) days prior to trial*, the trial court shall enter an order relieving one of the attorneys[3] previously appointed.

   However, if the notice is *withdrawn less than thirty (30) days prior to trial*, the trial court may either enter an order authorizing the two attorneys previously appointed to remain on the case for the duration of the present trial, or enter an

[3] There is no authority for determining which attorney shall be relieved; therefore, the decision of which attorney to relieve is a matter within the court's discretion. The court may also allow counsel to consult with the client and have input in the decision of which attorney shall continue in the case.

order relieving one of the attorneys previously appointed and granting the defendant, upon motion, a reasonable continuance of the trial. [Rule 13, Section 3(b)(3)].

C. INTERPRETERS

In recent years the number of accused persons with a limited English proficiency has increased significantly. As this trend continues, the nature of the challenges to pretrial, trial or post-trial rulings, tend to focus on whether a particular defendant understood his/her rights at a given phase due to language concerns. For example, a number of defendants claim they did not understand a particular waiver due to the absence of an interpreter (e.g. arrest, motion to suppress, consent to search, etc.). These examples illustrate how crucial an interpreter is at all stages of a proceeding against a defendant who is not proficient in English.

Most courts across Tennessee are familiar with the process of obtaining an interpreter for a defendant or defendants. However, this section will provide general information for those who are unfamiliar with the procedure and will serve as a reminder of the importance of involving an interpreter early in every facet of a capital case.

Tennessee Supreme Court Rules 41 and 42 set forth the rules of ethics and standards for court interpreters.[4] Rule 41 deals with ethics for interpreters, and the preamble states:

> **Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency ("LEP"). It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier. As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.**

[4] These ethics and guidelines, however, do not apply to interpreters for the deaf or hearing impaired. See Tenn. S. Ct. R. 41, Applicability and Enforcement.

In subsection B of Canon 3 of Rule 41, entitled "Impartiality and Avoidance of Conflict of Interest," the following are listed as creating an actual or apparent conflict of interest which the interpreter must declare in open court and the court must consider in determining if the interpreter may serve in the case:

(1) The interpreter is a friend, associate, or relative of a party or counsel for a party involved in the proceedings;

(2) The interpreter has served in an investigative capacity for any party involved in the case;

(3) The interpreter has previously been retained by a law enforcement agency or any party to assist in the preparation of the case at issue;

(4) The interpreter or the interpreter's spouse or child has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that would be affected by the outcome of the case;

(5) The interpreter has been involved in the choice of counsel or law firm for that case; or

(6) Any other situation in which the interpreter thinks his or her impartiality may be questioned or compromised.

Section 1 of Rule 42 establishes that the rule applies to all courts of this state unless noted otherwise. Section 2 of Rule 42 sets forth the definitions to be applied in interpreting this rule and Section 3 of Rule 42 provides the guidelines for determining the need for an interpreter.

Section 3. Determining Need for Interpretation.

(a) Appointing an interpreter is a matter of judicial discretion. It is the responsibility of the court to determine whether a participant in a legal proceeding has a limited ability to understand and communicate in English. If the court determines that a participant has such limited ability, the court should appoint an interpreter pursuant to this rule.

(b) Recognition of the need for an interpreter may arise from a request by a party or counsel, the court's own voir dire of a party or witness, or disclosures made to the court by parties, counsel, court employees or other persons familiar with the ability of the person to understand and communicate in English.

(c) The court shall appoint an interpreter according to the preference listed below:

1. State certified court interpreter;
2. State registered court interpreter;
3. Non-credentialed court interpreter.

(d) The court may appoint an interpreter of lesser preference (i.e., registered instead of certified or non- credentialed instead of registered) only upon a finding that diligent, good faith efforts to obtain the certified or registered interpreter, as the case may be, have been made and none has been found to be reasonably available. A non-credentialed interpreter may be appointed only after the court has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved.

(e) Before appointing a non-credentialed interpreter, the court shall make the following findings:

(i) that the proposed interpreter appears to have adequate language skills, knowledge of interpreting techniques, familiarity with interpreting in a court setting; and

(ii) that the proposed interpreter has read, understands, and will abide by the Rules of Ethics for Spoken Foreign Language Interpreters in Tennessee Courts.

(f) A summary of the efforts made to obtain a certified or registered interpreter and to determine the capabilities of the proposed non-credentialed interpreter should be made in open court.

(g) The court shall use the services of multiple interpreters where necessary to aid interpretation of court proceedings.

Once the court has determined that an interpreter is necessary in a given case, particular procedures should be followed in obtaining and utilizing an interpreter in the criminal proceedings. Specific questions regarding interpreters and the costs associated with interpreters should be directed to the AOC coordinator of the interpreter program.

1. Generally

Interpreters may be required for persons involved in court proceedings

who have limited English proficiency.[5] An interpreter must qualify as an expert, take an oath, and is subject to impeachment. Tenn. S. Ct. R. 42; Tenn. R. Evid. 604; State v. Millsaps, 30 S.W.3d 364, 370-71 (Tenn. Crim. App. 2000).

2. Interpreters For Persons With Limited English Proficiency

As quoted in the preamble of Rule 41 above, it is essential that the communication barrier of non proficient English speaking persons be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier. Appointing an interpreter is a matter of judicial discretion. Tenn. S. Ct. R. 42, Section 3(a).

Pursuant to Tennessee Supreme Court Rule 42 ("Rule 42"), a court is required to appoint a certified interpreter if one is reasonably available. If a court is unable to locate a certified interpreter after making a "diligent, good faith" effort to do so, the court may appoint a registered interpreter. A non-credentialed interpreter may be appointed only if neither a certified nor a registered interpreter is reasonably available and "the court has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved." Section 3 of Rule 42 provides additional guidance regarding the findings required prior to the appointment of a non-credentialed interpreter.

> **NOTE**: To locate certified and registered interpreters, consult the court interpreter roster on the interpreter page of the AOC's website. To get to this page,
>
> - go to the AOC's website (www.tncourts.gov)
> - select "Programs"
> - select "Court Interpreters"
> - select "Find a Court Interpreter" on left side of page for a listing of court interpreters with references to the language

[5] See Tenn. Code Ann. 24-1-211 entitled "Deaf and hearing impaired persons; interpreters" for information related to interpreters for the deaf or hearing impaired.

they interpret, their credentials, and their location.

Regardless of whether a court appoints a credentialed or non-credentialed interpreter, the court should always attempt to appoint a neutral, unbiased interpreter who has no interest in the outcome of the case. State v. Van Tran, 864 S.W.2d 465, 476 (Tenn. 1993).

Pursuant to Tennessee Supreme Court Rule 42, Section 7(h), the AOC compensates interpreters in cases in which an **indigent criminal defendant has a statutory or constitutional right to appointed counsel** in

> (1) All court hearings;
>
> (2) Pre-trial conferences between defendants and district attorneys in order to relay a plea offer immediately prior to a court appearance or to discuss a continuance; and
>
> (3) Communication between client and state funded counsel appointed pursuant to Supreme Court Rule 13; and communication between client, state funded counsel and others for purpose of gathering background information, investigation, trial preparations, and witness interviews.

Section 7(h)(2) also provides that in cases in which **a party has a statutory or constitutional right to appointed counsel, but is *not* found to be indigent,** interpreter costs will be paid for "court proceedings" as defined in Section 2 of Rule 42.

Section 7(h)(3) also provides that if "**a party does *not* have a statutory or constitutional right to appointed counsel**, interpreter costs will only be paid for "court proceedings," as defined in section 2 of Rule 42, and at no time will the AOC pay for the costs of interpreters in the following situations:

> **(i) Communications with attorneys, prosecutors, or other parties related to a case involving LEP [Limited English Proficient] individuals for the purpose of gathering background information, investigation, trial preparations, witness interviews, or client representation at a future proceeding unless pursuant to section**

7(h)(1) … ;

(ii) Communications relating to probation treatment services;

(iii) Any other communication which is not part of a court proceeding or immediately preceding or following a court proceeding.

Section 7(h)(4) also provides that "[p]ursuant to Article 1, Section 35 of the Tennessee Constitution, interpreter costs shall be paid … for services to victim(s) of crime during court proceedings in which the victim(s), or in the case of a homicide, the next-of-kin, are present."

3. Multiple Interpreters

Due to the level of concentration required to accurately conduct a simultaneous interpretation, interpreters require frequent breaks. See Tenn. S. Ct. R. 41, Canon 8, Commentary. Tennessee Supreme Court Rule 42, Section 3(g) provides that "[t]he court shall use the services of multiple interpreters where necessary to aid interpretation of court proceedings." The Commentary following Section 3(g) suggests the use of multiple interpreters for hearings lasting more than two (2) hours. In addition, there may also be issues related to multiple defendants and attorney-client communications which will be raised which may require multiple interpreters. Tenn. S. Ct. R. 42, Section 3 (Commentary). **Courts should require each interpreter to submit to the interpreter oath prior to the proceedings. Tenn. S. Ct. R. 42, Section 4(c).**

D. RECUSAL

1. On Motion of a Party and Applicable Rules and Standards

Litigants often will file a motion for recusal of the trial judge in a case. Motions for recusal call into question the integrity of the judicial process and require serious and careful consideration.

Sections 1 and 2 of Tenn. S. Ct. R. 10B set forth the standards governing recusal motions.

Section 1. Motion Seeking Disqualification or Recusal of Trial Judge of Court of Record.

1.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal. The motion shall be filed no later than ten days before trial, absent a showing of good cause which must be supported by an affidavit. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule.

1.02. While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.

1.03. Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.

1.04. Designation Procedure. A judge who recuses himself or herself, whether on the judge's own initiative or on motion of a party, shall not participate in selecting his or her successor, absent the agreement of all parties. With the agreement of all parties to the case, the judge may seek an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1). Otherwise, the presiding judge of the court shall effect an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2) and/or (3) in sequential order. If the presiding judge is the recused judge, the presiding judge shall take no action in selecting a successor. In such cases, the presiding judge pro tempore of the court shall effect an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2) or (3). If an interchange cannot be effected by

following the above procedure in sequential order, the presiding judge or the presiding judge pro tempore shall request by - using the designation request form appended to this rule - the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4). In a judicial district where the presiding judge is the only judge and he or she recuses himself or herself, the judge shall skip the sequential steps set forth in Tenn. Sup. Ct. R.11, § VII(c)(2) and (3) and instead request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4), using the designation request form. Similarly, if the recusing judge is a general sessions judge or juvenile court judge, and he or she is the only general sessions or juvenile court judge in that county, the judge shall skip the sequential steps set forth in Tenn. Sup. Ct. R. 11, § VII(c)(2) and (3) and instead request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4), using the designation request form. Special permission to skip the sequential steps may be granted by the Chief Justice for good cause shown.

Section 2. Appeal From Trial Court's Denial of Disqualification or Recusal Motion.

2.01. If the trial court judge enters an order denying a motion for the judge's disqualification or recusal, or for determination of constitutional or statutory incompetence, the trial court's ruling either can be appealed in an accelerated interlocutory appeal as of right, as provided in this section 2, or the ruling can be raised as an issue in an appeal as of right, see Tenn. R. App. P. 3, following the entry of the trial court's judgment. These two alternative methods of appeal – the accelerated interlocutory appeal or an appeal as of right following the entry of the trial court's judgment – shall be the exclusive methods of seeking appellate review of any issue concerning the trial court's denial of a motion filed pursuant to this rule. In both types of appeals authorized in this section, the trial court's ruling on the motion for disqualification or recusal shall be reviewed by the appellate court under a de novo standard of review, and any order or opinion issued by the appellate court should state with particularity the basis for its ruling on the recusal issue.

2.02. To effect an accelerated interlocutory appeal as of right from the denial of a motion for disqualification or recusal of the trial court judge, a petition for recusal appeal shall be filed in the appropriate

appellate court within twenty-one days of the trial court's entry of the order. In civil cases, a bond for costs as required by Tenn. R. App. P. 6 shall be filed with the petition. A copy of the petition shall be promptly served on all other parties, and a copy also shall be promptly filed with the trial court clerk. For purposes of this section, "appropriate appellate court" means the appellate court to which an appeal would lie from the trial court's final judgment in the case.

2.03. The petition for recusal appeal shall contain:

(a) A statement of the issues presented for review;
(b) A statement of the facts, setting forth the facts relevant to the issues presented for review;
(c) An argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities; and
(d) A short conclusion, stating the precise relief sought.

The petition shall be accompanied by a copy of the motion and all supporting documents filed in the trial court, a copy of the trial court's order or opinion ruling on the motion, and a copy of any other parts of the trial court record necessary for determination of the appeal.

2.04. The filing of a petition for recusal appeal does not automatically stay the trial court proceeding. However, either the trial court or the appellate court may grant a stay on motion of a party or on the court's own initiative, pending the appellate court's determination of the appeal.

2.05. If the appellate court, based upon its review of the petition for recusal appeal and supporting documents, determines that no answer from the other parties is needed, the court may act summarily on the appeal. Otherwise, the appellate court shall order that an answer to the petition be filed by the other parties. The court, in its discretion, also may order further briefing by the parties within the time period set by the court.

2.06. An accelerated interlocutory appeal shall be decided by the appellate court on an expedited basis. The appellate court's decision, in the court's discretion, may be made without oral argument. Tenn.

R. App. P. 39 ("Rehearing") does not apply to the appellate court's decision on an accelerated interlocutory appeal, and a petition for rehearing pursuant to that rule is therefore not permitted in such appeals.

2.07. In an accelerated interlocutory appeal decided by either the Court of Appeals or the Court of Criminal Appeals, a party may seek the Supreme Court's review of the intermediate court's decision by filing an accelerated application for permission to appeal. The application shall be filed in the Supreme Court within twenty-one days of the filing date of the intermediate court's order or opinion. The accelerated application shall include an appendix containing: (a) copies of the petition and supporting documents filed in the intermediate appellate court; (b) copies of any answer(s) filed by order of the intermediate appellate court; and (c) a copy of the order or opinion filed by the intermediate appellate court. A copy of the accelerated application for permission to appeal shall be promptly served on all other parties. In civil cases in which the party seeking the Supreme Court's review is not the party that filed the accelerated interlocutory appeal in the intermediate court, the party filing the accelerated application shall file with the application a bond for costs as required by Tenn. R. App. P. 6.

If the Supreme Court, based upon its review of the accelerated application for permission to appeal, determines that no answer from the other parties is needed, the Court may act summarily on the accelerated application. Otherwise, the Court shall order that an answer to the application be filed by the other parties. The Court, in its discretion, also may order further briefing by the parties within the time period set by the Court. The Supreme Court shall decide the appeal on an expedited basis upon a de novo standard of review and, in its discretion, may decide the appeal without oral argument.

The accelerated application for permission to appeal authorized by this section 2.07 is the exclusive method for seeking the Supreme Court's review of the intermediate court's ruling on an accelerated interlocutory appeal filed under section 2. The provisions of Tenn. R. App. P. 11 therefore do not apply to such appeals.

2.08. The time periods for filing a petition for recusal appeal pursuant to section 2.02 and for filing an accelerated application for permission to appeal to the Supreme Court pursuant to section 2.07

> **are jurisdictional and cannot be extended by the court. The computation of time for filing the foregoing matters under section 2 shall be governed by Tenn. R. App. P. 21(a).**

NOTE: Section 5 of Rule 10B states "[t]he provisions of this rule do not affect the right of any person to file an ethical complaint against a judge pursuant to Title 17, Chapter 5, Tennessee Code Annotated."

In the recent case of Cook v. State, 606 S.W.3d 247 (Tenn. 2020), the Tennessee Supreme Court addressed the standards that apply to recusal issues of judges:

> *Tennessee litigants are entitled to have cases resolved by fair and impartial judges. Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 564 (Tenn. 2001); Leighton v. Henderson, 220 Tenn. 91, 414 S.W.2d 419, 421 (1967) (stating that the Tennessee Constitution entitles litigants to the "cold neutrality of an impartial court"); Kinard v. Kinard, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998) (same); Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994) (same). Judges must be fair and impartial both in fact and in perception. State v. Reid, 213 S.W.3d 792, 815 (Tenn. 2006) (" '[T]he preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.' " (quoting Kinard, 986 S.W.2d at 228). As this Court declared more than one hundred years ago, "it is of immense importance, not only that justice shall be administered ... but that [the public] shall have no sound reason for supposing that it is not administered." In re Cameron, 126 Tenn. 614, 151 S.W. 64, 76 (1912); see also State v. Lynn, 924 S.W.2d 892, 898 (Tenn. 1996) ("It is the appearance that often undermines or resurrects faith in the system. To promote public confidence in the fairness of the system and to preserve the system's integrity in the eyes of the litigants and the public, 'justice must satisfy the appearance of justice.' " (quoting Offutt v. United States, 348 U.S. 11, 13, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).*
>
> *To these ends, the Tennessee Rules of Judicial Conduct declare that judges must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Tenn. Sup. Ct. R. 10, R.J.C. 1.2. Another provision declares that judges "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Tenn. Sup. Ct. R. 10,*

R.J.C. 2.2. As used in the Rules of Judicial Conduct, "impartiality" and "impartially" mean the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Tenn. Sup. Ct. R. 10, Terminology "Impartial," "Impartiality," "Impartially."

If a litigant knows of facts indicating that a judge cannot fulfill the judicial obligations of fairness and impartiality, the litigant should request the judge's recusal by filing a written motion. See Tenn. Sup. Ct. R. 10B, § 1.01. Recusal motions should be filed when "the facts forming the basis of that motion become known." Bean v. Bailey, 280 S.W.3d 798, 803 (Tenn. 2009) (citing Davis v. Tenn. Dep't of Emp't Sec., 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999)). A litigant cannot manipulate the judicial process by knowing of allegedly improper judicial conduct but remaining silent until after the legal matter has been resolved unfavorably to the litigant. Id. (quoting Tenn. Dep't of Emp't Sec., 23 S.W.3d at 313). Therefore, a claim of judicial bias may be deemed waived if a litigant either fails to file a written recusal motion or fails to file a written recusal motion in a timely manner after learning the facts that form the basis of the request. Id. (citing Tenn. Dep't of Emp't Sec., 23 S.W.3d at 313).

…

Rule of Judicial Conduct 2.11 recognizes that "the appearance of bias is as injurious to the integrity of the judicial system as actual bias." Liberty Mut. Ins. Co., 38 S.W.3d at 565 (citing Alley, 882 S.W.2d at 820). As a result, Rule of Judicial Conduct 2.11 incorporates the objective standard Tennessee judges have long used to evaluate recusal motions. In re Hooker, 340 S.W.3d 389, 395 (Tenn. 2011) (citing State v. Cannon, 254 S.W.3d 287, 307 (Tenn. 2008); Liberty Mut. Ins. Co., 38 S.W.3d at 564-65). Under this objective test, recusal is required if " 'a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.' " Liberty Mut. Ins. Co., 38 S.W.3d at 564-65 (quoting Alley, 882 S.W.2d at 820). Rule of Judicial Conduct 2.11 and the objective standard it embraces reflect that

> *our system of law has always endeavored to prevent even the probability of unfairness.... Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do*

> *their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."*
>
> *In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (quoting Offutt, 348 U.S. at 14, 75 S. Ct. 11).*

Cook, 606 S.W.3d at 253-55. See also State v. Griffin, 610 S.W.3d 752 (Tenn. 2020) (addressing issue and standards of recusal based upon motion due to supervisory role in district attorney's office).

2. Without a Motion

Tenn. Sup. Ct. R 10, R.J.C. 2.11(A) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."

In the Cook case cited above, the Tennessee Supreme Court held the trial judge in the post-conviction proceeding should have recused himself even in the absence of a motion for recusal because his comments would indicate that the decision to deny post-conviction relief was based (1) on his personal knowledge and high personal regard for the professional abilities of petitioner's attorneys and his belief that they could never be ineffective, and (2) his disdain for and disagreement with Tennessee law on post-conviction procedures and dissatisfaction with post-conviction petitioners and their lawyers. The court in Cook stated as follows:

> *In some circumstances, however, judges have an obligation to recuse themselves even if litigants do not file recusal motions. Tenn. Sup. Ct. R. 10, R.J.C. 2.11, cmt. 2 ("A judge is obligated not to hear or decide matters in which disqualification is required, even though a motion to disqualify is not filed."). Rule of Judicial Conduct 2.11(A) enumerates six specific circumstances in which recusal is required, even if a motion for recusal is not filed. Tenn. Sup. Ct. R. 10, R.J.C. 2.11(A)(1)-(6). But the six listed circumstances are illustrative not exclusive, and "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" Tenn. Sup. Ct. R. 10, R.J.C. 2.11(A) (emphases added).*

Cook, 606 S.W.3d at 254.

3. Recusal from an Entire Class of Cases

The Cook court also addressed the issue of whether a judge's comments call for disqualification from an entire class of cases:

> *We stop short of reaching the broader question implicitly presented by this appeal, which is: whether the post-conviction judge's inappropriate comments in this case call his impartiality into reasonable question and require his disqualification from all future post-conviction cases. An argument certainly can be made for answering this question in the affirmative. However, we decline to do so at this time. First, this decision should serve as an unmistakable admonition to this judge, and all other Tennessee judges, to refrain from such inappropriate comments in future cases. It also should serve as a crystal-clear reminder to ... every ... Tennessee judge[ ] of the obligation to recuse without any motion in any proceeding in which the judge's impartiality might reasonably be questioned. ... See Tenn. Code Ann. § 17-1-104 (2009 & Supp. 2019) ("Before entering upon the duties of office, every judge ... is required to take an oath or affirmation to support the constitutions of the United States and that of this state, and to administer justice without respect of persons, and impartially to discharge all the duties incumbent on a judge ... to the best of the judge's ... skill and ability."). We decline to deny to judges the presumption that is applied to all other public officials in Tennessee. West v. Schofield, 460 S.W.3d 113, 131 (Tenn. 2015) ("We are mindful that public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law." (citing Reeder v. Holt, 220 Tenn. 428, 418 S.W.2d 249, 252 (1967); Mayes v. Bailey, 209 Tenn. 186, 352 S.W.2d 220, 223 (1961); Jackson v. Aldridge, 6 S.W.3d 501, 503 (Tenn. Ct. App. 1999); State ex rel. Witcher v. Bilbrey, 878 S.W.2d 567, 576 (Tenn. Ct. App. 1994))).*
>
> *Nevertheless, we take seriously this Court's obligation to ensure that justice in Tennessee remains impartial both in fact and in appearance. In re Cameron, 151 S.W. at 76; Lynn, 924 S.W.2d at 898. As a result, if, in a future case, this Court determines that a judge has habitually made inappropriate comments that call into reasonable question the judge's impartiality in a particular category of cases, this Court will not hesitate to hold, in the exercise of its supervisory power over the Judicial*

> *Department, that the judge is disqualified from hearing all future cases in that category. See Tenn. Const. art. VI, § 1; Moore-Pennoyer v. State, 515 S.W.3d 271, 276 (Tenn. 2017) (citing cases); see also Tenn. Code Ann. § 16-3-501 (2009) (describing this Court's "general supervisory control over all the inferior courts of the [S]tate"); id. § 16-3-503 (declaring that the Supreme Court has "the power inherent in a court of last resort"); id. § 16-3-504 (declaring that the Supreme Court has "a broad conference of full, plenary[,] and discretionary power"). ...*

Cook, 606 S.W.3d at 258.

E. PRIORITY DOCKETING OF CAPITAL NOTICED AND/OR DEATH-SENTENCED CASES

Pursuant to Tenn. Code Ann. 39-13-217 as amended in 2019, "[t]he trial courts of this state and the Tennessee supreme court shall give first priority in docketing to cases where the state has given notice of intent to seek the death penalty pursuant to Rule 12.3(b) of the Rules of Criminal Procedure, or the defendant has been sentenced to death."[6]

[6] The 2019 combined amendments of this statute and others are known as the "Sergeant Daniel Baker Act" which eliminated the direct appeal to the Tennessee Court of Criminal Appeals in a capital trial.

Chapter 2

Media In Capital Cases (Part I) and Social Media (Part II)

I. MEDIA ISSUES IN CAPITAL CASES

Chapter 2

MEDIA IN CAPITAL CASES AND SOCIAL MEDIA

I. MEDIA ISSUES IN CAPITAL CASES

A. THE MEDIA, THE CAPITAL DEFENDANT, AND THE CONSTITUTION

"A trial is a public event. What transpires in the court room is public property." Craig v. Harney, 331 U.S. 367, 374 (1947). A court does not have special rights "which enables it, as distinguished from other institutions of democratic government, to suppress or censor events which transpire [in public] proceedings before it." Id. Thus, "those who see and hear what transpired [in open court] can report it with impunity. Id. The United States Supreme Court has reiterated what it said in Craig on numerous occasions; when there is an open, public trial, the media has an absolute right to publish information that is disseminated during the course of the trial.[1] However, courts have often struggled with the balance between the defendant's right to a fair trial and the media's right to public access to the judicial system.

1. The Right of the Media to Report

The United States Supreme Court has addressed the issue of the right of the media to report court proceedings. In Sheppard v. Maxwell**,** 384 U.S. 333 (1966), there was enormous media coverage surrounding the defendant's prosecution, and the Court was concerned with the rights of the accused to receive a fair trial. In ruling the Court stated:

[1] See Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966).

> *From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . [O]f course,* ***there is nothing that proscribes the press from reporting events that transpire in the courtroom.***

384 U.S. at 362-63 (emphasis added).

In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the preliminary hearing was open to the public. However, the court entered an order that prohibited everyone in attendance from "releasing or authorizing the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced" during the preliminary hearing. The Supreme Court, relying on Sheppard, held this prior restraint violated the First Amendment. In so holding, the Court stated:

> *To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "there is nothing that proscribes the press from reporting events that transpire in the courtroom." . . .* ***[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint.***

427 U.S. at 568 (citations omitted).

In Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), the trial court entered a pretrial order which "enjoined members of the news media from publishing, broadcasting, or disseminating in any manner, the name or picture of [a] minor child." 430 U.S. at 308. The publishing company challenged the prior restraint created

by the trial court. The trial court found that the United States Supreme Court's prior decisions were not applicable because there was a state statute which provided for closed juvenile proceedings unless specifically opened to the public by court order. Upon review, the Supreme Court held that its prior decisions were controlling and held

> *whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were "publicly revealed in connection with the prosecution of the crime . . . . Under these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments."*

430 U.S. at 310-12 (citations omitted).

Tennessee Applications:

State v. James Montgomery and Tony Carruthers and Memphis Publishing Company, Intervenor-Appellant, 929 S.W.2d 409 (Tenn. Crim. App. 1996)

During the trial of capital defendants James Montgomery and Tony Carruthers, a local Memphis paper published the names of certain prosecution witnesses. Another prosecution witness, Andre Johnson, saw the report and went into hiding. When Johnson failed to appear in court as required, the trial court found that placing the names of prosecution witnesses in the media might scare other witnesses and cause them not to appear to testify.

Therefore, the trial court *sua sponte* ruled that the media was barred from publishing the names of nine prosecution witnesses who were to testify at trial. However, the trial court did not ban the media from printing the testimony given by these witnesses.

Counsel for the Memphis Publishing Company arrived at the courtroom shortly after the ruling. Counsel asked the judge to reconsider his ruling and the judge refused. However, the trial judge agreed to meet with counsel after court had recessed for the day. Subsequently, the trial judge ruled the Memphis Publishing Company could publish the names of eight of the nine prosecution witnesses. However, the court kept the prior restraint in place with regard to Andre Johnson. The ban applied only through the time of trial. The publication was free to publish the names of the witnesses after trial. Thereafter, the trial resumed, Andre Johnson appeared as a prosecution witness, and he identified himself on the record as Andre Johnson. The people inside the courtroom heard him state his given name as well as his testimony. The Memphis Publishing Company published the substance of Johnson's testimony but did not print his name.

On appeal, the Tennessee Court of Criminal Appeals, relying on the above case law, held that

> *once Andre Johnson testified in open court and revealed his first and last name, no valid reason existed for the prior restraint on Johnson's name. The trial court's refusal to remove the prior restraint violated the First Amendment rights of the Memphis Publishing Company and its employees. The law is crystal clear:* ***the media may publish the names and testimony of witnesses testifying in open court during a public trial with impunity. Any restraint placed on the right is violative of the First Amendment.***

929 S.W.2d at 413-14 (emphasis added).

State v. Freddie Morrow, 1996 WL 170679 (Tenn. Crim. App. Apr. 12, 1996)

This case involved the trial of three young black men charged in the fatal shooting of a young white man who was apparently displaying a Confederate battle flag at the time of the shooting. The case stirred strong emotions in some members of both races in the local community. As a result, the case was the subject of intense media coverage.

The trial judge entered an order regarding media coverage that allowed still photographs of the proceedings and audio recordings but excluded television cameras from the courtroom. In the order the trial judge specifically found that "televising [the] trial would interfere with the court's ability to maintain decorum, prevent distractions, and most importantly guarantee the safety of witnesses and jurors." There was no hearing or presentation of evidence supporting the trial judge's findings. After the court issued the order regarding media coverage, the defendants waived their right to a jury trial. Thereafter, the intervening media outlet filed a motion to reconsider, claiming the safety of the jurors was no longer a factor. The judge held a hearing in which media counsel was allowed to present arguments and a plan for in-court television coverage. Some of the defendants' counsel expressed opposition to in-court cameras out of concern for the safety of their clients and the witnesses, but the attorneys offered no evidence in support of their objections.

Following the hearing, the trial judge concluded the procedures outlined by the media representatives for televising the trial would, in other cases, likely satisfy the need for the court to maintain courtroom decorum. However, the judge found, given the emotionally charged

nature of the case and the intense pretrial publicity surrounding it, the presence of television cameras in the courtroom might compromise the safety of the witnesses, the defendants, the family members of the victim, and the attorneys. Additionally, the trial court concluded that the presence of cameras might affect the witnesses' testimony. Thus, the trial court declined to modify its previous order barring television cameras from the courtroom.

On appeal, the Court of Criminal Appeals, relying on the newly adopted Tennessee Supreme Court Rule 30, concluded the trial court erred in barring television coverage of the trial. The Court stated that Rule 30 creates a presumption in favor of in-court media coverage, including the presence of television cameras. The Court further held that any finding that such coverage should be denied, limited, suspended, or terminated must be supported by substantial evidence that at least one of the four interests listed in subsection (A)(1) or (D)(2) of the Rule is of concern in the case before the court and that the order excluding or limiting coverage is necessary to adequately reach an accommodation of the interest involved.

State v. Courtney Mathews, and The Nashville Banner, The Tennessean, and the Leaf-Chronicle, Intervenor-Appellants, 1996 WL 269465 (Tenn. Crim. App. May 22, 1996)

Following the media's notification to the trial court that camera coverage would be sought, the defendant in this case objected to any cameras, either television or still, in the courtroom. An evidentiary hearing was conducted, and the defendant presented several witnesses on the issue. The prosecution joined in the defendant's request that cameras be banned. The trial court entered an order permitting cameras in the courtroom under certain

restrictions. The trial court ordered still cameras banned from the courtroom during times when the jury was present. Thereafter, the court entered a supplemental order in which it held it would consider a plan for using still cameras in the jury's presence if the plan "provided for the use of still cameras without being seen or heard by the jury." Several days later, the court approved a plan submitted by the print and electronic media regarding in–court camera use during the presence of the jury. The plan involved the construction of a screen in the courtroom through which photographs could be taken out of the sight of the jury and the witnesses.

On appeal, the Court of Criminal Appeals held there was substantial evidence in the record regarding concerns about safety and distractions that warranted making the presence of in-court cameras as inconspicuous as possible. Thus, the Court held that the trial judge did not abuse his discretion in imposing certain limitations upon the media.

Of particular note is the Court's rejection of defendant's argument that Rule 30 implicitly contains an exclusion of capital cases. The Court declined to read such an exclusion into the Rule.

The pretrial ruling on cameras in the courtroom was not the last time the issue of cameras was the subject of litigation in Mr. Mathews' case. Later, in State v. Courtney B. Mathews, 2008 WL 2662450, at *12 (Tenn. Crim. App. July 8, 2008),[2] the court addressed an issue related to the video camera which was used in Mr. Mathews' trial and attached to the ceiling and operated remotely. At the end of the guilt-innocence phase, the trial court concluded there were too many exhibits to bring into the jury room, so the trial court permitted the exhibits to remain in the courtroom and allowed the jury to move

[2] Mr. Mathews was granted partial post-conviction relief in the form of a delayed motion for new trial. As of this writing, that motion is pending.

between the jury room and courtroom to deliberate. The trial court ordered the camera to be pointed to a wall above the bench so that the jury's deliberations would not be recorded or viewed. The audio feed for the camera was disconnected, and the Court ordered all monitors in the media room where the camera was controlled to be turned off, except for one very small monitor used by the camera operator.

At some point during deliberations, the media assembled in the media room became concerned court had resumed without the media being notified. The camera operator tilted the camera downward toward the bench and saw the judge's chair empty. At some point, the trial judge entered the media room and saw this particular image on at least one of the other larger monitors in the room. As the Court of Criminal Appeals explained,

> *Defense counsel sought a mistrial claiming that, pursuant to Tennessee Rule of Appellate Procedure 36(b) the camera's recording images in the courtroom during jury deliberations resulted "in prejudice to the judicial process" and that relief was warranted without the showing of prejudice.*
>
> *The trial court conducted an extensive hearing on the matter, during which several members of the media testified. In general, the testimony showed that during jury deliberations from approximately 9:30 a.m. until approximately 3:00 p.m., the courtroom camera was focused upon the wall above the judge's chair. This image, which was not accompanied by any sound, was fed to monitors located in the courthouse media room and in at least two media trucks on the site. At some point, members of the media who were gathered in the media room wondered whether proceedings had resumed in the courtroom, and using a control device from the media room, the camera operator lowered the focal point of the camera approximately five feet to the judge's chair to determine that the judge had not returned to the courtroom. No one saw any jurors,*

> *exhibits, or any movement on the monitor. The camera operator testified that there was "no chance of seeing any movement in the center area or any part of the area except if someone sits in the Judge's chair." Testimony indicated that, although the downward pan of the camera could be observed by anyone watching the camera, the downward camera movement could not be heard. No one testified that any member of the jury was in the courtroom when the camera moved or that anyone in the courtroom was aware that the camera's focal point had been altered.*
>
> *At the conclusion of the hearing, the trial judge found that no evidence showed that the media's action "actually intruded into the deliberative function of the jury."*

2008 WL 2662450, at *12. On direct appeal, the Court of Criminal Appeals affirmed the trial court's ruling.

> *The record supports the trial court's conclusion that no intrusion occurred, and thus we are not obliged to determine whether the defendant bore a burden to show prejudice. No evidence established that any member of the jury was even aware of the incident. The evidence did not show that camera movements within the courtroom during deliberation impaired the jurors' ability to decide the case only on the evidence or that the trial was adversely affected by the impact of media coverage on one or more of the participants." State v. Harries, 657 S.W.2d 414, 419 (Tenn. 1983) (citing Chandler v. Florida, 449 U.S. 560, 581–82, 101 S. Ct. 802, 813 (1981)). Thus, the defendant is not entitled to relief on this issue.*

Id.

2. Defendant's Right to a Fair and Impartial Trial

The following is a list of general considerations for the trial court in considering issues related to the media and the defendant's right to a fair and impartial trial:

- Whether pretrial/trial coverage has been generally disruptive;
- Whether there has been a specific instance of disruptive conduct by media personnel or a media event;
- Whether the media coverage has impaired the court's ability to control the conduct of the proceedings before it and maintain courtroom decorum;
- Whether the media coverage has affected the court's ability to guarantee the safety of any party, witness, or juror;
- Whether the media coverage has impaired the fair administration of justice in the pending case;
- Whether the media coverage has impaired the jury's ability to decide the case on the evidence alone; or
- Whether the trial has been adversely affected by the impact of the media coverage on one or more of the participants

In State v. Pike, 978 S.W.2d 904 (Tenn. 1998), the trial court denied defendant's motion to deny television coverage of the pretrial proceedings in the case. On appeal, defendant argued that media coverage of the pretrial and trial proceedings "arguably affected the witness testimony and was generally disruptive of the proceedings." The Tennessee Supreme Court concluded that there was no indication that the coverage was in general disruptive or that any specific disruptive event occurred during the proceedings. Applying Rule 30, the Court held that a presiding judge's decision to deny a motion to preclude or limit media coverage is not error in the absence of proof that media coverage will compromise one of the important interests set forth in Sections (A)(1) and (D)(2) of the Rule. The Court also cited the pre-Rule

30 case of State v. Harries, 657 S.W.2d 414 (Tenn. 1983), holding that a defendant, who alleged that cameras had deprived him of his right to a fair trial, had not demonstrated that the presence of cameras impaired the jury's ability to decide the case on the evidence alone, or that the trial was adversely affected by the impact of the media coverage on one or more of the participants; thus, the defendant was not entitled to relief.

B. TENNESSEE SUPREME COURT RULE 30: MEDIA RULES

1. Media Access

Tennessee Supreme Court Rule 30(A) reads as follows:

> **Media Access.**
>
> **(1) Coverage Generally. Media coverage of public judicial proceedings in the courts of this State shall be allowed in accordance with the provisions of this rule. The coverage shall be subject, at all times, to the authority of the presiding judge to (i) control the conduct of the proceedings before the court; (ii) maintain decorum and prevent distractions; (iii) guarantee the safety of any party, witness, or juror; and (iv) ensure the fair and impartial administration of justice in the pending cause.**
>
> **(2) Requests for Media Coverage. Requests by representatives of the media for such coverage must be made in writing to the presiding judge not less than two (2) business days before the proceeding is scheduled to begin. The presiding judge may waive the two-day requirement at his or her discretion.**
>
> **(3) Notification of Request. Notification that the media has requested such coverage shall be provided by the Clerk of the particular court to**

> **the attorneys of record in the case. Such notification may be waived by the judge at the clerk's request if the request is made for media coverage of all or part of a docket. If the judge waives notification, the clerk shall post a notice with the docket in a conspicuous place outside the courtroom. The notice must state that the proceedings will be covered by the media, and that any person may request a continuance when the docket is called. Such continuance shall be granted only if the person can show that he or she was prejudiced by the lack of notice, and that there is good cause to refuse, limit, terminate or temporarily suspend media coverage pursuant to section D(2).**

Tennessee Supreme Court Rule 30 allows for media coverage of *public* judicial proceedings. However, as stated in Rule 30(A)(1), judges retain the discretion to refuse, limit, terminate or temporarily suspend, media coverage of an entire case or portions thereof, in order to:

- control the conduct of the proceedings before the court;
- maintain decorum and prevent distractions;
- guarantee the safety of any party, witness or juror; and
- ensure the fair and impartial administration of justice in the pending case.

See also Tenn. S. Ct. R. 30(D)(1)(" The presiding judge has the discretion to refuse, limit, terminate, or temporarily suspend, media coverage of an entire case or portions thereof, in order to (i) control the conduct of the proceedings before the court; (ii) maintain decorum and prevent distractions; (iii) guarantee the safety of any party, witness, or juror; and (iv) ensure the fair administration of justice in the pending cause.").

> **Before denying, limiting, suspending or terminating media coverage, the presiding judge *shall* hold an evidentiary hearing if such a hearing will not delay or disrupt the judicial proceeding. In the event that an evidentiary hearing is not possible, affidavits may be used. The burden of proof is on the party seeking limits on media coverage. Any finding that media coverage should be denied, limited, suspended or terminated must be supported by substantial evidence that at least one of the four interests in section D(1) is involved, and that such denial, limitation, suspension, or termination is necessary to adequately reach an accommodation of such interest. The presiding judge shall enter written findings of fact detailing the substantial evidence required to support his or her order.**

Tenn. S. Ct. R. 30(D)(2).

2. Definitions

Tennessee Supreme Court Rule 30(B) provides several definitions for the court's use in applying the rule.

a. "Coverage" is defined as "any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment."

b. "Media" is defined as "legitimate news gathering and reporting agencies and their representatives whose function is to inform the public, or persons engaged in the preparation of educational films or recordings."

c. "Proceeding" is defined as "any trial, hearing, motion, argument on appeal, or other matter held in open court that the public is entitled to attend." Rule 30 further states that "[f]or the purposes of section C of this rule, 'proceeding' includes any activity in

the building in which the judicial proceeding is being held or any official duty performed in any location as part of the judicial proceeding."

d. "Presiding Judge" is defined as "the judge, justice, master, referee or other judicial officer who is scheduled to preside, or is presiding, over the proceedings."

e. "Minor" is defined as "any person under eighteen (18) years of age."

3. Specific Prohibitions

Tennessee Supreme Court Rule 30(C) provides several specific prohibitions to media coverage.

a. Minors

Media coverage of a *witness, party, or victim* who is a minor is prohibited in any judicial proceeding.

> **EXCEPTION**: when a minor is being tried for a criminal offense as an adult.

Tenn. S. Ct. R. 30(C)(1).

While the media are prohibited from covering court proceedings involving minors, excluding the *public* from the courtroom during the testimony of a minor will violate the defendant's right to a public trial unless such a courtroom closure comports with the standards announced in Waller v. Georgia, 467 U.S. 39, 47 (1984). See State v. Franklin, 585 S.W.3d 431, 472-76 (Tenn. Crim. App. 2019).

b. Jurors and Jury Selection

i. Jury Selection

Media coverage of jury selection is prohibited. This limitation, however, does not allow the Court to exclude members of the media who are not photographing or recording the proceedings. See King v. Jowers, 12 S.W.3d 410 (Tenn. 1999).

NOTE: As early as practical during the jury selection process, the court should discuss media presence and limitations on media coverage with potential jurors. Potential jurors will probably feel better about their service knowing their faces will not be seen in news reports.

ii. Jurors

Media coverage of jurors during the judicial proceeding is also prohibited. In other words, jurors' faces cannot be shown in print, on TV, or on the Internet.

If a discussion regarding the service of a juror occurs in a jury out hearing; if a juror is questioned on the record about alleged conduct or potential conflicts during the trial; or if one of the parties or witnesses mentions a juror by name, the court should admonish any electronic media that such discussion, objection, questioning or testimony should not be broadcast to the public.

*** NOTE**: Rule 30(F)(4) specifies that this Rule **does not apply** to print

media. Therefore, if the court feels the printing of jurors' names either would result in disruption, would compromise the proceedings, or would pose a threat to the jury, there are likely procedures which would be constitutionally acceptable that the court can use to shield jurors from exposure, such as calling a blind pool, or only referring to jurors by numbers in open court. The court may also hold a hearing under Rule 30 to determine if a restriction is warranted, but there could be some objection to the application of the Rule to the print media.

c. Closed Proceedings

"Media coverage of proceedings which are otherwise closed to the public by law is prohibited." Tenn. S. Ct. R. 30(C)(4).

d. Juvenile Court Proceedings

Although the death penalty cannot be sought against a juvenile, it should be noted that Rule 30 also allows the media to be excluded in juvenile proceedings:

> **In juvenile court proceedings, if the court receives a request for media coverage, the court will notify the parties and their counsel of the request, and prior to the beginning of the proceedings, the court will advise the accused, the parties, and the witnesses of their personal right to object, and that if consent is given, it must be in writing. Objections by a witness will suspend media coverage as to that person**

only during the proceeding, whereas objections by the accused in a criminal case or any party to a civil action will prohibit media coverage of the entire proceeding.

Tenn. S. Ct. R. 30(C)(5).

e. Conferences of Counsel

"There *shall* be *no* audio pickup, recording, broadcast, or video close-up of conferences which occur in a court facility":

- between attorneys and their clients;
- between co-counsel of a client;
- between counsel and the presiding Judge held at the bench or in chambers; or
- between judges in an appellate proceeding.

Tenn. S. Ct. R. 30(C)(6).

f. Future Use of Media Material

"None of the film, videotape, still photographs, or audio recordings of proceedings under this Rule shall be admissible as evidence":

- in the proceeding out of which it arose,
- in any proceedings subsequent and collateral thereto, or
- upon any retrial or appeal of such proceeding.

Tenn. S. Ct. Rule 30(I). See, e.g., State v. Jackson, 444 S.W. 3d 554, 588 n.47 (Tenn. 2014); Coe v. State, 17 S.W.3d 193, 227 n.19 (Tenn. 2000)

4. Application

a. Generally

Tennessee Supreme Court Rule 30 applies to ***broadcast*** and ***recording*** media coverage. *"Coverage*", as stated previously, is specifically defined to mean *"any recording or broadcasting of a court proceeding by media using television, radio, photographic or recording equipment."*

As an initial matter, there is no guidance as to how courts are to address media members who wish to post real-time updates of court proceedings on Facebook, Twitter, or other social media sites. Internet postings seem more akin to print media reporting than broadcast media, so the court should apply the print media regulations outlined below to those reporters posting updates on the Internet. If such text-based communication becomes too distracting or obtrusive, the court can then place limits on it.

b. Exemption: Print Media

As previously mentioned, Rule 30(F)(4) specifies that Rule 30 does not apply to print media. Specifically, it states that it does not govern the coverage of a proceeding by a news reporter or other person who is not using a camera or electronic equipment.

NOTE: If the reporter wants to use his/her smartphone to take photographs and video

recordings, however, that use would be subject to the restrictions of Rule 30.

However, media personnel may use hand-held audio recorders that are no more sensitive than the human ear without making a formal request. Tenn. S. Ct. R. 30(F)(3).

c. Limitations to Exemption

- Recordings may be used as personal notes only and may not be used for broadcast; and

- Usage may not be distracting or obtrusive and no change of tape shall be made during court sessions.

Id.

5. Required Equipment and Personnel

In order to satisfy the rule the court must allow:

- at least one, but not more than two television cameras with one operator each;
- two still photographers using not more than two cameras each, and
- one audio system for radio broadcast purposes.

Tenn. S. Ct. R. 30(F)(1).

6. Media Requests

Requests By the Media must be

- in writing, and

- made not less than two (2) business days before the proceeding is scheduled to begin.

  NOTE: Judges have discretion to waive the two day notice requirement.

Tenn. S. Ct. R. 30(A)(2).

7. Pooling

- When more than one request for media coverage is made, the media shall select a representative to serve as a liaison and be responsible for arranging "pooling" among the media.
- This person must file their name, business address, phone and fax number with the clerk.
- Pooling arrangements shall be reached without the involvement of the presiding judge and shall include:

  - the designation of pool operators; and
  - procedures for cost sharing, access to and dissemination of material.

Tenn. S. Ct. R. 30(F)(2).

8. Courtroom Accommodations

- **Distractions from Equipment**

Only television, photographic and audio equipment which does not produce distracting sound or light shall be employed to cover proceedings in a court facility. Signal lights or devices to show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

- **Courtroom Light Source**

If possible, lighting for all purposes shall be accomplished from existing court facility light sources. If no technically suitable lighting exists in the court facility, modifications and additions may be made in light sources existing in the facility, provided such modifications and additions are unobtrusive, located in places designated in advance of any proceeding by the presiding judge, and without public expense.

- **Audio Pickup**

Audio pickup for all purposes shall be accomplished from existing audio systems present in the court facility or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judge.

- **Technical Difficulties**

Court proceedings shall not be interrupted by media personnel because of a technical or equipment problem. If any problem occurs, that piece of equipment shall be turned off while the proceeding is in session. No attempt shall be made to correct the technical or equipment problem until the proceeding is in recess or has concluded.

- **Additional Limitations on Courtroom Personnel and Equipment:**

    - **Presiding Judge may designate *the location in the courtroom for media equipment and operators.***
    - ***No permanent installation of equipment or alteration*** of court facilities may be made

unless approved by the presiding judge in advance and paid for by the media.

- During the proceedings there shall be ***no movement of personnel or equipment.*** All equipment must be placed in or moved out of the court facility prior to commencement or after adjournment each day, or during a recess.
- Media personnel must ***maintain appropriate attire and decorum.***

Tenn. S. Ct. R. 30(G-H).

9. Notification

Pursuant to Rule(30)(A)(3), "[n]otification that the media has requested such coverage *shall* be provided by the Clerk of the particular court to the attorneys of record in the case."

Exception:

- Notification may be waived by the judge at the clerk's request if the requested media coverage is for all or part of a docket. However, if the judge waives notice the clerk *shall* post a notice with the docket in a conspicuous place outside the courtroom. The notice must state that

    - the proceedings will be covered by the media; and,
    - any person may request a continuance when the docket is called.

Such continuance *shall* be granted *only if* the person can show

- he/she was prejudiced by the lack of notice; and,
- there is good cause to refuse, limit, terminate or temporarily suspend media coverage pursuant to the guidelines set forth in part D(2) of the Rule.

Tenn. S. Ct. R. 30(A)(3).

10. Punishment For Non-Compliance

"Media personnel who fail to comply with this rule shall be subject to an appropriate sanction as determined by the presiding judge." Tenn. S. Ct. R. 30(K).

C. MANAGING THE MEDIA

1. Controlling the Release of Information from the Court

It is important to meet with court personnel to make sure they understand what information should be made available to the public and what information is not to be released. Additionally, the staff should be informed of their role with regard to contact with the media and instructed to refrain from public comment on the proceedings before the court. This is particularly true for smaller counties where courtroom personnel may not have regular requests from the media and may not have adequate staff to deal with an abundance of media requests. In such cases, it is a good idea to have a meeting with staff to give some guidance on what portions of the record may be released, public comment, handling general media inquiries, etc.

General Guidelines for Releasing Portions of the Record:

(1) Evidence, in general, is deemed to be a public record. See Memphis Publ'g Co. v. City of Memphis, 871 S.W.2d 681, 684 (Tenn. 1994).

(2) Courtroom personnel need to be instructed that items filed under seal should not be released to the media. See generally, Tenn. Code Ann. § 10-7-503.

(3) The court has some discretion in allowing media inspection and copying of judicial records.

One case which addressed this issue is Nixon v. Warner Communications, 435 U.S. 589 (1978). While recognizing that the United States Constitution requires that members of the media have the opportunity to attend criminal trials and to report what they have observed, the Court declined to find a Constitutional right to copy tapes and transcripts. Id. at 607-08. However, the Court did recognize the general common-law right to inspect and copy public records and documents; but, found that this right is not absolute and that a court may exercise supervisory powers over the materials in its custody. Id. at 598-99 The Court concluded that trial courts should "exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production." Id. at 603. The Court suggested factors to be weighed in determining whether inspection and copying of the tapes should be allowed:

> (1) the amount of benefit to the public from the incremental gain in knowledge that would result from hearing the tapes themselves;
>
> (2) the degree of danger to the defendants or persons speaking on the tapes;

(3) the possibility of improper motives on the part of the media such as promoting public scandal or gratifying private spite, and

(4) any special circumstances particular to the case at hand.

Id. at 599-603.

In United States v. Beckham, 789 F.2d 401 (6th Cir. 1986), the court held that when the "right to make copies of tapes played in open court is essentially a request for a duplicate of information already made available to the public and the media, then the court has wide discretion in balancing the factors" listed in Nixon v. Warner Communications. Id. at 414-15. The court found a fundamental right was not implicated "as long as there is full access to the information and full freedom to publish." Id. at 415.

2. Controlling the Parties' Interaction with the Media

In high publicity cases where repeated public comment by the parties may harm the judicial process, a court may consider issuing a "gag order." In State v. Carruthers, 35 S.W.3d 516, 563 (Tenn. 2000), the Tennessee Supreme Court held that "a trial court may constitutionally restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, when the trial court determines that those comments pose a substantial likelihood of prejudicing a fair trial." However, since such orders implicate Fifth, Sixth and Fourteenth Amendment rights, such orders should be used rarely and drawn narrowly. Under the constitutional standard set forth in Carruthers, a trial court, before the issuance of a "gag order" should consider:

> (1) The nature and circumstances of the judicial proceeding, including concerns about media coverage, the intimidation of witnesses, the parties' manipulation of the media, and the expedition and ultimate resolution of the judicial proceeding.
>
> (2) Reasonable alternative measures that would ensure a fair trial without restricting speech, including a change of trial venue; postponement of the trial to allow public attention to subside; searching questions of prospective jurors; and "emphatic" instructions to jurors to decide the case on the evidence.
>
> (3) The scope of the "gag order." Because the scope of a "gag order" by definition restricts speech, "a court must be mindful that 'government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.' " Carruthers, 35 S.W.3d at 564 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

State v. Workman, No. W2001-01238-CCA-R10-PD (Tenn. Crim. App. order filed June 21, 2001, at Jackson) (citing Carruthers, 35 S.W.3d at 563). After full consideration of these factors, the trial court must determine that the potential comments of any and all trial participants pose a substantial likelihood of prejudicing a fair trial. Carruthers, 35 S.W.3d at 563.

3. Issues Not Covered Under Rule 30

Rule 30 was last amended in 1999,[3] long before the internet became a significant part of news coverage. The rule authors probably did not anticipate the era of reporters using their laptops and smart phones to "live blog" court proceedings or post Twitter updates from inside the courtroom.

A judge's ability to regulate media issues that are not covered under the rule likely falls under those general principles allowing a judge to maintain order within the courtroom. Regarding Twitter and blogging inside the courtroom, some judges allow it if the reporters are able to do so without disrupting courtroom decorum. Other judges do not allow live blogging, although in such instances a media area may be set up outside the courtroom so the press can watch a video feed of the proceedings and blog at will. In deciding how to handle such decisions, the judge should make determinations mindful of the press's right to report, the public's right to know, the parties' right to a fair trial, and the judge's right to regulate courtroom proceedings.

4. Prohibition Against Public Comment

Canon 2, Rule 2.10(A) of the Code of Judicial Conduct (Tennessee Supreme Court Rule 10) prohibits a judge, while a proceeding is pending in any court, from making public comment that might reasonably be expected to affect the outcome of the proceeding or impair the fairness of the proceeding or from making any non-public comment that might substantially interfere with a fair trial or hearing. This duty continues through the appellate process and until final disposition of the matter. The judge

[3] Although not amended since 1999, public comments on a proposed amendment were requested in 2015. This is discussed in the Compiler's Notes to the rule, but no amendment has been adopted to date.

shall require similar abstention on the part of court personnel subject to judicial control.

5. Using the Resources Available to You

In high profile cases, such as capital cases or cases that have received heightened media scrutiny, the Administrative Office of the Courts' public information officer is available to answer your media related questions, assist you with media issues and in some instances may be able to serve throughout the trial as the court's liaison to the media. These services can assist the court in dealing with multiple media inquiries; accommodating media requests; releasing of information to the media; helping the media understand the parameters of allowable coverage; and a number of other issues which may arise during the trial.

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II. SOCIAL MEDIA

A. USE BY JUDGES

As Facebook, Twitter, Instagram, and similar social media sites have become more prevalent, federal and state courts have had to address social media's impact on the courts. Part of that discussion involves whether judges can maintain social media accounts.

Various states have addressed the issue differently. Some jurisdictions have concluded that judges cannot maintain such accounts, while others have concluded that judges cannot maintain "friendships" or other connections with attorneys who

practice in the judge's court. In October 2012, Tennessee's Judicial Ethics Committee released Advisory Opinion No. 12-01, concluding,

> *while judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will be scrutinized [for] various reasons by others. Because of constant changes in social media, this committee cannot be specific as to allowable or prohibited activity, but our review, as set out in this opinion, of the various approaches taken by other states to this area makes clear that judges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.*

Judicial Ethics Committee, Advisory Op. No. 12-01, at 3-4.

1. Practical Considerations

Although a judge may maintain a "personal" online presence, a judge's "personal" page cannot be separated from the judge's public duties. A judge cannot do anything online that the judge cannot do in real life. In other words, comments on cases, political activity, and other actions that would be considered violations of the Code of Judicial Conduct in real life can also cause problems if the judge conducts such activity online.

There are also issues concerning a judge's online contacts. A judge may face some discomforting questions if a judge's online "friend" or "connection" posts unsavory material on the judge's page. But perhaps more importantly, judges must bear in mind that their online connections may create questions regarding conflicts of interest and the appearance of impropriety.

As logical as it may seem that a judge should not make an online connection with a litigant during the pendency of

the case, there is a published opinion (thankfully, from another jurisdiction) detailing a case in which a judge attempted to do so. The litigant (a party in a divorce proceeding) declined the friend request; the judge's divorce decree was not favorable to that litigant. The judge then denied a motion to disqualify, which the appellate courts overturned. See Chace v. Loisel, 170 So. 3d 802 (Fla. Ct. App. 2014). Furthermore, "friending" an attorney who appears before the court routinely may give rise to an appearance of impropriety. See Domville v. State, 103 So. 3d 184, 185-86 (Fla. Ct. App. 2012) (recusal proper in case where judge and prosecutor in defendant's case were Facebook friends; defendant had sufficiently "alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial").

Regarding persons other than litigants and attorneys, cases from other jurisdictions suggest it takes more than an online connection between a judge and a person otherwise connected to the litigation to show prejudice. See Clore v. Clore, 135 So. 3d 264, 271-72 (Ala. Civ. App. 2013) (in divorce proceeding, parties' daughter and judge were Facebook friends, but there was no proof of "connection" that would prejudice parties); Youkers v. State, 400 S.W.3d 200, 204-05 (Tex. Ct. App. 2013) (in probation revocation case where defendant assaulted girlfriend, judge and girlfriend's father were Facebook friends; father sent message to judge asking for leniency toward defendant, which led judge to inform involved parties about impropriety of message; no evidence judge's online relationship was proof of bias or partiality); Onnen v. Sioux Falls Indep. School Dist. No. 49-5, 801 N.W.2d 752, 758 (S.D. 2011) (defense witness posted Czech-language "happy birthday" message on trial judge's Facebook page; no prejudice because judge received numerous birthday messages, judge did not

connect post to witness, even after witness testified, and message was not related to case).

Nevertheless, given the concerns an appearance of impropriety can cause, a judge must be extremely cautious about the judge's online presence (personal and professional) if the judge wishes to maintain such accounts. The judge should check the account(s) frequently, especially during trial and other major proceedings.

2. Applications by Tennessee Courts

In State v. Jeffrey M. Forguson, 2014 WL 631246 (Tenn. Crim. App. Feb. 18, 2014)(no perm. app. filed), the defendant, citing a Facebook friendship between the trial judge and a confidential informant who testified at trial, argued the trial judge was incapable of serving as thirteenth juror given his connections with the witness. The trial judge commented,

> *Stewart County is a small county. The CI in [the Defendant's] case, ever since he was born, has lived within a mile of me. At this particular time he lives within a half a mile. I've known him all his life. If I recused myself on every case that I either knew a witness or was friends with a witness, I couldn't try cases in Stewart County.*
>
> *The fact that I knew the CI had no bearing on [the Defendant's] case. It would not have had any bearing on [the Defendant's] case. The CI, as I said, I've known him all his life. I've had him in court as a defendant when I was a prosecutor. I've had him in court in front of me as a judge on child support matters. So, if anything, I would've been more than likely to not believe the CI than to believe him.*

2014 WL 631246, at *12. The Court of Criminal Appeals affirmed the defendant's conviction, stating,

> *In this instance, the Defendant has simply not established that the trial judge's participation in the social network Facebook prevented him from properly exercising his role as thirteenth juror. The record in this case is not developed as to the length of the Facebook relationship between the trial court and the confidential informant, the extent of their internet interaction or the nature of the interactions. The fact that the trial judge was "friends" on Facebook with a witness is not sufficient proof that the trial court could not impartially fulfill its duty as thirteenth juror. In our review of the record, we find nothing to suggest that the trial court did not adequately function in its role as thirteenth juror and nothing to indicate bias on the part of the trial court.*

Id. *13. In his concurring opinion, Judge Witt noted,

> *[this] opinion in my view* ***should not stand for the proposition that a judge's Facebook relationship with a litigant or a key witness for a litigant poses no ground for disqualification.*** *I accept and agree with the trial judge's commentary that one cannot reasonably expect a trial judge living in a small community to recuse himself or herself because he or she is acquainted with a litigant or a key witness. When a judge shares a Facebook "friendship" with such a person, however, the aggrieved party may be able to show that this "social media" relationship is more active, regular, or intimate than mere incidental community propinquity might suggest. For instance, how intentional is the relationship? Who initiated it and when? How do the participants use the medium? What type of information is shared? What is the frequency of the communications? Certainly, I could envision a properly presented Rule 10B motion that, upon proof, evinces at least an appearance of impropriety. See Tenn. Sup. Ct. R. 10 § 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").*

> *For instance, as in the present case, the judge's familiarity with the Facebook "friend" may indicate his or her awareness of the "friend's" conflict with the criminal justice system.*
>
> *Strides in technology present various unprecedented challenges to the procedures and methods of the justice system. This case may well suggest another such challenge, and the perils should be heeded.*

Id. **13-14 (Witt, J., concurring) (emphasis added).

In State v. Shanterrica Madden, 2014 WL 931031 (Tenn. Crim. App. Mar. 11, 2014), perm. app. denied, (Tenn. Sept. 18, 2014), the defendant was convicted of killing her roommate, a MTSU basketball player. Before trial, the defendant's attorney filed a motion to disqualify the trial judge, noting his extensive connections to MTSU (graduate, commencement speaker, donor, etc.) and Facebook friendships with several MTSU-connected persons, including the women's basketball coach, who was expected to testify at trial (and did). Shortly before the hearing on the defendant's motion, the judge removed his MTSU Facebook connections, including his link to the coach. Following a contentious hearing, the trial court denied the recusal motion. On appeal, the appellate court concluded the trial judge did not abuse his discretion, stating,

> *The defendant in this case has failed to identify any concrete manner in which she was disadvantaged by any bias on the part of the trial court. The defendant maintains that the trial judge showed bias by allowing jurors to ask questions of some but not all of the trial witnesses. However, this issue does not involve [the basketball coach], the witness with whom the judge was Facebook friends, and the defendant does not otherwise tie the issue into the trial judge's contacts (online or otherwise) with the MTSU basketball program. The defendant also insinuates that the defendant was denied her right to*

*confrontation and was not allowed to be present during every stage of the criminal trial. The defendant claims that "the trial court created an environment where there is certainly circumstantial evidence that she was denied presence at all stages." However, the defendant does not cite to the record or otherwise identify this circumstantial evidence or direct us to where it may be found. Simply establishing that a trial judge is acquainted with a lawyer or other person connected to a case does not, without more, suffice to establish an abuse of discretion in the denial of a recusal motion. See Charles Hayes v. State, ... 2001 Tenn. Crim. App. LEXIS 652, at *18, 2001 WL 957458 (Tenn. Crim. App. Aug. 23, 2001) (abuse of discretion not shown in denial of a recusal motion where "the trial judge did not appear to have based his . . . decision on his personal knowledge of the case"). There must be some sort of a connection shown between the judge's relationship with a lawyer, party, or witness and some action taken in the case. See, e.g., Mohamed F. Ali v. State, ... 2003 Tenn. Crim. App. LEXIS 333, at * *57-58, 2003 WL 1877242 (Tenn. Crim. App. Apr. 11, 2003).*

In holding that the trial court did not abuse its discretion by denying the defendant's motion, we do not mean to imply that we condone everything that occurred in the court below. If the public is to maintain confidence in our system of justice, a litigant must be afforded the "cold neutrality of an impartial court." Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 564 (quoting Kinard v. Kinard, 986 S.W.2d 220, 227 (Tenn. Ct. App.1998)). The overall tenor of some of the questions asked and statements made by the trial court to defense counsel during the hearing concerning the defendant's recusal motion reveal that the trial judge was upset, perhaps because he felt that defense counsel had violated his privacy by visiting his Facebook page (and the pages of individuals listed as his "friends" on that page). However, the record reflects nothing other than zealous representation on the part of defense counsel.

> *Our supreme court has made clear that "[t]he Code of Judicial Conduct does not require judges to remain isolated from other members of the bar and from the community." State v. Cannon, 254 S.W.3d 287, 308 (Tenn. 2008). When engaging in physical and on-line contact with members of the community, however, judges must at all times remain conscious of the solemn duties they may later be called upon to perform. Perhaps someday our courts will follow the lead of Maryland, which has concluded that its judges must accept restrictions on online conduct that might be viewed as burdensome to ordinary citizens and prohibits the "friending" of attorneys and witnesses likely to appear before a judge. See Maryland Judicial Ethics Committee, No.2012-07 (2012).* ***In the meantime, judges will perhaps best be served by ignoring any false sense of security created by so-called "privacy settings" and understanding that, in today's world, posting information to Facebook is the very definition of making it public. A judge's online "friendships," just like his or her real life friendships, must be treated with a great deal of care.***
>
> *The defendant has failed to establish any bias or prejudice resulting from the trial court's decision to deny her motion to recuse. Her claim for relief is therefore denied.*

2014 WL 931031, **7-8 (emphasis added). The concurring opinion added,

> *In this case, although one Facebook "friendship" was sufficient to scrutinize the judge's impartiality, the record does not demonstrate more than a "virtual" acquaintance between the trial judge and the prospective witness. To the extent that any appearance of impropriety arose from this acquaintance, it was diminished by the trial court's action in fully disclosing his ties with MTSU and his concession that he had once met the witness in-person and had been Facebook friends with the prospective witness. It also bears noting that this witness was 1 of 1500 Facebook friends of the trial*

> *judge. He was not a witness to the murder and his testimony at trial focused primarily on the team's zero-tolerance drug policy. Appellant's frustration with the trial judge's action in "defriending" the Facebook connections without her knowledge, however, is understandable. Certainly, the better practice would have been for the trial judge to acknowledge the Appellant's discovery of the Facebook connections and consult with the parties prior to deleting them. However, given that Tennessee permits trial judges to engage in social media, deleting or "defriending" a potential witness before trial is the best remedy to avoid passive receipt of unwanted online communications during trial. A reasonable person in possession of the same facts and circumstances would conclude that there was no basis to question the judge's impartiality in this case; therefore, the judge did not abuse his discretion in denying the motion to recuse.*

Id. *13 (McMullen, J., concurring)

B. USE BY OTHER INVOLVED PERSONS

The trial court may also face issues concerning social media use by attorneys, trial participants, and the public at large. The court's ability to regulate social media commentary by trial attorneys probably falls within the same realm as the court's ability to control attorneys' general comments outside the courtroom: free speech rights limit the court's ability to act, but if necessary the court could issue a gag order extending to social media comments. Before trial, the court may wish to remind attorneys that their comments could be read by potential trial participants–including prospective jurors.

Regarding the public at large, there is generally little the court can do to regulate the public's behavior outside the courtroom. But if witnesses or attorneys were to be threatened or particularly unsavory comments were to be posted, then the court can investigate potential remedies.

The most likely place for social media to present a problem may well be with jurors. Attorneys will likely review potential jurors' social media presences before voir dire to determine whether any potential challenges for cause may exist. Furthermore, jurisdictions throughout the country are instructing juries that their prohibition against discussing the case with outsiders includes posting information about the case and/or their deliberations online. There have been a growing number of cases nationwide requiring new trials after a juror posted information online about trial testimony, jury deliberations, pending verdicts, etc. To address this trend, the TPI Committee has crafted the following instruction:

> *TPI (Crim. 1.09): No Independent Research or Investigation*
>
> *You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the [individuals] [corporations] involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.*
>
> *Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case outside the jury deliberation room. You may not use any*

> *electronic device or media, such as a telephone, cell phone, smart phone, iPhone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website, including, but not limited to, Facebook, LinkedIn, YouTube, Snapchat, Instagram, Google, Twitter, or any other social media, to communicate to anyone any information about this case or to conduct any research about this case until you have returned your verdict and the trial has concluded.*

(25th ed., 2021).

The jury should be instructed about the "no outside communications" rule both before trial and in the closing jury instructions. Ideally, a sequestered jury in a capital case would not have access to social networking tools, but the above-listed instruction is worth giving because it reiterates the jurors cannot talk about the case with each other until deliberations begin.

Juror admonitions about social media should be given during any court involvement with potential jurors before the jury is sworn. Although a sequestered juror likely will not have Internet access, jurors are generally not sequestered until they are sworn—and until then, they will have plenty of time to look up information on the case. It is a good idea to include such warnings on the jury questionnaire as well. Any potential juror who disregards the court's admonitions and discusses the case on social media before trial is subject to dismissal for cause, as such a juror would show an inability to follow the court's instructions.

- In one instance, the judge in a noncapital trial with a sequestered jury permitted the jurors to keep their cell phones but instructed them not to use the devices to talk to anyone about the case or do research. Defense counsel objected, but the trial court allowed the jurors to keep their phones after the jurors, upon questioning by the court, denied using their phones in a manner contrary to the court's instructions. The trial court reiterated its

> instructions. On appeal the Court of Criminal Appeals concluded the defendant failed to establish an actual separation occurred because the defendant failed to establish any jurors had used their phones to discuss the case or do research. See State v. Rayfield, 507 S.W.3d 682, 701-05 (Tenn. Crim. App. 2015). Nevertheless, the appellate court stated "trial courts, particularly those conducting trials involving sequestered juries, should consider limiting jurors' access to personal electronic devices and utilizing the pattern jury instruction regarding electronic communication." Id. at 705.

In another case that illustrates the importance of keeping the jury away from improper influences, a juror contacted the testifying medical examiner via Facebook and told the doctor about how "great" a job she had done in her testimony. State v. Smith, 418 S.W.3d 38, 43 (Tenn. 2013). The witness contacted the juror, saying she "was thinking" she recognized the juror and expressing fear over a possible mistrial. Id. The juror wrote back saying that two other jurors, the witness, and the juror all worked together. Id. The Tennessee Supreme Court remanded the case to the trial court for a hearing on whether the jury had been influenced improperly. The court observed,

> *this technological age now requires trial courts to take additional precautions to assure that jurors understand their obligation to base their decisions only on the evidence admitted in court. Trial courts should give jurors specific, understandable instructions that prohibit extra-judicial communications with third parties and the use of technology to obtain facts that have not been presented in evidence. Trial courts should clearly prohibit jurors' use of devices such as smart phones and tablet computers to access social media websites or applications to discuss, communicate, or research anything about the trial. In addition, trial courts should inform jurors that their failure to adhere to these prohibitions may result in a mistrial and could expose them to a citation for*

> *contempt. Trial courts should deliver these instructions and admonitions on more than one occasion.*

Id. at 50-51.[4]

During voir dire, jurors should be asked about their social media usage, whether they have seen the case discussed on social media, and whether they have any connections to anyone associated with the case (court staff, attorneys, witnesses, victim's family, etc.).

In another Tennessee murder trial, one of the jurors stated on her jury questionnaire that she had no prior knowledge of the case, but during trial the juror informed the court her grandson attended the same Head Start program where one of the witnesses was employed. State v. Kevin Waggoner, 2019 WL 4635589, at *17 (Tenn. Crim. App. Sept. 24, 2019), perm. app. denied, (Tenn. Feb. 19, 2020). After questioning by the court and attorneys, the juror was allowed to stay on the jury. Id.

After trial, however, the defendant moved for a mistrial based on the same juror's Facebook posts. Specifically, the juror had posed on Facebook "tribute pages" dedicated to the victim's memory; some of the messages on these pages contained communications between the juror and the victim's wife. Id. The messages indicated the juror and the victim's wife had developed a close bond, with the victim's wife planning to drive the juror to the defendant's sentencing hearing. Id. While not all these postings were dated, those dates which did appear were after the defendant's trial ended. Id. Additionally,

> *In other posts, the juror described the Defendant and his family as "evil," expressed her view that the Defendant's sentence was too lenient, and stated that she believed the*

[4] On remand, the trial court denied the defendant a new trial, and the Court of Criminal Appeals affirmed, concluding the State had overcome any presumption of prejudice that had been created by the communication of the juror's undisclosed acquaintance with the medical examiner. State v. William Darelle Smith, 2015 WL 100452 (Tenn. Crim. App. Jan. 7, 2015), perm. app. denied, (Tenn. May 14, 2015).

> *Defendant's wife and son should also go to jail. The juror stated that she was "proud" to return a guilty verdict against the Defendant and expressed disbelief as to how the Defendant's initial trial ended in a hung jury. The juror also posted a photograph of the Defendant's wife crying in the courtroom and mocked her.*

Id.

At the defendant's motion for new trial hearing, the victim's wife testified she had no contact with the juror, either in person or online, before trial, and nobody in the victim's family or the victim's wife's family knew the juror before trial. Id. at *18. She also was not sure whether she had communicated with the juror on the various memorial websites and pages that had been established. Id. The defendant's attorney attempted to subpoena the juror, but that motion was denied. Id.

On appeal, the Court of Criminal Appeals concluded the defendant failed to establish the online communications between the juror and the victim's wife were improper:

> *With regard to the Defendant's claims of improper extra-judicial communications, our supreme court has recognized that a jury's exposure to extraneous prejudicial information or improper outside influence during trial renders the validity of the verdict "questionable." Adams[5] [405] S.W.3d at 650 (citing State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984)). "[E]xtraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case." Id. (citations omitted). "An improper outside influence is any unauthorized 'private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.'" Id. at 650-51 (quoting Remmer v. United States, 347 U.S. 227, 229 (1954)).*
>
> *When challenging the validity of a jury's verdict, the defendant "must produce admissible evidence to make an*

[5] State v. Adams, 405 S.W.3d 641 (Tenn. 2013).

initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence." Id. at 651. If the defendant makes this initial showing, there is a rebuttable presumption of prejudice, and the burden shifts to the State to present admissible evidence explaining the conduct or demonstrating that it was harmless. Id. (citing Walsh v. State, 166 S.W.3d 641, 647 (Tenn. 2005)). Because the jury in this case was not sequestered, the Defendant must show something more than an extra-judicial communication between a juror and a third party to shift the burden to the State. Smith,[6] 418 S.W.3d at 48. The Defendant must present "evidence that, as a result of the extra-judicial communication, some extraneous prejudicial fact or opinion 'was imported to one or more jurors or some outside improper influence was brought to bear on one or more jurors.' " Id. (quoting Blackwell, 664 S.W.2d at 689).

This issue in this case does not involve a trial court's failure to hold an evidentiary hearing in light of a defendant's claims. See id. at 48-49 (holding that the trial court erred in failing to hold an evidentiary hearing when the trial court received during deliberations "reliable and admissible evidence" of an extra-judicial communication between a juror and a witness). The trial court in this case held an evidentiary hearing during which Mrs. Woodby testified. Rather, the issue is the trial court's denial of the Defendant's request to subpoena the challenged juror to testify at such a hearing.

As our supreme court has stated,

> *when misconduct involving a juror is brought to a trial court's attention, "it [is] well within [the judge's] power and authority to launch a full scale investigation by summoning . . . all the affiants and other members of the jury, if need be, with a view of getting to the bottom of the matter, and this, if necessary, upon [the judge's] own motion."*

Id. at 46 (quoting Shew v. Bailey, 260 S.W.2d 362, 368 (Tenn. Ct. App. 1951)). Courts have recognized the

[6] State v. Smith, 418 S.W.3d 38, 48 (Tenn. 2013).

*"general reluctance to 'haul jurors in after they have reached a verdict in order to probe for potential instances of . . . misconduct.'" State v. James Webb, No. 02C01-9512-CC-00383, 1997 WL 80971, at *11 (Tenn. Crim. App. Feb. 27, 1997) (quoting United States v. Infelise, 813 F. Supp. 599, 605 (N.D. Ill. 1993)); see United States v. Vitale, 459 F. 3d 190, 197 (2d Cir. 2005). Such post-verdict inquiries may lead to the harassment of jurors, the inhabitation of jury deliberations, an increase in meritless pleadings, an increased temptation to tamper with the jury, and an uncertainty in jury verdicts. Vitale, 459 F.3d at 197. As the United States Supreme Court has explained:*

> *Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.*

Tanner v. United States, 483 U.S. 107, 120-21 (1987) (internal citations omitted).

*As a result, an inquiry into juror misconduct is not justified by "'potentially suspicious circumstances.'" John Johnson v. State, No. W2007-02847-CCA-R3-PC, 2009 WL 2970520, at *8 (Tenn. Crim. App. July 14, 2009) (quoting State v. Robert Emmet Dunlap, Jr., No. 02C01-9801-CC-00009, 1998 WL 641338, at *3 (Tenn. Crim. App. Sept. 21, 1998). "'Something more than unverified conjecture must be shown.'" Id. (quoting Robert Emmett Dunlap, Jr., 1998 WL 641338, at *3); see United States v. Noel, 905 F.3d 258, 275 (3d Cir. 2018) (holding that a trial court did not abuse its discretion in denying a motion for new trial without a hearing when the defendant only offered speculation of jury misconduct).*

In the present case, the Defendant presented no evidence, either through his attachments to his motion for new trial or during the evidentiary hearing, that the juror knew the victim and his family prior to trial or that the juror engaged

> *in extra-judicial communications with members of the victim's family or any other third party about the case during trial. Most of the social media communications between the juror and members of the victim's family attached to the Defendant's motion for new trial were dated after the trial. Those communications that were not dated discussed matters such as the upcoming sentencing hearing and the result of the sentencing hearing, all of which occurred after the trial. Furthermore, some of the communications referred to the juror and Mrs. Woodby looking forward to meeting, indicating that they were not yet acquainted. Mrs. Woodby testified that neither she nor her family knew the juror and that they had no contact with her until after the trial, and the trial court credited Mrs. Woodby's testimony. The Defendant only offers speculation that the juror's testimony could establish juror misconduct. Thus, we conclude that the trial court did not err in denying the Defendant's request to subpoena the juror. Because the Defendant has failed to produce evidence that the juror failed to disclose material information during voir dire or that the juror engaged in improper extra-judicial communications during the trial, the Defendant is not entitled to relief on this issue.*

Waggoner, 2019 WL 4635589, at **19-20 (alteration and footnote added).

Other Jurisdictions

In a Kentucky murder case, jurors were asked during voir dire if they knew anything about the case or if they had seen anything about it on Facebook or Topix (an online bulletin board). Sluss v. Commonwealth, 381 S.W.3d 215, 221 (Ky. 2012). Two jurors were Facebook friends with the victim's mother, but neither juror mentioned this fact. The jurors were not asked explicitly about online connections to the victim's family, but the jurors were asked about their knowledge of the victim's family; neither juror said anything about their Facebook connections. One juror even denied having a Facebook account. Id. at 222. The Facebook connections were discovered after trial. Id. at 220-21. The Kentucky Supreme Court stated, "a juror who is a 'Facebook friend' with a family member of a victim, standing

alone, is arguably not enough evidence to presume juror bias sufficient to require a new trial." Id. at 223. "As with every other instance where a juror knows or is acquainted with someone closely tied to a case, it is the extent of the interaction and the scope of the relationship that is the relevant inquiry." Id. However, given the jurors' untruthful voir dire answers and their online connections to the victim's mother, the Kentucky Supreme Court concluded the defendant was entitled to a hearing regarding juror bias. Id. at 229-30.

Conversely, in another Kentucky murder case a juror who served on the jury stated during voir dire that she knew "some members" of the victim's family "casually." McGaha v. Commonwealth, 414 S.W.3d 1, 4 (Ky. 2013). She said she worked with the victim's nephew, and she said she had heard about the case in "the news." Id. Defense counsel did not inquire further about her relationships. Id. at 5. After trial, it was discovered the juror was Facebook friends with the victim's spouse. Id. The Kentucky Supreme Court, citing Sluss, concluded that the relationship, standing alone, was not sufficient to undermine jury impartiality. Id. at 6. Unlike the juror in Sluss, the juror here identified a connection to the victim's family, but defense counsel failed to investigate through additional voir dire. Accordingly, the court concluded the defendant had "failed to establish any partiality or bias whatsoever as a result of the social media relationship." Id. at 7.

C. RESOURCES

The interrelation between social media and the courts will undoubtedly evolve before the next version of this book is published. A judge may find it useful to attend CLEs on this subject. Furthermore, the National Center for State Courts, which participated in a TJC CLE on this subject in March 2020, maintains a page which contains links addressing social media as it relates to numerous aspects of the judicial system: https://www.ncsc.org/topics/media/social-media-and-the-courts/social-media/home

Chapter 3

Ex Parte Requests For Funds

Chapter 3

Ex Parte Requests For Funds

A. TENNESSEE SUPREME COURT RULE 13 GENERALLY

Tennessee Supreme Court Rule 13 contains the parameters for the appointment, qualifications and compensation of counsel for indigent defendants. Rule 13 also describes in detail the process through which an indigent defendant may request funds for investigative and expert services. Although the rule addresses non-capital and capital defendants, this section will focus on those sections relating to capital cases, particularly issues relating to *ex parte* requests for funds.

The defense motions for investigative and expert services are filed in an *ex parte* setting under seal. Accordingly, the court must conduct the inquiry into the motion without notice to the State that the motion was filed and without notice of any subsequent hearing on the motion. Further, any resulting order is also to be filed under seal with no copy to the State. It is important for the judge to educate his/her staff as to the procedure along with the clerk's office. In some cases, the clerk has erroneously put an *ex parte* motion on a docket or an *ex parte* order granting funds has been sent to the State. Education will prevent these troublesome issues.

B. REQUIREMENTS OF RULE 13 MOTIONS FOR FUNDS

Rule 13, Section 5 includes the parameters for the granting of funds for experts, investigators, and other support services in indigent capital trials and post-conviction cases. During the pretrial phase of a capital case, defendants will most likely seek funds for various services through *ex parte* motions for services. It is important to note that Rule 13 contains certain prerequisites to be met before a hearing is required. In other words, not every *ex parte* motion filed warrants a hearing.

Tennessee Supreme Court Rule 13, Section 5(a)(1), as amended October 26, 2021, provides as follows:

> **In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel, in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, and in juvenile transfer proceedings, the court, in an *ex parte* hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the payment or reimbursement of reasonable and necessary expenses by the director. See Tenn. Code Ann. § 40-14-207(b); *State v. Barnett,* 909 S.W.2d 423 (Tenn. 1995); *Owens v. State,* 908 S.W.2d 923 (Tenn. 1995).**

(Underlining added).

> **NOTE:** Subsection (a)(2) provides that funding for investigative, expert, or other similar services **shall not** be authorized or approved in **non-capital post-conviction proceedings**.

The Rule 13 process works efficiently if all parties are aware of the prerequisites of Rule 13 and the resulting order makes the findings required by Rule 13. Any deficiency in the motion and/or order will result in a delay of funds. This "delay" has at times been used by counsel as a basis for a continuance or a claim that counsel cannot be ready due to non-approval of funds by the Administrative Office of the Courts (AOC). Of course, the AOC staff must also ensure that Rule 13 prerequisites have been met.

1. Checklist - Initial Review of Motion

Must a hearing be granted? Only if the motion contains the following (see different requirements for expert services AND investigative services):

a. **Motion for Funds for Experts or Similar Services** — must contain:

(A) the nature of the services requested;

(B) the name, address, qualifications, and licensure status, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location at which the services are to be provided; and

(D) a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

Tenn. S. Ct. R. 13, § 5(b)(2).

b. Motion for Funds for Investigative or Similar Services – must contain**:**

(A) the type of investigation to be conducted;

(B) the specific facts that suggest the investigation likely will result in admissible evidence;

(C) an itemized list of anticipated expenses for the investigation;

(D) the name and address of the person or entity proposed to provide the services; and

(E) a statement indicating whether the person satisfies the licensure requirement of this rule.

Tenn. S. Ct. R. 13, § 5(b)(3).

2. Hearing Required

If the prerequisites for each type of motion have been met, Rule 13, Section 5(b)(4) mandates the court conduct an *ex parte* hearing on the motion to determine if the requested services are necessary to ensure the protection of the defendant's constitutional rights. A request for *ex parte* funds is neither a blank check nor a rubber

stamp approval. The court must consider the merits of the motion and determine whether the funds are necessary.

3. Particularized Need

Pursuant to Rule 13, Section 5(c)(1), "Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services."

What is particularized need? ***In the context of criminal trials and appeals***, particularized need is established when a defendant shows, by reference to the particular facts and circumstances, "that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial." Tenn. S. Ct. R. 13, §5(c)(2) (citing State v. Barnett, 909 S.W.2d 423 (Tenn. 1995)).

The Tennessee Supreme Court has established the following two-pronged test to determine whether a defendant has established a "particularized need" for expert services:

> *(1) the defendant must show that he or she "will be deprived of a fair trial without the expert assistance"; and*
>
> *(2) the defendant must show that "there is a reasonable likelihood that [the assistance] will materially assist [him or her] in preparation of [the] case."*

State v. Scott, 33 S.W.3d 746, 753 (Tenn. 2000) (quoting State v. Barnett, 909 S.W.2d at 430). See also State v. Jones, 568 S.W.3d 101, 137 (Tenn. 2019); State v. Willis, 496 S.W.3d 653, 723-25 (Tenn. 2016); State v. Hester, 324 S.W.3d 1, 47 (Tenn. 2010).

In the context of capital post-conviction proceedings, particularized need "is established when a petitioner shows, by

reference to the particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence." Tenn. S. Ct. R. 13, § 5(c)(3) (citing Owens v. State, 908 S.W.2d 923, 928 (Tenn. 1995)). See Lemaricus Davidson v. State, 2021 WL 3672797 (Tenn. Crim. App. Aug. 19, 2021).

Particularized need ***cannot*** *be established* (and funds should be denied) where the motion contains only:

> **(A) undeveloped or conclusory assertions that such services would be beneficial;**
>
> **(B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;**
>
> **(C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or**
>
> **(D) information indicating that the requested services fall within the capability and expertise of appointed counsel.**

Tenn. S. Ct. R. 13, Section 5(c)(4) (citations omitted).

The fact that the court approves an expert whose evaluation is unfavorable to the defense is not, standing alone, a sufficient basis on which to appoint another expert for the defense. See Barnett, 909 S.W.2d at 425-31; Ruff v. State, 978 S.W.2d 95, 100-01 (Tenn. 1998). Another finding of particularized need would be required before a second expert could be approved. "Courts are not required to find the defendant an expert who will support his theory of the case." Ruff, 978 S.W.2d at 101. See also State v. David Edward Niles, 2012 WL 1965438 (Tenn. Crim. App. June 1, 2012), perm. app. denied, (Tenn. Oct. 17, 2012). Both Barnett and Ruff addressed mental health experts, but it would be reasonable to apply these cases to other Rule 13 expert requests.

In State v. Jones, 568 S.W.3d 101 (Tenn. 2019), the Tennessee Supreme Court addressed the issue of a defendant's right to a mitigation expert. In Jones, the court quoted State v. Hester, 324 S.W.3d at 47, which stated "[t]o warrant reversal for failure of a trial court to allocate resources for expert assistance, a defendant must show the existence of a 'particularized need' for the allocation of resources for expert assistance." Jones, 568 S.W.3d at 137. The court further quoted Hester as stating that a "defendant must also establish that there is a reasonable likelihood that the requested expert assistance will materially assist him or her in preparing or presenting his or her case." Id. The Jones court continued by stating that

> *[c]apital defendants do not have an inherent statutory or constitutional right to a mitigation expert, although circumstances may arise in which a particularized need for a mitigation expert would require the appointment of such an expert. Absent a showing of any special need, there is no constitutional violation in the denial of a capital murder defendant's request for funds for a mitigation expert.*

Id.

> **NOTE**: The defendant in Jones failed to include the appropriate records to consider the issue and waived mitigation evidence available to him from his first trial.

4. 150-Mile Radius Requirement

Rule 13, Section 5(b)(1) requires that "[e]very effort shall be made to obtain the services of a person or entity whose primary office of business is within 150 miles of the court where the case is pending. If the person or entity proposed to provide the service is not located within the 150-mile radius, the motion **shall explain** the efforts made to obtain the services of a provider within the 150-mile radius." (Emphasis added).

Without question, the defendant must first seek an expert or investigator within the 150-mile radius of the court. Only if the

defendant has attempted and failed to find an expert within the radius will the court be in a position to hear the motion. As noted, the defendant shall explain in the motion the efforts to obtain an expert within the radius.

On occasion, the defendant will request an investigator who resides outside the 150-mile radius, but the motion will indicate that the investigator has a satellite office within 150 miles of the court. The mileage reimbursement and other expense reimbursement on the claim forms should be made from the nearby "satellite" office and not from the home office falling outside the 150-mile radius.

5. Hourly Rates for Experts/Investigators and Limitations

When a defendant files an *ex parte* motion, it must include the hourly rate charged by the particular expert or investigator. Rule 13, Section 5(d)(1) contains a listing of some of the various categories of experts and the approved maximum hourly rate the AOC will pay for such an expert. A motion which seeks to exceed the established cap of the hourly rate will likely not receive approval from the AOC. The specific listed experts are:

(A)	**Accident Reconstruction**	**$115.00**
(B)	**Medical Services/Doctors**	**$250.00**
(C)	**Psychiatrists**	**$250.00**
(D)	**Psychologists**	**$150.00**
(E)	**Investigators (Guilt/Sentencing)**	**$ 50.00**
(F)	**Mitigation Specialist**	**$ 65.00**
(G)	**DNA Expert**	**$200.00**
(H)	**Forensic Anthropologist**	**$125.00**
(I)	**Ballistics Expert**	**$ 75.00**
(J)	**Fingerprint Expert**	**$ 75.00**
(K)	**Handwriting Expert**	**$ 75.00**

Tenn. S. Ct. R. 13, Section 5(d)(1).[1] If an *ex parte* request for

[1] This list is from the 2021 version of the Tennessee Supreme Court Rules. In addition, the Tennessee Supreme Court/AOC has approved a rate of $195/hour for computer forensic experts, which includes cell phone data extraction.

funds includes an expert not shown on the list, the defendant should also include some type of statement to support his claim that the hourly rate is reasonable for such an expert. The trial court can only make a reasoned judgment as to the reasonableness of the hourly rate (not established in Rule 13). The final hourly rate to be approved in such instances will be determined by the AOC.

It should be noted that **in capital post-conviction proceedings**, a trial court shall not authorize more than a total of $20,000 for all investigative services and $25,000 for the services of all experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence. Tenn. S. Ct. R. 13, § 5(d)(4)-(5).

Rule 13 also prohibits authorizing expenses for expert tests or expert services if the results or testimony is per se inadmissible as evidence. Tenn. S. Ct. R. 13, § 5(d)(6).

6. Prior Approval

Rule 13, Section 5(e)(4)-(5) requires that the trial court order and any attachments authorizing services must be submitted to the director of the AOC for prior approval.

If the director denies prior approval, the claim is transmitted to the chief justice for disposition and prior approval. The decision of the chief justice is final on this issue. Tenn. S. Ct. R. 13, § 5(e)(5).

> **NOTE:** In the Memphis case of Jessie Dotson v. State, (currently on capital post-conviction appeal), certain expert services were approved by the trial court but later denied by the Chief Justice. The Post-Conviction Defender's Office objected to that denial, and the trial court overruled the objection stating it did not have the authority to overrule the Chief Justice's decision.

7. Expert/Investigator Travel and Other Expenses

The guidelines for payment of expenses is also set out in Rule 13. The AOC will typically monitor the expenses and will strike or approve certain expenses dependent upon whether the pleadings are compliant with Rule 13. As a reminder, Rule 13 indicates the order granting funds shall provide for the payment or reimbursement of reasonable expenses by the Director of the AOC. In certain circumstances, the court may, in its order, direct that certain travel expenses for a given expert receive prior approval of the court.

Rule 13 also provides that for persons or entities that receive an hourly rate of $100 or more, the time spent traveling shall be compensated at no greater than 50% of the approved hourly rate. Tenn. S. Ct. R. 13, Section 5(d)(2).

8. Processing of Order by the Trial Court

If the motion meets the Rule 13 requirements and the court makes the proper findings in the order, the order is then ready for processing. Many jurisdictions conduct the follow up in various ways.

The AOC should receive a copy of the *ex parte* motion and any attachments along with a copy of the order granting funds. Although Section 5(e)(4) of the rule states that claims may not be submitted to the AOC electronically, all motions and orders should be sent via email to IndigentTeam@tncourts.gov. Most courts send the approved order to the attorney, and the attorney will then email the motion, order, and CV to the above email address. Only one copy needs to be sent to the AOC, but it should reference the attorney due to the fact that the attorney may not engage the expert, etc. without the order of prior approval.

> **NOTE:** Remember, a thorough order will also expedite the proceedings.

SUMMARY:

FIRST: The judge should first review the *ex parte* motion to see if it contains the necessary prerequisites to grant a hearing (see requirements for motion for expert and/or investigative services).

SECOND: If the motion contains the prerequisites, the court **SHALL** conduct an *ex parte* hearing.

THIRD: At the hearing, the court must determine if the defendant has made a showing of a particularized need (see definition above) that the funds are necessary to ensure the defendant's constitutional rights.

FOURTH: Is the expert within 150-mile radius? If not, did the motion adequately explain the reason to extend beyond the radius?

FIFTH: Is the hourly rate within the Rule 13 guidelines? Does the motion also include the estimated number of hours?

SIXTH: If funds are granted, the Order should indicate the prerequisites were met to conduct a hearing, that the defendant has made a showing of particularized need for the funds (including that the funds are necessary to ensure defendant's constitutional rights), and that the funds requested are reasonable. In conclusion, the motion should indicate the name of the expert or investigator approved, the approved hourly rate, the estimated number of total hours, and the estimated expenses (for a grand total of funds sought). The motion should also include language for payment or reimbursement of expenses by the director via the parameters of Rule 13 and at the direction of the director.

SEVENTH: A copy of the motion (and attachments) and order is to be sent to the AOC contact person.

9. Miscellaneous Rule 13 Issues

a. Request for Funds for Work Performed Prior to Court Approval

There is no provision in Rule 13 providing for the payment of an expert or investigator who has completed work prior to court and AOC approval. Therefore, a defendant who fails to timely gain prior approval of funds for a given expert or investigator may do so at his/her own peril. The AOC will **not** approve funds for work performed prior to the date of the court's approval order. See Moncier v. Ferrell, 990 S.W.2d 710, 712 (Tenn. 1998) (rejecting attorney's contention that overnight mail charges were "necessarily so urgent that prior approval is not practical" and advising that trial courts "should exercise caution in issuing 'blank checks' under Rule 13").

Though not an identical concern, the court should enter an order appointing counsel (and designating lead and co-counsel) as soon as possible after appointment to ensure proper payment of attorney fees. The order appointing counsel may be entered **nunc pro tunc** to the date of actual in court appointment to ensure attorneys are paid for all their efforts.

b. Request for Funds for Work Performed Over the Limit Without Authorization

A similar dilemma exists when an expert or investigator previously approved by the court performs work in excess of the funds granted by the trial court. While a review would be conducted on a case-by-case basis, these unapproved hours may result in non-payment. When an expert or investigator approaches (or believes he or she is approaching) the cap amount previously granted by the trial court, it is the defendant's responsibility to follow the *ex parte* procedure noted herein to obtain additional funds. As with the initial

motion for funds, the defendant must request the additional funds with supporting documents as to why these additional funds are necessary. The defendant should include specific details of the work performed to date along with the specific categories of information (with time estimates) to support the additional funds requested.

Again, it is at the defendant's (or the expert's or investigator's) peril if work is performed in excess of the approved funds without **prior** approval from the trial court and the AOC for these additional funds.

c. Experts Not Found in Rule 13

On occasion a defendant seeks funds for an expert not listed on the Rule 13 schedule of expert types and applicable hourly rates. As discussed above, the defendant may want to first consult with the AOC to determine an hourly rate for such an expert.

If pre-approval is not sought, the defendant must include information in the *ex parte* motion as to defendant's attempts to determine the standard hourly rate for such an expert and support this finding in the motion and/or at the *ex parte* hearing. The court may or may not approve the hourly rate depending on the information provided by the defendant. The final approval of an hourly rate for an expert not set out in Rule 13 lies with the AOC.

d. Defendant Not Entitled to Particular Experts

Defense counsel may insist on particular experts even if the expert is found outside the 150-mile radius or charges high fees. Also, if the court denies a motion for a particular expert, defense counsel may respond that capital defendants are entitled to the best experts possible. In rejecting one capital defendant's assertion that his right to a fair trial was violated by the trial court's refusal to appoint a particular

expert, the Tennessee Supreme Court stated,

> *neither T.C.A § 40-14-207(b) nor Ake v. Oklahoma, 470 U.S. 68, 84-6 . . . require that a defendant have an expert of his choice appointed. The constitution requires that an indigent defendant be provided with the tools necessary to present an adequate defense. Having been provided with those implements of defense he is entitled to no more.*

State v. Smith, 857 S.W.2d 1, 12 (Tenn. 1993); see also State v. Reid, 213 S.W.3d 792, 828 (Tenn. 2006) (appendix).

e. Indigency Status, Experts, and Retained Counsel

It is possible that the defendant's family could hire an attorney for the defendant. If so, the court still needs to conduct an indigency hearing to determine whether the defendant is indigent. If the defendant is indigent, he still qualifies for Rule 13 services, even if his attorney is not court-appointed or if the defendant has wealthy benefactors.

In State v. Vaughn, 279 S.W.3d 584 (Tenn. Crim. App. 2008), the defendant was declared indigent and appointed an attorney. The court-appointed attorney obtained funding for a psychiatrist, who would investigate and prepare a defense related to the defendant's mental condition. Before the evaluation could be conducted, the defendant's family hired an attorney, and the trial court withdrew funding. Id. at 600. The Court of Criminal Appeals noted that

> *[a] defendant's status as an indigent is not automatically lost because a private attorney is retained,"[and] concluded the trial court erred in "tacit[ly] finding that the Defendant was no longer indigent because his family was able to hire a private attorney to represent him. Before concluding the Defendant was no longer indigent, and therefore revoking the previously authorized funds to hire a psychiatric expert, the trial court should have held an*

indigency hearing.

Id. at 601.

NOTE: Previously, a trial court has also found a defendant indigent for purposes of providing Rule 13 services when the defendant retained an attorney, but in paying the attorney, he spent all his money and qualified as indigent thereafter.

f. Mitigation in Non-Capital Cases

In State v. Jason Christopher Underwood, a non-capital first degree murder case, the appellate court concluded that given the range of other experts from which the defendant could gain similar information (experts which were in fact retained in that case), the defendant did not show a particularized need for the mitigation expert. State v. Jason Christopher Underwood, 2008 WL 5169573, **17-19 (Tenn. Crim. App. Dec. 10, 2008). See also, LeSergio Wilson v. State, 2015 WL 5455940 (Tenn. Crim. App, Sept. 17, 2015).

The opinion in Underwood should not be seen as a conclusion that a trial court can never grant a motion for a mitigation expert in a non-capital case. This is particularly true in life without parole cases, in which the defendant, if convicted of first degree murder, will have the opportunity to present mitigation evidence. For instance, in State v. Shawn Nelson Smoot, 2018 WL 4699046, at *29 (Tenn. Crim. App. Oct. 1, 2018), perm. app. denied (Tenn. Jan. 16, 2019), the trial court granted a continuance to the defendant in a life without parole case so the defendant could obtain a mitigation expert. The defendant later sought another continuance so counsel could have more time to find a mitigation expert, but the trial court denied the continuance. Id. The defendant appealed the denial of a continuance; the appellate court affirmed the trial court's denial, but the appellate court's conclusion the trial court properly denied

the continuance was not based on the fact that the defendant was seeking a mitigation expert in a non-capital case.

Therefore, a non-capital defendant may be able to obtain a mitigation expert, but when the State does not seek death or life without parole, the defendant may have a difficult time establishing particularized need for a mitigation expert. See Underwood, supra.

g. "Splitting" Large Requests for Services

A defendant may submit a request for services that will stretch long periods of time and may require large expenditures. For instance, a defendant may request investigative services to last 18 months and cost $20,000 or more.

While a motion for investigative services is to be expected, a trial judge's concern over the size of the request would be justified. Therefore, in a situation such as this one the court may wish to grant the Rule 13 motion in part (i.e., approving only part of the requested funds), requiring the defendant to reapply for funds either after a certain time or after a certain amount of funds have been spent. The court may also wish to require the defense to file *ex parte* progress reports detailing the expert's work on the case (either monthly or at the very least when the defense files a motion for renewed services). If the expert's work on the case does not meet expectations, the court can then place additional requirements on the expert or deny the renewal entirely.

C. ATTORNEY FEES

The rate for capital representation is also set out in Rule 13. Therefore, any question as to the applicable hourly rate for lead counsel or co-counsel at trial or in a post-conviction proceeding should be directed to Rule 13 and any subsequent amendment. See Tennessee Supreme Court

Rule 13, Section 4(k) for the current rates.

Attorneys in capital cases must submit interim claims rather than wait until the end of the attorney's service in the case. Interim claims

> **shall be filed at least every 180 days, but no more frequently than every 30 days. Any portion of a claim requesting payment for services rendered more than 180 days prior to the date on which the claim is approved by the court in which the services were rendered shall be deemed waived and shall not be paid.**

Tenn. S. Ct. R. 13, § 6(a)(4).

The court should enter an order appointing counsel (and designating lead and co-counsel) as soon as possible after appointment to ensure proper payment of attorney fees and at the proper rates.

D. ELECTRONIC SUBMISSION REQUIRED FOR ATTORNEY FEE CLAIMS

All claims for attorney fees must be submitted electronically via the AOC's Indigent Claims Entry (ICE) system. The trial judge must review all claims for compensation and expenses over $400. See Tenn. S. Ct. R. 13, § (6)(a)(1).

> **NOTE:** Compensation for experts is still addressed via the motions practice outlined above.

Chapter 4

Pretrial Case Management[1]

[1] Although there are voluminous motions which may be filed in any given criminal case, e.g., suppression, discovery, speedy trial, etc., this chapter focuses on those motions filed more particularly in a capital case.

Chapter 4

Pretrial Case Management

A. MENTAL HEALTH ISSUES

1. Competency to Stand Trial (And Incompetency)

TENN. CODE ANN. § 33-7-301. Evaluation of accused believed incompetent to stand trial - Judicial hospitalization proceedings - Recovery report.

(a) (1) When a defendant charged with a criminal offense is believed to be incompetent to stand trial, or there is a question about the defendant's mental capacity at the time of the commission of the crime, the criminal, circuit, or general sessions court judge may, upon the judge's own motion or upon petition by the district attorney general or by the attorney for the defendant and after hearing, order the defendant to be evaluated on an outpatient basis. The evaluation shall be done by the community mental health center or licensed private practitioner designated by the commissioner to serve the court or, if the evaluation cannot be made by the center or the private practitioner, on an outpatient basis by the state hospital or the state-supported hospital designated by the commissioner to serve the court. If, and only if, the outpatient evaluator concludes that further evaluation and treatment are needed, the court may order the defendant hospitalized, and if in a department facility, in the custody of the commissioner for not more than thirty (30) days for further evaluation and treatment for competence to stand trial subject to the availability of suitable accommodations.

(2) At any stage of a felony criminal proceeding, including a pretrial hearing, trial, sentencing, or post-conviction proceeding, the state may move or petition the court to authorize the district attorney general to designate a qualified expert to examine the

defendant if the defendant gives notice that the defendant intends to offer testimony about the defendant's mental condition, whether in support of a defense of insanity or for any other purpose. The court may authorize the district attorney general to designate a qualified expert, who is willing to be appointed, to examine the defendant, if:

(A) An inpatient evaluator under subdivision (a)(1) notifies the court in a pretrial proceeding that the type or extent of assessment required exceeds the expertise or resources available to the evaluator or exceeds the scope of analysis of the defendant's competence to stand trial, satisfaction of criteria for the insanity defense, or for commitment under chapter 6, part 5 of this title; or

(B) In any other type of felony criminal proceeding, the court determines that examination of the defendant by a qualified expert for the state is necessary to adjudicate fairly the matter before it.

(3) The amount and payment of expert fees shall be determined and paid by the state district attorneys general conference.

(4) (A) Except as provided in subdivision (a)(4)(B), during the post-conviction stage of a criminal proceeding, if it is believed that a defendant is incompetent to assist counsel in preparation for, or otherwise participate in, the post-conviction proceeding, the court may, upon its own motion, order that the defendant be evaluated on either an outpatient or inpatient basis, as may be appropriate. If the defendant is indigent, the amount and payment of the costs for the evaluation shall be determined and paid for by the administrative office of the courts. If the defendant is not indigent, the cost of the evaluation shall be charged as court costs. If the evaluation cannot be done on an outpatient basis and if it is necessary to hospitalize the defendant in a department facility, hospitalization shall not be for more than thirty (30) days and shall be subject to available suitable accommodations. Prior to transporting a defendant for such evaluation and treatment in a department facility, the sheriff or other transportation agent shall

determine that the receiving department facility has available suitable accommodations. Any costs incurred by the administrative office of the courts shall be absorbed within the current appropriation for the indigent defense fund.

(B) In a post-conviction proceeding in a capital case, if there is a question on the defendant's mental condition at the time of the commission of the crime when there has been no such prior evaluation or a question as to whether the defendant is intellectually disabled, the court may, upon its own motion or upon petition by the district attorney general or by the attorney for the defendant, and, if the matter is contested, after a hearing, order that the defendant be evaluated on an outpatient basis. If and only if the outpatient evaluator concludes that an inpatient evaluation is necessary, the court may order the defendant to be hospitalized for not more than thirty (30) days.

…

(b)(1) If the court determines on the basis of the mental health evaluation and other relevant evidence:

(A) That the defendant is incompetent to stand trial because of mental illness, or

(B) (i) That the defendant is competent to stand trial but that the failure to hospitalize would create a likelihood to cause the defendant serious harm by reason of mental illness, and

(ii) The defense attorney agrees with those findings, the district attorney general or the attorney for the defense may petition the criminal court before which the case is pending or which would hear the case, if the defendant were bound over to the grand jury to conduct proceedings for judicial hospitalization under chapter 6, part 5, of this title.

(2) Either party may demand a jury trial on the issues.

(3) The court is vested with jurisdiction to conduct the proceedings.

(4) In the proceedings the court shall determine, in addition to

the findings required by chapter 6, part 5 of this title, whether the defendant is substantially likely to injure the defendant or others if the defendant is not treated in a forensic services unit and whether treatment is in the defendant's best interest.

(5) If the court enters an order of judicial hospitalization, the defendant shall be transferred to the custody of the commissioner, and if the court finds in addition that the defendant is substantially likely to injure the defendant or others if the defendant is not treated in a forensic services unit and that treatment in the unit is in the defendant's best interests, the defendant shall be transferred to the custody of the commissioner at a forensic services unit designated by the commissioner. If the court commits a person under this subsection (b), the person comes into the commissioner's custody only if the forensic services unit has available suitable accommodations; provided, that, if there are no suitable available accommodations at the time of the determination, then the commissioner shall expeditiously find a state-owned or operated hospital or treatment resource to accommodate the person upon the availability of suitable available accommodations. Prior to transporting a defendant for such commitment, the sheriff or other transportation agent shall determine that the receiving facility has available suitable accommodations.

(c) When a defendant admitted under subsection (b) has been hospitalized for six (6) months, and at six-month intervals thereafter, the chief officer of the hospital shall file a written report with the clerk of the court by whose order the defendant was confined and shall give a copy of the report to the defendant, the defendant's attorney, the defendant's legal guardian or conservator, if any, and to the district attorney general.... The report shall detail the chief officer's best judgment as to the defendant's prospects for recovery, the defendant's present condition, the time required for relevant kinds of recovery, and whether there is substantial probability that the defendant will become competent to stand trial in the foreseeable future. This reporting obligation shall cease at the point that misdemeanor charges are retired for defendants with no other charges in

accordance with subsection (d).

(d) If a defendant is found to be incompetent to stand trial, any misdemeanor charges pending at the time of the incompetency determination shall be retired no later than eleven (11) months and twenty-nine (29) days after the date of arrest when the misdemeanor charge or charges have not otherwise been disposed of except that no misdemeanor charges shall be retired pursuant to this subsection (d) if the defendant is restored to competency prior to the date on which the misdemeanor charge or charges would have otherwise been retired under this subsection (d).

NOTE: If a defendant is found to be incompetent to stand trial due to intellectual disability, see Tenn. Code Ann. §§ 33-5-402 and 33-5-409.

NOTE: If a defendant is found to be incompetent to stand trial but not committable, see Tenn. Code Ann. §§ 33-7-401, and -402.

Both the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution prohibit the trial of a person who is mentally incompetent. Pate v. Robinson, 383 U.S. 375 (1966); State v. Harrison, 270 S.W.3d 21, 33 (Tenn. 2008) (citing Pate); State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000); see also State v. Johnson, 401 S.W.3d 1 (Tenn. 2013).

"In Tennessee, a criminal defendant is presumed to be legally competent." Johnson, 401 S.W.3d at 17 (citing State v. Reid, 164 S.W.3d 286, 306-07 (Tenn. 2005)).

In State v. Reid, 164 S.W.3d 286, 307-08 (Tenn. 2005), our state supreme court officially adopted the standard that a defendant must establish his/her incompetency by a preponderance of the evidence (this standard had been applicable since 1991 pursuant to State v.

Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991)). This standard is consistent with due process. Medina v. California, 505 U.S. 437 (1992); State v. Reid, 164 S.W.3d at 308.

In Dusky v. United States, 362 U.S. 402 (1960), the United States Supreme Court set out the standard for determining a defendant's competency to stand trial:

> *[T]he test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.*

Id. at 402.

Tennessee has adopted this standard. See Johnson, 401 S.W.3d at 17: Harrison, 270 S.W.3d at 33; State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991); State v. Benton, 759 S.W.2d 427, 429 (Tenn. Crim. App. 1988); Mackey v. State, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975). In Mackey, the Court of Criminal Appeals stated:

> *Both Tennessee decisions and the federal constitution prohibit the trial of a defendant whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.*

Mackey, 537 S.W.2d at 707 (citations omitted). See e.g. State v. Blackstock, 19 S.W.3d at 206.

Tenn. R. Crim. Pro. 12.2(f)-(g) sets forth the procedure for discovery and admissibility of evidence for a hearing on a defendant's competency to stand trial:

(f) REPORTS OF COMPETENCY EXAMINATIONS. – Prior to any hearing on competency to stand trial, the parties shall permit the opposite party, on request, to inspect and copy or photograph any results or reports of psychiatric, psychological, or mental examinations and of scientific tests or experiments made in connection with evaluating the defendant's competency to stand trial, or copies thereof, if:

(1) the item is within the party's possession, custody, or control; and

(2) the party intends to introduce any part of the item as evidence in the party's case-in-chief at the competency hearing; or

(3) the party intends to call as a witness at the competency hearing the person who prepared the report, and the results or reports relate to the witness' testimony. This provision does not limit the State's duty to disclose such information under other appropriate rules or the duty to produce exculpatory evidence. Disclosure under this provision shall occur at least 21 days prior to a hearing, on competency to stand trial unless the court finds that a shorter time is essential in the interests of justice so as not to unduly delay the trial. The court may also make such orders as are necessary to compel disclosure or make other appropriate orders.

(g) INADMISSIBILITY OF DEFENDANT'S STATEMENTS DURING COMPETENCY EXAMINATION.— No statement made by the defendant in the course of any examination relating to his or her competency to stand trial (whether conducted with or without the defendant's consent), no testimony by any expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any competency hearing or criminal proceeding except for impeachment purposes or an issue concerning a mental condition on which the defendant has introduced evidence

of incompetency or evidence requiring notice under Tenn. R. Crim. P. 12.2(b).

The competency statute and court rules, however, do not offer any guidance about the "quantum of proof necessary to establish a belief that a defendant is incompetent to stand trial." State v. Kiser, 284 S.W.3d 227, 246 (Tenn.), cert. denied, 558 U.S. 892 (2009). Various factors may be considered in determining a defendant's competency to stand trial, including but not limited to the defendant's behavior, the defendant's demeanor, and any medical evidence. Id. (citing Drope v. Missouri, 420 U.S. 162, 180 (1975)); see also Johnson, 401 S.W.3d at 17. There are no fixed or immutable signs, however, which invariably indicate the need for further inquiry. Kiser, 284 S.W.3d at 246.

The trial court's findings on competency "are conclusive on appeal unless the evidence preponderates otherwise." State v. Reid, 213 S.W.3d 792, 810 (Tenn. 2006) (quoting Oody, supra).

It is also noteworthy that in State v. Reid, 164 S.W.3d at 308, the court held that "nothing prevents a defendant from invoking an applicable privilege during a competency proceeding as a matter of law." The court noted that during the proceeding, the defendant has not yet been found incompetent and therefore could invoke the privilege. Additionally, the court noted that "the trial court is free to reconsider the issue of the defendant's invocation of privileges while evidence of the defendant's mental status is presented during the hearing by both the defense and prosecution." Id.

> **NOTE**: A defendant's competency standard for pleading guilty, entering a plea of nolo contendere, or waiving the right to counsel is the same standard as competency to stand trial. Godinez v. Moran, 509 U.S. 389 (1993); Berndt v.

State, 733 S.W.2d 119 (Tenn. 1987).

2. Forced Competency or Involuntary Medication

In Sell v. United States, 539 U.S. 166, 179 (2003), the United States Supreme Court addressed the issue of forced competency by medication. In that case, the court stated that

> *[T]he Constitution permits the Government involuntarily to administer [medication] to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary to further important governmental trial-related interests.*

This standard will permit involuntary administration of drugs solely for trial competence purpose in certain instances, but those instances may be rare.

The court must also find that four additional circumstances are present to forcibly medicate a defendant to become competent to stand trial. Id. at 180-81.

> *(1) A court must find that important government interests are at stake, such as (a) bringing the defendant to trial, (b) timely prosecution, or (c) assuring that the defendant's trial is a fair one. In considering these governmental interests, courts must consider the facts of the individual case as special circumstances may lessen the importance of that interest.*
>
> *(2) A court must find that involuntary medication will significantly further those governmental interests. The court must find that (a) administration of the drugs is substantially likely to render the defendant competent to stand trial, and (b) administration of the drugs is substantially unlikely to have side effects that will interfere*

> *significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair.*
>
> *(3) A court must find that involuntary medication is necessary to further those interests. In determining this, the court must (a) find that any alternative, less intrusive treatments are unlikely to achieve the same results, and (b) consider less intrusive means for administering the drugs.*
>
> *(4) A court must find that administration of the drugs is medically appropriate. Stated differently, this means that the administration of the drugs is in the defendant's best medical interest in light of the defendant's medical condition. One issue to consider here may be the specific kinds of drugs to be used.*

Id. at 180-81.

The Court also noted that these conditions need not be considered if the defendant is found to be "dangerous" or for purposes related to the individual's own interest where refusal puts his health gravely at risk. Id. at 181-82 (citing Washington v. Harper, 494 U.S. 210, 225-26 (1990)).

> **NOTE**: The Court in Sell indicated that the *Harper/Riggins*[2] test is more appropriate when a defendant is medicated because he is dangerous and that medication continues through trial, even if the forced medication is for the dual purpose of lessening dangerousness and establishing competency. Id. at 179-182. See State v. Taylor, 2008 WL 624913 (Tenn. Crim. App. Mar. 7, 2008).

[2] Riggins v. Nevada, 504 U.S. 127 (1992).

3. Notice of Mental Health Defenses and the "Reid" Notice

a. Tenn. R. Crim. P. 12.2(a)-(e)

Rule 12.2. Notice of Insanity Defenses of Expert Testimony of Defendant's Mental Condition and Discovery and Disclosure of Evidence in Pretrial Competency Hearings. –

(a) DEFENSE OF INSANITY. –

(1) NOTICE OF INSANITY DEFENSE. – A defendant who intends to assert a defense of insanity at the time of the alleged crime shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) TIMING. – Notice shall be given within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(3) FAILURE TO FILE NOTICE. – A defendant who fails to comply with the requirements of Rule 12.2(a)(1) may not raise an insanity defense.

(b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. –

(1) NOTICE OF EXPERT TESTIMONY. – A defendant who intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) TIMING. – Notice described in Rule 12.2(b)(1) shall be filed within the time provided for the filing of pretrial motions or at such later time as the court

may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(c) MENTAL EXAMINATION OF PATIENT. –

(1) AUTHORITY TO ORDER MENTAL EXAMINATION. – On motion of the district attorney general, the court may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order.

(2) INADMISSIBILITY OF STATEMENTS DURING EXAMINATION. – No statement made by the defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony.

(d) FAILURE TO PROVIDE NOTICE OF EXPERT TESTIMONY OR TO SUBMIT TO MENTAL EXAMINATION. – If a defendant fails to give notice under Rule 12.2(b) or does not submit to an examination ordered under Rule 12.2(c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

(e) INADMISSIBILITY OF WITHDRAWN INTENTION. – Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

…

NOTE: Tenn. R. Crim. P. 12.2(f)-(g) is set out

above in the section on competency to stand trial.

NOTE: The comments to the rule state that subsection (c)(2) applies at both the guilt and sentencing phase of the trial.

NOTE: Although not a defense, expert evidence of lack of mental state or what is often referred to as "diminished capacity" should also be noticed under Rule 12.2.

b. Rule 12.2 and the Trial

In State v. Martin, 950 S.W.2d 20, 25 (Tenn. 1997), the Tennessee Supreme Court held

> *...[W]hen a defendant indicates his or her intent to rely on a mental responsibility defense, the trial court, on motion of the district attorney, may order a mental examination. No statements made by the defendant, material derived from such statements, or expert testimony based on such statements, are admissible at trial except for impeachment or rebuttal of the mental responsibility evidence introduced by the defense. When restrictions are properly followed, ... the proceedings under Rule 12.2(c) do not violate the defendant's right against self-incrimination under the Constitutions of the United States or the State of Tennessee.*

The court noted that because the defendant also has access to the information generated from the evaluation, he/she may object *in limine* to any material on the basis of privilege, relevance, or any other ground. Id.

The Martin court further held

> *...[T]he Sixth Amendment of the U.S. Constitution and article I, § 9 of the Tennessee Constitution do not require the presence of counsel during a court-ordered mental examination....*
>
> *Although we hold that recording the mental examination is not constitutionally required, our holding should not be interpreted as prohibiting the trial court from enhancing the integrity of the trial. We fully endorse and encourage recording the psychiatric examination as a simple and effective means to preserve evidence and to enhance the accuracy and reliability of the truth-seeking function of the trial. A verbatim recording of the mental examination process would enhance the integrity of the trial without the potential hindrance of allowing counsel to be present during the examination itself. Accordingly, upon a showing that such a safeguard is feasible and not unduly intrusive in a given case, the trial court has the discretion to require video or audio taping of the psychiatric examination to assist both sides in preparing for trial.*
>
> *Similarly, the trial court has the authority to designate in its order not only the expert who is to perform the examination, but also the objective of the examination....*

Martin, 950 S.W.2d at 27 (citations omitted).

While our courts have recognized that a defendant is guaranteed the right to the assistance of counsel at critical stages of the proceedings, a defendant does not have the right to the physical presence of counsel during a court-ordered examination. State v. Huskey, 964 S.W.2d 892, 897-98 (Tenn. 1998) (quoting Martin, supra).

Rule 12.2(c) is also not so narrowly interpreted as to allow only a single interview. Id. at 898-99. Whether to allow

more than one examination is within the trial court's discretion. Id.

In Huskey, the court also held that "disclosure of the information from the examination is not limited by [Tenn. R. Crim. P.] 16 and does not depend on whether the defendant intends to use the information or witness involved in the Rule 12.2(c) examination." Id. at 900.

c. Capital Sentencing and the "Reid" Notice

In State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998), the court held that

> *[W]hen issues arise for which no procedure is otherwise specifically prescribed, trial courts in Tennessee have inherent power to adopt appropriate rules of procedure to address the issues. Rules adopted pursuant to this inherent power must be consistent with constitutional principles, statutory laws, and generally applicable rules of procedure. Indeed, when circumstances mandate the adoption of supplemental rules, trial courts should pattern such rules upon analogous generally applicable rules of procedure. Trial courts must also bear in mind that all procedural rules should be designed to provide for the just determination of every criminal proceeding, and to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.*

Based upon these principles, the court adopted certain notice and evaluation requirements in capital cases where a defendant seeks to present mental health evidence in mitigation. The Reid court adopted the following as the governing procedure in Tennessee in every capital trial in which the defendant intends to introduce expert mitigation

evidence relating to mental condition at the sentencing hearing of his/her trial:

1. If a capital defendant intends to introduce expert mental condition testimony as mitigation at the sentencing hearing, he or she must file pretrial written notice of intent no later than an appropriate date set forth by the trial court. The notice shall include the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine if an evaluation is necessary and, if so, the area in which its expert must be knowledgeable.

2. If a capital defendant files notice that he or she intends to introduce expert mental condition testimony at the sentencing hearing, the defendant shall, if requested by the State, be examined by a psychiatrist or other mental health professional selected by the State. The examination shall take place within a reasonable time frame set forth by the trial court. The State and defense will cooperate to provide the court-ordered professional with all necessary and relevant information. Said examination may be videotaped in accordance with the guidelines adopted in State v. Martin, 950 S.W.2d 20 (Tenn. 1997). The report of that examination and the report of any psychiatric examination initiated by the defendant shall be filed under seal with the Court before the commencement of jury selection. The Court-appointed professional conducting the examination for the State shall not discuss his/her examination with anyone unless and until the results of the examination are released by the Court to counsel for the State following the guilt phase of the trial.

3. The results of any examination by the State expert and the defense expert shall be released to the defense prior to trial to enable the defendant, with the assistance of counsel, to determine whether or not to introduce expert mental condition testimony as mitigation at the sentencing hearing. The results of any examination shall be released to the State only in the

> *event the jury returns a verdict of guilty of first degree murder and only after the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation at the penalty phase. After the return of a guilty verdict, the defendant shall file a pleading confirming or disavowing his or her intent to introduce expert mental condition testimony at a penalty phase. If the defendant withdraws the previously-tendered notice, the results of any mental condition examinations concerning the defendant will not be released to the State. The reports of any examinations, whether by the State or defense experts, concerning the defendant shall be released to the State immediately after the filing of a pleading confirming the earlier notice. Even if the defendant confirms his or her intent to offer mental condition evidence, the defendant may withdraw the notice of intent to introduce expert mental condition proof at any time before actually presenting such evidence, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed only therein, will be admissible against the defendant.*

Reid, 981 S.W.2d at 174.

NOTE: In a 2021 trial court case, the defense filed a Reid notice but did not agree to submit their experts' reports to the State's expert. The defense filed a motion requesting various procedures be implemented related to the Reid notice which were not provided for in the Reid opinion. Although there were various procedural requests in the defense motion, one key issue raised was whether the defense was required to turn over their expert reports to the State expert.

In summary, the trial court determined that, pursuant to the Reid decision, the State expert was a rebuttal witness and as such should have all necessary and relevant materials from the defense with which to

consider all mental health opinions to be offered by the defense at sentencing. The trial court noted the language in the Reid decision which instructs the parties to "cooperate" to provide all relevant information. The parties agreed any exam by the State expert could be videotaped, and the trial court found that to be appropriate. The trial court ordered the defense to provide the State expert with all necessary and relevant materials which the defense mental health experts relied upon in reaching their opinions and copies of any reports which were necessary and relevant to the mental health issues. The trial court further noted the areas which the defense asserted were "off limits" were only off limits if such information was not relied upon by a defense expert in reaching an opinion. If information was not relied upon, it was not required to be turned over to the State expert.

NOTE: A copy of the above referenced motion as well as the order denying interlocutory appeal by the Tennessee Court of Criminal Appeals on the issue is contained in the Appendix. As the order denying interlocutory appeal did not address the merits of the motion, this issue likely will be part of the direct appeal in the case.

4. Intellectual Disability and the Death Penalty

In 1990, the Tennessee Legislature first enacted Tenn. Code Ann. § 39-13-203, which prohibited the execution of intellectually disabled persons. In 2001, the Tennessee Supreme Court in Van

Tran v. State held that the Tennessee Constitution also prohibited the execution of an intellectually disabled person. Van Tran v. State, 66 S.W.3d 790, 800 (Tenn. 2001). Subsequent to the holding in Van Tran, the United States Supreme Court held that the Eighth and Fourteenth Amendments of the United States Constitution also prohibited the execution of the intellectually disabled. Atkins v. Virginia, 536 U.S. 304 (2002). Accordingly, under both the state and federal constitutions, if a criminal defendant is intellectually disabled then he/she is legally precluded from receiving the death penalty.

The Atkins court, however, left it to the states to develop the appropriate procedures to enforce the constitutional prohibition of executing the intellectually disabled. Id. at 317; see also Howell v. State, 151 S.W.3d 450, 457 (Tenn. 2004); but see discussion of Hall v. Florida, 572 U.S. 701 (2014), infra.

Subsequently, in Coleman v. State, 341 S.W.3d 221, 244 (Tenn. 2011), our state supreme court noted that "while the definition of 'intellectual disability' has changed over time, the three essential criteria for ascertaining whether a person is intellectually disabled continue to remain relatively constant."[3]

This, however, changed in 2021[4] as it related to the first criteria listed in § 39-13-203(a)(1); subsection (a)(1) changed from "Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below" to "Significantly subaverage general intellectual functioning."

[3] In Coleman, the court noted a possible misconception of existing law by some lower courts on the question of what types of evidence may be presented related to Tenn. Code Ann. § 39-13-203(a)(1). 341 S.W.3d at 240-41. See Van Tran v. Colson, 764 F.3d 594 (6th Cir. 2014). Note: Coleman predates the 2021 amendment to the statute.

[4] The 2021 amendments also added subsection g.

The statute,[5] as amended in 2021,[6] reads as follows:

> **TENN. CODE ANN. § 39-13-203. Intellectually disabled defendants - Death sentence prohibited.**
>
> **(a) As used in this section, "intellectual disability" means:**
>
> **(1) Significantly subaverage general intellectual functioning;**
>
> **(2) Deficits in adaptive behavior; and**
>
> **(3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.**
>
> **(b) Notwithstanding any law to the contrary, no defendant with intellectual disability at the time of committing first degree murder shall be sentenced to death.**
>
> **(c) The burden of production and persuasion to demonstrate intellectual disability by a preponderance of the evidence is upon the defendant. The determination of whether the defendant had intellectual disability at the time of the offense of first degree murder shall be made by the court.**
>
> **(d) If the court determines that the defendant was a person with intellectual disability at the time of the offense, and if the trier of fact finds the defendant guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), the jury shall fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. Section 39-13-207**

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[5] The terms "mental retardation" and "intellectual disability" are interchangeable, but "intellectual disability" is the preferred term[.]" See Coleman, 341 S.W.3d at 226, fn5. The term "intellectual disability" replaced "mental retardation" in the Tennessee Code by Acts 2010, ch. 734. See also Compiler's Notes to Tenn. Code Ann. § 39-13-203.

[6] In addition to the amendment to subsection (a)(1), subsection (g) was added to the statute which became effective May 11, 2021.

shall govern the sentencing proceeding.

(e) If the issue of intellectual disability is raised at trial and the court determines that the defendant is not a person with intellectual disability, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).

(f) The determination by the trier of fact that the defendant does not have intellectual disability shall not be appealable by interlocutory appeal, but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

(g)(1) A defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.

(2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.

NOTE: Tenn. Code Ann. §39-13-203 does not specify when the issue of intellectual disability must be raised. See State v. Pruitt, 415 S.W.3d 180, 201 (Tenn. 2013) (issue first raised before sentencing closing argument and state's proof addressed post-trial). The court in Pruitt indicated that the "best practice, however, would be to raise the issue in a pretrial setting to ensure that both the State and the defendant are provided a full and fair opportunity to collect, exchange, and present the requisite proof[.]" Id.

NOTE: Intellectual disability is also discussed under

the subjects of post-conviction petitions and motions to reopen in Chapter 8. The new subsection (g) is also addressed in Chapter 8.

To prevail on a claim of intellectual disability, the defendant carries the burden to prove by a preponderance of the evidence each of the factors listed in the 3-prong test established by the statute. Tenn. Code Ann. §39-13-203(c). The statute further requires that the trial court, rather than the jury, make the decision. Id.; see e.g. State v. Bell, 512 S.W.3d 167, 182 (Tenn. 2015).

a. Significantly Subaverage Intellectual Functioning

Prior to 2021, Tenn. Code Ann. §39-13-203(a) clearly required a criminal defendant to have "[s]ignificantly subaverage general intellectual functioning **as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below**" to be considered intellectually disabled. See Howell v. State, 151 S.W.3d at 468-70. However, **as of the 2021 amendment,** the statute now makes **no** reference to an I.Q. score as it now only requires **"significantly subaverage general intellectual functioning."**

Pre-2021 Amendment Cases

In Coleman, which was decided prior to the 2021 amendment, the court analyzed "the process and criteria used by the courts to determine whether a defendant charged with first degree murder should not be subject to the death penalty because he or she was a person with intellectual disability when the murder was committed." 341 S.W.3d at 230. The Coleman court clarified the type of evidence that the trial court should consider, based upon the prior statutory

language, in assessing the significantly subaverage intellectual functioning prong of the test.

> *The criterion in Tenn. Code Ann. § 39-13-203(a)(1) requires a "functional intelligence quotient of seventy (70) or below." **The statute does not require a "functional intelligence quotient test score of seventy (70) or below."** Because the statute does not specify how a criminal defendant's functional I.Q. should be determined, we have concluded that the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below.*
>
> *Ascertaining a person's I.Q. is not a matter within the common knowledge of lay persons. Expert testimony in some form will generally be required to assist the trial court in determining whether a criminal defendant is a person with intellectual disability for the purpose of Tenn. Code Ann. § 39-13-203(a). State v. Velda, 777 N.W.2d 266, 306 (Neb. 2010); State v. Lott, 2002 OH 6625, ¶ 18, 779 N.E.2d 1011, 1015; see also Maldonado v. Thaler, 625 F.3d 229, 233 (5th Cir. 2010); People v. Superior Court, 155 P.3d 259, 265-67 & n.6 (Cal. 2007); Jessica Hudson et al., Lightning But No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures in Implementing Atkins v. Virginia, 55 Naval L. Rev. 359, 385 n.139 (2008). Expert testimony that meets the requirements of Tenn. R. Evid. 702 and 703, unless otherwise barred, is admissible and may be considered by the trial court for the purpose of determining a defendant's functional I.Q. However, consistent with the plain language to Tenn. Code Ann. § 39-13-203(a)(1), as interpreted in Howell v. State, an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range (i.e., that the defendant's I.Q. falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is "seventy (70) or below" or is above 70).*

> *In formulating an opinion regarding a criminal defendant's I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields. See Brown v. Crown Equip. Corp., 181 S.W.3d 268, 275 (Tenn. 2005); McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 265 (Tenn. 1997);see also State v. Scott, 275 S.W.3d 395, 401-10 (Tenn. 2009). Of course, the soundness of any particular expert's opinion regarding a defendant's I.Q. may be tested by vigorous cross-examination. State v. Scott, 275 S.W.3d at 410. In the final analysis, the trial court is not required to follow the opinion of any particular expert, see State v. Flake, 88 S.W.3d 540, 556 (Tenn. 2002), but must fair give full and consideration to all the evidence presented, including the results of all the I.Q. tests administered to the defendant. See Howell v. State, 151 S.W.3d at 459.*

341 S.W.3d at 241-42 (footnote omitted and emphasis added). As pointed out in the emphasized text, the Tennessee statute then required a functional I.Q. score of 70 or below, not an I.Q. test score of 70 or below. Although experts commonly express a person's I.Q. within a range (such as "somewhere between 65 and 75"), the courts then required that a defendant's I.Q. "must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is 'seventy (70) or below' or is above 70)." Id.

In Coleman, the court also stated that trial courts should permit experts to consider such factors as the Flynn Effect in assessing a defendant's functional I.Q.

> *The AAIDD[7] currently recognizes ten potential "challenges" to the reliability and validity of I.Q. test scores. AAIDD Manual, at 36-41. Among these challenges are the standard*

[7] "AAIDD" is the American Association on Intellectual and Developmental Disabilities.

> *error of measurement, the Flynn Effect, and the practice effect. The Flynn Effect refers to the observed phenomenon that I.Q. test scores tend to increase over time. Thus, the most current versions of a test should be used at all times and, when older versions of the test are used, the scores must be correspondingly adjusted downward. AAIDD Manual, at 37; see also Coleman v. State, 2010 WL 118696, at *16-18. The practice effect refers to increases in I.Q. test scores that result from a person's being retested using the same or a similar instrument. AAIDD Manual, at 38.*

341 S.W.3d at 242, n.55; see also State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013).

In Keen v. State, 398 S.W.3d 594 (Tenn. 2012), the court later stated that

> *several courts misconstrued our holding in Howell that Tenn. Code Ann. § 39-13-203(a)(1) established a "bright line rule" for determining intellectual disability. They understood this language to mean that courts could consider only raw I.Q. scores. Accordingly, these courts tended to disregard any evidence suggesting that raw scores could paint an inaccurate picture of a defendant's actual intellectual functioning. See, e.g., Smith v. State, No. E2007-00719-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 793, 2010 WL 3638033, at *40 (Tenn. Crim. App. Sept. 21, 2010) (reluctantly refusing to consider the Flynn effect); Coleman v. State, No. W2007-02767-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 36, 2010 WL 118696, at *14, 16-18, 23 (Tenn. Crim. App. Jan. 13, 2010) (upholding, under Howell, a trial court's refusal to consider the standard error of measurement and the Flynn effect in determining the petitioner's I.Q. score); Black v. State, No. M2004-01345-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577, at *14, 17-18 (Tenn. Crim. App. Oct. 19, 2005) (rejecting the Flynn effect under the "bright-line cutoff" rule of Howell). This was an inaccurate reading of Howell, in which we took pains to say that the trial court should "giv[e] full and*

> *fair consideration to all tests administered to the petitioner" and should "fully analyz[e] and consider[] all evidence presented" concerning the petitioner's I.Q. Howell v. State, 151 S.W.3d at 459. Accordingly, if the trial court determines that professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.*

398 S.W.3d at 603-04.

Hall v. Florida, 572 U.S. 701 (2014)

After the decisions in Coleman and Keen, but before the 2021 amendment to the Tennessee Code, the United States Supreme Court in Hall v. Florida addressed the issue of how intellectual disability must be defined in order to implement the holding in Atkins and the various principles requiring the prohibition of executing the intellectually disabled. Hall, 572 U.S. at 707-10. After discussing various approaches taken by the different states to define intellectual disability post-Atkins, the Hall Court stated as follows:

> *the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But Atkins did not give the States unfettered discretion to define the full scope of the constitutional protection. The Atkins Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70. Atkins first cited the definition provided in the DSM-IV: "'Mild' mental*

retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." [Atkins v. Virginia,] 536 U.S., at 308, n. 3, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (citing Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)). The Court later noted that "'an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.'" 536 U.S., at 309, n. 5, 122 S. Ct. 2242, 153 L. Ed. 2d 335. Furthermore, immediately after the Court declared that it left "to the States the task of developing appropriate ways to enforce the constitutional restriction,'" id., at 317, 122 S. Ct. 2242, 153 L. Ed. 2d 335, the Court stated in an accompanying footnote that "[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions," ibid. Thus Atkins itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. In the words of Atkins, those persons who meet the "clinical definitions" of intellectual disability "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Id., at 318, 122 S. Ct. 2242, 153 L. Ed. 2d 335. Thus, they bear "diminish[ed] . . . personal culpability." Ibid. The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of Atkins. And those clinical definitions have long included the SEM. See Diagnostic and Statistical Manual of Mental Disorders 28 (rev. 3d ed. 1987) ("Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior").....

> *... If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in* Atkins *could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads* Atkins *to provide substantial guidance on the definition of intellectual disability....*
>
> *Intellectual disability is a condition, not a number.* See *DSM-5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.* See *APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid"). This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment.* See *DSM-5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). ...*

Hall, 572 U.S. at 719-23.[8]

[8] In State v. Bell, 512 S.W.3d 167 (Tenn. 2015), our Tennessee Supreme Court specifically addressed the issue of whether our intellectual disability statute, as interpreted by the Tennessee Supreme Court, was facially unconstitutional in light of the decision in Hall. In Bell, the Tennessee Supreme Court held

Intellectual Disability Standards

The American Association on Intellectual and Developmental Disabilities (AAIDD) (11th Edition) described intellectual disability as "characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before 18." Intellectual Disability: Definition, Classification, and Systems of Supports at (11th ed., 2010) ("AAIDD Manual").[9]

> *unlike the Florida Supreme Court [in Hall], we have not interpreted our statute to bar the presentation of other proof of a defendant's intellectual disability in the event that the defendant cannot produce a raw I.Q. test score of less than 71. Accordingly, we deem our statute, as currently interpreted, to be constitutionally sound under the Eighth Amendment*.

512 S.W.3d at 186. See also Vincent Sims v. State, 2014 WL 7334202 (Tenn. Crim. App. December 23, 2014); Pervis Tyrone Payne v. State, 2014 WL 5502365 (Tenn. Crim. App. October 30, 2014); Tyrone Chalmers v. State, 2014 WL 2993863 (Tenn. Crim. App. June 30, 2014).

[9] The 12th edition, however, now states that the developmental period is defined as before the age of 22. See https://www.aaidd.org/intellectual-disability/definition. The only reference to the new definition in caselaw appears in Justice Sotomayor's dissenting opinion to the denial of certiorari in Coonce v. United States, 142 S. Ct. 25, 28 (2021):

> *As noted, the AAIDD (relied upon in Hall) now has replaced its prior age-18 onset requirement with an age-22 onset requirement, evincing a clear shift. AAIDD Manual 1. Similarly, the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM) used to require an impairment to onset " 'before age 18 years' " to meet the definition of an intellectual disability. Atkins, 536 U.S. at 308, n. 3, 122 S. Ct. 2242 (quoting DSM–IV, p. 41 (4th ed. 2000)). However, in 2013, the manual's fifth edition (DSM–5) changed course, providing only that an impairment must onset "during the developmental period." Hall, 572 U.S. at 721, 134 S. Ct. 1986 (citing DSM–5, at 33). The revisions to the AAIDD and APA definitions have aligned those definitions more closely with that of the American Psychological Association, another authority relied upon in Hall, which also sets the cutoff at age 22. Manual of Diagnosis and Professional Practice in Mental Retardation 13, 36 (1996). These three leading clinical pronouncements provide powerful evidence of medical consensus that cannot be disregarded. Moore [v. Texas], 581 U. S.[___] , at ——, 137 S. Ct. [1039,]at 1049 [2017]*.

(Footnote omitted).

The fifth and most recent version of the American Psychological Association's (APA) Diagnostic and Statistical Manual (DSM-5)[10] describes intellectual disability as follows: "Intellectual disability (intellectual development disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in the conceptual, social, and practical domains." DSM-5, at 33.

While the Court in Hall cited these reference materials in its discussion of how to determine whether a person does or does not have an intellectual disability, no Tennessee appellate opinion has examined an intellectual disability claim considering the revised AAIDD and DSM-5 definitions of intellectual disability or the revised statutory definition. The change in definition from the DSM-IV to the DSM-5 is most prevalent in the adaptive deficit category, which will be explained below.

> **NOTE:** As previously stated, prior to the 2021 amendment to the intellectual disability statute, a finding of significantly subaverage general intellectual functioning required an IQ of 70 or below. Of note, in the DSM-5, published in 2013, the American Psychiatric Association explained the first prong of its intellectual disability diagnosis, deficits in intellectual functioning, entailed deficits in "reasoning, problem solving, abstract thinking, judgment, academic learning, and learning from experience," as confirmed by clinical evaluation and individualized standard IQ testing. DSM-5, at 33. As explained above, as of this writing Tennessee courts have not examined intellectual disability in light of the DSM-5 or the

[10] Beginning with the fifth edition of the DSM, the APA began numbering the edition with standard numerals (i.e., "DSM-5"). Prior editions were denoted with Roman numerals (i.e., "DSM-IV").

revised intellectual disability statute, which removed the explicit IQ requirement.

b. Deficits in Adaptive Behavior

" 'Deficits in adaptive behavior' refers to the inability of an individual to adapt to surrounding circumstances." State v. Pruitt, 415 S.W.3d 180, 203-04 (Tenn. 2013) (citing State v. Smith, 893 S.W.2d 908, 918 (Tenn. 1994)). In Van Tran, the court explained the accepted clinical definition of the phrase "adaptive functioning."

> *[A]daptive functioning ... "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." As discussed, a mentally retarded person will have significant limitations in at least two of the following basic skills: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Influences on adaptive functioning may include the individual's "education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with mental retardation."*

Van Tran, 66 S.W.3d at 795 (citations omitted) (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV)).

In Coleman, the court also discussed the issue of deficits in adaptive behavior and stated that

> *Distinguishing causally between intellectual disability and mental illness raises broad conceptual concerns in terms of the*

> *application of Tenn. Code Ann. § 39-13-203(a)(2). Causation and adaptive deficits present a complicated intersection. The American Psychiatric Association's, Diagnostic and Statistical Manual of Mental Disorders notes that "[a]daptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with [m]ental [r]etardation." DSM-IV-TR, at 42.*

341 S.W.3d at 249-50. The court discussed different approaches which could be used in determining the role of causation in assessing deficits in adaptive behavior. Despite these concerns with this issue, the Court held that it did not need to decide the appropriate approach to be applied to the role of causation in order to reach a decision in the case. Therefore, this issue has not been definitively answered at this time. Id. See Van Tran v. Colson, 764 F.3d at 619.

> **NOTE:** The accepted clinical definition of adaptive functioning has changed since the opinions cited above but no Tennessee case law discussing the new definition has been published at this time.

Clinical Definition

In both the AAIDD Manual and the DSM-5, deficits in adaptive behavior are defined as deficits in any one of the following three "domains":

- Conceptual domain, including language (communication), reading and writing (functional academics), money concepts, and self-direction;

- Social domain, including interpersonal skills, social responsibility, self-esteem, gullibility, naivete,

following rules and obeying laws, avoiding being victimized, and social problem solving; and

- Practical domain, including activities of daily living (self-care), instrumental activities of daily living (meal preparation, housekeeping, transportation, taking medication, money management, telephone use), occupational skills, and maintaining a safe environment.

Both the AAIDD and DSM-5 conclude that the criteria for adaptive behavior limitation is significant deficits in any one domain.

As stated above, Tennessee appellate courts have not yet addressed a case assessing intellectual disability under the revised AAIDD and DSM definitions.

Moore v. Texas, 586 U.S. ____, 139 S. Ct. 666 (2019) (Moore II):

The revised AAIDD and DSM definitions, however, have been discussed by the United States Supreme Court. In Moore, the United States Supreme court summarized its previous ruling in Moore v. Texas, 581 U.S. ___, 137 S. Ct. 1039 (2017) (Moore I), in which it remanded the issue of intellectual disability to the Texas appellate courts for reconsideration. The trial court had found Moore to be intellectually disabled but the appellate court had reversed this decision. The Court in Moore II summarized its prior ruling as follows:

> *At the outset of our opinion, we recognized as valid the three underlying legal criteria that both the trial court and appeals court had applied. Id., at —— – ——, 137 S. Ct., at 1045–1046 (citing American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010) (AAIDD–11); American Psychiatric Association, Diagnostic*

and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM–5)). To make a finding of intellectual disability, a court must see: (1) deficits in intellectual functioning—primarily a test-related criterion, see DSM–5, at 37; (2) adaptive deficits, "assessed using both clinical evaluation and individualized ... measures," ibid.; and (3) the onset of these deficits while the defendant was still a minor, id., at 38. With respect to the first criterion, we wrote that Moore's intellectual testing indicated his was a borderline case, but that he had demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning. Moore, 581 U.S., at —— – ——, 137 S. Ct., at 1048–1050. With respect to the third criterion, we found general agreement that any onset took place when Moore was a minor. Id., at ——, n. 3, 137 S. Ct., at 1045, n. 3.

But there was significant disagreement between the state courts about whether Moore had the adaptive deficits needed for intellectual disability. "In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical)." Id., at ——, 137 S. Ct., at 1046 (citing AAIDD–11, at 43). Based on the evidence before it, the trial court found that "Moore's performance fell roughly two standard deviations below the mean in all three skill categories." 581 U.S., at ——, 137 S. Ct., at 1046; see App. to Pet. for Cert. 309a. Reversing that decision, the appeals court held that Moore had "not proven by a preponderance of the evidence" that he possessed the requisite adaptive deficits, and thus was eligible for the death penalty. Ex parte Moore I, 470 S.W.3d at 520.[11] We disagreed with the appeals court's adaptive-functioning analysis, however, and identified at least five errors.

First, the Texas Court of Criminal Appeals "overemphasized Moore's perceived adaptive strengths." Moore, 581 U.S., at ——, 137 S. Ct., at 1050. "But the medical community," we said, "focuses the adaptive-functioning inquiry on adaptive deficits." Ibid.

Second, the appeals court "stressed Moore's improved

[11] Ex parte Moore, 470 S.W.3d 481, 527–528 (Tex. Crim. App. 2015).

behavior in prison." Id., at ——, 137 S. Ct., at 1050. But "[c]linicians ... caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." Ibid. (quoting DSM–5, at 38).

Third, the appeals court "concluded that Moore's record of academic failure, ... childhood abuse[,] and suffering ... detracted from a determination that his intellectual and adaptive deficits were related." 581 U.S., at ——, 137 S. Ct., at 1051. But "in the medical community," those "traumatic experiences" are considered " 'risk factors' for intellectual disability." Ibid. (quoting AAIDD–11, at 59–60).

Fourth, the Texas Court of Criminal Appeals required "Moore to show that his adaptive deficits were not related to 'a personality disorder.' " 581 U.S., at ——, 137 S. Ct., at 1051 (quoting Ex parte Moore I, 470 S.W.3d at 488). But clinicians recognize that the "existence of a personality disorder or mental-health issue ... is 'not evidence that a person does not also have intellectual disability.' " 581 U.S., at ——, 137 S. Ct., at 1051 (quoting Brief for American Psychological Association et al. as Amici Curiae in Moore v. Texas, O.T. 2016, No. 15797, p. 19.

Fifth, the appeals court directed state courts, when examining adaptive deficits, to rely upon certain factors set forth in a Texas case called Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004). Ex parte Moore I, 470 S.W.3d at 486, 489. The Briseno factors were: whether "those who knew the person best during the developmental stage" thought of him as "mentally retarded"; whether he could "formulat[e] plans" and "car[ry] them through"; whether his conduct showed "leadership"; whether he showed a "rational and appropriate" "response to external stimuli"; whether he could answer questions "coherently" and "rationally"; whether he could "hide facts or lie effectively"; and whether the commission of his offense required "forethought, planning, and complex execution of purpose." 135 S.W.3d at 8–9.

We criticized the use of these factors both because they had no grounding in prevailing medical practice, and because they invited "lay perceptions of intellectual disability" and "lay stereotypes" to guide assessment of intellectual disability. Moore, 581 U.S., at ——, 137 S. Ct., at 1051.

> *Emphasizing the Briseno factors over clinical factors, we said, " 'creat[es] an unacceptable risk that persons with intellectual disability will be executed.' " 581 U.S., at ——, 137 S. Ct., at 1051 (quoting Hall v. Florida, 572 U.S. 701, 704, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014)). While our decisions in "Atkins and Hall left to the States 'the task of developing appropriate ways to enforce' the restriction on executing the intellectually disabled," 581 U.S., at ——, 137 S. Ct., at 1048 (quoting Hall, 572 U.S. at 719, 134 S. Ct. 1986), a court's intellectual disability determination "must be 'informed by the medical community's diagnostic framework,' " 581 U.S., at ——, 137 S. Ct., at 1048 (quoting Hall, 572 U.S. at 721, 134 S. Ct. 1986).*
>
> *Three Members of this Court dissented from the majority's treatment of Moore's intellectual functioning and with aspects of its adaptive-functioning analysis, but all agreed about the impropriety of the Briseno factors. As THE CHIEF JUSTICE wrote in his dissenting opinion, the Briseno factors were "an unacceptable method of enforcing the guarantee of Atkins" and the Texas Court of Criminal Appeals "therefore erred in using them to analyze adaptive deficits." Moore, 581 U.S., at ——, 137 S. Ct., at 1053 (opinion of ROBERTS, C.J.)*

Moore II, 139 S. Ct. at 668-70.

On remand, the Texas appellate court reached the same conclusion, but the court focused almost exclusively on adaptive deficits and placed much greater credibility on the State's expert witness. Id. at 670. Again, Moore appealed and the Court in Moore II again overturned the Texas court stating as follows:

> *[W]e agree with Moore that the appeals court's determination is inconsistent with our opinion in Moore. We have found in its opinion too many instances in which, with small variations, it repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion.*
>
> *For one thing, the court of appeals again relied less upon the adaptive deficits to which the trial court had referred than upon Moore's apparent adaptive strengths. See Moore, 581 U.S., at ——, 137 S. Ct., at 1050 (criticizing the appeals*

court's "overemphas[is]" upon Moore's "perceived adaptive strengths"); supra, at 668 – 669. The appeals court's discussion of Moore's "[c]ommunication [s]kills" does not discuss the evidence relied upon by the trial court. Ex parte Moore II, 548 S.W.3d at 563–565. That evidence includes the young Moore's inability to understand and answer family members, even a failure on occasion to respond to his own name. App. to Pet. for Cert. 289a–290a. Its review of Moore's "[r]eading and [w]riting" refers to deficits only in observing that "in prison, [Moore] progressed from being illiterate to being able to write at a seventh-grade level." Ex parte Moore II, 548 S.W.3d at 565. But the trial court heard, among other things, evidence that in school Moore was made to draw pictures when other children were reading, and that by sixth grade Moore struggled to read at a second-grade level. App. to Pet. for Cert. 290a, 295a.

Instead, the appeals court emphasized Moore's capacity to communicate, read, and write based in part on pro se papers Moore filed in court. Ex parte Moore II, 548 S.W.3d at 565–566. That evidence is relevant, but it lacks convincing strength without a determination about whether Moore wrote the papers on his own, a finding that the court of appeals declined to make. Rather, the court dismissed the possibility of outside help: Even if other inmates "composed" these papers, it said, Moore's "ability to copy such documents by hand" was "within the realm of only a few intellectually disabled people." Id., at 565. Similarly, the court of appeals stressed Moore's "coherent" testimony in various proceedings, but acknowledged that Moore had "a lawyer to coach him" in all but one. Id., at 564, and n. 95. As for that pro se hearing, the court observed that Moore read letters into the record "without any apparent difficulty." Ibid.

For another thing, the court of appeals relied heavily upon adaptive improvements made in prison. See Moore, 581 U.S., at ——, 137 S. Ct., at 1050 ("caution[ing] against reliance on adaptive strengths developed" in "prison"); supra, at 668. It concluded that Moore has command of elementary math, but its examples concern trips to the prison commissary, commissary purchases, and the like. Ex parte Moore II, 548 S.W.3d at 566–569. It determined that Moore had shown leadership ability in prison by refusing, on occasion, "to mop up some spilled oatmeal," shave, get a haircut, or sit down. Id.,

at 570–571, and n. 149. And as we have said, it stressed correspondence written in prison. Id., at 565. The length and detail of the court's discussion on these points is difficult to square with our caution against relying on prison-based development.

Further, the court of appeals concluded that Moore failed to show that the "cause of [his] deficient social behavior was related to any deficits in general mental abilities" rather than "emotional problems." Id., at 570. But in our last review, we said that the court of appeals had "departed from clinical practice" when it required Moore to prove that his "problems in kindergarten" stemmed from his intellectual disability, rather than "'emotional problems.'" Moore, 581 U.S., at ——, 137 S. Ct., at 1051 (quoting Ex parte Moore I, 470 S.W.3d at 488, 526). And we pointed to an amicus brief in which the APA explained that a personality disorder or mental-health issue is "not evidence that a person does not also have intellectual disability." 581 U.S., at ——, 137 S. Ct., at 1051 (quoting Brief for APA et al. as Amici Curiae in No. 15–797, at 19).

Finally, despite the court of appeals' statement that it would "abandon reliance on the Briseno evidentiary factors," Ex parte Moore II, 548 S.W.3d at 560, it seems to have used many of those factors in reaching its conclusion. See supra, at 669 – 670 (detailing those factors). Thus, Briseno asked whether the "offense require[d] forethought, planning, and complex execution of purpose." 135 S.W.3d at 9. The court of appeals wrote that Moore's crime required "a level of planning and forethought." Ex parte Moore II, 548 S.W.3d at 572, 603 (observing that Moore "w[ore] a wig, conceal[ed] the weapon, and fle[d]" after the crime).

Briseno asked whether the defendant could "respond coherently, rationally, and on point to oral and written questions." 135 S.W.3d at 8. The court of appeals found that Moore "responded rationally and coherently to questions." Ex parte Moore II, 548 S.W.3d at 564.

And Briseno asked whether the defendant's "conduct show[s] leadership or ... that he is led around by others." 135 S.W.3d at 8. The court of appeals wrote that Moore's "refus[al] to mop up some spilled oatmeal" (and other such behavior) showed that he "influences others and stands up to authority." Ex

parte Moore II, 548 S.W.3d at 570–571.

Of course, clinicians also ask questions to which the court of appeals' statements might be relevant. See AAIDD–11, at 44 (noting that how a person "follows rules" and "obeys laws" can bear on assessment of her social skills). But the similarity of language and content between Briseno's factors and the court of appeals' statements suggests that Briseno continues to "pervasively infec[t] the [the appeals courts'] analysis." Moore, 581 U.S., at ——, 137 S. Ct., at 1053.

To be sure, the court of appeals opinion is not identical to the opinion we considered in Moore. There are sentences here and there suggesting other modes of analysis consistent with what we said. But there are also sentences here and there suggesting reliance upon what we earlier called "lay stereotypes of the intellectually disabled." Id., at ——, 137 S. Ct., at 1052. Compare Ex parte Moore II, 548 S.W.3d at 570–571 (finding evidence that Moore "had a girlfriend" and a job as tending to show he lacks intellectual disability), with AAIDD–11, at 151 (criticizing the "incorrect stereotypes" that persons with intellectual disability "never have friends, jobs, spouses, or children"), and Brief for APA et al. as Amici Curiae 8 ("[I]t is estimated that between nine and forty percent of persons with intellectual disability have some form of paid employment").

We conclude that the appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court. We consequently agree with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectual disability.

Moore II, 139 S. Ct. at 670–72.

c. Manifestation During the Developmental Period

Tenn. Code Ann. §39-13-203(a) requires that a defendant's intellectual disability must have been manifested during the

developmental period, or by eighteen (18) years of age. The term "developmental period" in Tenn. Code Ann. § 39-13-203(a) does not extend the time for manifestation of intellectual disability beyond the age of eighteen (18). State v. Strode, 232 S.W.3d 1 (Tenn. 2007).

Therefore, under the definition of intellectual disability as set forth in the statute, both the significantly subaverage general intellectual functioning and deficits in adaptive behavior must be manifested by the age of eighteen (18). Id.

NOTE: As previously stated, the 12th edition of the AAIDD manual now places the end of the developmental period at age 22, while the DSM-5 does not list a specific age by which intellectual disability must manifest. However, the 2021 amendment to Tennessee's intellectual disability statute still requires intellectual disability to manifest by age 18.

B. JOINDER AND SEVERANCE

1. The Rules

Tenn. R. Crim. P. 8: Joinder of Offenses and Defendants

(a) Mandatory Joinder of Offenses.

(1) *Criteria for Mandatory Joinder.* Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or the offenses consolidated pursuant to Rule 13, if the offenses are:

(A) based on the same conduct or arise from the same criminal episode;

(B) within the jurisdiction of a single court; and

(C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

(2) *Failure to Join Such Offenses.* A defendant shall not be subject to separate trials for multiple offenses falling within Rule 8(a)(1) unless they are severed pursuant to Rule 14.

(b) Permissive Joinder of Offenses. Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13, if:

(1) the offenses constitute parts of a common scheme or plan; or

(2) they are of the same or similar character.

(c) Joinder of Defendants. An indictment, presentment, or information may charge two or more defendants:

(1) if each of the defendants is charged with accountability for each offense included;

(2) if each of the defendants is charged with conspiracy, and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) even if conspiracy is not charged and all of the defendants are not charged in each count, if the several offenses charged:

(A) were part of a common scheme or plan; or

(B) were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Tenn. R. Crim. P. 13: Consolidation or Severance

(a) Consolidation. The court may order consolidation for trial of two or more indictments, presentments, or informations if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8.

(b) Severance. The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or of the state pursuant to Rule 14.

Tenn. R. Crim. P. 14: Severance of Offenses and Defendants

(a) Severance Motion.

(1) Timing.

(A) By Defendant. A defendant's motion for severance of offenses or defendants shall be made before trial, except that a motion for severance may be made before or at the close of all evidence if based on a ground not previously known. A defendant waives severance if the motion is not timely.

(B) By State. The state's motion for severance of counts or

defendants may be granted by the court only prior to trial, except with the consent of the defendant.

(2) *Double Jeopardy.* If during the trial the court grants a motion for severance made by the defendant or with the defendant's consent, the ruling does not bar a subsequent trial of that defendant on the offenses severed.

(b) Severance of Offenses.

(1) *Involving Permissive Joinder of Offenses.* If two or more offenses are joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others.

(2) *Involving Mandatory Joinder of Offenses.* If two or more offenses are joined or consolidated for trial pursuant to Rule 8(a), the court shall grant a severance of offenses in any of the following situations:

(A) Before Trial. Before trial on motion of the state or the defendant when the court finds a severance appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.

(B) During Trial. During trial, with consent of the defendant, when the court finds a severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether–in light of the number of offenses charged and the complexity of the evidence–the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

(C) Conflicting Positions on Continuance. When the court finds merit in both the district attorney general's motion for a continuance based on exigent circumstances that temporarily prevent the state from being ready for trial of the joined prosecutions and in the defendant's objection to the continuance based on a demand for speedy trial. A court granting a severance under this subdivision shall also grant a continuance of the prosecutions in which the exigent circumstances exist.

(c) Severance of Defendants.

(1) *Because of Out-of-Court Statement.* If a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to the defendant but is not admissible against the defendant, the court shall determine whether the state intends to offer the statement in evidence at trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(A) a joint trial at which the statement is not admitted in evidence or at which, if admitted, the statement would not

constitute error;

(B) a joint trial at which the statement is admitted in evidence only after all references to the moving defendant have been deleted and if the redacted confession will not prejudice the moving defendant; or

(C) severance of the moving defendant.

(2) *Because of Speedy Trial or Fair Determination Concerns.* On motion of the state or the defendant other than under Rule 14(c)(1), the court shall grant a severance of defendants if:

(A) before trial, the court finds a severance necessary to protect a defendant's right to a speedy trial or appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or

(B) during trial, with consent of the defendants to be severed, the court finds a severance necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(3) *Because of Failure to Prove Grounds for Joinder.* The court shall grant a severance of defendants if:

(A) a defendant moves for severance at the conclusion of the state's case or at the conclusion of all the evidence;

(B) there is not sufficient evidence to support the allegation on which the moving defendant was joined for trial with the other defendant or defendants; and

(C) in view of this lack of evidence, severance is necessary to achieve a fair determination of the moving defendant's guilt or innocence.

2. Joinder/Severance of Offenses

a. Permissive Joinder

"When the State initially seeks to consolidate separate indictments [for trial], it must establish only one thing: that the offenses are either (1) 'parts of a common scheme or plan,' or (2) that the offenses are 'of the same or similar character.'" See State v. Garrett, 331 S.W.3d 392, 402 (Tenn. 2011) (emphasis in original).

However, "If the State seeks consolidation of offenses under Rule 13(a) and the defendant objects, 'the prosecution bears the burden of producing evidence to establish that

consolidation is proper[.]'" Id. (quoting State v. Toliver, 117 S.W.3d 216, 228 (Tenn. 2003)). In such instances "the trial court must hold a hearing in order to gather the information necessary to adjudicate the issue[.]" Garrett, 331 S.W.3d at 403 (emphasis in original). Before cases may be consolidated under Rule 13(a), the State must prove

> *(1) the multiple offenses constitute parts of a common scheme or plan, Tenn. R. Crim. P. 14(b)(1); (2) evidence of each offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); [State v.] Moore, 6 S.W.3d [235,] 239 [(Tenn. 1999)]; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3).*

Spicer v. State, 12 S.W.3d 438, 447 (Tenn. 2007).

The State's failure to present any evidence justifying consolidation mandates severance of offenses; the appellate courts will review only evidence produced at the pretrial joinder/severance hearing (and not the evidence produced at trial) in reviewing the trial court's decision. See id.

In Spicer, the Tennessee Supreme Court stated that when a defendant seeks to prevent consolidation of offenses,

> *the "primary issue" to be considered . . . is whether evidence of one offense would be admissible in the trial of the other[s] if the . . . offenses remained severed. See State v. Burchfield, 664 S.W.2d 284, 286 (Tenn. 1984). In its most basic sense, therefore, any question as to whether offenses should be tried separately pursuant to Rule 14(b)(1) is "really a question of evidentiary relevance." State v. Moore, 6 S.W.3d 235, 239 (Tenn. 1999); see also Shirley, 6 S.W.3d at 248.*[12]

Id. (alterations added) The court in Garrett emphasized the importance of the 404(b) analysis in the trial court's decision whether to sever the offenses, given the possibility of a

[12] State v. Shirley, 6 S.W.3d 243, 248 (Tenn. 1999).

jury's convicting the defendant based on "propensity" or "bad character." See Garrett, 331 S.W.3d at 402-03.

The courts have recognized three different types of common scheme or plan:

> *(1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction.*

State v. Shirley, 6 S.W.3d 243, 248 (Tenn. 1999).

(1) Signature Crimes

In determining whether a series of crimes are of the same distinctive design or signature, the court must "look to the methods used to commit the crimes and not merely enumerate their similarities and differences. Even though offenses may be similar in many respects, they cannot be classified as signature crimes if they lack a distinct modus operandi." Id. Rather, "As to 'signature crimes' [the Tennessee Supreme Court has] described such offenses as involving a modus operandi so unique and distinctive, and involving 'such unusual particularities,' that reasonable persons would conclude that the means of committing the crimes 'would not likely be employed by different persons.'" Garrett, 331 S.W.3d at 404 (quoting Moore, 6 S.W.3d at 240)).

(2) Larger Continuing Plan or Conspiracy

"A larger [or continuing] plan or conspiracy . . . contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses." State v. Denton, 149 S.W.3d 1, 15 (Tenn. 2004). Furthermore, this category requires proof of "a working plan, operating towards

the future with such force as to make probable the crime for which the defendant is on trial." State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995), overruled on other grounds by Spicer, 12 S.W.3d at 447 n.12. The continuing plan or conspiracy category, traditionally, has been restricted to cases involving crime sprees, where the defendant commits several crimes closely in time to one another. See State v. Hall, 976 S.W.2d 121, 146 (Tenn. 1998) (Appendix) (joinder of trials for kidnapping, vandalism, and murder appropriate where defendants committed acts shortly after escape from prison; defendants had goal of fleeing the country and avoiding capture).

(3) Same Transaction

"The same transaction category involves crimes which occur within a single criminal episode." State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). The concept of the "same criminal episode" is explored in greater detail below in the section addressing mandatory joinder.

b. Mandatory Joinder

The failure by the State to join all the 'same conduct' or 'same criminal episode' offenses in the original indictment prevents the State from subsequently prosecuting the other charges that should have been included in the original indictment unless the charges have been severed in accordance with Tenn. R. Crim. P. 14(b)(2).

State v. Johnson, 342 S.W.3d 468, 473 (Tenn. 2011) (citing Tenn. R. Crim. P. 8(a)(2) and Tenn. R. Crim. P. 8 advisory commission comments).

The mandatory joinder provisions in Tenn. R. Crim. P. 8(a)(1) apply only to "same conduct" and "same criminal episode" offenses. Offenses arising out of the same conduct are the most

> *easily understood. The simplest example of a same conduct offense involves a single act that results in a number of interrelated offense. Thus, a defendant's rape of his daughter [resulting in both rape and incest charges] or a defendant's firing of a single gunshot that hits two victims are examples of multiple offenses precipitated by the same act or conduct.*

Johnson, 342 S.W.3d at 473-74 (footnotes and some citations omitted).

Regarding offenses constituting a single criminal episode, the Tennessee Supreme Court has adopted the following standard pronounced in the American Bar Association Standards for Criminal Justice, approved in 1978:

> *"Single criminal episode" offenses normally are generated by separate physical actions. The actions may be committed by separate defendants. In other respects, however, they are similar to same conduct offenses: they occur simultaneously or in close sequence, and they occur in the same place or in closely situated places. A critical characteristic of single episode offenses, particularly in cases involving otherwise unrelated offenses or offenders, is the fact that proof of one offense necessarily involves proof of the others.*

Johnson, 342 S.W.3d at 474 (footnotes omitted) (citing 2 ABA Standards for Criminal Justice § 13-1.2 cmt., at 13.10). "A break in the action may be sufficient to interrupt the temporal proximity required for a single criminal episode to exist." Johnson, 342 S.W.3d at 474.

For proof of one offense to "necessarily involve proof of the others,"

> *Proof of one offense must be "inextricably connected" with the proof of the other, see State v. Shepherd, 902 S.W.2d 895, 904 (Tenn. 1995), or that the proof of one offense forms a "substantial portion of the proof" of the other offense. See United States v. Montes-Cardenas, 746 F.2d 771, 776 (11th Cir. 1984). While the offenses need not be based solely on the same facts, requiring a substantial interrelationship between*

> *the evidence required to prove each of several offenses "properly focuses on the trial court's inquiry on the degree to which the defendant is harassed and judicial resources wasted by successive prosecutions. People v. Rogers, 742 P.2d 912, 919 (Colo. 1987) (en banc).*

Johnson, 342 S.W.3d at 475.

3. Joinder/Severance of Defendants

To ensure co-defendants their rights to a fair trial, the rules of criminal procedure allow for the severance of defendants in certain circumstances. See Tenn. R. Crim. P. 14(c). Defendants may be severed before trial or during trial. The court's severance decision must protect the rights of both the defendants and the state; "'when several persons are charged jointly with a single crime, . . . the state is entitled to have the fact of guilt determined and punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendants.'" State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982) (quoting Woodruff v. State, 51 S.W.2d 843, 845 (Tenn. 1932)).

As the Court of Criminal Appeals has recognized, cases where co-defendants seek a severance fall into two categories: "those in which the defendants base their request for severance on the existence of antagonistic defenses, and those in which one of the defendants has made a confession which the State wishes to introduce at trial." Dorsey v. State, 568 S.W.2d 639, 642 (Tenn. Crim. App. 1978) (footnotes omitted).

a. Antagonistic Defenses

The Court of Criminal Appeals has stated,

> *"While 'mutually antagonistic' defenses may mandate severance in some circumstances, they are not prejudicial per se." State v. Farmer, et al., No. 03C01-9206-CR-00196, 1993 WL 247907 (Tenn. Crim. App. July 8, 1993) (citing Zafiro v. United States, 506 U.S. 534, 347-38, 113 S. Ct. 933, 937, 122 L.Ed.2d 317 (1993)). Due to the difficulty in establishing*

> *prejudice, relatively few convictions have been reversed for failure to sever on these grounds. Id. Mere attempts to cast the blame on the other will not, standing alone, justify a severance on the grounds that the respective defenses are antagonistic. Id. "The defendant must go further and establish that a joint trial will result in 'compelling prejudice,' against which the trial court cannot protect, so that a fair trial cannot be had." Id. (quoting United States v. Horton, 705 F.2d 1414, 1417 (5th Cir. 1983)).*

State v. Ensley, 956 S.W.2d 502, 509 (Tenn. Crim. App. 1996).

b. Statement of Co-Defendant

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court prohibited the use of a statement by a non-testifying co-defendant which incriminates the defendant facing trial. The Court so held because a co-defendant's statement incriminating the defendant violates the defendant's right of cross-examination guaranteed by the Sixth Amendment's Confrontation Clause. Id. at 126. However, the Bruton rule "does not apply to confessions which [d]o not implicate the non-confessing defendant, nor does it apply to confessions from which 'all references to the moving defendant have been effectively deleted, provided that, as deleted, the confession will not prejudice the moving defendant.'" Dorsey, 568 S.W.2d at 642 (alteration added, citations omitted).

Thus, pursuant to Rule 14(c), the trial court must first determine whether the State intends to use the statement of a co-defendant at trial. If so, the court has three options: (1) try the cases together if either the statement is not introduced or the court determines the statement does not implicate the co-defendant; (2) try the cases together after removing all references to the co-defendant, so that the redacted statement does not prejudice the defendant moving for severance; or (3) sever the cases. Tenn. R. Crim. P. 14(c)(1)(A)-(C).

The Bruton rule is not implicated where the co-defendant's statement is not introduced for the truth of the matter asserted (i.e., if the co-defendant's statement is not hearsay). For instance, in Street v. Tennessee, 471 U.S. 409, 411 (1985), the defendant testified that his confession to police had been coerced and that he had not burglarized the victim's home or participated in the victim's murder. The prosecution then introduced the statement of another participant in the offenses; this statement implicated Street. Id. at 411-12. The sheriff read this statement into the record and explained the differences between the two statements; the other participant did not testify at Street's trial. Id. The Supreme Court held that the other participant's statement had been introduced only to rebut Street's claim that his (Street's) statement had been coerced, and not to prove that Street committed the offenses:

> *The nonhearsay aspect of [the other participant's] confession—not to prove what happened at the murder scene but to prove what happened when the respondent confessed—raises no Confrontation Clause concerns. The Clause's fundamental role in protecting the right of cross-examination was satisfied by [the sheriff's] presence on the stand. If respondent's counsel doubted that [the other participant's] confession was accurately recounted, he was free to cross-examine the [s]heriff.*

Street, 471 U.S. at 414 (internal citations omitted, alterations added). The trial court instructed the jury that the jury was only to consider the statement for rebuttal purposes, not for the truth of the matter asserted. Id. at 414-15.

Similarly, in State v. Price, 46 S.W.3d 785, 803 (Tenn. Crim. App. 2000), recorded conversations between the defendant and a non-testifying co-defendant (conversations which implicated the defendant) were introduced at trial. The defendant argued that the trial court's failure to sever resulted in a violation of his confrontation rights under

Bruton. Id. However, the appellate court concluded that the co-defendant's recorded statements "were not offered by the state to prove the truth of the matters asserted. Rather, they were offered solely for the purpose of providing the context of the defendant's statements." Id. at 804. Thus, the statements were held to be admissible. Id.

The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (citing Street, 471 U.S. at 414).

C. PRETRIAL JURY RELATED MOTIONS

1. Change of Venue or Venire

Article I, section 9 of the Tennessee Constitution provides a criminal defendant with the right to trial "by an impartial jury of the county in which the crime shall have been committed." Tenn. R. Crim. P. 18(a) also provides that a criminal defendant shall be prosecuted in the county where the offense was committed, **unless otherwise provided by court rule or statute.**

Tenn. R. Crim. P. 21(a) establishes that a trial court may change the venue of a criminal case on the defendant's motion or on its own motion **with the defendant's consent**.

> *...The court should order a venue change when a fair trial is unlikely because of undue excitement against the defendant in the county where the offense was committed or for any other cause.*

Tenn. R. Crim. P. 21(a). Subsection (b) of Rule 21 also requires that any motion for a change of venue must be accompanied by affidavit(s) alleging facts which constitute "undue excitement" or

any other cause on which the motion is based. Subsection (b) also allows the state to file counter-affidavits.

The rules and statutes provide no specific time for the filing of a motion for a change of venue. The rule simply provides that it shall be made at the earliest date after the cause relied upon in the motion is alleged to have arisen. Tenn. R. Crim. P. 21(c). In addition, Tenn. Code Ann. § 20-4-201 provides in pertinent part that

> **In ... all criminal cases:**
>
> **(1) The venue may be changed, at any time before trial, upon good cause shown, as prescribed by this part; or**
>
> **(2) A court may issue an order for a special venire of jurors from another county if in its discretion it determines the action to be necessary to ensure a fair trial.**

Subsection (2) specifically permits the trial court to grant a change of venire rather than a complete change of venue. "The statute is silent as to the conditions under which a trial court must order a requested change of venue as opposed to a change of venire." State v. Letalvis Darnell Cobbins, 2014 WL 4536564 (Tenn. Crim. App. Sept. 12, 2014).

> **NOTE:** Other sections of Title 20, Chapter 4, Part 2, apply to issues related to the change venue such as the transfer of records, costs, etc.

In State v. Hoover, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), the court listed the following seventeen (17) relevant factors to consider in determining whether to grant a change of venue:

> *(1) Nature, extent, and timing of pretrial publicity.*

(2) Nature of publicity as fair or inflammatory.
(3) The particular content of the publicity.
(4) The degree to which the publicity complained of has permeated the area from which the venire is drawn.
(5) The degree to which the publicity circulated outside the area from which the venire is drawn.
(6) The time elapsed from the release of the publicity until the trial.
(7) The degree of care exercised in the selection of the jury.
(8) The ease or difficulty in selecting the jury.
(9) The veniremen's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire.
(10) The defendant's utilization of his peremptory challenges.
(11) The defendant's utilization of challenges for cause.
(12) The participation by police or by prosecution in the release of publicity.
(13) The severity of the offense charged.
(14) The absence or presence of threats, demonstrations or other hostility against the defendant.
(15) Size of the area from which the venire is drawn.
(16) Affidavits, hearsay or opinion testimony of witnesses.
(17) Nature of the verdict returned by the trial jury.

See also State v. Sexton, 368 S.W.3d 371, 387 (Tenn. 2012); State v. Rogers, 188 S.W.3d 593, 621-22 (Tenn. 2006) (Appendix); State v. Davidson, 121 S.W.3d 600, 611-12 (Tenn. 2003).

A change of venue is not warranted merely because jurors have been exposed to pretrial publicity. State v. Mann, 959 S.W.2d 503, 531-32 (Tenn. 1997). Jurors can have knowledge of the facts surrounding the crime and still be qualified to sit, so long as they can unambiguously state that they can set that knowledge aside and perform their duty as a juror to base their decision solely on the evidence presented in the courtroom.

When a change of venue or venire is granted, Tenn. R. Crim. Pro. 21(d)-(f) and Tenn. Code Ann. § 20-4-206 govern the change of

location and procedure to be followed.

Rule 21 in pertinent part provides:

> **(d) Location of New Venue. –**
>
> **(1) Multi-County Circuit. – In a multi-county judicial circuit, the court shall change the venue to the nearest county in the judicial circuit in which the prosecution is pending where the cause for change of venue does not exist. If the same cause for change of venue exists in all other counties in the judicial circuit, the court shall change venue to the nearest county where the same cause for change of venue does not exist.**
>
> **(2) Single-County Circuit. – In a single-county judicial circuit, the court shall change venue to the nearest county where the same cause for change of venue does not exist.**
>
> **(3) Two Possible Counties. – If the court finds that there are two (2) or more adjoining or approximately equivalent counties to which the case might be removed under the provisions of this rule, the court shall determine where the case is to be heard.**
>
> **(e) Procedure After Venue Change Ordered. –**
>
> **(1) Duties of Clerk in Sending Court.– After the court orders a change of venue, the clerk of that court shall:**
>
> > **(A) make a complete transcript of the record and proceedings in the case; and**
> >
> > **(B) transmit the transcript, including the indictment and all other papers on file, to the clerk of the receiving court.**
>
> **(2) Duties of Clerk in Receiving Court. – The clerk of the receiving court shall enter the transcript from the sending court on the minutes of the receiving court.**
>
> **(3) Defendant in Custody. – If the defendant is in the custody of the sending county's sheriff, the sheriff shall-on order of the court-transfer and deliver the defendant to the sheriff of the receiving county to which the venue is changed. The sheriff of the receiving county shall receive and detain the defendant in custody until legally discharged.**

(4) Receiving Court. – The receiving court:

(A) shall take the case and proceed to trial, judgment, and execution, in all respects as if the indictment or presentment had been returned to that court;

(B) may release the defendant on bail or recognizance; and

(C) may enforce the attendance of the prosecutor and all witnesses by recognizance or bail.

(f) Fines, Forfeitures, and Fees After Venue Change. – When venue is changed, all fines and forfeitures in such cases go to the county in which the indictment was returned, and judgment shall be rendered accordingly. The fees of all jurors and witnesses, on being properly certified by the clerk of the receiving court, are a charge to the county in which the indictment or presentment was returned, in like manner as if the trial had not been removed.

Tenn. Code Ann. § 20-4-206 also addresses the issue of location when a change of venue or venire is granted and provides as follows:

Court to which changed -- Special venire. --

(a) The change of venue in a court of record shall be made to the nearest adjoining county free from the like exception, whether in the same judicial district or out of it.

…

(b) Upon an order for a special venire of jurors from a court other
than the court of record, as authorized by § 20-4-201, the jury selection shall be made from the nearest adjoining county free from the like exception, whether in the same judicial district or out of it.

Neither the rule nor the statute allows the defendant to choose the county to which the case is removed or from which the new jury is

selected.

2. Other Pretrial Jury Motions

a. Motion For A Fair Jury Selection Process OR Motion For Individual And Sequestered Voir Dire

This is a motion by which the capital defendant moves for individual, attorney conducted, sequestered voir dire on the issues of pretrial publicity, capital punishment, and attitudes toward mitigation and aggravation.

Tenn. R. Crim. P. 24(a) gives the trial court the discretion to permit individual voir dire on its own motion or the motion of a party. Individual voir dire is mandated only when there is a significant possibility of exposure to potentially prejudicial material. See, e.g., State v. Claybrook, 736 S.W.2d 95, 100 (Tenn. 1997). It is not mandated to question potential jurors regarding their feelings on the death penalty. See, e.g., State v. Smith, 857 S.W.2d 1 (Tenn. 1993).

Issues related to voir dire are more fully discussed in Chapter 5, infra.

b. Motion To Order Administration Of A Juror Questionnaire

The capital defendant often seeks to have a questionnaire filled out by all potential jurors. Whether to use a questionnaire is within the discretion of the trial court and is discussed more fully in Chapter 5, infra.

c. Motion For Written Procedures Regarding Bailiffs And Other Court Personnel Concerning Jurors And Prospective Jurors And/Or For Protective Orders

The capital defendant may ask for written instructions to court personnel regarding any discussion of the case either in or around the courthouse. These motions at times are rather broad and may request things such as having court personnel say nothing to jurors unless the communication is covered in the written instruction, having all communications between court personnel and jurors be on the record, informing defense counsel of all communication between court personnel and jurors, hearing defense counsel in advance on all matters of jury communication, and having no discussion of the case in or around the courthouse. The broad nature of some of the requests may not be manageable.

This is a matter within the trial court's discretion.

d. Motion For A Jury Panel Summoned Specifically For This Case

A capital defendant may file a motion for a special panel to be summoned specifically for that case alone. Generally, a large number of jurors are needed due to the sequestration issue and various issues which may warrant excusal for cause. This type of motion is within the trial court's discretion.

One potential pro to having a special panel is that a jury summons is valid for only two years. See State v. Hester, 324 S.W.3d 1, fn 24 (Tenn. 2018). In the event there are

delays or continuances, you are less likely to run into an issue of jurors who are no longer valid jurors under the summons if the panel is called specifically for the case.

e. Motion For Instructions To Accompany The Summons To Jurors For Service and For The Immediate Tagging Of Prospective Jurors

These matters, again, are within the court's discretion.

f. Motion To Sequester Jury

Pursuant to Tenn. Code Ann. § 40-18-116, jurors in death penalty proceedings in Tennessee **shall** be sequestered. Sequestration is discussed in Chapter 5, infra.

Defense motions may request that sequestration begin during voir dire. There is authority for limiting sequestration to after the jury has been sworn. State v. Black, 815 S.W.2d 166, 180 (Tenn. 1991).

g. Motion For Additional Peremptory Challenges

The capital defendant often requests additional peremptory challenges citing "enhanced due process."

Tenn. R. Crim. P. 24(d) already provides additional peremptory challenges in a death penalty case beyond those provided in other criminal cases. The defendant and the state are each entitled to 15 peremptory challenges in death penalty cases versus the 8 challenges they normally receive in felony cases. Each side also gets one challenge per alternate.

There is authority for denying a motion. State v. Davidson, 121 S.W.3d 600, 613 n.6 (Tenn. 2003).

h. Various Motions Related To "Death Qualified" Juries Which Include (A) Motion To Preclude Removing For Cause Jurors Who Are Not "Death Qualified" And (B) Who Cannot Consider The Death Penalty Because Of Their Religious Beliefs And (C) Motion To Challenge The Procedure Under The Tennessee Constitution.

These three motions are regularly filed in capital cases.

The established test to follow in selecting a jury in a capital case is found in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985).

Pursuant to Witherspoon, a challenge for cause should be sustained if the challenged prospective juror

> (1) would automatically vote against imposition of the death penalty without regard to the evidence that might be developed during trial, or
>
> (2) manifested an attitude toward the death penalty that would prevent him or her from making an impartial decision concerning the defendant's guilt.

Exclusion is not required when potential jurors simply express general objections to the death penalty or express reservation in its application. See Witherspoon, 391 U.S. at 522.

The Witherspoon standard, however, was later expanded in Wainwright to be whether the juror's views would

> (3) "**prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.**"

Wainwright, 469 U.S. at 424-25(emphasis added).

This standard does not require that a juror's bias be proven with "unmistakable clarity." Id.

It is also important to remember that a "reverse" Witherspoon juror is also excusable for cause whenever

> (4) he or she is so in favor of the death penalty as to feel that the death penalty should always be imposed if a defendant is convicted of murder. See Ross v. Oklahoma, 487 U.S. 81 (1988).

Ensuring that a jury is capable of imposing a life sentence is referred to as “life qualifying.”

These standards and questions are longstanding principles in capital case jury selection and have been repeatedly upheld. See Uttecht v. Brown, 551 U.S. 1 (2007); see also State v. Sexton, 368 S.W.3d 371 (Tenn. 2012); State v. Odom, 336 S.W.3d 541, 556 (Tenn. 2011).

The exclusion of potential jurors whose religious beliefs prevent them from considering the death penalty is also constitutional. See Wolf v. Sundquist, 955 S.W.2d 626, 632-33 (Tenn. Crim. App. 1997), perm. app. denied, (Tenn.

1997); see also State v. Reid, 213 S.W.3d 792, 834 (Tenn. 2006) (Appendix); State v. Leach, 148 S.W.3d 42, 67 (Tenn. 2004) (Appendix).

i. Motion For Jury Service Excusals And Postponements To Be Made On The Record

The court is empowered under Tenn. Code Ann. §§ 22-1-103, 22-1-105, and 22-2-315 to excuse persons from, and to postpone jury service. Pursuant to statute, the court is required to keep certain records regarding juror excusals and postponements. Tenn. Code Ann. § 22-1-103.

There are various ways in which to deal with this issue. Generally, it is within the discretion of the court to determine the manner in which to handle it in court or in which to have the jury coordinator handle it.

j. Motion For Two Juries – One Death Qualified And One Not For The Two Phases Of A Death Penalty Case

Pursuant to Tenn. Code Ann. § 39-13-204(a), the same jury shall determine both guilt and sentence. See also State v. Dellinger, 79 S.W.3d 458, 478-79 (Tenn. 2002) and State v. Reid, 213 S.W.3d 792 (Tenn. 2006) (Appendix).

k. Motion For Compensation Of All Jurors At Current Wages And Reimbursement To Primary Caregivers For Daycare Costs

The defense asserts that certain classes of individuals are excluded from jury service without this. However, persons who are primary caregivers or who would suffer financially

may be excused for hardship when necessary. See Tenn. Code Ann. § 22-1-103.

l. Motion To Alternate Voir Dire

This is within the court's discretion. State v. Smith, 993 S.W.2d 6 (Tenn. 1999) (Appendix) (No abuse of discretion to deny).

D. CONSTITUTIONALITY OF DEATH PENALTY MOTIONS

1. Motion To Preclude Death Penalty[13]

The capital defendant makes numerous challenges to the death penalty statute and procedures. They are generally as follows:

a. Tennessee's death scheme fails to meaningfully narrow the class of death eligible defendants.

(1) The (i)(2) aggravating circumstance has been construed and applied in an overbroad manner.

(2) The (i)(6) aggravating circumstance has been construed and applied in such a manner as to be duplicative of (i)(7) and is overbroad.

(3) The (i)(5) aggravating circumstance is vague and overbroad.

(4) In combination, subsections (i)(5), (6), and (7)

[13] Some of the issues dealt with here in number 1 may also be addressed in number 4 below.

encompass most homicides committed in Tennessee.

These arguments, however, have been held to be without merit. E.g. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); State v. Banks, 271 S.W.3d 90, 152-54 (Tenn. 2009); State v. Riels, 216 S.W.3d 737 (Tenn. 2007) (Appendix); State v. Stout, 46 S.W.3d 689 (Tenn. 2001); State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998)(Appendix); State v. Bush, 942 S.W.2d 489 (Tenn. 1997); State v. Keen, 926 S.W.2d 727 (Tenn. 1994); State v. Hines, 919 S.W.2d 573 (Tenn. 1995).

NOTE: There is an issue of lack of standing when a defendant challenges an aggravating circumstance which the State has not included in its notice to seek the death penalty. State v. Banks, 271 S.W.3d at 153.

b. The death sentence is imposed capriciously and arbitrarily.

(1) Unlimited discretion is vested in the prosecutor as to whether to seek the death penalty. This issue is without merit. Banks, 271 S.W.3d at 154-55; State v. Riels, 216 S.W.3d 737 (Tenn. 2007) (Appendix); Keen, supra; Hines, supra; State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994).

(2) The death penalty is imposed in a discriminatory manner based on race, geography, and gender. This issue is without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Hester, 324 S.W.3d at 78; Banks, 271 S.W.3d at 155-58; Riels, supra; Keen, supra; Hines, supra; Cazes, supra; State v. Smith, 857 S.W.2d 1, (Tenn. 1993).

(3) There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter. This issue is without merit. State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) (Appendix); State v. Thomas, 158 S.W.3d 361 (Tenn. 2005)(Appendix); Reid, 91 S.W.3d 247, 313 (Tenn. 2002); Nesbit, supra; Cazes, supra.

(4) The death qualification process skews the make-up of the jury and results in a relatively prosecution-prone jury. This issue is without merit. Thomas, supra; Nesbit, supra; Hines, supra.

(5) Defendants are prohibited from addressing misconceptions about matters relevant to sentencing (cost of incarceration, deterrence, method of execution, and parole eligibility). This issue is without merit. Thomas, supra; Nesbit, supra; Hines, supra; Cazes, supra.

(6) Requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland, and McKoy v. North Carolina. This issue is without merit. Hester, 324 S.W.3d at 71; Sexton, 368 S.W.3d at 427; Banks, 271 S.W.3d at 158-59; State v. Ivy, 188 S.W.3d 132 (Tenn. 2005) (Appendix); Nesbit, supra; Hines, supra.

(7) There is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances. This issue is without merit. Banks, 271 S.W.3d at 159; Riels, supra; Nesbit, supra; Cazes, supra.

(8) The jury is not required to make the ultimate determination that death is the appropriate penalty. This issue is without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Thomas, supra; Nesbit, supra; Hines, supra; Smith, supra.

(9) The defendant is denied final closing argument in the penalty phase of the trial. This issue is without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Thomas, supra; Nesbit, supra; Keen, supra; Cazes, supra; Smith, supra.

(10) Damaged, depressed, and mentally ill defendants are allowed to waive presentation of available mitigation and preclude attorneys from presenting powerful, relevant circumstances to the jury and to the higher courts for proportionality review. Counsel may raise mental health issues as necessary throughout the proceedings. State v. Odom, 137 S.W.3d 572 (Tenn. 2004)(Appendix); see also State v. Johnson, 401 S.W.3d 1 (Tenn. 2013); Smith, supra.

(11) Mandatory introduction of victim impact evidence and mandatory introduction of other crime evidence upon a prosecutor's request violate separation of powers and inject arbitrariness and capriciousness into capital sentencing in violation of due process and the equal protection clause. This issue is without merit. Thomas, supra; State v. Moore, 24 S.W.3d 788 (Tenn. 2000); Nesbit, supra. See State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix).

c. The appellate review process in death penalty cases is constitutionally inadequate.

(1) The appellate review process is not meaningful in that

(a) the court cannot reweigh proof due to the absence of written findings concerning mitigating circumstances. This issue is without merit. Hester, 324 S.W.3d at 78-79; Cazes, supra; Smith, supra.

(b) the information relied upon by the court for comparative review is inadequate and incomplete. This issue is without merit. Hester, 324 S.W.3d at 78-79; Cazes, supra.

(c) the court's methodology is flawed. This issue is without merit. Hester, 324 S.W.3d at 78-79; Cazes, supra.

(2) The statutorily mandated proportionality review is conducted in violation of due process and the law of the land.

These arguments are also without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Hester, 324 S.W.3d at 78-79; Banks, 271 S.W.3d at 159-60; Nesbit, supra; State v. Blanton, 975 S.W.2d 269 (Tenn. 1998); Keen, supra. See also Riels, 216 S.W.3d at 757.

2. Motion To Dismiss The Death Penalty On The Grounds That No Grand Jury Has Voted On It
AND
Motion To Dismiss Indictment And Motion To Strike The State's Rule 12.3(b) Notice To Seek The Death Penalty
AND

Motion To Preclude Submission Of Aggravating Factors Pursuant To Apprendi v. New Jersey and Ring v. Arizona

The capital defendant generally argues that under Section 14 of Article I of the Tennessee Constitution, the death penalty must be charged by a grand jury. Section 14 provides "That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment."

The defendant often argues that "capital" murder is different from non-capital murder and thus the indictment and notice should be dismissed because the aggravators are not included in the indictment pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, however, the court indicated it's holding did not apply to capital punishment which was within the range of punishment prescribed for a capital offense. In addition, Apprendi would not be applicable because the factors supporting the death penalty would be proven "beyond a reasonable doubt."

The indictment need only provide for the "charge", not the punishment. See Almendarez-Torres v. United States, 523 U.S. 224 (1998).

In State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002), the Tennessee Supreme Court held that Tennessee's death penalty statute could withstand a challenge under Apprendi for several reasons.

The court held that the death penalty was within the prescribed range of punishment for first degree murder. Dellinger, 79 S.W.3d at 466.

The court also held that the notice required under Rule 12.3 of the Tennessee Rules of Criminal Procedure satisfied due process under

both the federal and state constitutions and that aggravating circumstances need not be included in an indictment. Dellinger, 79 S.W.3d at 467. See State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix).

Furthermore, the court held that our sentencing scheme satisfies the Sixth Amendment right to jury trial because all aggravating circumstances are found by a jury beyond a reasonable doubt. Dellinger, 79 S.W.3d at 467. See also State v. Sexton, 368 S.W.3d 371, 426-27 (Tenn. 2012); State v. Hester, 324 S.W.3d 1, 77-78 (Tenn. 2010); Banks, 271 S.W.3d at 166-67 (Appendix); State v. Rollins, 188 S.W.3d 553 (Tenn. 2006); State v. Reid, 164 S.W.3d 286, 311-12 (Tenn. 2005); State v. Leach, 148 S.W.3d 42, 59 (Tenn. 2004); State v. Berry, 141 S.W.3d 549, 562 (Tenn. 2004); State v. Holton, 126 S.W.3d 845, 863 (Tenn. 2004).

3. Motion to Dismiss The Indictment And/Or Strike The Notice Of Death Penalty Due To The Unconstitutionality Of The Tennessee Death Penalty Statute In That It Violates Article 1 §19 Of The Tennessee Constitution And Related Provisions

The capital defendant may argue that Tenn. Code Ann. § 39-13-204(g)(1) is unconstitutional because it mandates that the jury must impose death upon a finding that the mitigating factors do not outweigh the aggravating factors. These provisions have been held not to violate the cited provisions of the Tennessee Constitution. E.g. State v. Johnson, 401 S.W.3d 1, 22-23 (Tenn. 2013); State v. Reid, 164 S.W.3d 285 (Tenn. 2005) (Appendix); State v. Smith, 868 S.W.2d 561 (Tenn. 1993).

4. Motion To Dismiss The Indictment Due To The Illegality And Unconstitutionality Of Tenn. Code Ann. § 39-13-204 And § 39-13-206 And The Imposition Of The Sentence Of Death[14]

Specifically, the capital defendant may claim as follows:

a. Tenn. Code Ann. § 39-13-204 does not sufficiently narrow the class of defendants who are eligible for a sentence of death. These allegations have been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Sexton, 368 S.W.3d at 428-29; Banks, 271 S.W.3d at 154; State v. Stout, 46 S.W.3d 689 (Tenn. 2001); State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998) (Appendix); State v. Bush, 942 S.W.2d 489 (Tenn. 1997); State v. Keen, 926 S.W.2d 727 (Tenn. 1994); State v. Hines, 919 S.W.2d 573 (Tenn. 1995).

b. Tenn. Code Ann. § 39-13-204 is an unconstitutional limit on the exercise of the jury's discretion because, once the jury finds aggravation it can impose a death sentence no matter what mitigation is shown. This allegation has been held to be without merit. E.g. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (Appendix); State v. Smith, 857 S.W.2d 1 (Tenn. 1993).

c. Tenn. Code Ann. § 39-13-204 mandatorily requires the jury to impose the death penalty if it finds the

[14] As previously indicated in footnote 4, there may be some duplication between the issues discussed here and in number 1 above.

aggravating circumstances outweigh the mitigating circumstances. This issue has been held to be without merit. E.g. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (Appendix); Johnson, 401 S.W.3d at 22-23; State v. Smith, 868 S.W.2d 561 (Tenn. 1993).

d. Tenn. Code Ann. § 39-13-204 does not require the jury to make the ultimate determination that death is the appropriate sentence. This issue has been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (Appendix); Sexton, supra; Odom, supra; Nesbit, supra; Hines, supra; Smith, supra.

e. Tenn. Code Ann. § 39-13-204 does not inform the jury of its ability to impose a life sentence out of mercy. This issue has been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Freeland, supra; State v. Schmeiderer, 319 S.W.3d 607 (Tenn. 2010) (Appendix); Smith, supra; State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994).

f. Tenn. Code Ann. § 39-13-204(h) prohibits the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase. This issue has been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Freeland, supra; Schmeiderer, supra; State v. Smith, 857 S.W.2d 1, 22-23 (Tenn. 1993).

g. The imposition of the death penalty is cruel and

unusual punishment. This issue has been held to be without merit. E.g. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Freeland, supra; State v. Black, 815 S.W.2d 166 (Tenn. 1991).

h. The imposition of the death penalty by lethal injection is cruel and unusual punishment. This issue has been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Schmeiderer, supra (three-drug protocol); Hester, supra; Banks, 271 S.W.3d at 160; Terry v. State, 46 S.W.3d 147 (Tenn. 2001).

NOTE: The court in Hester also rejected the defendant's claim as it related to the "Lancet Study." 324 S.W.3d at 79-80.

NOTE: The same issue has been raised as it relates to electrocution and has also been held to be without merit. E.g. State v. Black, 815 S.W.2d 166 (Tenn. 1991).

i. The imposition of the death penalty is unconstitutional because it has been imposed capriciously, arbitrarily, and discriminatorily in Tennessee on the basis of race, sex, geographic region and economic and political status of the defendant. This issue has been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Freeland, supra; Sexton, 368 S.W.3d at 428-29; Schmeiderer, supra; Keen, supra; Hines, supra; Cazes, supra at 268; State v. Smith, 857 S.W.2d 1, 23(Tenn. 1993).

j. The proportionality and arbitrariness reviews required by Tenn. Code Ann. § 39-13-206 are inadequate and deficient. These issues have also been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); State v. Rogers, 188 S.W.3d 593 (Tenn. 2006) (Appendix); Nesbit, supra ; State v. Blanton, 975 S.W.2d 269 (Tenn. 1998); Keen, supra; Cazes, supra at 269-71.

k. Tenn. Code Ann. § 39-13-204(d) allows the state to make the final closing arguments to the jury in the penalty phase. This issue has been held to be without merit. State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix); Freeland, supra; Sexton, supra; Nesbit, supra; Keen, supra; Cazes, supra; Smith, supra at 23; State v. Caughron, 855 S.W.2d 526 (Tenn. 1993).

l. Tenn. Code Ann. § 39-2-203(f) and (g) are unconstitutional because they provide insufficient guidance to the jury concerning who has the burden of proving whether mitigation outweighs aggravation and what standard of proof the jury should use in making that determination. This issue has been held to be without merit. E.g. State v. Bush, 942 S.W.2d 489, 524 (Tenn. 1997). See State v. Davidson, 509 S.W.3d 156 (Tenn. 2016) (Appendix).

m. Tenn. Code Ann. § 39-2-203 allows the jury to accord too little weight to non-statutory mitigating factors and limits the jury's options to impose the sentence of life. This issue has been held to be without

merit. Schmeiderer, supra; State v. Bush, 942 S.W.2d 489, 524 (Tenn. 1997).

n. Tenn. Code Ann. § 39-2-203 is unconstitutional because it provides no requirement that the jury make findings of facts as to the presence or absence of mitigating circumstances. This issue has been held to be without merit. State v. Thacker, 164 S.W.3d 208 (Tenn. 2005) (Appendix); State v. Smith, 857 S.W.2d 1 (Tenn. 1993); State v. Cazes, 875 S.W.2d 253, 269 fn.6 (Tenn. 1994).

o. Tenn. Code Ann. § 39-2-203(c) unconstitutionally permits the introduction of relatively unreliable evidence in the state's proof of aggravation or rebuttal of mitigation. This issue has been held to be without merit. Schmeiderer, supra; State v. Smith, 857 S.W.2d at 23.

p. The application of Tennessee's Death Penalty is unconstitutional under international law and pursuant to treaties to which the United States is bound in that it violates the Supremacy Clause. This issue is without merit. Odom, 137 S.W.3d at 599 (Appendix). See also Hester, 324 S.W.3d at 80 (waived); Sexton, 368 S.W.3d at 427.

q. The current system of capital punishment in the State of Tennessee is fundamentally "broken." This issue is without merit. Hester, 324 S.W.3d at 81.

r. The Tennessee Death Penalty Statute shifts the burden of proof to the defendant. This issue is without merit.

Sexton, 368 S.W.3d at 428-29; State v. Austin, 618 S.W.2d 738, 742 (Tenn. 1981); State v. Dicks, 615 S.W.2d 126, 130-31 (Tenn. 1981).

s. The Tennessee Death Penalty Statute is unconstitutional because it requires mitigators to outweigh aggravators in order to receive a life sentence. This issue is without merit. Sexton, 368 S.W.3d at 428-29; State v. Bane, 57 S.W.3d 411, 488-89 (Tenn. 2001).

t. The death penalty is unconstitutional because it fails to serve any legitimate penological objectives ofr deterrence and retribution. This issue is without merit. Banks, 271 S.W.3d at 160-61.

5. Motion To Dismiss The Death Penalty Notice Due To Pretrial Delay

In State v. Utley, 956 S.W.2d 489 (Tenn. 1997), our Tennessee Supreme Court quoted the United States Supreme Court in United States v. Marion, 404 U.S. 307, 324-25 (1971), on the proper standards to be applied to cases requesting dismissal under the 5th Amendment for pre-indictment delay. The court stated that "'[t]he Due Process Clause of the Fifth Amendment would require dismissal ... if it were shown at trial that the pre-indictment delay ... caused substantial prejudice to the [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.'" Utley, 956 S.W.2d at 495. See State v. Berry, 141 S.W.3d 549 (Tenn. 2004); State v. Gray, 917 S.W.2d 668, 671 (Tenn. 1996); see also State v. John Steven Hernandez, 2019 WL 2150171 (Tenn. Crim. App. May 15, 2019), perm. app. denied, (Tenn. Sept. 18, 2019). Although these cases dealt with

dismissal of the charges, this motion may seek dismissal of the charges or only the notice seeking the death penalty.

6. Motion to Dismiss Notice of Intention to Seek the Death Penalty Due to Illegal and Unconstitutional Double Counting of Facts as Aggravating Circumstances

"Double counting" of facts used to establish more than one aggravating circumstance is not prohibited in Tennessee. State v. Hall, 958 S.W.2d 379, 692 (Tenn. 1997). See also State v. Jordan, 325 S.W.3d 1, 74 (Tenn. 2010).

7. Motion to Dismiss the Death Notice on the Basis of Violations of Substantive Due Process and Equal Protection (as being violative of Defendant's Right to Life)

In State v. Holton, 126 S.W.3d 845 (Tenn. 2004) (Appendix), the court addressed this issue:

> *The appellant additionally asserts that the death penalty is violative of the fundamental right to life guaranteed by the United States and Tennessee Constitutions. Relying essentially upon substantive due process and equal protection principles, the appellant's argument is two-fold: (1) the death penalty never promotes a compelling state interest; and (2) even assuming the contrary, the State's pre-trial offer to the appellant of a sentence of life imprisonment in exchange for a guilty plea conclusively demonstrated the availability in his case of less intrusive means to promote the State's interest. As noted by the State, both this court and our supreme court have previously rejected similar arguments. See State v. Mann, 959 S.W.2d 503, 517 & 536 (Tenn. 1997); State v. Bush, 942 S.W.2d 489, 507 & 523 (Tenn. 1997); Brimmer v. State, 29 S.W.3d 497, 531 (Tenn. Crim. App. 1998); Byron Lewis Black v. State, No. 01C01–9709–CR–00422, 1999 WL 195299, *26, 1999 Tenn. Crim. App. LEXIS 324, at **73–74 (Nashville, April 8, 1999). The appellant is not, therefore, entitled to relief.*

See State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (Appendix);

Hester, 324 S.W.3d at 80; Sexton, 368 S.W.3d at 427. See also Detrick Cole v. State, 2011 WL 1090152 (Tenn. Crim. App. Mar. 8, 2011), perm. app. denied, (Tenn. July 14, 2011).

E. OTHER PRETRIAL MOTIONS

1. Motion For A Bill Of Particulars On Aggravating Circumstances

The capital defendant often seeks a bill of particulars for both the offense charged and the aggravating factors.

Pursuant to Tenn. R. Crim. P. 7(c), a bill of particulars may be required to adequately identify the offense charged. A bill of particulars is not meant to be used for the purpose of broad discovery. State v. Wiseman, 643 S.W.2d 354 (Tenn. Crim. App. 1982): see also State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994). "The purpose of the bill of particulars is to provide the accused with sufficient information about the offense alleged in the indictment to permit the accused

> (a) to prepare a defense,
> (b) to avoid surprise at trial, and
> (c) to enable the accused to prepare a plea of double jeopardy."

State v. Shropshire, 45 S.W.3d 64 (Tenn. Crim. App. 2000).

In State v. Bush, 942 S.W.2d 489 (Tenn. 1997), the court held that the Tenn. R. Crim. P. 7(c) does not apply to the penalty phase. The defendant is not entitled to a bill of particulars regarding the factual basis for each aggravating circumstance.

2. Motion For Heightened Standard Of Due Process And Reliability

In Smith v. State, 357 S.W.3d 322, 346 (Tenn. 2011), the court stated

> *We have on numerous occasions recognized "the heightened due process applicable in capital cases" and "the heightened reliability required and the gravity of the ultimate penalty in capital cases." State v. Cazes, 875 S.W.2d 253, 260 (Tenn. 1994); see also Pike v. State, 164 S.W.3d 257, 266 (Tenn. 2005) ("[W]e must be mindful that 'a sentence of death is final, irrevocable, and "qualitatively different" than any other form or level of punishment.' ") (quoting Van Tran v. State, 66 S.W.3d 790, 809 (Tenn. 2001)); State v. Terry, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed ") (emphasis in original)(internal quotation marks and citations omitted); Cooper, 847 S.W.2d at 531 (reversing death penalty on ineffective assistance grounds; noting "the Supreme Court 'has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination' ") (quoting California v. Ramos, 463 U.S. 992, 998–99, 103 S. Ct. 3446, 77 L.Ed.2d 1171 (1983)).*

This language, however, is general and the most appropriate way to respond to this type of a general language motion may be to simply grant the motion with the clarification that the trial court is aware of the state of the law, and that the court will review each motion and apply the appropriate law to each specific motion.

3. Motion To Prohibit Reference To The First Phase Of The Trial As The "Guilt" Phase

This is a matter within the judge's discretion. Tenn. Code Ann. § 39-13-204(e)(1) does refer to it as the "guilt" hearing.

4. Motion Requesting Pretrial Disclosure Of Witness Statements (Early Jencks)

Tenn. R. Crim. P. 26.2 governs the disclosure of witness statements. There is no constitutional requirement that the state provide witness statements prior to trial and the rule is clear that the state has no obligation to produce statements of a witness until the conclusion of the witness' testimony on direct examination. See State v. Taylor, 771 S.W.2d 387 (Tenn. 1989), cert. denied, 497 U.S. 1031 (1990).

However, in reality, most prosecutors turn this information over pretrial to avoid lengthy jury out hearings or delays when dealing with a sequestered jury in a capital case.

5. Motion For Disclosure Of Brady Material Relevant To The Penalty Phase/Mitigation

Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), **any** exculpatory evidence should be disclosed. Exculpatory evidence has been defined as pertaining to the guilt or innocence of the accused and/or to the punishment which may be imposed if the charge results in a conviction. E.g., State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992); see also Titsworth v. Dretke, 401 F.3d 301, 306 (5th Cir. 2005). "This disclosure requirement imposes a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Titsworth, at 306. However, "[t]he State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." Pippin v. Dretke, 434 F.3d 782, 789 (5th Cir. 2005).

6. Motion To Compel The State To Publish Its Criteria For Seeking The Death Penalty

A prosecutor's decision to seek the death penalty is a matter of prosecutorial discretion. State v. Smith, 993 S.W.2d 6 (Tenn. 1999) (Appendix) (denial of this motion affirmed); see United States v. Haynes, 242 F. Supp. 2d 540 (W.D. Tenn. Jan 17, 2003); United States. v. Fernandez, 231 F.3d 1240, 1246-47 (9th Cir.2000); see also State v. Banks, 271 S.W.3d 90, 154-55 (Tenn. 2008) (discussion of prosecutorial discretion in decision to seek death penalty).

7. Motion For Disclosure Of Information Pertaining To The Disproportionate And Arbitrary Nature Of A Death Penalty In This Case And Pertaining To Proportionality Review OR Motion For Discovery Of Dispositions Of All First Degree Murder Prosecutions In The State Of Tennessee

The defendant may get copies of the Rule 12 reports from the Administrative Office of the Courts and may seek the other information from the various clerk's offices which is what they are seeking to have the state do. If there is some difficulty in discovering this information, the defendant may then seek the court's additional assistance.

It should also be noted that proportionality is an appellate issue by statute. See Tenn. Code Ann. § 39-13-206.

This issue has been held to be without merit on appeal. State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) (Appendix).

8. Motion To Allow The Presentation Of Evidence To The Jury Of The Proportionality And Arbitrariness And Unfairness Of A Death Sentence

The statute makes this an appellate issue. The statute provides the defense wide latitude with mitigators, but they are case specific. The type of information generally requested in this type of motion would not be case specific and would broaden the overall scope of sentencing (how much would you allow on each case to compare, etc.) beyond the parameters set by the statute.

> **NOTE**: There is no established procedure specific to capital cases for evidence that cannot go before the jury to be admitted on these issues for appellate consideration.

9. Motion To Compel Disclosure Of Penalty Phase Witnesses

The comments to Tenn. R. Crim. Pro. 16 agree that pretrial discovery of names and addresses of witnesses for the state is required by Tenn. Code Ann. § 40-13-107 & Tenn. Code Ann. § 40-17-106. Statutes require witnesses be listed on the indictment and this list must be supplemented as needed.

This should also extend to the penalty phase. See State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998) (rules which do not specifically apply to the penalty phase, but which would logically apply, may be extended through the court's inherent powers to the penalty phase).

10. Motion For Notice And Specification By The State Of All Physical And Other Evidence That The State Intends To Introduce At The Penalty Trial

The defendant is entitled to file this motion pursuant to Rule 12(d)(2) for information available under Tenn. R. Crim. P. 16.

> *The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce.* State v. Louis Francis Gainnini*, No. 36, 1991 WL 99536, at *4 (Tenn. Crim. App., Jackson, June 12, 1991).*

State v. Miller, 2006 WL 2633211, at *15 (Tenn. Crim. App. Sept. 14, 2006). Pursuant to State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998), rules which do not specifically apply to the penalty phase, but which would logically apply, may be extended through the court's inherent powers to the penalty phase. Therefore, a Rule12(d)(2) notice may be required for the capital sentencing phase by extending the rule.

The Giannini case states as follows:

> *The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. This rule is not intended as a substitute for discovery. Consequently, the relief sought by the appellant pursuant to Rule 12(d)(2) was broader than the relief provided by the rule. The appellant was not entitled to the production of "all evidence to which the defendant may be entitled discovery pursuant to Rule 16"-only that evidence which could be the subject of a motion to suppress.*
>
> *Contrary to the contention of the assistant district attorney general, compliance with Rule 12(d)(2) by the State is not discretionary. The rule contemplates compliance by the State. When the State fails to comply with a defense motion predicated upon this rule, the trial court can order compliance. Moreover,*

> *responding that the State intends to "use in its evidence in chief at trial all evidence to which the defendant may be entitled discovery pursuant to Rule 16" does not constitute compliance with the rule. Such a response does not comport with the spirit or letter of Rule 12. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce.*

Other cases have cited Giannini. In State v. Banks, 2009 WL 2447672 (Tenn. Crim. App.), perm. app. denied, (Tenn. 2009), the court stated as follows:

> *Rule 12(d)(2), Tennessee Rules of Criminal Procedure, requires that upon a defendant's request, the State will provide the defendant notice of its "intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16." Tenn. R. Crim. P. 12(d)(2). The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce. State v. Fredrick Arnaz Miller, No. E2005-01583-CCA-R3-CD, 2006 WL 2633211, at *15 (Tenn. Crim. App., at Knoxville, Sept. 14, 2006), perm. to appeal denied (Tenn. Jan. 29, 2007) (citing State v. Louis Francis Giannini, No. 36, 1991 WL99536, at *4 (Tenn. Crim. App., at Jackson, June 12, 1991), perm. to appeal [denied, (Tenn. 1991)] (observing, however, that a defendant is "not entitled to the production of 'all evidence to which the defendant may be entitled discovery pursuant to Rule 16'-only that evidence which could be subject to a motion to suppress")).*

Also, in State v. Miller, 2006 WL 2633211(Tenn. Crim. App. 2006), the court again cited to Giannini and stated the following:

> *… At trial, the State asserted that defense counsel "has had a copy of the videotape for quite awhile with the audio on it."*
>
> *It appears from the record that Threatt was not shown the surveillance videotape and asked to identify the voice on the tape until May 22, 2004. The Defendant filed a motion to suppress this identification on May 24, 2004, one day before trial was to begin.*

At no time on the record did defense request a continuance; counsel only requested suppression of the voice identification.

*Rule 12(d)(2), Tennessee Rules of Criminal Procedure, requires that upon a defendant's request, the State will provide the defendant notice of its "intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16." Tenn. R. Crim. P. 12(d)(2). The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce. State v. Louis Francis Giannini, No. 36, 1991 WL 99536, at *4 (Tenn. Crim. App. Jackson, June 12, 1991).*

However, no violation of the Rules of Criminal Procedure occurred because the State was not aware of the voice identification until May 22nd. See State v. Hutchinson, 898 S.W.2d 161, 167-68 (Tenn.1994); State v. Harris, 30 S.W.3d 345, 349 (Tenn. Crim. App. 1999). The State promptly informed defense counsel upon discovery of this additional evidence. See Tenn. R. Crim. P. 16(c).

Moreover, when there has been a failure to produce discoverable material within the allotted time, the trial judge has the discretion to fashion an appropriate remedy; whether the defendant has been prejudiced by the failure to disclose is always a significant factor. See State v. Baker, 751 S.W.2d 154, 160 (Tenn. Crim. App.1987). Generally speaking, the exclusion of the evidence is a drastic remedy and should not be implemented unless there is no other reasonable alternative. See, e.g., State v. House, 743 S.W.2d 141, 147 (Tenn. 1987). Additionally, a defendant must demonstrate actual prejudice from the State's failure to provide evidence pursuant to a discovery request. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App.1981); State v. Briley, 619 S.W.2d 149, 152 (Tenn. Crim. App.1981). In considering discovery violations, the important inquiry is what prejudice has resulted from the discovery violation, not simply the prejudicial effect the evidence, otherwise admissible, has on the issue of a defendant's guilt. See, e.g., State v. Cottrell, 868 S.W.2d 673, 677 (Tenn. Crim. App.1992); Garland, 617 S.W.2d at 186.

There was no request for a continuance. The Defendant did have

an expert testify at trial as to the poor quality of the videotape. The Defendant has not provided even a suggestion as to how the poor quality of the videotape would affect a person's ability to identify the voice on the videotape, other than the fact that the tape is of poor quality. The Defendant had a copy of the videotape "for quite awhile[.]" Threatt testified that she knew the Defendant and was familiar with his voice. "For authentication purposes, voice identification by a witness need not be certain; it is sufficient if the witness thinks he can identify the voice and express his opinion ." Stroup v. State, 552 S.W.2d 418, 420 (Tenn. Crim. App.1977). Here, we cannot conclude that the trial court abused its discretion by admitting the evidence. This issue is without merit.

In State v. Thomas Huskey, 2002 WL 1400059 (Tenn. Crim. App. 2002), the court noted that testimony regarding items of evidence that could be suppressed must also be included in a Rule 12(d)(2) notice.

The defendant contends that the trial court erred in admitting certain evidence that was not disclosed to him during discovery and/or was not listed in the state's notice of intention to use evidence. Rule 12(d)(2), Tenn. R. Crim. P., requires that upon the defendant's request, the state will provide the defendant notice of its "intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16." See also State v. Louis Francis Giannini, No. 36, Shelby County, slip op. at 9 (Tenn. Crim. App. June 12, 1991), app. denied (Tenn. Nov. 12, 1991) ("The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16."). Rule 16, Tenn. R. Crim. P., governs discovery and includes a provision concerning sanctions for failure to comply with a discovery request. See *Tenn. R. Crim. P. 16(d)(2). One possible sanction for noncompliance is exclusion of the evidence. Id. The rules do not provide a sanction for noncompliance with Rule 12(d)(2). Moreover, given the rule's purpose, we question the defendant's position that the remedy for failure to disclose evidence pursuant to this rule is exclusion of the evidence. In any event, we address the defendant's contentions below.*

...

The defendant next complains about the trial court allowing D.C. to testify about rope. The defendant and the state disagreed about whether the state had to provide notice of its intention to present testimony regarding suppressible evidence. The state argued that Rule 12(d)(2) only required it to provide notice if it intended to introduce the rope but not if it merely elicited testimony about the rope. We agree with the defendant that testimony regarding items of evidence that could be suppressed must also be included in a Rule 12(d)(2) notice. However, in this case, the state did not present testimony in its case-in-chief, through D.C. or any of its witnesses, about rope used by the defendant, other than the victims' testifying that they were bound or that their hands were tied together with rope. Testimony about the type and color of rope used by the defendant was elicited during the state's cross-examination of Detective Michael Freeman, who was called as a defense witness. Because this testimony was not presented in the state's case-in-chief, we conclude that allowing this testimony was not error relative to Rule 12(d)(2). Similarly, the defendant complains about the introduction of photographs of rope. These photographs, however, were introduced by the defendant during its redirect examination of Detective Freeman. Accordingly, the trial court did not err in admitting these photographs.

11. Motion For Pretrial Specification Of State's Hearsay Evidence To Be Offered On The Issue Of Punishment

At sentencing, reliable hearsay may be admitted if the defendant is given a fair opportunity to confront and rebut it. Tenn. Code Ann. §39-13-204(c). The admissibility of hearsay is based on whether the proposed evidence is reliable and relevant to one of the aggravating or mitigating circumstances. State v. Rimmer, 250 S.W.3d 12, 18 (Tenn. 2008); State v. Reid, 213 S.W.3d 792, 817 (Tenn. 2006); State v. Austin, 87 S.W.3d 447, 459 (Tenn. 2002).

Although not specifically addressed by the rules, Reid, 981 S.W.2d 166 supra, allows the extension of discovery rules as deemed appropriate within the trial court's discretion.

12. Motion To Discover "Victim Impact" Proof And To Prohibit Its Introduction Or Place Limits On It

Victim impact evidence has been declared constitutional by both the Tennessee and United States Supreme Courts. Payne v. Tennessee, 501 U.S. 808 (1991). Its admissibility, however, is not unrestricted. State v. Jordan, 325 S.W.3d 1, 56-57 (Tenn. 2010); State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998). "Victim impact evidence may not be introduced if (1) it is so unduly prejudicial that it renders the trial fundamentally unfair; or (2) its probative value is substantially outweighed by its prejudicial impact." State v. Thacker, 164 S.W.3d 208, 252 (Tenn. 2005).

Pursuant to Tenn. Code Ann. § 39-13-204(c),

> **...The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose....**

Our courts have held that this statute does not expressly limit the introduction of other types of victim impact evidence authorized by prior case law. State v. Young, 196 S.W.3d 85, 108-09 (Tenn. 2006); State v. McKinney, 74 S.W.3d 291, 309 (Tenn. 2002).

In State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998), the Tennessee Supreme Court held that

> *...Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially,*

emotionally, psychologically or physically impacted upon members of the victim's immediate family.

Victim impact evidence is also limited to the current offense and victim impact evidence of another homicide, even if committed by the defendant, is not admissible. Id. at fn 11 (citing State v. Bigbee, 885 S.W.2d 797, 812 (Tenn. 1994)).

In Nesbit, the Tennessee Supreme Court set out the procedures to be followed for the admission of victim impact evidence. The admission of victim impact evidence and the procedures to be followed are discussed more fully in Chapter 7.

13. Motion For Disclosure Of Information Relating To Mitigating Circumstances

This motion essentially seeks the same information as number 5 above but with a different heading.

Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), **any** exculpatory evidence should be disclosed. Exculpatory evidence has been defined as pertaining to the guilt or innocence of the accused and/or to the punishment which may be imposed if the charge results in a conviction. E.g., State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992).

14. Motion For Exclusion Of Witnesses And For The Immediate Instruction Of All Potential Witnesses For The Enforcement Of Rule 615

The capital defendant often requests that Rule 615 apply to all hearings and at trial prior to voir dire.

Sequestration of witnesses at proceedings is appropriate under Tennessee Rule of Evidence 615 and this applies as early as voir dire at trial.

Pursuant to the Tennessee Constitution (Victim's Rights Amendment) and Tenn. Code Ann. § 39-13-204(c), persons testifying for victim impact only may not be excluded from the courtroom.

Aspects of Rule 615 are discussed more fully in Chapter 6**.**

15. Motion To Permit The Defense To Argue Last On Behalf Of The Defendant

The statute provides that the state will argue last at sentencing and this has been upheld by the appellate courts on numerous occasions. Tenn. Code Ann. § 39-13-204(d); e.g. State v. Dotson, 450 S.W.3d 1 (Tenn. 2014)(Appendix); State v. Reid, 164 S.W.3d 286 (Tenn. 2005) (Appendix); State v. Smith, 857 S.W.2d 1 (Tenn. 1993).

16. Motion To Preclude The State From Relying On Any Non-Statutory Aggravating Circumstance

Pursuant to Tenn. Code Ann. § 39-13-204, the state is limited to the statutory aggravating factors.

> **NOTE:** This statutory limitation does not prohibit the introduction of victim impact evidence.

17. Motion For Bail Or Bond

"The Tennessee Constitution guarantees that 'all prisoners shall be

bailable by sufficient sureties, unless for capital offen[s]es, when the proof is evident, or the presumption great." State v. Burgins, 464 S.W.3d 298 (Tenn. 2015) (quoting Tenn. Const. art. I, § 15); see also Tenn. Code Ann. § 40-11-102 (providing in part that "Before trial, all defendants shall be bailable by sufficient sureties, *except for capital offenses where the proof is evident or the presumption great*").

After indictment, the burden of proof is on the defendant to show facts warranting bail. Shaw v. State, 164 Tenn. 192, 47 S.W.2d 92 (1932); see also State v. Moss, 1996 WL 429162 (Tenn. Crim. App. Aug. 27, 1996), perm. app. denied, (Tenn. Feb. 24, 1997) (discussing the possible need for Tennessee Supreme Court to reconsider standards for bail in capital offenses but permission to appeal was denied).

> **NOTE:** For a thorough discussion of the Tennessee laws applicable to bail/bond, see Nashville Community Bail Fund v. Gentry, 2020 WL 6273913 (M.D. Tenn. Oct. 26, 2020).

18. Motion To Preclude Uniformed Officers From Attending The Proceedings And Limit The Show Of Force In The Courtroom

This issue may be raised as it relates to uniformed officers as security or as spectators.

a. Courtroom Security

In Holbrook v. Flynn, 475 U.S. 560 (1986), the Supreme defined the standards by which security presence in the courtroom may be measured in relation to a defendant's constitutional right to a fair trial. When a courtroom security situation is challenged as inherently prejudicial, the question

is whether there is "an unacceptable risk ... of impermissible factors coming into play." 475 U.S. at 570.

For a discussion of these standards in Tennessee case law, see State v. Sheddrick Harris, 2012 WL 29203 (Tenn. Crim. App. Jan. 5, 2012), perm. app. denied., (Tenn. May 16, 2012); State v. Hood, 2005 WL 2219691 (Tenn. Crim. App. September 13, 2005, at Jackson) and State v. Vernon, 2000 WL 490718 (Tenn. Crim. App. April 25, 2000, at Jackson).

b. Spectators

The second scenario deals with uniformed officers as spectators at a trial. This issue often is raised in cases dealing with the murder of a law enforcement officer.

One case addressing such a situation where it was held to be detrimental to the defendant's rights is Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991).

19. Motion To Prohibit The Shackling Of The Defendant

In Deck v. Missouri, 544 U.S. 622, 633 (2005), the court stated that

> *courts cannot routinely place defendants in shackles or other physical restraints visible to the jury.... The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific....*

For a discussion of these standards in Tennessee case law, see

Mobley v. State, 397 S.W.3d 70, 99 (Tenn. 2013).

20. Motion To Prohibit The Use Of A Stun Belt

For a discussion of these standards in Tennessee case law, see Mobley v. State, 397 S.W.3d 70, 99 (Tenn. 2013).

21. Motion To Require Pretrial Election (Heinous, Atrocious, or Cruel)

In this type of motion, the capital defendant seeks to have the state to elect between the various terms of the "heinous, atrocious, or cruel" aggravating factor much like a bill of particulars.

In State v. Keen, 31 S.W.3d 196, 208-10 (Tenn. 2000), the court addressed whether permitting jurors to find either "torture" or "serious physical abuse beyond that necessary to produce death" denied the appellant his constitutional right to a unanimous jury finding of the basis for the "especially heinous, atrocious, or cruel" aggravating circumstance. Keen provides a good discussion of this issue. See also State v. Sims, 45 S.W.3d 1 (Tenn. 2001).

22. Motion Re "Grisso Miranda Measures"

The "Grisso Miranda Measures" is used to assess the defendant's understanding of his rights and therefore provide the basis of a motion to suppress statements to law enforcement. The Grisso test is seemingly utilized primarily when a juvenile offender or a person with intellectual issues is questioned. Even as it applies to an adult offender, various jurisdictions have rejected this protocol. See State v. Griffin, 869 A.2d 640, 652 (Conn. 2005) (holding that the defense did not demonstrate the threshold reliability of the Grisso test under Daubert); Carter v. State, 697 So. 2d 529, 533

(Fla. App. 1997) (rejecting the Grisso protocol under Frye test); People v. Rogers, 247 A.2d 765, 766 (N.Y. 1988) (similar protocol rejected under Frye test). Some federal cases also discuss the Grisso test. E.g. Garner v. Mitchell, 557 S.W.3d 257 (6th Cir.), cert. denied, 130 S. Ct. 125 (U.S. 2009).

Currently, one post-conviction case in Tennessee refers to a doctor performing the "Grisso" test, see Robert Faulkner v. State, 2014 WL 4267460 (Tenn. Crim. App. Aug. 29, 2014), but there is no other case law on this issue in Tennessee.

23. Motion For Gag Order

See the detailed discussion of this motion in Chapter 2.

24. Motion To Instruct Jury That Any Sentence Imposed Will Actually Be Carried Out

Defendants often seek an instruction that they are to presume that any sentence they impose will actually be carried out (or, specifically, that if the jury sentences the defendant to death, the defendant will actually be executed). The Tennessee Supreme Court has rejected this argument. See State v. Payne, 791 S.W.2d 10, 21 (Tenn. 1990) ("The after-effect of a jury's deliberation is not a proper instruction for, or consideration by, the jury"); State v. Melson, 638 S.W.2d 342, 367 (Tenn. 1982) (such instructions are "not a full and fair reflection of what the jury [is] to consider" in that they address "the effects of the verdict [rather] than the verdict itself"); see also State v. Thomas, 158 S.W.3d 361, 389-90 (Tenn. 2005) (Appendix).

25. Motion Requiring State to Reply to Defendant's Motions In Writing

There is no authority either requiring such written responses in a

criminal case or finding it reversible error for the Court to deny such a motion.

But requiring the State to file written responses to the defendant's motions in a capital case will be in everyone's best interest — especially the Court. Generally, in the capital case, there are many motions which are not filed in non-capital cases and the written responses provide the Court with notice of which motions are contested and which ones are not. In addition, the written responses provide more guidance to the Court and the capital case attorney in understanding the parties' respective positions prehearing and researching the contested issues in order that the Court may make any necessary inquiries at the hearing.

Of course, if required, written responses should be required of both the State and the Defendant, regardless of who files a motion.

26. Motion Requiring Bench Conferences and Chambers Conferences To Be Transcribed or On The Record

It is important to preserve the capital case record so all future issues can be addressed fully when cases are reviewed by appellate courts, post-conviction courts, and federal habeas courts, many years post-trial and quite possibly with a different judge.

27. Motion To Prevent Jurors From Asking Questions

Rule 24.1 of the Rules of Criminal Procedure provides for juror questioning of witnesses and the procedure to follow if the trial court permits such questions. See State v. James, 315 S.W.3d 440 (Tenn. 2010). There is no authority preventing a judge from allowing such questions, but a judge is not required to allow jurors to ask questions either.

28. Motion To Prevent Comments On The Case In Media And Social Media

There appears little the Courts can do to prevent actions by non-participants in this regard. The press also has the right to cover courtroom proceedings, which are open to the public.

> **NOTE:** See the detailed discussion of gag orders in Chapter (2)(c)(2).

29. Motion To Restrict The Display Of A Living Photograph Of A Homicide Victim

This motion is contrary to the law. As of July 1, 2015, Tenn. Code Ann. §40-38-103(c) provides

> **In a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney general to show the general appearance and condition of the victim while alive.**

In State v. Glen Allen Donaldson, 2020 WL 2494478 **9-10 (Tenn. Crim. App. May 14, 2020), the appellate court addressed the application of the statute:

> *Although the statute in question mandates the admission of "an appropriate photograph of the victim while alive," the admission of such photograph is limited to certain cases and for certain purposes. See T.C.A. § 40-38-103(c). By the plain language of the statute, the trial court retains the discretion to determine whether a life photograph of a homicide victim is appropriate for admission. See id. Despite the statute's mandatory language, a trial court may nevertheless exclude a photograph, even if relevant to show the victim's "general appearance and condition ... while alive," see id., if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice," see Tenn. R. Evid. 403. Such a photograph would be inappropriate and, consequently,*

excludable under the statute. See T.C.A. § 40-38-103(c).

30. Motion To Compel State To Disclose Offers Of Leniency, Immunity, Special Treatment, Etc., For Witnesses

The State has a constitutional duty to furnish an accused with exculpatory evidence pertaining to the accused's innocence or the punishment that may be imposed. Brady v. Maryland, 373 U.S 83, 87 (1963). That duty also applies to evidence that may be used to impeach the prosecution's witnesses. See Giglio v. United States, 405 U.S. 150 (1972). Such impeachment evidence includes evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused. See Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001).

31. Motion To Suppress Statements Of Medical Personnel On Patient Privacy Grounds

Patient privacy laws (such as HIPAA) prevent covered entities from disclosing patient information, but law enforcement officials are not "covered entities", and, as long as certain requirements are met, law enforcement may obtain such records. See e.g. United States v. Stapleton, 2013 WL 3936104 (E.D. KY July 30, 2013); United States v. Elliott, 676 F. Supp. 2d 431 (D. Md. 2009).

32. Motion to Revoke Bail

Tenn. Code Ann. § 40-11-141(b), which provides that a court may revoke and terminate a defendant's bail, reads as follows:

> **If after the defendant is released upon personal recognizance, an unsecured personal appearance bond, or any other bond approved by the court, the defendant violates a condition of release, is charged with an offense committed during the defendant's release, or engages in conduct which results in the obstruction of the orderly and expeditious progress of the trial or other proceedings,**

> **then the court may revoke and terminate the defendant's bond and order the defendant held without bail pending trial or without release during trial.**

Our Tennessee Supreme Court, in addressing the constitutionality of this statute, has held that a defendant's constitutional right to pretrial bail is subject to forfeiture and that the statute is constitutional. Burgins, 464 S.W.3d at 306.

The court further stated, however,

> *The right to pretrial bail is explicitly afforded by the Tennessee Constitution, and though no right to bail is provided under the United States Constitution, bail revocation implicates substantial liberty interests protected under the Fourteenth Amendment.*
>
> *…*
>
> *…Accordingly, the procedure to revoke pretrial bail must meet the requirements of due process embodied within the Fourteenth Amendment and article I, section 8 of the Tennessee Constitution.*

Id. at 307.

The Burgins court established a pretrial bail revocation proceeding under § 40-11-141(b) may be initiated sua sponte by the trial judge, or by the State upon written motion setting forth at least one statutory ground for revocation. Id. at 310. The Court further held

> *The defendant is entitled to 1) written notice of the alleged grounds for revocation and the date, place, and time of the hearing, 2) disclosure of the evidence against him or her, 3) the meaningful opportunity to be heard and to present evidence, 4) the right to confront and cross-examine witnesses, and 5) the right to make arguments in his or her defense. The trial court must conduct an evidentiary hearing at which the State is required to prove, by a preponderance of the evidence,*

> *sufficient ground(s) under Tennessee Code Annotated section 40-11-141(b) to support a revocation. The evidentiary hearing need not be a mini-trial of the alleged conduct constituting the ground(s) for revocation. Moreover, the requirements for the revocation proceeding shall be somewhat flexible in that the trial court shall be able to consider factual testimony and documentary proof supporting the grounds for revocation of pretrial bail. In addition to documentary proof, the State must also present testimony from a corroborating witness or witnesses as to facts supporting the allegations contained in the documents. Hearsay evidence may be admitted when the trial court finds that it is reliable.* See generally *State v. Wade, 863 S.W.2d 406 (Tenn. 1993). At the close of proof, if the trial court finds that the State has shown, by a preponderance of the evidence, that the defendant has violated a condition of release, has committed a criminal offense while released on bond, or has engaged in conduct resulting in the obstruction of the orderly and expeditious progress of the trial or other proceedings, then the trial court may either revoke bail and hold the defendant until trial or continue bail with the possibility of additional conditions or an increased bond amount. In determining which option is appropriate, the trial court should consider 1) whether any additional bail conditions or an increased amount of bail would assure the appearance of the defendant at trial and protect the safety of the community under Tennessee Code Annotated section 40-11-116 and 2) the bail factors listed in Tennessee Code Annotated section 40-11-118. Revocation will be appropriate in cases where the court finds that the imposition of additional bail conditions or an increased amount of bail would not be sufficient to assure the defendant's appearance at trial or protect the public's safety.*

Id. at 310-11 (footnotes omitted).

33. State's Demand for Reid Notice

A deadline needs to be set for the notice by Defendant regarding the use of experts at sentencing only, i.e., the Reid Notice. The parties should follow procedures set out in the Reid case at 981 S.W.2d 166 (Tenn. 1998).

NOTE: See discussion of Reid notice above in this chapter.

34. Motion for Daily Transcripts

There is no constitutional right to a daily transcript, nor are such provisions found in statute, court rule, or case law. State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994). The Defendant must establish a transcript is necessary to vindicate a legal right. Id.; State v. West, 767 S.W.2d 387, 402 (Tenn. 1989).

35. Motion to Number All Filed Motions

Again, while there is no requirement for such a request, having some sort of numbering system for all motions (i.e., Defense #1, State Response to Defense Motion #4, Defense ex parte #12, etc.) should help the trial court and reviewing courts keep track of when motions were filed and whether an order has been filed on a particular motion. This is also particularly helpful when there are multiple defendants (Defendant Smith Motion #1, etc.).

36. Motion to Waive Rule of Sequestration (Rule 615) as to Defense Witnesses

As covered elsewhere in this book, the Tennessee Supreme Court's analysis of this issue in State v. Jordan, 325 S.W.3d 1, 39-52 (Tenn. 2009), makes clear that the Defendant is entitled to have any witnesses who will testify only as mitigation witnesses during the sentencing phase to remain in the courtroom throughout the guilt-innocence phase. However, any defense witnesses who testify during the first phase of trial are subject to the rule of sequestration, Tenn. R. Evid. 615.

37. Motion for Disclosure of Informants

Generally, the State need not disclose its informants to the Defense unless such disclosure would be "relevant and helpful to the accused's defense, or if essential to a fair determination of the prosecution." State v. Ostein, 293 S.W.3d 519, 527-28 (Tenn. 2009) (citations omitted). "For instance, disclosure is required when the informant (1) participated in the crime, (2) witnessed the crime, or (3) has knowledge which is favorable to the defendant." Id. at 528 (internal quotation and citations omitted).

38. Motion for Jury View of Crime Scene

The decision whether to allow a jury to view a crime scene is within the trial court's discretion. Boyd v. State, 475 S.W.2d 213, 222 (Tenn. Crim. App. 1971). Permitting "a view by the jury is rare in civil cases and rarer still in criminal trials." State v. Barger, 874 S.W.2d 653, 655 (Tenn. Crim. App. 1994).

If the Court allows the jury to see the crime scene, there are numerous questions to consider. Many of the questions concern security and logistics (ensuring the jury is not separated, making sure members of the public do not create problems by trying to talk to the jury or other trial participants, etc.):

- Has the crime scene changed to a significant degree since the offense occurred?
- How will the court ensure the jurors do not discuss the case during the jury view?
- If the Defendant wishes to be present, how will he be brought to the scene while maintaining the defendant's presumption of innocence (i.e., how will the jury avoid seeing the Defendant in handcuffs or other indicia of custody)?
- How much time will the jury view take? Will it disrupt the flow of the trial?

Given these issues, it may be best to deny such a motion.

39. Motion For Disclosure Of Prosecution's Jury Performance And Background Information As To Prospective Jurors

In this motion, the defendant asks for the following type of information:

> 1) the prospective jurors' past service, if any, on any other jury, what type case it was, and the verdict rendered,
>
> 2) any arrest or conviction records of prospective jurors, and
>
> 3) whether any prospective jurors were ever witnesses in a previous civil or criminal case.
>
> 4) whether the prospective jurors have ever sat on a grand jury and if so when and in what district.

Tenn. R. Crim. P. 24(g) provides that the parties be furnished with a list of prospective jurors with their names, addresses, occupations, names of spouses, and occupations of spouses. In addition, information concerning any prior criminal jury service shall be provided but need not be provided prior to the day of the trial. The rule does not provide for the other information requested by the defense.

> **NOTE:** The other type of information requested, however, is often the subject of questions on juror questionnaires in capital cases.

40. Motion to Join or Adopt Co-defendant's Motion

This motion often is filed in cases with multiple defendants. While there is no issue with allowing this type of motion, there can be procedural issues if the record is not clear. Therefore, the trial court may want to require in the scheduling order that any such motion must have the motion which the party is seeking to join or adopt attached to the motion to join or adopt. This requirement places a copy of the motion being addressed in the joining party's

record which may be important if the joining party seeks to appeal the trial court's ruling. Otherwise, review by an appellate court would be difficult if the actual motion was not part of the record.

F. TENN. R. CRIM. P. 17.1

RULE 17.1. PRETRIAL CONFERENCE. –

(a) Timing; Purposes. – At any time after the filing of the indictment, presentment, or information, the court-on a party's motion or on its own initiative-may order one or more pretrial conferences to consider matters that will:

(1) promote a fair and expeditious trial; and

(2) to the extent feasible, minimize the time that jurors are not directly involved in the trial or deliberations.

(b) Memorandum of Result. – At the conclusion of the conference, the court shall file a memorandum of the matters resolved.

(c) Admissibility of Defendant's Admissions. – No admissions made by the defendant or the defendant's attorney at the conference may be used against the defendant unless the admissions are in writing and signed by the defendant and the defendant's attorney.

(d) Exception for Unrepresented Defendant. – This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Chapter 5

Jury Selection

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Jury Selection

A. GENERAL CONSIDERATIONS

1. Introduction

Without question, one of the most important aspects of a capital trial is jury selection. In the capital context, jury selection includes certain nuances not found in a typical criminal trial. More specifically, the process in some ways requires a "cart before the horse" mentality wherein potential jurors are questioned about their views on the death penalty and other possible punishments even though technically they may not make it to the penalty phase. However, the very nature of a capital trial demands the implementation of such a procedure.

The jury in a capital case is often referred to as being "death qualified" or in other words able to follow the law and juror's oath which includes consideration of **all three** possible punishments including death. See State v. Miller, ___ S.W.3d ___ (Tenn. 2021) (Citing Lockhart v. McCree, 476 U.S. 162, 167 (1986), and State v. Sexton, 368 S.W.3d at 390). This qualification procedure outlined below highlights the various methods used to achieve this result.

Jury questionnaires, though not mandated in Tennessee law, may assist the parties and the court in making these determinations. Most courts across the State use questionnaires on a regular basis in capital cases, but a few may choose not to use them at all. Whatever the method used, the court must find that the potential juror can consider each of the three possible sentences - the death penalty, life without the possibility of parole, and life - as possible penalties if the defendant is convicted of first degree murder at the guilt/innocence phase of the trial. The

standard determined by the United States Supreme Court is set out in this chapter.

2. Statute

Title 22 of the Tennessee Code Annotated governs juries and jurors. Chapter One of the title, Tenn. Code Ann. §§ 22-1-101 through -106, addresses individual juror qualifications and exemptions; the most current version eliminated many of the former provisions under which an individual juror could be excluded from service.[1] Chapter Two (§§ 22-2-101 through -316) addresses the manner in which jurors are selected. Chapter Three (TCA §§ 22-3-101 through -104) addresses the examination and challenge of jurors. Lastly, Chapter Four (§§ 22-4-101 through -107) addresses compensation of jurors.

Under the current code, the old system of jury commissioners was replaced by a "jury coordinator," who is usually the clerk of court. See Tenn. Code Ann. § 22-2-201.

The default method for selecting prospective jurors is "random automated means, without opportunity for the intervention of any human agency to select a particular name and in a manner that causes no prejudice to any person. The names, which shall constitute the jury list, shall be compiled from licensed driver records or lists, tax records or other available and reliable sources that are so tabulated and arranged that names can be selected by automated means." Tenn. Code Ann. § 22-2-301(a). The jury rolls may be compiled from either a single source or any combination of sources, **but** the list may **not** be compiled from voter registration records. Id.

[1] In January 2009, the portion of Tennessee Code Annotated addressing jury selection and attendance (sections 22-1-101 through 22-5-315) was replaced by the current statute. In addition, effective July 1, 2021, and as discussed later in this chapter, the statute now permits a hardship for persons age 75 or older under certain conditions.

If a county cannot obtain and select names for jury selection by the default method of "random automated means," the county may use an alternate jury selection method in which the jury coordinator and the circuit court clerk (or clerk's deputy if the clerk serves as jury coordinator) will place names in the "jury box." See Tenn. Code Ann. § 22-2-302. The names "shall be selected randomly from licensed driver records or lists, tax records, or other available and reliable sources." Id. In other words, the names are still selected at random from a host source (such as driver's license registrations and tax records, but **not** voter registrations), but the names are selected by human beings rather than a computer. The process by which names are selected still must be random.

Against this general backdrop, the remaining sections of this chapter will discuss various considerations in capital case jury selection.

B. JURY POOL/VENIRE

1. Size of Pool

Two crucial questions to be considered as the jury selection phase approaches are: how many jurors will be needed and how many jurors will the court need to summon to get that number? Although these are not always easy questions to answer and the answers are often different depending on the specifics of each case, the following are some of the factors the court should consider:

- What is the summons return rate for your jurisdiction?
- How many jurors will need to survive individual voir dire?
- Should the court designate a special venire for just such a trial?
- Will it be necessary to select a jury from a venire in another city? (For a discussion of change of venire and selecting a jury in a different city, see infra).
- How many alternates will be needed?

- How many combined peremptory challenges will there be?

When making the "numbers" decision, it is always wise to err on the side of too many potential jurors rather than too few. The court does not want to find itself in a position of running out of jurors and needing to summon additional jurors; while it would seem harmless enough to simply call additional jurors, the statute provides specific procedures that must be followed in obtaining additional jurors for the pool.[2] This additional step invites additional claims of error if not followed strictly.

IMPORTANT CONSIDERATION: Sequestration of a capital case jury is ***mandatory***. Tenn. Code Ann. § 40-18-116. As a result, the jury pool will be subject to a much larger number of hardships than the average non-capital case. In addition, the jury pool will be further reduced due to exclusions and exemptions even before individual and/or general voir dire issues result in challenges for cause.

> **NOTE**: Many courts take up hardships when the jurors are initially summonsed in order to get a better idea of the actual number of potential jurors. If questionnaires are permitted, the jurors without hardships may fill out their questionnaires while those with potential hardships individually address those hardships with the court. It is best to take up the hardships individually, out of the hearing of other jurors, in order to limit other jurors trying to claim them as well. In addition, this procedure prevents some jurors from making statements which other jurors possibly should not hear. If this process is done far enough ahead of the trial date, there is time to summons more jurors using the court's normal procedures if needed.

If a judge conducts individual voir dire, he or she will want to pre-qualify enough jurors as both "death qualified" and "life qualified" so that general voir dire may be completed without running out of jurors

[2] These procedures are discussed later in this chapter.

due to challenges for cause and peremptory challenges combined. A juror being "life qualified" means they must also be willing to consider a sentence of less than death, and in Tennessee this means they are able to consider both life in prison and life without the possibility of parole. The defense has a right to ask "life-qualifying" questions when requested. See Kevin Burns v. State, 2005 WL 3504990 (Tenn. Crim. App. 2005), perm. app. denied, (Tenn. 2006) (citing to Morgan v. Illinois, 504 U.S. 719 (1992)).

> **NOTE:** Assuming you choose 4 alternates and recognizing that each side has 15 peremptory challenges and one additional peremptory challenge per alternate in a one defendant trial, the number of persons who should survive individual voir dire before proceeding to general voir dire should total somewhere in excess of 54 (15 + 15 + 4 + 4 = 38, plus the 12 jurors and 4 alternates = 54).
>
> Although 54 jurors would cover the peremptory challenges, if all challenges were exercised, there would be no room for any challenges for cause during the general voir dire if only 54 persons were used. Accordingly, while this number varies from court to court, it may be advisable to pre-qualify a number closer to 70 or more to avoid any problems.

Practical point: It is unusual for both sides to exercise all challenges. If all challenges are not exercised, then pre-qualifying a smaller number, such as 54 (or even less), may be sufficient. This situation, however, is not advisable and may be difficult to estimate.

> **NOTE:** Again, the court should consider the summons return rate along with the number of challenges (both cause and peremptory) in determining how many jurors to include in the starting pool.

NOTE: There are various procedures which may be utilized in jury selection with which your Capital Case Attorney is familiar.

2. **Change of Venire - Jury Selection in Another City**

The considerations discussed above apply equally but with added considerations in trials where the trial court has granted a change of venire. You will find that every jurisdiction uses its own unique method of summoning jurors for service. Once the court has determined the city from which the jury will be selected, the court should make the earliest possible contact with the foreign jurisdiction to learn what procedures are used by the jurisdiction.

- As mentioned above, an important consideration is the summons return rate for the particular jurisdiction. In your own jurisdiction you may find satisfactory results by summoning three hundred (300) jurors for the pool. However, in the other jurisdiction, you might be surprised when you arrive for jury selection and find that only seventy-five (75) jurors have reported for service. Therefore, it would have been beneficial to have known that the other city has a return rate of about 25 percent.

- Some jurisdictions will summon a special venire just for your case while others will simply rely on their regular/periodic pools for your case. Just be sure you have an understanding of how many jurors will be available for your case when your jury selection day arrives.

- Another consideration when selecting a jury from outside your area is the standard method used by that jurisdiction for excusing jurors or releasing them from service prior to a juror's appearance before the court.

NOTE: In a capital case, it is vital that the record accurately reflect every stage of the proceedings,

including excusing jurors. It is not wise to allow a clerk's office in another jurisdiction to excuse jurors without consultation with the court. While it is within the purview of each judge when to excuse a juror, it is important to have each excuse on the record. Some judges sign off on doctor's statements, etc. pursuant to the new statute prior to jury selection as documentation for an excused juror. The court may want to simply require the entire pool to be present on the date chosen for selection in the other city and make a finding on the record as to each. Alternatively, the court may require specific documentation be provided to the clerk and submitted to the court prior to any juror excusal. The court will want to inquire of the jurisdiction what their normal process is for excusal of jurors.

- As a practical consideration, depending on the size of the available facilities, the court may need to schedule a morning and afternoon session to accommodate the number in the pool.

3. Supplemental Jurors/Venire

As noted above, the trial court should take sufficient steps, with the proper considerations, to ensure the venire is large enough to accomplish the selection of a qualified jury. If the venire is too small or the court is simply unable to obtain a jury from the summoned venire, the statute establishes the only methods by which the trial court may obtain additional jurors.

TENN. CODE ANN. § 22-2-310: Jury members; special jury pool.

(a) The members of the grand and petit juries shall be made up as provided by law from the jury pool. In the event the original jury pool does not include a sufficient number of jurors, courts shall follow the procedures in subsection (b) for securing additional jurors. These additional names shall supplement, not replace, the

> **original jury pool. These procedures shall be repeated, as necessary, until the grand and petit juries are completed.**
>
> **(b)(1) Regardless of whether a county utilizes the automated means or manual method of jury selection, additional names shall be selected for the special jury pool in the same manner this part provides for the selection of the original jury pool. . . .**
>
> **. . . .**
>
> **(c)(1) If a judge presiding over a trial discovers that the number of jurors constituting the panel, or venire, assigned to the trial is not adequate to secure a petit jury, and that the jury pool has been exhausted or contains an insufficient number of jurors, the judge shall direct the jury coordinator to comply with subsection (b) [by generating names of additional potential jurors through "random means" provided for in section 22-2-301] unless the trial is pending in a county that utilizes the manual method of jury selection. In that event, the judge shall direct the jury coordinator to produce the jury box in open court, the judge shall open the box, and there shall be drawn from the box, as directed by the judge, the number of names deemed by the judge to be sufficient to secure a petit jury for that trial. . . .**

In short, the statute limits the judge's ability to select additional jurors.

If the county uses the "statutory default" method of random automated means, the judge must select additional members of the venire in the same manner in which original members of the venire are selected. The "jury box" method **cannot** be used in these instances.

> **NOTE**: The court may want to consider scheduling the initial appearance of jurors sufficiently far enough ahead of the trial date in order that additional jurors may be properly issued a summons to come on an additional date if in fact additional jurors are needed.

If the county uses "manual selection" (random selection by the court clerk or jury coordinator, rather than a computer), only then may the court use the "jury box" method. The jury coordinator or court clerk must produce the jury box in open court where the judge is required to open it and direct the drawing of a sufficient number of jurors. State v.

Bondurant, 4 S.W.3d 662 (Tenn.1999), citing State v. Lynn, 924 S.W.2d 892 (Tenn.1996) (*Tennessee Supreme Court reversed because of deviation from the statute*).

Failure to follow the strict procedures set out in this statute could result in additional claims of error at the motion for new trial and any ensuing appeal.

4. Jury Summons

Another consideration at this stage might be what to include, if anything, with the jury summons. Some courts include a letter briefly explaining that the potential juror is being called to service on a panel that will hear a death penalty case or more generally a case for which he or she might be sequestered for a given period of time. Other courts put more information into this letter (included with the summons) to briefly outline the case and explain the death penalty procedure. Of course, others include no information at all with the summons so potential jurors have no preconceived ideas about their service when they arrive.

While no single method is mandated or even required, this is simply another consideration for the court during the planning stages.

C. JURY QUESTIONNAIRES

1. Generally

At some time during the pre-trial planning stages of a capital trial, the court may want to address (possibly *sua sponte* or by motion of either party) the use of a jury questionnaire. While many courts routinely use them in capital cases, other courts may choose not to use them. This issue is within the court's discretion.

The court is not required to grant a request for a juror questionnaire. State v. Suttles, 30 S.W.3d 252 (Tenn. 2002) (holding trial court did not abuse its discretion in denying pretrial motion to disseminate a detailed questionnaire to potential jurors).

2. Advantages vs. Disadvantages

Those who utilize a questionnaire do so for some of the following reasons:

- to save time
- for quick identification of issues for specific further exploration/questioning (including responses of importance to each party) as to individual jurors
- to serve as documentation for the record
- to preserve issues for appellate review
- to provide privacy on sensitive issues for potential jurors possibly resulting in more candid responses
- to give the parties (and the court) a preview of a potential juror's views on relevant issues including pretrial publicity and the capital punishment

Others who choose not to use the questionnaire express the following disadvantages:

- the expense (including who bears the cost of printing and copying for all parties)
- the labor intensive nature of questionnaires (i.e. preparation, copying, logistics of assembling jurors to complete questionnaires)
- storage issues
- the time consuming process with what is thought to be little resulting benefit

NOTE: In many cases the cost of printing copies for the parties is no longer an issue as the forms are scanned in by the clerk and the parties are provided with a digital copy of the questionnaires.

3. When

If the court has made the decision to use a questionnaire, the next inquiry is when to distribute it to the venire for completion. Consider the following methods:

a. Should the questionnaire be sent out with the jury summons?

While this would appear to be an efficient method of distribution (with instructions to complete and return the questionnaire by a given date), the inability of the court to monitor completion of the questionnaires is highly problematic. Even though most questionnaires contain a sworn statement in which the juror verifies that he or she completed the questionnaire alone, there is no certainty as to the accuracy of the responses or that this person actually completed (or seriously completed) the responses in the comfort of their own home. Most likely, this method is not desirable.

Some clerks also voice concern over the cost of postage to send the often lengthy questionnaires in the mail with the summons.

b. Should the questionnaire be distributed to potential jurors as they arrive in response to the jury summons?

Some courts will distribute questionnaires to everyone in the potential pool as they arrive for the initial orientation. There is no error in this method of distribution, but the method nonetheless results in wasted efforts and materials. First, not all of those who appear for service will be eligible to serve (i.e. exempt from service; excluded from service or suffer from

hardship). As a result, this method may not be the most efficient method overall.

c. Should the questionnaire be distributed to potential jurors after hardships, exemptions, etc. have been addressed?

Many courts call the entire venire into an assembly room (or in smaller facilities conduct morning and afternoon sessions) to ascertain who will be excused due to a statutory exemption (citizenship, residency, etc.) or exclusion (convicted felon, etc.) or hardship. Only those remaining jurors complete a questionnaire.

In some courts, those who are not claiming hardship may complete the questionnaire while the court addresses hardships individually. If the hardship is not accepted, then the juror completes a questionnaire.

Some courts in Tennessee use a method whereby those summoned jurors are asked who intends to claim a hardship or exemption. Those who make such a claim are given a "hardship form" for completion. Those who cannot make such a claim are given a questionnaire for completion. This procedure expedites the process and minimizes waste. The forms may be reviewed by the court prior to any excusal.

> **NOTE**: Those who complete a hardship form, but whose hardship is not accepted by the court, will then complete a questionnaire.

Depending on the court's decision on whether or not to conduct individual voir dire and to what extent, the court will then instruct those potential jurors who completed a questionnaire when to return. It is at this stage many courts differ on how they choose to proceed.

Various methods of conducting individual voir dire are discussed below.

4. How to Use Effectively

Even though the questionnaires commonly in use in various courts across Tennessee include a wide range of information, their purpose is to shorten the time necessary to select a jury and/or conduct individual voir dire. Often the parties (and the court) hope to ascertain potential jurors' views on the death penalty along with any exposure to pretrial publicity. Counsel should be admonished not to simply repeat the questions already posed on the questionnaire but to use a question and the potential juror's response already given to clarify or expand upon that juror's views and/or knowledge.

The effectiveness of the questionnaire is based in part upon the presumed thoughtful preparation of the questions (clarity, etc.) as well as the timely distribution to the parties prior to voir dire. If the parties are not provided the questionnaires until the beginning of voir dire, one could argue that the effectiveness is potentially jeopardized. If the parties (and the court) are given ample time to review the completed questionnaires, the process can flow much smoother with less repetition in questioning.

Of course, the effectiveness of the questionnaire many times also hinges upon the leeway given to counsel in questioning. Case law illustrates the ability of counsel (state and defense) to manipulate responses given by a particular juror to such an extent that the response shown on the questionnaire bears little resemblance to the eventual answer. The trial court will want to balance counsel's attempts to get at the heart of the particular juror's beliefs with the need to protect the integrity of the process. Counsel should not be permitted to manipulate an answer to such an extent that the juror no longer knows how to give an honest

answer to a question. In such circumstances the questionnaire has served little or no purpose.

5. Other General Considerations

Regardless of the distribution method selected, the trial court should consider the time and expense involved in duplicating the questionnaires. Some clerk's offices are not equipped to handle the voluminous copying, especially in a short time. Further, even if they have an adequate copier, the clerk may not have the budget to use this extensive amount of paper or the staffing to accomplish the duplication. These considerations must be taken into account depending on the jurisdiction.

On the other hand, many clerks today scan the questionnaires and provide counsel with a digital copy of the questionnaires which saves both money and paper. Generally, many attorneys prefer a digital copy.

Another consideration in determining when the questionnaires should be completed and copies provided to counsel, is how much review time is necessary for counsel to be prepared to effectively conduct individual voir dire based on the responses given in the questionnaire. For example, if the questionnaires are completed at 9:00 a.m. with the jury instructed to return at 1:00 p.m. (which method has been utilized by some Tennessee judges), the parties (and the court) will have little time to review and scrutinize the particular juror's responses. Certainly, the parties would have a little more time (however minimal) to prepare if the jurors completed the questionnaires and returned the following day. Perhaps an even more efficient method would be to call the venire for a special initial session to address hardships and to complete questionnaires. If voir dire then began a few days to several weeks later, the parties would have sufficient time to prepare so as to expedite the actual process once it begins.

NOTE: In addition, if the venire is called for a special initial session to address hardships and to complete questionnaires, the court may have sufficient time to determine if more jurors will be needed or if a sufficient number will be available for voir dire at trial.

Certainly, no one method is mandated under Tennessee law and each judge must determine which method will work within their budgets, schedule, and facilities.

For those courts conducting individual voir dire, the questionnaires are collected with each juror being given a time and date for return. Although discussed more thoroughly below, generally, courts will either schedule a certain number of jurors per hour (e.g. 8-10 jurors report at 9:00 a.m., 8-10 jurors report at 10:00 a.m., etc.); a certain number of jurors divided into 9:00 a.m. and 1:00 p.m. sessions; or require all jurors to return at 9:00 a.m. on the scheduled day.

Of course, the court may want to consider the effects of such scheduling on the potential jurors. While this process is not an exact science, the jurors do appreciate some order in the process. Jurors who sit each and every day waiting for individual voir dire tend to become disgruntled when they first appear on a Monday at 9:00 a.m. and are not called until Wednesday evening for individual questioning. The first two methods (hourly increments or morning and afternoon sessions) mentioned above tend to reduce the wait time.

For an electronic version of a sample questionnaire or for more information concerning how jury selection has been handled in other cases, see your Capital Case Attorney.

6. Hardships

Under the revised (post-2009) statute, only certain jurors were still eligible for hardship excuses:

TENN. CODE ANN. § 22-1-103.

(a) Any person may be excused from serving as a juror if the prospective juror has a mental or physical condition that causes that person to be incapable of performing jury service. The juror, or the juror's personal representative, must provide the court with documentation from a physician licensed to practice medicine, verifying that a mental or physical condition renders the person unfit for jury service.

(b) Any person, when summoned to jury duty, may be excused upon a showing that the person's service will constitute an undue or extreme physical or financial hardship to the prospective juror or a person under the prospective juror's care or supervision.

> **(1) A judge of the court for which the prospective juror was called to jury service shall make undue or extreme physical or financial hardship determinations unless a judge of that court delegates this authority to the jury coordinator. In the event this authority is not delegated to the jury coordinator, a judge of the court may authorize the jury coordinator to make initial inquiries and recommendations concerning such requests.**
>
> **(2) A person asking to be excused based on a finding of undue or extreme physical or financial hardship shall take all actions necessary to have obtained a ruling on that request by no later than the date on which the person is scheduled to appear for jury duty.**
>
> **(3) Undue or extreme physical or financial hardship does not exist solely based on the fact that a prospective juror will be required to be absent from that prospective juror's place of employment.**
>
> **(4) A person requesting an excuse based on undue or extreme physical or financial hardship shall be required to provide the judge with income tax returns, medical statements from licensed physicians, proof of dependency or guardianship, an affidavit stating that the person is unable to obtain an appropriate substitute caregiver during the period of participation in the jury pool or on the jury, or similar documentation that the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation may result in a denial of the request to be excused.**

(5) As used in this section, "undue or extreme physical or financial hardship" is limited to circumstances in which a prospective juror would:

(A) Be required to abandon a person under the juror's personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury;

(B) Incur costs that would have a substantial adverse impact on the payment of the juror's necessary daily living expenses or on those for whom the juror provides the principal means of support;

(C) Suffer physical hardship that would result in illness or disease; or

(D) Be deprived of compensation due to the fact that the prospective juror works out-of-state and the out-of-state employer is unwilling to compensate the juror pursuant to § 22-4-106 or that the prospective juror is employed by an employer who is not required to compensate jurors pursuant to § 22-4-106 and declines to do so voluntarily.

(c) Documents submitted pursuant to this section shall be maintained by the jury coordinator during the jury service term, but may be destroyed thereafter. These documents are not public records and shall not be disclosed, except pursuant to a court order; however, the jury coordinator shall maintain a list of members of the jury pool who were excused pursuant to this section, and that information shall be made available upon request.

(d) A person excused from jury service pursuant to this section becomes eligible for qualification as a juror following the period ordered by the court, which shall not exceed twenty-four (24) months. A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature.

Effective July 1, 2021, subsection (e) was added to § 22-1-103, and provides as follows:

(e) A person who is seventy-five (75) years of age or older is excused from jury service upon a showing that the person is seventy-five (75) years of age or older and that the person is incapable of performing

jury service because of a mental or physical condition. The jury coordinator of the county shall excuse the person from jury service upon receiving a written declaration stating the person's name and date of birth, and declaring the mental or physical condition that causes the person to be incapable of performing jury service. The declaration may be completed by the person or the person's personal representative. The jury coordinator of each county shall make available declaration forms for the purpose of this subsection (e). This subsection (e) does not prevent a person seventy-five (75) years of age or older from participating in jury service.

D. VOIR DIRE - "DEATH QUALIFIED JURY"

1. Generally

As an initial matter, the United States Supreme Court has held that closing jury selection to the public violates a defendant's Sixth Amendment right to a public trial. See Presley v. Georgia, 558 U.S. 209, 215-16 (2010). In Lackey v. State, 578 S.W.2d 101, 103 (Tenn. Crim. App. 1978), where the defendants in a non-capital trial requested individual voir dire conducted in the judge's chambers and the trial court granted the request, the Court of Criminal Appeals stated,

> *Although this procedure was desired by the appellants, we do not approve of the conduct of this part of the trial out of the courtroom and out of the presence of the public. When the court considers it advisable to examine prospective jurors out of the presence of others, the prospective jurors should be kept from the courtroom and then called individually into the courtroom for their examination in the public trial.*

Thus, despite the sensitive nature of the questions jurors will face during individual voir dire in a capital case, individual voir dire should still occur in the courtroom, although certainly the court may allow certain sensitive answers to be given at the bench.

The purpose of voir dire is to ensure jurors seated at trial are competent, unbiased, and impartial. The decision of how to conduct voir dire of

prospective jurors lies within the sound discretion of the trial court. State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993). In the capital context, this purpose goes perhaps one step further in that a juror must be able to consider all three forms of punishment for first degree murder, including death. (The Wainwright v. Witt standard is discussed below). This process has been referred to as obtaining a "death qualified" jury.

Although Rule 24(a) of the Tennessee Rules of Criminal Procedure provides that the trial court "shall permit questioning by the parties for the purpose of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges[,]" the trial court, in its discretion, "controls the questions that can be asked to keep voir dire within relevant bounds." State v. Austin, 87 S.W.3d 447, 476 (Tenn. 2002).

The trial court is granted broad discretion to decide the manner in which voir dire will be conducted, and its discretion in this regard will not be disturbed on appeal absent a showing of an abuse of that discretion. State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994).

Although before voir dire jurors may inform the court about any issues that may affect their ability to stay throughout the trial, the court should still ask prospective jurors about their ability to stay until the end of trial before individual voir dire.

In some cases, the attorneys have spent a considerable amount of time questioning and rehabilitating a prospective juror, only to have the juror tell the court at the end of questioning that he/she had a commitment that rendered him/her unable to serve and required excusal. Asking jurors about their ability to serve before questioning begins can help prevent a similar situation.

2. Individual vs. Collective Voir Dire

Although the prevailing voir dire practice in a typical criminal case is to examine prospective jurors collectively, the court presiding over a capital case will likely be presented with a motion for individual voir dire. In some instances, the court itself may believe individual voir dire is most logical in a given case. However, there is no requirement in capital cases that death qualification of a capital jury be conducted by individual voir dire.

As a general rule, the decision to allow individual voir dire of prospective jurors is within the sound discretion of the trial court. State v. Robinson, 146 S.W.3d 469, 505 (Tenn. 2004). See also State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998) (denial of individual voir dire in a capital case does not violate constitutional principles); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998) (individual sequestered voir dire required only when there is a significant possibility that the prospective jurors have been exposed to potentially prejudicial material before the trial).

In Tennessee, individual voir dire is often used in capital case jury selection. Further, in those cases where individual voir dire has been granted, the trial court generally limits the examination to two issues: (1) pretrial publicity and (2) opinions on the death penalty and related issues such as mitigation. In special circumstances, the court may allow limited additional questioning on an issue peculiar (or highly sensitive) to a juror (e.g. juror family member on death row, juror family member murdered, etc.) or to the case.

In a highly publicized case, the preferred procedure is to conduct individual voir dire. State v. Mann, 959 S.W.2d 503 (Tenn. 1997). There is no error in limiting individual voir dire to the issues of pre-trial publicity and opinions on the death penalty. State v. Smith, 993 S.W.2d 6 (Tenn. 1999).

In some courts, jurors are called one by one for individual questioning on these two issues. Other judges begin with collective voir dire and later permit jurors to be individually questioned about pretrial publicity and opinions on the death penalty. Other judges conduct collective voir dire with all questions being asked in open court. Regardless of the method chosen by a particular judge, the court should be mindful of the unique nature of a capital case and the necessity of death qualifying—and life qualifying—the jury.

> **NOTE**: "Life-qualifying" a juror is similar to "death qualifying" a juror but, instead of determining whether a juror may or is willing to consider the death penalty, the court is determining whether the juror may or is willing to consider a sentence of less than death. In Tennessee, there are three sentencing options, therefore, the jurors are qualified on all three potential sentences. See State v. Miller, _____ S.W.3d ___ (Tenn. 2021), for a discussion of life qualification of jurors.

> **NOTE**: In State v. Miller, _____ S.W.3d ___ , fn 14 (Tenn. 2021), the Tennessee Supreme Court noted the Tennessee Court of Criminal Appeals discussion of what a life sentence means and how a life sentence should not be referred to as "life with parole" because this is a misnomer. See State v. Urshawn Miller, No. W2019-00197-CCA-R3-DD, 2020 WL 5626227, at *12 (Tenn. Crim. App. Sept. 18, 2020). The determinate sentence for imprisonment for life is sixty years. Tennessee Code Annotated § 40-35-501(h)(1). When a person is convicted of a murder committed on or after July 1, 1995, and receives a sentence of imprisonment for life, that person can be granted certain statutorily authorized "sentence reduction credits" up to nine years. Tenn. Code Ann. § 40-35-501(i)(1). These sentence credits could allow for release after a term of 51 years. See Tenn. Code Ann. § 41-21-236. This release, however, is not parole, but rather release after service of the complete sentence.

If the court decides to allow individual voir dire, the court should consider selecting a method for conducting the voir dire in the most efficient, expeditious, and economic fashion while preserving the rights of the parties and the integrity of the process. Below is one example of how to conduct individual voir dire:

Once the venire has been summoned and the hardships addressed, the court collects the questionnaires from those potential jurors who are ready, willing and able to serve. As those jurors complete their questionnaires, they return them to the court/clerk staff and are given a time and date to return for individual questioning. In this example, eight to ten jurors are scheduled for each hour of the scheduled day beginning at 9:00 a.m.

> **NOTE:** Some judges schedule more jurors per hour while others schedule less depending on how many they believe they can successfully question in the hour.

> **NOTE:** Some courts schedule a number of jurors for a morning session with approximately the same number being scheduled for an afternoon session while still others require all jurors to return at 9:00 a.m. on the same day.

This process is followed until all potential jurors are assigned a time and date to return.

On the day the scheduled jurors are to begin arriving, some judges address the group as a whole to explain the bifurcated nature of the trial with specific attention drawn to the penalty phase and the weighing of aggravating and mitigating circumstances. Other judges explain the process as each individual juror is called to the room for questioning. In some courts, the judge allows counsel to explain the process (however, many times counsel abbreviates the procedure to the extent that they are giving an inaccurate or incomplete statement of the law).

Each judge must assess the method most efficient in his/her given situation.

As might be expected, the best method might be to explain to the larger grouping *(whether 8-10 under one method, whether a 9:00 a.m. session and 1:00 p.m. session or whether all jurors at one time)* the statutory scheme relating to capital cases including possible punishment, aggravating and mitigating circumstances, etc. The trial court must remember most if not all potential jurors will have no knowledge of the process and have no previous exposure to these new terms. This "group" explanation of the process will expedite the individual voir dire procedure and limit repetitiously stating the process with each juror.

[See Appendix for an example of the introductory instructions].

Under any scenario, it is important for the court to remind the jurors that the defendant is presumed innocent and that the nature of the process (bifurcated trial) requires this type of "cart before the horse" questioning. The jurors should be told the case may never get to a penalty phase because the state first has the burden of proving the defendant guilty of first degree murder beyond a reasonable doubt. The more the court explains the process, the more efficient the process becomes. Practically speaking, during this process a trial court may vary the method as it determines what is working best for the parties in the instant case.

When individual questioning of a potential juror begins, the court will either begin questioning or allow the parties to begin questioning. (Some judges alternate between the state and defense counsel as to who goes first with questioning). Many judges begin individual voir dire by asking the questions themselves with follow up by counsel on any ambiguous answers. It is not error to conduct individual voir dire in this manner. See State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002).

The best method in a given case may not reveal itself until the process begins and the court hones the method as individual voir dire progresses. While the method may vary, the end result must be the same – the court must be able to ascertain whether the questioned juror can follow the juror's oath and the law as instructed by the court.

Of course, those courts who choose to conduct collective voir dire must nonetheless still address each juror's views on the death penalty (and pretrial publicity where applicable). As discussed in the next section, challenges for cause will follow some jurors regardless of the type of voir dire conducted.

3. Challenges for Cause

a. Pretrial Publicity/Pre-Formed Opinions

In State v. Sexton, 368 S.W.3d 371, 395-96 (Tenn. 2012), as corrected (Oct. 10, 2012), the Tennessee Supreme Court stated the following:

> *... the manner in which voir dire is conducted rests within the sound discretion of the trial court. Howell, 868 S.W.2d at 247. The goal of voir dire is to empanel a jury that is competent, unbiased, and impartial. State v. Hugueley, 185 S.W.3d 356, 390 (Tenn. 2006) (appendix); State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994); Howell, 868 S.W.2d at 247. A juror's prior knowledge about a case does not automatically result in constitutional error. Murphy, 421 U.S. at 799–800, 95 S. Ct. 2031; Hugueley, 185 S.W.3d at 390 (appendix). The fundamental inquiry "in determining a juror's acceptability is whether his exposure is to matters ... 'so prejudicial as to create a substantial risk that his or her judgment will be affected.' " Hugueley, 185 S.W.3d at 390 (appendix) (quoting Tenn. R. Crim. P. 24(c)(2)(B)). A trial court's determination as to the impartiality of a prospective juror can be overturned only if there has been an abuse of discretion. State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). Appellate courts must uphold a trial court's ruling with respect to the impartiality of prospective jurors absent a finding of manifest*

error. Patton v. Yount, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L.Ed.2d 847 (1984); Hugueley, 185 S.W.3d at 390 (appendix).

...

Because mere exposure to extrajudicial information does not automatically disqualify prospective jurors, trial courts must assess whether they can serve fairly and impartially given their knowledge of outside information. See Hugueley, 185 S.W.3d at 390 (appendix). In making this determination, the trial court must assess the level of potential prejudice arising from the extrajudicial information, as well as the believability of the juror's promise to remain impartial. See State v. Shepherd, 862 S.W.2d 557, 569 (Tenn. Crim. App. 1992). Given the wide-ranging availability of information in today's world, it is "quite likely jurors have some level of pre-trial exposure to the facts and issues involved in a case." Hugueley, 185 S.W.3d at 390 (appendix). In Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961), the United States Supreme Court observed that to

> *hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

While the Defendant claims that the trial court should have further questioned the jurors to learn the substance and extent of their pretrial exposure to information about the murders, "such questions are not constitutionally required, and a trial court's failure to ask such questions is not reversible error unless the defendant's trial is thereby rendered fundamentally unfair." Cazes, 875 S.W.2d at 262. In this instance, counsel for the Defendant was permitted to individually voir dire the jurors about the source and nature of any information they may have seen, heard, or read. While several of the jurors acknowledged that they had some exposure to information appearing in the local newspaper, all promised to serve in an impartial manner and to heed the instructions of the trial court. The

Defendant does not point to anything "so prejudicial as to create a substantial risk that [the jurors'] judgment [would] be affected." Hugueley, 185 S.W.3d at 390 (appendix). Nothing in the record suggests that the trial court abused its discretionary authority by not further questioning the jurors regarding their exposure to pretrial information. See Shepherd, 862 S.W.2d at 569 (explaining that it is up to the trial court to assess the believability of the jurors' assurances to serve impartially and follow the court's instructions). The Defendant is not entitled to relief on this issue.

In addition, the Tennessee Rules of Criminal Procedure addresses the issue of potentially prejudicial information:

TENN. R. CRIM. P. 24(c)(2)(B) - Challenges for Cause

Exposure to Information. – The prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. The court shall consider both the degree of exposure and the prospective juror's testimony as to his or her state of mind. A prospective juror who states that he or she will be unable to overcome preconceptions is subject to challenge for cause no matter how slight the exposure. If the prospective juror has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability depends on whether the court believes the testimony as to impartiality. A prospective juror who admits to having formed an opinion about the case is subject to challenge for cause unless the examination shows unequivocally that the prospective juror can be impartial.

b. The Jury: Death Qualification and Life Qualification

(1) Former Witherspoon v. Illinois standard:

In Witherspoon, the court held that jurors may be excluded for cause if they make it "unmistakably clear" that they would "automatically" vote against capital punishment without regard to the evidence or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's "guilt." Witherspoon v. Illinois, 391 U.S. 512, 522, n. 21 (1968).

(**2**) **Current Wainwright v. Witt standard**:

The United States Supreme Court later refined its holding in Witherspoon and established that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether **the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.**" Wainwright v. Witt, 469 U.S. 412, 424 (1985). In addition to dispensing with Witherspoon's reference to "automatic" decision making, this standard does not require that a juror's bias be proved with "unmistakable clarity." Id. (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). See also State v. Miller, ____ S.W.3d ___ (Tenn. 2021).

> **NOTE:** In State v. Sexton, 368 S.W.3d 371, 389-95 (Tenn. 2012), as corrected (Oct. 10, 2012) (Any juror who chose either "always death" or "never-death" was excluded by the trial court without an opportunity for counsel to question concerning their views), the trial court improperly excluded prospective jurors based solely on their responses to a single question concerning their views on the death penalty, requiring a new trial. It was determined the trial court failed to appropriately follow the test in Wainwright v. Witt. The Tennessee Supreme Court stated "trial courts must consider all of a juror's answers on a questionnaire, rather than giving just one answer dispositive weight, and should permit counsel to examine prospective jurors who provide inconsistent responses to pertinent questions." Id. at 395.

(3) "Life Qualification" and "Follow The Law: Morgan v. Illinois":

A defendant must be allowed to ask prospective jurors questions to ensure both that jurors will "follow the law" and that the jury contains no members who will automatically vote to impose the death penalty in case of conviction:

> *A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.*

Morgan v. Illinois, 504 U.S. 719, 729 (1992). In explaining why general "follow the law" questions are inadequate to ensure a capital jury will be fair and impartial, the Court explained,

> *As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individual's inability to follow the law. See supra, at 729. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. See Turner v. Murray, 476 U.S. [28,] 34-35 [(1986)] (plurality opinion). It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him*

> *from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." Id. at 36 (footnote omitted). Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.*

Id. at 735-36 (footnote omitted).

4. Application by the United States Supreme Court

In the 2007 United States Supreme Court habeas case of Uttecht v. Brown, the Court reviewed claims of error under Witherspoon and Witt regarding the excusal for cause of a juror who is substantially impaired in the ability to impose the death penalty under a state-law framework. The Uttecht decision held that all courts, but especially courts engaging in collateral review, owe deference to the decision of the trial court, which is in a superior position to determine the demeanor and qualifications of the challenged juror:

> *Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. [Witt], at 428, 105 S. Ct. 844; Darden[v. Wainwright], supra, [477 U.S. 168,] 178, 106 S. Ct. 2464. Leading treatises in the area make much of nonverbal communication. See, e.g., V. Starr & M. McCormick, Jury Selection 389-523 (3d ed. 2001); J. Frederick, Mastering Voir Dire and Jury Selection 39-56 (2d ed. 2005).*

Uttecht v. Brown, 551 U.S. 1, 9-10 (2007).

Challenges for cause will certainly arise when a juror indicates he or she would ALWAYS impose the death penalty or would NEVER impose the death penalty. The court's ruling is simplified if the juror is unequivocal in either direction.

The difficult challenges for cause result when a potential juror wavers in their responses as to whether they could follow the law and consider all forms of punishment. Of these, the most dangerous (relating to reversible error) are those jurors who first state they could not consider the death penalty but then say they "might" or would "possibly" consider the death penalty. The court should satisfy itself that the juror is truly equivocal and thereby require the parties to use a peremptory challenge if desired. On the other hand, if the court acknowledges the juror is uncertain about whether he or she could consider the death penalty but finds from all of that juror's answers and demeanor that he or she could not follow the law, the court must make a specific finding. In its finding, the court should summarize the responses given by that juror and state that even though the juror indicated he or she "might" or would "try" to follow the law, on the record the court should find that by those specific responses along with the juror's demeanor on the stand that the juror could not follow the law actually citing the Witt test.

When a party makes a challenge for cause, the trial court must carefully weigh the considerations set out in the Witt standard. In fact, the court should make its findings on the record and state essentially verbatim the language of the Witt standard (i.e. that the juror's view WOULD/WOULD NOT substantially impair . . .) The importance of the finding by the trial court is highlighted by the decision in Uttecht which gives deference to the trial court's ruling if the court has made a finding on the record.

In light of Uttecht, it is important for the trial court to specifically state on the record the precise nature of its findings, including the juror's demeanor, etc. (For example, if a jury responds "I think I can" the cold written record will sound equivocal; however, in person the juror may, through demeanor, body language, etc., be expressing a very certain ability to follow the law, etc. However, unless the trial court articulates these gestures, demeanor or body language on the record, the cold record could lead an appellate court to find that the juror was in fact

equivocal in his/her response). See e.g., State v. Odom, 336 S.W.3d 541, 558-59 (Tenn. 2011) (in dismissing juror, trial court made on-the-record finding that prospective juror kept "shaking her head no"; Tennessee Supreme Court emphasized that trial court's finding was supported "not only [by] the answers to questions posed by counsel but also nonverbal responses[.]").

5. General Voir Dire Following Individual Voir Dire

During individual voir dire the court must determine how many individuals need to be preliminarily qualified (during individual voir dire) so as to guarantee a sufficient pool for general voir dire. As noted below, various methods are used by judges across the state. Below are three methods commonly used in Tennessee but they do not represent every possible method of conducting voir dire.

Option A: Some judges will conduct individual voir dire until a total of 54-70 individuals[3] have been "pre-qualified," that is, they are free from challenges for cause on pre-trial publicity and views on the death penalty. Those 54-70 will remain in the courtroom, and the judge will seat 16 in the jury box. Group voir dire will proceed as it typically does. When peremptory challenges are exercised, the judge re-fills the box from the individuals in the gallery.

PRO: Once group voir dire begins, the parties typically go straight through until a jury is selected, often in one day.

CON: It may take a great deal of time to individually voir dire enough people to retain 54-70 for group voir dire.

[3] Assuming a jury of twelve jurors and four alternates (12 + 4) and 15 peremptory challenges per side (15 + 15) plus an additional one each per alternative (4 + 4) for a total of 54 (16 + 30 + 8). As noted above, a judge might want to select a few additional jurors for perhaps a total of 70 in the event some jurors are lost to a cause challenge at this advanced stage. This reserve should ensure additional individual voir dire will not be necessary.

Under this method, the court must presume for the sake of numbers that both parties exercised all of their peremptory challenges. On rare occasions, a juror will be excused for cause at this general voir dire stage. If for some reason ANY person is excused for cause on a different basis, and the parties exercise all of their peremptory challenges, the court is then in a position of having to call in another panel to continue individual voir dire, unless the judge has asked that others remain from earlier in the day.

Option B: Some judges will individually voir dire the venire until he has approximately 16 to 20 prospective jurors who are free from challenges for cause. While all other prospective jurors are in the gallery, the court will allow general voir dire of these individuals. The parties will exercise their challenges. When there are 12 potential jurors remaining, the court will continue individual voir dire until there are another four to eight prospective jurors who are free from challenges for cause. They return to the courtroom, and because everyone was present earlier, the next round of general voir dire proceeds much faster. After exercising strikes, this process continues until a jury is seated.

> **PRO:** The court is not "pre-qualifying" an excess number of prospective jurors, in the likelihood that the parties do not use all of their peremptory challenges.
>
> **CON:** There is a great deal of movement back and forth between areas, which involves delays that occur frequently. This method can be grueling and exhausting.

Option C: Some judges will conduct individual voir dire several weeks in advance of trial until approximately 70 or more individuals have been "pre-qualified," that is, they are free from challenges for cause on pre-trial publicity and views on the death penalty. Those 70+ jurors will be admonished concerning avoiding any discussion of the case or publicity and given a date to return for general voir dire. When the jurors return,

the court will inquire of any new issues which may have arisen for the jurors and speak to any who have an issue individually. There are usually only a few jurors who have any question at this point. Group voir dire will proceed as it typically does. When peremptory challenges are exercised, the judge re-fills the box from the individuals in the gallery.

> **NOTE:** If there are jurors who have not been individually voir dired, they may also be asked to return for general dire as a "reserve" group in the event the court ran out of jurors during general voir dire. Of course, these jurors may not be needed and may be excused once the jury and alternates are selected. Also, by completing individual voir dire in advance of trial, if something unusual happens and more jurors are needed, there is still time to summons more jurors prior to trial.
>
> **PRO:** Once group voir dire begins, the parties typically go straight through until a jury is selected, generally in one day. This allows much easier scheduling of witnesses for trial as the parties are aware when opening statements will occur.
>
> **CON:** It requires setting aside 3-5 days in advance of trial to individually voir dire enough people to retain 70+ for group voir dire.

Again, there is no prescribed method for selecting a jury and conducting individual and general voir dire. It is important for the process to maintain the integrity of the capital trial and ensure the selected jury will be able to follow the law.

6. Swearing in the Jury

Regardless of the selection method chosen, the court must be mindful of when to swear the jury.

WARNING: Once the jury is sworn, they cannot be separated. This means, for example, that they may not move their vehicles unless accompanied by an officer (in the car with them).

Many judges conduct one of the methods discussed above and choose not to swear the jury at the end of the process. Instead, they choose to admonish the jury and instruct them when to return for service.

It is has been useful in a number of recent trials for the court to seat a jury without swearing the jury. The jurors are instructed to return the following Monday (for example) with suitcases packed and ready to serve. When the jury returns on that Monday (for example) they are sworn and the trial begins. This method gives the jury time to collect their belongings and arrange their family schedules in light of their jury service.

In State v. Tony Edward Bigoms, 2017 WL 2562176 (Tenn. Crim. App. June 7, 2017), the appellate court addressed the issue of not swearing in jurors before allowing them to go home and pack after completion of jury selection:

> *The rule of sequestration requires that the jury not be permitted "to separate from each other after they have been sworn, and mingle with the balance of the community." Bondurant, 4 S.W.3d at 672 (emphasis added) (quoting McLain, 18 Tenn. (10 Yer.) at 242[4]). Trial courts are not permitted to "swear any of the jurors until the whole number is selected for a jury." Tenn. Code Ann. § 40–18–106. Once the jury is sworn, the rule of sequestration is in effect, and the jurors should not be allowed to leave the attendance and control of the court officers.*
>
> *Here, the trial court mistakenly thought, citing Tennessee Rule of Criminal Procedure 30.4 that it could not admonish the prospective jurors unless they were sworn. However, it has long been the rule in this state that "a trial judge has the discretion to allow the separation of tentatively selected jurors prior to the time the jurors are sworn to try the case, so long as*

[4] McLain v. State, 18 Tenn. (10 Yer.) 241, 242 (1837).

appropriate admonitions are administered." State v. Vaughan, *144 S.W.3d 391, 405 (Tenn. Crim. App. 2003) (citing* State v. McKay, *680 S.W.2d 447, 453 (Tenn. 1984)).*

It is undisputed that, rather than the trial court admonishing the tentatively selected jurors and allowing them to separate, the jury was sworn and then allowed to leave the attendance and control of the court officers. As such, the Defendant has shown a separation of the jurors. See Bondurant, *4 S.W.3d at 672–73 (holding that the defendant had "established a prima facie showing of [a] jury separation" when the jurors were allowed to drive themselves between their hotel and the courthouse and the court officer submitted an affidavit that he had no control over the jurors during that time).*

[For an example of emergency information forms, what jurors may bring, a juror information sheet, and a scheduling sample, see Appendix].

E. PEREMPTORY CHALLENGES & ALTERNATES

1. Peremptory Challenges

TENNESSEE RULE OF CRIMINAL PROCEDURE 24(e)(1):

(1) Death Penalty – If the offense is punishable by death, each defendant is entitled to fifteen peremptory challenges and the state is entitled to fifteen peremptory challenges for each defendant.

See also Tenn. Code Ann. § 40-18-118.

As discussed in Chapter 4, motions for additional peremptory challenges are not supported under Tennessee law. See State v. Davidson, 121 S.W.3d 600, 613 n. 6 (Tenn. 2003).

2. Alternates

TENNESSEE RULE OF CRIMINAL PROCEDURE 24(f)(1) & (2)(A) & (B):

(f) Additional Jurors. – Before jury selection begins, the court may call and impanel one or more jurors in addition to the regular jury of twelve persons. The following procedures shall apply:

(1) Same as Regular Jurors. – The additional jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors.

(2) Methods of Impaneling Additional Jurors. The trial court may use either of the following methods to select and impanel additional jurors:

(A) Single Entity. – During jury selection and trial of the case, the court shall make no distinction as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve . . . A juror who is not selected to be a member of the deliberating jury shall be discharged when the jury retires to consider its verdict.

(B) Separate Entities. – Following the selection of the jury of twelve regular jurors, the additional jurors shall be selected and impaneled as alternative jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

SPECIAL CONSIDERATIONS:

*** Does the court have the authority to retain the alternates after the return of a guilty verdict by the 12 and pending a finding as to the appropriate penalty? If one of the 12 who rendered the guilty verdict becomes unable to complete service during the penalty phase, may the court substitute one of the original alternates into the penalty phase deliberations?**

- Apparently, the answer to both questions is yes. In State v. Hester, 324 S.W.3d 1 (Tenn. 2010), the trial court discharged two of the four alternates before the jury retired to deliberate in the guilt phase. The two remaining alternates were kept separate from the jury during its deliberations but were present for testimony during the penalty phase. After the penalty phase began, one of the jurors became ill and was replaced with one of the alternates. The defendant moved for a mistrial and asked for a new sentencing hearing with a new jury. The trial court denied the motion.

  Tenn. R. Crim. P. 24(f)(2) states that alternate jurors can replace jurors at any time before the jury retires to deliberate its verdict. The rule also provides that alternates are to be discharged when the jury retires to deliberate. See id. However, the rule does not address the use of alternate jurors within the context of a bifurcated capital trial.

  The Tennessee Supreme Court in Hester, noting that the issue was one of first impression in Tennessee, concluded that the trial court's actions ― keeping alternates after the conclusion of the guilt/innocence phase and replacing one of the original 12 jurors with an alternate before deliberations in the sentencing phase began ― were constitutionally permissible. See generally Hester, 324 S.W.3d at 62-67.

  Left unresolved is the question of how much (if at all) the alternates are to be separated from the other jurors once the twelve jurors begin deliberating at the end of the guilt phase. Although not specifically stated in the Hester opinion, the alternates in that case were sequestered from both the public at large and the twelve regular jurors once the jury began deliberating in the guilt phase.

The thinking in such an instance is that the twelve jurors who deliberated the defendant's guilt or innocence are the jury, and therefore they must be kept from all potential outside influences — and that would include the alternates, who after sitting through the guilt phase would undoubtedly have their own opinions and may well be tempted to impart those views on the regular jurors (in violation of the court's instructions). Thus, keeping the alternates separate from the jurors outside the courtroom — which would include separate jury rooms at the courthouse, separate dining and entertainment plans, and other arrangements to keep the jury and the alternates separate while at the hotel — would minimize any chance of improper influence.

*** What happens if a juror has to be excused during deliberations?**

- The court cannot substitute an alternate for an excused juror after deliberations have begun. See State v. Bobo, 814 S.W.2d 353, 355 (Tenn. 1991). Although Bobo addressed a former version of the Code and Rule 24, and involved replacing a juror with an alternate who had already been discharged, there is no reason to believe that the Bobo holding does not apply to the current statute and procedural rule and applies to an alternate who is "held over" between the guilt and sentencing phases.

  The Court of Criminal Appeals, applying Bobo, has concluded that when a deliberating juror must be dismissed, the court must declare a mistrial unless the defendant waives his right to a twelve-person jury and agrees to proceed with an eleven-person jury. However, any waiver must be explicit, in writing, and the personal waiver of the defendant. See State v. Gary Lynn Harvey, 2010 WL 5550655 (Tenn. Crim. App. Dec. 30, 2010) (no permission to appeal filed).

F. BATSON CHALLENGE

1. Generally

A defendant may make a Batson challenge based on the State's alleged use of a peremptory challenge to exclude jurors of a particular racial composition. Batson v. Kentucky, 476 U.S. 79 (1986). While Batson originally applied to a *prosecutor's* improper race-based exercise of peremptory challenges, that decision has been extended to prohibit *defendants* from exercising racially-motivated strikes as well. Georgia v. McCollum, 505 U.S. 42 (1992). When a prosecutor is making the claim, it is known as a "reverse Batson challenge."

A non-minority defendant can object to the exclusion of minority jurors on "fair cross-section" grounds. See Holland v. Illinois, 493 U.S. 474, 476-77 (1990).

Peremptory challenges based solely on gender are also prohibited. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31 (1994).

The Batson Court established a three-step test for evaluating claims of alleged discrimination in jury selection.

2. Three-Step Test

(Stated here as a challenge by the defendant)

a. Prima Facie Case: Defendant must make a prima facie case that racial discrimination is the basis for excluding the juror.

- A defendant "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an interference of discriminatory purpose." Batson, at 93-94. A defendant does not need to establish the State's challenge was "more likely than not the product of purposeful discrimination." Johnson v. California,

545 U.S. 162, 170 (2005). A prima facie case may be established by merely demonstrating the State excluded members of a cognizable racial group for the jury pool. State v. Echols, 382 S.W.3d 366, 281 (Tenn. 2012); see also State v. Mobley, 2021 WL 3610905 (Tenn. Crim. App. Aug. 16, 2021). It should also be noted that Batson applies even if only one peremptory challenge is exercised in a purposefully discriminatory manner. State v. Ellison, 841 S.W.2d 824, 827 (Tenn. 1992).

b. Race Neutral Explanation: If the court concludes a prima facie case has been established, the State must then provide a race-neutral explanation for the strike.

- The State's race-neutral reason explanation "must be a clear and reasonably specific account of the prosecutor's legitimate reasons for exercising the challenge ... [but] need not be persuasive, or even plausible." State v. Hugueley, 185 S.W.3d 356, 368 (Tenn. 2006) (citing Batson, 476 U.S. at 97 and Purkett v. Elem., 514 U.S. 745, 767-68 (1995)). In addition, the State's explanation would not need to be one that would justify excusing the juror for cause. Batson, 476 U.S. at 97. "'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race[-]neutral.'" Hugueley, 185 S.W.3d at 368 (quoting Purkett v. Elem, 514 U.S. 745, 768 (1995)).

c. Court Inquiry and Ruling: If the State offers a race-neutral reason, the trial court must decide if the defendant has established purposeful discrimination; that is the court must conduct a "sensitive inquiry" to determine if the race-neutral reason is merely a pretext.

- In State v. Precious Briana Horton, 2020 WL 3267209 *5 (Tenn. Crim. App. June 17, 2020), perm. app. denied, (Tenn. Oct. 7, 2020), the appellate court addressed the issue:

> *... " 'The trial court may not simply accept a proffered race-neutral reason at face value but must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual.' "* State v. Kiser*, 284 S.W.3d 227, 255 (Tenn. 2009) (quoting* Hugueley*, 185 S.W.3d at 368). In making its determination of whether use of a peremptory challenge was discriminatory, the trial court must articulate specific reasons for each of its factual findings.* Woodson [v. Porter Brown Limestone Co, Inc.]*, 916 S.W.2d [896,] 906 [(Tenn. 1996)]*.
>
> *"[D]etermination of the prosecutor's discriminatory intent or lack thereof turns largely on the evaluation of the prosecutor's credibility, of which the attorney's demeanor is often the best evidence."* State v. Smith*, 893 S.W.2d 908, 914 (Tenn. 1994). The United States Supreme Court has recognized that a defendant may present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race, including: (1) statistical evidence comparing the prosecutor's use of peremptory strikes against African-American jurors and Caucasian jurors in the case; (2) the prosecutor's disparate questioning of African-American and Caucasian jurors in the case; (3) "side-by-side comparisons" of African-American jurors who were struck and Caucasian jurors who were not challenged; (4) the "prosecutor's misrepresentations of the record when defending the strikes during the* ***Batson*** *hearing; (5) relevant history of the State's use of peremptory strikes in past cases; or (6) any other relevant circumstances bearing upon the issue.* Flowers v. Miss*., 139 S. Ct. 2228, 2243 (2019). "When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent."* Id*. at 2250. A prosecution's shifting of reasons for the strike also suggests that the reasons may be pretextual.* Frost v. Chatman*, 136 S. Ct. 1737, 1751 (2016).*

"The ultimate burden of establishing purposeful discrimination lies with the party objecting to the peremptory challenge." Hugueley, 185 S.W.3d at 374.

It is important for the trial court to make the record when ruling on such claims.

- First, the trial court must make a **specific** finding on the record that a prima facie case was or was not made.

- Second, the court must note the State's race-neutral explanation for exercising the strike.

- Third, the court must analyze the defendant's response to the State's explanation.

- In the end, the court must state whether the defendant has or has not made a successful Batson challenge.

The trial court's findings are accorded great weight and will not be set aside unless they are clearly erroneous.

Capital Case Example:

In State v. Kiser, 284 S.W.3d 227, 255-59 (Tenn. 2009), the State used ten of its nineteen peremptory challenges on minority defendants. Four African-American jurors and two other minority jurors were seated. The defendant raised a Batson challenge; the State contended that the challenged jurors were excused based upon statements against death penalty in their questionnaires, although the challenged jurors did state that they could follow the law. Although the potential jurors could not be challenged for cause, their positions were such that they were proper for peremptory challenges. The defendant argued that a white juror who was ultimately seated also expressed equivocation; however, although the juror said she "felt like" and "thought" she could impose the death penalty, the juror never expressed any specific opposition to the death penalty. The Tennessee Supreme Court affirmed the trial court's finding that the State did not exhibit purposeful discrimination in exercising its peremptory challenges.

G. SEQUESTRATION AND RELATED ISSUES

Sequestration of a capital jury is statutorily mandated. Tenn. Code Ann. § 40-18-116.

The test of keeping a jury together is not a literal one, requiring each juror to be at all times in the presence of all others; rather, the real test is whether a juror passes from the attendance and control of the court officer. State v. Jackson, 173 S.W.3d 401, 410 (Tenn. 2005) (prima facie showing of separation during which all jurors were interviewed established no prejudice); James Dellinger and Gary Wayne Sutton v. State, 2006 WL 1679595 (Tenn. Crim. App. June 19, 2006) ("family night" at hotel where jurors were sequestered did not violate sequestration rule when jurors did not leave meeting room and were supervised at all times by court officers while in meeting room ― even if court officers did not monitor all conversations between jurors and family members).

In State v. Joshua Hunter Bargery, 2017 WL 4466559 (Tenn. Crim. App. Oct. 6, 2017), the Tennessee Court of Criminal Appeals discussed the sequestration of juries:

> *In criminal prosecutions in which a jury is sequestered, the trial court "shall prohibit the jurors from separating at times when they are not engaged upon actual trial or deliberation of the case." Tenn. Code Ann. § 40–18–116 (2010). The purpose of the sequestration rule is to protect juries from outside influences in order to ensure that the jurors will base their verdict only upon evidence presented at trial and, thus, preserve a defendant's right to a fair trial and an impartial jury. State v. Bondurant, 4 S.W.3d 662, 671 (Tenn. 1999). However, the sequestration rule does not literally require each juror to remain in the presence of the other jurors at all times; rather, the "real test is whether a juror passes from the attendance and control of the court officer." Id.*
>
> *Once a jury separation has been shown by a defendant, the State then has the burden of showing that such separation did not result in prejudice to the defendant. State v. Jackson, 173 S.W.3d 401, 410 (Tenn. 2005) (citing Gonzales v. State, 593 S.W.2d 288, 291 (Tenn. 1980)). "It is the opportunity of tampering with*

> *a juror, afforded by the separation which constitutes the ground for a new trial, but if such separation afforded no such opportunity, there can be no cause for a new trial."* Gonzales, *593 S.W.2d at 291 (quoting* Cartwright v. State, *80 Tenn. 620, 625 (1883)) (internal quotation marks omitted). If the State fails to satisfy its burden of showing that the separation did not result in prejudice to the defendant, then a new trial is required.* Bondurant, *4 S.W.3d at 672 (citation omitted). A mere possibility of a separation, though, is insufficient to place the burden upon the State to show lack of prejudice.* State v. McClain, *667 S.W.2d 64, 66 (Tenn. 1984). A defendant must show that an actual separation occurred. Id.*

It is not necessary for the juror to prove that they were, during their absence, subjected to improper influence from others; it is sufficient if they might have been. There would be no safety in a different rule of practice, for it would be almost impossible ever to bring direct proof of the fact it was done. State v. Bondurant, 4 S.W.3d 662 (Tenn. 1999) (State offered no rebuttal after proof revealed jury separation in that jurors were permitted to drive their personal vehicles after being selected for the jury and having been sworn).

If a separation issue is established, what evidence is needed for the State to rebut the proof depends on the issue of separation and how many jurors are involved in the separation. "The testimony of the entire jury may not always be necessary when there has been a jury separation, but it is in situations … where all of the jurors were implicated in the separation." State v. Tony Edward Bigoms, 2017 WL 2562176 (Tenn. Crim. App. June 7, 2017).

H. WAIVER OF JURY

It appears a capital defendant can waive sentencing by a jury.

> **TENN. CODE ANN. § 40-35-203(c). Imposition of Sentence**
>
> **If a capital offense is charged and the jury returns a verdict where death is a possibility, the jury shall fix the punishment in a separate hearing as otherwise provided by law, unless the jury is waived as to punishment.**
>
> **TENN. CODE ANN. § 39-13-205(b). Waiver of jury trials of first degree murder.**

> **(b) After a verdict of first degree murder is found, the defendant, with the advice of the defendant's attorney and the consent of the court and the district attorney general, may waive the right to have a jury determine punishment, in which case the trial judge shall determine punishment as provided by this part.**

(Emphasis added).

I. JURY MANAGEMENT

Issues pertaining to jury management are left to the sound discretion of the trial court. The trial court should be mindful of the unique nature of a capital case including time and expense involved. Not only is jury selection a crucial phase, the continued care and management of the sequestered jury is vital to a fair trial.

The rules, statutes, and case law provide the framework for seating the jury. The rules also provide certain admonishments the trial court should give to the jury. Some cases, discussed within the sections below, address some of the daily activities and care of the jury throughout the trial.

1. Accommodations

a. Housing

Of course, all of the sequestered jury must be housed at the same location. Typically, this is not an issue unless you are conducting a trial in a smaller rural jurisdiction. The trial court should confirm housing well in advance of the selected trial date. Most courts give each juror his or her own room (though some smaller jurisdictions have budget issues and try to double up the room occupation). Individual rooms is preferable as one juror per room certainly ensures the jurors will not be able to discuss the case when they adjourn to their rooms for the evening. Two jurors per room provides the opportunity for roommates (who are human) to discuss

the case/evidence prior to deliberations even in light of the trial court's admonishments not to discuss the case.

b. Television and Newspapers

The court should also limit the jury's communication with the "outside world." No newspapers should be allowed. Certainly, the daily paper (or other national publication) may cover the trial.

> **NOTE:** In one capital case, a court officer read the morning paper in the jury room and left it lying in the room. Luckily, the court reporter noticed the paper and removed it before the jury returned for service that day.

Many courts remove the television sets or arrange for the hotel to disconnect service to the jurors' rooms completely. Some hotels have the capacity to block all local programming which blocks local news coverage of the trial, and the parties often agree to this as an approved option. Many judges order disconnection of the televisions in rooms but provide a television room where the jurors can watch approved movies or other programming (per the court's review) under officer supervision. Again, these restrictions are within the court's discretion and should be addressed prior to sending the jury to the motel for the night. (Of course, admonishments should be given repeatedly upon each adjournment).

c. Keys, Telephones, and Cellphones

Telephones should be removed from all rooms of jury members and cellphones[5] should be either left in the car or at home or turned in to

[5] "In the absence of any specific directives from our supreme court, … trial courts, particularly those conducting trials involving sequestered juries, should consider limiting jurors' access to personal electronic devices and utilizing the pattern jury instruction regarding electronic communication." State v. Rayfield, 507 S.W.3d 682, 705 (Tenn. Crim. App. 2015), perm. app. denied, (Tenn. 2016).

the court officers and kept in the court officer's room. Car keys should also be turned in to court officers to avoid any juror going to their vehicle alone for any reason. One way to handle this issue is to have jurors place their keys, cellphone, and any charger in a ziplock bag with the juror's name on the bag to provide to the officer to keep in the officer's room.

Some courts allow supervised telephone contact between jurors and family members on a limited basis. Court officers must coordinate the calls. The best practice, as suggested by at least one appellate court, is to have all calls made on a speaker phone in the presence of the officer. State v. Tony Edward Bigoms, 2017 WL 2562176 (Tenn. Crim. App. June 7, 2017) ("To ensure that jurors do not leave the attendance and control of the court officers, the better practice would be to have the jurors make phone calls one at a time in the presence of a court officer and on speaker phone so the officer can hear both sides of the conversation."). The speaker phone may be a landline or cellphone. The court in State v. Joshua Hunter Bargery, 2017 WL 4466559 (Tenn. Crim. App. Oct. 6, 2017), thoroughly discussed the issue of phone calls and sequestered juries and recent case law related to the issue:

> *At the end of the first day of trial, the trial court provided the jury with thorough instructions regarding its sequestration. Within these instructions, the trial court stated, "[Y]ou're not gonna have your cell phone. ... You're not gonna have any way to communicate outside except by the telephone that they have available for you to use." The Defendant did not raise an objection to the jurors' making telephone calls at the time but raised it as an issue in his motion for new trial. During the motion for new trial hearing, eleven court officers and five jurors testified. The evidence established that, during the course of trial, jurors were allowed to make telephone calls to family members. The jurors were not allowed cell phones and the telephones in their hotel rooms were removed. Under the supervision of court officers, jurors made telephone calls one at a time inside a hotel room. Court officers logged the jurors' calls, including the name of the juror, the person called, and the subject of each call. During jurors' telephone calls, court officers stood within two feet of the jurors and heard one full*

side of the conversation. The State introduced as an exhibit an extensive call log, which contained a description of the topic of the jurors' conversation for each telephone call.

*From our review, it appears that panels of this court have addressed this issue on a few occasions, with varying results. In State v. Tracey Pendergrass, No. 03C01–9608–CC–00310, 1997 WL 760724, at *7–9 (Tenn. Crim. App. Dec. 11, 1997), perm. app. denied (Tenn. Sept. 21, 1998), the defendant argued that the trial court abused its discretion when it refused to grant the defendant's motion for mistrial after four jurors on the sequestered jury were allowed to use the telephone during the jury's deliberations to make arrangements for staying over another night. During a hearing on the motion, the three court officers who had taken the jurors to make their telephone calls testified. Id. at *8. One of the officers testified that he "did not hear any portions of the conversations" while the other court officers testified that they "did not know what was being said on the other end of the telephone conversations." Id. The trial court determined that there had not "been anything improper" and that there was no "prejudice to the defendant as far as the activities of the jury." Id. Upon review, this court concluded that a jury separation had occurred. Id. The court, however, concluded that the trial court had used an erroneous test in resolving the issue and remanded the matter to the trial court for an evidentiary hearing, in which the State would be allowed the opportunity to show that the communications to each juror were "upon subjects not involving the trial and that no impressions other than those drawn from the testimony were made upon the juror's mind." Id. at *8–9.*

*In State v. Thomas Dee Huskey, No. E1999–00438–CCA–R3–CD, 2002 WL 1400059, at *185–86 (Tenn. Crim. App. June 28, 2002), perm. app. denied (Tenn. Feb. 18, 2003), the court again addressed this issue when the defendant asserted that a jury separation had occurred when sequestered jurors were allowed telephone contact with family members. However, this court concluded that allowing the jurors to call their families in the presence of a court officer was not error. Id. at *186. Citing Bondurant, the court reasoned that the trial court specifically instructed the jurors and the court officers that any phone calls would occur in the officer's presence, and there was no evidence in the record that any juror "passed from the attendance and control of the court officer." Id.*

*Recently, in State v. Tony Edward Bigoms, No. E2015–02475–CCA–R3–CD, 2017 WL 2562176, at *17 (Tenn. Crim. App. June 7, 2017), no perm. app. filed, multiple members of the sequestered jury made telephone calls throughout the defendant's trial, but a court officer was in the room with the jurors when the telephone calls were made. Noting the factual similarities with Tracey Pendergrass, Judge Thomas concluded that a jury separation had occurred. Id. Judge Thomas noted that the telephone*

calls were made in groups of three and four jurors with all of the conversations occurring at the same time and that, "[m]ore importantly, the court officers were able to hear only the jurors' side of the conversations and did not hear what the outside persons said to the jurors." Id. However, Judge Montgomery wrote a separate concurring opinion, in which Judge Easter joined. Id. (Montgomery, J., concurring). Judge Montgomery concluded that no jury separation occurred when jurors called family members in the presence of court officers, reasoning:

> *The jurors in the present case remained within the custody and control of court officers at all times relevant to the telephone calls. The court officers were present, and the jurors were in the presence of other jurors during the calls. The calls were brief, and what the jurors said could be heard by the court officers. The jurors were not allowed to keep their cell phones during the trial, and their only opportunity to use them was brief, supervised, and communal. Neither the testifying court officers nor the jury foreman had any indication that any information relevant to the trial had been received during the telephone calls and, in fact, all indications were to the contrary. In my view, the circumstances and environment in which the calls were made created no meaningful opportunity for a violation of the rule of sequestration to occur, and no evidence shows that one did, in fact, take place.*

Id.

*We are persuaded by the rationale in Judge Montgomery's concurring opinion in Tony Edward Bigoms and conclude that the Defendant has not established a separation based on the jurors' phone calls to family members. See also Thomas Dee Huskey, 2002 WL 1400059, at *185–86. In this case, the trial court specifically instructed the jurors and the court officers that telephone calls would occur in the officer's presence, and the Defendant did not object. Moreover, the record shows that the jurors remained within the custody and control of court officers at all times relevant to the telephone calls. Court officers allowed jurors to make the calls, one at a time, through the use of a designated hotel room telephone. The calls were short and were to family members only. Court officers logged each call, noting the name of the juror, the person called, and the subject of the call. The court officers were instructed to stand within two feet of jurors during the telephone calls and to listen to the jurors' conversations. From their vantage point, court officers could hear one full side of the conversation and could observe the jurors' demeanor and tone of voice. At the motion for new trial hearing, the court officers who supervised the phone calls testified that there was never any indication that information relevant to the trial had been received by the jurors during the phone calls. We conclude that the evidence does not establish that any juror "passed*

> *from the attendance and control of the court officer."* Bondurant, *4 S.W.3d at 671.*
>
> *Even if the Defendant had established a separation based on the jurors' telephone calls to family members, we would conclude that the State met its burden of showing that such separation did not result in prejudice to the Defendant. In addressing the issue of juror separation, the trial court found that there was "no basis to believe that the jury ever received any extraneous information about this trial[,]" and the record supports this finding. Each of the court officers who supervised the jurors' telephone calls testified that they were close enough to hear the jurors' conversations, and there was no indication that the jurors' received information about the trial during the calls. The phone call log shows that the topics of conversation between the jurors and family members consisted of general matters such as jurors needing supplies and jurors checking on children or other family members. Additionally, five jurors testified that their telephone calls were monitored and that they did not discuss anything related to the Defendant's trial during the calls. Consequently, any jury separation did not result in prejudice to the Defendant, and the Defendant is not entitled to a new trial on this basis.* See Bondurant, *4 S.W.3d at 672.*

(Footnote omitted).

2. Other Devices such as Laptops, Tablets, Kindles, MP3 Players, Etc.

As technology continually advances, the court finds itself addressing new ways for jurors to be exposed to extraneous sources. Due to the substantial amount of extraneous information available today, all devices with internet capabilities should be excluded from juror access. State v. Rayfield, 507 S.W.3d 682 (Tenn. Crim. App. 2015), perm. app. denied, (Tenn. 2016) ("In the absence of any specific directives from our supreme court, … trial courts, particularly those conducting trials involving sequestered juries, should consider limiting jurors' access to personal electronic devices and utilizing the pattern jury instruction regarding electronic communication.").

As mentioned above, the court may want to allow DVD movies from an approved list of movies. Similarly, the court may place limits on other communications or perhaps reading material. For example, many people read book on devices, such as Kindles or tablets which have

internet access. These are also very problematic and should be restricted.

3. Other Hotel Related Issues

a. Playing cards and using the hotel exercise room

Jurors often play cards or games with each other during their down time at the hotel. Sometimes, this is done in areas where the jurors have reserved space for gathering, while other times this may be in jurors' rooms. In State v. Bargery, supra, the court also addressed claims made by a defendant that there was an issue of jury separation and premature deliberations when jurors were allowed to play cards together in jurors' rooms and exercise in the hotel exercise room. The court, however, found no issue of jury separation:

> *Upon review, we conclude that the Defendant has failed to show a jury separation based on jurors' playing cards and using the hotel exercise room. First, the card games are not separations because there is no indication that anyone other than one or more of the jurors was in the hotel room during the games. As noted by the trial court in addressing this issue, the jury was sequestered in a hotel where court officers were on duty twenty-four hours a day, and there was a camera monitoring the activities of the jurors. At most, the jurors' meeting for card games raises a concern that jurors might engage in premature deliberations; however, Ms. Edwards testified that jurors were "very careful" not to discuss the trial while playing cards. As for jurors' use of the hotel exercise room, the record reflects that the jurors were accompanied by court officers at all times while exercising and that jurors had no contact with third parties. Because no juror passed "from the attendance and control of the court officer," the Defendant has not established a jury separation during card games or during the use of the exercise room. Bondurant, 4 S.W.3d at 671.*

b. Family Visits

Again, in State v. Bargery, supra, the court addressed issues related to supervised weekend visitation with family members and found no violation of the required separation:

During the three-week trial, jurors were allowed two family member visits. The guidelines for the visits were "very strict," and jurors were told that, if they were caught discussing the case with family members, the trial would end. The visits were held in a confined space, and jurors and family members were supervised by multiple court officers. The court officers patrolled the designated visitation area, listening in on the conversations taking place between jurors and family members, and from the record there is no indication that jurors visited with family members outside the designated area. Officers could "understand what [jurors] were saying enough to know what they were and were not talking about," and they never heard jurors and family members discussing the Defendant's case. Because no juror passed "from the attendance and control of the court officer," the Defendant has not established a jury separation during family member visitations. Bondurant, *4 S.W.3d at 671;* see e.g., Tony Edward Bigoms, *2017 WL 2562176, at *18 (finding no jury separation when jurors and their family members were in the same room with the doors locked, three to four court officers observed their conversations, and jurors were instructed not to discuss the trial with family members);* James Dellinger and Gary Wayne Sutton v. State, *No. E2004–01068–CCA–R3–PC, 2006 WL 1679595, at *23 (Tenn. Crim. App. June 19, 2006) (concluding that jurors were not outside the attendance and control of the court officers when the family visitation was confined to one large room and there was no evidence that jurors left the designated area),* perm. app. denied *(Tenn. Oct. 30, 2006).*

c. Hotel Breakfast Buffet

In State v. Bargery, supra, the court discussed the breakfast buffet at a hotel:

Testimony at the motion for new trial hearing established that jurors ate breakfast every morning at the hotel where they were sequestered. Although there would typically be a few hotel guests eating at the same time, court officers were in the breakfast room supervising jurors at all times. Jurors sat at tables with other jurors, and there is no indication in the record of any interaction with third

parties in the room. Because the record does not support the Defendant's claim of a jury separation during breakfast, he is not entitled to relief.

4. Transport

The Court should also be mindful of the need to transport the sequestered jurors as a unit. Usually, this aspect requires coordination with other agencies. In some locales, a school bus, sheriff's van or other government vehicle is used to transport jurors. When a juror is transported from another jurisdiction to your court (Change of Venire), the court will want to ensure safe comfortable travel for the jurors. Some courts have secured the services of a bus line for transport.

The court officers or other guards (having been sworn) must travel with the jury at all times. It is their duty to keep the jury separate and apart from all others and prevent extraneous contact. Officers will also quell the jurors' temptation to discuss the case prior to deliberations.

If more than one vehicle is needed to transport the jury, each vehicle must contain a sworn officer or guard.

> **NOTE:** It is always a good idea to swear several additional officers as back up officers in the event an officer must be unexpectedly replaced.

Jurors who have been sworn may not drive their personal vehicles between the courthouse and the hotel. See Bondurant, supra.

5. Sunday/Sabbath Court

In State v. King, 40 S.W.3d 442, 450 (Tenn. 2001), the court addressed conducting trials on Sundays or the Sabbath. In King, the court determined that performing any judicial function, including a trial, on

Sunday (or Sabbath) does not violate the Tennessee Constitution or any Tennessee statutory provision.

The issue of whether to conduct judicial functions on Sunday rests within the sound discretion of the trial court. The trial court should (1) be deferential to the preferences of the litigants, witnesses, jurors, and attorneys; (2) be mindful of the need for every participant in a trial proceeding to be prepared and rested; (3) respect and accommodate the genuinely-held religious view of any litigant, witness, juror or attorney; and (4) must weigh all of these concerns against whatever pressing need or compelling interest may necessitate a Sunday or Sabbath proceeding. King, 40 S.W.3d at 449.

Many times the courts will break on Sunday to give all participants a day of rest from the trial. The decision sometimes depends on the progression of the trial and the stage of the trial as of Sunday. As noted, it is permissible to conduct court on Sunday applying the considerations set out in King.

The court should be mindful, however, that different faiths are likely represented on the jury and that some religions deem Saturday as the Sabbath. Therefore, they may pose an objection to Saturday court. In an attempt to accommodate all religions, some courts hold court for half a day on Saturday and half a day on Sunday.

On the flip side, what if a participant wants to attend a worship service (whether or not court is held)? On occasion a juror will express the desire to attend a worship service even though sequestered. This decision requires a delicate balance with multi-faceted considerations. Some courts have brought a non-denominational speaker before the group of jurors at the hotel to conduct a generic (denomination-wise) service on a voluntary basis. Others have permitted group attendance at a service all the while being separate (and coordinated with a particular church). The court should weigh the factors present and make a decision that best serves the interest of maintaining the integrity of the

trial. Many times the court finds itself unable to reach a consensus with jurors and simply denies the request to attend.

6. Voting

Compare and contrast the juror's right to vote. On occasion a trial falls within an election cycle and the sequestered jurors express their interest in voting. Typically, the local election officials carefully coordinate a time and place for the jurors to vote. Again, the court should ensure the jurors stay together (except while in a voting booth).

The Court may also suggest that jurors early vote, if possible.

7. Late Evening Hours & Day-Off Issues

During most trials, the court must decide how late to proceed each evening. Some courts have a standard cut-off time each day to be sure all parties are rested. Other courts will entertain suggestions from the parties and jurors as to how late they want to proceed. Many times the jurors and/or parties want to go beyond a normal court day. Other times, the court may attempt to accommodate a particular witness and allow them to testify a little later than usual. Each trial brings different scenarios.

Late evening hours and day-off issues are left to the discretion of the trial court. See State v. Reid, 91 S.W.3d 247, 300 (Tenn. 2002) (appendix).

A typical death penalty trial will also have times when the jury will have "down time." In addition to Sunday or Sabbath, the trial could experience a slight delay between the guilt and penalty phases due to expert travel or information exchange. The court may be required to fill this "down time" with other activities.

During some trials in Tennessee, the courts have arranged for the jurors to see an approved movie, to visit a specific site, or on rare occasions arrange for a supervised meeting with families. (One court reserved a senior citizens center and allowed the jurors to have a supervised visit with their families). So long as the jurors remain "sequestered" for the purposes of the law and under the supervision of court officers, the court can be creative in its entertainment of the jury on these days off. However, it is important to have a sufficient number of officers present in order to maintain the necessary supervision.

8. Spaces Used by Juries and the Jury Room

Courts must be mindful of the spaces used by juries and for jury deliberations and what is contained in the spaces. In State v. Tim Gilbert, 2021 WL 5755018 (Tenn. Crim. App. Dec. 3, 2021), the appellate court held that Confederate memorabilia in the room used as a jury room exposed the jury to extraneous information which established an improper outside influence thereby creating a presumption of prejudice and shifting the burden to the State to show the information was harmless in order to sustain the verdict.

9. Education of Staff

In many communities a death penalty case is a rare event. Depending on the amount of publicity, the case can consume a community. The court must take measures to educate their staff as to the sensitivities of a capital case and the critical nature of the sequestered jury. Of primary concern are those parties responsible for the care and transport of the jury. These individuals are the sole shield between the jury and the public or extraneous sources. Bailiffs, court officers, and/or deputies should be sworn before serving and trained in the transport and care of a sequestered capital jury. These individuals should understand the unique nature of a capital case, the types of prohibited contact or communication, and the nature of a sequestered jury, including the meaning of the terms.

Chapter 6

Guilt Phase

Chapter 6

Guilt Phase

A. RULE OF SEQUESTRATION

1. General Witnesses

Tenn. R. Evid. 615

> **At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. . . . The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.**

2. Victim's Family

Tennessee Code Annotated section 39-13-204(c) provides, in pertinent part:

> **. . . The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.**

3. Defendant's Family

Formerly, no authority existed permitting a defendant's family to remain in the courtroom during the guilt/innocence

phase and testify at the penalty phase. However, following the Tennessee Supreme Court's opinion in State v. Jordan, 325 S.W.3d 1 (Tenn. 2010), in most instances a defendant's family member will be allowed to remain in the courtroom if the family member will testify only during the penalty phase. This principle is based on the defendant's right to present mitigating evidence at the sentencing hearing. Presumably, the trial court can still exclude a defendant's family members from the courtroom if they will testify during the guilt/innocence phase.

In Jordan, the defendant filed a motion before trial to permit any friends or family who would be testifying only at the capital sentencing to remain in the courtroom throughout trial. Id. at 37. The trial court denied the motion. Id. at 38. The defendant later filed a renewed motion limiting the request to family members; the trial court denied the renewed motion. Id. During the capital sentencing phase, the defendant attempted to call his father, who had been in the courtroom during the guilt/innocence phase, as a mitigation witness. Id. The trial court refused to permit the defendant's father to testify at sentencing. Id. The Tennessee Supreme Court held that the trial court erred in refusing to allow the defendant's father to testify during the penalty phase; however, the court concluded that the trial court's error was harmless because the "essence" of the father's proposed mitigation testimony was contained in the testimony of the defendant's other mitigation witnesses. Id. at 52.

The Jordan rule does not stand for the proposition that a defendant's penalty-phase witness can never be prevented from testifying at the penalty phase when the witness was inside the courtroom during the guilt/innocence phase. However, the trial court must conduct an on-the-record balancing test of several factors before doing so:

> *a trial court should not automatically or arbitrarily exclude a defense witness from a capital sentencing trial simply on the basis that the rule was invoked at the beginning of trial and the*

> *witness nevertheless remained in the courtroom. Rather, the court should exercise its discretion and consider all relevant circumstances. Those circumstances may include, but are not limited to: (1) the reasons for the proffered witness's presence during the trial in contravention of the sequestration order; (2) any complicity of the defendant and/or his counsel in the violation of a sequestration order; (3) the relevance of the proffered witness's testimony; (4) the relationship, if any, between the proffered witness's proposed testimony and the testimony he or she heard in violation of the rule; (5) the potential impact on the proffered witness's testimony by proof heard in violation of the rule; (6) the extent to which the proffered testimony is cumulative; (7) the efficacy of less drastic remedies; (8) the policies favoring admission of the witness's testimony; and (9) the extent to which allowing the witness to testify will contravene the purposes served by the rule. To reiterate, the trial court must "inquir[e] into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family."* Sims,[1] *45 S.W.3d at 14. In conducting this evaluation, the trial court should place on the record its analysis and the reasons for its ruling. In no event should a trial court automatically or mechanically rely on Tennessee Rule of Evidence 615 to exclude mitigation proof from a capital sentencing trial on the basis that the witness was present during the guilt/innocence phase of the trial.* See Reid,[2] *213 S.W.3d at 817 (in determining whether to admit or exclude evidence at a capital sentencing hearing, the test is whether the evidence is "reliable and relevant to one of the aggravating or mitigating circumstances").*

Jordan, 325 S.W.3d at 48.

B. DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL

A defendant has a fundamental right under both the federal and state constitutions to be present during his or her trial. See State v. Muse, 967 S.W.2d 764, 766-67 (Tenn. 1998) (citing U.S. Const. amends. V,

[1] State v. Sims, 45 S.W.3d 1, 14 (Tenn. 2001).
[2] State v. Reid, 213 S.W.3d 792, 817 (Tenn. 2006).

VI, XIV; Tenn. Const. art. I, § 9). "Presence at trial means that the defendant must be present in court from the beginning of the impaneling of the jury until the reception of the verdict and the discharge of the jury." Muse, 967 S.W.2d at 766 (citation and internal quotations omitted).

1. Presence Required

Tennessee Rule of Criminal Procedure 43(a) states:

> **Unless excused by the court on defendant's motion or as otherwise provided by this rule, the defendant shall be present at :**
> **(1) the arraignment;**
> **(2) every stage of the trial, including the impaneling of the jury and the return of the verdict; and**
> **(3) the imposition of sentence.**

2. Waiver of Right to be Present

a. Voluntary Absence

Tennessee Rule of Criminal Procedure 43(b)(1) states:

> **(b) CONTINUED PRESENCE NOT REQUIRED. − The further progress of the trial, to and including the return of the verdict and imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:**
> **(1) VOLUNTARY ABSENCE. − Voluntarily is absent after the trial has commenced, whether or not he or she has been informed by the court of the obligation to remain during the trial[.]**

NOTE: See State v. Carruthers, 35 S.W.3d 516, 566-69 (Tenn. 2000) (Defendant waived his right to be present at the sentencing hearing where he was voluntarily absent from the sentencing hearing, and the trial judge

had done everything possible to persuade him to attend).

NOTE: See also State v. Mark A. Vestal, 2013 WL 4027452 at **5-6 (Tenn. Crim. App. Aug. 7, 2013) (no perm. app. filed) (During voir dire, defendant asked to be absent from jury selection. Court granted request but did not advise defendant of his right to be present during voir dire before defendant left; on appeal, parties agreed defendant entitled to new trial, despite language in Rule 43(b) suggesting that court need not inform defendant of "obligation to remain").

NOTE: Also, per Tenn. R. Crim. P. 43(c)(1), "If a trial proceeds in the voluntary absence of the defendant or after the defendant's removal from the courtroom, he or she must be represented in court by counsel."

b. Disruptive Defendants

Tennessee Rule of Criminal Procedure 43(b)(2) states:

> **(b) CONTINUED PRESENCE NOT REQUIRED. − The further progress of the trial, to and including the return of the verdict and imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:**
>
> **…**
>
> **(2) After being warned by the court that disruptive conduct will result in removal from the courtroom, persists in conduct justifying exclusion from the courtroom.**

(1) Grounds for Removal

A defendant "may sacrifice his right to be present at trial if he insists on conducting himself in a manner so disorderly, disruptive, or disrespectful that the trial cannot proceed with him present in the courtroom." State v. Cole, 629 S.W.2d 915, 917 (Tenn. Crim. App. 1981).

Before expelling the defendant, the trial court should warn the defendant that additional disruptions will lead to removal. Failure to issue such a warning may lead to a new trial. See State v. Tommy Earl Jones, 2011 WL 1631832 at *9 (Tenn. Crim. App. Apr. 19, 2011) (trial court warned unruly defendant that he would be shackled and have his mouth taped shut if he persisted but did not advise him that he would be sent out; court excluded defendant after behavior persisted; new trial ordered by appellate court).

(2) Procedure Following Removal

Tenn. R. Crim. P. 43(c), entitled "Procedure after Voluntary Absence or Removal", states:

> **(1) If a trial proceeds in the voluntary absence of the defendant or after the defendant's removal from the courtroom, he or she must be represented in court by counsel.**
>
> **(2) If the defendant is removed from the courtroom for disruptive behavior under Rule 43(b)(2):**
> **(A) The defendant shall be given reasonable opportunity to communicate with counsel during the trial; and**
> **(B) The court shall determine at reasonable intervals whether the defendant**

> **indicates a willingness to avoid creating a disturbance if allowed to return to the courtroom. The court shall permit the defendant to return when the defendant so signifies and the court reasonably believes the defendant.**

(Emphasis added).

Failure to check with the defendant "at reasonable intervals" to determine whether he wishes to return to the courtroom can be reversible error. See State v. Far, 51 S.W.3d 222, 228 (Tenn. Crim. App. 2001) (defense counsel checked with expelled defendant once and, finding him asleep, did not wake him to inquire about returning to court. No additional check with defendant until "trial was virtually over. ... This is not the type of periodic determination envisioned by the rule.").

3. Defendant *in absentia* with appointed elbow counsel:

When a defendant is representing himself with the assistance of elbow counsel, and defendant becomes disruptive, the appropriate course is to allow elbow counsel to continue with his representation in defendant's absence.

In State v. Ray Saulsberry, 2004 WL 221214 at **2-4 (Tenn. Crim. App. Jan. 30, 2004), the defendant sought to replace his appointed attorney the day before trial. When that request was denied, defendant elected to represent himself. Id. at *4. The trial court appointed his public defender as elbow counsel. Id. On the day of trial, the defendant became disruptive and was removed from the courtroom. Id. at **4-5. Elbow counsel was not required to continue his assistance; the trial court reasoned that such a procedure would violate the defendant's right to self-representation. Id. at **5-12.

After reviewing the procedure for removal of a disruptive defendant and ultimately affirming the trial court's decision on that issue, the Court of Criminal Appeals held that when a defendant has elbow counsel appointed to him, it is error for the trial to proceed with the defendant *in absentia* and without the participation of elbow counsel. Id. at **13-16.

NOTE: Court limited the holding to the facts of this case, stating that the issue of how a trial court should proceed with a disruptive defendant who does not have elbow counsel is not before the court.

If a defendant conforms his behavior to the dictates of the court and to the court's satisfaction, he "shall" be allowed to return to the courtroom and resume self-representation based upon the language of Rule 43(c)(2)(B).

C. COURTROOM CONDUCT ISSUES

1. Restraints/Clothing

a. Restraints

Generally, the defendant has a constitutional right not to be seen in restraints during both the guilt/innocence phase and the penalty phase. See Deck v. Missouri, 544 U.S. 622, 632-33 (2005). However, the right to be free from visible restraints is not absolute, and the trial court may order shackling in light of "special circumstances" that must be "case specific" and reflect "particular concerns" relating to the defendant on trial. Id. at 633. The court must make an on-the-record determination of these special circumstances, which may include security concerns or escape risks. Id.

The Tennessee Supreme Court has also applied this holding to the use of non-visible restraints such as "shock belts." In Mobley v. State, 397 S.W.3d 70, 96-97 (Tenn. 2013), a post-conviction petitioner argued that the use of shock belts could produce a chilling effect for a defendant at trial, as the defendant may be preoccupied with the thought of the belt being employed rather than keeping up with the trial or conversing with counsel. The court announced a test that should be used whenever any in-court restraint is used, regardless of whether that restraint can be seen by the jury:

> *Although we are disinclined at this point to hold that a stun belt may not be used as an in-court restraint on a criminal defendant, we agree with the aforementioned courts that have found that the use of a stun belt implicates many of the same principles as the use of shackles. We are loathe to approve the use of a stun belt without a finding of necessity simply because a stun belt is ordinarily not visible. Accordingly, we conclude that the principles and procedures set forth in Willocks*[3] *apply to the use of a stun belt as an in-court restraint.*
>
> *To that end, we reiterate that there is a legal presumption against the use of in-court restraints. Willocks v. State, 546 S.W.2d at 821. To justify the use of restraints, the State bears the burden of demonstrating necessity that serves a legitimate interest, such as preventing escape, protecting those present in the courtroom, or maintaining order during trial. State v. Thompson,*[4] *832 S.W.2d at 580; Willocks v. State, 546 S.W.2d at 820. The trial court should consider all relevant circumstances, including without limitation: (1) the defendant's circumstances, such as record of past behavior, temperament, and the desperateness of his or her situation; (2) the state of the courtroom and courthouse; (3) the defendant's physical condition; and (4) whether there is a less onerous but adequate means*

[3] Willocks v. State, 546 S.W.2d 819 (Tenn. Crim. App. 1976).
[4] State v. Thompson, 832 S.W.2d 577 (Tenn. Crim. App. 1991).

> *of providing security. Lakin v. Stine, 431 F.3d 959, 964 (6th Cir. 2005); Kennedy v. Cardwell, 487 F.2d at 110-11. The trial court should consider the relevant circumstances against the backdrop of affording the defendant the physical indicia of innocence, ensuring the defendant's ability to communicate with counsel, protecting the defendant's ability to participate in his or her defense and offer testimony in his or her own behalf, and maintaining a dignified judicial process. See Deck v. Missouri,*[5] *544 U.S. at 630-32.*
>
> *The trial court must make particularized findings, and the better practice is to hold a hearing on the issue so that factual disputes may be resolved and evidence surrounding the decision may be adduced and made part of the record. Willocks v. State, 546 S.W.2d at 822. Only in this way will the record allow for meaningful appellate review. Of course, the decision to require the use of a stun belt is addressed to the sound discretion of the trial court. State v. Thompson, 832 S.W.2d at 580. As a final note, we point out that should a stun belt inadvertently become visible to the jury, the trial court should give cautionary instructions that it should in no way affect the jury's determinations. See Willocks v. State, 546 S.W.2d at 822.*

Mobley, 397 S.W.3d at 101.

This conclusion does not necessarily mean that a shock belt or other restraints can never be employed. For instance, in State v. Michael David Fields, 2013 WL 1803629 at *23 (Tenn. Crim. App. Apr. 30, 2013), perm. app. denied, (Tenn. Sept. 11, 2013), the defendant was initially tried on two counts of first degree murder; the trial court denied the State's request for a stun belt at that time. The trial resulted in a mistrial. Id. Before the retrial could occur, the defendant was convicted of first degree murder in a separate case. Id. The county sheriff requested a stun belt for the retrial, and the trial court approved it, based

[5] 544 U.S. 622, 630-32 (2005).

on the defendant's prior conviction for a violent felony. Id. The Court of Criminal Appeals found no error with the trial court's ruling. See also State v. Hall, 461 S.W.3d 469, 499-500 (Tenn. 2015) (no violation of defendants' rights in joint trial where codefendants wore leg shackles during trial, but shackles were not visible during trial; defendants were alleged to have committed homicides while on escape from prison, and one codefendant had history of other escapes from custody).

b. Clothing

"[C]ompelling an accused to wear jail clothing furthers no essential state policy." Estelle v. Williams, 425 U.S. 501, 505 (1976). Thus, "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes[.]" Id. at 512. However, "the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." Id. at 512-13.

The Tennessee Supreme Court has held that the viewing of a brief video recording depicting the defendant in prison attire does not "serve as a 'constant reminder' to the jury that the Defendant had been previously jailed and ... [does] not corrupt the presumption of innocence[.]" State v. Taylor, 240 S.W.3d 789, 797 (Tenn. 2007).

2. Police Presence/Show of Force

Police presence in the courtroom during trial is not the sort of "prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986).

In Holbrook, the court held that the presence of four uniformed state troopers seated in the first row of the audience (augmenting the normal courtroom security force of two deputy sheriffs and six committing squad officers) did not deny the defendant his right to a fair trial. See generally id. at 569-72. Specifically, the court held,

> *The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted as long as their numbers or weaponry do not suggest particular official concern or alarm.*
>
> *To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." However, "reason, principles, and common human experience" counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial..In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate."*

Id. at 569 (citations omitted).

3. Spectators' "Show of Support" for Victim's Family (wearing buttons/ribbons/shirts, carrying signs or photos, etc.)

Family and close friends of the deceased will often wear campaign-style buttons containing a picture of the deceased, or they may wear ribbons or clothing of a particular color. Defendants occasionally file motions to prevent such "shows of support," arguing that such displays prejudice the jury. The only United States Supreme Court case addressing the button issue essentially delegated the issue to the states.

In the United States Supreme Court case, Carey v. Musladin, 549 U.S. 70 (2006), a defendant in a California murder case filed a pretrial motion to prevent spectators from wearing buttons bearing the victim's photograph during trial. The trial court denied the motion, and "[o]n at least some of the trial's 14 days, some members of [the victim's] family wore buttons with a photo of [the victim] on them." 549 U.S. at 72. On appeal in the state courts, the California Court of Appeal "stated that Musladin had to show actual or inherent prejudice to succeed on his claim and cited Flynn ... as providing the test for inherent prejudice." Id. at 73. Although the state appellate court disapproved of the practice, the Court concluded that the buttons had not prejudiced the defendant; the Court concluded that the jury was unlikely to construe the victim's photographs as anything other than an outward sign of the family's grief. See id.

Musladin filed a federal habeas corpus action; the Ninth Circuit Court of Appeals reversed, holding that "the state court's application of a test for inherent prejudice that differed from the one stated in Williams and Flynn 'was contrary to a clearly established federal law and constituted an unreasonable application of that law.'" Id. at 74 (citing Musladin v. Lamarque, 427 F.3d 653, 657-58 (9th Cir. 2005)).

The Supreme Court acknowledged that it had never addressed the issue regarding the interrelation between spectator conduct and a defendant's fair trial rights. The Court stated that it had never applied the test for inherent prejudice stated in cases involving state conduct (such as forcing the defendant to wear prison garb or police presence in the courtroom) to spectator conduct and suggested that because such cases "ask[ed] whether the practices furthered an essential interest," perhaps such cases could apply only to state-sponsored practices. See id. at 76. The Court further opined that the California courts were not required to apply federal case law regarding coercive state action to Musladin's case. Id. at 77. Thus, "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" Id. (citing 28 U.S.C. § 2254(d)(1)).

Tennessee's appellate courts have had limited chances to review the issue. In State v. Davidson, 509 S.W.3d 156 (Tenn. 2016), the trial court permitted family members to wear buttons displaying the victims' photographs. The Tennessee Supreme Court described the restrictions imposed by the trial court:

> *the buttons could only be worn by the victims' immediate family members, defined as parents, siblings, and grandparents; the buttons had to be worn on or close to the lapel; the buttons could not be worn while the family member was testifying; the buttons could show only a photograph of the victim as a young adult; and the same button had to be worn throughout the trial. The trial court reasoned that the buttons would express nothing more than normal grief occasioned by losing a family member and would not brand Mr. Davidson with the mark of guilt. The trial court explicitly found that the buttons would not create an atmosphere of coercion or intimidation at trial. The trial court enforced the restrictions and during the trial, reminded spectators that only immediate family members could wear the buttons.*

Id. at 192.

On appeal, the Defendant argued the buttons "constituted impermissible victim impact evidence that showed the emotional effect of the murders on the families, thereby creating an unacceptable risk that the jurors would be unduly influenced by their own emotional responses." Id. The Defendant further argued the trial court's permitting spectators to wear buttons "created an inherently prejudicial courtroom condition that deprived him of his right to a fair trial." Id. Finally, the Defendant argued the trial court "failed to require spectators to follow the restrictions placed on the display of the buttons." Id.

On appeal, the Tennessee Supreme Court declined to impose a per se rule banning spectator buttons. Rather, the court extended the rules announced by the United States Supreme Court in Holbrook v. Flynn and Estelle v. Williams to spectator conduct. The Tennessee Supreme Court explained,

> *Under this framework, trial courts should consider the totality of the circumstances and decide the issue on a case-by-case basis. Factors to be considered include the size and appearance of the buttons; by whom, when, and where they are worn; and whether the buttons display only a photograph of the deceased or contain a message suggesting or advocating guilt or innocence. A trial court should not allow buttons to be worn if they are so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial or when the defendant establishes actual prejudice.*
>
> *In reaching this decision, we are guided by the decisions of courts from other jurisdictions allowing buttons and t-shirts with victim photographs and other memorial displays to be worn at trial in certain circumstances. See, e.g., United States v. Farmer, 583 F.3d 131, 149–50 (2d Cir. 2009) (holding that t-shirts displaying victim's photograph were not so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial); Overstreet v. State, 877 N.E.2d 144, 159 (Ind. 2008) (finding that defendant failed to show deficient*

performance by counsel for failing to object or move the trial court to disallow spectators from wearing buttons); State v. Iromuanya, 282 Neb. 798, 806 N.W.2d 404, 432 (2011) (holding that there was no reasonable probability that the wearing of memorial buttons by spectators displaying an in-life photograph of the victim created an unacceptable threat to the defendant's right to a fair trial); State v. Paige, 375 S.C. 643, 654 S.E.2d 300, 303–04 (S.C. Ct. App. 2007) (finding no actual or inherent prejudice resulted from the trial court's refusal to order spectators to remove buttons from their clothing); State v. Lord, 161 Wash.2d 276, 165 P.3d 1251, 1258–59 (2007) (en banc) (finding that buttons carrying in-life photograph of the victim were a silent display of affiliation, which did not explicitly advocate guilt or innocence, were not inherently prejudicial); In re Woods, 154 Wash.2d 400, 114 P.3d 607, 616–17 (2005) (en banc) (holding that black and orange ribbons worn by victims' families were not inherently prejudicial so as to taint the defendant's right to a fair trial).

Here, the trial court properly recognized that a fair trial requires the courtroom atmosphere to be free of coercion or intimidation. After consideration of Mr. Davidson's objections, the trial court established and enforced restrictions on the appearance and display of the buttons that minimized any prejudicial effect. The buttons were of reasonably small size, worn by only immediate family members, and contained an image of a deceased victim. They were not worn while the family member was testifying. The buttons did not convey a specific message suggesting or advocating guilt or innocence. The record does not indicate how many family members wore the buttons, the number of days they were worn, or whether any juror saw the buttons or was affected by the buttons. Although the trial court noted at one point during the trial that it observed non-family members wearing the buttons and cautioned against this, there is no indication that the trial court's restrictions on the display of the buttons were not heeded.

We conclude that Mr. Davidson failed to show that the buttons worn by the victims' immediate family members were so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial or that there was any actual prejudice.

State v. Davidson, 509 S.W.3d at 196-97.

It goes without saying that the trial court should preclude more egregious outward conduct (carrying photographs or signs, wearing t-shirts with messages, etc.) inside the courtroom.

Another issue the courts may face concerns the possibility of several uniformed law enforcement officers attending a trial in which the victim is a member of law enforcement. This issue is different from the "show of force" issue examined above, as the uniformed officers would not be supplying courtroom security. Tennessee's appellate courts do not appear to have addressed this situation, but courts in other jurisdictions have. In one case in which the defendant was accused of killing a correctional officer, the Eleventh Circuit Court of Appeals stated,

> *In order for [the defendant] to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice. Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L.Ed.2d 525 (1986); Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961). The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.' " Holbrook v. Flynn, 475 U.S. at 570, 106 S. Ct. at 1346 (quoting Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976)). This test requires us to examine two factors: first, whether there is an "impermissible factor coming into play" and second, whether it poses an "unacceptable risk." The Ninth Circuit has found one example of an impermissible factor. In Norris v. Risley, 918 F.2d 828 (9th Cir.1990), the court determined that spectators at a kidnapping and rape trial who were wearing buttons inscribed with the words "women against rape" posed an impermissible factor, "[b]ecause the buttons . . . conveyed an implied message [of guilt], and because the buttons were not subject to the constitutional safeguards of confrontation and cross examination, they are clearly the sort of 'impermissible factors' that courts must ensure receive no weight." Id. at 830.*
>
> *We also must examine the record to determine if these impermissible factors posed an "unacceptable risk." The*

> *Williams Court held that a risk becomes unacceptable when there is a "probability of deleterious effects." Williams, 425 U.S. at 504, 96 S. Ct. at 1693. Should [the defendant] be able to prove actual or inherent prejudice due to the presence of the uniformed prison guards then the state must justify their presence with an "essential state interest specific to [the] trial." Holbrook, 475 U.S. at 569, 106 S. Ct. at 1346.*

Woods v. Dugger, 923 F.2d 1454, 1457 (11th Cir. 1991).

In Woods, the defendant was tried in a "small rural county in Northern Florida" with a population of just over 10,000, one-third of whom were prisoners. Woods, 923 F.2d at 1457. The county of trial and an adjoining county were the site of four state prisons which employed over 2,000 persons and contributed significantly to the local economy. Id. at 1457-58. The murder of the prison guard led to extensive publicity and media coverage, and the majority of the jury pool had either heard of this case or knew someone who worked in the correctional industry. Id. at 1458. At trial, about half of the spectators in the small courtroom gallery wore prison guard uniforms despite regulations stating a correctional officer was not to wear a uniform outside of work except when traveling to and from work. Id. at 1458-59. The Eleventh Circuit granted a new trial, concluding the presence of several uniformed prison guards created an unacceptable risk of prejudice, and the state was unable to show an essential state interest that would have justified the presence of the officers. Id. at 1460.

Conversely, in People v. Ramirez, 479 P.3d 797, 803 (Cal. 2001), the defendant was convicted of killing a police officer. Roughly "17 or 18 uniformed officers" attended the trial on the day of jury instructions and guilt phase closing arguments. Id. at 818. The trial court rearranged seating, removing uniformed officers from the two rows closest to the jury. Id. at 819. In this case, the California Supreme Court concluded the defendant failed to establish inherent or actual prejudice; while there were several officers present on the last day of

trial, the gallery was full, and the record did not contain evidence regarding "the ratio of uniformed officers to nonuniformed spectators." Id. at 821. Finally, given the location of the officers in the back of the courtroom, the lack of any intimidating actions by the officers, and the trial court's instructions, there was no undue risk of prejudice. Id. at 823.

In State v. Schierman, 438 P.3d 1063, 1095-96 (Wash. 2018), the spouse of a homicide victim was a member of the military, and on "one or two occasions" persons in military fatigues sat in the courtroom. The appellate court in that case concluded there was no prejudice given the relatively small number of uniformed military personnel in the gallery, even if the surviving spouse testified about his military service. Id. at 1098.

D. EVIDENTIARY ISSUES[6]

1. "Life Photographs"

In July 2015, Tennessee Code Annotated section 40-38-103(c) was enacted, which states,

> **In a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney general to show the general appearance and condition of the victim while alive.**

The Court of Criminal Appeals has explained,

> *Although the statute in question mandates the admission of "an appropriate photograph of the victim while alive," the admission of such a photograph is limited to certain cases and*

[6] While many evidentiary issues may be encountered in any trial, whether capital or non-capital, this section only addresses some of the issues which have been addressed by the courts since the first edition of this book.

> *for certain purposes. See T.C.A. § 40-38-103(c). By the plain language of the statute, the trial court retains the discretion to determine whether a life photograph of a homicide victim is appropriate for admission. See id. Despite the statute's mandatory language, a trial court may nevertheless exclude a photograph, even if relevant to show the victim's "general appearance and condition ... while alive," see id., if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice," see Tenn. R. Evid. 403. Such a photograph would be inappropriate and, consequently, excludable under the statute. See T.C.A. § 40-38-103(c).*

State v. Glen Allen Donaldson, 2020 WL 2494478, at *10 (Tenn. Crim. App. May 14, 2020), perm. app. denied, (Tenn. Sept. 16, 2020). Furthermore, "The fact that the photograph includes another person with the victim does not necessarily render it unduly prejudicial." State v. Telvin Toles, 2019 WL 2167835, at *12 (Tenn. Crim. App. May 17, 2019), perm. app. denied, (Tenn. Sept. 20, 2019).

Before the above statute was enacted, the Tennessee Supreme Court had concluded that admitting photographs of homicide victims depicting victims while they were alive was erroneous because such pictures "typically lack relevance to the issues on trial" and because these pictures have "potential to unnecessarily arouse the sympathy of the jury." State v. Adams, 405 S.W.3d 641, 657 (Tenn. 2013) (citing numerous cases reaching same conclusion). The error was routinely held to be harmless, as the courts stated these photos add "'little or nothing to the sum total of knowledge of the jury.'" Adams, 405 S.W.3d at 658 (citing State v. Dicks, 615 S.W.2d 126, 128 (Tenn. 1981)).

2. Evidence of Escape or Attempt to Escape

"[E]vidence of escape or attempted escape after the commission of a crime can be relevant and admissible at trial to show guilt, knowledge of guilt, and consciousness of guilt." State v. Rimmer, 623 S.W.3d 235, 263-65 (Tenn. 2021); see also State v. Burton, 751 S.W.2d 440, 450 (Tenn.

Crim. App. 1988); State v. Jaron Harris, 2015 WL 871740, at *13 (Tenn. Crim. App. Feb. 28, 2015) "The stage of the proceedings or the length of time expiring between the commission of the offense and the escape, or attempt to escape, is irrelevant and has no bearing on the admissibility of such evidence." Burton, 751 S.W.2d at 450; see also Rimmer, 623 S.W.3d at 264. "Evidence of an escape, or attempt to escape, is admissible if it occurs shortly after arrest, incident to a preliminary hearing, while awaiting trial, or during the trial on the merits." Burton, 751 S.W.2d at 450. (internal citations omitted).

3. Competency of Witnesses

Questions regarding the qualifications, admissibility, relevancy, and competency of witness testimony are matters left within the broad discretion of the trial court. See State v. Nash, 294 S.W.3d 541, 548 (Tenn. 2009).

a. Generally

Every person is presumed to be competent as a witness. Tenn. R. Evid. 601; Nash, 294 S.W.3d at 548; Berry v. State, 366 S.W.3d 160, 181 (Tenn. Crim. App. 2011).

Once the witness is deemed competent, any problems regarding the witness's ability to testify go to the weight of the testimony, not its admissibility. See State v. McGee, 605 S.W.2d 840, 841 (Tenn. Crim. App. 1980) (testifying victim was 93 years old, had a faltering memory, and was blind in one eye).

A mentally incompetent witness may testify if he/she is able to understand the obligations of an oath and has personal knowledge of the matter about which he/she expects to testify. Berry, 366 S.W.3d at 181; State v. Carruthers, 35 S.W.3d 516, 576 (Tenn. 2000)

(Appendix); State v. Caughron, 855 S.W.2d 526, 538 (Tenn. 1993).

The trial court cannot order a physical, psychiatric, or psychological examination of a witness. Carruthers, 35 S.W.3d at 575-76 (Appendix) (citing State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981)).

b. Child Witness

"When examining a child's competency to testify, a judge should determine whether the child understands the nature and meaning of an oath, has the intelligence to understand the subject matter of the testimony, and can relate the facts accurately." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Fears, 659 S.W.2d 370, 375 (Tenn. Crim. App.1983)).

4. Threats Against Witnesses

"Generally, evidence of threats against witnesses attributed to the accused is probative as being either (1) conduct inconsistent with the accused's claim of innocence or (2) conduct consistent with the theory that the making of such threats evinces a consciousness of guilt." State v. Austin, 87 S.W.3d 447, 477 (Tenn. 2002) (Appendix); State v. Markreo Quintez Springer and William Mozell Coley, 2014 WL 2828932, at *17 (Tenn. Crim. App. June 20, 2014); State v. Bruce D. Mendenhall, 2013 WL 430329, at *19 (Tenn. Crim. App. Feb. 4, 2013).

5. Confessions and Extrajudicial Statements

a. Modified Trustworthiness Standard

It has long been held that a criminal conviction cannot be based solely on a defendant's uncorroborated confession. See State v. Wagner, 382 S.W.3d 289, 297

(Tenn. 2012). For the longest time, only "slight" corroboration was needed, but the Tennessee Supreme Court has since adopted a "modified trustworthiness" standard in determining whether a confession is sufficiently corroborated:

> *Under the modified trustworthiness standard, a defendant's extrajudicial confession is sufficient to support a conviction only if the State introduces "independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury."* State v. Lucas,[7] *152 A.2d at 60. When the crime is of a type that does not result in a tangible injury, "the corroborative evidence must implicate the accused in order to show that a crime has been committed."* Smith v. United States[8] *348 U.S. at 154;* United States v. Brown,[9] *617 F.3d at 862–63.*
>
> *The modified trustworthiness standard is not a lesser standard than the traditional corpus delicti rule. Its focus is different. While the traditional rule required only "slight" evidence of the corpus delicti, the trustworthiness standard requires "substantial" independent evidence to bolster a defendant's extrajudicial confession or admission.* Opper v. United States,[10] *348 U.S. at 93;* Smith v. United States, *348 U.S. at 75. Because the forces of the modified trustworthiness standard is different, the following guidelines will help the bench and bar apply this standard in future cases.*
>
> *Here is the "modified trustworthiness" corroboration test in a nutshell. When a defendant challenges the admission of his extrajudicial confession on lack-of-corroboration grounds, the trial court should begin by asking whether the charged offense is one that involves a tangible injury. If the answer is yes, then the State must*

[7] State v. Lucas, 152 A.2d 50, 60 (N.J. 1959).
[8] Smith v. United States, 348 U.S. 147, 154 (1954).
[9] United States v. Brown, 617 F.3d 857, 862-63 (6th Cir. 2010).
[10] Opper v. United States, 348 U.S. 84, 93 (1954).

> *prove substantial independent evidence tending to show that the defendant's statement is trustworthy, plus independent prima facie evidence that the injury occurred. If the answer is no, then the State must provide substantial independent evidence tending to show that the defendant's statement is trustworthy and the evidence must link the defendant to the crime.*

State v. Bishop, 431 S.W.3d 22, 58 (Tenn. 2014). Although the modified trustworthiness test will mostly be an issue for appellate courts, this passage from Bishop suggests trial courts could potentially encounter the issue in pretrial motions to suppress a defendant's statement and in determining whether sufficient evidence exists to charge the jury with offenses based largely on a defendant's confession.

b. Invocation of Right to Counsel and/or Right to Remain Silent

Should the defendant wish to invoke his right to remain silent, such a request must be unequivocal. See Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010) (prolonged silence in the face of repeated police interrogation did not amount to unambiguous invocation of right to remain silent); State v. Dotson, 450 S.W.3d 1, 52-53 (Tenn. 2014) (defendant's statement that he did not wish to speak to interrogating officers any longer but was willing to talk to other officers did not amount to unambiguous invocation of right to remain silent); State v. Climer, 400 S.W.3d 537, 556-57 (Tenn. 2013) (right to remain silent).

Regarding the right to counsel, in State v. Saylor, 117 S.W.3d 239, 246 (Tenn. 2003), the Tennessee Supreme Court concluded that the "accused 'must articulate his desire to have counsel present sufficiently that a reasonable [police] officer ... would understand the statement to be a request for an attorney.'" (citations

omitted) There is no requirement that officers clarify equivocal requests for counsel. See Climer, 400 S.W.3d at 559-61. However, resolving such ambiguity "will often be good police practice." Id. at 562 n.14. "Questions that merely probe the parameters of Miranda rights are properly characterized as 'equivocal statements made by a person who is still in the decision making process'" and are inadequate to invoke the right to counsel. Id. at 563 (quoting Saylor, 117 S.W.3d at 246). For examples of equivocal, constitutionally inadequate requests for counsel, see Climer, 400 S.W.3d at 563-64.

c. Admissibility of Statements to Private Persons

Unlike cases involving searches and seizures in which a court must determine whether a private person conducting a search qualifies as a "state agent" and in which the products of such search are only admissible if the private person had a "legitimate independent motivation" for the person's actions, "[i]n cases that involve suspects making confessions to friends, relatives, and other associates, the law need not be concerned with whether that confidant could properly be labeled as a private citizen or an agent of the State." State v. Sanders, 452 S.W.3d 300, 311 (Tenn. 2014.).

> *As long as a suspect's incriminating statements are voluntary, it makes no constitutional difference whether the person who overhears the confession is an undercover police officer, an associate who later relays the confession to the authorities, or an associate who is already cooperating with the police and using a police recording or transmitting device. See United States v. White,*[11] *401 U.S. at 751–53, 91 S. Ct. 1122 (discussing these scenarios). In circumstances like the one at issue here, courts need not expend their energies to determine the point at which a suspect's confidant becomes a*

[11] United States v. White, 401 U.S. 745, 751-53 (1971).

government agent. Again, the constitution "gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent," even when "that same agent has recorded or transmitted the conversations which are later offered in evidence." United States v. White*, 401 U.S. at 752, 91 S. Ct. 1122. As the United States Supreme Court cautioned, a person "contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . [T]he risk is his."* United States v. White*, 401 U.S. at 752, 91 S. Ct. 1122;* see also Lopez v. United States*,[12] 373 U.S. at 440, 83 S. Ct. 1381 (finding "no invasion of constitutionally protected rights" and "no act of any kind which could justify the creation of an exclusionary rule" when an IRS employee wore a body wire and extracted incriminating statements from a hotel owner during a bribery sting operation). If the federal and state constitutions do not protect a suspect from being surreptitiously recorded by undercover law enforcement officers or by co-conspirators acting as informants, we likewise see no reason why the constitution should protect suspects from informants who happen to be their wives, family members, or former lovers.*

. . .

Accordingly, courts need not worry themselves over whether an informant in a "misplaced trust" case was a private individual or a state agent. The exclusionary rule under the Fifth Amendment is a prophylactic measure designed to deter police misconduct. In "misplaced trust" cases, there is no police misconduct to be deterred. In the early stages of an investigation, it is constitutionally acceptable for the police to cooperate with friends or relatives of the victim or the suspect to see if these individuals can goad the suspect into confessing. See United States v. Henry*, 447 U.S. 264, 272, 100 S. Ct. 2183, 65 L.Ed.2d 115 (1980) ("[T]he Fifth Amendment has been held not to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for*

[12] Lopez v. United States, 373 U.S. 427, 440 (1963).

> *compulsion."); see also Coolidge v. New Hampshire,[13] 403 U.S. at 488, 91 S. Ct. 2022 (rejecting any policy of constitutional criminal procedure that would "discourage citizens from aiding to the utmost of their ability in the apprehension of criminals").*

Sanders, 452 S.W.3d at 315-16 (footnotes omitted). Indeed, the only concern in such cases is whether the private party's actions render the suspect's statements involuntary, or in other words, "whether [the suspect]'s will was so severely overborne that his admissions were not the product of a rational intellect with freedom to choose." Id. at 317.

Sanders involved a recorded conversation taking place in a private residence; the Dotson opinion, issued shortly before Sanders, addressed the admissibility of a confession obtained by a private person not cooperating with police, while the suspect was in police custody. Dotson, 450 S.W.3d 53. In Dotson, after the defendant made incriminating statements to police, he invoked his right to counsel and asked to speak to his mother. Id. The police brought the mother to the police station; the police gave the mother no instructions regarding her interactions with the defendant, and the police were not present during the discussion between mother and son. Id. The State sought to use the mother's testimony at trial, while the defendant sought to exclude it. The Tennessee Supreme Court concluded the defendant's mother was not acting as a state agent at the time of the conversation; "there was no evidence at all suggesting that the police brought [the defendant's mother] to see the defendant 'for the purpose of eliciting incriminating statements,' or that the officers asked, directed, induced, or threatened her to obtain information from the defendant." Id. at 54 (citation omitted).

[13] Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971).

The analysis in Sanders does not apply to criminal informants, or "persons who obtain evidence for the government in exchange for money or benefits (such as leniency in charging or sentencing decisions). Criminal informants generally qualify as government agents for constitutional purposes." Sanders, 452 S.W.3d at 307.

State v. Willis, 496 S.W.3d 653 (Tenn. 2016), was another case involving misplaced trust. The defendant was convicted and sentenced to death for the October 2002 murders of two victims in Washington County. Id. at 665-66. Before the Washington County homicides, the defendant was on bond for federal drug charges, and the defendant also became the subject of an investigation involving the disappearance of his stepfather. Id. at 687. After the defendant was discovered using the missing man's credit card, the defendant was arrested on a federal warrant. Id. After this arrest, but before the defendant's arrest on the Washington County homicides, the defendant phoned his ex-wife, Wilda, and asked her to come to a federal court hearing. Id. at 688.

Wilda told investigators who had been looking into the missing man's disappearance—the missing man was also Wilda's uncle—about her intent to see the defendant at the court hearing. Id. Wilda was instead convinced to go to Washington County to see the defendant. Id. The authorities asked Wilda to wear a wire; she agreed. Id. at 689. She met with the defendant on October 15, 2002; this meeting only lasted fifteen minutes. The Washington County investigators then arranged for Wilda to have a "contact visit" with the defendant the next day, and during this visit the defendant made incriminating statements regarding the deaths of Wilda's uncle and the Washington County

victims. Id. After the meeting, the defendant invoked his right to counsel. Id.

After the October 16 meeting, the defendant was arrested for the Washington County homicides, and the authorities "discouraged Wilda from continuing to stay in contact with the defendant." Id. Nevertheless, Wilda continued to take her ex-husband's phone calls. Id. "She did not tell the defendant that she was cooperating with law enforcement authorities." Id. In late 2002, after the defendant was transferred to a federal detention facility in New York, Wilda told the defendant she would visit him in New York; this trip went against the advice of law enforcement and prosecutors in Tennessee. Id. at 691.

On January 1, 2003, Wilda met with the defendant in New York. Id. The defendant insisted he did not kill the Washington County victims, but he told Wilda where the chainsaw used in the Washington County murders was located and gave Wilda instructions on retrieving the chainsaw, wiping it clean, and hiding it. Id. Two days later, Wilda accompanied Bradley County officers as they searched for the chainsaw. Id. at 692. During the search, the defendant phoned her and told her about the locations of other items related to the Washington County murders and told her about what he wanted done with them. Id. The defendant had heard, before the January 3 call, that Wilda was cooperating with police, but he believed she would not do such a thing and believed that based on his invocation of the right to counsel, any statements Wilda had made to the police would be inadmissible. Id.

Before his trial on the Washington County homicides, the defendant moved to have his statements to Wilda suppressed. Id. The trial court denied the motion. Id.

On appeal, the Tennessee Supreme Court concluded that the defendant's statements to his ex-wife did not violate his Fifth Amendment protection against self-incrimination:

> *It is undisputed that, at the time Wilda initially met with the defendant, he was arrested and in custody on unrelated federal charges. As noted above, neither the fact that the defendant was in custody at the time he made the incriminating statements nor the fact that Wilda was cooperating with the police matters to an analysis under either the self-incrimination clause or the due process clause. See Perkins,[14] 496 U.S. at 296–98, 110 S. Ct. 2394; Sanders, 452 S.W.3d at 311; Clark,[15] 452 S.W.3d at 282–83 "[T]he United States Constitution provides no protection for those who voluntarily offer information to a confidant." Sanders, 452 S.W.3d at 314 (quoting Pate,[16] 2011 WL 6935329, at *9).*
>
> *To avoid this, the defendant argues that his statements were involuntary because they were induced by "deception and subterfuge." Similar to the defendant in Branam,[17] the defendant in this case in effect "asks us, evidently as a matter of state law, to adopt the viewpoint expressed in a concurring opinion in Perkins, in which Justice Brennan decried the 'deliberate use of deception and manipulation by the police.'" Branam, 855 S.W.2d 563, 568 (quoting Illinois v. Perkins, supra, 496 U.S. at 303, 110 S. Ct. 2394 (Brennan, J., concurring)). The Branam Court recounted: "Invoking the Fourteenth Amendment's guarantee of due process, Justice Brennan would require a review of the 'totality of the circumstances' surrounding elicitation of a suspect's statement by deceptive means, in order to ensure that the defendant's 'will was [not] overborne.'" Id. at 569 (alteration in original). The Branam Court did not adopt Justice Brennan's preferred approach, noting that, despite his family member's deception, there was nothing in the record to suggest that his statements*

[14] Illinois v. Perkins, 496 U.S. 292 (1990).
[15] State v. Clark, 452 U.S. 268 (Tenn. 2014).
[16] State v. Ted Ormand Pate, 2011 WL 6935329 (Tenn. Crim. App. Nov. 22, 2011).
[17] State v. Branam, 855 S.W.2d 563 (Tenn. 1993).

"were the result of a will that had been 'overborne.'" Id.; see also Sanders, 452 S.W.3d at 314. Similarly, we decline to adopt Justice Brennan's approach. Moreover, we find nothing in the record to suggest that the defendant's will was "overborne." As noted in Sanders, "the Fifth Amendment and Article I, Section 9 forbid official coercion, not mere 'strategic deception.'" Sanders, 452 S.W.3d at 312 (citations omitted). "These constitutional provisions are not concerned 'with moral or psychological pressures to confess emanating from sources other than official coercion.'" Id. (quoting United States v. Erving L., 147 F.3d 1240, 1247 (10th Cir.1998); Oregon v. Elstad, 470 U.S. 298, 305, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985)).

The defendant also intertwines his Fifth Amendment self-incrimination claim with his Fifth Amendment and Sixth Amendment right to counsel claim, arguing in effect that the alleged circumvention of his right to counsel somehow affected the voluntariness of his statements to Wilda. We reject this as well. The self-incrimination and right to counsel claims are separate and distinct, and we address the right to counsel claims below. As noted above, for Fifth Amendment and article I, section 9 purposes, we need not ascertain whether Wilda was acting as an agent of the State at the time the defendant made the incriminating statements in order to determine whether his right against self-incrimination was infringed.

From our review of the record, the evidence supports a finding that the relationship between the defendant and Wilda remained cordial after their divorce, and the defendant initiated the contact visit with Wilda on October 15, 2002. After that meeting proved unsatisfactory, the defendant wanted Wilda to meet with him again the next day. To this end, the defendant suggested that she bring a "fifty dollar lawyer" with her and pose as the lawyer's paralegal to gain access. If that proved successful, he told Wilda, he would send the attorney out of the meeting room so he could speak to her alone. The trial court declined to credit the defendant's testimony that this suggestion of a "fifty dollar lawyer" was a genuine request for counsel, and

> *instead credited Wilda's testimony that it was a ruse for her to gain access into the jail the following day. The defendant instructed Wilda to bring with her on October 16, 2002 a tape-recorder, a note pad, and a pen to take notes, and during the October 16, 2002 meeting, the defendant controlled the tape recorder, turning it on and off to present his version in the best possible light. He wasted no time in confessing to killing the victims, although he tried to cast it as a form of "self-defense." These facts do not support the defendant's assertion that the circumstances at the October 15, 2002 meeting and the October 16, 2002 meeting amounted to a police-dominated atmosphere, compulsion. or pressure for him to make a statement.*
>
> *As for any telephone calls made by the defendant from jail either in Tennessee or in New York, the defendant initiated every single telephone call and spoke freely, despite the clear recorded warning that the conversations were subject to monitoring and recording. The defendant and his Aunt Marie asked Wilda to come to New York on January 1, 2003. His confinement at those times does not render his statements to Wilda involuntary. The issue of voluntariness was resolved against the defendant by the trial court and the Court of Criminal Appeals, and we agree with the lower courts' holding that the defendant's Fifth Amendment and article I, section 9 rights against compelled self-incrimination were not violated.*

Willis, 496 S.W.3d at 700-02.

Regarding the defendant's Sixth Amendment right to counsel claims, the Tennessee Supreme Court concluded his conversations with his ex-wife before his arrest on the Washington County homicides did not violate the defendant's right to counsel. See id. at 706-07. While Wilda's contact with the defendant on October 15-16, 2002, was encouraged by the authorities, the defendant's comments regarding the Washington County homicides were admissible because the Washington County homicides and the defendant's pending federal charges for violating the conditions of release in the

New York federal case "were clearly not the 'same offense' for purposes of the Sixth Amendment right to counsel." Id. at 707. "When the defendant made his statements to Wilda on October 15 and 16, 2002, he had not been charged with the [Washington County] murders and the Sixth Amendment right to counsel had not attached as to those charges." Id.

The appellate court then addressed the Defendant's January 2003 statements to Wilda, both during the January 1 visit and the January 3 phone calls. Id. at 707-08. While the defendant had invoked his right to counsel as to the Washington County homicides before January 2003, that fact, standing alone, did not render his statements to Wilda inadmissible:

> *Whatever the arrangement between Wilda and law enforcement officials prior to the defendant's indictment for the murders of these victims, as discussed below, the facts as found by the trial court show that a clear break had occurred by the time Wilda went to New York on January 1, 2003. Once the defendant was indicted, the trial court found, law enforcement advised Wilda to stop accepting the defendant's calls. In contrast with Wilda's meetings with the defendant prior to his indictment, there is no evidence that law enforcement made arrangements for Wilda to meet with the defendant in New York. Certainly there is no evidence that law enforcement controlled or directed Wilda with regard to the defendant. To the contrary, law enforcement officials advised Wilda not to accede to the defendant's request that she visit him in New York but she went anyway, at the defendant's insistence, for her own reasons. Wilda brought no recording device to her meeting with the defendant in New York, and the conversation was not recorded. Thus, there are no facts showing that law enforcement officials assented to having Wilda act as an agent of the government in the January 1, 2003 New York meeting, or that they controlled or directed Wilda with regard to that meeting. [...]*
>
> *Evidence that Wilda reached out to law enforcement officers does not equate to evidence of actions by law enforcement officials manifesting assent*

to have Wilda act as a government agent while she was in New York. The existence of an agency relationship cannot be proved based only on the actions of the alleged agent. In the context of the Sixth Amendment, "there is general agreement that affirmative conduct by a government official is required to convert an ... informant into a government agent." Hailey v. State, *413 S.W.3d 457, 474 (Tex. App.–Fort Worth 2012) (quoting* Manns,[18] *122 S.W.3d at 187). "The government's willing acceptance of information provided ... by an ... informant did not make the informant the government's agent under the Sixth Amendment."* Elizondo v. State, *338 S.W.3d 206, 211 (Tex.App.–Amarillo 2011), aff'd, 382 S.W.3d 389 (Tex.Crim.App.2012). "[A]ll citizens ... have a duty to report information about criminal activities, and while the Sixth Amendment may limit the government's ability to encourage such reporting behavior, the government should not be required to actively discourage such behavior either."* Manns, *122 S.W.3d at 185 (emphasis in original). If we were to hold that law enforcement officers had to refuse either Wilda's telephone calls or the after-the-fact the information she offered, such a holding "would preclude police from using informants at all, a result we find untenable."* Matteo,[19] *171 F.3d at 894.*

The Court of Criminal Appeals noted that Wilda visited the defendant in New York in order to obtain information from him about the murders of the victims and her uncle. This fact is undisputed; indeed., the offer of such information was how the defendant persuaded Wilda to accept his invitation to visit him in New York. It shows Wilda's motivation for meeting with the defendant. It does not, however, substitute for evidence of actions by law enforcement officers manifesting their assent to have Wilda act as a government agent in that meeting. "[T]he protections of the Sixth Amendment right to counsel enunciated in Massiah[20] *and* Henry[21] *are inapplicable when, after the right to counsel has*

[18] Manns v. State, 122 S.W.3d 171 (Tex. Crim. App. 2003).
[19] Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999).
[20] Massiah v. United States, 377 U.S. 201 (1964).
[21] United States v. Henry, 447 U.S. 264 (1980).

attached, statements by a defendant are made to an individual who is not an agent for the Government, although he may be a Government informant. This is so regardless of whether the statements were 'deliberately elicited.'" United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir.1986); see also Hailey, 413 S.W.3d at 477–78 (noting that, "even if the State hoped for a confession from [the defendant], this is not sufficient to establish that [the informant] was an agent") (citing Manns, 122 S.W.3d at 185).

*Citing Henry, the Court of Criminal Appeals also pointed out that Wilda was trusted by the defendant and that he was incarcerated on January 1, 2003, when he made the incriminating statements to her. Willis,[22] 2015 WL 1207859, at *65 (citing United States v. Henry, 447 U.S. at 270, 274, 100 S. Ct. 2183). In Henry, the status of the informant as a government agent was not in question; the fact that the defendant trusted the informant and the effects of incarceration on the defendant were cited in Henry as factors in determining whether the defendant's incriminating statements were "deliberately elicited," that is, whether it amounted to a surreptitious interrogation by the government agent, in violation of the Sixth Amendment. The issue of interrogation is separate from the question of agency. See Hailey, 413 S.W.3d at 478 ("[T]he 'agency inquiry' constitutes a separate and distinct analysis from whether the informant 'deliberately elicited' [the] information sought to be suppressed as being obtained in violation of the accused's Sixth Amendment right to counsel." (internal quotation marks omitted)); see also Manns, 122 S.W.3d at 182 (noting that numerous courts "recognize that an informant must be a government agent before the protections in Massiah are implicated and further recognize that this agency inquiry is separate from whether the informant 'deliberately elicited' information"). The defendant's trust of Wilda and the fact that he was incarcerated do not bear on the question of whether Wilda was acting as a government agent in their January 1, 2003 New York meeting.*

[22] State v. Howard Hawk Willis, 2015 WL 1207859 (Tenn. Crim. App. Mar. 13, 2015), aff'd, 496 S.W.3d 653 (Tenn. 2016).

In short, the defendant has failed to prove an explicit or implicit arrangement between Wilda and law enforcement officers for her to act as an agent of the government in her January 1, 2003 meeting with the defendant in New York. In the absence of proof showing that the government had agreed for Wilda to act as a government agent in that meeting, there was no Sixth Amendment violation with respect to the incriminating statements made by the defendant. "It is merely a tautology to argue that the government should not be in the business of providing a market for information that infringes Sixth Amendment rights; there is no infringement unless the informant was a government agent, and there is no agency absent the government's agreement [with] the informant for his services." State v. Hernandez*, 842 S.W.2d 306, 316 (Tex. App.–San Antonio 1992) (quoting* United States v. York*, 933 F.2d 1343, 1357 (7th Cir.1991)). Accordingly, we reverse the Court of Criminal Appeals' holding that the trial court erred in denying the defendant's motion to suppress evidence of the statements he made to Wilda on January 1, 2003.*

We next consider the defendant's motion to suppress the incriminating statements he made during his telephone calls to Wilda on January 3, 2003, as she was accompanied by officers and following the defendant's directions to search for the chainsaw and other items associated with the murders of the victims. The trial court found that all of the phone calls from the New York detention facility were initiated by the defendant. It emphasized: "[I]n the New York Detention Center [the defendant] knows, every call he's told by this recording that it's subject to monitoring and recording when the call is placed. ... [T]here is no expectation of privacy at a jailhouse telephone, particularly, not under these circumstances. ... [T]here's nothing surreptitious about this." Willis*, 2015 WL 1207859, at *65.*

The Court of Criminal Appeals observed that, while the officers and Wilda were searching for the chainsaw based on the information the defendant gave Wilda in New York, "appellant called Wilda multiple

times. Wilda spoke to him in the presence of the officers and recorded the conversations using a recorder provided by the officers." It found that Wilda was acting as a state agent during these January 3, 2003 conversations and that she interrogated him as such, so the recorded telephone calls violated the defendant's Sixth Amendment right to counsel. Id.

The Court of Criminal Appeals appeared to give little weight to the fact that all of the telephone calls the defendant made to Wilda on January 3, 2003, were from a jail telephone and were preceded by a recording informing the defendant that all calls are subject to monitoring and recording. We consider this fact determinative.

"[T]he Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." Montejo v. Louisiana, *556 U.S. 778, 786, 129 S. Ct. 2079, 173 L.Ed.2d 955 (2009) (internal citations omitted). In this case, the monitoring and recording of the defendant's January 3, 2003 telephone conversations with Wilda was neither indirect nor surreptitious. The defendant acknowledges that he was warned at the beginning of each and every call that his conversations were subject to being monitored and recorded. He disregarded the warnings and made the telephone calls anyway. By placing the telephone calls to Wilda with full knowledge that they were subject to monitoring and recording, the defendant impliedly consented to the monitoring and recording of his conversations. In doing so, he voluntarily, knowingly and intelligently waived his Sixth Amendment rights. [(Citations omitted)].*

In sum, the record fully supports the trial court's finding that there was "nothing surreptitious" about law enforcement officials monitoring and recording the defendant's January 3, 2003 telephone conversations with Wilda. The defendant admitted that the calls he made from the New York detention facility were each

> *preceded by a warning that all calls were subject to monitoring and recording. Under these circumstances, the defendant impliedly consented to the monitoring and recording of his January 3, 2003 telephone conversations with Wilda, and thus effectively waived his Sixth Amendment right to counsel as to those telephone calls. Consequently, there was no Sixth Amendment violation with respect to the incriminating statements made by the defendant to Wilda on January 3, 2003, and we reverse the Court of Criminal Appeals' holding the trial court erred in denying the defendant's motion to suppress evidence of those statements.*
>
> *In the January 3, 2003, telephone conversations between the defendant and Wilda, he directed her to the location of the chainsaw, instructed her to wipe it clean of fingerprints and plant it at the home of Daniel Foster, then gave her directions to another location at which she was to search near a river for another piece of evidence that apparently had been thrown off a bridge. Applying the exclusionary rule, the Court of Criminal Appeals held that the trial court should have excluded not only the primary evidence, that is, the incriminating statements, but also the other incriminating evidence—the chainsaw—derived from the primary evidence, as the "fruit" of the incriminating statements. Nix v. Williams, 467 U.S. 431, 441–42, 104 S. Ct. 2501, 81 L.Ed.2d 377 (1984) (discussing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319 (1920); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)). In view of our determination that there was no violation of the defendant's Sixth Amendment right to counsel, we reverse this holding by the Court of Criminal Appeals as well. Our holding pretermits the question of whether the admission into evidence of the defendant's incriminating statements and the chainsaw were harmless beyond a reasonable doubt.*

Willis, 496 S.W.3d at 712-16 (original footnotes deleted, alterations and other footnotes added).

6. "Abandoning" Evidence Versus Tampering

Tampering with evidence is a "specific intent" crime; to be convicted of the offense, "[t]he State must prove that the defendant altered, destroyed, or concealed the record, document, or thing 'with intent to impair its verity, legibility, or availability as evidence.'" State v. Hawkins, 406 S.W.3d 121, 132 (Tenn. 2013). In a case where a defendant tossed a shotgun used to kill a victim over a short iron fence on the property where the shooting occurred (and in which the gun was recovered shortly after the shooting), the Tennessee Supreme Court determined the defendant had not concealed the evidence in such a way as to make it unavailable. Rather, the defendant had "abandoned" the evidence, which was not sufficient to sustain an evidence tampering conviction. Id. at 137-38.

7. Admissibility of Other Offenses Under Tenn. R. Evid. 404(b)

Generally, Tennessee Rule of Evidence 404(b) prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity with the character trait." Such evidence may be "admissible for other purposes," provided the following conditions are met:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

It is worth noting that for the longest time, the term "person", as used in the rule, related only to the defendant. See State v. Stevens, 78 S.W.3d 817, 836-37 (Tenn. 2002). However, 2014 Public Chapter 713 (effective July 1, 2014), created Tennessee Code Annotated section 24-7-125, which states, in relevant part:

> **In a criminal case, evidence of other crimes, wrongs, or acts is not admissible to prove the character of any individual, including a deceased victim, the defendant, a witness, or any other third-party, in order to show action in conformity with the character trait. It may, however, be admissible for other purposes.**

(Emphasis added). The statute concludes by listing the four criteria listed above.

In one Tennessee Supreme Court opinion, the court explained,

> *The comments to the Rule provide that the evidence of other crimes, wrongs, or acts should be excluded unless relevant to an issue other than the character of a defendant, such as identity, motive, intent, or absence of mistake. See Tenn. R. Evid. 404, Advisory Commission cmt.; see also Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980). In State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985), the decision upon which the Rule is based, this Court specifically held that before the proposed evidence can be admitted, the trial court must first find that the Defendant's connection to the other crime, wrong, or act has been clearly and convincingly established. In 2003, Rule 404(b) was amended to confirm the "clear and convincing" requirement explicated in Parton. See Tenn. R. Evid. 404(b)(3) & 2003 Advisory Commission cmt.*
>
> *Trial courts have been encouraged to take a "restrictive approach of [Rule] 404(b) ... because 'other act' evidence carries a significant potential for unfairly influencing a jury." State v. Dotson, 254 S.W.3d 378, 387 (Tenn. 2008) (second*

> *alteration in original) (quoting State v. Bordis, 905 S.W.2d 214, 227 (Tenn. Crim. App. 1995)) (internal quotation marks omitted). In Old Chief v. United States, the United States Supreme Court pointed out that "'the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.'" 519 U.S. 172, 181 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)); see also Michelson v. United States, 335 U.S. 469, 475-76 (1948)*

State v. Jones, 450 S.W.3d 866, 891 (Tenn. 2014).

In Jones, the State filed pretrial notice of its intent to introduce evidence of a homicide the defendant allegedly committed in Florida shortly after the Tennessee offense for which he would be tried. Following a lengthy 404(b) hearing, the trial court concluded the evidence of the Florida homicide was admissible at trial:

> *The trial court first determined that "the method of commission of the [Perez murder, the Florida offense] establishes such a unique modus operandi that it fairly leads to the inference that the perpetrator of the Perez murder was the perpetrator of the James murders [in Tennessee]." The trial court found that the murders of Perez and Mr. and Mrs. James shared the following characteristics: (1) multiple incision wounds to the neck; (2) strangulation; (3) the use of bindings; (4) the body being found face down; and (5) an attempt by the perpetrator to "wipe down" or "clean" the scene after the murder. The trial court further observed that both Mrs. James and Perez were found nude or partially unclothed, and that "it appear[ed] that each of the victim[s] may have known [the] attacker." The trial court acknowledged the existence of "some differences" between the Perez murder and the James murders, especially the fact that Perez was a "young, male victim[] who showed signs of recent sexual activity," whereas the Jameses were "elderly victims" who were not sexually assaulted. Nevertheless, the trial court found that the similarities between the crimes outweighed "any differences in the victimology of the offenses."*
>
> *Second, the trial court concluded that the proof "of the other crime, wrong, or act" presented by the State at the hearing*

> *qualified as "clear and convincing." See Tenn. R. Evid. 404(b)(3). The trial court emphasized the likely shoe print match, the fact that the Defendant and Perez had worked together, and "additional evidence plac[ing] the [D]efendant in the area at the time of the murder."*
>
> *Third, the trial court deferred ruling as to whether "a material issue exists other than conduct conforming with a character trait," such as the identity of the perpetrator, indicating that the proof at trial would dictate the result. See Tenn. R. Evid. 404(b)(2). Nevertheless, the trial court provided guidance by informing the parties that if the proof were to place at issue the Defendant's identity as the perpetrator of the murders of Mr. and Mrs. James, then the evidence that the Defendant killed Perez in a similar fashion would be material to the issue.*
>
> *Fourth, the trial court also deferred ruling as to whether the probative value of the evidence of the Perez murder was "outweighed by the danger of unfair prejudice." See Tenn. E. Evid. 404(b)(4). The trial court again indicated that resolution of this issue would depend upon the proof at trial.*
>
> *Finally, the trial court observed that because of the "nearly inextricable investigative connection" between the Perez murder and the James murders, "it may be necessary to admit at least portions of proof, relating to the Perez murder, in order to create a complete picture for the jury of the investigation conducted by the Bartlett authorities*

Id. at 881-82 (some alterations added)**.**

The Tennessee Supreme Court concluded the trial court's admission of the Florida offenses was error. Although a material issue existed (identity) and evidence of the other offense was clear and convincing, the probative value of the Florida offense was outweighed by the danger of unfair prejudice. The court explained that when the identity of the defendant is the material issue,

> *Although the evidence of the other crime need not be identical to the evidence of the charged offense, for other crime evidence to have probative value it must bear a sufficient connection to*

> *the issue of identity so as to establish the defendant's commission of "signature crimes." To meet this threshold, the similarities of the crimes must do more than simply outweigh their differences—there must be a "'highly distinctive common mark'" between the crimes.* Id. *at 231 (quoting* People v. Cavanaugh, *444 P.2d 110, 117 (Cal. 1968)); see also* State v. Moore, *6 S.W.3d 235, 240 (Tenn. 1999) ("Before multiple offenses may be said to reveal a distinctive design, and therefore give rise to an inference of identity, the 'modus operandi employed must be so unique and distinctive as to be like a signature.'" (quoting* State v. Carter, *714 S.W.2d 241, 245 (Tenn. 1986))). The test, therefore, is not whether the evidence demonstrates that the defendant committed both crimes, but whether the defendant used a peculiar and distinctive method in committing the crimes.*

Jones, 450 S.W.3d at 895. In this case, although the medical examiner testified there were some similarities between the two crimes, "he explained that there was nothing unusual about the methods employed—even in combination." Id. at 898. The court therefore concluded the similarities between the two crimes "fail to establish a modus operandi that is comparable to a signature." Id. at 899. The trial court's admission of the highly similar Florida murder was therefore "profoundly prejudicial. ... [T]he trial court created an opportunity for the jury to infer that the Defendant committed the uncharged murder and, therefore, must have committed the murders for which he was on trial." Id. Accordingly, the court ordered a new trial.

Another illustrative case emphasizes the importance of making explicit on-the-record findings regarding the four necessary factors that must be satisfied before evidence may be admitted under Rule 404(b). In State v. Sexton, 368 S.W.3d 371, 378 (Tenn. 2012), the defendant was convicted of killing a man and his wife; the defendant suspected the male victim of making a DCS claim against the defendant. The State intended to introduce testimony of a DCS worker regarding sexual abuse allegations against the defendant regarding the male victim's daughter (the defendant's

stepdaughter); the allegations were made four days before the victims' deaths. Id. at 400-01. In a pretrial hearing, the State announced its intent to present the testimony, citing motive. Id. at 400. The trial court did not hear the DCS worker's testimony before trial but concluded the testimony's relevance outweighed the danger of prejudice and would be admissible if the details of the accusations were not too graphic. Id. at 401.

On appeal, the Tennessee Supreme Court concluded that the trial court properly found the material issue of motive existed. Id. at 404. However, because the trial court failed to hear the DCS worker's proposed testimony before trial and failed to find that the prior bad act was established by clear and convincing evidence, the trial court's finding was not entitled to deference on appeal. Id. The Tennessee Supreme Court concluded the State's evidence of the prior bad acts did not come close to clear and convincing. The court also concluded the DCS worker's testimony was "cumulative on the issue of motive. . . . [T]he probative value of [her] hearsay testimony as to the Defendant's guilt of the murder of the [victims] was not essential to the State's case. Thus, ... the unfair prejudicial effect of the alleged sex abuse outweighed the probative value as to motive." Id. at 406-07.

In State v. Rimmer, 623 S.W.3d 235 (2021), the defendant was tried for the murder of his ex-girlfriend. Before trial, the State filed a motion seeking to introduce "evidence of the Defendant's January 1989 assault and rape of the victim, the Defendant's guilty plea, and the sentence imposed by the trial court[.]" Id. at 261. At a pretrial 404(b) hearing, the State introduced testimony from the victim's daughter (who was six years old at the time of the prior incident) and from the Memphis police officer who responded to the incident. Id. at 261-62. The trial court concluded the Defendant's conviction and incarceration for the prior attack against the victim were admissible under Rule 404(b):

> *[The trial court] found the State had proven the rape and assault by clear and convincing evidence. The trial court noted that the evidence included proof of the relationship between the Defendant and the victim as well as proof of the Defendant's malice and hostility toward the victim. This evidence was probative of identity, motive, intent, and premeditation, all non-propensity reasons for its admission. The trial court then held that the danger of unfair prejudice to the Defendant did not outweigh the probative value of the evidence.*

Id. at 262 (alteration added). However, the trial court did not permit the State to introduce evidence concerning the details of the Defendant's prior attack against the victim, as those details "presented a strong risk of inflaming the passions of the jury and a danger of unfair prejudice to the Defendant." Id. The trial court also noted the testimony about the attack offered by the victim's daughter was "hazy" and "did not meet the clear and convincing standard." Id.

The State also sought to introduce testimony from two former inmates, Lescure and Conaley, who were incarcerated with Rimmer in prison. Id. The State sought to have the inmates testify regarding the Defendant's intent to harm the murder victim after the Defendant was released from prison on the assault and rape charges. Id. at 263. The trial court concluded this potential testimony was admissible at the murder trial because the proof was "probative of intent, motive, identity, and premeditation" and "the danger of unfair prejudice to the Defendant did not outweigh the probative value of the statements." Id.

On direct appeal, the Tennessee Supreme Court affirmed the trial court's rulings:

> *This Court has previously held that prior instances of domestic abuse by a defendant against a victim can be admissible under Rule 404(b). See, e.g., State v. Jarman, 604 S.W.3d 24, 51 (Tenn. 2020) (affirming admissibility of evidence of defendant's prior alleged assault of victim to show defendant's intent and state of mind); State v. Smith, 868 S.W.2d*

561, 574 (Tenn. 1993) (in capital murder case, affirming admissibility of evidence of defendant's prior assaults of two of the victims, his estranged wife and her son, to show defendant's hostility, malice, intent, and settled purpose to harm them). But see State v. Gilley*, 173 S.W.3d 1, 7 (Tenn. 2005) (noting "there is no per se rule of admissibility under Rule 404(b) for prior acts of abuse committed by a defendant against a victim").*

In this case, the evidence at issue includes: [The victim's daughter's] reference to the Defendant's rape and assault of her mother and her mother's visits with the Defendant in jail afterwards; [the Defendant's brother's] statement that his brother pled guilty to raping the victim; judgment forms documenting the Defendant's guilty pleas to aggravated assault and rape; Mr. Conaley's testimony about anger the Defendant expressed toward the victim; Mr. Conaley's testimony regarding the Defendant's threat to kill the victim if she did not share unrelated personal injury settlement money with him; Mr. Conaley's observations about the Defendant's demeanor when he talked about the victim; Mr. Lescure's testimony about the Defendant's threat to "kill the funky bitch" after his release from prison; and Mr. Lescure's observations about the Defendant's demeanor when he talked about the victim.

Clearly the evidence at issue has probative value and also presents potential for unfair prejudice. The trial court found explicitly that the evidence was probative of identity, motive, intent, and premeditation and held that its probative value outweighed the danger of unfair prejudice to the Defendant. The trial court also acted to mitigate the risk of unfair prejudice by excluding evidence of the details of the 1989 rape and assault. [...]

Considering the entire record, we must conclude the trial court did not abuse its discretion. We affirm its decision to admit evidence of the Defendant's prior convictions for rape and aggravated assault, including the statements made to Mr. Conaley and Mr. Lescure during his subsequent incarceration for those offenses.

Rimmer, 623 S.W.3d at 262-63 (alterations added).

In certain instances, the State may introduce proof about a prior alleged offense for which the Defendant was previously

acquitted. However, the trial court must conduct a jury-out Rule 404(b) hearing before any such evidence is admitted. See State v. Jarman, 604 S.W.3d 24, 47 (Tenn. 2020). If such evidence is introduced, it is likely the trial court will need to permit the defense to introduce evidence of the Defendant's acquittal of the prior defense, and the court may have to instruct the jury as to the effect of such acquittal. The Tennessee Supreme Court has stated,

> *The majority of state jurisdictions hold that the defendant should be permitted to elicit some proof of the acquittal if acquitted-act evidence is admitted against him at trial.[ ] See Admissibility of Evidence as to Other Offense,[23] supra, at § 2[a]; see also People v. Ward, 351 Ill .Dec. 809, 952 N.E.2d 601, 611 (2011) (citation omitted) (holding it was an abuse of discretion not to admit acquittal evidence "[g]iven the real possibility the jury would convict defendant based on his alleged prior bad acts alone, [so] barring the acquittal evidence further enhanced the already high danger of undue prejudice against him"); Kinney,[24] 187 P.3d at 558 (reversing and granting a new trial because the state used acquitted-act evidence and the defendant was not permitted to rebut with evidence of acquittal); Hess,[25] 20 P.3d at 1127–29 (holding that is was an abuse of discretion not to admit proof of the defendant's acquittal because it was relevant and fell under a hearsay exception and that due to the high risk of unfair prejudice that may result in admitting acquitted-act evidence, a limiting jury instruction may help to balance the potential confusion of the jury); but see People v. Bolden, 98 Mich. App. 452, 296 N.W.2d 613, 617 (1980) (holding that it was not error for the trial court to exclude evidence of the defendant's acquittal because "[t]he fact that another jury harbored a reasonable doubt as to defendant's guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan, etc. in the case at bar" and "[t]he issue should not be clouded" by the ultimate verdict of the first trial). Further, "[n]early all [state] courts have adopted a case-by-case approach in analyzing requests by the defendant for an acquittal instruction, and*

[23] Christopher Bello, Annotation, Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense, 25 A.L.R. 4th 939, § 2[a] (1993, Supp. 2008).
[24] Kinney v. People, 187 P.3d 548, 558 (Colo. 2008).
[25] Hess v. State, 20 P.3d 1121, 1127-29 (Alaska 2001).

> *appellate courts have reviewed trial courts' refusals to give an acquittal instruction for an abuse of discretion."* Kinney*, 187 P.3d at 555 (citation omitted);* but see Andujar*,*[26] *899 A.2d at 1220 (concluding that evidence of the defendant's acquittal "must be presented to the jury either by stipulation, by the parties' testimony, or by an instruction from the trial justice" or it is a denial of due process) (emphasis removed) (internal quotations and citation omitted).*
>
> ...
>
> *We agree [...]that this decision must be determined on a case-by-case basis. Trial judges should continue to consider the specific facts of each case in making decisions regarding the admissibility of evidence, including proof of the defendant's acquittal and any issues that may arise related to relevancy, hearsay, and prejudice. Certainly, like many of our sister courts have found, evidence of the acquittal may be relevant for the jury to determine the credibility of a witness or weigh the proof at trial. In some cases, fairness may require that a defendant be able to cross examine a testifying witness about the result of the previous trial. On the other hand, there also may be times when the evidence the defendant seeks to elicit is for an improper purpose or offends some other rule. The trial court is in the best position to assess the party's evidence and use its discretion to admit or exclude such evidence when necessary. This is part of the important role of the trial court as gatekeeper, and the decision should be made based on the specific facts and circumstances of each case. The trial court's decision to admit or exclude evidence of the acquittal will be reviewed under an abuse of discretion standard.* See State v. Davidson*, 509 S.W.3d 156, 207 (Tenn. 2016);* State v. Gomez*, 367 S.W.3d 237, 243 (Tenn. 2012). We do note that, although the trial court retains discretion on the issue of whether to admit evidence of the acquittal after admission of acquitted-act evidence, it would be the rare case, indeed, in which a trial court appropriately could exclude evidence of the acquittal.*

Jarman, 604 S.W.3d at 44-47 (footnotes added).

[26] State v. Andujar, 899 A.2d 1209, 1220 (R.I. 2006).

8. Body-Related Searches and Identifications: DNA Swabs Contemporaneous to Arrest

In Maryland v. King, 569 U.S. 435, 449-50 (2013), the Supreme Court upheld Maryland's DNA collection program, which involves collecting buccal swabs from suspects arrested for serious offenses. Although these swabs are searches, the taking and analyzing of a cheek swab of the arrestee's DNA, like fingerprinting, is a legitimate police booking procedure that is reasonable (and therefore permissible) under the Fourth Amendment. See 569 U.S. at 451-52.

9. Searches of Cellular Phones Incident to Arrest

Generally, the police may not search a cell phone incident to arrest; such searches, absent exigent circumstances, may only be conducted pursuant to a warrant. See Riley v. California, 573 U.S. 373, 393-401 (2014).

10. Hearsay Issues

a. Defendant's Right to Present a Defense

Under some circumstances, the defendant's right to present a defense can "trump" the rule against hearsay. State v. Brown, 29 S.W.3d 427, 433 (Tenn. 2000). The rules of evidence "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id. at 432 (citations omitted). In determining whether a trial court's evidentiary ruling violates the defendant's constitutionally-protected right to present a defense, an appellate court must consider whether: "(1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting the exclusion of the evidence

is substantially important. Id." at 434. See also State v. Flood, 219 S.W.3d 307, 316 (Tenn. 2007).

In State v. Bell, 512 S.W.3d 167, 189 (Tenn. 2015), the defense theory was that the female murder victim's husband, and not the defendant, killed the victim. To advance this theory, "the Defendant wanted to establish that [the victim's] Husband was having an affair in order to prove that Husband had a motive to kill (or have killed) the victim." Id. The trial court excluded the evidence. Id. at 189. On direct appeal, the Tennessee Supreme Court concluded evidence of the husband's affair met the standards for admissibility under the right to present a defense. The appellate court concluded the defendant's right to present evidence that the victim's husband killed the victim was crucial to the defense "under the unique facts and circumstances of the case." Id. at 192. Because the husband admitted the affair, proof of the affair "bore sufficient indicia of reliability." Id. at 191. And while (as explained below) the Tennessee Supreme Court concluded the evidence was not admissible under Tennessee Rule of Evidence 608, the trial court's conclusion that evidence regarding the affair should be excluded because the husband was not a criminal defendant "was not a basis for excluding this proof. Moreover, the inadmissibility of proof for impeachment purposes is not a sufficient basis on which to exclude substantive proof of a criminal accused's defense to the crime for which he is being tried." Id.

Although the appellate court concluded the trial court should have admitted evidence regarding the affair, the error was deemed harmless given the other evidence introduced at trial supporting the husband-as-murderer theory, including the husband's admission he was "the prime suspect," his communications with his ex-wife

(with whom he was having the affair) during trial, and the fact that the husband's DNA (and not the defendant's) was found on the victim's body. Id. at 193. The appellate court also concluded the error was harmless given the evidence "point[ing] to the Defendant and the Defendant alone as the victim's killer." Id.

b. Impeaching a Witness: Character for Truthfulness or Untruthfulness

Tennessee Rule of Evidence 608(a) states, "The credibility of a witness may be attacked or supported by evidence in the form of reputation[.]" However, impeachment under Rule 608(a) is limited to evidence of "character for truthfulness or untruthfulness," and "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked." Id. Specific instances of conduct regarding truthfulness or untruthfulness may be admitted on cross-examination, but there are limits to the admission of such specific instances of conduct:

> **(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;**
>
> **(2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and**

> **(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination**.

Tenn. R. Evid. 608(b).

In State v. Bell, supra, 512 S.W.3d at 195, the victim's husband testified for the State. On cross-examination, the defendant sought to impeach the victim's husband by asking him about an affair he was having at the time of the offense. Id. The defense sought to introduce the proof to establish, among other things, the husband's lack of truthfulness. Id. After a jury-out hearing, the trial court concluded the testimony was inadmissible. On direct appeal, the Tennessee Supreme Court concluded that "[a]n extramarital affair, in and of itself, is not necessarily probative of the adulterer's truthfulness. A straying spouse may be participating in his or her affair after fully informing the other spouse." Id. (footnote omitted). Thus, the trial court properly excluded admission of the evidence regarding the husband's affair, at least on Rule 608 grounds. Id.

c. Confrontation Clause

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of

fact. Maryland v. Craig, 497 U.S. 836, 845 (1990); see also California v. Green, 399 U.S. 149, 157-58 (1970).

Criminal defendants are afforded two types of protection under the Confrontation Clause:

> (1) the right to physically face the witnesses who testify against them; and
>
> (2) the right to cross-examine the witnesses.

State v. Williams, 913 S.W.2d 462, 465 (Tenn. 1996) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

In Crawford v. Washington, 541 U.S. 36 (2004**),** the Court announced a new test to determine the admissibility under the Confrontation Clause of hearsay offered against an accused. Overruling Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that testimonial statements may not be offered into evidence unless two requirements are satisfied:

> (1) the declarant/witness must be unavailable; and
>
> (2) the defendant must have had a prior opportunity to cross-examine the declarant/witness.

Crawford, 541 U.S. at 68-69. The Court in Crawford did not give a comprehensive definition of "testimonial"; rather, the Court defined testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. However, the Court did outline three types of testimonial statements:

> (1) material *ex parte* in-court testimony or its functional equivalent;
>
> > [*This category includes affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used for prosecution*]
>
> (2) extrajudicial statements;
>
> > *[This category includes affidavits, depositions, prior testimony, or confessions.]*
>
> (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.
>
> > *[This would include statements made to police while they are performing an "investigative and prosecutorial function"]*

Id. at 51-52. In contrast to the above categories, casual statements to acquaintances, business records, or statements in furtherance of a conspiracy are not testimonial. Id. at 51, 56. But, it should be noted that the Tennessee Supreme Court has "not h[e]ld that statements between private parties unconnected to law enforcement ... are per se nontestimonial and thus exempt from Confrontation Clause scrutiny." State v. Franklin, 308 S.W.3d 799, 816 (Tenn. 2010).

"Thus, the **threshold question** in every case where the Confrontation Clause is relied upon as a bar to the admission of an out-of-court statement is whether the challenged statement is testimonial." State v. Dotson, 450 S.W.3d 1, 63 (Tenn. 2014) (citing State v. Cannon, 254 S.W.3d 287, 301 (Tenn. 2008)). Statements "'are

testimonial when the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" Franklin, 308 S.W.3d at 816 (quoting Cannon, 254 S.W.3d at 302). "An objective standard, focusing on the perspective of a reasonable person, governs the determination of the statement's primary purpose." Franklin, 308 S.W.3d at 817. The "reasonable person's perspective" should focus on the intent "both of a reasonable person in the declarant's position and of a reasonable person in the questioner's position[.]" Id.

If a statement is nontestimonial, the Confrontation Clause is not implicated, and the tests set forth by Crawford and its progeny should not be used. Rather, the trial court should determine admissibility under the Tennessee Rules of Evidence. See State v. Lewis, 235 S.W.3d 136, 145 (Tenn. 2007).

What constitutes a nontestimonial statement, though, has not been defined precisely. Several Tennessee opinions have focused on the **"primary purpose" test.** For instance, one Tennessee Supreme Court opinion stated "the statement is nontestimonial if the primary purpose is something other than establishing or proving past events potentially relevant to prosecution, such as providing or enabling assistance to resolve an ongoing emergency." Franklin, 308 S.W.3d at 817 (citing Cannon, 254 S.W.3d at 302).

The Tennessee Supreme Court's interpretation of the "primary purpose" test resembles that announced by the United States Supreme Court: A testimonial statement is one that has "a primary purpose of creating an out-of-court substitute for trial testimony." Michigan v. Bryant, 562 U.S. 344, 358 (2011). If the

"primary purpose" of a statement is "not to create a record for trial," then "the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Id. at 359.

In Bryant, the Court noted, "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.'" Id. at 360 (emphasis added). Such factors as the existence of an ongoing emergency and the medical condition of the victim are important in determining the primary purpose of an interaction, but the fact that the conversation occurred during an emergency or involved a seriously wounded victim does not, standing alone, make the conversation nontestimonial. See id. at 361-65. In addition, conversations can evolve from nontestimonial to testimonial for various reasons, such as the abatement of the emergency or the surrender of the suspect. Id. at 365.

Another Tennessee Supreme Court opinion, which will be examined in greater detail later in this section, has concluded a statement is testimonial "'if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character.'" Dotson, 450 S.W.3d at 69 (quoting Young v. United States, 63 A.2d 1033, 1043-44 (D.C. Cir. 2013)).

The Tennessee Supreme Court held that in determining whether a particular statement is testimonial trial courts may consider the following non-exhaustive list of factors:

> *(1) whether the declarant was a victim or an observer;*

> *(2) whether contact was initiated by the declarant or by law-enforcement officials;*
>
> *(3) the degree of formality attending the circumstances in which the statement was made;*
>
> *(4) whether the statement was given in response to questioning, whether the questioning was structured, and the scope of such questioning;*
>
> *(5) whether the statement was recorded (either in writing or by electronic means);*
>
> *(6) the declarant's purpose in making the statements;*
>
> *(7) the officer's purpose in speaking with the declarant; and*
>
> *(8) whether an objective declarant under the circumstances would believe that the statements would be used at a trial.*

State v. Maclin, 183 S.W.3d 335, 349 (Tenn. 2006). Although much of Maclin has been abrogated due to later case law, the Tennessee Supreme Court has held that these factors are still relevant to determine whether a statement is testimonial:

> *We believe that the multi-factor test that we first articulated in Maclin and repeated in Lewis remains relevant in determining whether the statement is "testimonial." Such factors as the identity of the declarant, the formality of the surrounding circumstances, the structure and extent of the questioning, et al. may very well bear on the ultimate, decisive inquiry: an objective determination of the primary purpose of the statement. We emphasize that the factors are "non-exhaustive," Lewis, 235 S.W.3d at 143, and allow for consideration of additional factual details specific to a particular case. Lower courts ought not apply the factors mechanically. See United States v. Rankin, 64 M.J. 348, 352 (C.A.A.F. 2007) ("[T]he*

> *Crawford analysis is contextual, rather than subject to mathematical application of bright line thresholds.").* *Instead, courts should consider the factors where helpful in assessing "if the primary purpose of the statement is to establish or to prove past events potentially relevant to later criminal prosecutions," rather than to resolve an ongoing emergency or for some other purpose.* Cannon, *254 S.W.3d at 303;* see Davis, *547 U.S. at 822.*

Franklin, 308 S.W.3d at 818.

d. Unavailable Witnesses

Confrontation Clause issues are not implicated if the witness who made the out-of-court statement is at trial and available for cross-examination. If a party wishes to use the statement of an unavailable witness, the witness's "unavailability must be supported by proof, not by unsupported statements of counsel." Cannon, 254 S.W.3d at 306.

One of the more common uses of unavailable testimony occurs when a witness testified under oath at a prior proceeding but is not available to testify at trial for various reasons, usually death or inability to be found. Specifically, Tennessee Rule of Evidence 804(b)(1) states a party may offer the former testimony of a declarant who is unavailable to testify at trial if the testimony was

> *given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.*

The Tennessee Supreme Court has stated,

> *In order to satisfy the right to confrontation when the State seeks to admit prior testimony of an unavailable witness, the State must show that the witness is truly unavailable after good faith efforts were made to obtain the witness's presence.* See State v. Sharp, *327 S.W.3d 704, 709, 712 (Tenn. Crim. App. 2010) (citing* State v. Henderson, *554 S.W.2d 117, 120 (Tenn. 1977);* State v. Armes, *607 S.W.2d 234, 236-37 (Tenn. 1980)). "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness."* Ohio v. Roberts, *448 U.S. 56, 74, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980),* overruled on other grounds by Crawford, *541 U.S. 36, 124 S. Ct. 1354. "Good faith" contemplates "'[t]he lengths to which the prosecution must go to produce a witness . . . [and] is a question of reasonableness.'"* Id. *(quoting* California v. Green, *399 U.S. 149, 189 n.22, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970)).*

State v. Jones, 568 S.W.3d 101, 129 (Tenn. 2019).

In Jones, the defendant argued the State had not established it had made a good-faith effort to locate a witness who had testified at the defendant's first trial but who the State contended was unavailable to testify at the second trial. The trial court ruled in the State's favor at trial and admitted the former testimony from the first trial, and the Tennessee Supreme Court affirmed this ruling on appeal:

> *The Defendant contends that, by delaying until one month prior to trial before trying to find Tavarus Young, the State failed to make a good faith effort to locate him, and, as a result, his prior testimony should not have been admitted. The evidence shows that, approximately one month before trial, the State contacted multiple jurisdictions in Florida, where Mr. Young was believed to be living. The Florida authorities found an address for Mr. Young's mother, and she provided his phone number. One of the prosecutors called Mr. Young in early April 2015, and Mr. Young stated that he would not return to Tennessee to testify. The State provided multiple emails between the State of*

> *Tennessee and the State of Florida reflecting the law enforcement attempts to locate Mr. Young. Mr. Young's photograph also was posted in a Florida newspaper in an effort to obtain the assistance of the general public in finding him. The State filed two petitions, on April 13, 2015, and on May 4, 2015, to secure Mr. Young's presence at trial. Based on those petitions, and pursuant to the Law to Secure Witnesses, the trial court issued certificates to secure Mr. Young's presence in court for the Defendant's trial. In the second certificate, the court stated that Mr. Young appeared to be evading service of process and had indicated his unwillingness to appear and testify. The court ordered that Mr. Young be immediately taken into custody and delivered to Tennessee. The Circuit Court of the Eleventh Judicial District in Miami, Dade County, Florida, received the certificates issued by the trial court and issued a summons for Mr. Young. However, the Florida court found that Mr. Young was "actively evading service of the summons to appear." A summons was served on Mr. Young's mother, and, when he nevertheless failed to appear in the Florida court pursuant to that summons, the Florida court ordered his arrest. Law enforcement continued to try to locate Mr. Young by contacting his relatives in Florida and a previous girlfriend in Oklahoma, all to no avail. The prosecutor explained that Mr. Young could not be located and that he was unaware of any other efforts the State could make to secure his presence. The efforts to locate Mr. Young continued even after the trial began.*
>
> *The record establishes that the State made multiple good-faith efforts to locate Mr. Young and secure his presence at trial. We conclude that the trial court did not abuse its discretion in determining that Mr. Young was unavailable.*

Id. at 129-30.

e. Statements to Police

In Davis v. Washington, 547 U.S. 813 (2006), the United States Supreme Court explained that a "police

interrogation" is not always conducted by a police officer, that the statements made during the interrogation can be considered either testimonial or nontestimonial depending on the circumstances, and that the statements can evolve from nontestimonial to testimonial as the circumstances change, holding:

> *Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.*

Davis, 547 U.S. at 822.

(1) 911 Statements

For purposes of the opinion in Davis, the Court found that the acts of a 911 operator constituted the acts of the police. Id. at 823 n.2. The victim's statements in response to a 911 operator's questions regarding an ongoing incident were considered nontestimonial. Id. at 828. In the companion case, the victim's statements in response to a police officer's questions regarding an incident which had concluded were considered testimonial. Id. at 829-30. The Court noted that statements made by a victim/witness to a 911 operator are not always considered nontestimonial. See id. at 828-29. For instance, statements made to a 911 operator after the emergency has concluded may be considered testimonial. Id. Finally, the Court concluded that the location of the "interrogation" (at the alleged

crime scene or at the police station, for example) is not dispositive. Id. at 832.

The Court's opinion in Davis abrogated a prior Tennessee Supreme Court holding in State v. Maclin, in which the court opined that whether a particular statement to a police officer is "testimonial" depends on "whether the declarant was acting in the role of a 'witness' at the time the statement was made." State v. Maclin, 183 S.W.3d 335, 349 (Tenn. 2006).

(2) Ongoing Emergencies/Police Questioning

In Bryant v. Michigan, 562 U.S. 344, 348 (2011), the State sought to introduce testimony by police officers who spoke with a murder victim shortly before his death. The police found the dying victim at the crime scene. Id. at 349. The police asked what had happened and who had shot him; the victim replied that a man named "Rick" [the defendant's first name was Richard] had shot him at 3:00 a.m., that he had spoken with the defendant through the back door of the defendant's house, and that he was shot through the door when he turned to leave the defendant's house. Id. The Supreme Court, emphasizing that an emergency focuses the participants on ending a threatening situation rather than proving past events potentially relevant to later criminal prosecution, ultimately held that "the circumstances of the encounter as well as the statements and actions of [the victim] and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency[.]'" Id. at 377-78 (quoting Davis, 547 U.S. at 822). Thus, the Court held that the

victim's "identification and description of the shooter and the location of the shooting were not testimonial hearsay" and "[t]he Confrontation Clause did not bar their admission at Bryant's trial." Bryant, 562 U.S. at 378.

The Court emphasized that an ongoing emergency is not the only situation in which a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. See id. at 358-59.

In State v. Franklin, 308 S.W.3d 799, 804 (Tenn. 2010), the victim of a robbery asked a bystander to write down the license plate number of a van in which the victim believed the alleged perpetrator was fleeing the scene. The police subsequently used this number to identify the defendant as the owner of the van. Id. at 805. The defendant objected to the admission of the number into evidence because the bystander who recorded the number did not testify at trial. Id. at 807. Under the specific facts of the case, the Tennessee Supreme Court concluded that the number was nontestimonial hearsay, that the defendant's confrontation rights were not implicated, and that the number was admissible pursuant to the excited utterance exception to the hearsay rule. See id. at 810-24.

f. Forensic/Scientific Reports

Reports and affidavits detailing the results of scientific or forensic testing are testimonial, and the analysts conducting such tests are witnesses for Sixth Amendment purposes. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009). Such reports are, therefore, inadmissible unless the analyst

who conducted the testing either (1) testifies at trial or (2) is unavailable at trial *and* the defendant had the prior opportunity to cross-examine the analyst. Bullcoming v. New Mexico, 564 U.S. 647, 663 (2011).

Melendez-Diaz and Bullcoming left open the question of whether experts could offer testimony regarding their review of work performed by experts who did not testify at trial. The Court addressed that question (to a certain extent) in Williams v. Illinois, 567 U.S. 50 (2012) (plurality opinion). In that case, after an Illinois State Police examiner identified semen in vaginal swabs taken from the victim, the state sent the swabs to an independent laboratory, which extracted a DNA profile. Id. at 61. The Illinois state crime lab had earlier developed a DNA profile from Williams' blood following his conviction in an earlier, unrelated case. Id. at 60. The crime lab's computer database indicated a match between the rape kit DNA profile and Williams' profile, a match confirmed by another state police examiner. Id. at 62. The state police examiners testified regarding their roles, but nobody from the independent lab testified, and the report regarding the DNA profile taken from the victim was not introduced into evidence. Id. at 62-63. The Supreme Court ultimately concluded that the testimony regarding the DNA match did not violate the defendant's Confrontation Clause rights.

No opinion received the approval of more than four justices; the lead opinion, authored by Justice Alito and joined by three other justices, emphasized that the testimony at issue here was not admitted for the truth of the matter asserted; experts have long been able to offer opinions in cases where they have no first-hand knowledge of the facts. Id. at 67. The opinion stated, in pertinent part:

> *[T]his form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.*

Id. at 57-58. Furthermore, the Alito opinion notes that even if the report had been introduced into evidence, there would have been no Confrontation Clause violation:

> *The Cellmark [independent lab] report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. ... If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence ... that are less reliable.*

Id. at 58.

Justice Thomas, concurring in the result, took issue with the plurality's assessment of the Cellmark report

as non-hearsay, claiming that the report's conclusions (and the report itself) could only have been introduced for the truth of the matter. See id. at 108 (Thomas, J., concurring). Justice Thomas also took issue with what he saw as the plurality's expansion of the "primary purpose" test by including "accusing a targeted individual of engaging in criminal conduct" and "inherently culpable" prongs. See id. at 116. Justice Thomas stated that the only reason the Cellmark report did not run afoul of the Confrontation Clause was because the report was "not a statement by a 'witnes[s] within the meaning of the Confrontation Clause. The Cellmark report lack[ed] the solemnity of an affidavit or deposition, because it is neither a sworn nor certified declaration of fact." Id. at 111.

The dissenting opinion, authored by Justice Kagan (with Justices Scalia, Ginsburg, and Sotomayor joining), concurred with Justice Thomas' conclusion that the "targeted accusation" test was not relevant to whether the report was testimonial. Id. at 135. The dissenters observed that for Confrontation Clause purposes, "it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect[.]" Id. at 136. "[T]he typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas" or dishonesty on the analyst's part. Id. at 135-36. The dissenters also rejected Justice Thomas' restrictions on the types of reports that could be considered testimonial. In addition to considering the reports of non-testifying analysts testimonial, the dissenters concluded that permitting an expert who had no knowledge of the report to testify to its contents violated the Confrontation Clause. Id. at 125.

After Williams, the admissibility of autopsy reports and of "surrogate testimony" regarding such tests remained unresolved for a time. However, in State v. Hutchison, 482 S.W.3d 893, 914 (Tenn. 2016), the Tennessee Supreme Court concluded an autopsy report was not testimonial under any of the tests announced in Williams, and, therefore, admitting a former medical examiner's report (and the surrogate testimony of a medical examiner who did not perform the autopsy) did not violate the defendant's constitutional rights under the Confrontation Clause.

> **NOTE:** In 2021 the General Assembly enacted a statute permitting a forensic analyst testifying for the State to offer "remote testimony," meaning "any method by which a forensic analyst testifies from a location other than the location where the hearing or trial is being conducted and outside the physical presence of a party or parties," provided (1) the State provides copies of the analyst's report at least fifteen days before the proceeding, (2) the defendant agrees to remote testimony, (3) the trial court concludes the defendant's agreement is knowing and voluntary, and (4) the State and court agree to permit remote testimony. See 2021 Tenn. Pub. Acts, ch. 501 (S.B. 1231) (eff. July 1, 2021, codified at Tenn. Code Ann. § 40-17-102). Remote testimony of the forensic analyst "must allow all parties to observe the demeanor of the analyst as the analyst testifies in a similar manner as if the analyst were testifying" in person. Id. The trial court must also "ensure that the defendant has a full and fair opportunity for examination and cross-examination." Id.
>
> The new statute does not explicitly provide for remote testimony by a defense forensic analyst,

but given a court's inherent powers to create reasonable procedures where none exist, a court should have discretion to permit remote testimony by a defense analyst if defense counsel provides adequate notice and the parties and court agree to allow remote testimony.

g. Prior Inconsistent Statements

(1) Impeaching a Witness: Prior Inconsistent Statement

A witness may also be impeached by proof that the witness made a statement inconsistent with the witness's trial testimony. See Tenn. R. Evid. 613(a). Extrinsic evidence of such statements is generally inadmissible "unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Tenn. R. Evid. 613(b). "This provision does not apply to admissions of a party-opponent[.]" Id.

In Bell, cited above, the defense also sought to introduce evidence of the affair to show that the husband's testimony, in which he said he told the police about the affair, was inconsistent with an earlier statement to police, which made no reference to the affair. Bell, 512 S.W.3d at 196. The Tennessee Supreme Court concluded when the earlier statement contained information omitted from trial testimony, or vice versa, the earlier statement could be considered a prior inconsistent statement under Rule 613. Id. "Accordingly, the trial court erred when it denied defense counsel the opportunity to

question [h]usband about the discrepancy between his testimony about what he told police and the written statements that he provided to police." Id. at 196-97. However, the Supreme Court, while acknowledging that "the 'undue restriction' of a criminal defendant's right to impeach credibility 'may violate a defendant's right to confrontation'" under the state and federal constitutions, concluded that the error was harmless given other evidence establishing the husband's alibi and the lack of evidence connecting the husband to his wife's death. Id. at 197.

(2) Prior Inconsistent Statements as Substantive Evidence

Formerly, prior inconsistent statements of a testifying witness could be used only to impeach the testimony of the witness. See State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000); Tenn. R. Evid. 613. And, if the witness admitted to having made the statement, extrinsic evidence of the statement was inadmissible at trial. Tenn. R. Evid. 613(b). While these provisions hold true for most statements, the Rules of Evidence were amended in 2009 to allow the admission of prior inconsistent statements as substantive evidence—in limited circumstances:

Tenn. R. Evid. 803(26) Prior Inconsistent Statements of a Testifying Witness

> **The following are not excluded by the hearsay rule:**
>
> **A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:**

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

Under the rule there are four prerequisites to admissibility:

(1) The statement must be admissible under Tenn. R. Evid. 613(b):

- The statement must be inconsistent with the testimony given at the present trial or hearing; and
- Extrinsic evidence of the statement cannot be offered unless and until the witness is given an opportunity to explain or deny the prior statement. The Tennessee Supreme Court has interpreted this rule as requiring that the witness be asked about the statement on cross-examination. See State v. Flood, 219 S.W.3d 307, 315 (Tenn. 2007).

(2) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement. The rule does not allow the admission of statements by non-witness declarants.

> (3) The statement must be recorded, either by (a) audio or (b) video; or (c) written and signed; or (d) given under oath. Per the Advisory Commission Comments, a written statement may be created by the witness or another person, but the witness must sign the statement. The Commission Comments do not state whether an electronic signature or a name typed at the end of an electronic document constitute an "actual signature," but they probably do; Tennessee has adopted both the Uniform Commercial Code and the Uniform Electronic Transactions Act, both of which provide for electronic signatures.
>
> (4) The statement must be "made under circumstances indicating trustworthiness" as determined by the trial court in a jury-out hearing.

See State v. Eric Boyd, 2021 WL 5629865 (Tenn. Crim. App. Dec. 1, 2021) (issue of trustworthiness addressed). The comments to the rule do not address potential issues concerning the Rule of Completeness. A good guideline is this: if extrinsic evidence of the prior inconsistent statement is allowed, the extrinsic evidence should be limited to the statements that fall within the Rule 803(26) exception or are otherwise admissible. This further emphasizes the importance of the jury-out hearing to resolve admissibility issues under the rule.

If the trial court admits evidence per Rule 803(26), the normal "prior inconsistent statement" jury instruction must be altered. There is a pattern instruction that states that prior inconsistent statements may be used only to assess the witness' credibility (and not as

substantive evidence) "unless [the statement is] entered as a numbered exhibit by the court and allowed to be taken by you back to the jury room. ..." See TPI (Crim.) 42.04(b), 42.06.

Illustrative Case: Limits of the Rule

State v. Ackerman, 397 S.W.3d 617 (Tenn. Crim. App. 2012) (overruled in part on other grounds by State v. Sanders, 452 S.W.3d 300 (Tenn. 2014)).

Shortly after a four-year-old girl disclosed sexual abuse to her mother and the mother's friend, the girl submitted to a forensic interview at which she revealed various types of sexual abuse at the hands of her father. Ackerman, 397 S.W.3d at 626-27. At least three years passed between the interview and the trial; the girl watched the video of her interview the day before her testimony, but she testified that she did not recall submitting to the interview, anything she said during the interview, or the types of the abuse she discussed during the interview. Id. at 624. She did say, however, that she "told the truth" during the forensic interview and was able to testify to some of the abuse she suffered "[b]ecause the video reminded me." See id. at 624, 636-37.

The video of the entire forensic interview was played during the forensic interviewer's testimony and was admitted as substantive evidence per Rule 803(26). Id. at 635-36. The trial court had made a pretrial ruling on the video's admissibility; the Court of Criminal Appeals stated that "it would be impossible for a trial court to determine admissibility under this

rule prior to trial because Rule 613 requires that the witness testify inconsistently at trial." Id. at 635 n.5. More importantly, the appellate court concluded that the video was not admissible under Rule 803(26) because ultimately, the victim did not testify inconsistently:

> *Although [the victim] said that she could not recall the interview with [the interviewer] or any of the statements she made during the interview, she did not testify inconsistently with any of the statements she made during that interview. [The victim] testified on direct that the defendant had touched her vagina with his tongue and with his hands and that the two had bathed together on at least one occasion. Both of these statements are consistent with [the victim]'s statements to [the interviewer]. [The victim] essentially had no memory of any abuse at the hands of the defendant. [The victim]'s lack of memory, however, does not qualify as an inconsistency. As indicated, if a witness testifies inconsistently with a prior statement and then evinces a lack of memory about the prior statement, then the prior statement is admissible via Rule 613. That is not what happened in this case. [The victim] did not testify inconsistently with the statements she made in the forensic interview but instead stated that she had no memory. Moreover, [the victim] acknowledged that she made the statements contained in the video and that the statements were "the truth." Because [the victim] unequivocally admitted making the statements in the video recording and did not testify inconsistently with the statements she made in the interview, extrinsic proof of those statements was not admissible under the terms of Rule 613(b). See [State v.] Martin, 964 S.W.2d [564,] 567 [(Tenn. 1998)]. Because the video did not qualify for admission via Rule 613(b), it was not admissible as substantive evidence via Rule 803(26).*

Ackerman, 397 S.W.3d at 638-39 (alterations added). Furthermore, the Court of Criminal Appeals emphasized that under the rule, only truly inconsistent prior statements are admissible:

> *Moreover, even assuming for the sake of argument that the victim's lack of memory established an inconsistency sufficient to satisfy the requirements of Rule 613, the entire video would not have been admissible. If the victim's lack of memory was sufficient to establish inconsistency, then only those portions of the video directly related to a claimed lack of memory would have been admissible.*

Id. at 639.

h. Confidential Informant Statements

The Sixth Circuit Court of Appeals has held that where information is provided by confidential informants to law enforcement authorities, describing criminal activity of the accused, the statements are testimonial. See United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004).

i. Excited Utterance

A hearsay "statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition" is admissible as an exception to the rule barring hearsay. Tenn. R. Evid. 803(2).

To be admissible under the exception, a startling event or condition, one that "suspend[s] the normal, reflective thought processes of the declarant," must be the catalyst for the excitement. State v. Stout, 46

S.W.3d 689, 699 (Tenn. 2001); State v. Gordon, 952 S.W.2d 817, 820 (Tenn. 1997). Additionally, there must be a nexus between the statement and the startling event (i.e., the statement must relate to the startling event or condition), and the utterance must be made while the declarant is under the stress of excitement from the event or condition. Franklin, 308 S.W.3d at 823; Gordon, 952 S.W.2d at 820. The statement must be spontaneous, but it need not necessarily be contemporaneous to the event. See, e.g., Stout, 46 S.W.3d at 699-700 (accomplice's out-of-court statement that defendant killed victim and accomplice's other statements on the details of the offense were admissible under excited utterance exception. Although 12 hours had elapsed between murder and accomplice's statement, witness was still under stress of excitement from murder at time he made statement).

j. Co-Conspirator Exception (Tenn. R. Evid. 803(1.2)(E))[27]

> *For a statement to be admissible as a statement as a co-conspirator, the State must prove by a preponderance of the evidence: "(1) that there is evidence of the existence of a conspiracy and the connection of the declarant and the defendant to that conspiracy, (2) that the declaration was made during the pendency of the conspiracy, and (3) that the declaration was made in furtherance of the conspiracy."*

State v. Francisco Jay Acona, 2012 WL 3291797, at *17 (Tenn. Crim. App. Aug. 13, 2012) (quoting State v. Henry, 33 S.W.3d 797, 803 (Tenn. 2000)).

If a conspiracy has not begun or has already concluded at the time of the statement, or if the statement is not

[27] See Crawford implications above.

"in furtherance of" the conspiracy, the statement is not admissible under this exception. State v. Carruthers, 35 S.W.3d 516, 554 (Tenn. 2000).

k. Prior Identification (Tenn. R. Evid. 803(1.1))

The "prior identification" exception to the hearsay rule applies if four elements are established:

> (1) the declarant made an identification in person;
>
> (2) the identification was made after perceiving the person;
>
> (3) the declarant testified at the hearing or trial in which the prior identification was introduced;
>
> (4) the declarant was subject to cross-examination about the statement.

Stout, 46 S.W.3d at 697-99; see, e.g., State v. Roderick Moore, 2011 WL 3530331, at **4-5 (Tenn. Crim. App. Aug. 18, 2011) (police officer's testimony regarding prior identifications of potential assailant by two declarants inadmissible when the two declarants themselves did not testify at trial and were not subject to cross-examination).

l. Medical Diagnosis and Treatment

(1) Generally

Tennessee Rule of Evidence 803(4) sets forth the requirements to be met before statements may be admitted as an exception to the hearsay rule as

statements made for medical diagnosis or treatment. First, the statement must have been made for the purpose of medical diagnosis and treatment, describing the medical history, which includes past or present symptoms, pain, or sensations; or, second, if the statement addresses the inception or general character of the cause or external source of the problem, then the information in the statement must be reasonably pertinent to diagnosis and treatment.

In the context of Rule 803(4), the term "diagnosis" "refers to a diagnosis made for the purpose of determining what course of treatment should be prescribed for the patient." State v. Rucker, 847 S.W.2d 512, 517 (Tenn. Crim. App. 1992). "By definition, a distinction exists between statements made for diagnosis and treatment and those made for evaluation. Statements made for purposes of evaluation are less likely to be viewed as reliable in the sense that they may have been affected by the prospect of litigation." State v. McLeod, 937 S.W.2d 867, 873 (Tenn. 1996). Thus, statements made for evaluation do not fall within the Rule.

Although Rule 803(4) ordinarily involves statements made to physicians, the scope of the rule applies to any person to whom a statement is made for purposes of or pertinent to medical diagnosis and treatment. See, e.g., Rucker, 847 S.W.2d 517-18 (statements made to nurse). Commentators have also suggested that the Rule extends to other medical professionals and employees such as ambulance attendants, orderlies, hospital attendants, clerks, and administrative personnel. Cohen, Tennessee Law of Evidence § 8.09[7] (6th ed. 2011).

However, in State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993), the Tennessee Supreme Court declined to apply Rule 803(4) to statements made to psychologists.

In State v. Cannon, 254 S.W.3d 287 301-03 (Tenn. 2008), the Tennessee Supreme Court held that consistent with Crawford, whether statements made by a victim to a sexual assault nurse examiner or other medical personnel are considered testimonial or nontestimonial depends upon the circumstances, with the focus being on the primary purpose of the statements.

If a statement is given for the primary purpose of medical diagnosis and treatment, the statement is nontestimonial, and its admissibility is governed by the rules of evidence as opposed to confrontation considerations. 254 S.W.3d at 303. In contrast, if the primary purpose of the statement is to establish or prove past events which may be relevant to a criminal prosecution, the statement is testimonial. Id. at 304-05. As with statements made to law enforcement personnel, statements made to medical personnel can evolve from nontestimonial to testimonial, and trial courts should redact any portions which violate a defendant's right to confrontation. Id. at 305.

In Cannon, the rape victim spoke with a sexual assault treatment nurse after emergency room personnel had treated and stabilized the victim. The Tennessee Supreme Court held that the victim's statements to the nurse, who was "a specially-trained sexual assault nurse employed by the Sexual Assault Crisis Center . . . as part of the police investigation to determine the extent

of [the victim's] injuries and to collect any evidence that could be used by the police in apprehending [the] attacker," were testimonial in nature and were, therefore, inadmissible when the nurse failed to testify at trial. Id. at 293. The court emphasized that the sexual assault nurse had been trained by various law enforcement agencies regarding the gathering of evidence and that because the victim had already been treated by ER physicians, there was no ongoing medical emergency at the time the victim spoke with the nurse. Id. at 305.

(2) Application to Children

The rationale for the diagnosis and treatment exception and its application become more troublesome when the declarant is a child who, due to his or her age, may be unable to comprehend the medical setting or to understand the need to provide accurate information. State v. McLeod, 937 S.W.2d 867, 870 (Tenn. 1996). In such a case, the trial court "should not presume that statements by a child to a medical services provider are untrustworthy merely because there is disputable evidence of the child's motivation to be truthful. Rather, the admissibility decision should be based upon a thorough examination of all the circumstances surrounding the statement." Id. at 871.

"The trial court should hold a jury-out hearing in order to make an admissibility determination, and when making this determination, the trial court should ensure that the hearsay statement was not 'improperly influenced by another, one made in response to leading or suggestive questions, or inspired by a custody battle or

family feud.'" State v. Antwan Deemeek Hudson, 2012 WL 344740, at *5 (Tenn. Crim. App. Feb. 2, 2012) (quoting State v. Stinnett, 958 S.W.2d 329, 331-32 (Tenn. 1997)).

In cases where the declarant is a child, numerous considerations are relevant to determining the motivation for the statements, including the timing and content of the statement, the presence or absence of any improper influences placed on the child, whether the child's statement was made in response to leading or suggestive questioning, and any other factor that may affect the trustworthiness of the statement. McLeod, 937 S.W.2d at 870; State v. Bobby Joe Croom, 2014 WL 3511017, at *9 (Tenn. Crim. App. July 11, 2014). Upon an affirmative finding from evidence in the record that the conditions of the rule are met, the statement is admissible. McLeod, 937 S.W.2d at 870.

A statement may still be admitted under this hearsay exception even if the child victim made the comments a considerable time after the alleged abuse occurred. See, e.g., State v. James Dickerson, 2016 WL 74449, at *5 (Tenn. Crim. App. Jan. 7, 2016) (statements made eight to nine months after abuse occurred); State v. David Wayne Felts, 2014 WL 3057038, at **12-13 (Tenn. Crim. App. July 8, 2014) (statement admissible under hearsay exception even when made nearly one year after abuse occurred).

m. Telephone Records & Other Computer Generated Records

Computer generated business records, such as telephone bills, are not hearsay and are admissible if

someone testifies concerning the reliability of the system used to generate the document. State v. Hall, 976 S.W.2d 121, 146-47 (Tenn. 1998).

Computer-generated *scientific* evidence, however, will likely require greater scrutiny. Furthermore, as referenced elsewhere in this chapter, the admissibility of phone records, the calls themselves, and other phone data entails issues other than hearsay (such as search and seizure principles).

n. Dying Declarations

Assuming a dying declaration is otherwise admissible under the Tennessee Rules of Evidence, admitting it at trial does not violate the defendant's right of confrontation regardless of whether the statement is considered testimonial or nontestimonial. State v. Lewis, 235 S.W.3d 136, 148-49 (Tenn. 2007).

> **NOTE:** Under the 2009 amendment to Rule 804(b)(2), a dying declaration is admissible "even though the declarant is not the victim of the homicide being prosecuted. The exception would apply, for example, where there were multiple victims but the prosecutions were severed." Tenn. R. Evid. 804(b)(2), Advisory Commission Comments.

o. Waiver, Forfeiture, and Harmless Error Re: Confrontation Clause

(1) Waiver

The right of confrontation may be waived, including by failure to object to the evidence at issue. States may adopt procedural rules governing the exercise of such objections.

Melendez-Diaz, 557 U.S. at 314 n.3; see also Cannon, 254 S.W.3d at 303 n.9 (choosing to address the Crawford issue on its merits but noting that the defendant "risked waiving this issue by not objecting at trial").

(2) Forfeiture

If the absence of the witness is caused by the defendant, the defendant may forfeit his right to confrontation. Davis v. Washington, 547 U.S. at 833. See Tenn. R. Evid. 804(b)(6). ("A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness" is not excluded by the hearsay rule). However, the defendant's conduct must have been designed to prevent the witness from testifying, and would include such things as bribing, intimidating, or killing the witness. The mere fact that the defendant killed the witness is not adequate to trigger the forfeiture exception unless the defendant did so to prevent the witness from testifying. Giles v. California, 554 U.S. 353, 366-68 (2008); see also State v. Brooks, 249 S.W.3d 323, 327-29 (Tenn. 2008).

(3) Harmless Error

"The erroneous admission of testimony in violation of an accused's right of confrontation is not structural error mandating reversal. Such a violation is subject to harmless error review." Cannon, 254 S.W.3d at 306.

p. Recorded Forensic Interviews of Child Sexual Abuse Victims

In 2009, the legislature enacted Tennessee Code Annotated Section 24-7-123, which allows the introduction of a recorded forensic interview of a child sexual abuse victim, provided certain requirements are met:

> **(a) Notwithstanding any provision of this part to the contrary, a video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact performed with or on the child by another is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the sexual contact if the requirements of this section are met.**
>
> **(b) A video recording may be admitted as provided in subsection (a) if:**
>
> **(1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross[-]examination;**
>
> **(2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pre-trial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:**
>
> **(A) The mental and physical age and maturity of the child;**
>
> **(B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;**

(C) The timing of the child's statement;

(D) The nature and duration of the alleged abuse;

(E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(F) Whether the statement is spontaneous or directly responsive to questions;

(G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;

(H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;

(I) The relationship of the child to the offender;

(J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and

(K) Any other factor deemed appropriate by the court;

(3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:

(A) Was employed by a child advocacy center . . . ;

(B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education,

criminal justice, nursing, psychology or other similar profession;

(C) Had experience equivalent to three (3) years of full[-]time professional work in one [or more of several social services] areas . . . [;]

(D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;

(E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;

(F) Had knowledge of child development through coursework, professional training or experience;

(G) Had no criminal history as determined through a criminal records background check; and

(H) Had actively participated in peer review;

(4) The recording is both visual and oral and is recorded on film or videotape or by other similar audio-visual means;

(5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and

(6) Every voice heard on the video recording is properly identified as determined by the court.

(c) The video recording admitted pursuant to this section shall be discoverable pursuant to the Tennessee rules of criminal procedure.

> **(d) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.**
>
> **(e) The court shall enter a protective order to restrict the video recording used pursuant to this section from further disclosure or dissemination. The video recording shall not become a public record in any legal proceeding. The court shall order the video recording be sealed and preserved following the conclusion of the criminal proceeding.**

Tenn. Code Ann. § 24-7-123 (some alterations added).

This statute withstood numerous challenges from a defendant in State v. McCoy, 459 S.W.3d 1, 4 (Tenn. 2014). In McCoy, the defendant was indicted on seven counts of rape of a child. Before trial, the State announced its intent to introduce a forensic interview of the child conducted at the local Child Advocacy Center. Id. The defendant challenged (1) section 24-7-123 as an unconstitutional violation of separation of powers; and the evidence of the interview as (2) inadmissible hearsay and (3) a Confrontation Clause violation. Id. at 5. The trial court sided with the defendant, but on the State's appeal the Tennessee Supreme Court upheld the validity of the statute.

Regarding the constitutional challenge, the court concluded, "the General Assembly did not encroach upon the powers of the judiciary by the enactment of section 24-7-123." Id. at 11. The court also concluded that "the recorded statement [at issue in the case], although falling within the definition of hearsay, is admissible under section 24-7-123 as a valid legislative exception to the general rule of excluding hearsay evidence." Id. at 12. Regarding the Confrontation Clause issue, the court explained,

Within this framework, the first question in the case before us is whether the video-recorded statement the State seeks to have admitted at trial is testimonial under Crawford. ... We hold that it is. Section 24–7–123(a) contemplates that video-recorded statements made to forensic interviewers will be used at trial to establish "act[s] of sexual contact performed with or on the child by another." In this regard, the video-recorded statements are the functional equivalent of in-court testimony. Further, the director of the Montgomery County Child Advocacy Center testified that the Center, which is a tax-exempt governmental entity, was created for "team[s] of investigators, [the Department of Children's Services,] law enforcement, [and] the [District Attorney's] office, [to] come together to investigate severe [child] abuse." Because the interview took place at the Center without any present threat of harm to the Child, there was no "ongoing emergency." Thus, the Child's video-recorded statement qualifies as testimonial.

Because the video-recorded statement is testimonial, Crawford requires that the Child be unavailable and that the Defendant had a prior opportunity for cross-examination before the statement may be admitted—unless the Child is made available at trial to defend or explain the statement upon cross-examination by the Defendant. See Crawford, 541 U.S. at 53–55. During argument before this Court, the State conceded that section 24–7–123 does not allow the admission of video-recorded statements when the witness is unavailable. The State further conceded that section 24–7–123(b)(1) requires the witness to authenticate the video recording before it is submitted, and to be available for cross-examination at trial. We agree this is the proper construction of the statutory text. In consequence, we hold that the only circumstance under which a child victim's video-recorded statements may be admitted in a manner consistent with both section 24–7–123 and the right of confrontation is when the witness first authenticates the video recording and then appears for cross-examination at trial to defend or explain the prior recorded statements.

Id. at 15. After noting that at least two other states had upheld similar statutes in the face of Confrontation Clause challenges, the court concluded,

> *[W]e hold that notwithstanding the testimonial nature of video-recorded statements taken pursuant to Tennessee Code Annotated section 24-7-123, the admission of these statements does not violate a defendant's right of confrontation so long as the child witness authenticates the video recording and appears for cross-examination at trial, as required by our statute.*

Id. at 16.

q. Prior Orders of Protection

In murder cases in which the defendant is accused of killing a spouse or domestic partner, the prosecution may wish to introduce evidence the victim applied for, or was granted, an order of protection against the defendant before the victim was killed. Tennessee's appellate courts have approved admitting such evidence, provided the evidence qualifies under a hearsay exception. The court will also likely have to hold a hearing under Rule 404(b), and if the evidence is unduly prejudicial, the court may have to redact certain prejudicial evidence or exclude the application/order entirely.

In the capital case of State v. Hawkins, 519 S.W.3d 1 (Tenn. 2017), the State's theory of prosecution was that the defendant killed the victim—the couple had been in an on again/off again relationship over the years and had children together—to prevent the victim from reporting the defendant's alleged sexual abuse of one of the couple's children. About a month before the victim disappeared, she filed an application for an order of protection against the defendant; the order was issued but not served on the defendant. Id. at 18.

At trial, the State sought to have the application for the order of protection admitted; the trial court granted the motion. Id. at 43. On appeal, the Tennessee Supreme Court affirmed the trial court's ruling:

> *The defendant next challenges the trial court's admission of the victim's January 15, 2008 application for an order of protection. The application was admitted as exhibit sixty-one through the testimony of Deborah Coffman, a counselor and records keeper for Citizens Dispute, a Shelby County government agency that assists persons in completing the application process for orders of protection. The victim's application included the following statements:*
>
> > *[The defendant] had the impression that he would be moving with me and my three children[.] When he realized he was not moving, he became violent pulling my hair and hit me on my right cheek (jaw) with his fist[.] He was telling my twelve year old daughter to lock herself in the bathroom and to tell the police that I pulled her hair (abused her)[.] He was not arrested for his violence.*
> >
> > *He wants my twelve year old daughter to be around him often, sleep with him and she has changed[,] telling lies and [being] disrespectful, I hope he hasn't molested her, he says no and she says no but both have lied, so I'm just trying to protect me and the children.*
> >
> > *I don't want him around me or my children, I don't trust him.*
>
> *The application also included the victim's statement that the defendant had told her she "was wrong for taking" K.T.[28] from him and that he could "get" the victim "without ... even having to touch [her]" because he could "get somebody else to get" the victim.*

[28] K.T. was the couple's daughter and alleged sexual abuse victim.

The trial court admitted the application pursuant to the forfeiture by wrongdoing exception to the hearsay rule, explaining:

> *And I'm finding, just so we'll all understand, their relationship had deteriorated to such a point, [the victim] and [the defendant], that at this point I think the record—that the State has shown by a preponderance of the evidence from this hearing that the reason for the killing, the motive for the killing, would be to stop her from prosecuting him for things against her and her child because she's here talking about harassing phone calls and things like that. So, I think [Tennessee Rule of Evidence] 804(6) is going to apply to this case to that extent.*

The Court of Criminal Appeals affirmed the trial court's ruling. Hawkins, *2015 WL 5169157, at *19*[29]*. We also affirm the trial court's ruling.*

The forfeiture by wrongdoing exception authorizes the admission of a hearsay statement "against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness." Tenn. R. Evid. 804(b)(6). Before admitting a hearsay statement under this exception, the trial court must conduct a jury-out hearing and determine that "a preponderance of the evidence establishes: 1) that the defendant was involved in or responsible for procuring the unavailability of the declarant; and 2) that [the] defendant's actions were intended, at least in part, to procure the absence of the declarant." State v. Ivy, *188 S.W.3d 132, 147 (Tenn. 2006);* see also State v. Brooks, *249 S.W.3d 323, 325 (Tenn. 2008) (stating that, for the exception to apply, the State must show that the defendant's actions "were intended, at least in part, to prevent a witness from testifying.");* Tennessee Law of Evidence, *§ 8.40[2] (discussing the forfeiture by wrongdoing exception).*

In Ivy, *this Court upheld the admission of a hearsay statement*

[29] State v. James Hawkins, 2015 WL 5169157 (Tenn. Crim. App. Aug. 28, 2015); aff'd, 519 S.W.3d 1 (Tenn. 2017).

> *at the defendant's homicide trial, explaining that the preponderance of the proof established that the defendant murdered the declarant to prevent her from contacting the police about his aggravated assault against her. Ivy, 188 S.W.3d at 147. In Brooks, this Court declined to apply the exception to admit the victim's hearsay statement because no proof was offered to show either that the defendant had threatened to harm the victim if she went to the police or that the defendant knew the victim had spoken to the police about him. Brooks, 249 S.W.3d at 329.*
>
> *The facts of this case are very similar to Ivy. The proof offered at the jury-out hearing showed that, even before the victim applied for the order of protection, she had summoned the police to the Prince Rupert apartment and attempted to remove K.T. and deny the defendant access to her. The application recites the defendant's threats against the victim because she called the police. Additionally, K.T. testified that, immediately before the defendant murdered the victim, the victim had again threatened to call the police, prompting the defendant to respond, "You're not going to call the police, not going to call anybody," and then to murder the victim. We conclude that the proof abundantly supports and does not preponderate against the trial court's determination that the State satisfied the requirements necessary for application of the forfeiture by wrongdoing exception. Accordingly, the trial court did not err by admitting exhibit sixty-one into evidence pursuant to the forfeiture by wrongdoing exception.*

Hawkins, 519 S.W.3d at 43-45 (footnotes and alterations added).

In the life without parole case of State v. Shawn Nelson Smoot, 2018 WL 4699046 (Tenn. Crim. App. Oct. 1, 2018), perm. app. denied, (Tenn. Jan. 16, 2019), the State sought to introduce an order of protection the victim had taken out against the defendant (her estranged boyfriend) before her death. "Prior to trial, the defendant filed a motion in limine to exclude any mention of the order of protection." Id. at *17. In a series of hearings, the trial court concluded the order of protection and the supporting documents were "admissible under Rule 404(b) of the Tennessee Rules of Evidence for the

purpose of proving motive, intent, and/or premeditation." Id. "The trial court further found the statements contained in the documents were admissible under the hearsay exceptions for then existing state of mind, statements against interest made by unavailable witnesses, and forfeiture by wrongdoing[.]" Id. The trial court also concluded "the statements did not violate the defendant's right to confrontation." Id. The trial court later issued an order stating the forfeiture by wrongdoing exception of the Tennessee Rules of Evidence did not apply, but the court "allowed the introduction of the order of protection as business records and public records." Id.

The trial court "ordered all hearsay statements by the victim had to be redacted from the petition for order of protection[,] id., but on appeal the Tennessee Court of Criminal Appeals concluded the redacted order of protection documents still contained inadmissible hearsay which should have been excluded at trial. Specifically, the redacted copies of the order of protection petition, ex parte order of protection, and agreed order of protection introduced at defendant's trial

> *identified the defendant, included a description of the defendant, stated the victim and the defendant had dated, identified the defendant's employer as Allstate, indicated the defendant kept a pistol in his truck, indicated abuse or threats of abuse had occurred in Knox County, requested a no contact order of protection, and requested the defendant to pay for the repair of the bathroom window. The victim's description of the abuse, including the date of the event, had been redacted from the documents. However, the petition showed the victim swore to the veracity of its contents on January 18, 2011. The ex parte order of protection was entered January 20, 2011, and the agreed order of protection was dated February 10, 2011. The agreed order of protection clarified that "[t]he parties wish to have social contact" and "[the defendant] is allowed to be in the presence of the [victim]. The agreed order of protection additionally stated*:
>
> > *The parties have reached a simple agreement that an order of protection should enter. Accordingly, the court*

> *makes no finding of fact; no hearing has been held; no testimony has been offered; and the respondent has made no admission with reference to this proceeding by virtue of his/her consent to the agreement, through counsel, or otherwise.* ***This order has no effect upon respondent's Second Amendment right to keep and bear arms. That right is unimpaired by this order.*** *(Emphasis in original.)*

Id. at **17-18.

The Court of Criminal Appeals stated that in this case, in which Smoot was accused of premeditated first degree murder, "The order of protection documents were properly admitted under Rule 404(b) to show the requisite motive and intent of the defendant." Id. at *19. Nevertheless, the redacted documents

> *contained hearsay statements that did not fall under one of the exceptions set forth within Tennessee Rules of Evidence 803, 804, or 805, including a statement that the defendant and victim dated, reference to the defendant's ownership of a firearm that he kept inside his truck, and a statement that the victim was in "immediate and present danger of abuse" by the defendant. Accordingly, the petition for order of protection should have been excluded as hearsay, and the trial court erred when granting its admission. The ex parte order of protection and order of protection, on the other hand, were orders of the trial court, not hearsay, and again properly admitted under Rule 404(b).*

Id.

However, the Court of Criminal Appeals concluded the error in admitting the supporting documents for the order of protection was harmless. The appellate court concluded the documents did not violate Smoot's rights under the Confrontation Clause, as the "statements contained in the petition for order of protection were sworn ... [and] were testimonial[,]" and "the defendant had the opportunity to cross-examine the victim regarding the information sworn to

in her petition for order of protection and failed to do so." Id. at *20. Furthermore, the appellate court concluded the information contained in the improperly-admitted hearsay statements was properly introduced through the testimony of other witnesses. See id. As such, the appellate court concluded "the error in admitting the petition for order of protection was harmless. The defendant [did] not [meet] his burden of proving the introduction of this evidence adversely impacted the outcome of [his] trial." Id.

11. Curative Admissibility and "Opening the Door"

Curative Admissibility and "Opening the Door," two means through which a party may admit otherwise inadmissible evidence, "are distinct, [yet] courts frequently, but incorrectly, refer to them as if they are synonymous." State v. Vance, 596 S.W.3d 229, 247 (Tenn. 2020). The Tennessee Supreme Court "has not yet expressly adopted the doctrine of curative admissibility." Id. at 249. However, the doctrine will be examined here in case a party seeks to admit evidence on curative admissibility grounds.

a. Curative Admissibility

"Curative admissibility permits the admission of inadmissible evidence by a party in response to the opposing party admitting inadmissible evidence." State v. Gomez, 367 S.W.3d 237, 248 (Tenn. 2012). "The party eliciting the inadmissible evidence cannot rely on the doctrine of curative admissibility to cure its own mistake. Only proof offered by an opponent triggers the doctrine." Vance, 596 S.W.3d at 248 n.10.

In summarizing curative admissibility, the Tennessee Supreme Court in Vance continued:

> *First and foremost, the doctrine serves the fundamental goal of fairness. As explained by Professor Wigmore:*

> *"[w]here an inadmissible fact has been offered by one party, and the opponent afterwards, for the purpose of negativing or explaining or otherwise counteracting it, offers a fact similarly inadmissible ... the second fact is admissible if it serves to remove an unfair effect upon the jury which might otherwise ensue from the original fact."*

21 Fed. Prac. & Proc. Evid. § 5039.3 (footnote omitted); see also, e.g., In re Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804, 817 (2d Cir. 1994) (recognizing that "[a] trial court may in the interests of fairness allow otherwise inadmissible evidence on an issue when necessary to rebut a false impression left by inadmissible evidence introduced by an opposing party" (citing United States v. Rea, 958 F.2d 1206, 1225 (2d Cir. 1992)), abrogated on other grounds by Zicherman v. Korean Air Lines Co., 516 U.S. 217, 116 S. Ct. 629, 133 L.Ed.2d 596 (1996)).

Curative admissibility, therefore, is not a "tit for tat" doctrine. The first line of defense against inadmissible evidence is a contemporaneous objection, perhaps coupled with a curative instruction. See In re Lockerbie, 37 F.3d at 817 (holding that opposing party did not have right to introduce inadmissible evidence after trial court determined that a strike and curative instruction were sufficient to cure impact of inadmissible evidence); 21 Fed. Prac. & Proc. Evid. § 5039.3 n.38 ("If no objection is made, the evidence is admissible and curative admissibility cannot be invoked.").

Moreover, only if the party opposing the inadmissible evidence suffers some particular and significant prejudice from its being heard by the fact-finder does the doctrine have possible applicability. See, e.g., United States v. Nardi, 633 F.2d 972, 977 (1st Cir. 1980) (doctrine of curative admissibility was not applicable where the inadmissible evidence was not prejudicial); Kessler v. Wal-Mart Stores, Inc., 587 N.W.2d 804, 808 (Iowa Ct. App. 1998) ("The theory of curative admissibility is not applicable where the plaintiff has shown neither that inadmissible testimony was offered or

that prejudice resulted." (citing Lala v. Peoples Bank & Trust Co., 420 N.W.2d 804, 807-08 (Iowa 1988))).

In keeping with the overall concern for fairness, if the doctrine is deemed applicable, the inadmissible evidence offered as the "cure" must be both relevant and proportional. As colorfully described in Federal Practice and Procedure Evidence, "tossing a stink bomb into the jury box does not justify nuking the offender in retaliation." 21 Fed. Prac. & Proc. Evid. § 5039.3 (citations omitted); see also, e.g., United States v. Rucker, 188 Fed. App'x 772, 779 (10th Cir. 2006) (recognizing that curative admissibility "is limited to the prevention of prejudice and used only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original [inadmissible] evidence" (quoting United States v. Morales-Quinones, 812 F.2d 604, 609-10 (10th Cir. 1987))) (alteration added); Valadez v. Watkins Motor Lines, Inc., 758 F.3d 975, 981-82 (8th Cir. 2014) (recognizing that "[t]he remedy for improper evidence is not always additional improper evidence[,]" rather, "[t]he rebuttal evidence offered to cure the error must be commensurate with the magnitude of the error itself"); Nardi, 633 F.2d at 977 ("The doctrine [of curative admissibility] applies ... only when inadmissible evidence has been allowed, when that evidence was prejudicial, and when the proffered testimony would counter that prejudice.").

Vance, 596 S.W.3d at 248-49.

b. "Opening the Door"

In explaining the more familiar doctrine of "opening the door," the Tennessee Supreme Court stated in Vance:

We emphasize that a party may open the door to otherwise inadmissible evidence by eliciting admissible evidence, in contrast to the doctrine of curative admissibility. 21 Fed. Prac. & Proc. Evid. § 5039.1 ("Unlike 'curative admissibility,' true 'opening the door' does not require the prior admission of

inadmissible evidence." (citations omitted)). Unlike the doctrine of curative admissibility, which requires the opposing party to object to the inadmissible evidence before requesting a cure, a party opening the door will not necessarily elicit an objection from the opposing party. Indeed, in this case, because the defense did not elicit inadmissible testimony from Detective Davis during its cross-examination, the State was not required to (and did not) object before seeking a remedy.

Like curative admissibility, opening the door is a doctrine intended to serve fairness and truth-seeking. See, e.g., Ramirez v. State, 739 So.2d 568, 579 (Fla. 1999) ("The concept of 'opening the door' is 'based on considerations of fairness and the truth-seeking function of a trial.' " (quoting Bozeman v. State, 698 So.2d 629, 631 (Fla. Dist. Ct. App. 1997))). Accordingly, as with curative admissibility, the remedy sought after a party has opened the door should be both relevant and proportional. The otherwise inadmissible evidence sought to be introduced by the opposing party should be limited to that necessary to correct a misleading advantage created by the evidence that opened the door. See, e.g., State v. Gaudet, 166 N.H. 390, 97 A.3d 640, 646 (2014) (recognizing that the opening the door doctrine applies "to situations in which one party has introduced admissible evidence that creates a misleading advantage and the opponent is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage") (citing State v. Wamala, 158 N.H. 583, 972 A.2d 1071, 1076 (2009)). More specifically,

> *For this doctrine to apply, a party must introduce evidence that provides a justification, beyond mere relevance, for the opponent's introduction of evidence that may not otherwise be admissible. However, the initial evidence must have reasonably misled the fact finder in some way. The rule, thus, prevents a party from successfully excluding evidence favorable to his opponent and then selectively introducing some of this evidence for his own advantage, without*

> *allowing the opponent to place the evidence in proper context. The fact that the "door has been opened" does not permit all evidence to pass through because the doctrine is intended to prevent prejudice and is not to be subverted into a rule for the injection of prejudice. The trial court is in the best position to gauge the prejudicial impact of particular testimony.*
>
> *Id. (citing and quoting Wamala, 972 A.2d at 1076-77 (citations and internal quotation marks omitted)).*

Vance, 596 S.W.3d at 250-51.

c. An Illustrative Case: State v. Vance

Vance and two other codefendants were indicted for first degree murder. Id. at 234-35. Before trial, one codefendant's case was severed from the others, and the trial court granted a motion preventing the State from introducing any testimony regarding the severed codefendant's prior statements implicating Vance in the offense. Id. at 234. During trial, counsel for Vance and the other remaining codefendant (who were tried jointly) cross-examined a detective who testified regarding identification of Vance and the other codefendant by a witness named Myles. Id. at 242. After the detective's testimony concluded, a jury-out hearing was held at which the State announced its intention to introduce a statement of the severed codefendant in which the severed codefendant implicated himself and the two codefendants on trial. Id. "The prosecutor asserted that defense counsel had opened the door to the admission of [the severed codefendant's] statement." Id. Counsel for the two codefendants on trial objected, claiming the third codefendant's statements were inadmissible hearsay and the statements were unreliable given the concerns over the third codefendant's competency. Id. The trial court, over defense counsel's objection, permitted the

State to ask the detective whether anyone other than the previously-identified witness had implicated Vance in the offenses. Id. at 243. The detective did not identify the third codefendant as the "other person" who implicated Vance. Id. at 244.

The trial court's order denying Vance's motion for new trial stated its actions in permitting the State's limited redirect questioning of the detective were permissible under the doctrine of "curative admissibility." Id. at 245-46. On appeal, however, the Tennessee Supreme Court concluded the State's cross-examination did not constitute curative admissibility:

> *in this case, the State sought the admission of inadmissible proof in response to cross-examination by the defense lawyers that did not elicit inadmissible testimony. None of Detective Davis' responses to the relevant cross-examination included inadmissible evidence. Accordingly, the doctrine of curative admissibility was not applicable, and the trial court was mistaken in describing the rationale for its ruling as resting, at least in part, on the doctrine of curative admissibility.*

Id. at 249.

Conversely, the court concluded that the State was entitled to present certain evidence under the "opening the door" principle, but fairness concerns did not justify admitting the detective's testimony about the identification by a person who was, ultimately, unknown to the jury:

> *In this case, the Defendant's primary defense was that the State's proof of his identity as one of the perpetrators was not credible. Mr. Myles was the only eyewitness at trial who had positively identified the Defendant as one of the three perpetrators, although Mr. Myles declined to identify the Defendant as such during his testimony.*

The defense theory was to impeach Mr. Myles' credibility and argue that the remaining evidence was either not credible or not enough upon which to conclude that the Defendant was one of the perpetrators. The defense tried to imply to the jury during its cross-examination of Detective Davis that the police investigation was inadequate and that the charges against the Defendant were based on nothing more than Mr. Myles' questionable statements.

In our view, the cross-examination of Detective Davis by the Defendant's lawyer clearly implied that there was no other eyewitness to the crimes who had identified the Defendant as one of the perpetrators. The Defendant's lawyer knew that this implication was misleading because he knew that [the third codefendant] had stated that both he and the Defendant had been involved. The Defendant's lawyer was trying to take advantage of the pretrial ruling that [the third codefendant's] statements were inadmissible in order to create a misleading impression about the strength of the State's investigation and proof. This is precisely the type of conduct for which the doctrine of "opening the door" was created.

In short, we hold that the defense opened the door for the State's introduction of proof sufficient to correct the misleading impression created by the cross-examination of Detective Davis. Nevertheless, the issue before us is whether the cross-examination of Detective Davis opened the door to the admission of Detective Davis' testimony that an unidentified eyewitness had been at the scene and had implicated the Defendant as one of the perpetrators. We hold that the trial court should not have allowed the State to adduce this testimony on redirect because its prejudicial impact substantially outweighed the misleading impression created by the defense's cross-examination.

In State v. Galmore, this Court considered the prejudicial impact of impeaching a criminal defendant through proof of an unidentified prior felony conviction. 994 S.W.2d 120, 122 (Tenn. 1999). We held that the trial court erred in ruling that the State could impeach the defendant's credibility in this manner because "[n]ot

> *identifying the felony . . . would permit a jury to speculate as to the nature of the prior conviction[,]"* id. *(citing* State v. Barnard, *899 S.W.2d 617, 622 (Tenn. Crim. App. 1994)), and because "instructing the jury on an unnamed felony would provide inadequate information for a jury to properly weigh the conviction's probative value as impeaching evidence,"* id. *(citing* State v. Summerall, *926 S.W.2d 272, 277 (Tenn. Crim. App. 1995)).*
>
> *In the instant case, Detective Davis' testimony that an unidentified eyewitness had implicated the Defendant similarly called for the jury to speculate about who the eyewitness was and, more significantly, offered the jury absolutely no indication about the reliability of this person's statement or the proper weight to accord it. Under the circumstances of this case, the misleading impression created by the defense simply was not so damaging as to justify the revelation of this "surprise" eyewitness upon whom the State so heavily relied during closing argument and for whom the jury was given no yardstick by which to measure his or her credibility*

Vance, 596 S.W.3d at 251-52 (alterations added, footnote omitted). However, the issue surrounding the detective's redirect testimony was limited to plain error review, and the Tennessee Supreme Court concluded the trial court's error in admitting the detective's testimony did not amount to plain error. See id. at 254-56.

E. *MOMON* HEARING

At the conclusion of the State's case in chief, or before the defense rests, the trial court should conduct a hearing on the record regarding the defendant's decision whether to testify on his own behalf. To quote the Tennessee Supreme Court's Momon opinion:

> *At any time before conclusion of the proof, defense counsel shall request a hearing, out of the presence of the jury, to inquire of the defendant*

> *whether the defendant has made a knowing, voluntary, and intelligent waiver of the right to testify. This hearing shall be placed on the record and shall be in the presence of the trial judge. Defense counsel is not required to engage in any particular litany, but counsel must show at a minimum that the defendant knows and understands that:*
>
> > *(1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify;*
> >
> > *(2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;*
> >
> > *(3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.*

Momon v. State 18 S.W.3d 152, 162 (Tenn.1999).

The trial court should also ask the defendant to complete a written waiver of his right to testify.

An example of a Momon waiver is included in the Appendix.

Conversely, there is no requirement that the trial court inform a defendant who elects to testify that the defendant has the right not to testify. See Mobley v. State, 397 S.W.3d 70, 90-91 (Tenn. 2013); State v. Washington, 387 S.W.3d 595, 606 (Tenn. Crim. App. 2012).

F. DEFENSE ISSUES

1. Insanity

a. Tenn. Code Ann. § 39-11-501

Insanity. –

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

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

(c) No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.

In other words, "for a defendant to successfully prove an insanity defense, he need only prove that, as a result of a severe mental disease or defect, either he did not appreciate the nature of his actions or he did not appreciate that his actions were wrongful[.]" State v. Richard Anthony Arriola, 2009 WL 2733746, at *5 (Aug. 26, 2009) (emphasis in original). "'Wrongfulness' goes to whether a defendant understands whether his actions are wrong, or, in other words, it addresses a moral capacity, whereas 'nature' goes to whether a defendant understands what the actions were, or in other words, it addresses a cognitive capacity." Id. at *6.

b. Burden of Proof and Applicable Standards

The statute places upon the defendant the burden of establishing the defense of insanity by clear and convincing evidence. Evidence is clear and convincing when "there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." See State v. Flake, 88 S.W.3d 540, 551

(Tenn. 2002) (quoting State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999)). The State has no obligation to offer evidence establishing the defendant's sanity. See Flake, 88 S.W.3d at 551. In determining a defendant's sanity, the trier of fact, may consider the facts surrounding the crime as well as the testimony of lay witnesses and expert witnesses. State v. Flake, 114 S.W.3d 487, 490 (Tenn. 2003). A trier of fact cannot ignore expert evidence arbitrarily, but the factfinder is not bound to accept the testimony of experts where the evidence is contested. Id. at 507; State v. Hank Wise, 2014 WL 992102, at *17 (Tenn. Crim. App. Mar. 13, 2014).

2. Diminished Capacity

a. Tennessee Rules of Evidence 702 & 704

Tennessee Rule of Evidence 702 states as follows:

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

Tennessee Rule of Evidence 704 states as follows:

> **Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.**

b. Expert Testimony on Capacity to Form Culpable Mental State

If general relevancy and evidentiary rules are satisfied, expert testimony that the defendant lacks the capacity,

because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law. In State v. Hall, 958 S.W.2d 679, 688-90 (Tenn. 1999), the holding was stated in terms of "psychiatric evidence" that the defendant lacked the culpable mental state because of mental disease or defect. However, in State v. Ferrell, 277 S.W.3d 372, 379-80 (Tenn. 2009), the holding was expanded to include any expert testimony that the defendant lacked the ability to form the culpable mental state due to mental disease or defect. The defendant in Ferrell sought to introduce testimony from his treating physician regarding an organic brain injury which prevented him from forming the culpable mental state. The trial court, citing Hall's "psychiatric evidence" standard, prohibited the expert from testifying. The Court of Criminal Appeals affirmed the trial court, but the Tennessee Supreme Court reversed. Id. at 380.

> **NOTE:** The expert testimony must establish that the defendant's mental disease or defect rendered the defendant completely unable to form the requisite culpable mental state. Testimony that the defendant's mental state "made it difficult" for him or "impeded his ability" to form the culpable mental state does not meet the Hall standard. See generally State v. Herbert Michael Merritt, 2013 WL 1189092 at **26-27 (Tenn. Crim. App. Mar. 22, 2013); State v. Marquette Milan, 2007 WL 4224725 at *5 (Tenn. Crim. App. Nov. 29, 2007); State v. Robert Austin, 2007 WL 2624399 at *6 (Tenn. Crim. App. Sept. 10, 2007); State v. Antonio D. Idellfonso-Diaz, 2006 WL 3093207 at *4 (Tenn. Crim. App. Nov. 1, 2006).

Diminished Capacity is not a defense. Thus, such evidence is not proof of "diminished capacity;" rather, such evidence should be relevant to negate the existence of the culpable mental state.

G. CLOSING ARGUMENT

The Tennessee Supreme Court has long recognized that "'argument of counsel is a valuable privilege that should not be unduly restricted.'" State v. Thomas, 158 S.W.3d 361, 412 (Tenn. 2005) (quoting Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975)). "[S]uch arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003).

> *However, even though the scope and tenor of their arguments may be limited, ... prosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable evidence to be drawn from the evidence, ... or make derogatory remarks or appeal to the jurors' prejudices[.]*

State v. Banks, 271 S.W.3d 90, 131 (Tenn. 2008).

In Goltz, the Court of Criminal Appeals identified five common areas of prosecutorial misconduct:

- Intentionally misstating the evidence or misleading the jury as to inferences it may draw;
- Expressing a personal belief or opinion as to the truth or falsity of any testimony or evidence or the defendant's guilt;
- Arguing in a way that inflames the jury's passions or prejudices;

- Arguing in a way that diverts the jury from its jury to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict; and

- Intentionally referring to or arguing facts outside the record, unless the facts are matters of common public knowledge.

Goltz, 111 S.W.3d at 6 (citations omitted).

In addition to offering curative instructions upon an objection by one of the parties, where the trial court finds an argument to be highly inflammatory, even if there is no objection, a trial court may sua sponte intervene to prevent prejudice. See Sparks v. State, 563 S.W.2d 564, 567 (Tenn. Crim. App. 1978).

1. Argument Designed to Inflame the Jury

During argument, the State is not permitted to engage in argument designed to inflame the jurors and must restrict his or her comments to matters properly admitted into evidence at trial. See State v. Hall, 976 S.W.2d 121, 158 (Tenn. 1998).

2. Personal Belief or Opinion

The prosecutor is not permitted to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. See Goltz, 111 S.W.3d at 6 (citations omitted) (noting that it is unprofessional conduct for the prosecutor to express his personal belief as to the truth or falsity of any testimony or evidence or the guilt of the defendant); State v. Charles Owens, 2007 WL 1094136 at *7 (Tenn. Crim. App. Apr. 12, 2007) (prosecutor's comment that "children have an absolute right to be believed" improper, but comment did not constitute plain error). The State can compare the testimony of certain witnesses and point out inconsistencies if the State does not pass judgment on the

credibility of a particular witness or the truth of witness testimony. See State v. Jim Gerhardt, 2008 WL 160930 at *16 (Tenn. Crim. App. Jan. 23, 2009) (child abuse case where sister of alleged victim testified; State's closing argument that sister was "credible" and "the best witness" at trial improper; comments that her testimony was consistent with victim's testimony and inconsistent with defendant's testimony were proper) (no perm. app. filed).

Likewise, the prosecutor should refrain from calling the defendant derogatory names. State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998).

3. Biblical References

References to the Bible during closing argument are inappropriate. State v. Reid, 164 S.W.3d 286, 347 (Tenn. 2005) (citing State v. Cribbs, 967 S.W.2d 773, 783 (Tenn. 1998)); see also State v Middlebrooks, 995 S.W.2d 550, 559 (Tenn. 1999).

4. Defendant's Decision Not to Testify

The State is strictly prohibited from commenting on a defendant's decision not to testify. State v. Jackson, 444 S.W.3d 554, 585-87. (Tenn. 2014). Indirect comments on a defendant's right to remain silent can be improper as well. See id. at 587. In determining whether a prosecuting attorney's remarks constitute an improper comment on the defendant's right to remain silent and not testify, the Tennessee Supreme Court in Jackson adopted a two-part test: "(1) whether the prosecutor's manifest intent was to comment on the defendant's right to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify." Id. at 588. Using this test, the Tennessee Supreme Court granted Ms. Jackson a new trial based on the prosecuting attorney's yelling at the defendant, "Just tell us

where you were! That's all we are asking, Noura!" during closing argument. Id. at 589.

However, argument that the State's proof is unrefuted or uncontradicted is not an improper comment upon a defendant's failure to testify. State v. Thomas, 818 S.W.2d 350, 364 (Tenn. Crim. App. 1991); State v. Coury, 697 S.W.2d 373, 378 (Tenn. Crim. App. 1985).

H. SUNDAY COURT

There is no Tennessee statute or constitutional provision that prohibits judicial functions on a Sunday. State v. King, 40 S.W.3d 442, 448 (Tenn. 2001). Likewise, the common law rule prohibiting judicial activities on Sundays has been abolished. Id. In King, the Tennessee Supreme Court specifically held that the issue of Sunday proceedings was left to the discretion of the trial court. Id. at 449; see also State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002). In exercising this discretion, the trial court should be deferential to the preferences and genuinely-held religious views of the litigants, witnesses, jurors, and attorneys, and the court must also be mindful of the need for every participant in a trial proceeding to be prepared and rested. King, 40 S.W.3d at 449. Finally, the trial court must weigh all these concerns against whatever pressing need or compelling interest may necessitate a Sunday proceeding. Id.

The Tennessee Supreme Court reversed the convictions in King because the trial judge did not take these considerations into account in compelling the parties to appear in court on Sunday. See id. at 450.

I. GUILT PHASE JURY INSTRUCTIONS[30]

1. TPI 0.00 Instruction Checklist

The Tennessee Pattern Jury Instructions contains a checklist of all TPI suggested instructions at section 0.00. Tennessee Practice, Volume 7. This checklist may be a helpful tool for both the court and the parties. Parties may use this checklist to make written requests to charge to submit to the court. Everyone using the same list is helpful in discussing it on the record. The parties could be required to submit the checklist as part of a pretrial conference or prior to trial with the understanding that this would not preclude them from making special requests as the evidence develops.

The court may use the list during the trial to note which sections should be included in the final charge as the evidence is presented. For example, if evidence is introduced of a prior bad act, this section will be checked to be included. This list can be helpful and easy to follow for the court's assistant, who may not be in the courtroom, in drafting the charge for the court.

2. Preliminary Jury Instruction

"Immediately after the jury is sworn, the court **shall** instruct the jury concerning its duties, its conduct, the order of proceedings, the general nature of the case, and the elementary legal principles that will govern the proceeding." Tenn. R. Crim. P. 30(d)(1) (emphasis added).

[30] This section will not contain a discussion on lesser included offenses. The authors acknowledge the difficulty judges occasionally face in determining which lesser offenses to charge. However, the extensive scope of the lesser offense issue—including a determination of what offenses constitute lesser offenses of particular charged offenses—is beyond the scope of this book. Judges are encouraged to consult other treatises or their capital case attorney should they have questions.

The Tennessee Pattern Jury Instructions contain a preliminary charge for criminal cases (TPI Crim. 1.00). However, the instruction does not contain language appropriate for a capital murder trial.

An example of a proposed modified TPI preliminary instruction for a capital case is included in the Appendix.

3. Questions of Witnesses by Jurors/Follow-Up Questions

"In the court's discretion, the court may permit a juror to ask a question of a witness." Tenn. R. Crim. P. 24.1(c). Rule 24.1(c) requires jurors to write down questions anonymously and submit the questions to a court officer, who will in turn pass the question along to the judge. Tenn. R. Crim. P. 24.1(c)(1). The trial judge will then review the questions "outside the hearing of the jury" and, after consulting with the attorneys, decide whether to ask the question to the witness. Tenn. R. Crim. P. 24.1(c)(2). The trial judge or one of the attorneys may ask the question "in its original or amended form in whole or in part." Id. If the trial judge permits the juror's question(s) to be asked, the court may allow both parties to ask follow-up questions based on the witness' answers. See State v. James, 315 S.W.3d 440, 458-60 (Tenn. 2010). The preliminary charge has an optional instruction to inform jurors about whether they will be allowed to ask questions.

If the trial court permits questions, "the court shall instruct jurors early in the trial about the mechanics of asking a question and to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror." Tenn. R. Crim. P. 24.1(c)(3). Any question submitted by the jury must be kept in the record regardless of whether the trial court permitted the question to be asked. Tenn. R. Crim. P. 24.1(c)(4).

4. Definition of "Knowing" in Felony Murder Instruction

Counsel may argue that the court used an improper definition of "knowing" when instructing on the elements of felony murder, and that it should be the same definition as that employed in the second degree murder instruction. This argument may be disposed of by pointing out that there is no culpable mental state required for conviction of first degree felony murder, except for the intent to commit the enumerated underlying felony offense. Tenn. Code Ann. § 39-13-202(b); State v. Rice, 184 S.W.3d 646, 684 (Tenn. 2006) (Appendix).

5. Definition of Premeditation

In instructing the jury on the definition of premeditation, the court cannot define premeditation in terms of the non-exhaustive "laundry list" of factors often cited by the appellate courts as examples of evidence of premeditation (declarations of intent to kill, use of deadly weapon upon unarmed victim, etc.). Such instructions are improper comments on the evidence and constitute reversible error. See State v. Hollis, 342 S.W.3d 43, 51-52 (Tenn. Crim. App. 2011).

6. Flight Instruction

A flight instruction is not prohibited when there are multiple motives for flight because to determine otherwise would prevent a flight instruction when a defendant evades arrest for numerous crimes. A defendant's specific intent for fleeing a scene is a jury question. State v. Berry, 141 S.W.3d 549, 587-88 (Tenn. 2004) (Appendix).

7. Sequential Jury Instructions

Sequential or "acquittal first" jury instructions are constitutionally permissible. See State v. Davis, 266 S.W.3d 86, 907-08 (Tenn. 2008).

8. Partial Judgment of Acquittal

In a trial of a multi-count indictment, should the trial court grant the defendant's judgment of acquittal as to some counts and submit other counts to the jury,

> *it is sufficient for the trial court to inform the jury that the dismissed charges have been removed from the indictment, that no instruction concerning the dismissed charges will be provided, and that the jury should not speculate as to the removal of the dismissed charges or the absence of instructions on the dismissed charges.*

State v. Little, 402 S.W.3d 202, 215 (Tenn. 2013). If the defendant requests, the trial court "should also provide an appropriate limiting instruction as to the purpose of the evidence related to the dismissed charges." Id. A pattern instruction to be given when the court grants a partial judgment of acquittal, TPI (Crim.) 43.01, is included in the pattern instruction book.

9. Instructions on Kidnapping, False Imprisonment, and Related Offenses

When the defendant is charged with offenses alleging false imprisonment (false imprisonment, kidnapping, aggravated kidnapping, and especially aggravated kidnapping**)** and other offenses, the court must instruct the jury that a conviction for the false imprisonment-related offense cannot stand unless the removal or confinement required to sustain a conviction for that offense was to a greater degree than necessary to commit the other "non-confinement" offenses charged in the indictment. In other words, a conviction cannot stand if the confinement was incidental or secondary to the other offenses. See State v. White, 362 S.W.3d 559, 576-81 (Tenn. 2012).

NOTE: The current pattern jury instructions contain the relevant post-White language to be used if applicable. Failure to include the White language constitutes reversible error. See State v. Cecil, 409 S.W.3d 599, 610-12 (Tenn. 2013).

10. Alibi Instruction

If evidence supporting the alibi defense is fairly raised by the evidence, the trial judge is required to give the instruction, even if the defendant does not request it. See State v. Benson, 600 S.W.3d 896, 905-06 (Tenn. 2020) (quoting Sneed v. State, 498 S.W.2d 626, 629 (Tenn. Crim. App. 1973)); Poe v. State, 370 S.W.2d 488, 489 (Tenn. 1963).

11. Direct and Circumstantial Evidence Instruction

The former jury instruction whereby a conviction based entirely on circumstantial evidence may stand only if the evidence excludes "every other reasonable hypothesis save that of guilt" is now improper considering the Tennessee Supreme Court's opinion in State v. Dorantes, 331 S.W.3d 370, 379-81 (Tenn. 2011), which eliminated that principle. The jury should still be instructed on the difference between direct and circumstantial evidence, including an instruction that either evidence can be used to convict a defendant and that one type of evidence is not necessarily "better" than the other.

12. Expert Testimony/Hearsay

Expert witnesses can base their opinions on hearsay evidence. See Tenn. R. Evid. 703. However, if an expert witness relies on such evidence, the jury must be instructed that "the hearsay statements are to be used only for evaluating the expert witness's testimony and should not be relied on as substantive evidence." State v. Jordan, 325 S.W.3d 1, 54 (Tenn. 2010).

NOTE: The pattern instructions now include a revised instruction on expert witnesses that incorporates the Jordan hearsay provision. See T.P.I. (Crim.) 42.02.

13. Self-Defense

Self-defense, like other general defenses, must be submitted to the jury if it is "fairly raised by the proof." Tenn. Code Ann. § 39-11-203(c). "[T]he quantum of proof necessary to fairly raise a general defense is [something] less than [what is] required to establish a proposition by a preponderance of the evidence." State v. Hawkins, 406 S.W.3d 121, 129 (Tenn. 2013). "When determining if a defense has been fairly raised by the proof, the court must consider the evidence in the light most favorable to the defendant, including all reasonable inferences that can be made in the defendant's favor." State v. Benson, 600 S.W.3d 896, 903 (Tenn. 2020). If the court, in its function as gatekeeper, concludes a general defense is fairly raised, the court must instruct the jury regardless of whether the defendant makes a written request. State v. Cole-Pugh, 588 S.W.3d 254, 263-64 (Tenn. 2019).

Regarding self-defense, the trial judge—not the jury—makes the determination whether the State has established, by clear and convincing evidence, that the defendant was engaged in unlawful activity[31] at the time the defendant used force in the alleged self-defense situation. State v. Perrier, 536 S.W.3d 388, 394 (Tenn. 2017). The defendant's potential commission of unlawful activity relates only to the duty to retreat before engaging in self-defense. See id. at 399.

[31] The self-defense statute had long provided "a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening and using force … ." Tenn. Code Ann. § 39-11-611(b)(1). However, in 2021, the General Assembly replaced the phrase "not engaged in unlawful activity" with "not engaged in conduct that would constitute a felony or Class A misdemeanor." 2021 Tenn. Pub. Acts, ch. 115 (S.B 188), § 3. The new definition is effective for offenses occurring on or after July 1, 2021. Id., § 4.

In determining whether the evidentiary burden for instructing on self-defense has been raised, the Tennessee Supreme Court has rejected a contention that "fairly raising" a defense requires only the "slightest of evidence." Benson, 600 S.W.3d at 905. "Fairly raising" a defense instead requires less proof than preponderance of the evidence. Id. However, "[t]he bar is substantially higher for one trying to fairly raise the issue of the valid use of deadly force" than it is to fairly raise the issue of whether one was justified in using non-lethal force. Id. at 906-07 (citing Tenn. Code Ann. § 39-11-611(b)(2)). Thus, the trial court in Benson properly refused to instruct the jury on self-defense when the evidence established the victim had only punched the defendant in the nose. See id. at 907.

14. Outside Communication, Use of Social Media, Etc.

In a world where a growing number of people are on some sort of social networking site such as Twitter or Facebook, jurisdictions throughout the country are instructing juries that their prohibition against discussing the case with outsiders includes posting information about the case and/or their deliberations online. There have been a growing number of cases nationwide requiring new trials after a juror posted information online about trial testimony, jury deliberations, pending verdicts, etc. To counteract this trend, the TPI Committee has crafted the following instruction:

TPI (Crim. 1.09): No Independent Research or Investigation

> **You, as jurors, must decide this case based solely on the evidence You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the *[individuals] [corporations]* involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case.**

Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case outside the jury deliberation room. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website, including but not limited to, Facebook, LinkedIn, YouTube, Snapchat, Instagram, Google, Twitter, or any other social media to communicate to anyone any information about this case or to conduct any research about this case until you have returned your verdict and the trial has concluded.

Tennessee Practice, Volume 7. The jury should be instructed about the "no outside communications" rule **both** before trial and in the closing jury instructions. Ideally, a sequestered jury will not have access to social media, but the above-listed instruction may still be worth giving because it reiterates that the jurors cannot talk about the case with each other until deliberations begin.

In a case which illustrates the importance of keeping the jury away from improper influences, a juror contacted the testifying medical examiner via Facebook and told the doctor about how "great" a job she had done in her testimony. State v. Smith, 418 S.W.3d 38, 43 (Tenn. 2013). The witness contacted the juror, saying she "thought" she recognized the juror and expressing fear over a possible mistrial. Id. The

juror wrote back saying that two other jurors, the witness, and the juror all worked together. Id. The Tennessee Supreme Court sent the case to the trial court for a hearing on whether the jury had been influenced improperly. The court observed,

> *this technological age now requires trial courts to take additional precautions to assure that jurors understand their obligation to base their decisions only on the evidence admitted in court. Trial courts should give jurors specific, understandable instructions that prohibit extra-judicial communications with third parties and the use of technology to obtain facts that have not been presented in evidence. Trial courts should clearly prohibit jurors' use of devices such as smart phones and tablet computers to access social media websites or applications to discuss, communicate, or research anything about the trial. In addition, trial courts should inform jurors that their failure to adhere to these prohibitions may result in a mistrial and could expose them to a citation for contempt. Trial courts should deliver these instructions and admonitions on more than one occasion.*

Id. at 50-51.

J. MISTRIAL

The law is settled that the double jeopardy clauses of the state and federal constitutions protect against

(1) a second prosecution for the same offense after conviction,

(2) a second prosecution for the same offense after an acquittal, and,

(3) multiple punishments for the same offense.

State v. Maupin 859 S.W.2d 313, 316 (Tenn. 1993); State v. Griffith, 787 S.W.2d 340, 341 (Tenn. 1990); State v. Mounce, 859 S.W.2d 319,

321 (Tenn. 1993). There are exceptions, however, to the prohibition against double jeopardy.

1. Manifest Necessity

A retrial is permitted where there is a "manifest necessity" for the declaration of the mistrial, regardless of the defendant's consent or objection. United States v. Dinitz, 424 U.S. 600, 606 (1976); Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1978). "If it appears that some matter has occurred which would prevent an impartial verdict from being reached, a mistrial may be declared, and a claim of double jeopardy would not prevail on a subsequent trial." Arnold, 563 S.W.2d at 794 (citing Illinois v. Somerville, 410 U.S. 458 (1973)). The circumstances under which a mistrial may be declared have been explained as follows:

> *The court may discharge the jury without working an acquittal of the accused in any case where the ends of justice, under the circumstances, would otherwise be defeated, or where the circumstances show that a fair and unbiased trial could not be had, or where any unforeseen emergency, contingency, or happening after the empaneling of the jury prevents the trial from going forward according to orderly and established legal procedure.*

Jones v. State, 403 S.W.2d 750, 753 (Tenn. 1966).

The granting of a mistrial is within the sound discretion of the trial court. Jones, 403 S.W.2d at 753; State v. Williams, 929 S.W.2d 385, 388 (Tenn. 1996); State v. Compton, 642 S.W.2d 745, 746 (Tenn. Crim. App. 1982). In making this determination, "no abstract formula should be mechanically applied and all circumstances should be taken into account." Jones, 403 S.W.2d at 752.

2. Hung Jury

The impossibility of a jury reaching a verdict has long been recognized as a sufficient reason for declaring a mistrial. Richardson v. United States, 468 U.S. 317, 323-24 (1984); Arizona v. Washington, 434 U.S. 497, 509 (1978); State v. Seagroves, 691 S.W.2d 537, 540 (Tenn. 1985); Jones, 403 S.W.2d at 754; Arnold, 563 S.W.2d at 794.

If the jury claims it is deadlocked during the guilt/innocence phase, the trial judge should first instruct the jury that it cannot disclose its division (i.e., the numerical split in voting) or whether they have "entertained a prevailing view" (i.e., whether they are "leaning" a certain way). "The only permissive inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations." Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975). If the jury indicates that further deliberations would be fruitless, the court can declare a mistrial. If the jury indicates that it might reach a verdict, the court can give the "Kersey instruction" that appears in the pattern instructions.

The procedure for addressing a deadlocked sentencing phase jury is mandated by statute. See discussion in Chapter 7. The Tennessee Supreme Court has concluded a trial court is not categorically excluded from giving the Kersey charge in a capital sentencing hearing, but

> *the rationale for giving the Kersey charge—avoidance of the societal costs of a retrial—is not as compelling in a capital sentencing hearing because the jury's inability to agree on the sentence does not result in a retrial. See Lowenfield v. Phelps, 484 U.S. 231, 238, 108 S. Ct. 546, 551, 98 L.Ed.2d 568 (1988). The jury's inability to agree merely results in further deliberations on the punishments of life imprisonment or life imprisonment without the possibility of parole, and if the jury is unable to unanimously agree on either of these options, the trial judge imposes a life sentence. See Tenn. Code Ann. § 39–13–204(h) (1993). Nonetheless, we agree with the United States Supreme Court that "[t]he State has in a capital sentencing*

> *proceeding a strong interest in having the jury express the conscience of the community on the ultimate question of life or death."* Lowenfield*, 484 U.S. at 238, 108 S. Ct. at 551 (internal quotations and citations omitted). Where a jury returns from deliberations after only a short period of time and informs a trial court that it has failed to achieve unanimity, the trial court has the authority to give the* Kersey *instruction, but trial courts should be "mindful in such cases that the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."* Lowenfield*, 484 U.S. at 238–39, 108 S. Ct. at 551. Therefore, we reject the defendant's assertion that trial courts may never give a* Kersey *instruction in a capital sentencing hearing. Trial courts are afforded discretion to determine whether a jury has been "ultimately" unable to agree on punishment. However, in exercising this discretion, trial courts must be mindful that the rationale for giving the instruction is not as compelling in a capital sentencing hearing and the need for reliability is greater because of the qualitative difference between death and other penalties.*

State v. Torres, 82 S.W.3d 236, 257 (Tenn. 2002). In Torres, the Tennessee Supreme Court concluded the trial court in a capital sentencing erred in giving the Kersey charge when the jury sent the judge a note after six hours of deliberating that they were hopelessly deadlocked, with one juror refusing to "budge" from his vote for life in prison. Id. The trial judge did not give the jury supplemental instructions consistent with the capital sentencing statute and did not ask whether additional instructions and deliberations might assist their returning a verdict. Id. The jury returned a death sentence an hour later. Id. The Tennessee Supreme Court concluded that in Torres, "the effort to secure a verdict here reached the point that a single juror may have been coerced into surrendering views conscientiously held, and under such circumstances, 'the jury's province is invaded and the requirement of unanimity is diluted.'" Id. at 258 (quoting Kersey, 525 S.W.2d at 144).

3. Hung Jury With Multiple Counts Or Lesser Offenses

Subsection 2 of Tenn. R. Crim. P. 31 provides a specific procedure to follow if the jury is deadlocked in any count involving an offense where there are lesser included offenses:

> **(2) Procedures When No Unanimous Verdict. — If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:**
>
> > **(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;**
> >
> > **(B) The court shall then inquire if the jury has unanimously voted not guilty as to the charged offense.**
> >
> > > **(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.**
> > >
> > > **(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.**
> >
> > **(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser included offense.**
> >
> > > **(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.**
> > >
> > > **(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.**

> **(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.**
>
> **(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.**

Failure to follow this procedure, as well as failure to declare a mistrial when dismissing a deadlocked jury, can cause significant problems. See State v. Houston, 328 S.W.3d 867, 877-82 (Tenn. Crim. App. 2010) (Indictment charged defendant with three counts of first degree murder; jury found defendant not guilty of first degree murder as to count two and was unable to reach verdict on charged offense in other two counts. Instead of inquiring only into deadlock on second degree murder on count 2 and first degree murder on the other counts, the trial court polled jury as to all lesser included offenses. Jury announced that it was unable to reach verdict on some lessers and found defendant not guilty on others. Trial court also dismissed jury without declaring mistrial. Appellate court concluded that trial court's actions prevented retrial on all offenses, including those where jury was unable to reach verdict).

K. THE THIRTEENTH JUROR RULE

The Tennessee Court of Criminal Appeals has stated:

> *Rule 33(d) of the Tennessee Rules of Criminal Procedure provides that a "trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." The rule "is the modern equivalent to the 'thirteenth juror rule,' whereby the trial court must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict."* State v. Blanton, *926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). Our supreme court has held*

> *that the rule "imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment."* State v. Carter, *896 S.W.2d 119, 122 (Tenn.1995).

State v. Biggs, 218 S.W.3d 643, 653 (Tenn. Crim. App. 2006). The rationale behind the rule is that "[i]mmediately after the trial, the trial court judge is in the same position as the jury to evaluate the credibility of witnesses and assess the weight of the evidence, based upon the live trial proceedings." State v. Moats, 906 S.W.2d 431, 434 (Tenn. 1995).

It is important to note that effective July 1, 2014, a significant law went into effect regarding a reviewing court's ability to affect the trial judge's thirteenth juror determination:

> **When any successor judge to the original trial judge or any appellate court is determining if a new trial should be granted to a criminal defendant on the grounds that the verdict of guilty is against the weight of the evidence, immediately upon the original trial judge dismissing a jury following the return of a unanimous verdict, there is created a presumption that the original trial judge has served as the thirteenth juror and approved the jury's verdict with respect to each count on which a unanimous verdict was returned.**

Tenn. Code Ann. § 40-18-119 (eff. July 1, 2014). Thus, if the judge says nothing upon the jury's return of a verdict and makes no additional comments later in the proceedings that could cast doubt on the jury's verdict, the reviewing judge (be it a successor trial judge or an appellate judge) would presume that the judge served as thirteenth juror.

L. DOUBLE JEOPARDY CLAIMS

In determining whether certain offenses should be merged for double jeopardy purposes after conviction, courts should be aware that the Tennessee Supreme Court has revised the standard to be applied in such cases.

> *The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall be put in jeopardy of life and limb twice for the same offense. U.S. Const. amend. V. Similarly, the Tennessee Constitution guarantees "[t]hat no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. I, § 10. Both clauses provide separate protections against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. See Schiro v. Farley, 510 U.S. 222, 229, 114 S. Ct. 783, 127 L.Ed.2d 47 (1994); State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996).*
>
> *In ... cases [involving the third category], the double jeopardy prohibition against multiple punishments functions to prevent prosecutors from exceeding the legislatively authorized punishment. State v. Watkins, 362 S.W.3d 530, 542 (Tenn. 2012).*
>
> *In Watkins, this Court restructured Tennessee's double jeopardy analysis in single prosecution cases. Id. at 556 (abrogating the previous Denton rule). In single prosecutions, multiple-punishment claims fall into one of two categories: (1) "unit-of-prosecution" claims or (2) "multiple description" claims. Id. at 543.*

State v. Smith, 436 S.W.3d 751, 766 (Tenn. 2014).

1. Unit of Prosecution Claims

In Watkins, the court described "unit of prosecution" claims, which involve multiple violations of the same statute:

> *Unit-of-prosecution claims arise when defendants who have been convicted of multiple violations of the same statute assert that the multiple convictions are for the "same offense." When addressing unit-of-prosecution claims, courts must determine "what the legislature intended to be a single unit of conduct for purposes of a single conviction and punishment." Thomas,[32] 47 U. Pitt. L. Rev. at 11; see also Universal C.I.T. Credit*

[32] George C. Thomas III, "A Unified Theory of Multiple Punishment," 47 U. Pitt. L. Rev. 1, 11 (1985).

> *Corp.*,[33] *344 U.S. at 221, 73 S. Ct. 227 (describing the only issue before the Court as "[w]hat Congress has made the allowable unit of prosecution"); United States v. Weathers, 186 F.3d 948, 952 (D.C. Cir. 1999) ("Where two violations of the same statute rather than two violations of different statutes are charged, courts determine whether a single offense is involved not by applying the Blockburger[34] test, but rather by asking what act the legislature intended as the 'unit of prosecution' under the statute."); State v. Lewis, 958 S.W.2d 736, 739 (Tenn. 1997) ("The legislature has the power to create multiple 'units of prosecution' within a single statutory offense, but it must do so clearly and without ambiguity."). Courts apply the "rule of lenity" when resolving unit-of-prosecution claims, meaning that any ambiguity in defining the unit of conduct for prosecution is resolved against the conclusion that the legislature intended to authorize multiple units of prosecution. See Gore v. United States, 357 U.S. 386, 391–92, 78 S. Ct. 1280, 2 L.Ed.2d 1405 (1958) (recognizing that the rule of lenity may be applied in resolving unit-of-prosecution claims); see also Thomas, 47 U. Pitt. L .Rev. at 17 ("[A]ny ambiguity in defining the unit of conduct must be resolved against the conclusion that each physical action is a separate violation.").*

Watkins, 362 S.W.3d at 543-44 (one footnote omitted, other footnotes added).

For an example of the courts' determining "legislative intent" allowed for multiple convictions to stand in a "unit-of-prosecution" case, see State v. Harbison, 539 S.W.3d 149, 169-70 (Tenn. 2018) (defendant could be convicted of multiple counts of employing firearm during commission of dangerous felony for incident involving firing upon multiple victims with a single gun; "Nothing in the language of the [felony firearms] statute indicates that the legislature intended to limit the unit of prosecution to the number of firearms employed by a defendant"); see also State v. Hogg, 448 S.W.3d 877, 886 (Tenn. 2014) (rejecting defendant's claim of multiplicitous convictions for sexual exploitation of a minor when convictions based on multiple images taken at same

[33] United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952).
[34] Blockburger v. United States, 284 U.S. 299 (1932).

place within one-hour time frame; "plain language of [statute] identifies the 'unit of prosecution' by providing for separate counts for especially aggravated sexual exploitation when there are separate images or motion picture films"); State v. Aguilar, 437 S.W.3d 889, 906-08 (Tenn. Crim. App. 2013) (in case where defendant was found to have over 150 images of child pornography and six explicit videos, multiple convictions for having over 100 images and 50 images on computer, plus four individual convictions for videos were allowed to stand, rejecting defendant's claim that he could be convicted for only one offense of sexual exploitation of a minor; convictions not multiplicitous because "legislature intended cumulative punishment").

2. Multiple Description Claims

The court has defined "multiple description" claims as follows:

> *[M]ultiple description claims arise when a defendant who has been convicted of multiple criminal offenses under different statutes alleges that the statutes punish the same offense. [Watkins, 362 S.W.3d] at 544.*
>
> ...
>
> *... In Watkins, we adopted the two-pronged Blockburger test for multiple description claims. Watkins, 362 S.W.3d at 556. Under the Blockburger test, Tennessee courts must examine the statutory elements "in the abstract, without regard to the proof offered at trial." Id. at 544. In a Blockburger analysis, our primary focus is whether the General Assembly expressed an intent to permit or preclude multiple punishments. Id. at 556. If either intent has been expressed, no further analysis is required. Id. When the legislative intent is unclear, however, we must apply the "same elements test" from Blockburger. Id. at 546–47. Under this test, the first step is to determine whether the convictions arise from the same act or transaction. Id. at 545. The second step is to determine whether the elements of the offenses are the same. Id. at 557. If each offense contains an element that the other offense does not, the statutes do not violate double jeopardy. Id.*

State v. Smith, 436 S.W.3d at 767.

In Smith, the defendant was convicted of several counts that ultimately stemmed from a false police report he made regarding the supposed disappearance of his wife. Among his convictions were three convictions under Tennessee Code Annotated section 39-16-502(a)(2), which criminalizes making a false "report or statement in response to a legitimate inquiry by a law enforcement officer[.]" Applying the Blockburger test, the court reversed two of the convictions as multiplicitous:

> *[W]e note that the three false reports or statements were made to three different law enforcement officers on three different days. We recognize that each report contained some fact not discussed in the others, but the reports related to the same incident or offense and were in furtherance of the officers' investigation into the same incident or offense. The fact differences did not extend to a new incident or offense. because we have concluded the unit of prosecution in subsection (a)(2) is the false statement or report made in response to a legitimate law enforcement inquiry about an incident or offense, we must conclude that the three convictions under subsection (a)(2) are multipicitous. We therefore affirm count five and dismiss counts seven and eight.*

Id. at 773-74.

M. MOTION FOR NEW TRIAL

> **A motion for a new trial shall be in writing or, if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered. The court shall liberally grant motions to amend the motion for new trial until the day of the hearing on the motion for a new trial.**

Tenn. R. Crim. P. 33(b).

As in any other criminal case in which the defendant is convicted of first degree murder and other offenses, in those cases in which the defendant is sentenced to death and convicted of other offenses, the filing deadline for the initial motion for new trial is thirty days after the order sentencing the defendant for his non-capital convictions. See State v. H.R. Hester, 2009 WL 275760 at *46 (Tenn. Crim. App. Feb. 5, 2009) (citing State v. Bough, 152 S.W.3d 453, 460-61 (Tenn. 2004)); aff'd, 324 S.W.3d 1 (Tenn. 2010).

While Rule 33 allows the trial court to permit the defendant to file "liberal" amended motions for new trial, the thirty-day limit for filing the initial motion for new trial cannot be extended. Tenn. R. Crim. P. 45(b); see State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997); State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). Because the thirty-day provision is jurisdictional, an untimely motion for new trial is a nullity. Dodson, 780 S.W.2d at 780. An untimely motion for new trial does not toll the time for filing a notice of appeal, so an untimely motion for new trial may result in an untimely notice of appeal. State v. Davis, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987). Generally, failure to file a motion for new trial permits the defendant to appeal only the sufficiency of evidence and sentencing issues on appeal; other issues are treated as waived. See Howard v. State, 604 S.W.3d 53, 55 (Tenn. 2020).

> **NOTE:** As explored in Chapter 8 of this book, a trial counsel's failure to file a timely motion for new trial, thus resulting in limited review of a defendant's appellate issues, formerly resulted in trial counsel's prejudice being presumed for post-conviction ineffective assistance of counsel purposes. See id. at 60-61 (citing Wallace v. State, 121 S.W.3d 652, 654-55 (Tenn. 2003). However, in Howard the Tennessee Supreme Court concluded that where trial counsel filed an untimely motion for new trial, counsel's ineffectiveness is no longer examined through a lens in which counsel's actions are presumed prejudiced; rather, in such instances counsel's prejudice (in ineffective assistance

claims) is examined through the traditional Strickland v. Washington standard. Howard, 604 S.W.3d at 62-64.

Chapter 7

Penalty Phase

CHAPTER 7

Penalty Phase

A. APPLICABLE LAW AND PRELIMINARY MATTERS

Tennessee law provides that a person convicted of murder in the first degree[1] shall be punished by death, by imprisonment for life without possibility of parole,[2] or by imprisonment for life.[3] Tenn. Code Ann. §

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[1] Tenn. Code Ann. § 39-13-202, which sets forth the definition of first degree murder in Tennessee, was amended in 2021 and reads as follows:

> **(a) First degree murder is:**
> **(1) A premeditated and intentional killing of another;**
> **(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated abuse of an elderly or vulnerable adult in violation of § 39-15-511, aggravated neglect of an elderly or vulnerable adult in violation of § 39-15-508, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child, or aircraft piracy; or**
> **(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.**
> **(4) A killing of another in the perpetration or attempted perpetration of an act of terrorism in violation of § 39-13-805.**
> **(b) No culpable mental state is required for conviction under subdivisions (a)(2)-(4), except the intent to commit the enumerated offenses or acts in those subdivisions.**
> **(c)(1) Except as provided in subdivision (c)(2), a person convicted of first degree murder under subdivisions (a)(1)-(4) shall be punished by:**
> **(A) Death;**
> **(B) Imprisonment for life without possibility of parole; or**
> **(C) Imprisonment for life.**
> **(2) If a person convicted of first degree murder under subdivision (a)(4) was an adult at the time of commission of the offense, then the person shall be punished by:**
> **(A) Death; or**
> **(B) Imprisonment for life without possibility of parole.**
> **…**
> **(e) As used in subdivision (a)(1), "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.**

See also Tenn. Code Ann. §§ 39-13-207 and -208 and §§ 39-13-803 and -805 as they relate to subsections (a)(4) and (c)(2) above.

[2] Life without the possibility of parole is a potential sentence for offenses committed on or after July 1, 1993.

[3] In State v. Miller, ___ S.W.3d ___ (Tenn. 2021), the Tennessee Supreme court noted the Tennessee Court of Criminal Appeals discussion of what a life sentence means and how a life

39-13-204(a). In order to be sentenced to either death or life imprisonment without parole,[4] the State must file a notice that it is seeking the enhanced sentence. Tenn. R. Crim. P. 12.3 and Tenn. Code Ann. § 39-13-208. If no notice is filed, then the court would impose a life sentence if a defendant is found guilty of first degree murder. Tenn. Code Ann. § 39-13-208(c).

Following the return of a verdict of guilty of first degree murder in a case in which the notice is filed seeking death or life without the possibility of parole, the jury in Tennessee determines, in a separate sentencing hearing or penalty phase, whether the defendant "shall be sentenced to death, to imprisonment for life without possibility of parole, or to imprisonment for life." Tenn. Code Ann. § 39-13-204(a).

Pursuant to statute, the penalty phase of the trial shall be conducted "as soon as practicable before the same jury that determined guilt" following the return of the guilt phase verdict. Tenn. Code Ann. § 39-13-204(a).

NOTE: Retrials as to penalty only are governed by the same

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sentence should not be referred to as "life with parole" because this is a misnomer. See State v. Urshawn Eric Miller, 2020 WL 5626227 (Tenn. Crim. App. Sept. 18, 2020). The determinate sentence for imprisonment for life is sixty years. Tenn. Code Ann. § 40-35-501(h)(1). When a person is convicted of a murder on or after July 1, 1995, and receives a sentence of imprisonment for life, that person can be granted certain statutorily authorized "sentence reduction credits" up to nine years. Tenn. Code Ann. § 40-35-501(i)(1). These sentence credits could allow for release after a term of 51 years. See Tenn. Code Ann. § 41-21-236. This release, however, is not parole, but rather release after service of the complete sentence.

[4] Tenn. Code Ann. § 39-13-202 (d) was added in 2021. It provides for a sentence of life without parole for certain instances of attempted first degree murder as follows:

> **Notwithstanding § 39-12-107, a person convicted of attempted first degree murder may be sentenced to imprisonment for life without possibility of parole if the court finds the person committed the offense against any law enforcement officer, correctional officer, department of correction employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter, who was engaged in the performance of official duties, and the person knew or reasonably should have known that the victim was a law enforcement officer, correctional officer, department of correction employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter engaged in the performance of official duties.**

Although this statute has not been interpreted yet by the courts, two respected authorities have opined that "Constitutionally, the jury would have to make this finding rather than the trial judge despite the wording of the statute, to make this sentence an option." Craft, Chris and Ward, W. Mark. Criminal Law Update: 2020-2021.

requirements discussed in this chapter, subject only to those limitations, exceptions, and additions discussed in Chapter 9.

NOTE: There have been cases in which a juror who served in the determination of guilt became unavailable during the sentencing hearing due to illness. See State v. Hester, 324 S.W.3d 1 (Tenn. 2010). Consult with your Capital Case Attorney prior to the release of any alternates to determine if you prefer to prepare for such a possibility and the **strict procedures** which must be followed. Simply stated, preparing for this possibility is like having two separate, sequestered juries once deliberations begin: the jury and the alternates.

1. Applicable Law

This Chapter discusses the law applicable to penalty phase proceedings as it currently exists. As also discussed in Chapter 9, all penalty phase proceedings must be held in accordance with the law in effect at the time of the commission of the offense. See State v. Cauthern, 967 S.W.2d 726, 732 (Tenn. 1998) (citing State v. Brimmer, 876 S.W.2d 75, 82 (Tenn. 1994)). As a result, cases involving older offense dates will require review and application of prior law.

> **NOTE:** A copy of the applicable statutes and jury instructions for older cases may be obtained from your Capital Case Attorney if needed.

2. Waiver of Penalty Phase Jury

A defendant may waive his right to have a jury determine his guilt and/or sentence in a capital case. Tenn. Code Ann. § 39-13-205; Tenn. R. Crim. P. 23.

> **TENN. CODE ANN. § 39-13-205. Waiver of jury trials of first degree murder.**
>
> **(a) In trials of first degree murder, the defendant, with the advice of the defendant's attorney and the consent of the court and district attorney general, may waive the right to a jury to determine**

guilt, in which case the trial judge shall determine guilt; provided, that such waiver will not affect the defendant's right to a jury to determine punishment, if the defendant is found guilty of first degree murder.

(b) After a verdict of first degree murder is found, the defendant, with the advice of the defendant's attorney and the consent of the court and the district attorney general, may waive the right to have a jury determine punishment, in which case the trial judge shall determine punishment as provided by this part.

(c) Reference to a jury in § 39-13-204 shall apply to a judge if the jury is waived.

(Emphasis added).

Tenn. R. Crim. P. 23.

(a) RIGHT TO JURY TRIAL. – In all criminal prosecutions except for small offenses, the defendant is entitled to a jury trial unless waived.

(b) WAIVER. –

(1) TIMING. — The defendant may waive a jury trial at any time before the jury is sworn.

(2) PROCEDURES. — A waiver of jury trial must:

(A) be in writing;

(B) have the consent of the district attorney general; and

(C) have the approval of the court.

See also Tenn. Code Ann. § 40-35-203(c) (referring to the jury fixing punishment in a capital case unless the jury is waived).

The filing of a written waiver of a penalty phase jury is not all that is necessary to accomplish an effective waiver. The United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002), held a capital defendant has a constitutional right to have a jury engage in the fact-finding necessary to support a sentence of death. Accordingly, in addition to being in written form, any waiver of the right to a penalty phase jury must be knowing, intelligent, and voluntary. See generally Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary

but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); see also Blakely v. Washington, 542 U.S. 296, 305-06 (2004).

As a result, **an on-the-record colloquy** should be conducted with the defendant to ensure that his or her written waiver of a penalty phase jury is knowing, intelligent, and voluntary.

B. OPENING STATEMENTS

Just as in the guilt phase of the trial,[5] the parties are permitted to make opening statements to the jury in the penalty phase of a capital trial. Tenn. Code Ann. § 39-13-204(b).

> **TENN. CODE ANN. § 39-13-204(b).**
>
> **In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement; provided, that the waiver of opening statement by one party shall not preclude the opening statement by the other party.**

1. State's Opening

A prosecutor's opening statement during the penalty phase in a capital case does not limit whether otherwise properly noticed aggravating circumstances can be considered by the jury. See State v. Robinson, 146 S.W.3d 469, 526 (Tenn. 2004) (Appendix). In Robinson, the Tennessee appellate courts rejected the defendant's argument that the trial court had improperly permitted the State to rely upon the two aggravating circumstances set forth in the pretrial notice of intent, where the prosecutor had indicated during his opening statement that he was relying upon only one of those aggravating circumstance. See id.

> **NOTE:** Some specifics of what has been deemed improper argument in a capital case will be taken up in subsection G of this Chapter entitled "Closing Argument."

[5] See Tenn. Code Ann. § 20-9-301; State v. Sexton, 368 S.W.3d 371, 414-15 (Tenn. 2012).

The State's opening statement also should not include any reference to what may be rebuttal proof in the penalty phase. State v. Schmeiderer, 319 S.W.3d 607, 619 (Tenn. 2010).

2. Defense Opening

A defense attorney's decision not to present an opening statement during the penalty phase of a capital trial will not be considered ineffective assistance of counsel because "[t]here is no requirement that an opening statement be made." Johnson v. State, 1999 WL 608861, * 20 (Tenn. Crim. App. 1999) (reversing and remanding for resentencing on other grounds).

Defense counsel opening statements may open the door to otherwise impermissible state argument. In State v. Thomas, 158 S.W.3d 361, 414-15 (Tenn. 2005), the court pointed out "[w]hile community conscience arguments are generally improper, a prosecutor's … argument must be evaluated in light of the defense argument that preceded it."

C. AGGRAVATING CIRCUMSTANCES

Tenn. Code Ann. § 39-13-204(i) states in part that

> **No death penalty or sentence of imprisonment for life without possibility of parole shall be imposed, except upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances...[.]**

Tennessee currently has 19 statutory aggravating circumstances. Tenn. Code Ann. § 39-13-204(i)(1)-(19). In Zant v. Stephens, 462 U.S. 862, 877 (1983), the United States Supreme Court held that in order for a state to impose the death penalty without violating the Eighth Amendment, it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." In Tennessee, this "narrowing" is accomplished through the use of the statutory aggravating circumstances which must be proven by the State beyond a reasonable

doubt and which must be proven beyond a reasonable doubt by the State to outweigh any mitigating circumstances raised by the proof. See Tenn. Code Ann. § 39-13-204(f).

1. (i)(1) – Adult Defendant and Victim Under Twelve

> **Tenn. Code Ann. § 39-13-204(i)(1):**
>
> **The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older[.]**

This aggravating circumstance has no mens rea requirement and may be applied in any case in which the victim is less than twelve years of age.

While the literal language also requires proof that the defendant was eighteen years of age or older at the time of the offense, proof of the defendant's age should be a mere formality in a capital sentencing hearing because a defendant under eighteen years of age at the time of an offense is ineligible for the death penalty. See Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"); see also Tenn. Code Ann. § 37-1-134(a)(1) (forbidding the imposition of a death sentence on a juvenile).

> **NOTE: Life Without the Possibility of Parole**
>
> The factors listed in Tenn. Code Ann. § 39-13-204(i) are the same factors relied upon by the State in first degree murder cases where the death penalty is not sought but *life without the possibility of parole* is sought by the State. See § 39-13-207. Although minors are not eligible for the death penalty, minors are eligible for life without the possibility of parole, and therefore, the age of the defendant could be very relevant in a life without parole case as it relates to this aggravating circumstance.
>
> In addition, as opposed to death penalty cases, the rationale in

State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), does not apply to life without parole cases, and it is not prohibited to use an aggravating circumstance when the aggravator duplicates an element of the offense. State v. Butler, 980 S.W.2d 359 (Tenn. 1998).

The Tennessee Supreme Court has specifically held this aggravating circumstance "sufficiently and meaningfully" narrows the class of death-eligible defendants, even in cases where the defendant had been convicted of felony murder in the perpetration of aggravated child abuse. State v. Godsey, 60 S.W.3d 759, 778-81 (Tenn. 2001). Unlike the (i)(7) felony murder aggravating circumstance at issue in State v. Middlebrooks, the (i)(1) aggravating circumstance "does not by its terms apply to all aggravated child abuse murderers." Godsey, 60 S.W.3d at 780. Felony murder by aggravated child abuse can be committed against a child under eighteen but older than twelve years of age, while the (i)(1) aggravating circumstance applies only where the victim was less than twelve years of age at the time of the crime. Id.; see also State v. Hodges, 7 S.W.3d 609, 629 (Tenn. Crim. App. 1998) (same conclusion in life without parole case).

NOTE: It should be noted that in Godsey, where the defendant had been the first and only person in Tennessee to receive a death sentence based solely upon the (i)(1) aggravating circumstance, the Tennessee Supreme Court, following a lengthy statutory comparative proportionality analysis, concluded the sentence of death was disproportionate in that case and affirmed the Court of Criminal Appeals' modification of the sentence to life imprisonment without the possibility of parole. See Godsey, 60 S.W.3d at 781-93.

NOTE: Other cases in which the (i)(1) factor has been applied include:

State v. Dotson, 450 S.W.3d 1 (Tenn. 2014);
State v. Rogers, 188 S.W.3d 593 (Tenn. 2006);
State v. Holton, 126 S.W.3d 845 (Tenn. 2003);
State v. Torres, 82 S.W.3d 236 (Tenn. 2002);

State v. Keen, 31 S.W.3d 196 (Tenn. 2000);
State v. Vann, 976 S.W.2d 93 (Tenn. 1998);
State v. Payne, 791 S.W.2d 10 (Tenn. 1990);
State v. Irick, 762 S.W.2d 121 (Tenn. 1988); and
State v. Coe, 655 S.W.2d 903 (Tenn. 1983).

2. (i)(2) - Prior Violent Felony

Tenn. Code Ann. § 39-13-204(i)(2):

The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person[.]

When the prior violent felony aggravating circumstance is noticed, Tenn. Code Ann. § 39-13-204(c) (in part) also applies:

… In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. …

NOTE: This amendment to 204(c) in 1998 allowed proof not previously admissible at the capital sentencing hearing.

Prior to 1989, the language of the prior violent felony aggravating circumstance was as follows:

The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

Tenn. Code Ann. § 39-13-203(i)(2) (1981). For pre-1989 offenses, the previous version of the statute should be followed. See State v. Odom, 336 S.W.3d 541, 548 fn1 (Tenn. 2011) (new sentencing

hearing required when wrong version of statute applied to allow facts and circumstances of prior offense); see also State v. Henretta, 325 S.W.3d 112 (Tenn. 2010).

a. Burden of Proof of Identity

As part of its burden of proof in proving this factor, the State has the burden of proving the identity of the defendant as the person who committed the prior violent felony beyond a reasonable doubt. State v. Dellinger, 79 S.W.3d 458, 472-73 (Tenn. 2002). A certified copy of a prior criminal judgment, bearing the name of the defendant, without more, is insufficient alone to establish the identity of the defendant as the same person convicted of the prior felony for purposes of the (i)(2) aggravating circumstance. See State v. Robert Williams, 1996 WL 146696 (Tenn. Crim. App. Apr. 2, 1996); see also Lowe v. State, 805 S.W.2d 368, 371-72 (Tenn. 1991) (holding that a certified copy of a judgment merely creates a permissive inference of identification).

In State v. Dellinger, 79 S.W.3d 458, 472 (Tenn. 2002), the Tennessee Supreme Court held that the State sufficiently carried its burden of proof as to the (i)(2) aggravating circumstance where the introduction of certified copies of prior criminal judgments was coupled with testimony from a witness who had been present at the time of entry of the prior convictions and who identified the defendants as the same persons convicted of the prior felonies reflected in the judgments.

b. Timing of Prior Conviction(s)

It is well established law in Tennessee that, for purposes of Tenn. Code Ann. § 39-13-204(i)(2), "so long as a defendant is *convicted* of a violent felony *prior* to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable." State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997) (emphasis in original) (citing State v. Nichols, 877 S.W.2d 722, 736 (Tenn.1994), and State

v. Caldwell, 671 S.W.2d 459, 464-65 (Tenn. 1984)); see also State v. Dellinger, 79 S.W.3d at 472; State v. Stout, 46 S.W.3d 689, 719 (Tenn. 2001).

Simply stated, the "prior" offense may occur after the date of the commission of the capital offense, so long as the defendant is convicted of the "prior" offense before the capital sentencing or resentencing hearing begins.

c. Validity of Prior Conviction(s)

In Johnson v. Mississippi, 486 U.S. 578 (1988), the United States Supreme Court held that it violates the Eighth Amendment prohibition against cruel and unusual punishment for a death sentence to be based on an invalid prior conviction. See also Teague v. State, 772 S.W.2d 915, 930-32 (Tenn. Crim. App. 1988), cert. denied 493 U.S. 874 (1989).

In State v. Shepherd, 902 S.W.2d 895, 906-07 (Tenn. 1995), the Tennessee Supreme Court held that application of the (i)(2) aggravating circumstance could not stand where, after the conclusion of the defendant's capital trial, the prior conviction relied on by the State in support of (i)(2) had been reversed and the case remanded for a new trial (Harmless error not found in this case as 2 of 3 aggravating circumstances found to be invalid).

d. Nature of Prior Conviction(s)

Our courts have held that, for purposes of determining whether a prior conviction is sufficient pursuant to (i)(2), "the plain language requires the prosecution to prove that the defendant had (1) a prior conviction, (2) for a felony offense, (3) whose statutory elements involved the use of violence to a person." State v. Ivy, 188 S.W.3d 132, 148 (Tenn. 2006). Our Tennessee Supreme Court has defined the word "violence" as "physical force unlawfully exercised so as to injure, damage or abuse." State v. Fitz, 19 S.W.3d 213, 214 (Tenn. 2000).

See also State v. Jones, 568 S.W.3d 101, 139 (Tenn. 2019).

The Tennessee Supreme Court has held that, in determining whether a prior conviction constitutes a prior violent felony for purposes of the (i)(2) aggravating circumstance, "the trial judge must necessarily examine the facts underlying the prior felony" to ascertain whether it involved violence against a person if the statutory elements of the offense are such that it could have been committed "with or without proof of violence." State v. Sims, 45 S.W.3d 1, 12 (Tenn. 2001). This procedure "is a legal determination that neither requires nor allows trial judges to make factual findings as to whether the prior conviction involved violence." State v. Cole, 155 S.W.3d 885, 904 (Tenn. 2005). "This legal determination is analogous to the preliminary questions trial judges often are called upon to decide when determining the admissibility of evidence." Id. "If the trial court determines that the statutory elements of the prior offense involved the use of violence, the State may introduce evidence that the defendant had previously been convicted of the prior offenses," and the trial court "then would instruct the jury that those convictions involved the use of violence to the person." State v. Powers, 101 S.W.3d 383, 400-01 (Tenn. 2003).

In Shepard v. United States, 544 U.S. 13, 16 (2005), the United States Supreme Court held that, in determining the underlying character of a predicate offense to which the defendant had pled guilty, the trial court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." If the prior conviction resulted from a jury trial rather than a guilty plea, the trial court is limited to examining the charging documents filed in the court of conviction and instructions given to the jury. Id. at 20 (citing Taylor v. United States, 495 U.S. 575 (1990)).

In State v. Young, 196 S.W.3d 85, 112 (Tenn. 2006), our Tennessee Supreme Court held as follows regarding the

procedure to follow in determining if a prior felony conviction involved the use of violence to the person:

> *...In Rice, 184 S.W.3d at 668-69,[6] we considered the Sims procedure in light of the United States Supreme Court's recent decision in Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). In Shepard, the Court held that, in determining the underlying character of a predicate offense to which the defendant had pled guilty, the trial court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Id. at 16. ... In Rice, we determined that "Shepard does not change a judge's ability to find the 'fact of a prior conviction,'" but simply limits "the scope of the judge's inquiry to reliable judicial records regarding the prior conviction and precludes the judge from re-examining the facts underlying that conviction." 184 S.W.3d at 669. Similarly, we held in State v. Ivy, 188 S.W.3d 132, 151 (Tenn. 2006), that "Shepard clarifies but does not invalidate the procedures this Court adopted in Sims." Thus, when the State alleges prior violent felony convictions, the statutory elements of which do not necessarily involve the use of violence to the person, the trial court must conduct the Sims analysis, limiting its inquiry to the records delineated by Shepard. ...*

There have been numerous cases which have relied upon this circumstance and which have analyzed the statutory elements of particular offenses to determine whether they involved the use of violence to the person. If there is any question as to whether a particular offense involved the use of violence to the person, case law and statutes should be consulted to ensure that the offense can be used to support application of the (i)(2) aggravating circumstance. E.g. State v. Rollins, 188 S.W.3d 553 (Tenn. 2006) ((i)(2) factor was insufficient on appeal due to failure by state to establish proof of violence under post-Sims standards).

Some of the cases which have applied this factor and their prior felonies include:

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[6] State v. Rice, 184 S.W.3d 636 (Tenn. 2006).

State v. Rimmer, 623 S.W.3d 235 (Tenn. 2021) (assault with intent to commit robbery with a deadly weapon; rape; 2 counts of aggravated assault);
State v. Urshawn Eric Miller, ____ S.W.3d ____ (Tenn. 2021) (aggravated robbery);
State v. Jones, 568 S.W.3d 101 (Tenn. 2019) (FL first degree murder);
State v. Hawkins, 519 S.W.3d 1 (Tenn. 2017) (ten aggravated robbery convictions) (Multiple aggravated assault convictions were also used but challenged by defendant on appeal because no Sims hearing was conducted. Court held "[e]ven excluding the aggravated assault convictions, then, the evidence is abundantly sufficient to support the jury's finding of the (i)(2) aggravating circumstance. The error is harmless beyond a reasonable doubt.")
State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) (second degree murder);
State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (aggravated robbery);
State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013) (robbery and aggravated robbery);
State v. Johnson, 401 S.W.3d 1 (Tenn. 2013) (VA malicious wounding);
State v. Odom, 336 S.W.3d 541 (Tenn. 2011) (murder);
State v. Henretta, 325 S.W.3d 112 (Tenn. 2010) (rapes, second degree murder, and kidnapping);
State v. Schmeiderer, 319 S.W.3d 607 (Tenn. 2010) (first degree murder, attempted first degree murder and aggravated assault);
State v. Reid, 213 S.W.3d 792 (Tenn. 2006) (TX aggravated robbery, first degree murder, aggravated robbery, especially aggravated kidnapping); and
State v. Young, 196 S.W.3d 85 (Tenn. 2006) (rape, robbery with a deadly weapon, MS Kidnapping, MS manslaughter, AL first degree robbery).

3. (i)(3) - Great Risk of Death to Two or More Persons

TENN. CODE ANN. § 39-13-204(i)(3):

The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder[.]

The Tennessee Supreme Court has held that the (i)(3) "aggravating circumstance 'contemplates either multiple murders or threats to

several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.'" Johnson v. State, 38 S.W.3d 52, 60 (Tenn. 2001) (quoting State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984)). The Court in Johnson further stated that "[m]ost commonly, this aggravating circumstance 'has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present.'" Id. at 60-61 (quoting State v Henderson, 24 S.W.3d 307, 314 (Tenn. 2000)); see also State v. Burns, 979 S.W.2d 276, 280 (Tenn. 1998).

In State v. Cone, 665 S.W.2d 87 (Tenn. 1984), the Tennessee Supreme Court expressed its doubt as to whether the evidence in that case was sufficient to support application of this aggravating circumstance. The court in Cone explained its reasoning on this point as follows:

> *It is clear from the record that on the afternoon of August 9, 1980, the accused shot two persons and attempted to shoot a third in escaping from an armed robbery after a high-speed automobile chase. On the next morning he terrorized [another person] and some hours later killed [the victims of the charged murders]. There is considerable logic and plausibility to the finding of the jury that the acts of murder were committed during the course of an attempted escape from this crime spree, and certainly more than two persons were in danger.*
>
> *We are of the opinion, however, that generally the statute does not contemplate an extended criminal episode, but contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based. . . .*

Cone, at 95 (footnote omitted).

> **NOTE**: It should be noted that, despite its view regarding the sufficiency of the evidence supporting the (i)(3) aggravator, the court in Cone nevertheless upheld the death sentence in that case, concluding that any error in application of (i)(3) was harmless beyond a reasonable doubt given the other three aggravating circumstances which were found by the jury and supported by the record. Id.

The court in Johnson v. State, 38 S.W.3d at 60-61, noted that, "[i]n many of the cases upholding application of the (i)(3) aggravator, the defendant fired random shots with others present or nearby, the defendant engaged in a shoot-out with other parties, or the defendant actually shot people in addition to the murder victim." (Footnotes omitted).

In support of its conclusion that this aggravator cannot be vicariously applied, the court explained that

> *[u]nlike other aggravating circumstances, such as the (i)(5) aggravator, the statutory language of the (i)(3) aggravating circumstance simply does not permit application of this aggravating circumstance unless the defendant "knowingly created" the "great risk of death," either by his or her own actions or by directing, aiding, or soliciting another to do the act, i.e., to shoot the gun, that creates the great risk of death. Without some proof that the defendant in some way "knowingly created" the "great risk of death," this aggravating circumstance does not apply, even though a great risk of death may have been created by someone during the course of the criminal episode. Because this aggravating circumstance focuses more upon the defendant's actions and intent rather than upon the actual circumstances surrounding the killing, we decline to accept the State's invitation to vicariously apply the (i)(3) aggravating circumstance ... .*

Id. at 63.

Some cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include:

> State v. Clayton, 535 S.W.3d 829 (Tenn. 2017) (fatally shot 3 victims, fired weapon toward area where he knew another slept, and a 4-year old was present);
> State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) (multiple people present and killed);
> State v. Jordan, 325 S.W.3d 1 (Tenn. 2010) (defendant killed three people and shot two others);
> State v. Henderson, 24 S.W.3d at 314 (random shots through a thin wall);
> State v. Burns, 979 S.W.2d at 280-81 (fired in a car with 3 passengers

and random shots fired at bystanders);
State v. McKay, 680 S.W.2d 447 (Tenn. 1984) (random shots in a store and nearby); and
State v. Workman, 667 S.W.2d 44 (Tenn. 1984) (defendant engaged in a shoot-out with police).

4. (i)(4) - Murder for Hire

TENN. CODE ANN. § 39-13-204(i)(4):

The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration[.]

Application of this aggravating circumstance "requires proof of payment or promise of payment as a motive for the murder." State v. Stephenson, 195 S.W.3d 574, 587 (Tenn. 2006).

Cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include:

State v. Stephenson, 195 S.W.3d 574 (Tenn. 2006) (sole aggravator);
State v. Austin, 87 S.W.3d 447, 467 (Tenn. 2002) (sole aggravator);
State v. Stevens, 78 S.W.3d 817, 841 (Tenn. 2002) ((i)(2) and (i)(4) aggravating circumstances);
State v. Hutchison, 898 S.W.2d 161, 175 (Tenn. 1994) (sole aggravator);
State v. Wilcoxson, 772 S.W.2d 33, 40 (Tenn. 1989) ((i)(2), (i)(4), and (i)(5) aggravating circumstances);
State v. Porterfield, 746 S.W.2d 441, 449 (Tenn. 1988) ((i)(4) and (i)(5) aggravating circumstances as to defendant who solicited murder, and (i)(2), (i)(4), and (i)(5) aggravating circumstances as to actual killer);
State v. Coker, 746 S.W.2d 167, 175 (Tenn. 1987) ((i)(2) and (i)(4) aggravating circumstances); and
State v. Groseclose, 615 S.W.2d 142, 148-50 (Tenn. 1981) ((i)(4) and (i)(5) aggravating circumstances).

5. (i)(5) - Heinous, Atrocious, or Cruel (HAC)

TENN. CODE ANN. § 39-13-204(i)(5):

The murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death[.]

NOTE: Prior to 1989, the language of this aggravating circumstance was as follows:

> ***The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.***

Tenn. Code Ann. § 39-2-203(i)(5) (1981). For pre-1989 offenses, case law construing this prior language should be consulted.

An in-depth discussion of the history of this aggravating circumstance and all the cases either construing or upholding application of it, as it has been worded over time, is beyond the scope of these materials. This section will, therefore, focus only on those Tennessee cases necessary to an understanding of how this aggravating circumstance, as it is presently worded, may be applied in specific circumstances in order to remain a constitutionally permissible narrowing device. It should be noted that the constitutional validity of this aggravating circumstance depends upon the limiting construction given to its language by the Tennessee Supreme Court. See generally Godfrey v. Georgia, 446 U.S. 420 (1980) (construing Georgia's similar aggravating circumstance); Maynard v. Cartwright, 486 U.S. 356 (1988) (construing Oklahoma's similar aggravating circumstance).

This aggravating circumstance (often referred to as HAC) may be applied if the evidence is sufficient to support a finding of ***either*** "torture" ***or*** "serious physical abuse beyond that necessary to produce death." See State v. Rollins, 188 S.W.3d 553, 572 (Tenn. 2006); State v. Suttles, 30 S.W.3d 252, 262 (Tenn. 2000). "Jurors do not have to agree on which prong makes the murder 'especially heinous, atrocious, or cruel.' " State v. Davidson, 509 S.W.3d 156, 220 (Tenn. 2016). As long as the proof is sufficient under either

prong for finding the aggravating circumstance beyond a reasonable doubt, and all jurors agree that the aggravating circumstance is present and applicable to the case at hand, different jurors may rely upon either theory to reach their conclusion." Id. See also State v. Willis, 496 S.W.3d 653 (Tenn. 2016).

The Tennessee Supreme Court has defined "torture," as used in this aggravating circumstance, as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." Rollins, 188 S.W.3d at 572 (citing State v. Pike, 978 S.W.2d 904, 917 (Tenn. 1998) and State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985)); see also State v. Jordan, 325 S.W.3d at 67-68.

The courts have also "repeatedly considered a defendant's actions in causing the victim to fear death or physical harm as a factor in whether the defendant has created the severe mental pain or anguish relevant to a finding of torture." Jordan, 325 S.W.3d at 68 (citing State v. Carter, 114 S.W.3d 895, 903-04 (Tenn. 2003), State v. Nesbit, 978 S.W.2d 872, 886-87 (Tenn. 1998), and State v. Hodges, 944 S.W.2d 346, 357-58 (Tenn. 1997)).

In defining the phrase "serious physical abuse beyond that necessary to produce death," the court has explained that "serious" refers "to a matter of degree, and that physical, rather than mental, abuse must be 'beyond that' or more than what is 'necessary to produce death.' " Rollins, 188 S.W.3d at 572; see also State v. Nesbitt, 978 S.W.2d 872, 887 (Tenn. 1998); State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996). The court has defined the word "abuse," as used in this aggravator, as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.'" Odom, 928 S.W.2d at 26 (quoting Black's Law Dictionary 11 (6th ed. 1990)); see also State v. Hugueley, 185 S.W.3d 356, 381 (Tenn. 2006).

Finally, because this aggravating circumstance "focuses upon the nature and circumstances of the crime, rather than the actions, intent, and conduct of the defendant," it may be vicariously applied to a defendant who did not personally commit the murder. State v.

Robinson, 146 S.W.3d 469, 500 (Tenn. 2004).

Some of the capital cases which have upheld this factor include:

State v. Henry Jones, 568 S.W.3d 101 (Tenn. 2019);
State v. Davidson, 509 S.W.3d 156 (Tenn. 2016);
State v. Willis, 496 S.W.3d 653 (Tenn. 2016);
State v. Bell, 512 S.W.3d 167 (Tenn. 2015);
State v. Dotson, 450 S.W.3d 1 (Tenn. 2014);
State v. Henretta, 325 S.W.3d 112 (Tenn. 2010);
State v. Jordan, 325 S.W.3d 1 (Tenn. 2010); and
State v. Hester, 324 S.W.3d 1 (Tenn. 2010).

6. (i)(6) - Murder of a Witness or to Avoid Prosecution

Tenn. Code Ann. § 39-13-204(i)(6):

> **The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;**

This aggravating factor focuses on the defendant's motives for committing a murder and is not limited to the killings of eyewitnesses who know or can identify the defendant. State v. Terry, 46 S.W.3d 147, 162 (Tenn. 2001). In addition, the defendant's desire to avoid arrest or prosecution need not be the sole motive for the killing; instead, it may be just one of the purposes motivating the defendant to kill. Id.; see also State v. Banks, 271 S.W.3d 90, 149 (Tenn. 2008); State v. Bush, 942 S.W.2d 489, 504 (Tenn. 1997). "However, ... there must be some 'particular proof' in the record to support this aggravating circumstance." State v. Powers, 101 S.W.3d 383, 399 (Tenn. 2003) (citing State v. Hartman, 42 S.W.3d 44, 58 (Tenn. 2001)). "Mere plausibility of the theory that avoiding arrest or prosecution was one of the motives of the murder is insufficient." Id.

Some of the capital cases that have found this factor applicable include:

State v. Jones, 568 S.W.3d 101 (Tenn. 2019);
State v. Davidson, 509 S.W.3d 156 (Tenn. 2016);

State v. Willis, 496 S.W.3d 653 (Tenn. 2016);
State v. Dotson, 450 S.W.3d 1 (Tenn. 2014);
State v. Freeland, 451 S.W.3d 791 (Tenn. 2014);
State v. Henretta, 325 S.W.3d 112 (Tenn. 2010);
State v. Banks, 271 S.W.3d 90 (Tenn. 2008);
State v. Rollins, 188 S.W.3d 553 (Tenn. 2006);
State v. Ivy, 188 S.W.3d 132 (Tenn. 2006);
State v. Reid, 164 S.W.3d 286 (Tenn. 2005);
State v. Thacker, 164 S.W.3d 208 (Tenn. 2005);
State v. Powers, 101 S.W.3d 383 (Tenn. 2003);
State v. Bane, 57 S.W.3d 411 (Tenn. 2001); and
State v. Hall, 976 S.W.2d 121 (Tenn. 1998).

But see State v. Jordan, 325 S.W.3d 1 (Tenn. 2010) (evidence insufficient to support this factor).

NOTE: In Powers, the court also addressed the issue related to the presentation of evidence of the underlying facts of another crime in establishing this factor. The example here was where a defendant has priors where he was identified by a victim and went to jail for those offenses and then later in the instant offense the victim was murdered. The implication would be that the murder was to avoid prosecution and jail again. The court indicated that any such evidence must be very narrowly tailored to the issue. Powers, 101 S.W.3d at 401.

NOTE: Such evidence of prior bad acts would most likely be the subject of either a jury-out or pretrial motion hearing and should be carefully considered before admission.

7. (i)(7) - Felony Murder

TENN. CODE ANN. § 39-13-204(i)(7):

The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child, aircraft piracy, or unlawful throwing,

placing or discharging of a destructive device or bomb[.]

(Emphasis added). The statute was amended and the underlined language was approved and became effective on July 6, 2009.

> **NOTE**: For offenses committed prior to May 30, 1995, the language of this aggravating circumstance was as follows:
>
> > ***The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.***
>
> Tenn. Code Ann. § 39-13-204(i)(7) (Supp. 1990).
>
> **NOTE:** For pre-1995 offenses, case law construing the former wording of this aggravator, particularly State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), should be consulted.

The 1995 amendments to the language of this aggravator were made in response to the Tennessee Supreme Court's decision in Middlebrooks, wherein the court, construing the former wording of this aggravator, held that it could not constitutionally be used as an aggravating circumstance to support imposition of the death penalty in a case where the defendant's first degree murder conviction had been based solely on felony murder. See Middlebrooks, 840 S.W.2d at 346.

> **NOTE: LIFE WITHOUT PAROLE:** State v. Butler, 980 S.W.2d 359, 363 (Tenn. 1998) (holding that (i)(7) aggravator, as previously worded, could be used to enhance a sentence to life without the possibility of parole in a case where the defendant's first degree murder conviction was based solely on felony murder).

As recognized by the court in Middlebrooks, "[t]he minimum standards for determining whether a sentence of death may be

constitutionally imposed under the United States Constitution for felony murder" are set forth in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). Middlebrooks, 840 S.W.2d at 337. In Enmund, the United States Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who merely "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797. In Tison, the United States Supreme Court refined the position it took in Enmund and held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death" was "a highly culpable mental state" capable of supporting the imposition of the death penalty. 481 U.S. at 157.

As presently worded, the (i)(7) aggravator "is applicable where the murder 'was ***knowingly*** committed, solicited, directed, or aided by the defendant, while the defendant had a ***substantial*** role in committing or attempting to commit [a specific enumerated felony].'" State v. Reid, 91 S.W.3d 247, 306 (Tenn. 2002) (appendix) (quoting current language of aggravator and emphasizing 1995 statutory changes); see also State v. Rogers, 188 S.W.3d 593, 618 (Tenn. 2006). As a result, this aggravating circumstance, as presently worded, may be constitutionally applied in cases where the defendant's first degree murder conviction is based solely on felony murder. See id.

In both State v. Bell, 512 S.W.3d 167, 204 (Tenn.2015), and State v. Willis, 496 S.W.3d 653, 732 (Tenn. 2016), the Tennessee Supreme Court held that "the felony murder aggravating circumstance may be applied only once to a single murder committed in the course of multiple felonies." In Willis, the jury was erroneously instructed and found, as two separate aggravating circumstances, that the defendant had killed the female victim both while he had a substantial role in committing her kidnapping and while he had a substantial role in committing the male victim's murder. Willis, at 732. The court held the jury should have been instructed on a single aggravating circumstance based upon the multiple felonies of kidnapping and first-degree murder, but the error was harmless. Id.

See also State v. Henretta, 325 S.W.3d 112, 145–46 (Tenn.2010); State v. Morris, 24 S.W.3d 788, 798–99 (Tenn.2000).

Some of the capital cases that have found this factor applicable include:

State v. Urshawn Eric Miller, ____ S.W.3d ____ (Tenn. 2021);
State v. Jones, 568 S.W.3d 101 (Tenn. 2019);
State v. Davidson, 509 S.W.3d 156 (Tenn. 2016);
State v. Willis, 496 S.W.3d 653 (Tenn. 2016);
State v. Dotson, 450 S.W.3d 1 (Tenn. 2014);
State v. Freeland, 451 S.W.3d 791 (Tenn. 2014);
State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013);
State v. Odom, 336 S.W.3d 541 (Tenn. 2011);
State v. Henretta, 325 S.W.3d 112 (Tenn. 2010);
State v. Jordan, 325 S.W.3d 1 (Tenn. 2010);
State v. Banks, 271 S.W.3d 90 (Tenn. 2008); and
State v. Rollins, 188 S.W.3d 553 (Tenn. 2006).

8. (i)(8) - Defendant's Custodial or Escape Status

TENN. CODE ANN. § 39-13-204(i)(8):

The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement[.]

The definition of "lawful custody" or "lawful confinement" for purposes of this aggravating circumstance is fairly straightforward and includes any lawful custodial status at the time of the murder. As a result, this aggravating circumstance has been upheld in cases (1) where the defendant was serving a sentence in a correctional facility for a prior offense at the time of the murder, see, e.g., State v. Schmeiderer, 319 S.W.3d 607 (Tenn. 2010); State v. Hugueley, 185 S.W.3d 356 (Tenn. 2006); State v. Sutton, 761 S.W.2d 763 (Tenn. 1988), (2) where the defendant was in the custody of the local sheriff in a "trusty" status at the time of the murder, see, e.g., State v. Hartman, 42 S.W.3d 44 (Tenn. 2001), and (3) where the defendant committed the murder while attempting to flee the

custody of a law enforcement officer immediately after having been placed under arrest. See, e.g., State v. Workman, 667 S.W.2d 44 (Tenn. 1984).

The meaning of the phrase "during the defendant's escape" from lawful custody or confinement has been more problematic. In State v. Odom, 928 S.W.2d 18 (Tenn. 1996), the State proved that the defendant had escaped on March 28, 1991, from a Mississippi jail where he had been serving a life sentence for murder. The murder for which the State sought the death penalty was not committed until May 10, 1991. Id. at 21. The Tennessee Supreme Court held in Odom that the defendant's status as an "escapee" was not enough to support application of the (i)(8) aggravator. Id. at 27. The Court reasoned:

> *Our rationale is simple–"during" as used in this statute means "throughout the continuance of." The end of the escape marks the beginning of one's status as an "escapee." Although [the defendant] was, assuredly, an "escapee," by no stretch can we say that the murder occurred during the defendant's escape from lawful custody or from a place of lawful confinement. When he committed the murder, [the defendant's] escape was an accomplished face–a fait accompli.*

Id.

However, the decision in Odom does not mean that any lapse in time between the beginning of the escape and the murder, even one spanning several days, makes the (i)(8) aggravating circumstance inapplicable; the crucial question is not the lapse of time, but whether the "escape" from custody or confinement has been completed or is still on-going. See State v. Hall, 976 S.W.2d 121, 134 (Tenn. 1998). In Hall, the Court concluded that, in contrast to the facts present in Odom, the following facts were sufficient to support application of the (i)(8) aggravator:

> *[T]hese murders were committed only four days after the defendants fled confinement in Kentucky and while the defendants were in the process of obtaining the [victims'] automobile–a means of transportation to further their escape. Indeed, the proof shows that the escapees had remained in an*

> *area approximately two miles in diameter until they were able to steal automobiles to further their escape. Moreover, law enforcement officers were actively canvassing this small area for the defendants, searching with helicopters, tracking dogs, and four-wheel drive vehicles in an attempt to locate the escapees [.] ... Clearly, the defendants were still in the process of escaping from Kentucky to Mexico. These murders were simply a step toward accomplishing this end.*

Id.

Some of the capital cases that have found this factor applicable include:

State v. Schmeiderer, 319 S.W.3d 607 (Tenn. 2010);
State v. Hugueley, 185 S.W.3d 356 (Tenn. 2006);
State v. Hartman, 42 S.W.3d 44 (Tenn. 2001);
State v. Henderson, 24 S.W.3d 307 (Tenn. 2000);
State v. Hall, 976 S.W.2d 121 (Tenn. 1998);
State v. Sutton, 761 S.W.2d 763 (Tenn. 1988); and
State v. Workman, 667 S.W.2d 44 (Tenn. 1984).

9. (i)(9) - Law Enforcement or Emergency Services Victim

TENN. CODE ANN. § 39-13-204(i)(9):

The murder was committed against any law enforcement officer, corrections official, corrections employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that the victim was a law enforcement officer, corrections official, corrections employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter engaged in the performance of official duties[.]

NOTE: The words "emergency medical or rescue worker, emergency medical technician, paramedic" were added to the statute and only apply to offenses committed on or after July 1, 1996.

NOTE: The statute was again amended to include

"probation and parole officer." This amendment became effective on July 1, 2008.

Application of this aggravating circumstance requires proof that the defendant "knew or reasonably should have known" of the victim's status as a law enforcement officer, corrections worker, or emergency services worker. See State v. Hugueley, 185 S.W.3d 356, 382 (Tenn. 2006) (determining that jury instruction on this aggravator omitted the required knowledge element, but concluding that error was harmless beyond a reasonable doubt given the overwhelming evidence supporting application of this aggravator).

Some cases in which imposition of the death penalty has been upheld based in part upon application of this aggravating factor include:

State v. Johnson, 401 S.W.3d 1 (Tenn. 2013)((i)(2) and (i)(9) aggravating circumstances);
State v. Kiser, 284 S.W.3d 227 (Tenn. 2009) (sole aggravator);
State v. Hugueley, 185 S.W.3d at 383 ((i)(2), (i)(5), (i)(8), and (i)(9) aggravating circumstances);
State v. Henderson, 24 S.W.3d 307, 314 (Tenn. 2000) ((i)(3), (i)(6), (i)(7), and (i)(9) aggravating circumstances); and
State v. Workman, 667 S.W.2d 44, 47-49 (Tenn. 1984) ((i)(3), (i)(6), (i)(7), (i)(8), and (i)(9) aggravating circumstances).

10. (i)(10) - Judge or Attorney Victim

TENN. CODE ANN. § 39-13-204(i)(10):

The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general, due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office[.]

While this aggravating circumstance has never been applied in a death penalty case in Tennessee, it seems logical to conclude that it should be applied in a manner consistent with the (i)(9) and (i)(11) aggravating circumstances given that these aggravators are similarly designed to narrow the class of death-eligible murders to those where the defendant's knowledge of the victim's status as a

public official or government employee was the motivating factor behind the killing.

11. (i)(11) - Publicly Elected Official

> **TENN. CODE ANN. § 39-13-204(i)(11):**
>
> **The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official[.]**

This aggravating circumstance has only been construed in one case in Tennessee. In the non-capital case of State v. Looper, 118 S.W.3d 386 (Tenn. Crim. App. 2003), the jury found evidence sufficient to support application of this aggravating circumstance and sentenced the defendant to life without the possibility of parole. On appeal, the defendant argued that the evidence presented at trial had been insufficient "for a rational trier of fact" to conclude that the victim, a state senator, had been murdered "due to or because of" his official duties or status as a state senator. Id. at 437. The defendant argued on appeal that the evidence, even when viewed in the light most favorable to the State, showed "at most" that the state senator had been killed "not because of his official duties or status," but because he was at the time running for re-election to his official office. Id. at 437-38. The Court of Criminal Appeals rejected this argument with the following reasoning:

> *The fact is that the victim was both the incumbent state senator for the district and a candidate for reelection, and his death would create a vacancy for this office. The record fully supports the determination of the jury that the defendant killed the victim to create a vacancy in the position for which the defendant was a candidate.*

Id. at 438.

12. (i)(12) - Mass Murder

TENN. CODE ANN. § 39-13-204(i)(12):

The defendant committed "mass murder," which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight (48) month period[.]

Effective 05/30/1997.

NOTE: For offenses committed prior to June 30, 1997, the language of this aggravating circumstance was as follows:

The defendant committed "mass murder" which is defined as the murder of three(3) or more persons within the State of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

Tenn. Code Ann. § 38-2-203(i)(12)(1982) (replaced by Tenn. Code Ann. § 39-13-204(i)(12)(1991)).

The case of State v. Bobo, 727 S.W.2d 945, 955 (Tenn. 1987) (**applying the pre-1997 language**), was the first case to construe this aggravator. In Bobo, the Tennessee Supreme Court held that (i)(12) may be constitutionally applied only if the triggering offenses are shown by convictions entered prior to the capital sentencing hearing. The Court specifically stated that, for this aggravator to be utilized, "the State must show beyond a reasonable doubt (1) that the defendant had been *convicted* of three or more murders, including the one for which he has just been tried, (2) within the State of Tennessee, (3) within a period of forty-eight (48) months, (4) perpetrated in a similar fashion, and (5) in a common scheme or plan." Bobo, at 956-57 (emphasis in original). The Court in Bobo ultimately concluded that the (i)(12) aggravator had not been properly applied to the defendant "because he did not have a sufficient number of triggering convictions for the murders 'of three or more persons within the State of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.' " Id. at 955.

NOTE: The Court in Bobo, after determining that the (i)(12) aggravator should not have been applied in the case, nevertheless determined that the death sentence should be upheld because the error in applying the (i)(12) aggravator was harmless beyond a reasonable doubt in light of the other aggravating circumstances, which were (i)(2) and (i)(7), clearly established by the evidence presented at the sentencing hearing. See Bobo, 727 S.W.2d at 956.

In State v. Black, 815 S.W.2d 166, 184 (Tenn. 1991), the second case to construe the (i)(12) aggravator, the Court added that this aggravating circumstance also "encompasses a situation where a defendant is simultaneously tried, as in the present case, for a series of separate but related homicides committed as part of a common scheme or plan." See also State v. Van Tran, 864 S.W.2d 465, 478 (Tenn. 1993). The Black Court explained:

> *The language of the subsection "within a period of forty-eight (48) months," would be applicable to the kinds of serial murders committed by Wayne Williams in Atlanta, by the "Son of Sam" in New York, or by Theodore "Ted" Bundy in Florida. The language would also be applicable to multiple murders such as those committed by Charles J. Whitman by sniper fire from the tower on the University of Texas campus. The term "mass murderer" as used in the statute can apply to multiple murders committed close in time or multiple murders committed singly over a longer period of time, not to exceed four years.*

Black, at 183-84.

Other cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include:

> State v. Jones, 568 S.W.3d 101 (Tenn. 2019) (this factor in combination with (i)(2), (i)(5), (i)(6), (i)(7), (i)(12), and (i)(14) aggravating circumstances);
> State v. Clayton, 535 S.W.3d 829 (Tenn. 2017) ((i)(3) and (i)(12) aggravating circumstances);
> State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) (multiple death sentences based this factor and on some combination of (i)(2), (i)(3), (i)(5), (i)(6), (i)(7), and (i)(12) aggravating circumstances);

State v. Jordan, 325 S.W.3d 1 (Tenn. 2010) ((i)(3), (i)(5), (i)(7), (i)(12), and (i)(13) aggravating circumstances);
State v. Reid, 213 S.W.3d 792 (Tenn. 2006) ((i)(2), (i)(6), (i)(7), and (i)(12) aggravating circumstances);
State v. Holton, 126 S.W.3d 845 (Tenn. 2004) (sole aggravating circumstance as to one of the victims; remaining three victims based on (i)(1) and (i)(12) aggravating circumstances);
State v. Smith, 868 S.W.2d 561 (Tenn. 1993) (as to one victim based on (i)(5) and (i)(12) aggravating circumstances; as to two remaining victims based on (i)(5), (i)(6), (i)(7), and (i)(12) aggravating circumstances); and
State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993) ((i)(5) and (i)(12) aggravating circumstances).

13. (i)(13) - Mutilation of the Body

TENN. CODE ANN. § 39-13-204(i)(13):

The defendant knowingly mutilated the body of the victim after death[.]

(Effective 07/01/1995).

In State v. Jordan, 325 S.W.3d 1, 71-72 (Tenn. 2010), the Tennessee Supreme Court addressed this aggravating factor.

> *This Court has not previously addressed in detail the use of this aggravating circumstance to impose the death penalty. In at least two cases, however, our Court of Criminal Appeals considered its use in the imposition of a sentence of life without parole. See State v. Thompson, 43 S.W.3d 516, 525-26 (Tenn. Crim. App. 2000), perm. appeal denied (Tenn. Mar. 5, 2001); State v. Price, 46 S.W.3d 785, 827-28 (Tenn. Crim. App. 2000), perm. appeal denied (Tenn. Feb. 26, 2001). In both cases, the court noted that mutilation is not statutorily defined and so turned to the dictionary definition of mutilation as "'to cut up or alter radically so as to make imperfect.'" Thompson, 43 S.W.3d at 525 (quoting Webster's Third New International Dictionary, 1493 (1993)); Price, 46 S.W.3d at 827 (same). The court also noted in both cases that "the legislative intent underlying mutilation as an aggravating circumstance must be 'that the General Assembly ... meant to discourage corpse desecration.'" Thompson, 43 S.W.3d at 525-26 (quoting Price, 46 S.W.3d at 828). In Thompson, the court concluded that the proof supported this aggravating circumstance where, after the victim's death, the defendant "stabbed him four times in the back with a knife, slit his throat, cut his forehead and legs, and fractured both of his legs by exerting great pressure from behind." 43 S.W.3d at 526. In*

> *Price, the court concluded that the defendant's post-mortem infliction of flash burns on his murder victim's face satisfied the definition of mutilation. 46 S.W.3d at 828.*
>
> *We recognize that the term "mutilation" is most frequently used to describe activities that are more obviously disfiguring to a victim's body than multiple gunshot wounds. See, e.g., Terry v. State, 46 S.W.3d 147, 161, 166 (Tenn. 2001) (referring to defendant's actions in cutting off victim's head and right forearm after killing him and burning the body as "mutilation" in discussion of (i)(5) aggravator); State v. Harris, 989 S.W.2d 307, 311 (Tenn. 1999) (victim's body "mutilat[ed]" where body parts severed and heart removed; (i)(5) aggravator alleged). Nevertheless, we hold that the circumstances of this case are sufficient to support the jury's finding of this aggravating factor. During his initial assault on his wife, Defendant shot two bullets into Mrs. Jordan's head. Medical proof established that each of these wounds was fatal, and Mr. Goff and Mr. Taylor both testified that Mrs. Jordan appeared dead at the time they were still in the crow's nest. Certainly it is reasonable to infer that Defendant thought she was dead. After murdering his wife, Defendant left the crow's nest and walked to his truck. There, he murdered another person. Unfinished, Defendant carried his assault rifle back to the crow's nest. He had a brief conversation with Mr. Taylor. Only after Mr. Taylor had left the crow's nest, descended the steps, and turned the corner did Defendant open fire on Mrs. Jordan's body. These circumstances support the inference that Defendant was intent on desecrating Mrs. Jordan's corpse. He did so by firing several high-powered bullets into her body. Although these bullets did not succeed in severing any of Mrs. Jordan's body parts, they caused a great deal of damage. Freddie Ellison described Mrs. Jordan as being "shot all to pieces." Dr. Turner described the assault rifle gunshot wounds to Mrs. Jordan's ribs, right lung, diaphragm, liver, kidney, spinal column, and back muscles. We hold that the multiple gunshot wounds that Defendant inflicted after Mrs. Jordan's death "alter[ed] radically so as to make imperfect" her body. The proof is sufficient to support the jury's application of this aggravating factor.*

(Original footnote omitted).

Subsequently, in State v. Willis, 496 S.W.3d 653 (Tenn. 2016), the court noted "mutilate" could also mean "to cut off or permanently destroy a limb or essential part of." (Citing the Merriam-Webster On-Line Dictionary).[7]

[7] Located at http://www.merriamwebster.com/dictionary/mutilate).

In State v. Davidson, 121 S.W.3d 600, 610 (Tenn. 2003), the Tennessee Supreme Court affirmed the use of this factor without discussion. In Davidson, the medical examiner observed that the skin at the front and back of the neck had been cut; the trachea exhibited a clean, sharp cut; the hyoid bone, which is located in the upper throat, had also been cut; and there was clear disarticulation of the cervical vertebral column. In addition, the torso, including the breast bone, had been cleanly cut open with some type of sharp instrument. This incision ran almost the entire length of the torso from the sternum to the navel and exposed the internal organs. Several superficial cuts had been made in the soft tissue next to the large incision. The medical examiner also opined that both the major incision and the lesser cuts were inflicted after death.

Some cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include:

State v. Hawkins, 519 S.W.3d 1 (Tenn. 2017);
State v. Davidson, 504 S.W.3d 156 (Tenn. 2016);
State v. Willis, 496 S.W.3d 653 (Tenn. 2016); and
State v. Jordan, 325 S.W.3d 1 (Tenn. 2010).

14. (i)(14) - Victim Age 70 or Over, or Vulnerable Due to Handicap or Disability (Lottie's Law)

TENN. CODE ANN. § 39-13-204(i)(14):

The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability[.]

Effective 07/01/2011 (current language).

NOTE: There are two **prior** versions of this aggravating circumstance.

The original version, which applies to offenses committed on or after July 1, 1997, but before July 1, 1998, read

> ***The victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew of reasonably should have known of such handicap or disability.***

The second version of this aggravating circumstance, which applies to offenses committed on or after July 1, 1998, but prior to July 1, 2011, read

> ***The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability.***

The first part of the current version of this aggravating circumstance is similar to the (i)(1) aggravator in that it **does not** require the defendant to have known, or reasonably should have known, the age of the victim at the time of the homicide. See State v. Rollins, 188 S.W.3d 553, 571 (Tenn. 2006) (holding that uncontested testimony from prosecution witnesses, that victim was 81 years old at the time of murder, was sufficient to support application of (1)(14) aggravating circumstance).

In contrast, the second part of this aggravating circumstance may only be applied in those cases where it is proven that the victim was particularly vulnerable due to a mental or physical disability ***and*** that the defendant "knew or reasonably should have known" of the victim's condition. However, to date, there have been no cases in which the (i)(14) aggravator has been applied based solely on this alternative language.

In State v. Leach, 148 S.W.3d 42, 47 (Tenn. 2004), one of the victims, who was 70 years old at the time of the murder, also had diminished mental capabilities and partial paralysis in her right hand and right leg. The Tennessee Supreme Court upheld application of the (i)(14) aggravator in Leach, concluding that the State had proven beyond a reasonable doubt that the elderly victim "was seventy years of age or older or was particularly vulnerable due to a

significant handicap or significant disability, whether mental or physical, and at the time of the murder [the defendant] knew or reasonably should have known of such handicap or disability."[8] Leach, at 59.

Other capital cases which have applied this factor include:

State v. Jones, 568 S.W.3d 101 (Tenn. 2019);
State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013); and
State v. Hester, 324 S.W.3d 1 (Tenn. 2010).

15. (i)(15) - Act of Terrorism

TENN. CODE ANN. § 39-13-204(i)(15):

The murder was committed in the course of an act of terrorism[.]

(Effective 7/04/2002).

There is currently no Tennessee capital case applying this factor.

16. (i)(16) - Intentional Killing of a Woman Who is Pregnant

TENN. CODE ANN. § 39-13-204(i)(16):

The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant[.]

(Effective 7/1/2010).

There is currently no Tennessee capital case applying this factor.

17. (i)(17) - Random Killing

Tenn. Code Ann. § 39-13-204(i)(17):

The murder was committed at random and the reasons for the

[8] This case involved the application of a prior version of the statute.

killing are not obvious or easily understood[.]

(Effective 7/1/2011).

There is currently no Tennessee capital case applying this factor. However, this factor was relied upon in a life without parole case. State v. Timothy Dewayne Ison, 2020 WL 3263384 (Tenn. Crim. App. June 17, 2020) (victim fatally stabbed multiple times while walking on greenway for no apparent reason). In Ison, the court stated that "random killing is in no way inapposite to the concept of premeditation."

18. (i)(18) – Fentanyl (Opiate) Related Murder

Tenn. Code Ann. § 39-13-204(i)(18):

> **The defendant knowingly sold or distributed a substance containing fentanyl, carfentanil, or any other opiate listed in § 39-17-408(c) with the intent and premeditation to commit murder.**

(Effective 7/1/2019).

There is currently no Tennessee death penalty case applying this factor.

19. (i)(19) – Good Samaritan Victim

Tenn. Code Ann. § 39-13-204(i)(19):

> **The victim of the murder was acting as a Good Samaritan at the time of the murder and the defendant knew that the person was acting as a Good Samaritan. For purposes of this subdivision (i)(19), "Good Samaritan" means a person who helps, defends, protects, or renders emergency care to a person in need without compensation.**

(Effective July 1, 2021).

There is currently no Tennessee death penalty case applying this factor.

D. VICTIM IMPACT EVIDENCE

1. Generally

Both the Tennessee and United States Supreme Courts have held that victim impact evidence is constitutional. Payne v. Tennessee, 501 U.S. 808 (1991). Its admissibility, however, is not unrestricted. State v. Austin, 87 S.W.3d 447, 463 (Tenn. 2002). "Victim impact evidence may not be introduced if 1) it is so unduly prejudicial that it renders the trial fundamentally unfair, or 2) its probative value is substantially outweighed by its prejudicial impact." State v. Thacker, 164 S.W.3d 208, 252 (Tenn. 2005).

Pursuant to Tenn. Code Ann. § 39-13-204(c),

> **...The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose....**

"The statute does not place any restriction on the number of witnesses who may testify about the murder's impact." State v. Jordan, 325 S.W.3d 1, 56 (Tenn. 2010).

Our courts have held that this statute does not expressly limit the introduction of other types of victim impact evidence authorized by prior case law. Id. See also State v. Young, 196 S.W.3d 85, 108-09 (Tenn. 2006) (while portions of the victim impact were appropriate, both the victim's employer and mother improperly testified to matters beyond a "brief glimpse" of the victim's life when testifying about the effect of the victim's death on others); State v. McKinney, 74 S.W.3d 291, 309 (Tenn. 2002) (A coworker of the murder victim testified regarding the victim's service as a police officer, including a description of the victim's duties and activities, but his testimony was limited to factual background, and he did not testify about the effect of the victim's death on himself, other officers, society, or the Memphis Police Department. The court held this was a "brief glimpse" into the victim's life which did not violate the defendant's

right to equal protection or due process.).

"[T]he limits on such evidence are qualitative rather than based on genetic or institutional relationships. … A blood or marital relationship is not a prerequisite for such status." Jordan, 325 S.W.3d at 57. See also Tenn. Code Ann. § 40-38-302(4)(A)(iii).[9]

In State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998), the Tennessee Supreme Court held

> *...Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.*

Victim impact evidence is also limited to the current offense and victim impact evidence of another homicide, even if committed by the defendant, is not admissible. Id. at n. 11 (citing State v. Bigbee, 885 S.W.2d 797, 812 (Tenn. 1994)).

In Nesbit, the court established various procedures and standards to govern the admissibility of victim impact evidence and argument.

2. Procedure

a. State must notify the trial court of its intent to produce victim impact evidence.

b. The trial court must hold a hearing outside the presence of the jury to determine the admissibility of the evidence.

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[9] As part of the Tennessee statutes addressing victim's rights, section 4(A)(iii) of Tenn. Code Ann. § 40-38-302 defines "victim" to mean in pertinent past as follows:

> *If the victim is deceased or is physically or emotionally unable to exercise the victim's rights, then the following persons, or their designees, in the order of preference in which they are listed:*
>
> *(a) A family member; or*
>
> *(b) A person who resided with the victim[.]*

c. Victim impact evidence should not be admitted until the trial court determines that evidence of one or more aggravating circumstances is already present in the record.

NOTE: "Although the admission of unduly prejudicial victim impact evidence may implicate due process concerns, the procedure established in Nesbit is not constitutionally mandated." Austin, 87 S.W.3d at 463.

3. Scope and Standards

a. Victim impact should be limited to information

(1) designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed;

(2) the contemporaneous and prospective circumstances surrounding the individual's death; and

(3) how those circumstances financially, emotionally, psychologically, or physically impacted upon members of the victim's immediate family.

NOTE: Evidence regarding the emotional impact on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and the risk of undue prejudice, particularly if no proof is offered on the other types of victim impact – but there is no bright-line test; it is a case-by-case analysis.

NOTE: Victim impact evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. See Nesbit, at 891.

b. The state is not required to prove that a defendant has specific knowledge about a victim's family to secure admissibility of the victim impact evidence.

NOTE: But the trial court may consider the defendant's specific knowledge of the family when evaluating the probative value of the victim impact proof on the appropriateness of the death penalty and when determining if probative value is substantially outweighed by prejudicial effect. The defendant's specific knowledge can be important in analyzing probative value.

4. Argument

a. Argument is permissible, but restraint should be exercised. The State should not argue what is little more than an appeal to the emotions of the jurors as such argument may be unduly prejudicial. The jury should not be given the impression that emotion may reign over reason.

b. Argument on relevant, though emotional, considerations is permissible, but inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely emotional response to the evidence is not permissible and should not be tolerated by the trial court.

c. Argument should not characterize victim impact evidence as an aggravating circumstance to weigh against mitigation proof.

5. Jury Instruction

When the State presents victim impact evidence, the court should instruct the jury on the proper way in which to consider such evidence. In Nesbit, the Tennessee Supreme Court provided an instruction to be provided in substance[10] to juries when such evidence has been introduced.

The prosecution has introduced what is known as victim impact

[10] In State v. Reid, 91 S.W.3d 247, 283 (Tenn. 2002), the court clarified that the specific instruction in Nesbit was only a suggestion.

> *evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.*
>
> *Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged.* ***You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt****.*

Nesbit, 978 S.W.2d at 892 (emphasis added). See also Tennessee Practice, Volume 7, Instruction 7.04(a). The language emphasized in the above instruction has been addressed by the T.P.I. committee:

> *The trial judge* ***may*** *wish to remove this language, as it is the opinion of the Committee that "a contradiction exists because the statute provides that the jury shall return a verdict of death upon finding the existence of an aggravating circumstance beyond a reasonable doubt, which the Nesbit instruction allows the jury to consider victim impact evidence only after it has found that at least one aggravating circumstance exists, and that it outweighs the mitigating circumstances beyond a reasonable doubt." State v. Reid, 91 S.W.3d 247, 287 (Tenn. 2002).*

Tennessee Practice, Volume 7, Instruction 7.04(a), fn 4. The instruction from Nesbit has been upheld by later courts. See e.g., Banks, 271 S.W.3d at 172.

E. MITIGATING CIRCUMSTANCES

Mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438

U.S. 586 (1978). Article I, section 16 of the Tennessee Constitution, and the Eighth Amendment of the United States Constitution require the sentencing body in a capital case to consider mitigating evidence. See e.g. State v. Carter, 114 S.W.3d 895, 905 (Tenn. 2003).

Pursuant to Tenn. Code Ann. § 39-13-204(c), evidence tending to establish any mitigating factor is admissible in a capital sentencing hearing. Id. Hearsay mitigating evidence is admissible during the penalty phase as well. State v. Austin, 87 S.W.3d 447 (Tenn. 2002); State v. Odom, 928 S.W.2d 18 (Tenn. 1996).

1. Statutory Mitigating Circumstances

Tenn. Code Ann. § 39-13-204(j):

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

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

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

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances that the defendant reasonably believed to provide a moral justification for the defendant's conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

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

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

and

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

2. Burden of Proof

The Tennessee statute on capital sentencing does not contain a burden of proof requirement as to mitigating circumstances; stated differently, the defendant does not have the burden of proving a mitigating circumstance. Tenn. Code Ann. § 39-13-204; State v. Hodges, 944 S.W.2d 346, 353-54 (Tenn. 1996). See also State v. Schmeiderer, 319 S.W.3d 607 (Tenn. 2010) (Appendix). Subsection (e)(1) of Tenn. Code Ann. § 39-13-204 provides as follows:

> **After closing arguments in the sentencing hearing, the trial judge shall include instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i), which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing, or both, which shall include, but not be limited to, those circumstances set forth in subsection (j). These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations. However, a reviewing court shall not set aside a sentence of death or of imprisonment for life without the possibility of parole on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not enumerated in subsection (j).**

As stated in the statute, the trial court should charge the jury to consider any mitigating factor "raised by the evidence." Tenn. Code Ann. § 39-13-204(e)(1).

There is also no requirement of jury unanimity as to any particular mitigating circumstance, or that jurors agree on which mitigating circumstances apply. State v. Hodges, 944 S.W.2d 346 (Tenn. 1996)**;** State v. Odom, 928 S.W.2d 18 (Tenn. 1996); State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994).

3. Statutory vs. Non-statutory

The statute specificity allows consideration of mitigating circumstances other than those listed in Tenn. Code Ann. § 39-13-204(j)(1)-(8). Tenn. Code Ann. § 39-13-204(j)(9).

"Jury instructions on specific non-statutory mitigating circumstances are not constitutionally mandated." Hodges, at 351-52 (citing State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996); State v. Hutchison, 898 S.W.2d 161, 173-74 (Tenn. 1994)). "Therefore, the right to such instructions, as well as the form and content of the instructions, derives solely from the statute." Hodges, at 352.

> **NOTE:** Penalty phase jury instructions are discussed later in this chapter.

Pursuant to current statutory law and case law, a capital defendant is entitled to have the jury consider **all** statutory and non-statutory mitigating circumstances which are raised by the evidence. Tenn. Code Ann. § 39-13-204(j); State v. Harris, 839 S.W.2d 54 (Tenn. 1992).

4. Hodges Hearing

In State v. Hodges, 944 S.W.2d 346 (Tenn. 1996), the Tennessee Supreme Court addressed various issues related to mitigating circumstances in capital sentencing hearings and its prior decision in Odom. The procedure which courts follow in considering motions related to charging mitigating circumstances to a jury is often referred to as a Hodges hearing.

Under the current statute, a trial court has no duty, absent a timely and proper request from the defense, to include instructions on non-statutory mitigating circumstances. State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996). In Odom, the court explained as follows:

> *Once the trial court decides that the proffered evidence is "mitigating" in nature and that it has been "raised by the evidence," it becomes a "mitigating circumstance" as a matter of law, and the trial court must*

> *include it in the instructions. The jury instructions are critical in enabling the jury to make a sentencing determination that is demonstrably reliable. To ensure this reliability, the jury must be given specific instructions on those circumstances offered by the capital defendant as justification for a sentence less than death. In this regard, the party desiring such an instruction must submit the requested instruction in writing to the trial court.*

Id. In addition, when the defense proffers a requested instruction which is overly specific, the trial court should revise and generalize the instruction to conform to the evidence and the law. Id.

Instructions on non-statutory mitigating circumstances must not be fact specific and should not imply to the jury that the judge has made a finding of fact. Instead, instructions on non-statutory mitigating circumstances must be "drafted so that when they are considered by the jury, the statutory mitigating circumstances are indistinguishable from the non-statutory mitigating circumstances." Hodges, 944 S.W.2d at 352 (citing State v. Odom, 928 S.W.2d 18, 32 (Tenn. 1996)). The trial judge is precluded from revealing to the jury that a request was made and from identifying the party making the request. Odom, 928 S.W.2d at 32.

As previously indicated, the statute requires jurors to consider those statutory and non-statutory mitigating circumstances which have been "raised by the evidence." Tenn. Code Ann. § 39-13-204(e)(1).

Again, the statute does not impose a burden of proof as to mitigating circumstances. Therefore, to comply precisely with the statute, a trial court should *only* instruct the jury to consider those statutory and non-statutory mitigating circumstances which had been *raised by the evidence*. Hodges, 944 S.W.2d at 353. It has also been previously noted that there is no provision in the capital sentencing scheme that requires the State to disprove mitigating circumstances beyond a reasonable doubt.

For a discussion of a pre-1989 case, see State v. Austin, 87 S.W.3d 447 (Tenn. 2002).

5. Specific Types of Mitigating Evidence[11]

a. No Significant History of Prior Criminal Activity

[(j)(1): The defendant has no significant history of prior criminal activity.]

When a defendant relies upon this factor, "he inevitably becomes subject to rebuttal evidence offered by the prosecution showing prior criminal activity. Neither the prosecution nor the defense is limited ... to proof of prior convictions." State v. Stephenson, 195 S.W.3d 574, 600 (Tenn. 2006); State v. Mann, 666 S.W.2d 41, 44 (Tenn. 1984). "The fact that the Defendant had not been convicted or even arrested for this offense is irrelevant." Stephenson, at 600.

b. Extreme Mental or Emotional Disturbance

[(j)(2): The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.]

(1) Notice Required

A capital defendant must file pretrial notice of intent to present expert testimony regarding mental condition as mitigation evidence at the sentencing phase of the trial. State v. Reid, 981 S.W.2d 166 (Tenn. 1998); State v. Huskey, 964 S.W.2d 892 (Tenn. 1998); State v. Martin, 950 S.W.2d 20 (Tenn. 1997). This notice is often referred to as the "Reid" notice.

> **NOTE:** A more detailed discussion of the Reid notice and its requirements and procedures may be found in Chapter 4.

(2) Procedure Once "Reid" Notice is Filed

Once notice is filed, the trial court, upon request of the

[11] This section discusses the statutory mitigating factors and some non-statutory mitigating factors. This discussion does not include all possible non-statutory mitigating factors.

State, may order the defendant to undergo a psychiatric evaluation by a mental health expert chosen by the State. See Tenn. Code Ann. § 33-7-301.

The defense will be afforded access to **any** expert reports prior to trial.

The State will be afforded access to the reports **only after** a jury returns a verdict of guilty and the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation.

(3) Challenges to the Language of the Statute

The Tennessee Supreme Court has rejected challenges to the wording of this mitigating factor. In particular the court has rejected challenges to the word "extreme" as a modifier. State v. Mann, 959 S.W.2d 503 (Tenn. 1997); State v. Hall, 958 S.W.2d 679 (Tenn. 1997).

NOTE: A defendant may request this factor without the term "extreme" as a non-statutory mitigating factor.

c. Victim Participant or Consented to Offense

[(j)(3): The victim was a participant in the defendant's conduct or consented to the act.]

In State v. Becton, 2002 WL 1349530 (Tenn. Crim. App.), perm. app. denied, (Tenn. 2002) (LWOP), the victim was a gang member in the same gang as the codefendants. The court held that the trial court's refusal to charge this mitigating factor was not error where the defendant alleged the victim had consented to the offense by virtue of his membership in the gang. See also State v. Leon Barnett Collier, 1997 WL 9722 (Tenn. Crim. App. 1997) (LWOP) (No instruction warranted for defendant statement that one victim provoked him when the victim told him he would never see his son again).

d. Moral Justification

[(j)(4): The murder was committed under circumstances that the defendant reasonably believed to provide a moral justification for the defendant's conduct.]

In State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994) (as discussed in Brimmer v. State, 29 S.W.3d 497 (Tenn. Crim. App. 1998), the trial court instructed this factor when defendant alleged the victim had made sexual advances upon him.

Also, in State v. Holton, 126 S.W.3d 845 (Tenn. 2004), the trial court instructed this factor when evidence was presented concerning the defendant having murdered his four children over concerns for "their well-being" and "to save them."

e. Accomplice and Participation Relatively Minor

[(j)(5): The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor.]

Some cases which have addressed this mitigating factor include the following:

State v. Willis, 496 S.W.3d 653 (Tenn. 2016) (charged to jury);
State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (claimed in mitigation);
State v. Joe Maine, 2010 WL 2219630 (Tenn. Crim. App. 2010) (LWOP) (factor not applicable);
State v. Guy, 165 S.W.3d 651 (Tenn. Crim. App. 2004) (LWOP) (charged in mitigation);
State v. Stout, 46 S.W.3d 689 (Tenn. 2001);
State v. Howell, 34 S.W.3d 484 (Tenn. Crim. App. 2000) (LWOP) (accomplice but not relatively minor participant); and
State v. Robert Matthew Lane, 1999 WL 559919 (Tenn. Crim. App. 1999) (LWOP) (Not a minor participant).

f. Extreme Duress or Substantial Domination By Another

[(j)(6): The defendant acted under extreme duress or under the substantial domination of another person.]

Some cases which have addressed this mitigating factor include the following:

State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (raised in mitigation);
State v. Joe Maine, 2010 WL 2219630 (Tenn. Crim. App. 2010) (LWOP);
State v. Reid, 164 S.W.3d 286 (Tenn. 2005) (Court refused to charge);
State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999) (raised in mitigation); and
State v. Leon Barnett Collier, 1997 WL 9722 (Tenn. Crim. App. 1997) (LWOP) (no instruction given) (extreme duress defined).

g. Youth or Advanced Age of Defendant

[(j)(7): The youth or advanced age of the defendant at the time of the crime.]

In State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), the court held that this factor need not be charged where the defendant was a 28-year-old, high school graduate, with an honorable discharge from the military. One example of a case in which this mitigating factor was considered is State v. Pike, 978 S.W.2d 904 (Tenn. 1998) (the jury considered the 18-year-old defendant's age in mitigation).

h. Substantially Impaired Mental Ability

[(j)(8): The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which substantially affected the defendant's judgment.]

The Tennessee Supreme Court has also rejected challenges to the wording of this mitigating factor. In particular, the Court has rejected challenges to the word "substantially" as a modifier. State v. Mann, 959 S.W.2d 503 (Tenn. 1997); State v. Hall, 958 S.W.2d 679 (Tenn. 1997).

> **NOTE**: A defendant may request this factor without the term "substantially" as a non-statutory mitigating factor.

If an individual unsuccessfully raises the issue of intellectual

disability, this factor may still be relied upon at sentencing.

> **If the issue of intellectual disability is raised at trial and the court determines that the defendant is not a person with intellectual disability, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).**

Tenn. Code Ann. § 39-13-203(e).

i. "Catch-All"

[(j)(9): Any other mitigating factor that is raised by the evidence produced by either the prosecution or defense, at either the guilt or sentencing hearing.]

It is error to fail to charge this factor in a capital case.

> **NOTE:** However, in State v. Reid, 164 S.W.3d 286 (Tenn. 2005), counsel failed to object when the trial court did not charge the "catch-all" mitigating circumstance in Tenn. Code Ann. § 39-13-204(j)(9). The court held that failure to charge the "catch-all", while error, **did not constitute plain error**. Id. (Appendix) (Court instructed both statutory and non-statutory mitigating circumstances).

j. Disadvantaged Background

"Evidence of a defendant's background and character are considered relevant because defendants who come from a disadvantaged background or who have emotional or mental problems may be less culpable than defendants who have no such excuse." State v. Odom, 928 S.W.2d 18, 38-39 (Tenn. 1996).

k. Co-defendant's Sentence

In State v. Austin, 87 S.W.3d 447 (Tenn. 2002) (Appendix), the court held that failure to charge a codefendant's sentence as a mitigating circumstance was not error. This was a

pre-1989 act case and thus the law in effect at the time of the offense did not require that the jury be charged on non-statutory mitigating circumstances. **The court, however, was specific in its holding that it was to the pre-1989 act case only.**

> *Although we find it unnecessary to address the Appellant's contention that sentences received by co-defendants are a valid non-statutory mitigating circumstance, a determination of whether the circumstance is mitigating would be a cognizable issue had the 1989 Criminal Sentencing Act been applicable. See generally Odom, 928 S.W.2d at 30-32. Additionally, while we take no position as to this determination, the Appellant is correct that under the Federal Death Penalty Act the circumstance that "another defendant or defendants, equally culpable in the crime, will not be punished by death" is a statutorily enumerated mitigating factor. 18 U.S.C.S. § 3592(a)(4).*

Austin, Appendix at footnote 22.

l. Sympathy

In State v. Keen, 31 S.W.3d 196 (Tenn. 2000) (Appendix), the defendant challenged the trial court's denial of his motion to instruct the jury that it could consider sympathy as a mitigating circumstance. In addition, the defendant asserted that the combined anti-sympathy charge given by the judge in combination with this denial was a violation of the Eighth Amendment by limiting his mitigation evidence. The charge given read as follows:

> *You should in no case allow mere sympathy or prejudice solely to influence your verdict but should look to the law and all the facts and circumstances proven in the evidence to determine the verdict.*

Id. The court in Keen held that the trial court properly instructed the jury that it could not consider sympathy. Id.

m. Residual Doubt

Although the Eighth Amendment of the United States Constitution does not require a lingering or residual doubt instruction, the Tennessee Supreme Court has determined that it is a non-statutory mitigating circumstance. State v. Thomas, 158 S.W.3d 361, 402-03 (Tenn. 2005); see also State v. Dotson, 450 S.W.3d 1 (Tenn. 2014); State v. McKinney, 74 S.W.3d 291 (Tenn. 2002); State v. Hartman, 42 S.W.3d 44 (Tenn. 2001). Thus, where raised by the evidence, a jury instruction is appropriate. Id.

> **NOTE:** Polygraph exam results or testimony related thereto, however, are not admissible under the theory of lingering or residual doubt. State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001).

n. Mercy

Capital defendant's frequently request a "mercy" charge. Our appellate courts have repeatedly held that such an instruction is not required in a capital sentencing hearing. E.g., Thacker, 164 S.W.3d at 255.

However, some courts have permitted mercy to be charged as a non-statutory mitigating circumstance.

6. Waiver of Mitigation

A defendant may waive the right to present mitigation proof so long as the defendant is competent. State v. Johnson, 401 S.W.3d 1, 7 (Tenn. 2013). The decision to waive mitigation is one left solely to the discretion of the defendant. Id, at 13-15. The waiver need only be by a competent defendant and done knowingly and voluntarily. Id. at 13. To aid trial courts in determining whether defendants are competent and fully informed at the time a waiver is given, our courts have established the following procedure:

> *[C]ounsel must inform the trial court of these circumstances on the record, outside the presence of the jury. The trial court must then take*

> *the following steps to protect the defendant's interests and to preserve a complete record:*
>
> > *1. Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial;*
> >
> > *2. Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and*
> >
> > *3. After being assured the defendant understands the importance of mitigation, inquire of the defendant whether he or she desires to forego the presentation of mitigating evidence.*

Zagorski v. State, 983 S.W.2d 654, 660-61 (Tenn. 1998); see also Johnson, 401 S.W.3d at 15-16. In State v. Smith, 993 S.W.2d 6, (Tenn. 1999), the court reiterated its holding in Zagorski and held that

> *a competent defendant who knowingly and voluntarily chooses a defense strategy will not late be able to complain about the detrimental consequences which result from the decision.*

"The trial court must exercise care not to inquire into the content of the evidence being waived so as to guard against the disclosure of information protected by attorney-client privilege." Johnson, 401 S.W.3d at 16. The trial court is not required to call mental-health witnesses on its own to present mitigation evidence at the penalty phase of a trial for capital murder after a defendant validly waives his right to present mental-health mitigation evidence. Id. at 19-20.

Some other cases in which the defendant has waived his right to present mitigating evidence include:

> State v. Jones, 568 S.W.3d 101, 139 (Tenn. 2019);
> State v. Willis, 496 S.W.3d 653 (Tenn. 2016); and
> State v. Kiser, 284 S.W.3d 227 (Tenn. 2009).

F. EVIDENTIARY ISSUES

1. Standards at Sentencing

Tenn. Code Ann. § 39-13-204 (c):

In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

See State v. Rimmer, 250 S.W.3d 12 (Tenn. 2008) (Tenn. R. Evid. do not limit admission of evidence in a capital sentencing hearing); State v. Berry, 141 S.W.3d 549 (Tenn. 2004); State v. Stout, 46 S.W.3d 689 (Tenn. 2001); Owens v. State, 13 S.W.3d 742 (Tenn. Crim. App. 1999).

2. Accomplice Testimony

Corroboration of accomplice testimony, which is required to prove guilt during the guilt phase of a trial, is not required to prove an aggravating circumstance during the penalty phase of the trial. State v. Bane, 57 S.W.3d 411, 419-21 (Tenn. 2001).

3. Photographs

In State v. Davidson, 504 S.W.3d 156 (Tenn. 2016), the court discussed the various standards related to the introduction of photographs in a capital trial in Tennessee:

> *Before a photograph is admissible, it must be verified and authenticated by a knowledgeable witness. Banks, 564 S.W.2d at 949. After authentication, the photographs must be shown to be relevant to the issues at trial. See State v. Vann, 976 S.W.2d 93, 102–03 (Tenn. 1998) (citing State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994); Banks, 564 S.W.2d at 951). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. In other words, "[t]o be relevant, evidence must tend to prove a material issue." Tenn. R. Evid. 401 advisory commission comment; see also State v. Faulkner, 154 S.W.3d 48, 67 (Tenn. 2005) (holding that "a photograph must be found relevant to an issue that the jury must decide before it may be admitted into evidence"). Factors to be considered in determining the relevance of photographic evidence include the photograph's accuracy and clarity, the need for the photograph to be used in addition to testimonial evidence to relate the facts to the jury, and the need to admit the photograph to establish the elements of the crime or to rebut the defendant's contentions. Banks, 564 S.W.2d at 951.*
>
> *Generally, relevant evidence is admissible. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403; see Vann, 976 S.W.2d at*

102–03 (citing Stephenson, 878 S.W.2d at 542; Banks, 564 S.W.2d at 951). Exclusion of relevant evidence is an extraordinary remedy that should be used sparingly, and the party seeking to exclude the evidence bears a heavy burden of persuasion. State v. James, 81 S.W.3d 751, 757–58 (Tenn. 2002) (citing White v. Vanderbilt Univ., 21 S.W.3d 215, 227 (Tenn. Ct. App. 1999)).

After determining that photographic evidence is relevant, the trial court must then weigh its probative value against any undue prejudice. Banks, 564 S.W.2d at 951. A relevant photograph "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. (quoting Fed. R. Evid. 403). "[T]he issue is not whether the evidence is prejudicial, but whether it is unfairly prejudicial." Vann, 976 S.W.2d at 103 (alteration in original) (citing State v. DuBose, 953 S.W.2d 649, 655 (Tenn. 1997)). " '[U]nfair prejudice' is '[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " Id. at 103 (quoting DuBose, 953 S.W.2d at 654). Photographs must never be used "solely to inflame the jury and prejudice them against the defendant." Banks, 564 S.W.2d at 951 (citing Milam v. Commonwealth, 275 S.W.2d 921, 924 (Ky. 1955)).

Photographs of a corpse may be admissible even though the photographs may be of a "gruesome and horrifying character." Id. at 950–51 (citing People v. Jenko, 410 Ill. 478, 102 N.E.2d 783, 785 (1951)). The more gruesome the photograph, the more likely it is that a defendant can establish that the photograph's prejudicial effect outweighs its probative value. See id. at 951 (citing Commonwealth v. Scaramuzzino, 455 Pa. 378, 317 A.2d 225, 226 (1974)).

Admission of photographs of a murder victim is often problematic. Post–mortem photographs can be helpful to show how the victim died and the nature of the injuries inflicted before death. Post–mortem pictures can also be relevant to the issue of deliberation or premeditation. See id. at 950. The intent to kill may be inferred from the brutality of the attack. Id. (quoting State v. LaChance, 524 S.W.2d 933, 937 (Tenn. 1975), abrogated on other grounds by State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992)). "[T]he succession of blows, the patently vicious manner of their infliction, the enormity of the cruelty and the horrendous injuries suffered provide further evidence of a wil[l]ful execution of an intent to kill." Id. (quoting LaChance, 524 S.W.2d at 937–38). The manner in which the killing was committed, such as "repeated shots, blows, and other acts of violence" may constitute sufficient evidence of premeditation. Id. (quoting LaChance,

524 S.W.2d at 938). Post–mortem photographs can be gruesome because of their subject matter, and therefore their prejudicial effect must be considered.

In State v. Willis, 496 S.W.3d 653 (Tenn. 2016), petition for cert. filed, No. 16-6995 (U.S. Nov. 21, 2016),[12] *we held the trial court did not abuse its discretion in admitting a number of graphic post-mortem photographs during the guilt and sentencing phases of the defendant's capital trial. The challenged photographs in Willis included color photographs of the decomposed bodies of the two victims, one of which had been mutilated after death. Id. at 725. The photographs from the guilt phase depicted the locations of the victims' bullet wounds, fly larvae and pupae, a storage tote containing the body of one of the victims, one victim's bound hands and feet, and one victim's severed head and hands. Id. The photographs from the sentencing phase depicted the severely decomposed headless and handless body of one victim and that victim's severed and severely decomposed head. Id. We found that each of these photographs had probative value. Id. at 727. The photographs admitted during the guilt phase were probative on the contested issues of premeditation and time of death, and the photographs admitted during the sentencing phase were probative on the aggravating circumstances, which supported the State's decision to seek the death penalty. Id. Further, in considering the danger of unfair prejudice, we observed that it is fair to consider the grotesque and horrifying nature of the charged conduct. Id. at 729. To the extent the photographs tended to be shocking or gruesome, it was because the crime depicted was of that sort. Id. (quoting State v. Sandles, 740 S.W.2d 169, 177 (Mo. 1987) (en banc)). We held in Willis that the defendant's failure to establish the probative value of the challenged photographs was substantially outweighed by the danger of unfair prejudice. Id.*

In State v. Brown, 836 S.W.2d 530, 551–52 (Tenn. 1992), this Court found no error in the trial court's admission of nine color, close-up photographs of the deceased victim's body. The State presented testimony regarding the injuries, but under the Banks standards, we held the graphic photographs were relevant to the brutality of the attack and extent of force used against the victim, from which the jury could infer the element of malice. Id. at 551 (citing Banks, 564 S.W.2d at 950). We noted that each photograph represented a different part of the victim's body and that no two photographs depicted the same injuries. Id.

In State v. Cole, 155 S.W.3d 885, 912–13 (Tenn. 2005), this Court

[12] State v. Willis, 496 S.W.3d 653 (Tenn. 2016), cert. denied, 137 S. Ct. 1224 (2017).

upheld the admissibility of post-mortem photographs of the victim's scalp, which showed a ring of soot around a bullet wound. The photographs were relevant to supplement the medical examiner's testimony that the bullet wound was inflicted from contact range, which supported an inference of premeditation and contradicted the defendant's claim of self-defense and the defendant's statement to police that he shot the victim from a few feet away. Id. at 913. We concluded that the probative value of the photographs was not outweighed by their prejudicial effect. Id.

In State v. Carter, 114 S.W.3d 895, 903–04 (Tenn. 2003), we upheld the trial court's decision to admit into evidence three photographs depicting the bodies of two murder victims at the crime scene. The photographs showed a male victim's body crouched in a closet and covered with blood and a female victim's body lying in a pool of blood on a bathroom floor. Id. at 901. One photograph showed that the female victim was partially nude. Id. We held that the photographs were relevant to show the nature and circumstances of the crimes and to demonstrate the "especially heinous, atrocious, or cruel" aggravating circumstance for the crimes. Id. at 903 (quoting Tenn. Code Ann. § 39-13-204(i)(5)). We further held that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. Id. at 904.

Applying these factors here, we find the trial court did not abuse its discretion in admitting the photographs into evidence. The trial court reviewed numerous photographs and only allowed certain photographs to be admitted into evidence. The verification and authenticity of the photographs were not in dispute. The photographs accurately depicted different aspects of [the female and male victims'] bodies and the injuries inflicted on them. The photographs were not cumulative because they showed different views of various parts of their bodies, and they assisted in the jury's understanding of the medical examiner's testimony. During the pretrial hearing, the medical examiner stated that she could testify about her findings but that her testimony alone was "not good enough" for the jury to truly comprehend the method and manner of the victims' deaths. During her trial testimony, she used the photographs to describe how the victims died, including showing the binding around [the male victim's]hands and feet, the shirt wrapped around his head, the sock placed in his mouth, the places where he had been shot, how severely burned and charred his body was, the damage to his anus from blunt force trauma, how [the female victim] was bound and positioned in the garbage can, and the injuries to various parts of her body. These photographs were relevant to the issues at trial. They showed that the manner in which the rapes and murders were committed was deliberate, premeditated, and took some time to

> *accomplish. They also showed the repeated blunt force trauma that the victims endured and the extent of their injuries. The photographs were graphic but not unnecessarily gruesome or horrifying especially given the facts. The photographic evidence of the torture inflicted on the victims during their last hours cannot be ignored or recreated in any other manner. The photographs were likely prejudicial to Mr. Davidson—but not unfairly prejudicial.*
>
> *We conclude that the photographs were relevant and that their probative value was not substantially outweighed by the danger of unfair prejudice. We hold that the trial court did not abuse its discretion in admitting the photographs of the victims into evidence.*

Davidson, at 198-201 (footnote added).

In addition, in State v. Odom, 137 S.W.3d 572, 587-88 (Tenn. 2004), the court held that

> *[a]t a resentencing hearing, both the State and the defendant are entitled to offer evidence relating to the circumstances of the crime. A trial court is afforded broad discretion in determining whether to admit photographs of the deceased in a murder prosecution.*

(Citations omitted). See also State v. Clayton, 535 S.W.3d 829, 856-57; State v. Odom, 336 S.W.3d 541, 564-65 (Tenn. 2011) ("Although the Rules may serve as a guide in determining the admissibility of evidence in capital sentencing hearings, '[t]rial judges are not ... required to adhere strictly' to them during a sentencing hearing because they 'are too restrictive and unwieldy in the arena of capital sentencing.'" (Quoting Sims, 45 S.W.3d at 14)).

As of July 1, 2015, Tenn. Code Ann. §40-38-103(c) provides

> **In a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney general to show the general appearance and condition of the victim while alive.**

In State v. Glen Allen Donaldson, 2020 WL 2494478 **9-10 (Tenn. Crim. App. May 14, 2020), the appellate court addressed the application of the statute:

Although the statute in question mandates the admission of "an appropriate photograph of the victim while alive," the admission of such photograph is limited to certain cases and for certain purposes. See T.C.A. § 40-38-103(c). By the plain language of the statute, the trial court retains the discretion to determine whether a life photograph of a homicide victim is appropriate for admission. See id. Despite the statute's mandatory language, a trial court may nevertheless exclude a photograph, even if relevant to show the victim's "general appearance and condition ... while alive," see id., if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice," see Tenn. R. Evid. 403. Such a photograph would be inappropriate and, consequently, excludable under the statute. See T.C.A. § 40-38-103(c).

4. Defendant's Character

In State v. Thacker, 164 S.W.3d 208 (Tenn. 2005), the court discussed the issue of evidence related to the defendant's character at a capital sentencing hearing.

Evidence is not excluded at a capital sentencing hearing merely because it is otherwise inadmissible under the Rules of Evidence. See Tenn. Code Ann. ' 39-13-204(c); State v. Stout, 46 S.W.3d 689, 702 (Tenn. 2001). In a capital sentencing hearing, any evidence relevant to the circumstances of the murder or to the aggravating or mitigating circumstances is admissible in determining punishment if it has probative value. See Teague, 897 S.W.2d at 250. Further, due to the constitutional requirement that capital sentencing be conducted in an individualized manner, evidence regarding the defendant's character and background is admissible regardless of its relevance to any aggravating or mitigating circumstances. Sims, 45 S.W.3d at 13. Nevertheless, a trial court has the discretion to exclude any evidence that would render the trial fundamentally unfair, or whose probative value is outweighed by its prejudicial effect. See Tenn. R. Evid. 403; State v. Burns, 979 S.W.2d 276, 282 (Tenn. 1998).

Generally, Rule 404 prohibits the use of character evidence to prove action on a particular occasion in conformity with the character trait. See Tenn. R. Evid. 404. Rule 404(b) specifically serves to filter out evidence of prior bad acts if offered to infer conduct in conformity with a character trait; however, such evidence may be admissible for other purposes. Tenn. R. Evid. 404(b). In cases where character evidence is admissible, Tennessee Rule of Evidence 405 provides that "inquiry on

cross-examination is allowable into relevant specific instances of conduct." Tenn. R. Evid. 405(a). However, before inquiring into specific instances of conduct, the trial court must hold a hearing outside the presence of the jury and determine whether a factual basis for the inquiry exists and whether "the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues." Id.

In State v. Sims this Court analyzed the relationship between Rule 405 and Tennessee Code Annotated section 39-13-204(c), focusing on the precise issue of whether section 39-13-204(c) precluded application of Rule 405 during a capital sentencing hearing. 45 S.W.3d at 13. We concluded that section 39-13-204(c) provides trial judges with wider discretion than normally permitted under the Rules of Evidence and that trial judges are not required to strictly follow Rule 405 in determining whether the State should be allowed to question a defendant's witness regarding the defendant's prior convictions. Sims, 45 S.W.3d at 14. We have provided the following principles:

> *The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.*

Id.; see also Stout, 46 S.W.3d at 703.

We also concluded that the issue should not be whether testimony is character evidence under Rules 404 and 405. Rather, the proper focus in a capital sentencing hearing should be whether the testimony is relevant to the mitigating factors presented by the defendant and on the relevance of the defendant's prior bad acts to refute those mitigating circumstances. Sims, 45 S.W.3d at 14. We further noted that when evidence of prior convictions is admitted in a capital sentencing

hearing, the trial court should instruct the jury that the evidence is to be considered solely to rebut mitigating testimony related to the defendant's character. Id. at 15.

In Sims, the prosecution was allowed to cross-examine a witness regarding the defendant's prior burglary and theft convictions in order to rebut mitigating evidence that the defendant was not by nature an aggressive person. Id. at 14-15. Likewise, in State v. Stout, evidence of prior convictions for aggravated burglary, theft, reckless endangerment and robbery was allowed to rebut mitigation evidence that the defendant was a "fine, active Christian." 46 S.W.3d at 703.

Thacker, at 226-28.

5. Confessions

In State v. Nichols**,** 877 S.W.2d 722, 732 (Tenn. 1994), the court held that the defendant's confession was admissible at sentencing in that it described the nature and circumstances of the crime.

6. Hearsay

If relevant, hearsay is admissible during the penalty phase of a capital murder case. Tenn. Code Ann. ' 39-13-204(c); State v. Rimmer, 250 S.W.3d at 23-24; State v. Austin, 87 S.W.3d 447 (Tenn. 2002). Although our statute does permit the introduction of hearsay evidence, if the evidence is offered by the State, the statute requires that "the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted." Tenn. Code Ann. ' 39-13-204(c).

7. State's Rebuttal Proof

In certain circumstances the State will be allowed to rebut the mitigation offered by the defendant at a capital sentencing hearing. The test is whether the probative value outweighs the prejudicial effect. State v. Sims, 45 S.W.3d 1, 13 (Tenn. 2001). In the penalty phase, the focus is on relevance as opposed to a strict application of the rules of evidence. Id.

EXAMPLES:

State v. McKinney
74 S.W.3d 291 (Tenn. 2002) (Appendix).

Trial court properly allowed the State to impeach a defense witness, who portrayed the defendant as a peaceful, non-violent person, with the defendant's juvenile adjudication for aggravated assault.

> **NOTE**: In such instances, it is appropriate for the trial court to give a limiting instruction informing the jury that prior convictions should be considered solely for the purpose of rebutting the mitigating testimony relating to the defendant's character as a non-aggressive person. See State v. Sims, 45 S.W.3d 1 (Tenn. 2001).

State v. Bane
57 S.W.3d 411, 424 (Tenn. 2001)

State was properly permitted to rebut proposed mitigation. Defendant introduced mitigating evidence regarding his family background, marriage and two sons. State properly rebutted this evidence with proof of defendant's relationships with other women.

8. Polygraphs

Evidence of polygraph examination results, testimony on such results, or testimony related to a defendant's willingness or refusal to submit to a polygraph examination is not admissible during a capital or non-capital sentencing hearing. State v. Stephenson, 195 S.W.3d 574 (Tenn. 2006); State v. Pierce, 138 S.W.3d 820, 826 (Tenn. 2004); see also State v. Sexton, 368 S.W.3d 371, 409-10 (Tenn. 2012) (guilt phase); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001); but see State v. Freeland, 451 S.W.3d 791 (Tenn. 2014) (admitting willingness to take polygraph examination as relevant to issue of voluntariness of statement).

9. Waiver of the Right to Testify at Sentencing

If a capital defendant wishes to waive his right to testify at the capital sentencing hearing, the trial court should ensure that the requirements for such a waiver as set out in Momon are followed at sentencing. State v. Rimmer, 250 S.W.3d 12, 27 (Tenn. 2008).

In Momon v. State, 18 S.W.3d 152 (Tenn.1999), the Tennessee Supreme Court held that the right of the defendant to testify is fundamental and can only be waived in person and there must be evidence in the record demonstrating "an intentional relinquishment or abandonment of a known right or privilege" by the Defendant. Id. at 161–62 (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). The court outlined specific procedures for ensuring that a waiver is properly recorded which includes a hearing out of the presence of the jury to establish on the record that the defendant has personally made a knowing, intelligent, and voluntary waiver. The trial court must determine that

> (1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify;
> (2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;
> (3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.

Id. at 162. Defense counsel should ask the defendant these questions and, under ordinary circumstances, "the trial judge should play no role in this procedure." Id.

In State v. Rimmer, the court further held that a valid waiver under Momon did not require that the Defendant be advised pursuant to Cazes, 875 S.W.2d at 266, of his ability to testify to collateral mitigating factors in a death penalty sentencing hearing without waiving his privilege against self-incrimination. Rimmer, at 28-29; see also State v. Kiser, 284 S.W.3d at 253-53.

10. Limited Cross-Examination of Defendant

As briefly discussed above, if the Defendant chooses to testify at the capital sentencing hearing, he or she may limit that testimony to collateral matters and not testify concerning the specifics of the offense. The State would then be limited on cross-examination to the collateral issues on which the defendant testified. Cazes, 875 S.W.2d at 266.

In State v. Willis, 496 S.W.3d at 759 (appendix), the court indicated the failure to explain on the record the evidentiary ruling from Cazes concerning the limited cross-examination of the defendant does not invalidate appellant's waiver of the right to testify.

11. Rule 615: "The Rule" in Capital Cases

In State v. Jordan, 325 S.W.3d 1 (Tenn. 2010), the court discussed the application of Tenn. R. Evid. 615 and the sequestration of witnesses in a capital case.

> *[A] trial court should not automatically or arbitrarily exclude a defense witness from a capital sentencing trial simply on the basis that the rule was invoked at the beginning of trial and the witness nevertheless remained in the courtroom. Rather, the court should exercise its discretion and consider all relevant circumstances. Those circumstances may include, but are not limited to: (1) the reasons for the proffered witness's presence during the trial in contravention of the sequestration order; (2) any complicity of the defendant and/or his counsel in the violation of a sequestration order; (3) the relevance of the proffered witness's testimony; (4) the relationship, if any, between the proffered witness's proposed testimony and the testimony he or she heard in violation of the rule; (5) the potential impact on the proffered witness's testimony by proof heard in violation of the rule; (6) the extent to which the proffered testimony is cumulative; (7) the efficacy of less drastic remedies; (8) the policies favoring admission of the witness's testimony; and (9) the extent to which allowing the witness to testify will contravene the purposes served by the rule. To reiterate, the trial court must "inquir[e] into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family." Sims, 45 S.W.3d at 14. In conducting this evaluation, the trial court should place on the record its analysis and the reasons for its ruling. In no*

event should a trial court automatically or mechanically rely on Tennessee Rule of Evidence 615 to exclude mitigation proof from a capital sentencing trial on the basis that the witness was present during the guilt/innocence phase of the trial. See Reid, 213 S.W.3d at 817 (in determining whether to admit or exclude evidence at a capital sentencing hearing, the test is whether the evidence is "reliable and relevant to one of the aggravating or mitigating circumstances").

12. Economic Cost of Death Penalty

In State v. Davidson, 509 S.W.3d at 240, the court held as follows:

the trial court did not err by refusing to allow the defendant to introduce evidence regarding the cost of imposing the death penalty compared to the cost associated with imprisoning an individual for life. Evidence of the expense associated with implementing the death penalty bore no relation to the defendant or his crimes, and as such, it was irrelevant.

13. Right to Call Witnesses: Exclusion of Bailiff as Witness

In Banks, 271 S.W.3d at 144, the appellate court affirmed the trial court's refusal to allow the defendant to call one of its own court officers, who was safeguarding the jury, to testify during the penalty phase of the trial regarding the defendant's good conduct as a prisoner. The defendant unsuccessfully argued this infringed on his Sixth Amendment right to call witnesses and his due process of law protections.

G. CLOSING ARGUMENT

Tenn. Code Ann. § 39-13-204(d).

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

Tennessee appellate courts have recognized that closing argument is a valuable privilege for both the State and the defense; thus, trial courts should allow wide latitude to counsel in arguing their cases to the jury. See State v. Bigbee, 885 S.W.2d 797, 807 (Tenn. 1994). However, closing

argument is subject to the discretion of the trial judge, and must be temperate, predicated on evidence introduced during the trial, and relevant to the issues being tried. State v. Johnson, 401 S.W.3d 1, 20 (Tenn. 2013); State v. Jordan, 325 S.W.3d at 64; State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994).

In addition to offering curative instructions upon an objection by one of the parties, where the trial court finds an argument to be highly inflammatory, even if there is no objection, a trial court may sua sponte intervene to prevent prejudice. See Sparks v. State, 563 S.W.2d 564, 567 (Tenn. Crim. App. 1978).

Prosecutors' closing arguments must be evaluated in light of defense arguments that precede them. State v. Thomas, 158 S.W.3d at 414-15.

1. Victim Impact

Victim impact evidence is not an aggravating circumstance to be weighed against mitigation proof, and prosecutors should not characterize it as such. State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998). During closing argument, the prosecution may ask the jury to "consider" victim impact evidence but may **not** ask the jury to "weigh it." State v Reid, 91 S.W.3d 247 (Tenn. 2002); see also State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (holding that the State's argument regarding the impact the victim's death had on the entire community exceeded the scope of victim impact argument under Nesbit).

2. Deterrence/Community Conscience Arguments

Prosecutors should avoid arguing specific deterrence during the penalty phase because it is not relevant to an aggravating circumstance. State v. Schmeiderer, 319 S.W.3d 607, 621 (Tenn. 2010); State v. Sims, 45 S.W.3d 1 (Tenn. 2001); State v. Blanton, 975 S.W.2d 269 (Tenn. 1998); State v. Cauthern, 976 S.W.2d 726 (Tenn. 1998); State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988).

In Sims the Court found that the following statement by the prosecutor was improper:

> *The only verdict that is proper in this case ... [t]he only proper verdict that this defendant has earned, that he deserves, that all his life he's been crying out for, sentence me to death, because if you don't stop me, I'm going to take somebody else away from you. I'm going to take away a valued member of this community if you don't stop me.*

Likewise, in State v. Cauthern, 976 S.W.2d 726 (Tenn. 1998), the Court held that

> *the prosecutor's statements that the jury should "do its duty" and that its verdict should send a message to the community constituted a plea for general deterrence, which has no application to either aggravating or mitigating factors. The Court further found that the argument impermissibly suggested to the jury that the defendant, as an incarnation of "the evil one," should be sentenced to death not only for the offense charged but also for other heinous offenses committed by "the evil one" in the form of other notorious murderers.*

3. Biblical References

References to the Bible during closing argument are inappropriate. See State v. Jordan, 325 S.W.3d at 63-64 (angel of death and death angel); State v. Reid, 164 S.W.3d 286, 347 (Tenn. 2005) (citing State v. Cribbs, 967 S.W.2d 773, 783 (Tenn. 1998)); see also State v Middlebrooks, 995 S.W.2d 550, 559 (Tenn. 1999); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998) (holding that the prosecution's reference to the Lord's Prayer and its requests for the jury to "combat and destroy" the "evil one," amounted to the use of biblical passages that the Court repeatedly has held to be improper and inflammatory); State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994); State v. Bates, 804 S.W.2d 868, 881 (Tenn.), cert. denied, 502 U.S. 841 (1990).

4. Epithets

It is improper for the prosecutor to use epithets to characterize a defendant. In State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998), the Tennessee Supreme Court held that the frequent references to the defendant as the "evil one," used as epithets to characterize the defendant, were improper and potentially appealed to the bias and

passion of the jury. See also State v. Thomas, 158 S.W.3d 361 (Tenn. 2005) (holding that the prosecutors' references to the defendants as "greed" and "evil" were improper); Darden v. Wainwright, 477 U.S. 168, 179 (1986) (holding it improper to refer to the defendant as an "animal"); Bates, 804 S.W.2d at 881 (holding it was improper to refer to the defendant as a "rabid dog"); State v. Ladonte Montez Smith, 1999 WL 1210813, at * 12 (Tenn. Crim. App., Nashville, Dec. 17, 1999) (holding prosecutor's reference to defendant as a guilty dog was improper); State v. Joel Guilds, 1999 WL 333368, at * 5 (Tenn. Crim. App., Nashville, May 27, 1999) (holding that the prosecutor referring to the defendant as "this clown" was improper). But see State v. Hawkins, 519 S.W.3d 1, 49 (Tenn. 2017) ("We cannot say that characterizing the defendant as "mean" was improper, inflammatory, or inconsistent with the proof presented at trial.").

> **NOTE**: In State v. Middlebrooks, 995 S.W.2d at 558-59, the defendant's use of racial epithets before and during the offense was deemed relevant and admissible to rebut the theory of the defense and mitigating evidence.

5. Victim's Family Support of or Opposition to the Death Penalty

"Admission of a victim's family members' characterizations and opinions about the crimes, the defendant, and the appropriate sentence violates the Eighth Amendment." Nesbit, 978 S.W.2d at 888, n.8; Middlebrooks, 995 S.W.2d at 558.

Testimony that a victim or victim's family member either supports or opposes the death penalty in a particular case is irrelevant as victim impact and/or mitigation. State v. Hester, 324 S.W.3d 1, 59-60 (Tenn. 2010).

6. Future Dangerousness

In Tennessee, future dangerousness may be argued if the defendant first presents proof or argues to the contrary. State v. Hall, 976 S.W.2d 121 (Tenn. 1998).

7. "Mercy"

It was error for the prosecutor to argue that the jury should show the defendant the same mercy that he showed the victims. State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994).

8. Caldwell v. Mississippi

It is constitutionally impermissible to lead a capital sentencing jury to believe that the responsibility for the defendant's death rests elsewhere. Caldwell v. Mississippi, 472 U.S. 320 (1985); see also State v. Jordan, 325 S.W.3d 1 (Tenn. 2010) (discussion of Caldwell issue).

9. For Other Offense

It was inappropriate for a prosecutor to argue that the death sentence was appropriate to punish the defendant for the current offense and for a previous murder for which the defendant had already received a life sentence. State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994).

10. Marital Privilege

In State v. Sexton, 368 S.W.3d 371 (Tenn. 2012), the court held that "[n]o comment should be made on to the exercise of marital privilege in either opening statements or closing arguments."

11. Reference to Other Crimes

In State v. Sexton, 368 S.W.3d at 424, the court stated the following:

> *During argument on behalf of the Defendant in the penalty phase, defense counsel had pointed out that the murders did not involve any other felonies. In response, the prosecution argued that while "it wasn't in the course of a bank robbery or something like that, ... other felonies [were] involved. It is a crime of aggravated burglary for a person to ... enter your house with the intent to commit an assault ... [or] some other crime. So there [are] other crimes involved." The Defendant alleges that the argument was improper and the Court of Criminal Appeals agreed. Sexton, 2010 WL 5054428, at *30. In this appeal, the State's brief concedes that these comments may have "improperly adverted to*

> *other criminal conduct," but maintains that the comments did not affect the result of the proceeding, even though the trial court took no specific curative measures. We agree that the argument by the prosecution should have been confined to the single aggravating circumstance alleged in the notice seeking the death penalty—that the murders were committed for the purpose of avoiding, identifying with, or preventing arrest or prosecution. Tenn. Code Ann. § 39–13–204(i)(6); see also Tenn. R. Crim. P. 12.3(b)(2). To suggest that other felonies could be considered was misleading to the jury, a prohibited area of argument as indicated by the ruling in Goltz.*[13]

(Footnote added).

12. Applicability of Mitigating Factors

"The State is permitted to argue that mitigating circumstances are not applicable based upon the evidence or that a circumstance is of little or no weight in terms of actual mitigation value." State v. Banks, 271 S.W.3d 90, 135 (Tenn. 2008) (citing State v. Hall, 976 S.W.2d 121, 170 (Tenn.1998); State v. Brimmer, 876 S.W.2d at 85, and State v. Howell, 868 S.W.2d 238, 258 (Tenn.1993)).

13. Reference to Mitigating Factors as Special Treatment

In Banks, the defendant argued the following closing arguments were improper:

> *It's sad but with your everyday common lifetime experiences, you know that it is common for some kids to pick on others, especially in sibling situations. Does it set him apart from any other defendant who commits murder? Does it make him special? Does it make him different? Because a mitigating circumstance, ladies and gentlemen, is one that sets it apart, something that makes this offense something that deserves this defendant—this defendant deserved to be treated differently than everybody else, special consideration.*
>
> *...*
>
> *So whether you've been bullied or picked on, you didn't hear any proof of torture. You didn't hear any proof that he had to go a hospital. You didn't hear any proof that it was anything outside the norm of anybody else's childhood growing up experiences. So do you set that apart? Is that anything different from what anybody else has had to endure? Is it anything different than what any of you have had to endure? Does it justify or excuse or should it be given*

[13] State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003).

less culpability for execution because you had that lifetime childhood experience?

Banks, 271 S.W.3d at 135-36. The court in Banks held as follows:

The prosecutor's argument was not that consideration of the mitigating circumstances would afford Mr. Banks special treatment. Rather, the prosecutor was describing mitigating circumstances as those that render a particular offender less culpable than the average person. Regardless of how these arguments are characterized, they fall safely within the domain of legitimate argument that the jury should afford little or no weight to a particular mitigating circumstance asserted by Mr. Banks, specifically that Mr. Banks was picked on and beaten by his brothers.

271 S.W.3d at 136 (citing State v. Hall, 976 S.W.2d at 170; State v. Brimmer, 876 S.W.2d at 85; and State v. Howell, 868 S.W.2d at 258).

14. The "Wrong Punishment Would Negate a Guilty Verdict"

In Banks, the State improperly made the following statement in closing argument:

Now we're ... wrapping up what is ... the penalty phase. And it is considerably shorter than the first phase or the rest of the trial. But make no mistake, it is no less important. And in fact, it's more important because the wrong punishment negates the proper verdict. And the wrong punishment negates a guilty verdict.

271 S.W.3d at 136. However, the appellate courts held the error was harmless as the trial court provided a curative instruction to the jury. Id.

H. PENALTY PHASE INSTRUCTIONS

TENN. CODE ANN. § 39-13-204(e)(1).

(e) (1) After closing arguments in the sentencing hearing, the trial judge shall include instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i), which may

be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing, or both, which shall include, but not be limited to, those circumstances set forth in subsection (j). These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations. However, a reviewing court shall not set aside a sentence of death or of imprisonment for life without the possibility of parole on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not enumerated in subsection (j).

(2) The trial judge shall provide the jury separate verdict forms, as specified by subdivisions (f)(1), (f)(2), and (g)(2)(B). If the defendant has been found guilty of first degree murder as described in § 39-13-202(c)(1), then the jury shall be instructed that a defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least fifty-one (51) full calendar years of the sentence. The jury shall also be instructed that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole.

> **NOTE:** Defendants who commit an offense prior to July 1, 1993, are not entitled to an instruction on life without the possibility of parole. State v. Austin, 87 S.W.3d 447 (Tenn. 2002); State v. Keen, 31 S.W.2d 196 (Tenn. 2000); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998).

1. Life With the Possibility of Release

A trial court shall instruct the jury that the earliest release eligibility date for a person convicted of first degree murder is fifty-one years. Tenn. Code Ann. § 39-13-204(e)(2); see State v. Charles Golden, 1998 WL 518071, at * 7 (Tenn. Crim. App., at Jackson, Aug. 21, 1998), no perm. app. filed (citing Attorney General Opinion 97-098 (7-1-97)); see also Drummer v. State, 6 S.W.3d 520, 522 (Tenn. Crim. App. 1999).

This "release" eligibility should not be referred to as parole. In State v. Urshawn Eric Miller, ____ S.W.3d ____, fn 14 (Tenn. 2021), the court referred to the Tennessee Court of Criminal Appeals discussion of what a life sentence means and how a life sentence should not be referred to as "life with parole" because this is a

misnomer. The determinate sentence for imprisonment for life is sixty years. Tennessee Code Annotated § 40-35-501(h)(1). When a person is convicted of a murder on or after July 1, 1995, and receives a sentence of imprisonment for life, that person can be granted certain statutorily authorized "sentence reduction credits" up to nine years. Tenn. Code Ann. § 40-35-501(i)(1). These sentence credits could allow for release after a term of 51 years. See Tenn. Code Ann. § 41-21-236. This release, however, is not parole, but rather release after service of the complete sentence.

2. Defendant's Right Not to Testify

A defendant has a constitutional right to a no-adverse-inference instruction, when properly requested, at both the guilt and penalty phases of a criminal trial. State v. Munn, 56 SW.3d 486 (Tenn. 2001).

3. Effect of Failure to Reach a Verdict

Tennessee Code Annotated § 39-13-204(h) requires the trial court and the litigants to refrain from commenting on the effect of the failure to reach a verdict and the Tennessee Supreme Court has held that this practice is constitutional. See State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994). The Tennessee Supreme Court has repeatedly held that a jury instruction that the jury must unanimously agree in order to impose a life sentence without an instruction regarding the effect of a non-unanimous verdict does not offend constitutional standards. See State v. Davidson, 121 S.W.3d 600 (Tenn. 2003), State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000); State v. Cribbs, 967 S.W.2d 773, 796 (Tenn. 1998); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994).

4. Jury Questions

The Constitution is not violated when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigation evidence. Weeks v. Angelone, 528 U.S.

225 (2000); see also State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (holding that, in response to the jury's questions regarding the meaning of possible punishments and the role of the jury in sentencing, the trial judge properly referred a jury to the instructions provided in the charge).

5. Jury Deliberations

In State v. Davidson, the following occurred:

> *A video recording of a statement Mr. Davidson gave to law enforcement after his arrest was introduced into evidence as a part of the State's proof. During deliberations, the jury sent the trial court a note asking to review Mr. Davidson's statement. The trial court granted the jury's request and determined that the video should be shown on the screen in the courtroom rather than in the jury room. The trial court reasoned this procedure would allow the court and counsel to view the same evidence the jury was viewing and to ensure the equipment worked properly. Because the viewing was to occur in the courtroom, the trial court determined it was a public proceeding and spectators could remain in the courtroom. The trial court admonished everyone not to make any comments or react to the video. Mr. Davidson's counsel objected, arguing that jury deliberations were not public proceedings and should not be conducted in the courtroom. The trial court overruled the objection, stating the jury was only being brought into the courtroom to view the video and that no jury deliberations or discussions would occur in the courtroom. After the jury was brought into the courtroom, the foreperson asked the trial court whether the video could be zoomed in on Mr. Davidson and the volume increased. The trial court responded that the video recording could not be adjusted to zoom in and that the volume was at the highest level. The jury watched a portion of Mr. Davidson's statement while members of the public were present. After approximately one hour and twenty minutes, the trial court recessed the proceedings for a break, and the jury retired to the jury room. During the break, the jury sent a note to the trial court indicating they had seen enough of the video.*

509 S.W.3d at 201. On appeal, the defendant argued these proceedings were an intrusion on the secrecy of jury deliberations.

The court held the following procedure should be followed when the jury seeks to review evidence that cannot be properly examined in the jury room during jury deliberations:

> *We hold that during jury deliberations, when a jury requests to view or hear evidence that cannot be appropriately examined in the jury room, the trial court should bring the jury into the courtroom with the parties and counsel present to view the evidence. The trial court, in its discretion, may allow members of the public to remain in the courtroom or may conduct the viewing with only counsel and the parties present. The trial court should instruct the jury that it is not to deliberate in the courtroom and should admonish the parties, counsel, and any spectators not to comment on the evidence or in any manner attempt to influence the jury.*
>
> *Here, the trial court did not abuse its discretion by allowing the jury to view the recorded statement in the courtroom. There is no evidence that the jury deliberated in open court, that the jury was exposed to any outside influence, or that the public interfered with the secretive deliberative process. The jury's request to adjust the video to zoom in on Mr. Davidson and to increase the volume and the note from the jury that it had seen enough of the video did not constitute jury deliberations. The trial court did not abuse its discretion by allowing the jury to view the video recorded statement in the courtroom with members of the public present.*

Id. at 204.

I. DYNAMITE CHARGE

In Kersey v. State, 525 S.W.2d 139, 144-45 (Tenn. 1975), the Tennessee Supreme Court held that it is impermissible under Tennessee law to give the so-called Allen or "Dynamite" charge in a criminal case to a deadlocked jury. The court explained its reasoning as follows:

> *The so-called Allen or Dynamite charge had its origin in Commonwealth v. Tuey, 62 Mass. 1 (1851). It achieved national prominence and the name by which it is generally known through Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896) . . . .*
>
> *The Tennessee version of the Allen charge originated in Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955), wherein this Court approved a charge identical with that given in the case at bar. ...*

Reference to various text treatments will validate the assertion that the Allen charge, in one form or another, has tantalized the criminal defense bar, tortured the trial bench and tormented the appellate courts throughout the nation. . . .

In our view the Allen charge and the Allen-Simmons charge operate to embarrass, impair and violate the constitutional right of trial by jury. Any undue intrusion by the trial judge into this exclusive province of the jury, is an error of the first magnitude. We recognize that the trial judge has a legitimate concern in the administration of justice and that he labors under a duty to lend guidance to the jury through instructions as to the governing principles of the law. However, when the effort to secure a verdict reaches the point that a single juror may be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted. We view these charges as being tantamount to a judicially mandated majority verdict which is impermissible under Tennessee law.

Moreover, there is an inherent inconsistency in these charges in that the dissenters are urged to reconsider their verdict and simultaneously are reminded to make their decisions based upon their own convictions which they are cautioned not to sacrifice. They ask the dissenters to consider shifting their opinions, because the majority is of a different persuasion. We find no merit to any suggestion that might necessarily makes right. . . .

We conclude that the interests of justice demand the rejection of the 'dynamite' charge. Under the statutory and inherent supervisory power of this Court, we direct that trial courts in Tennessee, when faced with deadlocked juries, comply with the ABA Standards Relating to Trial by Jury, Sec. 5.4, which are as follows:

5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because

> *of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.*
>
> *(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.*
>
> *(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.*
>
> *The instruction contemplated in Sec. 5.4(a) may be given as a part of the main charge and should be given in the following form:*
>
> > *The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.*
> >
> > *It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.*
> >
> > *If given as a part of the main charge, it may be repeated should a deadlock develop.*
> >
> > *Judicial economy and uniformity demand these results. Strict adherence is expected and variations will not be permissible.*

Id. at 141-42, 144-45.

Whether to administer the Kersey charge during the sentencing phase of a capital murder trial is a fact-specific decision that will vary from case to case. Post-Kersey case law indicates that the key factors for a trial court to consider in determining whether to give a Kersey charge to a penalty phase jury include:

(1) the length of time that the jury has been deliberating;

(2) whether the jury is equivocal or unequivocal about the deadlock; and

(3) whether the jury expresses, in response to the court's inquiry, that further deliberations might be successful.

EXAMPLE WHERE APPROPRIATE:

Giving the Kersey charge during the sentencing phase of a capital murder trial was appropriate under these circumstances. Jury had been deliberating for only three (3) hours, and jury sent a note that it was divided 11 to one with no foreseeable agreement. Court brought jury back and gave Kersey charge without further inquiry. Two hours later, the jury returned a verdict of death. The Supreme Court held that the Legislature's inclusion of the adverb "ultimately" in § 39-2-203(h) indicated an awareness that a tentative inability to agree on a verdict may routinely occur.

NOTE: The Supreme Court pointed out that the jury's note did not express an unequivocal deadlock. State v. Caruthers, 676 S.W.2d 935, 942 (Tenn. 1984).

EXAMPLE WHERE ERROR:

Kersey instruction under the circumstances of this case was error. After six (6) hours, the jury sent a note to the Court that they were deadlocked 11 to one, and that the one in favor of life without parole "would not change his mind." Over objections, the Court brought the jury back, and without inquiring whether further deliberations might be productive, gave the Kersey charge. One hour later, the jury came back with a death sentence. The Supreme Court held that the jury expressed an unequivocal deadlock, and the trial court should have instructed the jury that it should decide between life imprisonment without parole or a life sentence. State v. Torres, 82 S.W.3d 236, 257-58 (Tenn. 2002).

J. ALLOCUTION

"[T]here is no statutory, common-law, or constitutional right to allocution in a capital case." State v. Stephenson, 878 S.W.2d 530, 554 (Tenn. 1994).

K. HUNG JURY AS TO PUNISHMENT

Tenn. Code Ann. § 39-13-204(h)

(h)(1) Except as provided in subdivision (h)(2), if the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreperson of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and the judge shall impose a sentence of imprisonment for life. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.
(2) If the defendant has been found guilty of first degree murder as described in § 39-13-202(c)(2), but the jury cannot ultimately agree on punishment, then the trial judge shall inquire of the foreperson of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, then the judge shall dismiss the jury and the judge shall impose a sentence of imprisonment for life without possibility of parole. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury on the effect of the jury's failure to agree on a punishment.

L. VERDICTS AND JUDGMENTS

Tenn. Code Ann. § 39-13-204(e), (f), and (g) (in part):

(e) (2) The trial judge shall provide the jury separate verdict forms, as specified by subdivisions (f)(1), (f)(2), and (g)(2)(B). ...
(f) (1) If the defendant has been found guilty of first degree murder as described in § 39-13-202(c)(1) and the jury unanimously determines that

no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, the sentence shall be imprisonment for life. The jury shall then return its verdict to the judge upon a form provided by the court[.] …

(2)(A) Except as provided in subdivision (f)(2)(B), if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or to imprisonment for life. The trial judge shall instruct the jury that, in choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, the jury shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances. In its verdict, the jury shall specify the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and shall return its verdict to the judge upon a form provided by the court[.] …

(B) (i) If the defendant has been found guilty of first degree murder as described in § 39-13-202(c)(2) and the jury unanimously determines that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, or that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, then the sentence shall be imprisonment for life without possibility of parole.

(ii) If imprisonment for life without possibility of parole is the sentence of the jury, then the jury shall reduce to writing the finding that no statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, or that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt.

(iii) These findings and verdict must be returned to the judge upon a form provided by the court[.] …

(g) (1) The sentence shall be death, if the jury unanimously determines that:

(A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and

(B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt.

(2)(A) If the death penalty is the sentence of the jury, the jury shall:

(i) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(ii) Signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

(B) These findings and verdict shall be returned to the judge upon a form provided by the court[.] …

NOTE: The statutorily mandated verdict forms are reproduced in Volume 7 of Tennessee Practice (TPI) (Instruction 7.04).

1. Verdicts

The Tennessee Supreme Court has "never held" that a jury's verdict in the sentencing phase of a capital case include "an exact or verbatim statement of the statutory aggravating circumstances" found in support of the sentence. State v. Davidson, 121 S.W.3d 600, 618 (Tenn. 2003); State v. McKinney, 74 S.W.3d 291, 303 (Tenn. 2002); see also State v. Bland, 958 S.W.2d 651, 661 n. 6 (Tenn. 1997) ("The failure of the verdict to repeat the language of the statute defining the aggravating circumstance does not invalidate the jury's findings."). While "a verbatim statement may be the preferred practice," the jury's verdict need only be "sufficiently clear" to "indicate that the jury has found the **elements** of the aggravated circumstance or circumstances relied upon by the prosecution." McKinney, 74 S.W.3d at 303 (emphasis added); see also Davidson, 121 S.W.3d at 600. In fact, "[i]f the jury has returned an incorrect or imperfect verdict, the 'trial court has both the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict.'" McKinney, 74 S.W.3d at 303 (quoting State v. Harris, 989 S.W.2d 307, 314 n. 7 (Tenn. 1999)).

Example: In Harris, a case involving imposition of a sentence of life without possibility of parole, the Court held that the jury's penalty phase verdict stating only that it had found that "[t]he

murder was especially heinous and atrocious" was an incomplete verdict with respect to the (i)(5) aggravating circumstance. See Harris, 989 S.W.2d at 313, 318. However, the Court determined that the error in the penalty phase verdict was harmless because another valid aggravating circumstance had been found by the jury in support of the sentence. See id. at 317-18.

2. Judgments/Merger

In State v. Davidson, the court addressed the issues related to merger when a defendant is convicted of alternative counts of the same offense or offenses which are lesser included offense of other counts.

> *Under certain circumstances, multiple convictions must merge into a single conviction. Merger is required when a jury returns guilty verdicts on two offenses, one of which is a lesser-included offense of the other offense. See, e.g., Davis, 466 S.W.3d at 77. Merger is required when a jury returns guilty verdicts on two counts representing alternative theories of the same offense. See, e.g., State v. Cribbs, 967 S.W.2d 773, 788 (Tenn. 1998) (citing Carter v. State, 958 S.W.2d 620, 624 n.6 (Tenn. 1997)). Here, the trial court did not err in merging the offenses or in effectuating the merger. Merger only requires a "single judgment of conviction." It does not require a "single judgment 'document.' " State v. Berry, No. W2014-00785-SC-R11-CD, Order at 3–4 (Tenn. Nov. 16, 2015).*
>
> *Where merger is required, the trial court should prepare the judgment using the uniform judgment document. See Tenn. Sup. Ct. R. 17. The trial court "should complete a uniform judgment document for each count." Berry, Order at 5. The trial court should follow these guidelines when preparing the uniform judgment document:*
>
> > *The judgment document for the greater (or surviving) conviction should reflect the jury verdict on the greater count and the sentence imposed by the trial court. The judgment document for the lesser (or merged) conviction should reflect the jury verdict on the lesser count and the sentence imposed by the trial court. Additionally, the judgment document should indicate in the "Special Conditions" box that the conviction merges with the greater conviction. To avoid confusion, the merger also should be noted in the "Special Conditions" box on the uniform judgment document for the greater or surviving conviction.*

> *Id. This method "maintains the integrity of each of the jury's dual verdicts and accurately reflects the merger for purposes of appellate review and collateral challenges to the conviction." Id.*
>
> *...[E]ffectuating merged convictions on separate uniform judgment documents reflects that the guilty verdict in the lesser or alternative charge is "not mere surplusage but remains a valid jury verdict of guilt that need not be 'dismiss[ed],[] 'vacat[ed],' 'or stri[cken].' " Berry, Order at 5 (alterations in original) (quoting Addison, 973 S.W.2d at 267).*
>
> *The trial court prepared separate judgment documents for each of the guilty verdicts, including those verdicts for alternative charges and lesser-included offenses. This properly effectuated the necessary mergers....*

Davidson, 509 S.W.3d at 217-18.

M. SENTENCE

Tenn. Code Ann. § 40-23-114. Death by lethal injection - Election of electrocution.

(a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.

(b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.

(c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.

(d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a

capital crime shall be executed by any constitutional method of execution. No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Tennessee or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

(e) For any person who commits an offense or has committed an offense for which the person is sentenced to the punishment of death, the method of carrying out the sentence shall be by lethal injection unless subdivision (e)(1) or (e)(2) is applicable. If subdivision (e)(1) or (e)(2) is applicable, the method of carrying out the sentence shall be by electrocution. The alternative method of execution shall be used if:

(1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction in the manner described in subsection (d); or

(2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.

Tenn. Code Ann. § 40-23-116(a). Manner of executing sentence of death - Witnesses.

(a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it is the duty of the sheriff of the county in which the sentence of death has been passed to remove the person so sentenced to death from that county to the state penitentiary in which the death chamber is located, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the death sentence. On the date fixed for the execution in the judgment and mandate of the court, the warden of the state penitentiary in which the death chamber is located shall cause the death sentence to be carried out within an enclosure to be prepared for that purpose in strict seclusion and privacy. ...

N. JUVENILES AND LIFE WITHOUT PAROLE

Although juveniles are not eligible for the death penalty, they are eligible for a sentence of life without the possibility of parole. The United States Supreme Court in Jones v. Mississippi, 141 S. Ct. 1307 (2021) (Syllabus), in summary, held:

(1) A sentencer need not make a separate factual finding of permanent incorrigibility before sentencing a murderer under 18 to life without parole. In Miller v. Alabama, 567 U.S. 460 (2012), the Court mandated "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a life-without-parole sentence. 567 U.S., at 483. And in Montgomery v. Louisiana, 577 U.S. 190 (2016), the Court stated that "a finding of fact regarding a child's incorrigibility ... is not required." 577 U.S., at 211. Miller and Montgomery require consideration of an offender's youth but not any particular factual finding. Miller and Montgomery therefore refute Jones's argument that a finding of permanent incorrigibility is constitutionally necessary.

(2) Nor must a sentencer provide an on-the-record sentencing explanation with an "implicit finding" of permanent incorrigibility before sentencing a murderer under 18 to life without parole. An on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. Nor is an on-the-record sentencing explanation required by or consistent with Miller or Montgomery, neither of which said anything about a sentencing explanation.

(3) The Court's decision does not disturb Miller's holding (that a State may not impose a mandatory life-without-parole sentence on a murderer under 18) or Montgomery's holding (that Miller applies retroactively on collateral review). The resentencing in Jones's case complied with Miller and Montgomery because the sentencer had discretion to impose a sentence less than life without parole in light of Jones's youth. The Court's decision today should not be construed as agreement or disagreement with Jones's sentence. In addition, the Court's decision does not preclude the States from imposing additional sentencing limits in cases involving murderers under 18. Nor does the Court's decision prohibit Jones from presenting his moral and policy arguments against his life-without-parole sentence to the state officials who are authorized to act on those arguments.

Chapter 8

Post-Conviction Issues

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A. TENNESSEE POST-CONVICTION PROCEDURE

Tennessee post-conviction capital case litigation can be lengthy and complex. There are various avenues available to capital litigants who wish to contest their conviction, death sentence, or both. The initial process of post-conviction review is governed by the Post-Conviction Procedure Act, codified at Tennessee Code Annotated sections 40-30-101 through -313. The Act sets forth the claims which are suitable for post-conviction review; the procedures a petitioner must follow in bringing such an action; and the duties of the court in reviewing such matters.

1. Statute of Limitations

Tenn. Code Ann. Section 40-30-102(a) requires a post-conviction petition to be filed within **one (1) year** of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final.[1]

The filing of a petition for writ of certiorari to the United States Supreme Court does not toll the limitations period. See generally Whitehead v. State, 402 S.W.3d 615, 618 (Tenn. 2013). In Whitehead trial counsel incorrectly advised the petitioner the one-year period ran from the date on which the United States Supreme Court denied the certiorari petition. The Tennessee Supreme Court concluded due process-based tolling of the limitations period was warranted.

[1] Filing an *untimely* application for permission to appeal to the Supreme Court does not delay commencement of the one-year post-conviction statute of limitations. State v. Williams, 44 S.W.3d 464, 473 (Tenn. 2001) (Drowota, J., dissenting).

Under most circumstances, failure to file within the one-year limitations period will bar consideration of any post-conviction petition filed thereafter.

a. Exceptions to the Statute of Limitations:
(Tenn. Code Ann. § 40-30-102(b) and (c))

(1) Newly Recognized Constitutional Right with Retroactive Application:

> **(b)(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. <u>The petition must be filed within one (1) year of the ruling</u> of the highest state appellate court or United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]**
>
> Tenn. Code Ann. § 40-30-102(b)(1) (emphasis added).
>
> **[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.**
>
> Tenn. Code Ann. § 40-30-122.
>
> **NOTE**: A case addressing post-conviction retroactivity and section 40-30-122 is discussed below.

(2) New Scientific Evidence Establishing Actual Innocence

(b)(2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted[.]

Tenn. Code Ann. § 40-30-102(b)(2). This statute limits actual innocence claims to those based on scientific evidence. Actual innocence claims based on newly discovered non-scientific evidence must be brought in a petition for writ of error coram nobis. See Dellinger v. State, 279 S.W.3d 282, 291 n.7 (Tenn. 2009); State v. Workman, 41 S.W.3d 100, 103 (Tenn. 2001); Andrew Thomas v. State, 2011 WL 675936 at **43-44 (Tenn. Crim. App. Feb. 23, 2011); Perry Anthony Cribbs v. State, 2009 WL 1905454 at *35 (Tenn. Crim. App. July 1, 2009) ("our supreme court [in Dellinger] concluded that a claim of actual innocence not based on scientific evidence may not be raised in a petition for post-conviction relief").

(3) Previous Conviction Used to Enhance Sentence Subsequently Invalidated

A petitioner may seek post-conviction relief due to a sentence which was enhanced by an invalid conviction pursuant to Tennessee Code Annotated section 40-30-102(b)(3). The prerequisites to "invalidation" are set forth in subsection (b)(3) of the statute:

(1) previous conviction was not the result of a guilty plea with an agreed sentence;

(2) previous conviction has subsequently been held to be invalid; and

(3) petition was filed within one year of the finality of the ruling holding the previous conviction to be invalid.

b. Retroactivity and Post-Conviction

In Bush v. State, 428 S.W.3d 1 (Tenn. 2014), the Tennessee Supreme Court confirmed that the standard announced in section 40-30-122 was to be used by courts in determining whether a new rule of criminal law was to be applied retroactively. The court also went into detail discussing certain terms in the statute, particularly the definitions of "observance of fairness safeguards" and "implicit in the concept of ordered liberty." Id. at 18-21.

In 2000, Mr. Bush pled guilty to two counts of attempted rape. 428 S.W.3d at 6. As a condition of his pleas, he was placed on lifetime community supervision, but he did not learn about this provision until after he was released from prison. Id. He did not challenge the lifetime supervision provision until after the Tennessee Supreme Court's opinion in Ward v. State, 315 S.W.3d 461, 476 (Tenn. 2010), in which the court concluded "trial courts have an affirmative duty to ensure that a defendant is informed and aware of the lifetime supervision requirement prior to accepting a guilty plea." Mr. Bush filed a post-conviction petition within a year of Ward's publication. Bush, 428 S.W.3d at 7. In the petition, Mr. Bush argued the Ward holding was a new rule of constitutional criminal law requiring retroactive application. Id. The trial court granted relief, concluding due process required the tolling of the post-conviction limitations period and concluding the petitioner's guilty plea was not knowing and voluntary based on the petitioner's lack of knowledge of the community supervision requirement. Id. at 7-8. The Court of Criminal Appeals and the Tennessee Supreme Court both concluded the Ward rule was not one requiring retroactive application. Id. at 8, 21.

In reaching this decision, the Tennessee Supreme Court first concluded "the retroactivity of new constitutional rules in post-conviction proceedings should henceforth be determined using

Tenn. Code Ann. § 40-30-122. Id. at 16. The court also concluded the Ward rule was clearly a new rule of constitutional criminal procedure: "[T]he Ward v. State case resulted in a split decision by the Court of Criminal Appeals and this Court ultimately reversed the majority decision. Thus, Ward v. State's decisional history demonstrates that the Ward v. State ruling was subject to debate and was certainly not dictated by precedent." Id. at 17. The court then turned its attention to the other half of section 40-30-122.

The court in Bush stated cases announcing a "rule plac[ing] primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" include Lawrence v. Texas, 539 U.S. 558 (2003), in which the Supreme Court struck down bans on consensual homosexual contact, and Roe v. Wade, 410 U.S. 113 (1973), addressing a woman's right to an abortion. See Bush, 428 S.W.3d at 17. The court in Bush stated "Ward ... does not fall into that category." Id.

The court then reviewed the terms "fairness safeguards" and "implicit in the concept of ordered liberty":

> *The words "fairness safeguards" are clear enough. "Safeguards" in this context refers to criminal procedural rules designed to guard against defendants being denied their due process right to a fundamentally fair adjudication of guilt. Due process itself "embodies the concepts of fundamental fairness," justice, and "the community's sense of fair play and decency." Whitehead v. State, 402 S.W.3d at 623 (quoting Seals v. State, 23 S.W.3d 272, 277 (Tenn. 2000); United States v. Lovasco, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)). The rule of Ward v. State clearly constitutes a procedural "safeguard" derived from due process notions of "fairness."*
>
> *More difficult to parse is the phrase "implicit in the concept of ordered liberty." This limiting phrase implies that not all constitutionally-derived "fairness safeguards" warrant retroactive application in post-conviction cases. As for the word "implicit," relevant definitions include "[i]mplied though not plainly*

expressed; naturally or necessarily involved in, or capable of being inferred from, something else."

"Ordered liberty" is something of a legal term of art with a long history. The phrase currently appears in 122 opinions by the United States Supreme Court. Its first legal use appears in Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937), overruled by Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The "ordered liberty" idiom first appeared in the context of the United States Supreme Court's efforts to determine which of the rights explicitly protected in the Bill of Rights were "incorporated" or "absorbed" into the Due Process Clause of the Fourteenth Amendment and were thereby binding on the states. The Supreme Court, adopting a selective approach to incorporation, decided that while all constitutional rights are important, only those rights that are "the very essence of a scheme of ordered liberty" should be binding on the states through the Fourteenth Amendment. Palko v. Connecticut, 302 U.S. at 325. The Court noted that these rights reflect "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" such that "a fair and enlightened system of justice would be impossible without them." Palko v. Connecticut, 302 U.S. at 325.

The "ordered liberty" language next appeared in the context of the United States Supreme Court's adoption of newly recognized, non-textual substantive rights derived from the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court described these rights as being "implicit in the concept of ordered liberty" and explained that they were "deeply rooted in this Nation's history and tradition" in the sense that they involve "the basic values that underlie our society." Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 503(1977)[.]

Finally, the United States Supreme Court gradually imported the "ordered liberty" concept into its decisions involving the retroactivity of new constitutional rules in federal habeas corpus cases. The retroactivity standard the Court adopted in Teague v. Lane, 489 U.S. 288, 307, 310 (1989), was taken from Justice Harlan's separate opinion in Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting). However, the Court in Teague v. Lane explained that the procedures the Court would deem "implicit in the concept of ordered liberty" were limited

to "watershed rules of criminal procedure" or "those new procedures without which the likelihood of an accurate conviction is seriously diminished," few of which the Court believed were likely to emerge. Teague v. Lane, 489 U.S. at 313.

As this Court has previously recognized, the retroactivity standard of Tenn. Code Ann. § 40-30-122 is similar to the federal standard of Teague v. Lane. See Van Tran v. State, 66 S.W.3d at 811 (stating that Tenn. Code Ann. § 40-30-122 is "citing the Teague standard for retroactivity"); State v. Gomez, 163 S.W.3d 632, 651 n.16 (Tenn. 2005) (stating in dicta that Tenn. Code Ann. § 40-30-122 was "virtually identical" to the federal standard), cert. granted, judgment vacated 549 U.S. 1190 (2007). To be clear, Tenn. Code Ann. § 40-30-122 does not include Teague v. Lane's terminology about "watershed rules" or "the likelihood of an accurate conviction." However, in the context of post-conviction proceedings, the "ordered liberty" idiom has come to encompass both of these limiting concepts.

We have also determined that, by adopting Tenn. Code Ann. § 40-30-122, the General Assembly intended to change Tennessee's standard for determining the retroactivity of new constitutional rules in post-conviction proceedings. We generally presume that when the General Assembly passes laws on a particular topic, it knows the current law on that subject and legislates accordingly. Lee Med., Inc. v. Beecher, 312 S.W.3d at 527; Seals v. H & F, Inc., 301 S.W.3d 237, 242 (Tenn. 2010). In this case, therefore, we presume that the General Assembly knew in 1995 that Meadows v. State expressed the current law on the retroactivity of new constitutional rules and that the General Assembly intended to change that law by enacting Tenn. Code Ann. § 40-30-122.

...

To summarize, we have determined that, by adopting Tenn. Code Ann. § 40-30-122, the General Assembly intended to replace the retroactivity standard this Court adopted in Meadows v. State with the functional equivalent of the federal standard from Teague v. Lane, a standard the General Assembly recognized was "stricter" than Tennessee's prior standard. Additionally, we find that the General Assembly intended that the phrase "fairness safeguards that are implicit in the concept of ordered liberty" should be interpreted along the same lines as the Teague v. Lane standard. In this light, the "fairness safeguards" of Tenn. Code Ann. § 40-30-122

> *are equivalent to the Teague v. Lane standard's "watershed rules of criminal procedure" or "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague v. Lane, 489 U.S. at 313.*

Bush, 428 S.W.3d at 18-20 (alterations added; footnotes omitted).

The Tennessee Supreme Court stated the Ward rule was "an important new constitutional rule," but declined to deem it a "fairness safeguard ... implicit in the concept of ordered liberty[.]" Id. at 20. The court first noted the Ward rule "would not appear to affect the accuracy of Mr. Bush's conviction. We highly doubt that the failure of a trial court to alert a defendant to the sentence of lifetime community supervision would cause an innocent person to plead guilty." Id. at 21. The court also stated, "The crimes that warrant lifetime community supervision are all quite serious felonies—not the type of conviction to which a defendant would be likely to confess falsely." Id. at 21 (citing Tenn. Code Ann. § 39-13-524(a)).

The court also stated the Ward rule was

> *not a "watershed rule of criminal procedure." In this regard, the rule was simply an extension of the long-recognized constitutional doctrine that courts may not accept a guilty plea "without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242 (1969); see also Howell v. State, 185 S.W.3d 319, 331 (Tenn. 2006); State v. Mellon, 118 S.W.3d 340, 345 (Tenn. 2003). In State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977), this Court first adopted procedures to ensure that plea colloquies in Tennessee did not violate the Boykin v. Alabama "knowing, voluntary, and intelligent" rule. Similarly, Tenn. R. Crim. P. 11(b)(1)(B) requires that before a court accepts a guilty plea, it must inform the defendant of, among other things, "the maximum possible penalty and any mandatory minimum penalty." See also Lane v. State, 316 S.W.3d 555, 563-64 (Tenn. 2010) (cataloging the full requirements for a plea colloquy in Tennessee). In Ward v. State, we simply held that lifetime community supervision qualified as one of the penalties that a trial court must disclose under Tenn. R. Crim.*

> *P. 11(b)(1)(B) and under the due process doctrines which birthed Tenn. R. Crim. P. 11(b). Ward v. State, 315 S.W.3d at 474.*
>
> *This Court's constitutional function is to effectuate the intent of the General Assembly even when the result may appear unfair. Pickard v. Tennessee Water Quality Control Bd., 424 S.W.3d 511, 524 (Tenn. 2013). Legislative policy is "committed to the intelligence and discretion of the [General Assembly] and the courts will not run a race of opinions with these representatives of the people upon the question of the wisdom and propriety of such legislation." Rush v. Great Am. Ins. Co., 213 Tenn. 506, 518-19, 376 S.W.2d 454, 459 (1964).*

Bush, 428 S.W.3d at 21.[2]

c. Due Process Considerations

Tennessee appellate courts have been careful not to apply the statue of limitations in the Post-Conviction Procedure Act in such a way as to preclude a petitioner from having a reasonable opportunity to raise a claim in a meaningful time and manner, particularly when the failure to file in a timely manner is due to circumstances beyond the petitioner's control. See State v. McKnight, 51 S.W.3d 559, 563 (Tenn. 2001); Seals v. State, 23 S.W.3d 272 (Tenn. 2000). In Caldwell v. State, 917 S.W.2d 662 (1996), the Tennessee Supreme Court held that under Burford v. State, 845 S.W.2d 204 (1992), and Sands v. State, 903 S.W.2d 297 (Tenn. 1995), there are certain circumstances in which a post-conviction petition may be considered even though it is technically time-barred.

Formerly, under Caldwell, a trial court's determination of whether due process-based tolling applied required the court to examine when the limitations period would have begun to run, whether the grounds were late arising, and whether a strict application of the limitations period would deny the petitioner an opportunity to present the claims. However, in Whitehead v.

[2] The Court also concluded Mr. Bush was not entitled to due process-based tolling of the limitations period. See Bush, 428 S.W.3d at 21-23.

State, the Tennessee Supreme Court adopted a new standard for determining whether due process tolling of the post-conviction limitations period is appropriate:

> *A petitioner is entitled to due process tolling upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.*

Whitehead v. State, 402 S.W.3d 615, 631 (Tenn. 2013) (citing Holland v. Florida, 560 U.S. 631, 649 (2010)). "This rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct." Bush, 428 S.W.3d at 22.

The court in Whitehead added,

> *In terms of diligence, courts have recognized that due diligence "does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts. ... Moreover, the due diligence inquiry is an individualized one that must take into account the conditions of confinement and the reality of the prison system." Downs v. McNeil, 520 F.3d at 1323 (quoting Aron v. United States, 291 F.3d 708, 712 (11th Cir.2002)).*

Whitehead, 402 S.W.3d at 631.

d. Mental Incompetency

Due process requires the tolling of the statute of limitations where a petitioner is found to be mentally incompetent. In Reid ex rel. Martiniano v. State, 396 S.W.3d 478, 512 (Tenn. 2013), the Tennessee Supreme Court stated,

> *the standards and procedures in [Tennessee Supreme Court Rule 28, section 11] should henceforth be used in all post-conviction proceedings ... in which the petitioner's competency is properly raised. Thus, Tenn. Sup. Ct. R. 28, § 11 will apply not only when a petitioner seeks to withdraw a previously-filed petition for post-conviction relief, but also when a petitioner seeks to toll the statute*

> *of limitations in Tenn. Code Ann. § 40-30-102(a) due to incompetency, and when a "next friend" seeks to have the prisoner declared incompetent.*

A *prima facie* showing of mental incompetency requires more than conclusions or assertions and instead requires the submission of "'affidavits, depositions, medical reports, or other credible evidence that contain[s] specific factual allegations that demonstrate the petitioner's inability to manage his personal affairs or understand his legal rights and liabilities.'" Reid ex rel. Martiniano, 396 S.W.3d at 512. (quoting Holton v. State, 201 S.W.3d 626, 634 (Tenn. 2001)); see also State v. Nix, 40 S.W.3d 459, 464 (Tenn. 2001).

> *If [a] prima facie showing is made, then the trial court should schedule a hearing to determine whether the prisoner is competent to manage his petition. ...*
>
> *The competency standard applicable to these proceedings is whether the prisoner possesses "the present capacity to appreciate [his or her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity." Tenn. Sup. Ct. R. 28, § 11(B)(1). The question is not whether the prisoner is able to care for himself or herself, but whether the prisoner is able to make rational decisions concerning the management of his or her post-conviction appeals. The prisoner (or the "next friend") bears the burden of proving incompetency by clear and convincing evidence. Reid v. State, 197 S.W.3d at 703–05.*

Reid ex rel. Martiniano, 396 S.W.3d at 512-13. The court continued,

> *To provide structure to its Tenn. Sup.Ct. R. 28, § 11 analysis, the trial court should employ the three-step Rumbaugh*[3] *test:*
>
> > *(1) Is the person suffering from a mental disease or defect?*

[3] Rumbaugh v. Procunier, 753 F.2d 395, 398-99 (5th Cir. 1985).

> *(2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?*
>
> *(3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?*
>
> *If the answer to the first question is no[;] the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent.*
>
> *Rumbaugh v. Procunier, 753 F.2d at 398–99. The third step asks whether a prisoner, despite his or her mental disease or defect, is capable of making a rational choice from among the available post-conviction options. A decision may be rational even when it is not one that the majority would consider acceptable, sensible, or reasonable. A decision is rational when it is based on a process of reasoning. Groves, 109 S.W.3d at 336. A person's decision-making process is rational when that person can (1) take in and understand information; (2) process the information in accordance with his or her personal values and goals; (3) make a decision based on the information; and (4) communicate the decision. Groves, 109 S.W.3d at 335.*

Reid ex rel. Martiniano, 396 S.W.3d at 513.

As stated above, the petitioner bears the burden of proving he is incompetent by **clear and convincing evidence**. A finding of incompetence requires neither a stay of the post-conviction proceedings nor abeyance of individual issues; the trial court should appoint, if necessary, a "next friend" or guardian ad litem

to pursue the action on behalf of the inmate. Reid v. State, 197 S.W.3d 694, 705-06 (Tenn. 2006).

If an evaluation is required, statutory provisions provide for payment of the expert and the length during which the petitioner may be hospitalized, if necessary:

> **(A) Except as provided in subdivision (a)(4)(B), during the post-conviction stage of a criminal proceeding, if it is believed that a defendant is incompetent to assist counsel in preparation for, or otherwise participate in, the post-conviction proceeding, the court may, upon its own motion, order that the defendant be evaluated on either an outpatient or inpatient basis, as may be appropriate. If the defendant is indigent, the amount and payment of the costs for the evaluation shall be determined and paid for by the administrative office of the courts. If the defendant is not indigent, the cost of the evaluation shall be charged as court costs. If the evaluation cannot be done on an outpatient basis and if it is necessary to hospitalize the defendant in a department facility, hospitalization shall not be for more than thirty (30) days and shall be subject to available suitable accommodations. Prior to transporting a defendant for such evaluation and treatment in a department facility, the sheriff or other transportation agent shall determine that the receiving department facility has available suitable accommodations. Any costs incurred by the administrative office of the courts shall be absorbed within the current appropriation for the indigent defense fund.**
>
> **(B) In a post-conviction proceeding in a capital case, if there is a question on the defendant's mental condition at the time of the commission of the crime when there has been no such prior evaluation or a question as to whether the defendant is intellectually disabled, the court may, upon its own motion or upon petition by the district attorney general or by the attorney for the defendant, and, if the matter is contested, after a hearing, order that the defendant be evaluated on an outpatient basis. If and only if the outpatient evaluator concludes that an inpatient evaluation is necessary, the court may order the defendant to be hospitalized for not more than thirty (30) days.**

Tenn. Code Ann. § 33-7-101(a)(4)(A) and (B).

2. Grounds for Relief

Post-conviction relief is available when petitioner's conviction or sentence is *void or voidable* because of abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States. Tenn. Code Ann. § 40-30-103. Perhaps the most common ground for relief alleged under the statute is a claim of ineffective assistance of counsel.

a. Ineffective Assistance of Trial Counsel

Claims of ineffective assistance of counsel are reviewed under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668 (1984). The petitioner has the burden to prove both that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant to deprive him of a fair trial. Strickland, 466 U.S. at 687; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The reviewing court need not review both prongs if the petitioner fails to demonstrate either one of them. See Strickland, 466 U.S. at 697.

"Deficient performance means that 'counsel's representation fell below an objective standard of reasonableness.'" Davidson v. State, 453 S.W.3d 386, 393 (Tenn. 2014) (quoting Strickland, 466 U.S. at 688). "To determine reasonableness, a reviewing court must consider the 'professional norms' prevailing at the time of the representation." Davidson, 453 S.W.3d at 393 (citing Strickland, 466 U.S. at 688). "Counsel's performance is not deficient if the advice given or the services rendered 'are within the range of competence demanded of attorneys in criminal cases.'" Davidson, 453 S.W.3d at 393 (quoting Baxter v. Rose, 523 S.W.2d at 936). Accordingly, on post-conviction, trial counsel are presumed to have "provided adequate assistance and

used reasonable professional judgment to make all strategic and tactical significant decisions. The petitioner bears the burden of overcoming this presumption." Davidson, 453 S.W.3d at 393 (citing Strickland, 466 U.S. at 690).

To establish prejudice, the petitioner must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. "The question under this prong is whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Davidson, 453 S.W.3d at 393 (citations and internal quotations omitted). A "reasonable probability" is a lesser burden of proof than a "preponderance of the evidence." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006); Goad, 938 S.W.2d at 370.

In reviewing counsel's conduct, a "fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

(1) The Effect of Self-Representation and Waiver

When a defendant forfeits or waives the right to counsel, regardless of whether the waiver is explicit or implicit, he or she also forfeits or waives the right to effective

assistance of counsel. State v. Carruthers, 35 S.W.3d 516, 551 (Tenn. 2000). However, the defendant retains the right to complain of ineffective assistance with respect to any stage wherein he/she was represented by counsel. Id.

(2) Claims Under United States v. Cronic

Citing to United States v. Cronic, 466 U.S. 648 (1984), a petitioner may argue trial counsel's inaction ultimately denied him the right to counsel at critical stages in a proceeding and prevented "meaningful adversarial testing" of the facts of the case, and therefore prejudice should be presumed.

In the post-conviction appeal of one capital case, the Tennessee Court of Criminal Appeals summarized Cronic:

> *In Cronic, the United States Supreme Court identified three scenarios involving the right to counsel where the situation was "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. [at] 658–60. Under such circumstances, an irrebuttable presumption of prejudice exists, and the petitioner need not meet the elements of Strickland to prove ineffective assistance of counsel. Id. at 662. These scenarios are: (1) situations involving "the complete denial of counsel," where the accused is denied the presence of counsel at "a critical stage" in the proceedings; (2) situations where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) situations where "counsel is available to assist the accused during trial, [but] the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659–60; see also Berry v. State, 366 S.W.3d 160, 174 (Tenn. Crim. App. 2011).*
>
> *...*
>
> *The first scenario discussed in Cronic involves "the*

> *complete denial of counsel," where the accused is denied the presence of counsel at "a critical stage." Cronic, 466 U.S. at 659. Courts have presumed prejudice under this first scenario when counsel was not appointed until the morning of the trial, see Powell v. Alabama, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 158 (1932), and when counsel only met with the defendant for a total of six minutes and was suspended from the practice of law for the last month before the trial, see Mitchell v. Mason, 325 F.3d 732, 742–44 (6th Cir.2003). ...*
>
> *The second scenario discussed in Cronic is a situation where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. In Bell v. Cone, 535 U.S. 685, 696–97, 122 S. Ct. 1843, 152 L.Ed.2d 914 (2002), the United States Supreme Court limited this scenario to those situations where counsel's "failure to test the prosecutor's case" was "complete." In Cone, the Court characterized Cone's argument as "not that his counsel failed to oppose the prosecution throughout the ... proceeding as a whole, but that his counsel failed to do so at specific points" and held that the issues should be examined under the standard in Strickland rather than the standards in Cronic. Cone, 535 U.S. at 697.*

Leonard Jasper Young v. State, 2013 WL 3329051, at **35-36 (Tenn. Crim. App. June 27, 2013) (emphasis and alteration added); perm. app. denied, (Tenn. Oct. 17, 2013).

Regarding Cronic's "complete denial of counsel" prong, in one capital case the Court of Criminal Appeals rejected the petitioner's argument his attorneys' "lack of investigation and any meaningful preparation" constituted complete denial of counsel; although counsel in Mr. Young's case "failed to conduct a thorough investigation and seek a mental health evaluation," the attorneys did not completely abandon the defendant:

> *Counsel reviewed discovery, interviewed witnesses, challenged in federal court the officers' actions in*

> *transporting the petitioner from Mississippi to Tennessee and back to Mississippi, filed a motion to suppress the Petitioner's statements to law enforcement, and questioned witnesses during the suppression hearing. During the guilt phase of the trial, counsel presented argument to the jury, cross-examined the State's witnesses, elicited testimony regarding the Petitioner's cooperation and expressions of remorse, and argued points of law to the trial court.*

Id. at *36.

Regarding the second Cronic prong, the appellate courts have repeatedly rejected capital petitioners' claims counsel's failure to perform certain actions during trial, standing alone, constituted a complete failure to subject the State's case to adversarial testing. See, e.g., Berry, 366 S.W.3d at 174; Leonard Jasper Young. 2013 WL 3329051 at **35-37; William Glenn Rogers v. State, 2012 WL 3776675 at *41 (Tenn. Crim. App. Aug. 30, 2012); Robert L, Leach, Jr. v. State, 2010 WL 2244113 at **22-24 (Tenn. Crim. App. June 4, 2010); Tony Carruthers v. State, 2007 WL 4355481 at **36-37 (Tenn. Crim. App. Dec. 12, 2007).

In a recent death penalty post-conviction opinion, the Tennessee Court of Criminal Appeals concluded none of the Cronic circumstances applied in a case in which counsel did not move for a change of venue despite the constant and overwhelming media attention the case received before petitioner's trial. See Lemaricus Davidson v. State, 2021 WL 3672797, at *40 (Tenn. Crim. App. Aug. 19, 2021), perm. app. denied (Tenn. Dec. 8, 2021). The appellate court noted a jury questionnaire was issued, trial counsel questioned prospective jurors extensively during individual and general voir dire, and trial counsel retained a jury selection expert. Id. The Court of Criminal Appeals stated, "The record reflects that trial counsel clearly engaged in a hard-fought defense for the Petitioner.

Thus, the Petitioner's reliance on Cronic is misplaced, and the Strickland standard controls." Id.

One case in which the Tennessee Court of Criminal appeals **did** conclude a post-conviction petitioner established he was entitled to relief under Cronic was Courtney B. Mathews v. State, 2019 WL 7212603 (Tenn. Crim. App. Dec. 27, 2019), no perm. app. filed. Mr. Mathews claimed that after trial, he was denied counsel and the State's case was not subject to meaningful adversarial testing because: (1) after the verdict was reached, Mathews' two trial attorneys[4] had an ex parte meeting with the trial judge in which the attorneys said their client's codefendant (who was set to be tried after the Mathews trial ended) was innocent and strongly implied Mathews committed the offenses for which he was convicted; (2) Mathews' trial attorneys permitted the codefendants' attorneys to review privileged files, which led to the discovery of a document in which Mathews' investigator detailed Mathews' statements regarding his involvement in the offenses; and (3) Mathews' post-trial attorney (who was one of the petitioner's attorneys at trial) failed to represent Mathews during the motion for new trial, as the attorney presented skeletal new trial motions (both original and amended), allowed the motion to languish in the trial court nine years before a final order was issued, and waived a hearing on the motion for new trial. See id. at *21.

The Tennessee Court of Criminal Appeals concluded Mathews was entitled to relief under Cronic (in the form of a delayed direct appeal, beginning with the motion for new trial). While the appellate court noted the attorneys' conflict of interest in discussing the case with the trial judge ex parte and permitting codefendants' counsel to review privileged documents detailing Mathews'

[4] The State sought the death penalty, but the jury returned a sentence of life without parole.

involvement in the offenses, the appellate court focused on post-trial counsel's failure to argue the petitioner's motion for new trial:

> *... [T]rial counsel failed to zealously represent their client by letting the case linger in the trial court for years without pursuing preparation of the transcript. This case languished in the trial court for over nine years before the motion for new trial was finally adjudicated in March 2005. Securing the transcript does not provide a valid reason for this delay; in fact, it appears that the co-defendant's lawyers had a copy of the Petitioner's trial transcript first. The trial judge testified that he got the "clear impression" from trial counsel that the Petitioner himself "was not sure if he wanted to proceed in a motion for new trial" because he did not want to be exposed to the death penalty upon retrial. However, neither trial counsel nor the Petitioner confirmed the trial judge's assertion. We also question whether that was the state of the law at the time, given that the jury had already rejected a death sentence in this case. See Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (holding that if a trial court has rejected death as a possible sentence, double jeopardy bars the state from seeking the death penalty at re-sentencing, even where rejection of the death sentence was based on a legal error).*
>
> *Just as in State v. Davis, 466 S.W.3d 49, 79 (Tenn. 2015) (Lee, J., concurring), "this case illustrates the danger of allowing a case to lay dormant while the wheels of justice grind to a halt." With the passage of time, memories fade and witnesses become intimidated, move, pass away, or simply want to forget the events they witnessed. Davis, 466 S.W.3d at 79. The law changes and evolves, as it has in this case, making identification of the proper principles to apply even more difficult. Timely adjudication of criminal charges is a right guaranteed by the United States Constitution. Id. Trial judges should manage their dockets in a timely manner, and defense lawyers and prosecutors should take reasonable efforts to expedite litigation. Id. The timely resolution of criminal cases is a foundational principle of our criminal justice system and is essential to the pursuit of justice. Id.*

> *Here, trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing in the post-trial phase, and there has been a denial of the Petitioner's Sixth Amendment rights that makes the adversary process itself presumptively unreliable. See Cronic, 466 U.S. at 659. In addition to the inexcusable delay in the Petitioner's motion for new trial proceedings and the trial judge's and trial counsels' unethical behavior, trial counsel only filed a skeletal motion for new trial and amended motion for new trial. The amended motion for new trial, that took over seven years to file, raised only two additional issues. All issues were presented in cursory fashion without argument or citation to legal authority. Moreover, from the testimony at the post-conviction hearing, it appears trial counsel waived a hearing on the motion for new trial without providing evidence of the Petitioner's consent. The Petitioner's waiver only covered his presence at the motion for new trial hearing. Trial counsels' deficiencies in this case are egregious. We conclude that there has been a complete breakdown in the adversarial process. We cannot speculate about what issues might have been raised in the Petitioner's motion for new trial had he had the effective assistance of conflict-free counsel.*
>
> *Because the presumed prejudice standard of Cronic applies, we hold that the Petitioner is entitled to relief. However, the Petitioner's convictions remain intact. Trial counsels' deficiencies occurred post-trial. Upon remand, the Petitioner is permitted a delayed motion for a new trial and conflict-free counsel during the motion for new trial phase*

Courtney B. Mathews v. State, 2019 WL 7212603, at **26-27.

Formerly, one of the most common situations in which prejudice was presumed on post-conviction occurred when trial counsel failed to file a timely motion for new trial, thus preventing appellate review of most issues. However, the Tennessee Supreme Court has concluded that the failure to file a timely motion for new trial does not constitute "the complete denial of counsel" under Cronic; therefore, in such instances, the post-conviction

court assesses prejudice under the standards announced in Strickland. Howard v. State, 604 S.W.3d 53, 61-64 (Tenn. 2020).

Thus, in most cases it appears that Cronic will be inapplicable to a petitioner's claims. For all practical purposes, the courts have provided a literal meaning to the "complete failure" standard. In most cases, attorneys who appear to have done little on a client's case will still have their performance evaluated under Strickland.

(3) Common Claims

Many different issues may arise under a claim of ineffective assistance of counsel. Many claims relate to issues that are explored in other sections of this bench book, including (but not limited to): failure to move for change of venue, failure to challenge prosecutorial misconduct, failure to file certain motions, failure to challenge recusal of trial judge, etc. Certain claims that arise frequently under claims of ineffective assistance of counsel are explored here.

(a) Failure to Call Witnesses

When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990); see also Scott v. State, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). Generally, this is the only way the petitioner can establish:

> (1) a material witness existed who could have been discovered but for counsel's negligent investigation of the case;

(2) a known witness was not interviewed;

(3) the failure to discover or interview the witness caused him prejudice; or

(4) the failure to present a known witness or call the witness to the stand resulted in the denial of critical evidence which caused the petitioner prejudice.

Black, 794 S.W.2d at 757. The trial court should not speculate on what a witness' testimony might have been if introduced by counsel. Id.

If the supposedly omitted witness does testify at the evidentiary hearing, "the post-conviction court must determine whether the testimony would have been (1) admissible at trial and (2) material to the defense." Pylant v. State, 263 S.W.3d 854, 869 (Tenn. 2008). If either prong is not met, "the post-conviction court is justified in finding that trial counsel was not deficient in failing to call that witness at trial." Id. If the testimony was both admissible and material to the defense, "the post-conviction court must assess whether the witness is credible." Id. at 869-70.

(b) Failure to Investigate

Trial counsel has a duty to investigate and prepare a case, and this duty derives from counsel's basic function "to make the adversarial testing process work in the particular case." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) (quoting Strickland, 466 U.S. at 690). Counsel's duty is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at

691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions[,]" and "what investigation decisions are reasonable depends critically on such information." Id. "[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." Id. Counsel is not required to interview every conceivable witness. See, e.g., Davis v. State, 912 S.W.2d 689, 700-01 (Tenn. 1995) (finding the failure to interview a number of potential witnesses not to constitute deficient performance, as trial counsel had nonetheless adequately investigated the case); see also Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). The fact that a particular strategy or tactical decision failed does not by itself establish deficiency. Goad, 938 S.W.2d at 369. Furthermore,

> *[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel. Rather, courts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and [j]udicial scrutiny of counsel's performance must be highly deferential.*

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (alternations in original) (citations omitted) (quoting Strickland, 466 U.S. at 688-89) (internal quotation marks omitted).

Nesbit v. State, 452 S.W.3d. 779, 796 (Tenn. 2014).

"[M]ore than 'the bare facts of [an] occurrence,' or lack thereof, are required to substantiate a claim of ineffectiveness based on trial counsel's failure to investigate or to obtain allegedly favorable

evidence." Mariet L. Patrick v. State, 2014 WL 6612559 at *6 (Tenn. Crim. App. Nov. 24, 2014) (quoting Denton v. State, 945 S.W.2d 793, 803 (Tenn. Crim. App. 1996)). As is the case with missing witness testimony, detailed above, the petitioner must produce proof of the supposedly overlooked evidence or occurrence so the post-conviction court can evaluate the proof. See Derrick Quintero and William Eugene Hall v. State, 2008 WL 2649637 at *52 (Tenn. Crim. App. July 7, 2008) (citing Black, 794 S.W.2d at 757).

As stated in greater detail below, "In death-penalty cases, the right to effective assistance of counsel extends beyond the guilt-and-innocence phase of the trial." Davidson, 453 S.W.3d at 394.

(c) Failure to Communicate with Client

"In Baxter v. Rose, our supreme court emphasized the importance of consultation between the attorney and client. 523 S.W.2d at 934. The purposes are to 'elicit matters of defense' and apprise the accused of 'potential strategies and tactical choices.' [523 S.W.2d] at 933." Brimmer v. State, 29 S.W.3d 497, 511 (Tenn. Crim. App. 1998) (citations from original included). However, even if the petitioner establishes deficient attorney-client communication, the petitioner cannot establish prejudice if he "fail[s] to satisfactorily prove how this lack of communication might have affected the results of the trial[.]" Brimmer, 29 S.W.3d at 511.

(d) Failure to Present Expert Testimony

Post-conviction petitioners will often allege their attorneys were ineffective for failing to present

expert testimony to rebut a State's expert or to support their own defense. In one case, the United States Supreme Court emphasized that even in cases where calling an expert might have been beneficial to the defense, counsel's failure to do so will not necessarily result in ineffective assistance:

> *Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." [Strickland, 466 U.S. at 689]. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. [Id. at 689]. It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it.*

Harrington v. Richter, 562 U.S. 86, 106 (2011).

In Kendrick v. State, 454 S.W.3d 450 (Tenn. 2015), the Tennessee Supreme Court applied this principle in concluding a trial attorney who failed to call a firearms expert at trial did not provide the ineffective assistance of counsel. On direct appeal in State v. Kendricks, 947 S.W.2d 875 (Tenn. Crim. App. 1996), the defendant was convicted of first degree murder following a November 1994 jury trial. At trial, the defendant argued the gun went off accidentally, but the jury rejected this defense. Mr. Kendrick filed a timely petition for post-conviction relief, but the hearing on the petition was not held until February and March 2011. Kendrick v. State, 454 S.W.3d at 455-56.

At trial, the petitioner's trial attorney elicited testimony from a crime scene examiner that the gun used in the victim's death fired as the officer was removing it from the trunk of his automobile, striking the officer in the foot. Id. at 460-61. On direct examination, the officer testified he did not remember whether his finger was on or near the trigger when the gun fired, but on cross-examination, trial counsel asked several questions designed to leave the jury with the impression that the gun fired accidentally and the officer's finger was nowhere near the trigger when it happened. Id. The State introduced an expert witness from the Georgia Bureau of Investigation who testified, "The only way you can fire this rifle without breaking it is by pulling the trigger." Id. at 462. The petitioner's trial counsel offered no expert witness to counter the State's expert. Trial counsel attempted to introduce the contents of a report from another officer to whom the crime scene investigator purportedly said his hands were nowhere near the gun's trigger when the gun fired, but the crime scene investigator denied speaking to this other officer, so the report's contents were not introduced, and the trial court did not allow the other officer to testify at trial. Id. at 463. The petitioner testified at trial that his gun had never malfunctioned before his wife was shot, and he denied telling his wife "I told you so" as she lay dying. Id.

At the post-conviction hearing, the petitioner presented the testimony of a firearms expert who testified extensively about issues concerning malfunctioning trigger mechanisms in guns like the petitioner's that Remington had produced since 1948. Id. at 464. The expert had "first bec[o]me

suspicious about the trigger mechanism in 1970" but did not testify as an expert witness about such issues until 1994, the same year as the petitioner's trial. Id. The expert said gun owners, generally, were not aware of these defects in 1994, and "if someone had done research at the time of Mr. Kendrick's 1994 trial, they potentially would have been able to find" the expert. Id.

Trial counsel testified he was aware the State planned to call a firearm expert to testify the petitioner's gun was working properly, but counsel did not seek a rebuttal expert because counsel expected to use the crime scene investigator's testimony about accidentally shooting himself in the foot "very effectively." Id. at 465. Counsel expected the investigator to testify consistently with the information contained in the other officer's report (i.e., that the investigator claimed the gun discharged while his hands were nowhere near the trigger), that this testimony would "trump" the State expert's testimony, and that the testimony "was enough for a reasonable doubt as to anything." Id. Counsel admitted he was not prepared for the investigator to say he "couldn't remember" how the gun discharged. Id.

The post-conviction court denied the petitioner relief; on appeal, the Court of Criminal Appeals reversed, based in part on trial counsel's failure to "adduce expert proof about the trigger mechanism in this rifle." Id. at 467 (citation omitted). The Tennessee Supreme Court, analyzing and citing extensively to Harrington and another Supreme Court case, Hinton v. Alabama,[5] reversed. As to the expert issue, the court stated,

[5] 571 U.S. 263 (2014).

Harrington and Hinton provide a useful lens for assessing allegations of ineffective assistance that relate to the failure to investigate or retain expert testimony. There are cases, such as Hinton, in which a defense attorney bears an affirmative duty to consult an expert, and perhaps to call an expert as a rebuttal witness. From Hinton, we learn that when the prosecution's theory of the case hinges on expert forensic science testimony, the acquisition of an expert witness for the defense may be exactly what professional norms under Strickland v. Washington require.

In most cases, however, the decision to select an expert, or which expert to select, constitutes one of the "strategic" defense decisions that Strickland v. Washington shields from scrutiny. In many cases, cross-examining the prosecution's expert will be just as effective as, and less risky than, utilizing a rebuttal expert. Each case must stand on its own facts.

Expert testimony and forensic science evidence, in particular, have become crucial to many criminal cases. Many cases hinge on DNA evidence, blood toxicology reports, the identification of latent fingerprints, voice recognition, handwriting analysis, toolmark evidence, the analysis of bite marks, shoe prints and tire tracks, and other evidence that falls under the broad umbrella of "forensic science." The use of forensic science evidence has blossomed over recent decades, but in this century, forensic science practitioners have faced criticism from attorneys, scientists, legislators, and others. As the Innocence Project reports, 316 prisoners have been exonerated by post-conviction DNA testing, and approximately half of these wrongful convictions can be attributed, in some way, to deficiencies and errors in forensic science.

Due to the ubiquity and persuasive power of forensic science evidence, it has become necessary for defense counsel to be conversant with forensic

science and to be prepared to challenge forensic science testimony – either through effective cross-examination or by marshaling expert testimony for the defense.

In this case, the scientific testimony at issue was not of the "individualization" variety, such as fingerprint, bite mark, or toolmark evidence. Instead, the State presented a firearms expert who testified that Mr. Kendrick's rifle appeared to operate properly. Agent Fite [the State's expert] performed "drop tests" designed to make the rifle misfire, but the rifle did not malfunction. Agent Fite concluded that no one could fire the rifle without pulling the trigger or breaking it.

Defense counsel employed two strategies to counteract this testimony. First, he tried to discredit Agent Fite by characterizing him as someone who believed he never made mistakes. Second, he attempted to cross-examine Agent Fite about the Remington Model 742 rifle, the precursor model to the rifle Mr. Kendrick owned. The trial court overruled this line of questioning as irrelevant and permitted Agent Fite to discuss only the Remington model that Mr. Kendrick owned.

At the post-conviction hearing, Mr. Kendrick presented Mr. Belk [petitioner's post-conviction expert] as a firearms expert. Like Agent Fite, Mr. Belk was unable to cause Mr. Kendrick's rifle to malfunction. However, Mr. Belk testified that the trigger mechanism – found in Mr. Kendrick's rifle and millions of other Remingtons of various types and models – had malfunctioned on occasion. The post conviction court observed that Mr. Belk's testimony would have been "helpful" to Mr. Kendrick at trial.

The post-conviction court's observation that expert testimony regarding the occasional failure of the trigger mechanism would have been helpful at Mr. Kendrick's original trial comes with three significant qualifications. First, it is doubtful that

Mr. Kendrick's trial counsel would have obtained permission to hire a firearms expert in 1994, even if he had requested one. It was not until 1995 that this Court recognized that indigent non-capital criminal defendants had a constitutional right to expert psychiatric assistance. State v. Barnett, 909 S.W.2d 423, 424 (Tenn. 1995). In doing so, we expressly limited the holding of the case to psychiatric experts. State v. Barnett, 909 S.W.2d at 430 n.7.

Second, even after briefing and oral argument in this case, it remains entirely uncertain that Mr. Kendrick's trial counsel could have located and hired a firearm expert in 1994 who could have testified concerning the potential defects of the Remington Model 7400's trigger mechanism. Mr. Belk told the post-conviction court that he first testified about the trigger mechanism in 1994. The record does not indicate the existence of any other such experts who were available at that date. Mr. Kendrick's trial counsel said that he considered himself knowledgeable about firearms and that he was unaware of any discussion in the industry concerning defective Remington trigger mechanisms.

Even though the public defender's office had often consulted a local gunsmith, Mr. Kendrick's trial counsel could not recall whether he or anyone else in the office talked to the gunsmith in conjunction with Mr. Kendrick's case. As trial counsel pointed out, "[Y]ou couldn't Google Remington trigger mechanisms back then." In short, the record does not contain clear and convincing evidence that trial counsel could have found Mr. Belk or his equivalent, or that the sort of testimony Mr. Belk provided at the post-conviction hearing would have been available or admissible at trial.

Third, even if Mr. Kendrick's trial counsel had been able to find and retain Mr. Belk for the original trial in 1994, Mr. Belk would not have been able to testify, as he did during the post conviction hearing, about the three instances of the Remington

Model 7400's malfunctioning. The record reflects that one, if not all, of these instances occurred, according to Mr. Belk, in the "late nineties, probably '97 or '98."

Even if we were to disregard these difficulties in Mr. Kendrick's argument, we are unable to conclude that Mr. Kendrick's trial counsel's performance was deficient. The best evidence that Mr. Kendrick's Model 7400 was capable of misfiring is the undisputed fact that Sergeant Miller [the crime scene examiner at issue] was shot in the foot by the very same rifle. Sergeant Miller's injury was not speculative, and it did not involve other weapons. Trial counsel had a reasonable basis to believe Sergeant Miller would testify that he had not touched the trigger, and that this testimony would be "enough for a reasonable doubt as to anything."

In light of defense counsel's testimony, we find that Mr. Kendrick's trial counsel made a reasonable tactical decision to construct his "accidental firing" defense around Sergeant Miller's mishap with Mr. Kendrick's rifle. While counsel knew the substance of Agent Fite's impending testimony, defense counsel reasonably calculated that the incident involving Sergeant Miller would "trump[]" anything Agent Fite could say. In hindsight, Sergeant Miller's testimony deviated from what trial counsel expected. But at the time defense counsel was forming his trial strategy, it was reasonable to anticipate that he could "use [Sergeant Miller's testimony] very effectively" to elicit an acquittal. Despite Sergeant Miller's memory lapse, defense counsel's performance on this issue indicated "active and capable advocacy." Harrington v. Richter, 562 U.S. at 111, 131 S. Ct. at 791. It was not constitutionally deficient.

This was not a case that hinged on expert testimony. The bulk of the State's case consisted of eyewitnesses. Although there are cases in which defense counsel must summon expert testimony – and we encourage defense attorneys to be vigilant in this

> *regard – this is not such a case. Surely it would have been "best practices" for trial counsel to consult a firearms expert before trial, but in this case the failure to do so was not objectively unreasonable.* Harrington v. Richter*, 562 U.S. at 106, 131 S. Ct. at 788-89.*

Kendrick, 454 S.W.3d at 475-77 (footnotes omitted).

(e) Failure to Present Mitigation

(i) Adequate Investigation

"In death-penalty cases, the right to effective assistance of counsel extends beyond the guilt-and-innocence phase of the trial." Davidson, 453 S.W.3d at 394. The Tennessee Supreme Court has stated that courts must be

> *particularly cautious in preserving a defendant's right to counsel at a capital sentencing hearing. The Eighth and Fourteenth Amendments to the United States Constitution mandate that a death sentence be based on a particularized consideration of relevant aspects of the character and record of each ... defendant. In this respect, evidence about the defendant's background and character is relevant because of the belief that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse. Thus, although there is no requirement that defense counsel present mitigating evidence in the penalty phase of a capital trial, counsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases. [Defense attorneys who*

> *anticipate a capital sentencing hearing possess] a greater duty of inquiry into a client's mental health. ... [C]ounsel may not treat the sentencing phase as nothing more than a mere postscript in the trial.*

Goad v. State, 938 S.W.2d 363, 369-70 (Tenn. 1996) (citation and quotations omitted).

Trial counsel in death penalty cases are "not required to present mitigating evidence at sentencing ... or to run down every conceivable line of potentially mitigating evidence." Davidson, 453 S.W.3d at 395 (citing Wiggins v. Smith, 539 U.S. 510, 533 (2003). However,

> *for counsel's strategic and tactical choices to be entitled to deference, they must be "informed ones based upon adequate preparation." Goad v. State, 938 S.W.2d at 369. The United States Supreme Court has noted that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" Wiggins v. Smith, 539 U.S. at 533 (quoting Strickland v. Washington, 466 U.S. at 690-91). Accordingly, counsel's decision not to investigate or present mitigation evidence "must be directly assessed for reasonableness in all circumstances." Strickland v. Washington, 466 U.S. at 691.*
>
> *.... The [Supreme] Court noted that presenting some mitigating evidence does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." Sears v. Upton, 561 U.S. 945, 955 (2010). It also stated that*

> *its inquiry in these cases called for a "probing and fact-specific analysis" that included consideration of "the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the [collateral] proceeding."* Sears v. Upton, *561 U.S. at 955-56;* see also Wiggins v. Smith, *539 U.S. at 527.*

Davidson, 453 S.W.3d at 395.

In Wiggins, finding counsel rendered ineffective assistance, the United States Supreme Court held that ***defense counsel's investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.*** See 539 U.S. at 524. The lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. Investigation is essential to fulfillment of these functions.

As the Tennessee Supreme Court has explained,

> *To provide effective representation, counsel must make either a reasonable investigation or a reasonable decision that particular investigations would be unhelpful or unnecessary.* Wiggins v. Smith, *539 U.S. at 521. Either way, counsel's decision must indicate a reasoned strategic judgment. [*Id.*] at 526. Defense counsel should investigate the defendant's medical history, educational history, employment and training history, family and social history, adult and juvenile*

> *correctional experiences, and religious and cultural influences. [Id.] at 524.*
>
> *Counsel is not required to investigate every conceivable line of mitigating evidence, no matter how unlikely it is to help the defense. Nor must counsel present mitigating evidence in every case. But "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitation of the investigation." [Id.] at 533 (internal quotation marks omitted). To determine whether counsel's actions were reasonable, a reviewing court should 'consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." [Id.] at 527.*

Davidson, 453 S.W.3d at 402.

(ii) Tennessee Decisions

Where the alleged prejudice under *Strickland* involves counsel's failure to present mitigating evidence in the penalty phase of a capital trial, the Tennessee Appellate Courts have held that the trial court should consider the following:

* the nature and extent of the mitigating evidence that was available but not presented;
* whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and

* whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.

Davidson, 453 S.W.3d at 403 (citing Nichols v. State, 90 S.W.3d 576, 598 (Tenn. 2002), and Goad, 938 S.W.2d at 371).

In Davidson v. State, 453 S.W.3d 386 (Tenn. 2014), a death penalty post-conviction case, the Tennessee Supreme Court concluded petitioner's attorneys were ineffective for not presenting evidence of the defendant's brain damage and cognitive disorders at sentencing. Id. at 405-06. Before trial, Jerry Ray Davidson's trial counsel had received TDOC records detailing his mental illness, including "severe psychotic disturbance" and "difficulties controlling his impulses." Id. at 403. Trial counsel also obtained records detailing a schizophrenia diagnosis when the defendant was a teenager, as well as abnormal CT and EEG scans. Id. An expert retained by trial counsel also issued a report detailing the petitioner's history of mental illness. Id. Trial counsel did not present this evidence during either phase of the trial because they were concerned such evidence would open the door to damaging information in the various reports, including the defendant's claim he had "raped over 100 women," statements taken while incarcerated for other sexual offenses that he would continue assaulting women when he left prison, and numerous sexually degrading comments regarding women. See id. at 397.

The Tennessee Supreme Court concluded "counsel made a reasonable tactical decision to abstain from presenting psychological evidence during the guilt phase of trial." Id. at 403-04. However, the court granted the petitioner a new sentencing hearing, concluding counsel's failure to present mental health-based mitigation evidence (which they had in their possession) constituted ineffective assistance. Id. at 405-06. The court pointed out that even Davidson's "threatening statements about raping women [could have been used] to illustrate his cognitive deficiencies." Id. at 404. The court noted concerns about the damaging nature of the petitioner's comments was unfounded, given the evidence in the record of Davidson's history of convictions for sexual offenses. Id. at 404-05.

In short, the court could not

> *escape the fact that "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Mr. Davidson's] moral culpability" and led to a sentence less than death. Wiggins v. Smith, 539 U.S. at 538 (quoting Williams v. Taylor, 529 U.S. at 398). At least one member of the jury could have decided that Mr. Davidson was less morally blameworthy (and thus undeserving of death) in light of his lifelong history of psychosis, his frontal lobe dysfunction, and the fact that his mental functioning was in some respects equivalent to that of a nine-or-ten-year-old child. These post-conviction revelations sufficiently undermine our confidence in the verdict to*

> *merit post-conviction relief. We find a reasonable probability that, but for counsel's failure to present psychological mitigation evidence, the result of the sentencing trial would have been different.*

Davidson, 453 S.W.3d at 405-06.

In Goad, the court found petitioner's attorneys were ineffective for failing to adequately prepare for the penalty phase of trial. The court found counsel should have subpoenaed witnesses who could have testified regarding Mr. Goad's post-traumatic stress disorder.[6] Goad, 938 S.W.2d at 370-73.

In Perry Anthony Cribbs v. State, 2009 WL 1905454 at **51-52 (Tenn. Crim. App. July 1, 2009), perm. app denied, (Tenn. Dec. 20, 2009), the Court of Criminal Appeals concluded trial counsel were ineffective for failing to investigate the extent of the defendant's mental impairment and present such evidence at the sentencing hearing:

> *Although the petitioner's attorneys were aware that he had some type of mental impairment, they failed to pursue any further investigation into the issue. ... [C]ounsel had a duty to collect as much information as possible about the petitioner's mental history, including his school records. Had counsel followed through with their request for the petitioner's records from the Memphis City School system, they would have discovered that the results of an I.Q. test the*

[6] When a competent and fully informed defendant instructs counsel not to investigate or present mitigating evidence at trial, counsel will not later be adjudged ineffective for following those instructions. See Schriro v. Landrigan, 550 U.S. 465, 476-77 (2007); Zagorski v. State, 983 S.W.2d 654 (Tenn. 1998); State v. Smith, 993 S.W.2d 6 (Tenn. 1999).

> *petitioner took when he was thirteen years old showed his I.Q. was only 70, the threshhold [sic] delineating mental retardation and ineligibility for the death penalty. ... [C]ounsel could [also] have argued to the jury in mitigation at sentencing that the petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct "to the requirements of the law was substantially impaired as a result of a mental disease or defect ... which was insufficient to establish a defense to the crime but which substantially affected the [petitioner's] judgment."*

In Detrick Cole v. State, 2011 WL 1090152 at *37 (Tenn. Crim. App. Mar. 8, 2011), perm. app. denied, (Tenn. July 14, 2011), the Court of Criminal Appeals concluded trial counsel were ineffective for failing to present adequate mitigation and failing to present evidence challenging the weight of the "prior criminal history" aggravating factor. Regarding mitigation, the court concluded the petitioner was prejudiced by counsel's failure to present family members and other experts who would have testified the petitioner "grew up in a household of marital discord, abuse, infidelity and drug abuse." Id. at *45. At trial, the jury essentially heard the petitioner's actions in killing the victim were an aberration given the relatively stable home environment in which he was raised. Id. at *22.

Regarding the weight of the aggravating circumstance, Cole's previous conviction involved the robbery of a man who "picked up" the petitioner (who was a juvenile at the

time of the prior offense) outside an adult bookstore. Id. at *41. Trial counsel chose not to attack the previous victim's credibility, a move which the appellate court found deficient. Id. The appellate court also faulted trial counsel for not presenting proof that: (1) the State initially did not seek to transfer the petitioner's previous case to adult court; (2) the co-defendant in the initial felony was more culpable than the petitioner; and (3) an empty revolver was used during the previous offense. Id. at *43.

(f) Jury Issues

Claims that trial counsel were ineffective relative to the jury generally can be divided into two areas: ineffectiveness related to jury instructions, and ineffectiveness related to jury selection. A separate issue – that a juror engaged in misconduct – will be explored elsewhere in this chapter.

Jury Instructions: Tennessee appellate courts have found counsel ineffective for failing to object to an erroneous jury instruction; failing to preserve jury instruction issues for appeal; and failing to raise these issues on direct appeal. See Dean v. State, 59 S.W.3d 663, 668-69 (Tenn. 2001). Failing to request an instruction on an appropriate lesser included offense *can* also constitute ineffective assistance. However, in such instances "the prejudice inquiry assesses whether a reasonable probability exists that a properly instructed jury would have convicted the petitioner of the lesser-included offense instead of the charged offense." Moore v. State, 485 S.W.3d 411, 421 (Tenn. 2016).

***Jury Selection*:** Petitioners may raise several potential issues related to jury selection: counsel failed to use a questionnaire; counsel failed to challenge certain jurors, either for cause or via peremptory challenge; counsel failed to object to certain questions asked potential jurors by the State or the trial court; counsel failed to ask adequate questions of jurors; counsel failed to raise Batson challenges; counsel failed to object to the dismissal of certain jurors, etc. Ultimately, counsel's effectiveness in jury selection will relate to the jurors who were seated and deliberated during the petitioner's trial.

This section from a Court of Criminal Appeals opinion in a capital post-conviction case addresses the role of defense counsel during capital jury selection:

> *Jury selection implicates an accused's state and federal constitutional rights to a competent, fair-minded, and unbiased jury. See Smith v. State, 357 S.W.3d 322, 347 (Tenn. 2011) (recognizing that "[b]oth the United States and Tennessee Constitutions guarantee a criminal defendant the right to a trial by an impartial jury") . ... The process of voir dire is aimed at enabling a defense lawyer (as well as a prosecutor) to purge the jury of members not meeting these criteria. See United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976) ("[T]he principal way this right [to an impartial jury] is through the system of challenges exercised during the voir dire of prospective jurors."); Smith, 357 S.W.3d at 347 (recognizing that "'[t]he ultimate goal of voir dire is to ensure that jurors are competent, unbiased, and impartial.'" (quoting State v. Hugueley, 185 S.W.3d 356, 390 (appx) (Tenn. 2006) . ... As emphasized by the United States Supreme Court,*

> *The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated—i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or vote a life sentence.*

Morgan v. Illinois, 504 U.S. 719, 734 n.7 (1992) (quoting Smith v. Balkcom, 660 F.2d 573, 578 (5th Cir. 1981)).

As the United States Court of Appeals for the Sixth Circuit has asserted, "Among the most essential responsibilities of defense counsel is to protect his constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." Miller v. Francis, 269 F.3d 609, 615 (6th Cir. 2001). By posing appropriate questions to prospective jurors, a defense lawyer is able to exercise challenges in a manner that ensures the jury passes constitutional muster. See United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973).

*Despite its significance, a trial lawyer is "accorded particular deference when conducting voir dire" and his or her "actions during voir dire are considered to be matters of trial strategy." Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001). Also, "[a] strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so illchosen that it permeates the entire trial with obvious unfairness." Id. Thus, it is imperative for a petitioner claiming ineffective assistance of counsel during jury selection to demonstrate that the resulting jury was not impartial. See Smith, 357 S.W.3d at 348. (citing James A. Dellinger v. State, No. E2005-01485-CCA-R3-PD, 2007 WL 2428049, at *30 (Tenn. Crim. App. Aug. 28, 2007)).*

William Glenn Rogers v. State, 2012 WL 3776675 at **35-36 (Tenn. Crim. App. Aug. 30, 2012), perm app denied, (Tenn. Dec. 11, 2012).

Turning to a few specific issues, "There is no constitutional right to have questions posed to the venire specifically directed to matters that conceivably might prejudice veniremen against him." Gregory Robinson v. State, 2013 WL 1149761 at *66 (Tenn. Crim. App. Mar. 20, 2013). "[F]ailing to question whether a prospective juror can fairly consider a life sentence does not necessarily constitute deficient performance." Id. (citing Hartman v. State, 896 S.W.2d 94, 105 (Tenn. 1995)). Generally, failing to inquire about "how receptive the jury would be to specific mitigating factors ... does not necessarily constitute ineffective assistance of counsel." Id. (citing State v. Goodwin, 703 N.E.2d 1251, 1257 (Ohio 1999)). There is also no requirement counsel utilize a jury consultant or jury questionnaires. Id. at *67.

b. Ineffective Assistance of Appellate Counsel

It is counsel's responsibility to determine the issues to present on appeal. State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986) (citing State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984)). This responsibility addresses itself to the professional judgment and sound discretion of appellate counsel. Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995). There is no constitutional requirement that every conceivable issue be raised on appeal. Campbell v. State, 904 S.W.2d 594, 597 (Tenn. 1995). The determination of which issues to raise is a tactical or strategic choice. Id.

The Tennessee Supreme Court has stated,

> *If a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, as it is in this case, then the reviewing court must determine the merits of the issue. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986). Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim. See United States v. Dixon, 1 F.3d 1080, 1083 (10th Cir.1993).*

Carpenter v. State, 126 S.W.3d 879, 887-88 (Tenn. 2004).

In Carpenter, 126 S.W.3d at 887, the court addressed a non-exhaustive list of factors to consider in the context of a determination of whether appellate counsel was ineffective:

> (1) Were the omitted issues significant and obvious?
>
> (2) Was there arguably contrary authority on the omitted issues?
>
> (3) Were the omitted issues clearly stronger than those presented?
>
> (4) Were the omitted issues objected to at trial?
>
> (5) Were the trial court's rulings subject to deference on appeal?
>
> (6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
>
> (7) What was appellate counsel's level of experience and expertise?
>
> (8) Did the petitioner and appellate counsel meet and go over possible issues?

(9) Is there evidence that counsel reviewed all the facts?

(10) Were the omitted issues dealt with in other assignments of error?

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

The court in Carpenter stated factor (11) addressed "the ultimate question" regarding the "deficient performance" prong of the Strickland test and is, therefore, unhelpful in determining whether appellate counsel's performance was deficient. Id. at 888-89.

In reviewing another death penalty post-conviction case, the Court of Criminal Appeals stated,

> *The same principles apply in determining the effectiveness of both trial and appellate counsel. Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995). A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that the petitioner's appeal would have been successful before the state's highest court. See e.g., Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L.Ed.2d 756 (2000); Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir.2001); Mayo v. Henderson, 13 F.3d 528, 533-34 (2d Cir.1994). To show that counsel was deficient for failing to raise an issue on direct appeal, the reviewing court must determine the merits of the issue. Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004) (citing Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305(1986)). Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. Id. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. Id. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim. Carpenter, 126 S.W.3d at 888 (citing United States v. Dixon, 1 F.3d 1080, 1083 (10th Cir.1993)). Additionally, ineffectiveness is very rarely found in cases where a defendant*

asserts that appellate counsel failed to raise an issue on direct appeal, primarily because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.

Tyrone Chalmers v. State, 2008 WL 2521224 at *41 (Tenn. Crim. App. June 25, 2008), perm. app. denied, (Tenn. Dec. 22. 2008).

c. Ineffective Assistance: Plea Agreements

On the issue of ineffective assistance of counsel in plea agreements, the Tennessee Supreme Court has stated,

> *The Strickland standard for determining whether a defendant received effective assistance of counsel applies during plea negotiations as well as during trial. Missouri v. Frye, 132 S. Ct. 1399, 1407-09 (2012); see also Hill v. Lockart, 474 U.S. 52, 58-59 (1985). Accordingly, during the plea bargaining process, as at all critical stages of the criminal process, counsel has the responsibility to render effective assistance as required by the Sixth Amendment. Frye, 132 S. Ct. at 1407-08; Harris v. State, 875 S.W.2d 662, 663, 665 (Tenn. 1994). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Frye, 132 S. Ct. at 1408. A fair trial does not correct trial counsel's deficient performance in failing to convey a plea offer because of "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." Lafler v. Cooper, 132 S. Ct. 1376, 1381 (2012); accord Bush v. State, 428 S.W.3d [1], 20 (Tenn. 2014) (citing Frye, 132 S. Ct. at 1407; Wlodarz v. State, 361 S.W.3d 490, 503-04 (Tenn. 2012)).*

Nesbit v. State, 452 S.W.3d at 787.

d. Intellectual Disability (formerly known as mental retardation)

Execution of the intellectually disabled is prohibited by the United States and Tennessee Constitutions. Van Tran v. State, 66 S.W2d 790 (Tenn. 2001). In so holding, the Tennessee Supreme Court adopted a retroactive constitutional principle that gives rise to claims under either a motion to reopen a post-conviction

petition or in an original petition for post-conviction relief.

> **NOTE**: A detailed examination of the issue of intellectual disability is also presented in Chapter 4 of this Bench Book.

To receive a full hearing on the issue of intellectual disability post-conviction, a petitioner must present a "colorable claim" of intellectual disability. Howell v. State, 151 S.W.3d 450, 460 (Tenn. 2004). "[A] colorable claim is defined as a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Id. (internal quotations omitted)

The American Association on Intellectual and Developmental Disabilities (AAIDD) describes intellectual disability as "characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before 18." Intellectual Disability: Definition, Classification, and Systems of Supports at (11th ed., 2010) ("AAIDD Manual").

The fifth and most recent version of the American Psychological Association's (APA) Diagnostic and Statistical Manual (DSM-5)[7] describes intellectual disability as follows: "Intellectual disability (intellectual development disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in the conceptual, social, and practical domains." DSM-5, at 33.

No Tennessee appellate opinion has examined an intellectual disability claim considering the revised AAIDD and DSM-5 definitions of intellectual disability. The change in definition from the DSM-IV to the DSM-5 is most prevalent in the adaptive

[7] Beginning with the fifth edition of the DSM, the APA began numbering the edition with standard numerals (i.e., "DSM-5"). Prior editions were denoted with Roman numerals (i.e., "DSM-IV").

deficit category, which will be explained below.[8]

Tennessee Code Annotated section 39-13-203(a), as amended in May 2021, defines intellectual disability as:

> (1) significantly sub-average general intellectual functioning;
>
> (2) deficits in adaptive behavior; **and**
>
> (3) evidence that the intellectual disability manifested during the developmental period, or by age eighteen (18).[9]

(Emphasis added).

The petitioner has the burden of demonstrating he/she is intellectually disabled by a preponderance of the evidence. Tenn. Code Ann. § 39-13-203(c). All three criteria must be satisfied before a finding of intellectual disability may be made.

(1) Significantly Subaverage General Intellectual Functioning

Before the 2021 revision to the intellectual disability statute, a finding of significantly subaverage general intellectual functioning required an IQ of 70 or below. Of note, in the DSM-5, published in 2013, the American Psychiatric Association explained the first prong of its intellectual disability diagnosis, deficits in intellectual

[8] Nor has any Tennessee appellate opinion addressed the revised statutory definition of intellectual disability, which removed the IQ requirement from the "significant subaverage general intellectual functioning" prong.

[9] The 12th edition of the AAIDD manual places the end of the developmental period at age 22, while the DSM-5 does not list a specific age by which intellectual disability must manifest. However, the 2021 amendment to Tennessee's intellectual disability statute still requires intellectual disability to manifest by age 18.

functioning, entailed deficits in "reasoning, problem solving, abstract thinking, judgment, academic learning, and learning from experience," as confirmed by clinical evaluation and individualized standard IQ testing. DSM-5, at 33. As explained above, as of this writing Tennessee courts have not examined intellectual disability in light of the DSM-5 and of the revised intellectual disability statute, which removes the explicit IQ requirement from the statute. Because the DSM-5 still takes a person's IQ into account in determining whether a person suffers from intellectual disability, the authors find it helpful to summarize Tennessee's existing case law, which is based on the former statute's IQ requirement.

Collateral proceedings have clarified the former Tennessee statute required a functional IQ of 70 or below, **not** an IQ test score of 70 or below. See Coleman v. State, 341 S.W.3d 221, 241-42 (Tenn. 2011). Thus, the 70 IQ test score is not a "bright line" cut-off as it may have been previously interpreted by some courts. The trial court may use relevant and reliable practices, methods, standards, and data in finding the defendant's functional IQ. See id. at 242. The trial court is not required to follow any expert's opinion, but must fully and fairly consider all evidence presented, including the results of all IQ tests administered to the petitioner. Id.

> **NOTE:** Experts commonly express a person's IQ within a range (such as "somewhere between 65 and 75"). Under prior case law, the courts required that a defendant's IQ "must be expressed specifically (i.e., that the defendant's IQ is 75 or is 'seventy (70) or below' or is above 70)." Id. However, under the revised intellectual disability statute, in which there is no requirement of a 70 IQ, it remains to be seen whether expert testimony regarding a subject's IQ range will be acceptable to satisfy the first prong of

the intellectual disability test.

(2) Adaptive Functioning

Adaptive functioning "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." Van Tran, 66 S.W.3d at 795 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 40 (4th ed. 1994)). Under the DSM-IV, as cited in Van Tran, an intellectually disabled individual will have significant limitations in at least two of the following basic skills: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Id. Influences on adaptive functioning may include the individual's "education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation." Id. In 1994, our supreme court construed the term deficits in adaptive behavior in its ordinary sense as "the inability of an individual to behave so as to adapt to surrounding circumstances." State v. Smith, 893 S.W.2d 908, 918 (Tenn. 1994).

However, in both the AAIDD Manual and the DSM-5, deficits in adaptive behavior are defined as deficits in any one of the following three "domains":

- Conceptual domain, including language (communication), reading and writing (functional academics), money concepts, and self-direction;

- Social domain, including interpersonal skills, social

responsibility, self-esteem, gullibility, naivete, following rules and obeying laws, avoiding being victimized, and social problem solving; and

- Practical domain, including activities of daily living (self-care), instrumental activities of daily living (meal preparation, housekeeping, transportation, taking medication, money management, telephone use), occupational skills, and maintaining a safe environment.

Both the AAIDD and DSM-5 conclude that the criteria for adaptive behavior limitation is significant deficits in any one domain. As stated above, Tennessee has not yet addressed a case assessing intellectual disability under the revised AAIDD and DSM definitions.

Under prior Tennessee case law, the element of "deficits in adaptive behavior" has also been defined as "the inability of an individual to behave so as to adapt to surrounding circumstances." State v. Smith, 893 S.W.2d 908, 918 (Tenn. 1995).

In Coleman, the court also discussed the issue of deficits in adaptive behavior and stated,

> *Distinguishing causally between intellectual disability and mental illness raises broad conceptual concerns in terms of the application of Tenn. Code Ann. § 39-13-203(a)(2). Causation and adaptive deficits present a complicated intersection. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders notes that "[a]daptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with [m]ental [r]etardation." DSM-IV-TR, at 42.*

341 S.W.3d at 249-50. The court discussed different

approaches which could be used in determining the role of causation in assessing deficits in adaptive behavior. Despite these concerns with this issue, the court held that it did not need to decide the appropriate approach to be applied to the role of causation to reach a decision in the case. Therefore, this issue has not been definitively answered at this time. Id.

(3) Onset Before Age 18

"Based on an exhaustive review of the legislative history of the [intellectual disability] statute, [the Tennessee Supreme] Court's prior understanding of the terms, and a survey of other jurisdictions," the Tennessee Supreme Court has concluded "the language 'during the developmental period, or by the age of eighteen' does not include the years past the age of eighteen." State v. Strode, 232 S.W.3d 1, 16 (Tenn. 2007). Accordingly, "Under the definition of [intellectual disability] as set forth in Tennessee Code Annotated section 39-13-203(a), both the significantly subaverage general intellectual functioning ... and deficits in adaptive behavior must be manifested by the age of eighteen." Id. (alterations added).

As of this writing, although the DSM-5 has eliminated an age requirement for "manifestation during the developmental period" purposes and the AAIDD has raised the maximum age to 22, Tennessee's statute still requires intellectual disability to manifest by age 18, and no Tennessee appellate opinion has reached a contrary conclusion. Therefore, prior case law interpreting the age 18 requirement should still be consulted.

e. Post-Conviction Intellectual Disability Claims

In 2021, the General Assembly enacted a law which created a procedural mechanism allowing death row inmates who may

have been procedurally barred from raising intellectual disability claims to, in fact, file such claims. The statute codified at Tennessee Code Annotated section 39-13-203(g)(1) and (2), reads:

> **(1) A defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.**
>
> **(2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.**

The wording of the statute, the lack of accompanying procedural rules, and the lack of guidance from the appellate courts leave some questions unresolved. For example, at what point is an inmate's conviction "final on direct review"—after the petitioner's direct appeal, or after the petitioner has exhausted all three tiers of review? As of this writing, two post-conviction intellectual disability petitions filed in Shelby County provide some guidance. One petitioner, Pervis Payne, who had filed numerous intellectual disability-based claims in state court over the years but whose claims were dismissed for the lack of a mechanism to raise such claims, filed a post-conviction intellectual disability petition after his three tiers of appellate review were exhausted. Another Shelby County inmate, David Keen, filed his post-conviction intellectual disability petition while his federal habeas petition was still pending in the federal courts, and the State did not argue Keen's claim was unripe.

> **NOTE:** As of this writing, no evidentiary hearing has been held in Mr. Keen's case. In Mr. Payne's case, after the State's expert evaluated the petitioner, the State conceded

Mr. Payne was intellectually disabled, so no evidentiary hearing was held.

However, although in that case the parties agreed Mr. Payne's death sentences should be vacated, the trial court still issued a **written order containing findings of fact and conclusions of law**. As mentioned elsewhere in this chapter, any post-conviction "agreement" to resolve a case should be supported by on-the-record findings of fact and conclusions of law in case a party (particularly the State Attorney General) objects to the agreed resolution later.

One significant issue remains unresolved: do procedural dismissals of prior intellectual disability claims constitute "previously adjudicated on the merits," or does such an adjudication not constitute a prior ruling that the petitioner was or was not intellectually disabled? This issue, and possibly others, may not be resolved until intellectual disability claims under the new subsection are addressed by the appellate courts.

f. Juror Bias and Tenn. R. Evid. 606

Both the state and federal Constitutions guarantee a defendant the right to a trial by an impartial jury. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. Two categories of challenges to juror qualifications exist. The first is propter defectum, "on account of defect," covering general disqualifications based on alienage, family relationship, or statutory provisions. Such challenges must be raised before the jury returns its verdict. State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993). The second category, propter affectum, "on account of prejudice," relates to juror bias or impartiality and may be raised at any time, including in a petition for post-conviction relief. See Steven James Rollins v. State, 2012 WL 3776696 at *14 (Tenn. Crim. App. Aug. 31, 2012) (death penalty post-conviction case).

Juror prejudice claims can relate to the juror's failure to disclose certain relationships on voir dire, and they can also relate to the juror's exposure to undue influences during trial. Relative to "failure to disclose" claims, the Court of Criminal Appeals has stated:

> *The jury selection process must be carefully guarded to ensure that each defendant has a fair trial and that the verdict is determined by an impartial trier of fact. The Tennessee Constitution guarantees every accused "a trial by a jury free of … disqualification on account of some bias or partiality toward one side or the other of the litigation."* Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954)*
>
> *Bias in a juror is a "leaning of the mind; propensity or prepossession towards an object or view, not leaving the mind indifferent; [a] bent; [for] inclination."* Durham v. State*, 182 Tenn. 577, 188 S.W.2d 555, 559 (1945). Jurors who have prejudged certain issues or who have had life experiences or associations which have swayed them "in response to those natural and human instincts to mankind," [*Durham*], 188 S.W.2d at 559, interfere with the underpinnings of the justice system.*
>
> *…*
>
> *[A] defendant bears the burden of providing a prima facie case of bias or partiality. See State v. Taylor, 669 S.W.2d 694, 700 (Tenn. Crim. App. 1983). … When a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality, a presumption of prejudice arises.* Durham*[,] 188 S.W.2d [at] 559[]. Silence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer. …. Therefore, failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality[.]*

Rollins, 2012 WL 3776696, at **14-15 (citing Akins, 867 S.W.2d at 354-56) (some alterations added, some citations omitted).

When dealing with jury bias claims based on a failure to disclose,

the Court of Criminal Appeals in Akins noted, "[F]ailure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality," and "[w]hile that presumption may be rebutted by an absence of actual prejudice, the court must view the totality of the circumstances, and not merely the juror's self-serving claim of lack of partiality, to determine whether the presumption is overcome." Akins, 867 S.W.2d at 356-57.

In Rollins v. State, a juror did not answer voir dire questions in a manner suggesting he had any knowledge of the case or interaction with the victim. 2012 WL 3776696 at **7-8. On post-conviction, the petitioner's attorneys obtained two separate affidavits from the juror, who said he knew the victim and bought bait from the victim at least once per week. The juror also claimed, among other things, that he had made up his mind "as soon as they seated the jury," that he "knew" the petitioner "was a crook," that he was "upset about the [victim's] murder," that he "knew [the petitioner] was going to burn," and so on. Id. at *10. During his post-conviction hearing testimony, the juror affirmed the statements in his affidavit were true. Id. at *11. In concluding the petitioner was entitled to a new trial based on juror bias, the Court of Criminal Appeals stated,

> *The totality of the circumstances surrounding the voir dire in this case demonstrates that Juror 9 failed to disclose his friendship with the victim, and there is nothing in the record to overcome the presumption of this bias. The circumstances of this case can readily be distinguished from those circumstances in each of the cases discussed above wherein the courts concluded there was no constitutional violation regarding juror bias or partiality. Furthermore, while Juror 9 may not have willfully concealed his friendship with the victim, he most definitely failed to disclose that fact to the court. Akins reminds us that the intent of the juror is not dispositive of the issue. 867 S.W.2d at 356 n. 15. Juror 9's failure to disclose his friendship with the victim of the murder trial on which he was about to sit as a member of the jury was inexcusable. It is difficult to imagine a situation in which a reasonable juror would*

not think his or her friendship with the murder victim of the case is not a material fact which should not be imparted to the court and parties. As our supreme court recently recognized, "the failure to ask the prospective jurors about their past experiences as victims or associates of victims is objectively unreasonable." Smith, *357 S.W.3d at 347. The post-conviction court accredited Juror 9's testimony "that if the evidence had not been presented to him that he would not have reached the same verdict." Any subsequent self-serving statements by Juror 9 that his friendship with the victim did not affect his ability to be fair and impartial are, however, "of little consequence" to the issue.* Akins, *867 S.W.2d at 356 n. 16. Accordingly, the courts should not consider statements about the affect of the bias on the juror's decision making process. Cf.* Walsh v. State, *166 S.W.3d 641, 649 (Tenn. 2005) (holding that "Tennessee Rule of Evidence 606(b) permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative processes is inadmissible").*

To borrow the words of our supreme court: "His failure under these circumstances to reveal this [friend]ship almost forces the conclusion that he was animated by an ulterior motive in remaining silent, and that this ulterior motive stemmed from a partiality in favor of the prosecution and, by the same token, a bias against [the defendant]." Toombs, *270 S.W.2d at 650. Moreover,*

> *[t]he integrity of the voir dire process depends upon the venire's free and full response to questions posed by counsel. When jurors fail to disclose relevant, potentially prejudicial information, counsel are hampered in the jury selection process. As a result, the defendant's right to a trial by a fair and impartial jury is significantly impaired.*

Akins, *867 S.W.2d at 357.*

Based upon the foregoing analysis, this court concludes that the Petitioner has established by clear and convincing evidence that Juror 9 was presumptively biased, which presumption was not overcome by the State, and that the Petitioner was, therefore, denied his constitutional rights to a trial by a fair and impartial jury.

Rollins, 2012 WL 3776696 at **23-24. The court in Rollins discussed and distinguished another capital post-conviction case

in which a juror bias claim based on failure to disclose was rejected by the appellate courts:

> *In Carruthers [v. State, 2007 WL 4355481 (Tenn. Crim. App. Dec. 12, 2007], another capital post-conviction case, the defendant's mother and brother testified during the post-conviction hearing that they recognized one of the trial jurors as their neighbor. The juror in question also testified during the hearing. He stated that although someone mentioned that the defendant's mother was present during trial, he further testified that he did not remember recognizing any of the courtroom spectators as being one of his neighbors. At the conclusion of closing arguments during the guilt phase, the trial court informed the parties that the juror in question was possibly a neighbor of the defendant's mother. Id. at [**]44–45. According to the information imparted to the trial court, however, the defendant's mother did not know the juror personally and only recognized him as a neighbor on her street. Id. at [*]45. Neither of the parties requested to voir dire the juror and neither objected to his continued presence on the jury. Id. at [*]46. During the penalty phase of the trial, defense counsel moved for a mistrial because they had since learned that the juror in question lived only two doors down from the defendant's mother. Id. The trial court denied the request based on the fact that no evidence had been introduced to suggest that the juror was prejudiced against the defendant or his family. Id.*
>
> *On appeal of the denial of post-conviction relief, Carruthers argued the fact that the juror lived on the same street as his mother raised a presumption of bias. Id. at [*]47. In denying relief, this court stated that there was no allegation that the juror failed to disclose any association with the defendant's family during jury selection or that any question was asked that should have triggered such a response from him. Id. at [*]48. This court held that the proof did not establish that the juror recognized the defendant or that he was biased against the defendant or his family. Id. This court noted that " 'Tennessee courts have routinely refused relief in post-verdict propter affectum challenges in cases where there was a casual relationship not disclosed during voir dire or the record failed to reveal an inherently prejudicial relationship or a false answer.'" Id.*

Rollins, 2012 WL 3776696 at *17 (alterations added).

Juror bias claims may also be raised based on exposure to extraneous prejudicial information or outside influences. Extraneous prejudicial information "is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case." State v. Adams, 405 S.W.3d 641, 650 (Tenn. 2013). "An improper outside influence is any unauthorized 'private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.'" Id. at 650-51 (citing Remmer v. United States, 347 U.S. 227, 229 (1954)).

In considering juror bias claims resulting from exposure to such information, the Tennessee Supreme Court has stated, "Like judges, jurors must be—and must be perceived to be—disinterested and impartial. Because a fair trial requires that jurors base their verdict solely on the evidence introduced at trial, Tennessee courts have long employed sequestration to protect jurors from outside influences." State v. Smith, 418 S.W.3d 38, 45 (citations omitted). The court in Smith continued,

> *When a trial court learns that an extra-judicial communication between a juror and a third-party has occurred, the court must take steps to assure that the juror has not been exposed to extraneous information or has not been improperly influenced. In most circumstances, the appropriate first step is to conduct a hearing in open court in the presence of the defendant to place the facts in the record and to determine on the record whether cause exists to find that the juror should be disqualified. Whitmore v. Ball, 77 Tenn. 35, 37 (1882); Smith v. State, 566 S.W.2d 553, 559–60 (Tenn. Crim. App. 1978). As the Court of Appeals has noted, when misconduct involving a juror is brought to a trial court's attention, "it [is] well within [the judge's] power and authority to launch a full scale investigation by summoning ... all the affiants and other members of the jury, if need be, with a view of getting to the bottom of the matter, and this, if necessary, upon [the judge's] own motion." Shew v. Bailey, 260 S.W.2d [362,] 368 [(Tenn. Ct. App. 1951)].*
>
> *Because of the potentially prejudicial effect of a juror's receipt of extraneous information, the State bears the burden in criminal cases either to explain the conduct of the juror or the third party or*

> *to demonstrate how the conduct was harmless. Error is harmless when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."* State v. Brown, *311 S.W.3d 422, 434 (Tenn. 2010) (quoting* Neder v. United States, *527 U.S. 1, 15 (1999)).*
>
> *When a jury is not sequestered, something more than a showing of an extra-judicial communication between a juror and a third party is required to shift the burden to the State. There must also be evidence that, as a result of the extra-judicial communication, some extraneous prejudicial fact or opinion "was imported to one or more jurors or some outside improper influence was brought to bear on one or more jurors."* State v. Blackwell,[10] *664 S.W.2d at 689;* see also State v. Meade, *942 S.W.2d 561, 565 (Tenn. Crim. App. 1996) (quoting* State v. Clinton, *754 S.W.2d 100, 103 (Tenn. Crim. App. 1988)). Thus, when it is shown that a juror has been exposed to extraneous prejudicial information or an improper influence, a rebuttable presumption arises and the burden shifts to the State to explain the conduct or demonstrate that it was harmless.* State v. Adams, *405 S.W.3d at 651;* Walsh v. State, *166 S.W.3d 641, 647 (Tenn. 2005).*

Smith, 418 S.W.3d at 46 (footnote omitted). If the extra-judicial communication is discovered after trial, it may be brought in a motion for new trial or in a post-conviction claim.

> *In determining whether the State has rebutted the presumption of prejudice in circumstances such as these, trial courts should consider the following factors: (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial; (2) the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror(s); and (4) the weight of the evidence adduced at trial. No single factor is dispositive. Instead, trial courts should consider all of the factors in light of the ultimate inquiry—whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict.*

Adams, 405 S.W.3d at 645 (footnote omitted) (citing Walsh v.

[10] 664 S.W.2d 686 (Tenn. 1984).

State, 166 S.W.3d 641, 649 (Tenn. 2005)). It is important to remember that not all evidence is admissible in challenging a jury verdict.

Tennessee Rule of Evidence 606(b) states,

> **Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.**

(emphasis added). See also Robert Faulkner v. State, 2014 WL 4267460 at **65-82 (Tenn. Crim. App. Aug. 29, 2014) (reversing conviction of defendant convicted in domestic violence killing where juror failed to disclose during voir dire she had been victim of domestic violence, despite questioning reasonably designed to elicit such facts).

The United States Supreme Court has carved out an exception to Rule 606(b)'s prohibition against a juror's testifying regarding deliberations: such testimony is permissible when the testimony concerns racial bias on the part of the juror. In Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017), a Hispanic man was put on trial for sexual offenses against two teenaged girls. None of the empaneled jurors mentioned any sort of racial bias on their questionnaires or during voir dire. Id. After the jury convicted the defendant of some of the charged offenses, defense counsel spoke to the jurors. Id. Two of the jurors told counsel that

"another juror had expressed anti-Hispanic bias toward [the defendant] and [his] alibi witness." Id. The two jurors submitted affidavits stating a juror identified as "H.C." made several derogatory statements regarding "Mexican men" during deliberations. Id. at 862. The trial court acknowledged the juror's bias but denied the defendant's motion for new trial based on Colorado Rule of Evidence 606(b), which "generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict." Id. The language of the Colorado rule mirrors the language of the corresponding Tennessee and federal rules. The Colorado appellate courts affirmed the defendant's convictions. Id. The United States Supreme Court reversed, stating,

> *the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.*
>
> *Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.*
>
> *The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. [...] These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may*

come forward of their own accord.

That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did juror H.C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis.

Petitioner's counsel did not seek out the two jurors' allegations of racial bias. Pursuant to Colorado's mandatory jury instruction, the trial court had set limits on juror contact and encouraged jurors to inform the court if anyone harassed them about their role in the case. Similar limits on juror contact can be found in other jurisdictions that recognize a racial-bias exception. See, e.g., Fla. Standard Jury Instrs. in Crim. Cases No. 4.2 (West 2016) ("Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone"); Mass. Office of Jury Comm'r, Trial Juror's Handbook (Dec. 2015) ("You are not required to speak with anyone once the trial is over. ... If anyone tries to learn this confidential information from you, or if you feel harassed or embarrassed in any way, you should report it to the court ... immediately"); N.J. Crim. Model Jury Charges, Non 2C Charges, Dismissal of Jury (2014) ("It will be up to each of you to decide whether to speak about your service as a juror").

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H.C.'s statements. A similar pattern is common in cases involving juror allegations of racial bias. See, e.g., Villar,[11] 586 F.3d, at 78 (juror e-mailed defense counsel within hours of the verdict); Kittle v. United States, 65 A.3d 1144, 1147 (D.C.2013) (juror wrote a letter to the judge the same day the court discharged the jury); Benally,[12] 546 F.3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict). Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited to recounting the exact statements made by H.C. that exhibited racial bias.

While the trial court concluded that Colorado's Rule 606(b) did not

[11] United States v. Villar, 586 F.3d 76 (1st Cir. 2009).
[12] United States v. Benally, 546 F.3d 1230 (10th Cir. 2008).

> *permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.*

Peña-Rodriguez, 137 S. Ct. at 869-70 (footnote and alteration added, some citations omitted).

In the post-conviction appeal in Walsh v. State, 166 S.W.3d 641, 649 (Tenn. 2005), the Tennessee Supreme Court held that Rule 606(b) "permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative processes is inadmissible." This rule can, admittedly, make things difficult to rebut the presumption of prejudice that arises from such improper contact or influences.

For instance, in Walsh, one of the jurors from Walsh's trial testified at the post-conviction hearing regarding the statement a court officer made to them during deliberations: something to the effect of, "You have to reach a decision." 166 S.W.3d at 644. The juror also testified that ultimately, she was not swayed by this comment. Id. at 644-45. In concluding the testimony regarding the effect of this improper influence entitled the petitioner to a new trial, the Tennessee Supreme Court stated,

> *In the case now before us, we conclude that it was error for the post-conviction court to consider the juror's testimony regarding the effect of the court officer's statement on her decision making process. The juror's testimony that the statement had been made was properly considered and raised a presumption of prejudice to the petitioner. The only evidence presented by the State to rebut this presumption was the inadmissible cross-examination testimony of this juror. The State could have called the court officer to testify as to whether he actually made the statement, or the other members of the jury could have been asked whether they heard the statement. However, as no other proof was presented on this issue at the hearing, we conclude that the State failed to sufficiently rebut the presumption of prejudice to the petitioner. Accordingly, we reverse*

> *the judgment of the Court of Criminal Appeals and remand this case for a new trial.*

Id. at 649.

In State v. Adams, 405 S.W.3d 641 (Tenn. 2013) (direct appeal), during deliberations the foreman of a sequestered jury discovered a note in his hotel room, written by one of the discharged alternates, indicating that the two alternates believed the defendant was guilty of first degree murder. Adams, 405 S.W.3d at 649. In the hearing on the motion for new trial, the foreman testified (over the defendant's objection) that the note had no impact on the jury's deliberations. See id. at 650. On appeal, the Tennessee Supreme Court concluded the foreman's testimony regarding the note's impact on the jury's deliberations was inadmissible, but applying the four Walsh/Adams factors, the court concluded the State had rebutted the presumption of prejudice arising from the improper communication:

> *As to the first factor, the nature and content of the information or influence is best determined by an inquiry into the identities of the parties involved, the substance of the communication, and how the exchange of information occurred. The jury foreman testified that after the conclusion of the trial he discovered a written note left by the discharged male alternate juror indicating that each of the alternates believed the Defendant to be guilty as charged. While the improper communication in this case was not a face-to-face conversation between a juror and a third party, it nevertheless was an unauthorized communication from a third party because, as indicated, a discharged alternate juror is no longer a member of the jury. In this instance, however, while the alternate juror's communication to the foreman was improper, it did not impart upon the foreman any extrajudicial evidence. Throughout the trial process an alternate is in all other respects a juror, hearing all of the evidence and listening to the instructions provided by the trial judge. The note merely reflected the opinion of the two alternate jurors based upon the proof presented during the course of the trial—the very same evidence known to the foreman—and made no reference to any part of the testimony or the others serving on the jury.*

*This case differs significantly from other cases where convictions have been set aside or civil verdicts have been reversed because jurors have conducted independent research on issues presented at trial, shared their own personal knowledge of a case, or initiated a conversation with a member of the prosecutor's office or a trial witness. See, e.g., Blackwell, 664 S.W.2d at 688 (reversing defendant's conviction for sale of alcoholic beverages to a minor because, during trial, a juror discussed the defendant's guilt with the mother of the minor who had purchased the alcohol); Briggs v. State, 207 Tenn. 253, 338 S.W.2d 625, 626, 628 (1960) (reversing defendant's conviction for voluntary manslaughter because one juror, who was a neighbor of the defendant, told the other members of the jury that the defendant had killed his brother, had a bad temper, and would "kill you if he got mad"); Martin v. Opryland USA, Inc., No. 01–A–01–9412–CV–00567, 1995 WL 322632, at *2, *4 (Tenn. Ct. App. May 26, 1995) (granting defendant a new trial because one juror, who was a nurse, conducted independent medical research on the plaintiff's injuries and shared her findings with the other jurors during deliberations). Here, the foreman neither instigated the communication nor sought out the discharged alternate jurors' opinions. Moreover, the foreman's lack of interest in the contents of the note is evidenced by the fact that he did not reveal to the other jurors either the existence of the note or its contents. This factor favors the State.*

The second factor, the number of jurors exposed to the information or influence, also favors the State. The foreman testified that he did not inform the other jurors about either the existence or the contents of the note, and there was no evidence presented to contradict his testimony in that regard. Cf. Walsh, 166 S.W.3d at 644–45 (observing that the trial court accredited testimony of one juror who "was convinced that the other members of the jury also heard the officer's remark"). Although in this case the exposure of the note was limited to the foreman, we caution that when extraneous prejudicial information or an improper outside influence is brought to bear upon even one juror it may be sufficient to set aside a verdict if there is a reasonable possibility that the verdict was tainted. Fullwood v. Lee, 290 F.3d 663, 668 (4th Cir. 2002) ("[I]f even a single juror's impartiality is overcome by an improper extraneous influence, the accused has been deprived of the right to an impartial jury."); see also Parker v. Gladden, 385 U.S. 363, 366, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."); [State v.]Blackwell, 664 S.W.2d [686,] 689 [(Tenn.

1984)] (holding that a presumption of prejudice arises if "some extraneous prejudicial information, fact or opinion, was imported to one or more jurors or some outside improper influence was brought to bear on one or more jurors").

The third factor, the manner and timing of the exposure to the juror(s), is neutral under these circumstances. The manner of the exposure tips the scales favorably for the State because the foreman was alone when he discovered the note upon returning to his hotel room. The timing of the exposure, however, is more favorable to the Defendant because the foreman discovered the note during an overnight break in the process of deliberation. Of course, these circumstances are in contrast to other cases resulting in new trials where jurors have been exposed to extraneous prejudicial information or an improper outside influence while in the jury room during active deliberations, when a juror could feel pressured to vote in a particular way. See, e.g., Walsh, 166 S.W.3d at 644–45 (granting new trial because a court officer entered the jury room during deliberations and told the jury that it was required to reach a decision); Blackwell, 664 S.W.2d at 688 (granting new trial because, prior to deliberations, a juror discussed the merits of the case with an interested third party and then entered the jury room immediately proclaiming the defendant's guilt). Nevertheless, allowing an alternate juror to assert his or her opinion and potentially influence jurors desecrates the sanctity of the jury of twelve. The presence of alternate jurors in the jury room during deliberations "is contrary to the common law[and] the principles embedded in the concept of the jury trial." Patten v. State, 221 Tenn. 337, 426 S.W.2d 503, 506–07 (1968) (reversing conviction because an alternate juror was permitted to retire with the empaneled jurors); see also Tenn. R. Crim. P. 24(f)(2)(A) ("A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict."). Even though, in this instance, the alternate jurors did not enter the jury room during active deliberations, the timing favors the Defendant because the deliberation process had already begun.

Because Rule 606(b) prohibits inquiry into the subjective impact upon a jury verdict, a consideration of the weight of the State's evidence introduced at trial is, as the fourth and final factor in our analysis of these circumstances, helpful in determining the possible impact any extraneous prejudicial information or improper outside influence had upon the verdict. In our view, the State presented overwhelming evidence of the Defendant's guilt, including a

recorded statement to the police in which he admitted to killing the victim. The State also presented specific evidence as to premeditation, which included the Defendant's recorded statement that he would kill the victim if he discovered that she had cheated on him and the numerosity of stab wounds inflicted upon the victim.

In summary, even without any consideration of the testimony of the jury foreman that should have been excluded, the State presented sufficient, admissible evidence to rebut the presumption of prejudice that accompanies an improper outside influence upon the jury. Because we have found no reasonable possibility that the note from the discharged alternate juror to the jury foreman affected the verdict, the Defendant is not entitled to relief on this issue.

Adams, 405 S.W.3d at 654-56 (some citations omitted).

3. Pleading Requirements

a. Petition

(1) Generally

Pursuant to Tenn. Code Ann. § 40-30-104, a petition for post-conviction relief will include:

- All claims known to petitioner and petitioner should verify under oath that all such claims have been included.

- Allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each claim was not previously presented in an earlier proceeding. Affidavits, records, or other evidence supporting the petition may be attached.

- The name of any attorney who has given advice or assistance in the preparation of the petition.

(2) Specificity Required

Tenn. Code Ann. § 40-30-106(d) states, in part,

> **The 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. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition.**

The remainder of subsection (d) provides an exception for *pro se* litigants:

> **If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.**

If the amended petition lacks specificity in the factual basis for petitioner's claims, or if there is inadequate citation to legal authority supporting petitioner's claims, the best course of action may be for the trial judge to enter an order requiring the petitioner to amend his petition in accordance with the specificity requirement. This will avoid complications which could arise on direct appeal and in subsequent federal litigation.

(3) Time Limits For Petition and Amended Petition

Generally, a petition must be filed within one year of final judgment or within one (1) year of the final ruling of the highest state appellate court reviewing the conviction. Tenn. Code Ann. § 40-30-102(a).

Once a petition has been filed, if it fails to state the factual basis for the grounds alleged in the petition and the

petition was filed by a pro se litigant, the petitioner will have fifteen (15) days to file an amended petition complying with the statute. Tenn. Code Ann. § 40-30-106(d).

If the amended petition is incomplete, the court shall determine if petitioner is indigent. If the court finds petitioner is indigent, the court may appoint counsel. Tenn. Code Ann. § 40-30-106(e).

Counsel shall have thirty (30) days from the date of appointment to either file an amended petition or notice that no amended petition will be filed. Id.

(4) Effect of Withdrawal

A petitioner may withdraw their petition at any time prior to the hearing without prejudice to refile, but the withdrawn petition shall not toll the statute of limitations. Tenn. Code Ann. § 40-30-109(c).

b. Responsive Pleadings
[Tenn. Code Ann. § 40-30-108]

(1) Generally

Tenn. Code Ann. § 40-30-108(a) and (d) provide the district attorney general's answer shall respond to each of the allegations of the petition and shall assert such affirmative defenses as he/she deems appropriate.

(2) State Motion to Dismiss

Pursuant to Tenn. Code Ann. § 40-30-108(c), the State may assert the following as grounds for dismissal:

- statute of limitations

- petition was not filed in court of conviction
- petition asserts a claim for relief from judgments entered in separate trials or proceedings
- previous pending petition
- facts alleged fail to show petitioner is entitled to relief
- claims for relief are either waived or have been previously determined.

If the State files a motion to dismiss, the motion must include "the facts relied upon to support the motion ... [.]" Tenn. S. Ct. R. 28, § 5(G).

(3) Time Limits For Answer or Response

An answer or other responsive pleading shall be filed within thirty (30) days, unless extended for good cause. Tenn. Code Ann. § 40-30-108(a). Failure of the state to respond does *not* entitle the petitioner to relief. Id. The court may find it useful to require the State to file an amended response to address particular issues if a response fails to do so.

4. Preliminary Considerations

a. Initial Review

The statute requires the court to examine the petition and the files, records, transcripts, etc. of the judgment under attack and enter an order, within thirty (30) days of the filing of an original petition or an amended petition. Tenn. Code Ann. § 40-30-106(a).

Once a petition is filed, the trial court must determine whether the petition asserts a **colorable claim**. Arnold v. State, 143

S.W.3d 784, 786 (Tenn. 2004). A colorable claim is defined in Tennessee Supreme Court Rule 28 Sec. (2)(H) as "a claim, in a petition for post-conviction relief, that, **if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act."** (Emphasis added). See id. Post-conviction relief is available only 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. If the facts alleged, taken as true, fail to state a colorable claim, the petition shall be dismissed. Tenn. Code Ann. § 40-30-106(f).

However, if the petition does state a colorable claim, the court shall enter a preliminary order. Tenn. Code Ann. § 40-30-106(i) and Tenn. Code Ann. § 40-30-107(a). This order shall appoint counsel for the petitioner if the petitioner is indigent and requests counsel. Tenn. Code Ann. § 40-30-107(b)(1). It shall also direct the petitioner or petitioner's counsel to file an amended petition, or a written notice that no amendment will be filed, within thirty days of the entry of the order. Tenn. Code Ann. § 40-30-107(b)(2).

b. Procedural Defaults Requiring Dismissal

Pursuant to Tenn. Code Ann. § 40-30-106(b) and (c), dismissal is required if it plainly appears from the face of the petition:

- that the petition was not filed in the court of conviction, or
- within the time set forth in the statute of limitations, or
- a post-conviction petition challenging the same conviction is already pending in either the trial court or an appellate court, or
- a prior petition was filed attacking the conviction and resolved on the merits.

Pursuant to Tenn. Code Ann. § 40-30-106(g) and (h), any claims deemed to be either waived or preciously determined should be dismissed. The terms "waived" and "previously determined" are defined in the statute as follows:

> **(g) 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[13] in which the ground could have been presented unless:**
>
> **(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or**
>
> **(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.**
>
> **(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.**

Tenn. Code Ann. § 40-30-106(g) and (h). See also House v. State, 911 S.W.2d 705, 711-14 (Tenn. 1995).

As set forth in the statute, the EXCEPTIONS to waiver are found in subsections(g)(1) and (2).

> ***NOTE THE REQUIREMENTS FOR WRITTEN ORDER OF DISMISSAL:*** The court's order should state the reasons for dismissal and the facts requiring dismissal. **If the petition is dismissed as untimely**, the order should state the date of conviction, whether an appeal was taken, the name of each court to which an appeal was taken, the date of the final action by each appellate court, and the date upon which the petition was filed. **If the petition is**

[13] Regarding the merits of a state constitutional claim, a federal court should not be considered a court of competent jurisdiction. Carter v. State, 958 S.W.2d 620 (Tenn. 1997).

dismissed based on a prior pending petition, the court shall state the style of the pending petition and in which court it is pending. Tenn. Code Ann. § 40-30-106(b) and (c).

c. Prehearing Procedure

(1) Timelines

Pursuant to Tenn. Code Ann. § 40-30-109(a), the court must review the case and enter an order within **30 days** of the State's filing of its responsive pleading which addresses whether the petitioner is entitled to a hearing or if no relief/hearing is warranted.

§ 40-30-109(a) further provides the evidentiary hearing shall be **within four (4) calendar months** of the entry of the court's order. This deadline may only be extended by order of the court based upon a finding that *unforeseeable circumstances render a continuance a manifest necessity* and any such extension **shall not exceed (60) days.** Tenn. Code Ann. § 40-30-109(a).

(2) Docketing

Pursuant to Tenn. Code Ann. § 40-30-121, capital post-conviction cases shall be given priority over all other matters in docketing.

(3) Discovery

The exact parameters of the parties' discovery obligations in a post-conviction case may seem somewhat unclear, given the nature of the applicable statutes and court rules. "Code section 40-30-109 and Rule 28 together provide what is discoverable and how it is discoverable in a Tennessee post-conviction proceeding." Nikolaus

Johnson v. State, 2018 WL 2203241 at *7 (Tenn. Crim. App. Jan. 23, 2018) (internal quotations and punctuation omitted). In Nikolaus Johnson, the Court of Criminal Appeals observed,

> *[T]he greatest hurdle to defining the parameters of the post-conviction petitioner's discovery obligation is Rule 16 itself, particularly when read in conjunction with Rule 28. Rule 16 is a trial rule and, as a result, is ill-fitted to the realities of a post-conviction proceeding. In a typical criminal trial, the State initiates the criminal proceeding and bears the burden of proving beyond a reasonable doubt that the defendant has committed the crimes with which he has been charged. Conversely, in a post-conviction proceeding, the post-conviction petitioner initiates the proceeding and bears the burden of proving the factual claims in the post-conviction petition by clear and convincing evidence. It is this reversal of roles that makes application of Rule 16 particularly difficult in a post-conviction proceeding. Moreover, myriad constitutional rights apply at the trial level, which rights inform the application of the discovery requirements in Rule 16, that do not similarly apply at a post-conviction proceeding.*

Id. After reviewing the applicable court rules, the Court of Criminal Appeals concluded,

> *the State's duty to disclose Rule 16 discovery materials is triggered upon the post-conviction court's finding that the post-conviction petitioner has stated a colorable claim for relief and the filing of the preliminary order in the case. See Tenn. Sup. Ct. R. 28, § 6(B)(3)(C); id. § 6(C)(7). After the State's duty to disclose has been triggered by the entry of the post-conviction court's preliminary order, we must revert to the language contained in Rule 16.*

Id. at *10. Before the filing of a post-conviction petition, the petitioner may seek records from the State pursuant to the Tennessee Public Records Act. The State's obligation to comply with the Public Records Act—and the State's actual compliance with the Act—does not absolve the

State of its obligation to provide discovery to the Petitioner after the trial court has determined a colorable claim has been stated. See Id. at *11. Once a petition has been filed, the petitioner is not entitled to obtain documents under the Public Records Act. See Waller v. Bryan, 16 S.W.3d 770, 775-77 (Tenn. App. 1999), perm. app. denied, (Tenn. 2000).

Furthermore, the petitioner must provide reciprocal discovery. "[A] post-conviction petitioner must provide those materials discoverable under Rule 16 to the State when the State has satisfied its discovery obligation in the post-conviction proceeding and has subsequently made a request for such materials." Johnson, at *11.

In addition, in discussing discovery related to expert witnesses, the Johnson court stated as follows:

> *Rule 28 provides that "[t]he Tennessee Rules of Evidence apply in post-conviction proceedings except as otherwise provided by these rules." Tenn. R. Sup. Ct. 28, § 3. Tennessee Rule of Evidence 705 provides: "The expert may testify in terms of opinion or inference and give reasons without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Tenn. R. Evid. 705 (emphasis added). The plain language of this rule authorizes the post-conviction court to require disclosure of the underlying facts or data before an expert witness testifies. This court has concluded that " '[a]s a general rule, a trial court will require disclosure of the underlying data of the expert's opinion when the court believes that the party opponent will be unable to cross-examine effectively and the reason for such inability is other than the prejudicial nature of such facts or data.' " State v. Schiefelbein, 230 S.W.3d 88, 148 (Tenn. Crim. App. 2007) (quoting State v. Henry Eugene Hodges, No. 01–C–01–9212–CR–00382, slip op. at 25 (Tenn. Crim. App., Nashville, May 18, 1995) (citation and internal quotation marks omitted)). Here, the State argued that, given the claims presented in the post-conviction*

> *petition, it was likely that the petitioner would present expert testimony regarding his mental health history and that pre-hearing disclosure of the facts and data underlying the expert testimony would enable the State to effectively cross-examine the expert witnesses without asking for a continuance. The post-conviction court agreed and concluded that the pre-hearing disclosure of the underlying facts and data was necessary to prevent unnecessary delay in the post-conviction proceeding. Under these circumstances, we cannot say that the post-conviction court erred by ordering that the petitioner would be required to furnish to the State the underlying facts or data prior to the evidentiary hearing.*

Johnson, at *11.

d. Stay of Execution

> **Upon the filing of a petition for post-conviction relief [in a capital case], the court in which the conviction occurred shall issue a stay of the execution date that shall continue in effect for the duration of any appeals or until the post-conviction action is otherwise final.**

Tenn. Code Ann. § 40-30-120(a). A copy of the order staying execution should be sent directly to the warden at Riverbend (or, in the case of female inmates, directly to the warden at the prison where the inmate is housed).

e. Duty to Disclose Potentially Exculpatory Evidence

> **Whenever a law enforcement agency discovers new evidence deemed potentially exculpatory by the chief law enforcement officer of the agency, the agency shall report the evidence to the district attorney currently serving in the jurisdiction in which the case was prosecuted, the trial court in which the conviction was obtained, the individual convicted in the case in which the evidence was secured, and that individual's attorney, if such individual is represented by counsel, within thirty (30) days of the discovery of the evidence.**

Tenn. Code Ann. § 40-30-123 (Eff. July 1, 2021).

5. Burden of Proof

A petitioner has the burden of proving the allegations of fact by *clear and convincing* evidence. Tenn. Code Ann. § 40-30-110(f). Evidence is "clear and convincing" when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240 (Tenn. Crim. App. 1998).

6. Final Order (Tenn. Code Ann. § 40-30-111)

Within sixty (60) days of the conclusion of the proof, the court shall enter a final written order setting forth all grounds presented, and the court's findings of fact and conclusions of law regarding each such ground. Such time limit may be extended upon a finding of manifest necessity. However, such extension shall not exceed thirty (30) days. Tenn. Code Ann. § 40-30-111(d).

The post-conviction statute provides that **final disposition of a capital case must be made within one (1) year of the filing of the petition.** Copies of all orders extending deadlines in capital cases shall be sent to the administrative office of the courts. Tenn. Code Ann. § 40-30-111(d). The trial courts will also provide information for the AOC's annual report to the legislature, which is due December 1 of each year. Id. § 40-30-11(e).

Should the court find that petitioner has demonstrated there was such an infringement upon his/her rights as to render the judgment void or voidable, the court shall:

- vacate and set aside the judgment, **or**
- order a delayed appeal.[14]

[14] Tenn. Code Ann. § 40-30-113 sets forth the specific procedure for granting a delayed appeal.

7. Successive Petitions and Motions to Reopen

a. Successive Petitions

The Post-Conviction Procedure Act contemplates the filing of only one petition for post-conviction relief. Tenn. Code Ann. § 40-30-102(c). Ordinarily, a second or subsequent petition is to be summarily dismissed. Id.

b. Motions to Reopen[15]

Pursuant to Tenn. Code Ann. § 40-30-117, "a petitioner may file a motion in the trial court to reopen the first post-conviction petition" in limited circumstances. The statute permits a motion to reopen based upon a new constitutional right, new scientific evidence establishing actual innocence, and when a conviction used to enhance a sentence is invalidated.

A defendant does not have the due process right to re-litigate a previously determined claim for ineffective assistance of trial counsel via a motion to reopen. Coleman v. State, 341 S.W.3d 221, 257-58 (Tenn. 2011). In other words, the trial court's granting of a motion to reopen does not allow a petitioner to raise any conceivable claim in the subsequent proceedings. Only those claims permissible as exceptions to the statute of limitations under T.C.A. § 40-30-102(b) or under the motion to reopen statute may be brought. See id. See also Harold Wayne Nichols v. State, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), perm. app. denied, (Tenn. 2020).

(1) New Constitutional Right

Tenn. Code Ann. § 40-30-117(a)(1) provides a motion to

[15] There are an abundance of different issues which petitioners attempt to bring pursuant to motions to reopen, but this book will only generally address a few of the more prevalent issues raised. If you have a question concerning a specific issue, you may contact your Capital Case Attorney for more information.

reopen may be appropriate when:

> **The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest [court] establishing a constitutional right that was not recognized as existing at the time of trial[.]**

In Keen v. State, 398 S.W.3d 594, 608-09 (Tenn. 2012), the Tennessee Supreme Court held it's prior opinion in Coleman v. State, which permitted the use of other evidence beyond a defendant's functional I.Q. test score in determining whether a defendant is intellectually disabled, did not establish a new constitutional right and thus could not be applied retroactively to a petitioner's case so as to permit him to challenge his death sentence by reopening his post-conviction proceedings and presenting evidence of a newly obtained I.Q. score. The court further stated that such evidence does not constitute "new scientific evidence of actual innocence" under subsection (a)(2). Id. at 612-13.

(2) New Scientific Evidence Establishing Actual Innocence

Tenn. Code Ann. § 40-30-117(a)(2) provides a motion to reopen may be appropriate when:

> **The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted[.]**

In Ray v. State, 984 S.W.2d 236 (Tenn. Crim. App. 1997), the appellate court held this provision does not provide the petitioner a vehicle for obtaining discovery; rather, the petitioner must delineate in the motion to reopen the new scientific evidence that has already been secured and

which will establish his or her actual innocence.

(3) Previous Enhancing Conviction Held Invalid

Tenn. Code Ann. § 40-30-117(a)(3) provides a motion to reopen may be appropriate when:

> **The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid[.]**

8. Appointment of Counsel in Capital Post-Conviction

There is no constitutional right to counsel in post-conviction proceedings. House v. State, 911 S.W.2d 705, 712 (Tenn. 1995). However, Tenn. Code Ann. § 40-30-202 contemplates the appointment of the Office of the Post-Conviction Defender to represent an indigent capital defendant challenging his conviction and/or sentence in a petition for post-conviction relief.

However, part of the responsibilities of the post-conviction defender is to recruit qualified members of the private bar who are willing to provide representation in state death penalty proceedings. Such counsel may be appointed at the request of the Post-Conviction Defender's Office to represent capital defendants in post-conviction matters.

A petitioner's statutory right to counsel includes the right to conflict-free counsel. See Frazier v. State, 303 S.W.3d 674, 679-83 (Tenn. 2010). Thus, if a conflict exists with the Post-Conviction Defender's Office, the court may appoint private counsel. The statutes contemplate the court's appointment of private counsel "during the representation of two (2) or more indigent persons ... [when] the interests of those persons [become] so adverse or hostile that they cannot all be counseled by the post-conviction defender or the post-conviction defender's staff

without conflict of interest[.]" Tenn. Code Ann. § 40-30-207. However, the Frazier holding gives the trial court the ability to appoint private counsel in the case of other conflicts of interest.

Rule 13 establishes the qualifications for appointed counsel in death penalty post-conviction cases:

> **Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts; and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.**

Tenn. S. Ct. R. 13, § 3(h).

Note that if private counsel are appointed on post-conviction or to represent a petitioner in a competency to be executed proceeding, Rule 13 makes no designation between "lead counsel" and "co-counsel." If two private attorneys are appointed in a post-conviction case, both attorneys will be paid the same rate. See Tenn. S. Ct. R. 13, § 3(k) (3) and (4).

PREREQUISITE TO APPOINTMENT:

Before counsel is appointed, *petitioner* must have *signed and verified* the petition for post-conviction relief filed with the court.

Holton v. State, 201 S.W.3d 626 (Tenn. 2006):

Nothing in the Post-Conviction Defender Commission Act allows the Post-Conviction Defender to initiate a post-conviction action on behalf of an inmate who has not signed or verified the post-conviction petition. The Post-Conviction Defender Commission Act, Tenn. Code Ann. §

40-30-206 (a), states:

> **It is the primary responsibility of the post-conviction defender to represent, without additional compensation, any person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to indigence or determined by a state court with competent jurisdiction to be indigent, for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against that person in state court, and who the court determines requires the appointment of counsel.**

The statute extends only to those who are unable to secure counsel and who the court determines requires the appointment of counsel.

There is no statutory basis upon which to use the Post-Conviction Defender Commission Act as a catapult for standing on behalf of one who has neither signed nor verified a post-conviction petition.

9. Special Issues

Various issues can arise during the post-conviction process which may call into question the petitioner's competency. Initially, the petitioner's competency to initiate post-conviction proceedings on his behalf may arise. In such instances the court may be called on to determine whether a petition may be initiated on behalf of petitioner by a "next friend." Additionally, once the petition has been filed a court may be called on to consider whether petitioner is competent to continue with the proceedings. Finally, the court may be called on to determine whether petitioner has the present mental competence required to decide to withdraw his post-conviction petition and forego review of his claims.

a. Next Friend Petitions

As previously stated, a court may not consider a petition that is not signed and verified under oath by the petitioner. However, if the court finds petitioner is not mentally competent the court may consider petitions filed on behalf of petitioner by a "next friend."

Reid ex rel Martiniano v. State, 396 S.W.3d 478, 512 (Tenn. 2013):

> *To proceed on a "next friend" petition on the basis that the prisoner is incompetent, the "next friend" must make a prima facie showing that the prisoner is incompetent by submitting "affidavits, depositions, medical reports, or other credible evidence that contain specific factual allegations showing the petitioner's incompetence." Holton v. State, 201 S.W.3d at 634 (quoting State v. Nix, 40 S.W.3d at 464). The "next friend" must also demonstrate a "significant relationship" with the prisoner and must show that he or she is "truly dedicated to the best interests of the person on whose behalf he [or she] seeks to litigate." Holton v. State, 201 S.W.3d at 632. If this prima facie showing is made, then the trial court should schedule a hearing to determine whether the prisoner is competent to manage his petition. In the absence of a "next friend," the court may appoint a guardian ad litem to advocate on the petitioner's behalf. See Reid v. State, 197 S.W.3d at 696, 705–06. To assure adequate preparation for the competency hearing, "the trial court may enter a scheduling order requiring the parties to provide notice of any expert witnesses and to provide a written report of the expert[s'] opinions at a designated time prior to the hearing." Reid v. State, 197 S.W.3d at 703.*

b. Competency to Proceed

Competency to proceed on post-conviction is neither a constitutional nor a statutory right. State v. Reid, 197 S.W.3d 694, 700 (Tenn. 1996). Due process requires only that a petitioner be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. Id. at 702

(1) Standard and Threshold Burden of Proof

Just as petitioner must be able to understand his legal rights and liabilities upon commencement of a post-conviction proceeding, a petitioner must be able to maintain that level of competence throughout the

proceedings. The burden is on the petitioner to make a threshold showing that he is incompetent to proceed in a post-conviction action. The petitioner must submit a pleading alleging his or her incompetence to proceed and attach thereto affidavits, depositions, medical reports, or other credible evidence that contain specific factual allegations demonstrating his incompetency *by clear and convincing evidence*. Id. Competency standards for post-conviction proceedings, as explained above, are governed by Tennessee Supreme Court Rule 28 and the Tennessee Supreme Court's opinion in Reid ex rel. Martiniano v. State.

(2) Procedure

Pursuant to Reid v. State, 197 S.W.3d at 696, 705-06, and Reid ex rel. Martiniano v. State, 396 S.W.3d at 512, the following procedures should be followed:

- Hearing:

  If a prima facie showing is made, then a competency hearing should be held.

- Scheduling:

  In preparation for the competency hearing, the trial court may enter a scheduling order requiring the parties to provide notice of any expert witnesses and to provide a written report of the expert's opinions at a designated time prior to the hearing.

- Appointing Next Friend

  If the court finds petitioner is incompetent to proceed, like the procedure set forth for

initiating post-conviction petitions on behalf of incompetent petitioners, the court should appoint a "next friend" or guardian ad litem to pursue the action on behalf of the petitioner.

c. Right to Proceed *Pro Se*

There is no constitutional right to representation at the post-conviction stage; but there is a statutory right to counsel. In particular, the statute has created an office responsible for handling indigent capital post-conviction matters. However, nothing in the statute requires petitioner to accept the aid of counsel and nothing specifically precludes a capital defendant from raising post-conviction claims on his/her own. If a petitioner refuses to sign or verify a petition prepared by counsel on his behalf, then the court does not have jurisdiction to hear the claims set forth in that petition. Perhaps the more complicated situation arises when a petitioner has accepted the aid of counsel from the office of the post-conviction defender in filing his petition and subsequently decides he does not wish to have counsel represent him.

The Tennessee Supreme Court has stated,

> *While the constitutional right to self-representation does not apply to post-conviction proceedings, both the statutes authorizing the appointment of counsel in post-conviction proceedings and the rules implementing these statutes recognize that prisoners have the right of self-representation in post-conviction proceedings. Prisoners may represent themselves if they do not request a lawyer or if they decline to accept the offer of an appointed lawyer. Post-conviction proceedings are frequently initiated by self-represented prisoners who file their own petitions, and Tenn. Code Ann. § 40–30–107(b)(2) expressly authorizes "petitioner[s] ... proceeding pro se" to file papers and represent themselves.*

Lovin v. State, 286 S.W.3d 275, 285 (Tenn. 2009) (footnotes omitted).

Tennessee Supreme Court Rule 13, section 1(e)(3) permits a petitioner to decline to accept a lawyer if one is offered. Per Rule 13, section 1(f)(1)-(2), a defendant's refusal of counsel must be in writing, and the court must also be satisfied that the potential pro se litigant fully understands the right to counsel and the consequences of proceeding pro se.

Lovin dealt with a petitioner who wished to discharge his retained lawyer and represent himself on appeal. Id. at 281-82. While Lovin's fact pattern is different from one a judge will likely encounter in a capital death penalty case, Lovin's holdings are equally applicable to an indigent petitioner who wishes to represent himself in a post-conviction proceeding.

The Tennessee Supreme Court in Lovin continued,

> *A prisoner's request to represent himself or herself in a post-conviction proceeding must meet three prerequisites. First, the request must be asserted in a timely manner. State v. Herrod, 754 S.W.2d 627, 629–30 (Tenn. Crim. App. 1988) (finding that a defendant desiring to represent himself or herself at trial must assert the right of self-representation in a timely manner). Second, in order to assure that the prisoner has not waived counsel inadvertently and to prevent a prisoner from later claiming that his right to an appointed lawyer was improperly denied, the prisoner's assertion of his or her desire to represent himself or herself must be clear and unequivocal. Cole v. State, 798 S.W.2d at 265; Pryor v. State, 632 S.W.2d 570, 570 (Tenn. Crim. App.1982). Third, the assertion of the right of self-representation must reflect a knowing and intelligent waiver of the right to counsel. State v. Small, 988 S.W.2d at 673; State v. Northington, 667 S.W.2d at 60.*
>
> *A prisoner need not have legal training in order to effectively assert his or her right of self-representation in a post-conviction proceeding. See State v. McCary, 119 S.W.3d 226, 256 (Tenn. Crim. App.2003). However, to assure that the prisoner's waiver of his or her right to appointed counsel is knowing and intelligent, the court must conduct an intensive hearing on the record to advise the prisoner of the consequences of self-representation and to determine that the prisoner knows and understands the consequences of his or*

her decision. See Cottingham v. Cottingham, 193 S.W.3d 531, 536 (Tenn. 2006); State v. Carruthers, 35 S.W.3d 516, 546 (Tenn. 2000); State v. McCary, 119 S.W.3d at 256–58; see also Tenn. R. Crim. P. 44(b)(1)(B).

Lovin, 286 S.W.3d at 287-88 (footnotes omitted).

Questions to Consider Prior to Allowing Capital Petitioners to Proceed Pro Se

1. Has petitioner filed a *pro se* petition for post-conviction relief within the required statute of limitations?

2. Has a subsequent amended petition been filed by counsel?

3. If a subsequent amended petition was filed by counsel, was it signed and verified under oath by the petitioner?

4. Has counsel been appointed to represent petitioner?

5. Do conflicts exist between petitioner and counsel or has petitioner expressed dissatisfaction with counsel?

6. Has petitioner exhibited or has counsel indicated that petitioner suffers from mental health problems?

If petitioner is refusing to sign and verify the claims in a petition or amended petition prepared by counsel and expresses a desire to proceed *pro se*, and neither petitioner's behavior, records before the court or comments of counsel create a concern that the petitioner may not be competent to make such decisions, then the court may allow petitioner to proceed on his/her own. All procedures appropriate to *pro se* litigants in other contexts, such as the appointment of elbow counsel, etc. should apply to the

post-conviction setting as well.

If petitioner accepts the aid of counsel in preparing the petition and preparing for the post-conviction hearing and subsequently decides he no longer wishes to have counsel represent him the court should inquire as to the petitioner's reasons for his decision and should question counsel about the nature of the relationship between counsel and petitioner. Additionally, the court will want to examine whether the petitioner is competent to make this decision.

If the court finds petitioner is competent, then the court may allow petitioner to retain private counsel if he/she is able to do so or in the alternative may allow petitioner to proceed without counsel. However, given the statutory creation of the Office of the Post-Conviction Defender to handle indigent capital post-conviction matters, it would appear the court's ability to remove the post-conviction defender in favor of providing petitioner with alternative counsel from the private bar is severely limited if not outright precluded. Since the petitioner's right to counsel stems not from a constitutional right but a statutorily created one, it would appear petitioner must choose between accepting the statutorily provided counsel, retaining private counsel, or proceeding *pro se.*

If the court finds petitioner is not competent to make such a choice, the court should proceed with the "next friend" procedure as outlined above.

d. Withdrawal of Petition

While making available post-conviction review, our legislature has left the exercise of the privilege to the discretions of those convicted of crimes. Thus, a capital petitioner, if competent, essentially controls the initiation of a post-conviction proceeding and likewise a competent petitioner may decide to terminate the post-conviction proceedings by withdrawing his/her petition.

In Pike v. State, 164 S.W.3d 257, 264-65 (Tenn. 2005), the Tennessee Supreme Court first concluded that under appropriate procedural safeguards, post-conviction review in a capital case may be waived by a competent petitioner. The Tennessee Supreme Court has reaffirmed this conclusion. See generally Reid ex rel. Martiniano v. State, 396 S.W.3d 478, 512-13 (Tenn. 2013).

(1) Initial Questioning

Initially, the court should examine the competency of petitioner to make this choice.

Tennessee Supreme Court Rule 28, Section 11(A) sets forth the relevant inquiry when a capital litigant expresses a desire to withdraw his/her post-conviction petition. Before allowing petitioner to withdraw his/her petition, the trial court must address the petitioner personally in open court and ascertain that the petitioner:

- does not desire to proceed with any post-conviction proceedings;
- understands the significance and consequences of withdrawing the post-conviction petition;
- is knowingly, intelligently, and voluntarily, without coercion, withdrawing the petition, and
- is competent to decide whether to withdraw the post-conviction petition.

(2) Competency

The Reid ex rel. Martiniano v. State opinion makes clear the standards announced in Tennessee Supreme Court

Rule 28, Section 11(B) constitute the relevant inquiry as to whether a petitioner possesses the present capacity to waive post-conviction review. See 396 S.W.3d at 512-13.

Standard: The standard for determining competency of a petitioner to withdraw a post-conviction petition and to waive further post-conviction relief under this section is:

> whether the petitioner possesses the present capacity to appreciate the petitioner's position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity.

Tenn. S. Ct. R. 28, § 11(B)(1).

In other words, "The question is not whether the prisoner is able to care for himself or herself, but whether the prisoner is able to make rational decisions concerning the management of his or her post-conviction appeals." Reid ex rel. Martiniano, 396 S.W.3d at 513. This Reid opinion also provided further guidance to trial courts in their decision-making by citing to the Fifth Circuit's test in Rumbaugh v. Procunier[16] and the Tennessee Supreme Court's definition of rationality provided in In re Conservatorship of Groves. See Reid ex rel. Martiniano, 396 S.W.3d at 513.

Presumption: The petitioner is presumed competent to withdraw a post-conviction petition and waive post-conviction relief.

Appointing Mental Health Professionals: If a genuine issue regarding the petitioner's present competency arises

[16] Rumbaugh v. Procunier, 753 F.2d 395, 398-99 (5th Cir. 1985).

during the hearing, the trial court shall enter an order appointing at least one, but no more than two, mental health professionals from lists submitted by the State and counsel for the petitioner.

Written Evaluations: The order shall direct that the petitioner be evaluated by the mental health professionals to determine petitioner's competency and that the appointed mental health professionals file written evaluations with the trial court within ten days of the appointment unless good cause is shown for later filing.

Subsequent Evidentiary Hearing: If a genuine issue regarding the petitioner's present competency exists after the evaluation, the trial court shall hold a separate hearing on the record, allowing the introduction of testimony, exhibits and evidence, to determine the petitioner's competency.

Burden of Proof: Petitioner bears the burden of proving competency to waive a post-conviction claim by clear and convincing evidence. Reid ex rel. Martiniano, 396 S.W.3d at 513.

Written Findings: The trial court shall file detailed written findings regarding the court's competency determination, which shall be included in the court's order granting or denying withdrawal of the petition.

Right to Reinstate Petition After Withdrawal: A competent death-sentenced inmate may revoke a waiver of post-conviction review so long as the revocation occurs **within thirty (30) days** of the trial court's order permitting the inmate to waive post-conviction review. Pike v. State, 164 S.W.3d 257, 266-67 (Tenn. 2005). This rule is **limited to** death-sentenced inmates who seek to revoke an **initial waiver of post-conviction relief** and

does not apply to death-sentenced inmates "who attempt to manipulate and to delay the judicial process by repeatedly seeking to waive and thereafter reinstate post-conviction review." Id.

10. Managing the Post-Conviction Proceedings

The trial judge should allow a reasonable time for a full and fair evidentiary hearing. Consideration should be given to the scheduling needs of counsel as well as the scheduling needs of the court. However, the court should also be mindful of the need to have such proceedings commenced in a timely manner. Additionally, the statute places certain time frames for handling post-conviction matters.

a. Scheduling

Once an amended petition is filed and counsel has been appointed, trial courts may want to enter a detailed scheduling order setting a date for the hearing; deadlines for filing pre-hearing motions; if necessary, a date for filing post-hearing arguments; and a date for entering the court's final order. Pursuant to Tenn. Code Ann. § 40-30-109(a), the scheduling order should not set a hearing date that is beyond four months from the entry of the order. While these dates are certainly fluid,[17] setting these parameters at the outset can be helpful. In nearly all capital post-conviction matters, the petitioner will be represented by counsel from the Office of the Post-Conviction Defender. Because this office represents petitioners across the entire state and has a substantial case load, it is helpful for the court to set some timelines for bringing these cases to

[17] In arguing for a continuance of a scheduled evidentiary hearing, counsel for one post-conviction petitioner cited to State v. Jones, 729 S.W.2d 683, 685 (Tenn. Crim. App. 1986), in which the Court of Criminal Appeals stated that "it is the general rule in Tennessee that statutory provisions which relate to the mode or time of doing an act to which the statute applies are not to be mandatory, but directory only"—in other words, nonbinding. Counsel also suggested that such statutes unconstitutionally encroach upon judicial authority. See, e.g., Trapp v. McCormick, 130 S.W.2d 122, 125 (Tenn. 1939).

completion. The statute requires that capital post-conviction matters be completed within one year of the filing of the petition. However, trial courts will often encounter multiple motions to continue post-conviction proceedings. Thus, courts must find a means of balancing counsel's need to have adequate time to prepare and the petitioner's right to have a full and fair hearing with the need for judicial economy and the statutory time limits for handling such matters.

Motion for Continuance

While capital cases are certainly more complex and may require additional time, the court is not required, simply upon the basis that a case is capital, to grant a continuance or multiple continuances. The appellate courts are replete with examples upholding the trial court's denial of a capital post-conviction petitioner's request for a continuance. See Lemaricus Davidson v. State, 2021 WL 3672797, at **15-18 (Tenn. Crim. App. Aug. 19, 2021) (post-conviction court did not abuse discretion in denying continuances even though only fifteen months elapsed between filing of pro se petition and issuance of final post-conviction order), perm. app. denied (Tenn. Dec. 8, 2021); see also Hugueley v. State, 2011 WL 2361824 (Tenn. Crim. App. June 8, 2011); Stevens v. State, 2006 WL 3831264 (Tenn. Crim. App. Dec. 29, 2006); Burns v. State, 2005 WL 3504990 (Tenn. Crim. App. June 7, 2005); Hall v. State, 2005 WL 2008176 (Tenn. Crim. App. June 28, 2005); Hodges v. State, 2000 WL 1562865 (Tenn. Crim. App. Oct. 20, 2000). These cases provide good examples for the types of scheduling challenges that may arise in capital post-conviction cases. The overriding consideration in these cases is (1) whether petitioner was provided a full and fair hearing despite being denied more time to investigate or prepare; and (2) whether petitioner was prejudiced by the trial court's denial of his/her motion for a continuance.

Essentially, the decision whether to grant a continuance rests

within the sound discretion of the trial court. State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995). The denial of a continuance will not be disturbed on appeal unless it appears the trial court abused its discretion resulting in prejudice to an appellant, namely that the failure "denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." Id. "A bare claim that additional investigation could have been conducted is not sufficient to demonstrate unfair prejudice so as to support a motion for continuance." Hodges v. State, 2000 WL 1562865, at *31. "Unless an appellant can show that his substantial rights were prejudiced by reason of the denial of his motion for continuance, the appellate court will conclude that there was no abuse of discretion by the trial court in denying the motion." Id.

b. Appointment of Experts and Approval of Investigative Funds

Tennessee Supreme Court Rule 28, section 6(B)(8):

> **Upon motion, in capital cases involving indigent petitioners, the court may authorize expenditure of funds for experts, investigation, or similar services in accordance with Rule 13, § 2B(10) of the Rules of the Supreme Court of Tennessee. The court's order granting or denying the motion shall include specific findings of fact and conclusions of law and shall, upon request, be filed under seal with the record.**

The trial court must specify in its order granting the requested services, the expert appointed, the hourly rate, and the total monetary amount approved.

Tennessee Supreme Court Rule 13 places caps on the amount of money the trial court can authorize for investigative services and all expert services in death penalty post-conviction cases. See Tenn. S. Ct. R. 13, § (5)(d)(4)-(5). These caps can be overcome if "the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence."

Id. Furthermore, "Expenses shall not be authorized or approved for expert tests or expert services if the results or testimony generated from such tests or services will not be admissible as evidence." Id., § 5(d)(6).

(1) Need Determination

[Tennessee Supreme Court Rule 13, § 5(a)(1)]
[Tenn. Code Ann. § 40-14-207(b)]

> **Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows, by reference to particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence.**

Tenn. S. Ct. R. 13, § 5(c)(3); see Owens v. State, 908 S.W.2d 923, 928 (Tenn. 1995); Stephen Lynn Hugueley v. State, 2011 WL 2361824 at *24 (Tenn. Crim. App. June 8, 2011); perm. app. denied, (Tenn. Dec. 13, 2011), reh'g denied, (Tenn. Jan. 11, 2012)

- *Ex Parte* Hearing
  An ex parte hearing is required for all Rule 13 motions for services. See Tenn. S. Ct. R. 13, § 5(a)(1)

- Requirement of Motion for **Experts or similar services**: each motion seeking funding for experts must include

  - The nature of the services requested (Tenn. S. Ct. R. 13, § 5(b)(2)(A));

  - The name, address, qualifications, and licensure status, as evidence by a curriculum

vitae or resume, of the person or entity proposed to provide services (id., § 5(b)(2)(B));

- The means, date, time, and location at which the services are to be provided (id., § 5(b)(2)(C)); and

- A statement of the itemized costs of the services, including the hourly rate, and the amount of any additional or incidental costs (id., § 5(b)(2)(D)).

- Requirement of Motion for **Investigative or Similar Services**: each motion seeking funding for investigators or similar services must include

  - The type of investigation to be conducted (Tenn. S. Ct. R. 13, § 5(b)(3)(A));

  - The specific facts that suggest the investigation likely will result in admissible evidence (id., § 5(b)(3)(B));

  - An itemized list of anticipated expenses for the investigation (id., § 5(b)(3)(C));

  - The name and address of the person or entity proposed to provide the services (id., § 5(b)(3)(D)); and

  - A statement indicating whether the person satisfies the licensure requirement of this rule (id., § 5(b)(3)(E)).

(2) Experts Generally

The admissibility of expert testimony, the qualification of expert witnesses, and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court. State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992). A witness who is qualified in a particular field may testify in the form of an opinion if the specialized knowledge of the witness will substantially assist the trier of fact in understanding evidence or determining a fact at issue. Tenn. R. Evid. 702. A trial court's ruling will not be overturned on appeal absent a clear abuse of discretion in admitting or excluding the expert testimony. State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002).

Some examples of typical requests include:

- Mitigation Specialist
- General Investigative Services
- Mental Health Experts
- Expert Attorney

In post-conviction matters involving claims of ineffective assistance of counsel, petitioner may attempt to offer expert testimony from an attorney skilled in handling capital cases to offer testimony regarding the standards of practice expected of defense attorneys in capital cases and an opinion as to whether petitioner's trial counsel met those standards.

While trial courts may allow such testimony, appellate courts have held that the admission of this type of testimony is purely discretionary and have noted that where trial courts have considerable experience handling capital cases such testimony may be unnecessary to assist

the court in ruling on the post-conviction petition.

11. Resolution of Post-Conviction Proceedings Before Hearing

Through the years, post-conviction courts at times have approved agreements between the State and a petitioner's attorney to "settle" or "resolve" the case before a final hearing. Usually, an agreement will involve the State agreeing to have the petitioner taken off death row in return for the petitioner waiving future challenges to his convictions or sentences.

Two Tennessee appellate opinions have made clear that such "agreements" **cannot** occur unless the post-conviction court enters an order finding the petitioner is **entitled to relief** on a basis recognized under the post-conviction statutes. These cases, examined below, are Harold Wayne Nichols v. State, 2019 WL 5079357 at *2 (Tenn. Crim. App. Oct. 10, 2019), perm. app. denied (Tenn. Jan. 15, 2020), and Abu-Ali Abdur'Rahman v. State, 2020 WL 7029133 (Tenn. Crim. App. Nov. 30, 2002), no perm. app. filed.

a. Nichols v. State

In Nichols, death row inmate Harold Wayne Nichols filed a motion to reopen his post-conviction proceedings in June 2016. The post-conviction court entered an order concluding the petitioner presented a "colorable claim" for reopening the post-conviction proceedings. 2019 WL 5079357 at *2. The petitioner filed an amended petition raising several issues, including a motion to reopen based on additional grounds and claims which were not covered under either the exception to the statute of limitations or the motion to reopen statute. Id. at *3.

The parties later informed the court they had reached an agreement; the State informed the court that the State "was prepared to concede error and enter into an agreement whereby Petitioner's sentence would be modified and his petition withdrawn." Id. The post-conviction court expressed concern

that "a valid basis for post-conviction relief had not been established" and such a valid basis was a requirement for "the parties entering a settlement agreement modifying the sentence." Id. The post-conviction court set a future hearing and permitted the parties to file additional pleadings, but shortly before the hearing the post-conviction court summarily dismissed the motion to reopen because (1) the Supreme Court opinions cited by the petitioner did not constitute new rules of constitutional law requiring retroactive application; (2) the petitioner's other claims were waived, time-barred, or previously determined, and (3) the court could not "accept ... [the] proposed settlement agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." Id.

On appeal, the Court of Criminal Appeals affirmed the trial court's ruling. The appellate court concluded the cases cited by the petitioner did not entitle him to reopen his petition, id. at *8, and the petitioner's other claims raised in the amended petition were either previously determined or waived, id. at *10. The appellate court also concluded the trial court acted properly in summarily dismissing the petition even after setting an evidentiary hearing. Id. at *11.

As relevant to the current section of this bench book, the Court of Criminal Appeals concluded the trial court properly refused to enter the agreed order, as it had no authority to do so:

> *Clearly, the post-conviction court's authority to vacate a judgment, order a delayed appeal, or enter any other "appropriate order" is contingent upon the court's finding that the judgment is void or voidable due to an infringement of the petitioner's constitutional rights. See Wilson v. State, 724 S.W.2d 766, 768 (Tenn. Crim. App. 1986) (holding that trial court's grant of delayed appeal was inappropriate where there was no finding of constitutional deprivation on the face of the order). Only upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an*

*agreement to settle the case without a new trial or sentencing hearing. See State v. Boyd, 51 S.W.3d 206, 211-12 (Tenn. Crim. App. 2000). As this Court has noted, "the post-conviction law is not for the purpose of providing sentence modifications" but for remedying constitutional violations. Leroy Williams v. State, No. 03C01-9209-CR-00306, 1993 WL 243869, at *3 (Tenn. Crim. App. July 6, 1993) (citing State v. Carter, 669 S.W.2d 707 (Tenn. Crim. App. 1984)).*

Moreover, the post-conviction court did not abuse its discretion in refusing to accept the District Attorney General's concession of error on Petitioner's post-conviction claims. See State v. Hester, 324 S.W.3d 1, 69 (Tenn. 2010) (holding that a court is not required to accept the State's concession). Indeed, the post-conviction court acted well within its authority by independently analyzing the issues to determine whether the concession reflected an accurate statement of the law. See Barron v. State Dep't of Human Servs., 184 S.W.3d 219, 223 (Tenn. 2006); see also State v. Shepherd, 902 S.W.2d 895, 906 (Tenn. 1995) (independently analyzing the defendant's death sentence after finding "no legal basis in this record for outright modification of the sentence to life," despite the State's concession at oral argument). The Post-Conviction Procedure Act requires the post-conviction court to "state the findings of fact and conclusions of law with regard to each ground" in its final order disposing of the post-conviction petition, regardless of whether it is granting or denying relief. T.C.A. § 40-30-111(b); Tenn. Sup. Ct. R. 28, § 9(A); see State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984) (noting that this is a mandatory requirement designed to facilitate appellate review of the post-conviction proceedings). The post-conviction court did not act arbitrarily or abuse its discretion in following the statutory requirements of the Post-Conviction Procedure Act.

*In the absence of a finding of constitutional violation sufficient to grant post-conviction relief, the post-conviction court is without jurisdiction to modify a final judgment. See Delwin O'Neal v. State, No. M2009-00507-CCA-R3-PC, 2010 WL 1644244, at *2 (Tenn. Crim. App. Apr. 23, 2010) (affirming trial court's finding that it lacked jurisdiction over a post-conviction petitioner's request for a reduction of sentence after constitutional claims were abandoned), perm. app. denied (Tenn. Sept. 3, 2010). Petitioner's reliance on case law addressing a trial court's authority to accept a plea agreement to resolve pending charges pre-trial is misplaced given that Petitioner's convictions have long since become final. "[O]nce the judgment becomes final in the trial court, the court*

> *shall have no jurisdiction or authority to change the sentence in any manner[,]" T.C.A. § 40-35-319(b), except under certain limited circumstances "authorized by statute or rule."* State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991);* see, e.g.*, T.C.A. § 40-35-212; Tenn. R. Crim. P. 35, 36, 36.1;* see also Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999) (noting the availability of habeas corpus and post-conviction to collaterally attack a conviction or sentence that has become final). "[J]urisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties."* Moore*, 814 S.W.2d at 383 (citing* State v. Hamlin*, 655 S.W.2d 200 (Tenn. Crim. App. 1983)). "It is well-settled that a judgment beyond the jurisdiction of a court is void."* Boyd*, 51 S.W.3d at 210 (citing* State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996));* see also Lonnie Graves v. State*, No. 03C01-9301-CR-00001, 1993 WL 498422, at *1 (Tenn. Crim. App. Dec. 1, 1993) (citing* State v. Bouchard*, 563 S.W.2d 561, 563 (Tenn. Crim. App. 1977)) (holding that "[t]he purported modification of an order that has 'ripened' into a final judgment is void" despite the agreement of the parties). To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution.* See Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000);* State v. Dalton*, 109 Tenn. 544, 72 S.W. 456, 457 (Tenn. 1903). Thus, the post-conviction court did not err in refusing to accept the proposed settlement agreement and modify a final judgment when it lacked the statutory authority to do so under the Post-Conviction Procedure Act.*

Nichols, 2019 WL 5079357 at **11-12

b. Abu-Ali Abdur'Rahman v. State

In Abdur'Rahman, the second case to be addressed by the appellate courts, Abdur'Rahman (formerly James Jones) filed a motion to reopen his post-conviction petition in June 2016, basing the petition on several recent United States Supreme Court opinions. 2020 WL 7029133 at *1. The post-conviction court entered an order granting the motion in part and denying it in part, concluding two of the cases cited by the petitioner did not entitle him to have his post-conviction proceedings reopened, but the court's order also stated it would hold a hearing as to whether

the petitioner was entitled to relief on the third case, Foster v. Chatman.[18] Id. at *2.

No activity occurred in Mr. Abdur'Rahman's case over the next three years. In August 2019, the petitioner filed a "Pre-Hearing Memorandum" arguing Foster created a new rule of law that applied retroactively to his post-conviction proceedings. Id. An evidentiary hearing was held, at which both parties agreed the petitioner was entitled to relief under Foster based upon the actions of the original prosecuting attorney during jury selection. Id. at *3. The parties submitted a proposed agreed order to the trial court, the relevant text of which was quoted in the Court of Criminal Appeals' opinion:

> *It appears from the signatures appearing below of the Petitioner and his counsel, and of the attorney for the State, that the parties stipulate, and therefore the Court finds, as follows:*
>
> *...*
>
> *G. The State and the Petitioner have agreed to settle this case according to the terms set forth below, subject to Court approval. The State represents that this settlement will serve the ends of justice.*
>
> *H. By signing below, Petitioner represents to the Court that he understands the terms of this settlement which involve the waiver of any claims he may have in this case, subject to the terms of this Order, and that he believes this settlement is in his best interest.*
>
> *ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED as follows:*
>
> *1. The Court's judgment for Count 1 convicting Petitioner of First Degree Murder and sentencing him to death is hereby amended, such that Petitioner's sentence for Count 1 is and shall be Life in*

[18] 578 U.S. ___, 136 S. Ct. 1737 (2016). In the intervening years between Mr. Abdur'Rahman's petition and the trial court's order granting relief, several courts concluded Foster did not entitle a petitioner to relief, as Foster did not create a new rule of constitutional law requiring retroactive application.

> *Prison, and not Death.*
>
> *2. All other provisions of the Court's judgments for Counts 1, 2 and 3 shall remain in full force and effect.*
>
> *3. All of Petitioner's claims in this case are deemed waived by Petitioner and are therefore DISMISSED, subject to the terms of this Agreed Order.*

Id.

At a subsequent hearing at which the trial judge announced he was entering the agreed order, the judge acknowledged that "an issue arose as to whether parties could agree to set aside a jury verdict such as the one presented to this court." Id. The judge said his review of the relevant law left him with the impression that he could so resolve the case. Id. The trial judge also opined "the prosecuting office has the authority to remedy a legal injustice under circumstances such as these before us. ... [T]he [c]ourt believes the parties reached an equitable and just resolution and, therefore, approves the agreed order." Id. (one alteration added). On the judgment form, the trial judge wrote the following in the "special conditions" section:

> *Judgment amended pursuant to agreed order signed by the court on 8/28/19 which was entered in consideration of potential unconstitutional conviction and sentence pursuant to the provisions of [T.C.A. §] 40-30-101 et seq and [T.C.A. §] 40-30-117 (post-conviction statutes). In consideration of this modification of judgment, [Petitioner] waives all appeals and claims related to this matter.*

Id. at *4 (alterations in original).

The State, through the Attorney General, appealed. On appeal, the Court of Criminal Appeals concluded the Attorney General could appeal the lower court's decision despite the Attorney General's position differing from that of the District Attorney General, who represented the State in the trial court. See id. at **5-9.

As relevant to this section, the Court of Criminal Appeals concluded the trial court had no jurisdiction to enter the agreed order ("AO") because the court did not state a basis upon which the petitioner was entitled to relief:

> *The problem in this case arises from the fact that, although the post-conviction court had jurisdiction over Petitioner's reopening of the post-conviction proceedings, it did not have jurisdiction to amend Petitioner's death sentence to life imprisonment under the terms of the AO. "There obviously is an important distinction between the right to seek relief in a post-conviction proceeding and the right to have relief in a post-conviction proceeding." Shazel v. State, 966 S.W.2d 414, 415-16 (Tenn. 1998) (emphasis in original). "[I]n order for a Court to have the jurisdiction to enter a decree in a particular case it must not only have the general jurisdiction over the subject matter involved and over the parties, it must also have the power to grant the particular relief decreed." Brown v. Brown, 281 S.W.2d 492, 503 (Tenn. 1955). Rather than granting Petitioner post-conviction relief upon a finding of a constitutional violation, the AO in this case specifically stated that Petitioner's post-conviction claims were waived and dismissed. Thus, the post-conviction court did not have jurisdiction to amend Petitioner's sentence because his original judgment of conviction remained final. See Delwin O'Neal v. State, No. M2009-00507-CCA-R3-PC, 2010 WL 1644244, at *3 (Tenn. Crim. App. Apr. 23, 2010) (affirming trial court's finding that it lacked jurisdiction over a post-conviction petitioner's request for a reduction of sentence after constitutional claims were abandoned), perm. app. denied (Tenn. Sept. 3, 2010).*
>
> *"As a general rule, a trial court's judgment becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed." Boyd, 51 S.W.3d at 210 (citing State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996)). "[O]nce the judgment becomes final in the trial court, the court shall have no jurisdiction or authority to change the sentence in any manner[,]" except under certain limited circumstances. T.C.A. § 40-35-319(b); see State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991). "[J]urisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties." Moore, 814 S.W.2d at 383 (citing State v. Hamlin, 655 S.W.2d 200 (Tenn. Crim. App. 1983)). "[A]ny attempt by the trial court to amend the*

*judgment, even with the agreement of the [d]efendant and the State, is void." Boyd, 51 S.W.3d at 210 (citing Pendergrass, 937 S.W.2d at 837; Moore, 814 S.W.2d at 383); see also Lonnie Graves v. State, No. 03C01-9301-CR-00001, 1993 WL 498422, at *2 (Tenn. Crim. App. Dec. 1, 1993). "To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution." Harold Wayne Nichols, 2019 WL 5079357, at *12 (citing Workman v. State, 22 S.W.3d 807, 808 (Tenn. 2000); State v. Dalton, 72 S.W. 456, 457 (Tenn. 1903)).*

The Post-Conviction Procedure Act provides a means for seeking relief from an otherwise final judgment "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." T.C.A. § 40-30-103; see Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999) (noting the availability of post-conviction proceedings "to collaterally attack a conviction and sentence which have become final"). With regard to the disposition of a post-conviction petition, the statute provides as follows:

> *If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, including a finding that trial counsel was ineffective on direct appeal, the court shall vacate and set aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.*

T.C.A. § 40-30-111(a). The language of this statute is significant in two respects. First, it limits the available relief that a post-conviction court may grant to either vacating the original judgment or ordering a delayed appeal. See T.C.A. § 40-30-113 (describing the procedures for granting a delayed appeal). Vacating a judgment allows the case to "be returned to the particular stage needed to remedy the constitutional wrong found to have occurred," whether that be the pre-trial stage or the pre-sentencing stage. Sills, 884 S.W.2d at 142-43. Significantly, the post-conviction statute "does not authorize a trial judge to reduce a sentence[.]" State v. Carter, 669 S.W.2d 707, 708 (Tenn. Crim. App. 1984). Second, the post-conviction court's authority to grant relief "is contingent upon the court's finding that the judgment is void or voidable due to an

*infringement of the petitioner's constitutional rights." Harold Wayne Nichols, 2019 WL 5079357, at *11; see Wilson v. State, 724 S.W.2d 766, 768 (Tenn. Crim. App. 1986) (holding that trial court's grant of a delayed appeal was inappropriate where there was no finding of a constitutional violation on the face of the order). "In the absence of a finding of constitutional violation sufficient to grant post-conviction relief, the post-conviction court is without jurisdiction to modify a final judgment." Harold Wayne Nichols, 2019 WL 5079357, at *12. Thus, taking these provisions of the statute together, it is clear that "[o]nly upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an agreement to settle the case without a new trial or sentencing hearing." Id., at *11 (citing Boyd, 51 S.W.3d at 211-12).*

*Petitioner asserts that much of this Court's opinion in Harold Wayne Nichols regarding a post-conviction court's jurisdiction to accept a settlement agreement was dicta and, therefore, is not controlling. The term "obiter dictum" refers to a statement made by the court that is not necessary for a determination of the issue and, although it may be persuasive, it generally is not binding as precedent within the rule of stare decisis. See Staten v. State, 232 S.W.2d 18, 19 (Tenn. 1950). 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[.]" Holder v. Tenn. Judicial Selection Comm'n, 937 S.W.2d 877, 882 (Tenn. 1996). In Harold Wayne Nichols, the petitioner was specifically challenging the post-conviction court's conclusion that it could not accept the proposed settlement agreement "where there is no claim for post-conviction relief before this [c]ourt which should survive this [c]ourt's statutorily required preliminary order." 2019 WL 5079357, at *11. Thus, dicta or not, the question of the post-conviction court's authority to accept a proposed settlement agreement without following the statutory requirements of the Post-Conviction Procedure Act was squarely before this Court.*

Alternatively, Petitioner argues that Harold Wayne Nichols, which was decided less than two months after the entry of the AO in this case, represents a change in the law and cannot be applied to retroactively invalidate the AO. Petitioner asserts on appeal that this Court's unpublished opinion in Joseph Matthew Maka, 2004

*WL 2290493, which was relied upon by the post-conviction court, was "the only appellate authority on point" regarding the validity of settlement agreements in post-conviction cases at the time the AO was entered. However, Joseph Matthew Maka simply stands for the proposition that the trial court loses jurisdiction to amend or vacate an agreed order granting post-conviction relief once it becomes final. Id. at *2 (citing State v. Peele, 58 S.W.3d 701, 705-06 (Tenn. 2001)); see also Anthony E. Perry v. State, No. W2006-02236-CCA-R3-PC, 2008 WL 2483524, at *4 (Tenn. Crim. App. June 19, 2008) (relying on Joseph Matthew Maka in holding that the post-conviction court lost jurisdiction to vacate its order denying relief after it became final), perm. app. denied (Tenn. Oct. 27, 2008). Although the Joseph Matthew Maka court vacated the post-conviction court's subsequent order denying relief and reinstated the earlier agreed order, 2004 WL 2290493, at *3, the court did not specifically address the propriety of the agreed order itself. Moreover, we would note that, unlike this case, the agreed order in Joseph Matthew Maka did not state that the defendant was waiving all claims or that the post-conviction court was amending an otherwise final judgment. Instead, it stated that the post-conviction petition was "granted as to each issue and claim for relief raised therein," and that it appeared that the defendant's conviction for second degree murder was vacated and he stood to be retried for first degree murder. Id., at *1-2. Thus, Joseph Matthew Maka does not support the proposition that the post-conviction court had the jurisdiction to enter the AO in this case, which amended Petitioner's final judgment of conviction in the absence of any finding of a constitutional violation.*

Moreover, Petitioner's argument overlooks this Court's published opinion in Boyd, which was cited in Harold Wayne Nichols. In Boyd, the defendant filed a petition for post-conviction relief alleging ineffective assistance of counsel after the direct appeal of his guilty plea was dismissed for failure to properly preserve his certified questions of law. 51 S.W.3d at 208. The prosecutor agreed that the defendant was entitled to post-conviction relief, and the post-conviction court entered an agreed order granting the defendant a delayed appeal pursuant to Tennessee Code Annotated section 40-30-213(a) (now renumbered as 40-30-113(a)). Id. However, on appeal, the State Attorney General argued "that the trial court did not have jurisdiction to amend the final judgment" to include the certified questions of law. Id. at 209. This Court agreed, concluding that the post-conviction court "did not have the jurisdiction to amend the judgment when it granted the

> *delayed appeal" despite the agreement of the parties. Id. at 210. This Court concluded, however, that defendants in such a situation were not "left without a remedy" in that the post-conviction court, upon a finding of ineffective assistance of counsel according to the appropriate standard, could "vacate the judgment of conviction and allow the defendant to withdraw the guilty plea" pursuant to Tennessee Code Annotated section 40-30-211(a) (now renumbered as 40-30-111(a)). Id. at 211. Thereupon, the parties are "placed back in the position they occupied prior to the guilty plea" where they could "re-enter into such a plea agreement[.]" Id. at 212. The trial court could then "conduct another plea hearing and enter a new judgment of conviction, explicitly reserving the certified questions of law." Id. Thus, Boyd stands for the proposition that the post-conviction court cannot accept an agreement of the parties to bypass the statutory requirements of the Post-Conviction Procedure Act to amend a final judgment of conviction.*
>
> *Because the AO in this case stated that Petitioner's claims were waived and dismissed, the post-conviction court never made a finding of a constitutional violation as required to grant relief under the Post-Conviction Procedure Act. Indeed, the amended judgment states that it was entered "in consideration of potential unconstitutional conviction and sentence" (emphasis added). Without finding that Petitioner's conviction or sentence were constitutionally infirm, the post-conviction court did not have the authority to vacate Petitioner's original judgment under Tennessee Code Annotated section 40-30-111(a). Thus, because Petitioner's original judgment was never vacated, it remained final, and the post-conviction court had no jurisdiction to amend it, despite the agreement of the parties. See Boyd 51 S.W.3d at 210 (citing Pendergrass, 937 S.W.2d at 837; Moore, 814 S.W.2d at 383). We conclude that the proper remedy in this case is to vacate both the amended judgment and the AO, thereby placing the parties back into the positions they occupied at the time of the evidentiary hearing on August 28, 2019. See State v. Santos Macarena, No. M2005-01905-CCA-R3-CO, 2006 WL 1816326, at *3 (Tenn. Crim. App. June 27, 2006), no perm. app. filed.*

Abdur'Rahman, 2020 WL 7029133 at **11-14. No application for permission to appeal was filed with the Tennessee Supreme Court.

NOTE: On remand, the parties again agreed Mr.

Abdur'Rahman was entitled to relief. The petitioner pled guilty to one count each of first degree murder, assault with intent to commit first degree murder, and armed robbery. He received life sentences for each conviction. The Tennessee Attorney General's Office did not appeal despite the office's "significant concerns about [the trial court order's] legality."[19]

B. PETITIONS FOR POST-CONVICTION DNA ANALYSIS

Pursuant to the Post-Conviction DNA Analysis Act of 2001, Tenn. Code Ann. §§ 40-30-301 through -313,

> **a person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.**

Tenn. Code Ann. § 40-30-303 (emphasis added).

1. "At Any Time"

The language "at any time" contained in the statute means there is no statute of limitations for filing a petition for DNA analysis under the Act. Willie Tom Ensley v. State, 2003 WL 1868647 at *2 (Tenn. Crim. App. Apr. 11, 2003). The Tennessee Supreme Court has stated that "this provision has no statutory time limit and gives petitioners the

[19] See letter from Attorney General Herbert Slatery, III, to Davidson County District Attorney General Glenn Funk, dated December 10, 2021, located at https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2021/pr21-49-letter.pdf (accessed Dec. 16, 2021).

opportunity to request analysis at 'any time,' whether or not such a request was made at trial." Griffin v. State, 182 S.W.3d 795, 799 (Tenn. 2006).

> **NOTE:** The Tennessee Court of Criminal Appeals has concluded that the language of section 40-30-303, permitting "a person convicted of and sentenced for the commission" of certain offenses to bring a post-conviction DNA action "at any time" does not permit the estate of an inmate to file a post-conviction DNA claim on the inmate's behalf after the inmate has died. See Estate of Sedley Alley v. State, 2021 WL 1828501, at **23-26 (Tenn. Crim. App. May 7, 2021). perm. app. denied, (Tenn. Sept. 22, 2021).

There is no prohibition against simultaneous post-conviction petitions under the DNA Act and direct appellate review; thus, a petitioner may file a petition for post-conviction DNA analysis simultaneous to his/her direct appeal. Waters v. State, 2003 WL 1191866 (Tenn. Crim. App. Mar. 11, 2003). The statute is currently silent on the issue of successive petitions for DNA Analysis, but the Court of Criminal Appeals, in a footnote, stated, "While the Post-Conviction DNA Analysis Act does not statutorily prohibit a defendant from filing unlimited successive petitions requesting DNA testing, neither can this Court condone such piecemeal litigation aimed at delaying the execution of a sentence." Sedley Alley v. State, 2006 WL 1703820 at *24 n.3 (Tenn. Crim. App. June 22, 2006) ("Alley II"), abrogated in part on other grounds by Powers v. State, 343 S.W.3d 36 (Tenn. 2011).

A petitioner, under the Tennessee Act, is not required to plead with "specificity" and, unlike other states, is not required to demonstrate that identity was an issue at trial. Ensley v. State, 2003 WL 1868647 at *2.

2. Specific meaning of "DNA analysis"

"The Act, by all accounts, provides for DNA testing and analysis but does not provide for additional scientific testing not encompassed within the clearly defined term 'DNA analysis.'" Bondurant v. State,

208 S.W.3d 424, 431 (Tenn. Crim. App. 2006).

3. Appointment of Counsel

Pursuant to Tenn. Code Ann. § 40-30-307, "The court may, at any time during proceedings instituted under this part, appoint counsel for an indigent petitioner."

Since Tenn. Code Ann. § 40-30-206 assigns to the Office of the Post-Conviction Defender the representation of indigent capital defendants in all post-conviction matters, it is likely that such petitions will be initiated by counsel for the Post-Conviction Defender's Office.

4. Prima Facie Case

The Act addresses two categories of cases in which DNA analysis might be appropriate. Griffin v. State, 182 S.W.3d 795, 798 (Tenn. 2006). In the first category, DNA Analysis is mandatory and must be ordered where the petitioner established a *prima facie* case that there is a reasonable probability that DNA testing would lead to exculpatory results. If the state contests the presence of any qualifying criteria and it is apparent that each prerequisite cannot be established, the trial court has the authority to dismiss the petition. Powers v. State, 343 S.W.3d 36, 48 (Tenn. 2011); William D. Burford v. State, 2003WL 1937110 (Tenn. Crim. App. Apr. 24, 2003). The Act does not specifically provide for a hearing as to the qualifying criteria and, in fact, authorizes a hearing only after DNA analysis produces a favorable result. William D. Burford, 2003 WL 1937110 at *6; Tenn. Code Ann. §§ 40-30-309, -312. The Act specifically contemplates summary dismissal under appropriate circumstances, and failure to meet *any* of the qualifying criteria is fatal to the action. Burford, 1937110 at *6.

The second avenue for relief under a petition for DNA Analysis is discretionary. Where petitioner presents a *prima facie* case that potential DNA testing has a reasonable probability of producing results which would have rendered a more favorable verdict or sentence had the results been known at the time of trial, then the court may, in its

discretion order appropriate relief. Tenn. Code Ann. § 40-30-305.

In making its determination a trial court may consider all the evidence available, including the evidence at trial and/or any stipulations of fact by the petitioner or his counsel and the state; and the opinions of appellate courts on either direct appeal of the conviction, post-conviction proceedings, or habeas corpus actions. Ensley, 2003 WL 1868647 at *3; see also Anthony Darrell Hines v. State, 2008 WL 271941 (Tenn. Crim. App. Jan. 29, 2008). Additionally, previous incriminating statements by the petitioner, as well as pleas and defenses employed by petitioner are relevant to the trial court's inquiry. Clayton Turner v. State, 2004 WL 735036 at *3 (Tenn. Crim. App. Apr. 1, 2004); David I. Tucker v. State, 2004 WL 115132 at *2 (Tenn. Crim. App. January 23, 2004).

The Tennessee Supreme Court has concluded the DNA testing act permits a petitioner access to a DNA database if a positive match between the crime scene DNA and a profile contained within the database (i.e., someone other than the petitioner) would create a reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained or would have rendered a more favorable verdict or sentence if the results had been previously available. See Powers v. State, 343 S.W.3d 36, 49-50 (Tenn. 2011).

Because states have no obligation to provide for post-conviction relief of any form, including DNA testing, there is no inherent right to a certain type or method of testing when seeking such relief.

a. Exculpatory Results

After notice to the prosecution and an opportunity to respond, the court **shall** order DNA analysis if it finds:

> **(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;**

> **(2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;**
>
> **(3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and**
>
> **(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.**

Tenn. Code Ann. § 40-30-304 (emphasis added*).*

The Post-Conviction DNA Analysis Act was enacted in recognition of the possibility that a person has been wrongfully convicted or sentenced. Jack Jay Shuttle v. State, 2004 WL 199826 (Tenn. Crim. App. Dec. 16, 2003). In this regard, **the post-conviction court is to assume that the "DNA analysis will reveal exculpatory results** in the court's determination as to whether to order DNA testing." Id. (emphasis added).

If the court finds petitioner has failed to establish one or more of the above qualifying criteria, the court should dismiss the petition.

Meaning of "Reasonable Probability" under section 40-30-304(1): "The definition of 'reasonable probability' has been well-established in other contexts, and is traditionally articulated as 'a probability sufficient to undermine confidence in the outcome.'" Powers, 343 S.W.3d at 54 (quoting Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009)). "[P]rior to a mandatory order of testing, a petitioner's argument must merely establish 'a probability sufficient to undermine confidence' in the decision to prosecute or in the conviction had the State or the jury known of exculpatory DNA testing results." Powers, 343 S.W.3d at 55.

b. More Favorable Verdict or Sentence

Under Tenn. Code Ann. § 40-30-305, the ordering of DNA analysis is discretionary. The court **may** order DNA analysis if it finds that:

> **(1) A reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;**
>
> **(2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;**
>
> **(3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and**
>
> **(4) The application for analysis is made for the purposes of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.**

Tenn. Code Ann. § 40-30-305 (emphasis added).

What is "reasonable probability" under section 40-30-305?

As with section 40-30-304(1) above, "A 'reasonable probability' of a different result [under section 40-30-305(1)] exists when the evidence at issue, in this case potentially favorable DNA results, undermines confidence in the outcome of the prosecution." Sedley Alley v. State, 2006 WL 1703820 (Tenn. Crim. App. June 22, 2006) ("Alley II"), abrogated in part on other grounds by Powers v. State, 343 S.W.3d 36 (Tenn. 2011); see also Powers, 343 S.W.3d at 54 n.27; State v. Workman, 111 S.W.3d 10, 18 (Tenn. Crim. App. 2002). However, notwithstanding its consideration of the "potentially favorable" DNA testing results, the reviewing court cannot ignore the existing evidence. See Sedley Alley v. State, 2004 WL 1196095 (Tenn. Crim. App. May

26, 2004) ("Alley I"), abrogated in part on other grounds by Powers v. State, 343 S.W.3d 36 (Tenn. 2011). That is, the convicted **defendant requesting post-conviction DNA analysis is not provided a presumption of innocence**, and the reviewing court need not ignore all the other proof supporting the conviction. Id. However, "Courts ... should guard against denying petitions for post-conviction DNA testing under the Act based on an appellate court's prior determination that the evidence on direct or post-conviction appeal, which was reviewed in the light most favorable to the State, was sufficient to convict." Powers, 343 S.W.3d at 57.

If the court finds petitioner has failed to establish one or more of the above qualifying criteria, the court should dismiss the petition.

5. Cost of Analysis

a. Tenn. Code Ann. § 40-30-304 (exculpatory results)

If an order granting analysis is issued pursuant to this section of the Act, then the **court shall** also **order payment** for the analysis. Tenn. Code Ann. § 40-30-306.

b. Tenn. Code Ann. § 40-30-305 (favorable results)

If an order granting analysis is issued, then the **court may require the petitioner to pay** for the analysis. Tenn. Code Ann. § 40-30-306.

6. Laboratory Results
[Tenn. Code Ann. § 40-30-308]

If previous testing was performed by either party, the court may order the parties to turn over the laboratory reports prepared in connection with the DNA testing and any underlying data and laboratory notes.

If the court orders DNA analysis, it shall also order the production of any laboratory reports prepared in connection with the analysis and may, in its discretion, order the production of the underlying data and laboratory notes.

If the court orders analysis, it shall select a laboratory that meets the standards adopted pursuant to the DNA Identification Act of 1994.[20] See Tenn. Code Ann. § 40-30-310.

7. Preservation of Evidence
[Tenn. Code Ann. § 40-30-309]

If the petition is not summarily dismissed by the trial court, the court shall order that "**all evidence in the possession of the prosecution, law enforcement, laboratory, or the court that could be subjected to DNA analysis must be preserved during the pendency of the proceeding**."

8. Final Order
[Tenn. Code Ann. § 40-30-312]

Once the court has found the contents of the petition establish a *prima facie* case and the trial court has determined all statutory prerequisites are present and has ordered DNA analysis, if the results of the analysis are not favorable to the petitioner, the court shall dismiss the petition. If the results are favorable, the court shall order a hearing, and thereafter make such orders as are required.

C. PETITIONS FOR POST-CONVICTION FINGERPRINT ANALYSIS

In 2021, the General Assembly enacted the "Post-Conviction Fingerprint Analysis Act of 2021," Tennessee Code Annotated sections 40-30-401 through -413 (effective July 1, 2021). The language of the new fingerprint

[20] The DNA Identification Act of 1994, referenced in this section, is codified at 42 U.S.C. § 14131 et seq.

analysis act borrows heavily from the post-conviction DNA act, so it would seem fairly reasonable for a trial judge to apply the reasoning of appellate opinions interpreting the DNA analysis act to fingerprint analysis claims.

1. Specific Meaning of "Fingerprint Analysis"

> **As used in this part, unless the context otherwise requires, "fingerprint analysis" means the process through which fingerprints are analyzed and compared for identification purposes, including, but not limited to, latent print comparisons and searches in fingerprint databases.**

Tenn. Code Ann. § 40-30-402.

2. Appropriate Party to Initiate Post-Conviction Fingerprint Action

Unlike the post-conviction DNA analysis act, which provides only that a person convicted for certain offenses may file a post-conviction DNA petition, the Post-Conviction Fingerprint Analysis Act provides that "an appropriate party" may bring such an action "at any time." Tenn. Code Ann. § 40-30-403. The statute defines appropriate party as (1) "A court on its own motion;" (2) "A district attorney general;" or (3) "A person convicted of and sentenced for the commission or attempted commission" of several offenses, including first degree murder, any class A or class B felony, any lesser included offense of these three categories, or "Any other offense, at the discretion of the court." Tenn. Code Ann. § 40-30-403(b)(1)-(3) and 40-30-403(b)(3)(A)-(E).

3. Appointment of Counsel

As with post-conviction DNA proceedings, in post-conviction fingerprint claims, "The court may, at any time during proceedings instituted under this part, appoint counsel for an indigent petitioner." Tenn. Code Ann. § 40-30-407. Indigent capital defendants will likely have their petitions initiated by the Post-Conviction Defender's Office, or possibly the federal defender's office if the petitioner has an active case in the federal courts.

4. Prima Facie Case

As in the DNA analysis act, the Post-Conviction Fingerprint Analysis Act addresses two categories of cases in which fingerprint analysis might be appropriate. In the first category, fingerprint testing is mandatory and must be ordered where the petitioner established a *prima facie* case that there is a reasonable probability that DNA testing would lead to exculpatory results. Tenn. Code Ann. § 40-30-404. The second avenue for relief under a petition for fingerprint analysis is discretionary. Where petitioner presents a *prima facie* case that potential fingerprint testing has a reasonable probability of producing results which would have rendered a more favorable verdict or sentence had the results been known at the time of trial, then the court may, in its discretion order appropriate relief. Tenn. Code Ann. § 40-30-405.

As stated above, the Tennessee Supreme Court has concluded the DNA testing act permits a petitioner access to a DNA database if a positive match between the crime scene DNA and a profile contained within the database (i.e., someone other than the petitioner) would create a reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained or would have rendered a more favorable verdict or sentence if the results had been previously available. See Powers v. State, 343 S.W.3d 36, 49-50 (Tenn. 2011). Thus, it appears reasonable to conclude a fingerprint analysis petition is proper if it aims to match crime scene fingerprints to prints that may be in a federal or state database.

a. Exculpatory Results

After notice to the prosecution and an opportunity to respond, the court **shall** order fingerprint analysis if it finds:

> **(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis;**
>
> **(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;**

(3) The evidence was never previously subjected to fingerprint analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-404. The underlined text above is not contained in the corresponding section of the post-conviction DNA analysis act.

b. More Favorable Verdict or Sentence

Under Tenn. Code Ann. § 40-30-405, the ordering of fingerprint analysis is discretionary. The court **may** order DNA analysis if it finds that:

(1) A reasonable probability exists that analysis of the evidence will produce fingerprint results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;

(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;

(3) The evidence was never previously subjected to fingerprint analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior analysis; and

(4) The application for analysis is made for the purposes of demonstrating innocence and not to unreasonably delay the

execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-305. As with section -404, the underlined text does not appear in the corresponding section of the post-conviction DNA analysis act.

5. Cost of Analysis

a. Tenn. Code Ann. § 40-30-404 (exculpatory results)

If an order granting analysis is issued pursuant to this section of the Act, then the **court shall** also **order payment** for the analysis. Tenn. Code Ann. § 40-30-406.

b. Tenn. Code Ann. § 40-30-405 (favorable results)

If an order granting analysis is issued, then the **court may require the petitioner to pay** for the analysis, unless the petitioner is indigent. Tenn. Code Ann. § 40-30-406.

6. Laboratory Results

[Tenn. Code Ann. § 40-30-408]

If previous testing was performed by either party, the court may order the parties to turn over the laboratory reports prepared in connection with the fingerprint testing and any underlying data and laboratory notes.

If the court orders fingerprint analysis, it shall also order the production of any laboratory reports prepared in connection with the analysis and may, in its discretion, order the production of the underlying data and laboratory notes.

If the court orders analysis, "the court must select the laboratory used by the original investigating agency if the laboratory is capable of performing the required analysis." Tenn. Code Ann. § 40-30-410. "If the laboratory used by the original investigating agency is not capable

of performing the required analysis, the court shall select a laboratory that the court deems appropriate." Id.

7. Preservation of Evidence
[Tenn. Code Ann. § 40-30-409]

If the petition is not summarily dismissed by the trial court, the court shall order that "**all evidence in the possession of the prosecution, law enforcement, laboratory, or the court that could be subjected to fingerprint analysis must be preserved during the pendency of the proceeding**." Should fingerprint evidence be destroyed intentionally after such an order, sanctions may result, "including criminal contempt for a knowing violation of the court's order." Id.

8. Final Order
[Tenn. Code Ann. § 40-30-412]

Once the court has found the contents of the petition establish a *prima facie* case and the trial court has determined all statutory prerequisites are present and has ordered fingerprint analysis, if the results of the analysis are not favorable to the petitioner, the court shall dismiss the petition. If the results are favorable, the court shall order a hearing, and thereafter make such orders as are required.

D. STATE HABEAS CORPUS

The right to seek habeas corpus relief is guaranteed by Article I, Section 15 of the Tennessee Constitution, which provides that "the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it." While there is no statute of limitations for seeking habeas corpus, the grounds upon which habeas corpus relief will be granted are narrow. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007).

Although the writ of habeas corpus is constitutionally guaranteed, it has been

regulated by statute for well over one hundred years. Faulkner v. State, 226 S.W.3d 358, 361 (Tenn. 2007) (citing Ussery v. Avery, 432 S.W.2d 656, 657 (Tenn. 1968)).

The statutory grounds for habeas corpus relief appear to be broad: "any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in Tenn. Code Ann. § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint." Tenn. Code Ann. § 29-21-101 (2000). Nevertheless, the courts of this state have long held that the writ of habeas corpus may be granted only when the petitioner has established a lack of jurisdiction for the order of confinement or is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery, 432 S.W.2d at 658; State v. Galloway, 45 Tenn. (5 Cold.) 326, 336-37 (1868).

A petition for writ of habeas corpus may also be filed to challenge an illegal sentence. Moody v. State, 160 S.W.3d 512, 516 (Tenn. 2005). "An illegal sentence is one which is 'in direct contravention of the express provisions of [an applicable statute], and consequently [is] a nullity.'" Cantrell v. Easterling, 346 S.W.3d 445, 452 (Tenn. 2011) (quoting State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978)). Examples of illegal sentences include:

> *(1) a sentence imposed pursuant to an inapplicable statutory scheme; (2) a sentence designating a [release eligibility date] where ... specifically prohibited by statute; (3) a sentence ordered to be served concurrently where statutorily required to be served consecutively; and (4) a sentence not authorized for the offense by any statute*.

Davis v. State, 313 S.W.3d 751, 759 (Tenn. 2010). A sentence of life without parole when not authorized by the statute at the time, a sentence imposed under the wrong sentencing act, and a sentence to serve one's time in a facility other than that authorized under the statute would also be considered illegal. See generally Cantrell, 313 S.W.3d at 463-64 (collecting cases). Conversely, an improper determination of an offender's sentencing range (i.e., sentencing the defendant as a Range III offender where his prior convictions would only make him eligible for a Range II sentence) would not be an "illegal" sentence that could be challenged in a habeas corpus proceeding. Edwards v. State, 269 S.W.3d 915, 924 (Tenn. 2008).

Unlike the federal writ of habeas corpus**,** relief is available in this state only when it appears on the face of the judgment or the record that the trial court was without jurisdiction to convict or sentence the petitioner or that the sentence of imprisonment has otherwise expired. Archer, 851 S.W.2d at 164; see also Hoover v. State, 215 S.W.3d 776 (Tenn. 2007); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992). Also, unlike a post-conviction petition, which might afford a means of relief for constitutional violations such as the deprivations of the effective assistance of counsel, the purpose of the state habeas corpus petition is to contest a void, not merely a voidable, judgment. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); State ex rel. Newsom v. Henderson, 424 S.W.2d 186, 189 (Tenn. 1968). The petitioner must offer proof beyond the record to establish the invalidity of a conviction, the judgment is merely voidable and not void. State v. Ritchie, 20 S.W.3d 624, 630-31 (Tenn. 2000).

1. Petition

Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.

The petition shall state:

> (1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;
>
> (2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;
>
> (3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character,

to the best of the applicant's knowledge and belief; and

(4) That it is the first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

Tenn. Code Ann. § 29-21-107(b)(1)-(4).

"A trial court properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements." Summers v. State, 212 S.W.3d 251, 260 (Tenn. 2007).

In 2009, the General Assembly amended section 29-21-101 by adding subsection (b), which covers guilty pleas:

> **(b) Persons restrained of their liberty pursuant to a guilty plea and negotiated sentence are not entitled to the benefits of this writ on any claim that:**
>
> **(1) The petitioner received concurrent sentencing where there was a statutory requirement for consecutive sentencing; or**
>
> **(2) The petitioner's sentence included a release eligibility percentage where the petitioner was not entitled to any early release; or**
>
> **(3) The petitioner's sentence included a lower release eligibility percentage than he was entitled to under statutory requirements.**

2. Place for Filing

Under Tennessee Code Annotated section 29-21-105, a person filing a petition for writ of habeas corpus is required to file such petition with the court or judge nearest him, which would generally mean within the county, unless sufficient reason be given in the petition for not doing so. State ex rel. Leach v. Avery, 387 S.W.2d 346 (Tenn. 1965).

3. Appointment of Counsel

Tenn. Code Ann. § 40-14-204 states that, "in all proceedings for the

writ of habeas corpus or the writ of error coram nobis, the court having jurisdiction of those matters shall determine the question of indigency and appoint counsel, if necessary." However, there is no requirement that counsel be appointed or that a hearing be granted whenever a pro se habeas corpus petition alleges that an agreed sentence is illegal based on facts not apparent from the face of the judgment. Summers v. State, 212 S.W.3d 251 (Tenn. 2007). Summary dismissal may be proper when, the petitioner fails to attach to the habeas corpus petition pertinent documents from the record of the underlying proceedings to support his factual assertions. Id. Under the Post-Conviction Procedure Act, an indigent capital defendant filing a habeas corpus petition would be entitled to representation by counsel from the Office of the Post-Conviction Defender.

4. Defendant in Federal Custody

Even though a defendant may currently be in federal custody, he/she is not divested of his/her constitutional entitlement to test the propriety of his/her state convictions.

5. Effect of Post-Conviction Statute

The Post-Conviction Procedure Act provides that a petition for habeas corpus filed in the State courts "**may be treated as a [post-conviction] petition ... when the relief and procedure authorized by [the Act] appear adequate and appropriate, notwithstanding anything to the contrary in [the State habeas corpus statute] or any other statute.**" Tenn. Code Ann. § 40-30-105(c). This procedure has been approved by the Tennessee courts. Porter v. State, 455 S.W.2d 159, 160 (Tenn. Crim. App 1970). For all practical purposes, the Post-Conviction Procedure Act appears to have superseded the earlier State habeas corpus statute.

The court may treat a habeas petition as a post-conviction petition, but it is not required to do so. Also, if the court treats the habeas petition as one for post-conviction relief, the petition must be timely; if untimely, the petition must fall under one of the statutory tolling provisions of the Post-Conviction Procedure Act or be subject to due process-based

tolling.

However, although a petition for writ of habeas corpus may be treated as a petition for post-conviction relief, in such instances the court may not transfer the case to another court where post-conviction jurisdiction would be proper. In Carter v. Bell, 279 S.W.3d 560 (Tenn. 2009), a petitioner convicted of offenses in Maury County but serving his sentence in Davidson County filed a petition for writ of habeas corpus in Davidson County. In his habeas petition, the petitioner, who entered a guilty plea and agreed to a sentence outside the sentencing range but less than the statutory maximum sentence for the offense, argued "that he agreed to an illegal sentence and should therefore be allowed to withdraw his guilty plea." Id. at 563. He also argued that because his sentence was illegal, his plea was not knowingly and voluntarily entered. Id. at 561-62. The habeas court denied the petition, finding that the sentence was legal. On appeal, the petitioner argued that, based upon the involuntary and unknowing guilty plea argument, his petition should be treated as a post-conviction petition and transferred to Maury County, where jurisdiction would be proper. The Court of Criminal Appeals and the Tennessee Supreme Court both concluded that transfer of the petition to another court was not authorized by statute. Id. at 565-66.

Furthermore, although a habeas corpus petition may be treated as one for post-conviction relief, the reverse is not true. There is no statutory provision providing for a post-conviction petition to be treated as a habeas corpus petition. See generally Moran v. State, 457 S.W.2d 886, 887 (Tenn. Crim. App. 1970).

E. WRIT OF ERROR CORAM NOBIS

1. History

Under the common law of Tennessee, the writ of error coram nobis was available only in civil proceedings. See State v. Mixon, 983 S.W.2d

661, 666-67 (Tenn. 1999). As the court in Mixon noted:

> *The writ was developed by the judiciary in England during the Sixteenth century. Since neither the right to move for a new trial nor the right to appeal were recognized at common law, the writ of error coram nobis was developed as a procedural mechanism to allow courts to provide relief under limited circumstances.*
>
> *Essentially, the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial factual error not appearing in the record which, if known at the time of judgment, would have prevented the judgment from being pronounced.*

Mixon, 983 S.W.2d at 667-67 (citations and footnote omitted).

> *In 1858, the General Assembly enacted a statutory version of the writ of error coram nobis which was confined to civil cases and was limited in scope to "the correction of a material error of fact, where the applicant has had no notice of the proceedings, or was prevented from making defense by surprise, accident, mistake or fraud, without fault on his part." Dinsmore v. Boyd, 74 Tenn. 689, 696 (1881). It was not until 1955 that the General Assembly made coram nobis relief available in criminal cases and mandated that such proceedings be "governed by the same rules applicable to [the writ of error coram nobis] in civil cases, except in so far as inconsistent with the section." State ex rel. Carlson v. State, 219 Tenn. 80, 497 S.W.2d 165, 167 (Tenn. 1966) [.]*

State v. Vasques, 524-25 (Tenn. 2007). In 1971, Rule 60 of the Tennessee Rules of Civil Procedure was enacted and superseded the writ of error coram nobis in civil cases. Mixon, 983 S.W.2d at 668. Because the General Assembly has never repealed the statute, the writ of error coram nobis continues to be a remedy in criminal actions, but "the procedure governing the remedy is based upon the civil writ of error coram nobis which has been abolished for almost 28 years." Id. As the Tennessee Supreme Court has recognized

> *[t]he statutes thus give rise to an anomalous situation – an existing remedy that is governed by antiquated procedural rules. [State v. Mixon, 983 S.W.2d 661, 668. (Tenn. 1999)]. Nonetheless, the*

General Assembly has not resolved this anomaly since it was first pointed out four years ago in Mixon.

Harris v. State, 102 S.W.3d 587, 593 n.7 (Tenn. 2003).

2. Statute

In 1978 the legislature amended the statute to its current version. Tenn. Code Ann. § 40-26-105 provides that convicted defendants in criminal cases have available to them a proceeding in a writ of error coram nobis.

a. Grounds for Relief

Part (b) of the statute outlines the relief obtainable through a writ of error coram nobis. A petitioner may seek relief from errors that were outside the record, or ones that were not or could not have been previously litigated; or, upon a showing that the petitioner was without fault in failing to present certain evidence at the proper time, a petitioner may seek a writ of error coram nobis based on newly discovered evidence relating to matters which were litigated at the trial if the trial judge determines such evidence *may have* resulted in a different judgment had it been presented at trial. Tenn. Code Ann. § 40-26-105(b) (emphasis added).

The Tennessee Supreme Court has explained that the "litigated at trial" language contained in the coram nobis statute "refers to a contested proceeding involving the submission of evidence to a fact-finer who must assess and weigh the proof in light of the applicable law and arrive at a verdict of guilt or acquittal." Frazier v. State, 495 S.W.3d 246, 250 (Tenn. 2016).

b. Petition

A petition for writ of error coram nobis, which seeks relief on the ground of newly discovered evidence, should recite:

(1) the grounds and nature of the newly discovered

evidence;

(2) why the admissibility of the newly discovered evidence may have resulted in a different judgment if admitted at trial;

(3) that petitioner was without fault in failing to present the claims at the appropriate time; and

(4) the relief sought.

State v. Hart, 911S.W.2d 371, 374-75 (Tenn. Crim. App. 1995).

The Tennessee Supreme Court has made clear that certain claims may **not** be addressed in a coram nobis proceeding:

- **Brady violations**: While the newly discovered evidence that is the subject of a Brady claim may be addressed in a coram nobis claim, the constitutional claim resulting from the State's supposed withholding of the evidence must be brought in a post-conviction action. See Nunley v. State, 552 S.W.3d 800, 819-20 (Tenn. 2018).

- **Guilty pleas**: a guilty plea is not a trial; because the plain language of the coram nobis statute references trials only, a defendant may not seek to attack a guilty plea through a coram nobis petition. See Frazier, supra, 495 S.W.3d at 253.

- **Juror bias**: citing Frazier, the court concluded a claim of juror bias relates to "a purported constitutional error rather than guilt or innocence," and therefore a juror bias claim is not cognizable in a coram nobis proceeding. State v. Lee Hall, a/k/a/ Leroy Hall, Jr., No. E1997-00344-SC-DDT-DD, order at 4 (Tenn. Dec. 3, 2019) (order denying

stay of execution).

- **Intellectual disability** claims may not be raised in a coram nobis petition. See Payne v. State, 493 S.W.3d 478, 486 (Tenn. 2016).

Additionally, **actual innocence claims based on newly-discovered scientific evidence** must be raised in a petition for post-conviction relief or motion to reopen a post-conviction petition.

3. Statutory Interpretation & Appellate Court Analysis

The language of the statute clearly indicates the court is to determine whether the newly discovered evidence *may have* resulted in a different judgment. Tenn. Code Ann. § 40-26-105(b). In State v. Mixon, the Tennessee Supreme Court characterized the *may have* language as requiring a new trial based on newly discovered evidence if:

> *(1) the trial court is reasonably well satisfied that the testimony given by the material witness was false and the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, or was surprised by the false testimony, or was unable to know of the falsity of the testimony until after the trial; and (3) the jury might have reached a different conclusion had the truth been told.*

983 S.W.2d 661, 673 n.17 (Tenn. 1999).

In State v. Workman, 41 S.W.3d 100 (Tenn. 2001), the Tennessee Supreme Court approved the standard applied in Mixon. Upon appeal in Workman, following the initial remand to the trial court for an evidentiary hearing, the Court of Criminal Appeals again examined the meaning of the *may have* standard in an effort to ascertain its practical application. State v. Workman, 111 S.W.3d 10, 17-18 (Tenn. Crim. App. 2002). The Court of Criminal Appeals concluded a new trial was warranted "only when there was a probability sufficient to undermine confidence in the outcome." Id. at 18.

The Tennessee Supreme Court rejected a petitioner's assertion that the plain language of the statute provided the necessary guidance needed to determine whether coram nobis relief was appropriate. See State v. Vasques, 221 S.W.2d 514, 527 (Tenn. 2007). The court held "the *may have* standard, if interpreted literally, is too lenient in the common law context of writ of error coram nobis." Id. The court found that "[i]f based upon mere *possibility*, coram nobis relief would be available to any defendant, who, within one year of his conviction and sentence, discovers new evidence even if only slightly favorable to his defense." Id. Thus, the court held:

> *[i]n an effort to amplify the standard established in Mixon and confirmed by our own decision in Workman, we hold that in a coram nobis proceeding, the trial judge must* ***first consider the newly discovered evidence and be "reasonably well satisfied" with its veracity.*** *If the defendant is "without fault" in the sense that the exercise of* ***reasonable diligence would not have led to a timely discovery of the new information****, the trial judge must then consider both the evidence at trial and that offered at the coram nobis proceeding in order to determine whether the new evidence* ***may have led to a different result****.*

Id. (emphasis added). The court stated this standard *requires determination of both the relevance and the credibility of the discovered information*. Id. The court found such an interpretation upheld

> *the traditional, discretionary authority of our trial judges to consider the new evidence in the context of the trial, to assess its veracity and its impact upon the testimony of the other witnesses, and to determine the potential effect, if any, on the outcome.*

Id. at 527-28.

The Supreme Court has noted, "as a general rule, newly discovered evidence which is merely cumulative or 'serves no other purpose than to contradict or impeach' does not warrant the issuance of the writ." Wlodarz v. State, 361 S.W.3d 490, 499 (Tenn. 2012) (quoting *State v.*

Hart, 911S.W.2d 371, 375 (Tenn. Crim. App. 1995)).

A motion to reopen a post-conviction petition cannot be treated as a petition for writ of error coram nobis. See Harris, 102 S.W.3d at 591-92.

4. Statute of Limitations

a. One Year Limit

Although the statute imposes a one-year statute of limitations for filing claims under a petition for writ of error coram nobis, Tennessee appellate courts have held that due process may require the tolling of the statute. Under the statute, a judgment becomes final, and the one-year coram nobis statute of limitations begins to run thirty days after entry of the judgment in the trial court if no post-trial motion is filed, or upon entry of an order disposing of a timely filed post-trial motion. State v. Mixon, 983 S.W.2d 661 (Tenn. 1999).

Compliance with the statute of limitations must be pled by the petitioner and shown on the face of the petition; lack of compliance is not an affirmative defense to be pled by the State. Nunley, 552 S.W.3d at 828.

b. Due Process Considerations

The Tennessee Supreme Court has held that the *magnitude and gravity of the penalty of death persuades us that the important values which justify limits on untimely ... petitions are outweighed by* [a petitioner's] *interest in having a court evaluate newly discovered evidence that show actual innocence of the capital offense.* State v. Workman, 41 S.W.3d 100, 103 (Tenn. 2001). In so holding, the court applied the test in Burford v. State, 845 S.W.2d 204 (Tenn. 1992), and Seals v. State, 23 S.W.3d 272 (Tenn. 2000), to determine whether the statute of limitations for coram nobis should apply to a particular petitioner. In Seals, the

court found that before a court may terminate a litigant's procedural rights due process requires that a potential litigant be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. The test is whether the period provides an applicant a reasonable opportunity to have the claimed issue heard and determined.

The Tennessee Supreme Court reaffirmed its holding in Workman in Dellinger v. State, 279 S.W.3d 282, 291 n.7 (Tenn. 2009).

5. Hearing

a. Summary Dismissal

A coram nobis petition is "subject to dismissal on the face of the petition, without discovery or an evidentiary hearing, and even prior to notification to the opposing party." Nunley, 552 S.W.3d at 825. While "there will be instances in which the request for coram nobis relief cannot be resolved on the face of the petition," a trial court "need only conduct evidentiary hearings when they are essential." Id. at 826 (internal citation omitted).

b. Evidentiary Standard

While the statute states a petitioner will be entitled to a new trial "if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial," the Tennessee Supreme Court, adopting the standard for the grant of a motion for new trial based on newly discovered evidence, has stated,

> *The burden of proof for the grant of coram nobis relief is indeed heavy. Trial courts are required to grant a new trial based on newly discovered evidence only if the defendant proves each of the following three requirements: (1) that he or she was reasonably diligent in seeking the evidence; (2) that the evidence is material; and (3) that the evidence is likely to change the result of the trial. ...*

> *Moreover, the credibility of the newly discovered evidence is of paramount importance to its consideration in a petition for writ of error coram nobis.*
>
> State v. Hall, 461 S.W.3d 469, 495-96 (Tenn. 2015) (citations omitted).

F. OTHER CHALLENGES TO DEATH SENTENCE

In recent years, death row inmates have begun filing challenges to their death sentences other than those outlined above. These challenges have usually occurred after an inmate has exhausted the traditional three tiers of appeals, and these claims often involve intellectual disability claims. However, these challenges could come at any time and may not be limited to those inmates claiming intellectual disability. Furthermore, this list is by no means a complete list of potential challenges.

1. Motion to Correct Illegal Sentence (Tenn. R. Crim. P. 36.1)

Rule 36.1 of the Tennessee Rules of Criminal Procedure allows a defendant to seek correction of an unexpired illegal sentence at any time. See State v. Brown, 479 S.W.3d 200, 211 (Tenn. 2015). "[A]n illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1(a).

Because a punishment of death was authorized by the first degree murder statute at the time a defendant was sentenced, Rule 36.1 will not afford a death-sentenced petitioner relief. See David Ivy v. State, 2018 WL 625127 at *4 (Tenn. Crim. App. Jan. 30, 2018), perm. app. denied, (Tenn. May 18, 2018); Michael Eugene Sample v. State, 2017 WL 3475439 at *3 (Tenn. Crim. App. Aug. 11, 2017), perm. app. denied, (Tenn. Nov. 21, 2017).

2. Writ of Audita Querela

The Tennessee Court of Criminal Appeals has stated:

> *A writ of audita querela is a "common law writ affording 'relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution.' " Dwight Seaton v. State, No. E1999–01312–CCA–R3–CD, 2000 WL 1177462, at *3 (Tenn. Crim. App. Aug. 21, 2000) (quoting United States v. Fonseca–Martinez, 36 F.3d 62, 64 (9th Cir.1994) (citation omitted)). The Tennessee Supreme Court has concluded that the writ of audita querela "is absolutely unknown and obsolete in the practice of this State." Marsh v. Haywood, 25 Tenn. 210, 1845 WL 1897, at *1 (Tenn.1845). Furthermore, Tennessee Code Annotated section 27–8–102 (2000) reflects that the writ of audita querela is obsolete by providing that the statutory writ of certiorari lies "[i]nstead of audita querela[.]"*

James Dellinger v. State, 2015 WL 4931576 at *13 (Tenn. Crim. App. Aug. 18, 2015), perm. app. denied, (Tenn. May 6, 2016). See also David Ivy, 2018 WL 625127 at *4; Michael Eugene Sample, 2017 WL 3475439 at **1-2.

3. Bivens (or Bivens-like) Claims

The Court of Criminal Appeals' opinion in James Dellinger also concluded Bivens or Bivens claims do not entitle a death row inmate to relief:

> *The Petitioner asserts that the trial court erred in denying his claims of intellectual disability and violation of double jeopardy principles pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In the absence of a federal statute providing for damages against a federal employee for violating the United States Constitution, the United States Supreme Court in Bivens recognized a limited, implied cause of action by a private citizen against federal employees for egregious violations of the Fourth Amendment. See Bivens, 403 U.S. at 390. The Supreme Court provided for a judicially-created damages remedy, concluding that the plaintiff would otherwise have*

> *no remedy for an unconstitutional invasion of his rights by federal agents. Id. Thus, "Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." Carlson v. Green, 446 U.S. 14, 18 (1980).*
>
> *Both the trial court and the Petitioner correctly recognize that Tennessee courts have not expanded Bivens to include an implied cause of action against the State or a State official based on a violation of Tennessee law. Furthermore, Bivens provides for an implied cause of action for monetary damages. See Bivens, 403 U.S. at 397. The Petitioner, however, seeks to invalidate his death sentence, a remedy not recognized by Bivens.*

James Dellinger, 2015 WL 4931576 at **14-15.

4. Open Courts Clause

Article I, section 17 of the Tennessee Constitution provides: "That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

The Open Courts Clause "does not create a right but, rather, requires a mechanism by which a citizen may redress grievances." State ex rel. Herbert S. Moncier v. Nancy S. Jones, 2013 WL 2492648 at *6 (Tenn. Ct. App. June 6, 2013). The Court of Criminal Appeals has concluded "Article I, section 17 does not create a substantive cause of action to enforce other constitutional provisions or laws." James Dellinger, 2015 WL 4931576 at *16.

5. Declaratory Judgment Claims

Sovereign immunity principles prevent an inmate from seeking a declaratory judgment asserting the inmate is intellectually disabled and, consequently, ineligible for the death penalty. See James Dellinger, 2015 WL 4931576 at *14; Dennis Wade Suttles v. State, 2014 WL 2902271 at *19 (Tenn. Crim. App. June 25, 2014).

6. Due Process and Law of the Land Claims (and claims that the court should create a mechanism to address claims which are not addressed under statute, court rule, or case law)

Litigants may contend constitutional guarantees such as the Due Process Clause of the United States Constitution, Due Process considerations set forth in the Tennessee Constitution, and the Law of the Land provision of the Tennessee Constitution should excuse any procedural bar to raising a particular claim, or that constitutional concerns should lead the court to create a mechanism for addressing certain claims where no such mechanism exists in statute, case law, or court rule. Such contentions are often raised by litigants who raise intellectual disability claims before execution but who did not raise such claims at trial or post-conviction.

Such claims have proven unsuccessful. "[D]ue process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner." Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992). Thus, if a litigant had an opportunity to raise a prior claim, due process principles would not entitle the petitioner to raise the claim again. If a petitioner claims he was unable to raise the claim on post-conviction due to the ineffective assistance of counsel, such a claim will be unsuccessful, as there is no right to effective counsel in a post-conviction proceeding. James Dellinger, 2015 WL 4931576 at *17 (citing Whitehead v. State, 402 S.W.3d 615, 625 n.10 (Tenn. 2013)).

Finally, any request for the court to identify an appropriate procedural vehicle to address a particular claim when no procedure exists would essentially be a request for an advisory opinion. A court cannot provide an advisory opinion. David Ivy, 2018 WL 625127 at *4 (citing Nichols v. State, 90 S.W.3d 576, 607 (Tenn. 2002)). Furthermore, only the Tennessee Supreme Court can create procedural mechanisms. See Tenn. Code Ann. § 16-3-402 (granting the Tennessee Supreme Court authority to prescribe rules of practice and procedure).

G. PRESENT COMPETENCY TO BE EXECUTED

The Eighth Amendment to the United States Constitution precludes the execution of a prisoner who is incompetent. Ford v. Wainwright, 477 U.S. 399 (1986). Tennessee has adopted a cognitive test for determining competency to be executed. Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999). Under Tennessee law a prisoner is not competent to be executed if the prisoner lacks "'a rational understanding of his conviction, his impending execution, and the relationship between the two.'" State v. Irick, 320 S.W.3d 284, 295 (Tenn. 2010) (citing Billiot v. Epps, 671 F. Supp. 2d 840, 853 (S.D. Miss. 2009)).

In Panetti v. Quarterman, 551 U.S. 930 (2007), the United States Supreme Court expounded on its holding in Ford. Post-Panetti and Irick (the court in Irick explicitly renounced those parts of Van Tran and other cases inconsistent with Panetti), it is insufficient for trial courts to merely examine whether a prisoner has identified the link between his crime and the punishment to be inflicted. Rather, trial courts must now consider whether petitioner suffers from such a severe mental disorder that puts the awareness of the link between crime and punishment "in a context so far removed from reality that the punishment can serve no proper purpose." Panetti, 551 U.S. at 960. The Court in Panetti held that

> *The potential for a prisoner's recognition of the severity of the offense and the objective vindication are called in question ... if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of these concepts shared by the community as a whole. ...*
>
> *... A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it.*

Id. at 958-59. In Irick, the Tennessee Supreme Court added,

> *[U]nder Panetti, the execution is not forbidden so long as the evidence shows that the prisoner does not question the reality of the crime or the reality of his punishment by the State for the crime committed. See Overstreet v. State, 877 N.E.2d 144, 174 (Ind. 2007). The Court's decision in Panetti also emphasizes that*

> *a prisoner seeking to establish incompetency may not be foreclosed from offering proof to show that a mental illness obstructs his rational understanding of his conviction, his impending execution, and the relationship between the two.*

320 S.W.3d at 295.

In Madison v. Alabama, 139 S. Ct. 718 (2019), the United States Supreme Court reaffirmed Panetti's conclusion that the Eighth Amendment forbids the execution of a person whose mental illness prevents a rational understanding of the reason for his execution. In that case, the condemned inmate suffered from dementia which prevented him from recalling his commission of the underlying offense. Id. at 723. Counsel for Mr. Madison filed a motion for a stay of execution, arguing that he no longer understood the "status of his case" or the "nature of his conviction and sentence." Id. The state countered Madison was still eligible for execution because he still "had 'a rational understanding of [the reasons for] his impending execution,' as required by Ford and Panetti[.]" Id. The Alabama state courts concluded Madison was competent to be executed.

At the Supreme Court, Madison conceded his dementia, standing alone, did not prevent his execution, and the state conceded Madison could be found incompetent if his lack of rational understanding was caused by dementia rather than psychotic delusions:

> *First, a person lacking memory of his crime may yet rationally understand why the State seeks to execute him; if so, the Eighth Amendment poses no bar to his execution. Second, a person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution. What matters is whether a person has the "rational understanding"* Panetti *requires—not whether he has any particular memory or any particular mental illness*.

Id. at 726-27 (emphasis added). Given the state courts' focus on their erroneous reasoning that dementia could not give rise to the lack of rational understanding under Panetti, the Supreme Court remanded Madison's case to the state courts for a new competency hearing.

1. Initiating Competency Proceedings

The 2010 Irick opinion dealt only with the standard for competency to be executed, so pre-Irick case law concerning the procedures the parties and the courts are to follow in addressing competency to be executed is still valid. See Irick, 320 S.W.3d at 287 and n.3 (explaining the procedural history of Irick's competency filings, citing to Van Tran); see also Tenn. S. Ct. Rule 12(4).

In Van Tran, the Tennessee Supreme Court stated the issue of competency to be executed generally is not ripe for determination until execution is imminent. Van Tran, 6 S.W.3d at 267. The court continued,

> *In Tennessee, execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence and* [the Tennessee Supreme Court] *has set an execution date upon motion of the State Attorney General.*

Id.

After issuing the Van Tran opinion, the Tennessee Supreme Court amended Supreme Court Rule 12 to clarify the procedure for filing motions—including motions challenging an inmate's competency to be executed—after an inmate has completed the three tiers of appellate review:

> **4. Setting Execution Date at Conclusion of Standard Three-Tier Appeals Process**
>
> **(A) Motion/Response**
>
> **After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date. The motion shall include a brief summary of the procedural history of the case demonstrating that the prisoner has completed the standard three-tier appeals process. The motion shall be considered premature if filed prior to the expiration of the time**

for filing a petition for writ of certiorari or a petition to rehear the denial of a petition for writ of certiorari in the United States Supreme Court.

Any response in opposition to the motion shall be filed within ten (10) days after the motion is filed and shall assert any and all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur, including a claim that the prisoner is not competent to be executed, *see Coe v. State*, 17 S.W.3d 191 (Tenn. 2000); *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999); or a request for a certificate of commutation pursuant to Tenn. Code Ann. § 40-27-106, *see Workman v. State*, 22 S.W.3d 807 (Tenn. 2000). Unless otherwise ordered by the Court, no reply to the response is required. The Court will not delay setting an execution date pending resolution of collateral litigation in federal court. The Court will not delay setting an execution date pending resolution of collateral litigation in state court unless the prisoner can prove a likelihood of success on the merits in that litigation.

Tenn. S. Ct. R. 12(4)(A) (emphasis added). If the Tennessee Supreme Court concludes competency proceedings should occur, the court will remand the issue of competency to be executed to the trial court where the prisoner was originally tried and sentenced.

2. Requirements of Petition

Upon remand the petitioner will have three (3) days to file a petition:

(1) identifying the proceeding in which he/she was convicted and sentenced;

(2) setting forth the facts supporting his/her assertion that the execution should be stayed based on his/her present mental incompetence;

(3) containing affidavits, record, or other evidence supporting the factual allegations of mental incompetence;

(4) identifying any other proceeding in which petitioner has challenged his or her mental competency; and

(5) setting forth the names, locations, hourly rates, and qualifications of mental health professionals who would be available to evaluate the petitioner if the trial court determines such an evaluation is necessary.

Id. at 267. The District Attorney General shall have three days to file a response.

3. Threshold Showing & Preliminary Order

Within four days of the filing of the State's response, the trial court shall decide if a hearing is warranted based upon a determination of whether the petitioner has made a threshold showing that his/her competency is genuinely at issue. A petitioner is presumed competent to be executed and bears the burden of overcoming this presumption by a preponderance of the evidence. Id. at 271.

Petitioner may demonstrate that there is a genuine issue as to his/her present competency through the submission of affidavits, depositions, medical reports, or other credible evidence. Id. at 269. However, the proof submitted must relate to present competency. Thus, at least some of the evidence must be the result of recent mental evaluations or observations of the petitioner. Id. Ordinarily unsupported assertions by family members, the petitioner, or his/her attorney(s) will be insufficient to satisfy the required threshold showing. Id. Likewise, assertions that a petitioner may become incompetent in the future will not be sufficient to meet the threshold showing. See Coe v. State, 17 S.W.3d 193, 221 n.5 (Tenn. 2000).

If the trial court finds there is a genuine issue regarding petitioner's present competency, then a hearing should be held. Id. (citations omitted).

If the trial court finds petitioner has failed to make the requisite threshold showing, the court shall enter a written order denying the petition. Id. Any such order should include detailed written findings of

fact and conclusions of law. Id.

4. Evaluations

When a trial court finds a genuine issue as to competency exists the court shall enter an order

- *appointing at least one, but no more than two, mental health professionals from each list submitted by the respective parties;*

- *directing the prisoner be evaluated by the appointed mental health professionals to determine competency to be executed; and*

- *requiring the mental health professionals to file written evaluations with the trial court within ten days (10) of the appointment.*

Van Tran, 6 S.W.3d at 269.

5. Hearing

Within ten (10) days of the evaluations being filed, the trial court shall hold a hearing to determine the issues of competency. Id. at 270.

Since petitioner bears the burden of demonstrating his/her incompetence, a petitioner should be given wide latitude in presenting his/her claims and the rules of evidence should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of competency. Id. at 270 (citations omitted).

6. Final Order

Within five days of the conclusion of the hearing, the trial court shall enter written findings of fact:

- setting out any undisputed facts;

- explaining its assessment of the credibility of the various witnesses and their conflicting opinions; and

- describing relevant observations regarding the defendant's behavior during the hearing.

Id. at 271.

A timeline of events and deadlines per Van Tran is available in the Appendix.

Chapter 9

Retrial and Resentencing

Chapter 9

Retrial and Resentencing

A. TENN. CODE ANN. § 39-13-204(k) (AMENDED 2021):

> **(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held; but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for that purpose. If the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder, whether the sentence is death, imprisonment for life without possibility of parole or imprisonment for life, be granted a new trial, either as to guilt or punishment, or both, the new trial shall include the possible punishments of death, imprisonment for life without possibility of parole or, unless the defendant is convicted of first degree murder as described in § 39-13-202(c)(2),[1] imprisonment for life.**

Although this provision states that any new trial or resentencing "shall include the possible punishments of death, imprisonment for life without possibility of parole or imprisonment for life," **the option of life without the possibility of parole does not apply to pre-1993 act cases.** See State v. Cauthern, 967 S.W.2d 726, 735 (Tenn.1998); see also State v. Austin, 87 S.W.3d 447 (Tenn. 2002) (Appendix); State v. Keen, 31 S.W.3d 196, 213-19 (Tenn. 2000).

B. RETRIAL ISSUES

1. Seeking Death Penalty Where Jury Returned Verdict of Less than Death Prohibited.

In most cases, when a jury previously returned a verdict of either life

[1] In 2021, the legislature enacted Tennessee Code Annotated section 39-13-202(a)(4), adding to the definitions of first degree murder "[a] killing of another in the perpetration or attempted perpetration of an act of terrorism in violation of § 39-13-805." Section 39-13-202(c)(2), also enacted in 2021, states that if the "person convicted of first degree murder under subdivision (a)(4) was an adult at the time of the commission of the offense," the person shall be sentenced to death or life without parole—in other words, an adult convicted for first degree murder under the act of terrorism provision may not be sentenced to life in prison.

without parole or life in prison, the State may not seek the death penalty on retrial. See Bullington v. Missouri, 451 U.S. 430, 446 (1981). Such is certainly the case where the jury's verdict of less than death does not result from a deadlock. As the Supreme Court stated in an opinion issued three years after Bullington:

> *Application of the Bullington principle renders respondent's death sentence [imposed on retrial after defendant received a life sentence at the first trial] a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for respondent's offense. The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial on the appropriateness of the death penalty.*

Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984) (alteration added).

However, if a life or life without parole sentence results from a jury's deadlocking over a death vs. life without parole decision, the State **might** be able to seek the death penalty in the subsequent trial or sentencing hearing. In Sattazahn v. Pennsylvania, 537 U.S. 101, 104 (2003), a sentencing jury deadlocked in its deliberations (the only sentences provided under the statute in effect at that time were death and life imprisonment). The trial court, pursuant to statute, discharged the jury and entered a life sentence. Id. at 105. The intermediate appellate court remanded for a new sentencing hearing (based on another issue). Pennsylvania sought the death penalty again, and the jury in the new sentencing hearing sentenced the defendant to death. Id. The case made it to the United States Supreme Court, which, noting that a retrial after a hung jury does not violate the Double Jeopardy Clause, held, in a plurality opinion that the entry of a life sentence following the jury's deadlock did not constitute an "acquittal" relative to the sentencing question—i.e., the deadlocked jury did not find that the state failed to prove its case beyond a reasonable doubt—and therefore the state was not barred from seeking the death penalty at the

second sentencing hearing. See id. at 117-18.

No Tennessee appellate opinion has addressed this issue directly,[2] so it is unclear how the Sattazahn holding would affect a retrial following an original trial in which the jury deadlocked on the death penalty, deliberated on the life vs. life without parole issue, then returned a sentence. The State would argue a jury-imposed sentence of life in prison or life without parole that results from a deadlocked jury on the death consideration (see Tenn. Code Ann. § 39-13-204(h)) would not preclude the State from seeking the death penalty in a new sentencing hearing. The State's reasoning would be that the first jury never made a determination as to whether the aggravating factors outweighed the mitigators beyond a reasonable doubt, so the subsequent jury would not be foreclosed from making that determination (i.e., it would be no different than a retrial after a hung jury). The defense obviously would not share that reasoning.

2. Prosecutorial Vindictiveness (seeking death in a retrial where death was not sought the first time)

In State v. Phipps, 959 S.W.2d 538 (Tenn. 1997), the Tennessee Supreme Court was faced with an issue of whether the state's decision to pursue the death penalty on retrial after a successful appeal, when the death penalty had not been sought in the original trial, gave rise to a rebuttable presumption of prosecutorial vindictiveness. The court in Phipps stated,

> *[E]ven in the absence of proof of actual bad faith or malice, a rebuttable presumption of prosecutorial vindictiveness may arise if the circumstances*

[2] The Tennessee Supreme Court indirectly addressed the Sattazahn holding in State v. Stephenson, 195 S.W.3d 574, 586 (Tenn. 2006). In that opinion, the court stated, "In Sattazahn, the United States Supreme Court held that when a defendant who is convicted of murder and sentenced to life imprisonment because the jury is unable to agree on a sentence succeeds in having his or her conviction reversed on appeal, double jeopardy does not prevent the state from seeking the death penalty on retrial." But because Mr. Stephenson argued Sattazahn precluded his (Stephenson's) convictions for both murder and conspiracy on double jeopardy grounds—an argument the Tennessee Supreme Court rejected—the court did not examine the Sattazahn holding regarding capital resentencing in great depth.

> *of a case pose a "realistic likelihood" of prosecutorial retaliation. After a defendant has raised the issue of vindictiveness, the trial court must review the circumstances of record and decide whether the prosecutor's actions give rise to a realistic likelihood of prosecutorial retaliation. In assessing whether a "realistic likelihood" of prosecutorial retaliation exists, courts must consider whether the right asserted by the defendant would result in duplicative expenditures of prosecutorial resources, or require the State to do over again what it thought it had already done correctly once. When the circumstances demonstrate that the prosecutor has "a personal stake" or an interest in self vindication, or when institutional biases militate against retrial of a decided question, the balance weighs in favor of recognizing the presumption. Likewise the presumption is especially warranted if the prosecutorial decision to increase the charge or sentence is made after an initial trial is completed rather than in a pretrial context. When application of these factors to the circumstances of a case reveal the existence of a realistic likelihood of prosecutorial retaliation, Pearce[3] applies. The presumption is not, however, absolute. Once the presumption of vindictiveness has been raised, the burden shifts to the State to rebut it by presenting clear and convincing evidence which demonstrates that the prosecutor's decision was motivated by a legitimate purpose. Finally, in attempting to overcome the presumption, the prosecutor is not limited to evidence which arose after the original sentencing proceedings, so long as the evidence constitutes "objective information . . . justifying the increased sentence."*

Id. at 546 (citations omitted; footnote added). The court went on to "hold that the State's pursuit of the death penalty following a successful appeal of a conviction for which the death penalty originally was not sought gives rise to a rebuttable presumption of prosecutorial vindictiveness." Id. at 547. This presumption may be overcome by clear and convincing evidence which demonstrates that the prosecutor's decision was motivated by a legitimate purpose. Id.

3. Missing/Lost Evidence

Tennessee Pattern Jury Instructions (Crim. 42.23) states:

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[3] North Carolina v. Pearce, 395 U.S. 711 (1969). In Pearce, the Supreme Court "held that the Due Process Clause of the Fourteenth Amendment prevents increased sentences which are actually or likely motivated by a vindictive desire to punish a defendant for the exercise of a statutory or procedural right." Phipps, 959 S.W.2d at 540 (citing Pearce, 395 U.S. at 725-25).

> The State has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of such a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The State has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value, so that an as yet unknown defendant may later examine the evidence.
>
> If, after considering all of the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are an issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

The United States Supreme Court in Arizona v. Youngblood, 488 U.S. 51, 58 (1988), held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), the Tennessee Supreme Court interpreted Tennessee's due process clause, set forth in article I, section 8 of the Tennessee Constitution, more broadly than its federal counterpart, rejected Youngblood's "bad faith" approach, and adopted a balancing test for determining "whether a trial conducted without a certain piece of lost or destroyed evidence would be fundamentally fair." Id. at 914; see State v. Merriman, 410 S.W.3d 779, 785 (Tenn. 2013), and State v. Franklin, 585 S.W.3d 431, 459 (Tenn. Crim. App. 2019).

The first and threshold inquiry under the test adopted in Ferguson is "whether the State had a duty to preserve the evidence." Ferguson, 2 S.W.3d at 917; Merriman, 410 S.W.3d at 785; Franklin, 585 S.W.3d at 460. As the Tennessee Supreme Court explained in Ferguson:

> *Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law. It is, however, difficult to define the boundaries of the State's duty to preserve evidence. This difficulty is recognized in California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2533-34, 81 L. Ed. 2d 413 (1984). It held:*
>
> > *Whatever duty the Constitution imposes on the States to*

> *preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.*

Ferguson, 2 S.W.3d at 917 (footnote omitted); see also Merriman, 410 S.W.3d at 785.

Additionally, the evidence must have existed at some point for the State's duty to preserve it to be triggered. As the Tennessee Court of Criminal Appeals has stated, "a law enforcement officer's failure to collect certain items from a crime scene [does] not result in a Ferguson violation." Franklin, 585 S.W.3d at 461. See also State v. Kenneth Clay Davis, 2007 WL 1259206, * 4 (Tenn. Crim. App. Apr. 30, 2007) (declining to apply Ferguson test to alleged loss of traffic stop videotape where testimony showed that videotape never existed); State v. Prince, 2005 WL 1025774, * 4 (Tenn. Crim. App. May 3, 2005) (declining to apply Ferguson test to alleged loss of arrest videotape where no "substantial" evidence presented that videotape ever existed).

The Court of Criminal Appeals has observed:

> *the State is not required to investigate cases in any particular way: "Due process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process."*

State v. Tony Best, 2008 WL 4367529, at *13 (Tenn. Crim. App. Sept. 25, 2008) (citations omitted). The defendant in Best, who was tried for selling methamphetamine, complained the police improperly destroyed methamphetamine components contained in three containers seized by police during an investigation of a suspected meth lab; he argued that "destruction of the evidence deprived him of the opportunity to prove that it was not his by conducting fingerprint tests on it." Id. at *10. The State argued the components were properly destroyed for safety

reasons, and that testing was also unnecessary given that other components deemed safe enough to keep had been tested, and the defendant's fingerprints were not found on them. Id. The Court of Criminal Appeals concluded that the police destruction of the meth components did not prejudice the defendant, observing that police destruction of evidence that is "too dangerous to retain" does not violate the defendant's due process rights. Id. at *14.

The Court of Criminal Appeals, applying the Tony Best analysis, has twice published opinions concluding the State is under no obligation to conduct investigations in a particular fashion and due process does not require the State to retain particular evidence. See, e.g., Franklin, 585 S.W.3d at 459-61 (no duty to preserve child rape victim's underwear when underwear was not collected by police); State v. Brock, 327 S.W.3d 645, 698-99 (Tenn. Crim. App. 2009) (no duty to preserve bloody footprint next to homicide victim's body when police did not collect footprint).

If it is established the State collected evidence, had a duty to preserve evidence, and failed to preserve it, then Ferguson requires consideration of the following factors in determining the appropriate consequence for the loss or destruction of the evidence:

> 1. *The degree of negligence involved;*
>
> 2. *The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and*
>
> 3. *The sufficiency of the other evidence used at trial to support the conviction.*

Ferguson, 2 S.W.3d at 917; see also Merriman, 410 S.W.3d at 785. The degree of negligence factor "presumes negligence in the loss or destruction of the evidence. Should the proof show bad faith, the trial judge may consider such action as may be necessary to protectthe defendant's fair trial rights." Ferguson, 2 S.W.3d at 917 n.10; Merriman, 410 S.W.3d at 786.

Finally, the Court in Ferguson instructed:

> *If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Dismissal is, however, but one of the trial judge's options. The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction.*

Ferguson, 2 S.W.3d. at 917. The standard jury instruction on the State's duty to preserve evidence, T.P.I. (Crim.) 42.23, comes directly from a footnote in the Ferguson opinion setting forth language regarded as suitable in the event the trial judge determines that a jury instruction is the appropriate consequence for the State's loss or destruction of potentially exculpatory evidence. See id. at 917 n.11.

Applications in capital case:

State v. Rimmer, 623 S.W.3d 235 (Tenn. 2021) (Rimmer III):

In February 1997, a man was seen loading "something thick that had been rolled up in a blanket" into the trunk of a maroon Honda Accord outside a Memphis motel. 623 S.W.3d at 244. A few days later, after the victim, a night clerk at the motel, disappeared, Mr. Rimmer arrived at his brother's house in a "wine-colored" Accord. Id. at 246. The next month, the Defendant was stopped in Indiana driving a maroon Honda Accord. Id. Indiana law enforcement tested reddish-brown stains in the back seat of the car, which tested positive for blood, and numerous photos of the interior of the car were taken. Id. at 247. Several items were removed from the car, which were "either sealed and stored in envelopes and paper bags or placed in the trunk of the vehicle, which was sealed prior to transport to Memphis. Id. The vehicle was first stored at the Memphis police department, then it was moved to TBI for additional processing. Id. at 247-48. After TBI conducted its testing, the car was returned to the Memphis police, who in turn returned the

car to its original owner "because the police department did not have the storage capacity to keep it longer." Id. at 248.

At the time of Mr. Rimmer's 2016 retrial, the defense moved to dismiss the indictments or suppress testing results from the car and its items because the Honda "was released before the Defendant had the opportunity to inspect it and independently test it." Id. at 258. Mr. Rimmer argued "[d]epriving him of the ability to inspect and independently test the vehicle . . . deprived him of the right to a fundamentally fair trial." Id. The trial court denied the motion, and the Court of Criminal Appeals affirmed the trial court's ruling. The Tennessee Supreme Court affirmed, stating:

> *After review of the record, we agree with the lower courts that the State did not have a duty to preserve the maroon Honda for later production to the Defendant. The efforts to retrieve evidence from the vehicle before its release were thorough and extensive. After the Defendant was pulled over in Indiana, Johnson County Sheriff's Office employees searched the vehicle and inventoried evidence in the presence of MPD officers. A positive presumptive blood test was conducted and preserved as to at least one of the reddish-brown stains in the vehicle's back seat. Investigators took ninety-six photographs of the vehicle and its contents, including photographs of the trunk after the inside cover was removed. The vehicle and items taken from it were then securely transported for processing, first to Memphis and later to the TBI. Once at the TBI, the maroon Honda was photographed, inventoried, and vacuumed for hair and fiber samples. Upholstery and carpet samples were cut for fiber analysis, and items taken from the vehicle were tested for the presence of human blood. Investigators conducted serological analysis of the interior of the vehicle to confirm the presence of human blood in the back seat.*
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> *The items taken from the vehicle, the bloody patches of upholstery cut from the back seat of the vehicle, and the abundant photographs of the vehicle were all preserved and available to the Defendant for analysis. Under these circumstances, the vehicle itself had little apparent exculpatory value, and its release back to the owner did not leave the Defendant unable to obtain comparable evidence through the investigatory materials that remained available to the defense. See Ferguson, 2 S.W.3d at 917. The State had no duty to retain the vehicle.*
>
> *In the alternative, even if the State had a duty to preserve the vehicle,*

the release of the maroon Honda back to the owner did not violate the Defendant's due process rights. First, there was no negligence involved in the State's failure to retain the vehicle. Id. *[...] [T]he Honda in this case was released pursuant to policy because law enforcement authorities did not have the storage capacity to retain it indefinitely.*

Second, the vehicle itself had little significance as evidence; the Defendant offers only speculation as to the probative value of being able to physically inspect the trunk. Per the DNA tests, the blood at the crime scene matched the blood found inside the Honda, and both were consistent with being the blood of the victim. The existence of blood of a third party or the absence of any blood whatsoever in the trunk would not negate this evidence.

Finally, the other evidence used at trial was overwhelming. See Ferguson, *2 S.W.3d at 917. As summarized above, while incarcerated for rape of the victim, the Defendant expressed a desire to kill her. A witness described seeing a maroon Honda parked close to the night entrance of the Memphis Inn around 1:40 a.m. the night the victim disappeared, and saw a man place something heavy and wrapped in a blanket into the vehicle's trunk. DNA tests determined blood found at the scene and inside the Honda the Defendant drove was consistent with that of the victim. Immediately after the victim disappeared, the Defendant went to see his brother to get assistance cleaning blood from the Honda's interior, stopped going to work, and embarked on a cross-country trip, leaving behind his last paycheck. The Defendant later confessed to the murder in conversations with a fellow inmate, complete with accurate descriptions of the crime scene. Finally, the Defendant tried to escape custody on multiple occasions.*

Consequently, even if the State had a duty to preserve the Honda, which it did not, the release of the vehicle did not result in a fundamentally unfair trial. Accordingly, we affirm the trial court's denial of the Defendant's motion to dismiss the indictments or suppress DNA evidence.

Rimmer III, 623 S.W.3d at 259-60 (citations omitted).

State v. Jordan, 325 S.W.3d 1, 82 (Tenn. 2010) (appendix):

Shortly after the offense, the state took blood and urine samples from the defendant which showed the presence of alcohol (at 0.17%) and certain medications in his system. The defendant

filed a motion to preserve evidence but the state destroyed the evidence within a year, per TBI crime lab protocols. The defendant argued he was denied the right to present a defense (both at trial and at sentencing), but the Court of Criminal Appeals concluded the defendant was not prejudiced. First, the court noted that "the State is not required to preserve samples taken for the limited purpose of determining the defendant's blood-alcohol level." Id. at 82. The blood was not expected to play "a significant role in the accused's defense" and the blood sample was destroyed "in conformity with the established procedures of the laboratory." Id. at 82-83. The evidence "did not possess any exculpatory value that was apparent prior to its destruction," and seeing that the evidence of the defendant's intoxication and drug use was introduced at trial via the crime lab's test results, the evidence was not of great significance. Id. at 83.

Pretrial Application:

State v. Merriman, 410 S.W.3d 779 (Tenn. 2013):

The Tennessee Supreme Court has concluded missing evidence may be addressed during a pretrial motion to dismiss. All three Ferguson factors must be addressed, but

> *... a trial court conducting a Ferguson analysis must assess the sufficiency of the State's evidence while being mindful that this assessment is not the equivalent of determining the defendant's guilt or innocence beyond a reasonable doubt. Again, Ferguson's inquiry into the sufficiency of the State's evidence provides context to the lost or destroyed evidence, allowing the trial court to weigh the significance of the lost evidence in light of the other evidence and to determine an appropriate remedy, if one is required.*

Merriman, 410 S.W.3d at 789-90. "Furthermore, a defendant cannot file a pretrial motion to dismiss to 'force the court to conduct a mini-trial in which the State must present the merits of the charge . . . or be cut short in its attempt to prosecute.'" Id. at

788 (quoting State v. Norton, 55 S.W.3d 580, 582 (Tenn. Crim. App. 2001) (internal quotation omitted)).

4. Unavailable Witnesses

Tenn. R. Evid. 804 (Hearsay Exceptions; declarant unavailable) states (in part):

(a) Definition of Unavailability. — "Unavailability of a witness" includes situations in which the declarant —

(1) Is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Demonstrates a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or

(6) For depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. — Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

Prior testimony from a witness who testified during the defendant's first trial can be used during a retrial if the witness is determined to be "unavailable." Should the State seek to present the former testimony of

an unavailable witness, "the State must have made a good-faith effort to establish the presence of the witness in question." State v. Sharp, 327 S.W.3d 704, 712 (Tenn. Crim. App. 2010). "'Good faith' has been defined as '[t]he lengths to which the prosecution must go to produce a witness . . . [and] is a question of reasonableness.'" Id. (quoting Ohio v. Roberts, 448 U.S. 56, 74 (1980)).

In determining what constitutes a "good-faith effort" to locate a missing witness, the Tennessee Supreme Court has concluded that in the absence of independent evidence of an attempt to locate the witness to prove the witness's unavailability, "The prosecuting attorney's statement to the Court concerning the efforts of the State's investigator to locate the witness cannot be considered as evidence of proof on the issue of the State's good faith effort." State v. Armes, 607 S.W.2d 234, 237 (Tenn. 1980). In Sharp, the Court of Criminal Appeals concluded the State's placing phone calls to a witness's purported phone number several times over a six to eight month period, even after the phone number had been disconnected, was not sufficient to constitute a good-faith effort to locate the witness. Sharp, 327 S.W.3d at 712. However, in Rimmer III, a TBI agent testified regarding his attempts to locate a witness from the defendant's original trial. Specifically, the agent searched

> *enforcement databases as well as Google searches. He consulted "CLEAR," which searched real estate records, criminal information, and both criminal and civil records. He also searched the State of Tennessee Justice Portal, which contained driver's license information, vehicle information, criminal histories, and Tennessee Department of Correction information. He further searched the National Crime Information Center (NCIC) which he characterized as a national search through the FBI. Finally, he searched death records. He found a potential phone number but, after calling the number, determined it was a "dead end."*

Rimmer III, 623 S.W.3d at 281-82 (appendix). Although the TBI agent did not attempt to contact the witness's family and did not attempt to obtain contact information from the Indiana Department of Correction (where the defendant had, unknown to the TBI agent, been incarcerated previously), the trial and appellate courts concluded the State's attempts to locate the witness constituted a good-faith effort, and their failure to

find the witness despite such an effort allowed them to introduce the witness's former testimony at the defendant's retrial. Id. at 283.

In State v. Bilbrey, 912 S.W.2d 187 (Tenn. Crim. App. 1995), a case involving a sentence of life imprisonment, the court held that the testimony of the defendant's co-defendant, from the defendant's first trial, could be used at the defendant's retrial based on the co-defendant's unavailability resulting from his invocation of his Fifth Amendment privilege against self-incrimination. The defendant in Bilbrey had been previously tried and convicted of first degree murder and aggravated robbery. The defendant's co-defendant testified in the defendant's first trial as a State witness. On appeal from the defendant's initial convictions and sentences, the Court of Criminal Appeals reversed and remanded for a new trial. See State v. Bilbrey, 858 S.W.2d 911 (Tenn. Crim. App. 1993). At the retrial, the co-defendant invoked his Fifth Amendment privilege against self-incrimination when called as a State witness. Upon request, the trial court allowed the State to read into the record the co-defendant's testimony from the first trial. At the conclusion of the retrial, the defendant was again found guilty of first degree murder and sentenced to life imprisonment. On appeal, the defendant argued that the trial court had erred in granting the State's motion to read the prior testimony of the co-defendant into the record at the retrial given the circumstances of the case. The Court of Criminal Appeals affirmed, finding no error in the admission of the co-defendant's testimony from the first trial. Bilbrey, 912 S.W.2d at 188.

In State v. Stephenson, 195 S.W.3d 574, 590-91 (Tenn. 2006), the Tennessee Supreme Court also addressed the issue of prior testimony introduced at resentencing and stated, "The prerequisites for admission of [prior] testimony under Rule 804(b)(1) of the Tennessee Rules of Evidence do not apply to . . . resentencing hearing[s]." 195 S.W.3d at 590. The court held that a defendant's rights of confrontation under both the Sixth Amendment and the Tennessee Constitution are not violated by the admission of prior testimony in a capital sentencing hearing. Id. at 590-91.

5. Victim Impact in Older Cases

Although the pool of applicable defendants is dwindling, it is worthy to note that the State may introduce victim impact evidence even if the offense was committed at a time when the capital sentencing statute did not provide for victim impact evidence. See State v. Carter, 114 S.W.3d 895, 906-07 (Tenn. 2003); State v. Reid, 91 S.W.3d 247, 279-80 (Tenn. 2002) (citing State v. Nesbit, 978 S.W.2d 872, 889-90 (Tenn. 1998)).

C. RETRIAL/RESENTENCING ISSUES

1. Double Jeopardy

In addition to the double jeopardy issues explored earlier in this book, double jeopardy concerns may arise based on the way juries were formerly instructed on certain offenses, particularly first degree murder.

In the second jury trial involving Michael Rimmer, the defendant argued the jury's verdict in the first jury trial precluded him from being tried for felony murder. See Rimmer III, 623 S.W.3d at 253.[4] Rimmer was originally indicted on separate counts of first degree premeditated murder and felony murder, as well as counts of aggravated robbery, and theft of property. See id. at 241. At the first trial, the trial court instructed the jury as follows:

> *When you retire to consider your verdict in indictment number 98-01034, you will first inquire, is the defendant guilty of Murder in the First Degree as charged in the First Count of the indictment? If you find the defendant guilty of this offense, beyond a reasonable doubt, your verdict should be,*
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> > *"We, the Jury, find the defendant guilty of Murder in the First Degree as charged in the First Count of the*

4 On direct appeal of Rimmer's first conviction and death sentence, the Court of Criminal Appeals affirmed the defendant's conviction but granted him a new sentencing hearing. See State v. Rimmer, 2001 WL 567960 (Tenn. Crim. App. May 25, 2001) ("Rimmer I"). The jury at the resentencing hearing sentenced Rimmer to death, and this sentence withstood direct appeal. See Rimmer II, 250 S.W.3d 12, 36 (Tenn. 2008). However, after the resentencing direct appeal ended Rimmer was granted post-conviction relief in the form of a new trial, and "[t]he state did not appeal." Rimmer III, 623 S.W.3d at 242.

indictment."

> *If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Murder in the First Degree During the Perpetration of a Robbery as charged in the Second Count of the indictment*

Id. at 254. The jury found the defendant guilty of premeditated first degree murder and, pursuant with the trial court's jury instructions, did not consider the felony murder count. See id.

Before Rimmer's second trial, he moved to dismiss the felony murder counts on double jeopardy grounds, arguing "the jury's failure to return a verdict on the felony murder count in the first trial amounted to an acquittal, which prevented a second trial on that charge." Id. The trial court denied the motion. Id. The jury in the second trial found the defendant guilty on both first degree murder counts, which merged. See id. at 252. On direct appeal, the Tennessee Supreme Court affirmed the trial court's decision:

> *Based on the sequential jury instructions given in the 1998 trial and the subsequent verdict, once the jury found the defendant guilty of first degree premeditated murder (Count 1), we presume it stopped its deliberations without considering the felony murder charge (Count 2). Thus, the jury in the first trial did not have a full opportunity to consider the felony murder count before it rendered its verdict, so double jeopardy did not prevent the State from prosecuting the Defendant for felony murder in the second trial. See, e.g., Price v. Georgia, 398 U.S. 323, 329, 90 S. Ct. 1757, 26 L.Ed.2d 300 (1970) (holding double jeopardy prevents retrial on the greater charge when the first jury "was given a full opportunity to return a verdict" on the greater charge and returned a verdict on the lesser charge instead (quoting Green v. United States, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L.Ed.2d 199 (1957))). Accordingly, we affirm the trial court's denial of the Defendant's motion to dismiss the felony murder count.*

Rimmer III, 623 S.W.3d at 255.

2. Scope

a. Applicable Statute

The admissibility of evidence at a capital resentencing hearing is governed by Tennessee Code Annotated section 39-13-204(c). See State v. Rimmer, 250 S.W.3d 12, 23-24 (Tenn. 2008) ("Rimmer II"). Section 39-13-204(c) reads:

> **(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.**

However, the version of this statute applicable to a defendant's retrial

is the version **in effect at the time of the offense**.

Thus, if a defendant is being retried for an offense occurring before May 7, 1998, the State is not allowed to introduce "evidence concerning the facts and circumstances of the prior conviction" if the State seeks death based on the defendant's prior conviction for a violent felony. See State v. Odom, 137 S.W.3d 572, 582-83 (Tenn. 2004); State v. Powers, 101 S.W.3d 383, 400 (Tenn. 2003).

NOTE: For a discussion of the evidence admissible at a sentencing hearing, see Chapter 7 of this book.

b. Aggravators and Mitigators at Resentencing

In Rimmer II, the court stated, "While the trial court has some discretionary authority [to admit evidence], the purpose of the statute is to permit any probative evidence of mitigation. The plain language of the legislation prohibits the exclusion of mitigating evidence merely because it is hearsay." Rimmer II, 250 S.W.3d at 253. "The pertinent inquiry as to its admissibility is whether the proposed evidence is 'reliable and relevant to one of the aggravating or mitigating circumstances.'" Id. (quoting State v. Reid, 213 S.W.3d 792, 817 (Tenn. 2006)). If such evidence is reliable, "hearsay should be permitted in a capital sentencing hearing." Id. (citation omitted). "[P]roof of residual doubt is relevant in a capital sentencing hearing as a 'non-statutory mitigating circumstance.'" Id. (citations omitted).

In State v. Harris, 919 S.W.2d 323, 330 (Tenn. 1996), the court held that where a defendant is sentenced to death and then receives relief on appeal, the prosecution is not prohibited from again seeking the death penalty at resentencing. The court stated that "the capital sentencing trial is not a series of mini trials, and there is no such thing as an acquittal from an aggravating circumstance. . . . Accordingly, the State is free, at resentencing to introduce proof of any aggravating circumstance which is otherwise legally valid." Id.

Practically, this would mean that if the state had sought four

aggravating factors at the original trial and the jury had only found two, all four original factors plus any additional factors may be sought at the resentencing hearing. See State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997).

The Harris court further discussed the scope of aggravating and mitigating circumstances at a resentencing hearing.

> *[T]he State is not precluded by Tenn. R. Crim. P. 12.3 from relying on new aggravating circumstances at resentencing. Notice such as that rule requires is not constitutionally mandated, though it is the better practice. State v. Berry, 592 S.W.2d 553, 562 (Tenn. 1980). The purpose of the rule is to ensure that the defense receives timely notice to enable adequate trial preparation. In the context of a capital resentencing hearing wherein the State intends to rely on aggravating circumstances different from those relied upon at the original trial, that purpose is fulfilled by requiring the State to file a new notice under Tenn. R. Crim. P. 12.3, which informs the defense of its intent to seek the death penalty, including the aggravating circumstances upon which the State intends to rely, thirty days prior to the resentencing hearing. Cf. State v. Hines, [919]S.W.2d [573] (Tenn. 1995) (Holding that a new notice is not required before resentencing if the State intends to rely upon only those aggravating circumstances noticed before the first trial).*
>
> *As this Court previously has observed, "on a resentencing hearing, the rule of evidence with regard to the only issue before the jury remains the same -- both the State and the defendant may introduce any evidence relating to the circumstances of the crime, relevant aggravating circumstances or any mitigating circumstances, so that the jury will have complete information relevant to punishment. State v. Bigbee, 885 S.W.2d 797, 813 (Tenn. 1994). Simply stated, if the offered evidence bears on punishment, it is admissible." State v. Teague, 897 S.W.2d 248, 250 (Tenn. 1994).*
>
> *At resentencing, the defendant is not limited to proof of mitigating circumstances presented in the initial sentencing hearing. Id. Neither is the State limited, by constitutional restrictions, or Tenn. R. Crim. P. 12.3, to evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence. Pickens v. State, 730 S.W.2d [230,] 235 [(Ark. 1987)], (quoting, United States v. Shotwell Mfg. Co., 355 U.S. [233,] 243 [(1957)] Any other rule would defeat the basic premise of capital sentencing proceedings which are theoretically designed to allow the sentencer to consider all relevant evidence regarding the nature of the*

> *crime and the character of the defendant to determine the appropriate punishment. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); see also Preston v. State, 607 So. 2d [404,] 409 [(Fla. 1992)].*

Harris, 919 S.W.2d at 331-32 (alterations added).

> **NOTE:** Based on the above, if the State wishes to introduce new aggravating circumstances (or delete old ones) in the new sentencing proceeding, it must file a new Rule 12.3 notice. However, if the State wishes to rely on the previous aggravators, it need not file a new notice. Furthermore, the language of any statutory aggravating circumstance listed in the notice (and instructed to the jury) must be the language **in effect at the time of the offense**.

See also State v. Bane, 57 S.W.3d 411, 427-28 (Tenn. 2001) ("Harris makes it clear that the 'clean slate' rule applies to resentencing.").

The Tennessee Supreme Court has long held, "At a resentencing hearing, both the State and Defendant are entitled to offer evidence relating to the circumstances of the crime so that the sentencing jury will have essential background information 'to ensure that the jury acts from a base of knowledge in sentencing the defendant.'" State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987) (quoting State v. Teague, 680 S.W.2d 785, 788 (Tenn. 1984)). See also State v. Middlebrooks, 995 S.W.2d 550, 567 (Tenn. 1999) (Appendix); State v. Stephenson, 195 S.W.3d 574, 598 (Tenn. 2006) (Appendix).

c. Formerly Litigated Motions

The court in Stephenson was also presented with a situation in which a defendant at resentencing sought to assert new grounds on a motion to suppress which had been litigated at the original trial. The court held that "[t]he fact that the defendant's sentence was overturned on appeal does not provide him with a second opportunity to litigate pretrial issues that could have been raised before his original trial." Stephenson, 195 S.W.3d at 592.

3. Residual Doubt

In State v. Hartman, 42 S.W.3d 44, 57 (Tenn. 2001), the Tennessee Supreme Court discussed the issue of what is admissible on resentencing as it relates to the issue of residual doubt.[5]

> *A capital sentencing jury may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The United States Supreme Court has held that there is no constitutional right to have residual doubt considered as a mitigating factor in a capital sentencing hearing. See Franklin v. Lynaugh, 487 U.S. 164, 174, 108 S. Ct. 2320, 2327, 101 L. Ed. 2d 155 (1988). However, just six years ago this Court, in a unanimous decision, held that Tennessee law requires that a defendant be allowed to present evidence at a re-sentencing hearing to establish residual doubt as a nonstatutory mitigating circumstance. See State v. Teague, 897 S.W.2d 248, 256 (1995) (Teague IV). In so holding we stated:*
>
> > *The defendant's legal argument, that in this case he is entitled to present "any exculpatory evidence of which [the State] was aware relating to the defendant's role in or noninvolvement in the killing of [the victim]" is supported by the facts of this case as well as the statute and the Tennessee and federal decisions discussed above. Those cases dealt with evidence that had been presented to the jury in the prior trial or evidence that was consistent with the defendant's plea in the prior trial. In none of the cases in which the evidence was held to be admissible in the re-sentencing hearing did the defendant take a position regarding the circumstances of the crime inconsistent in legal principle with that taken at the prior trial. As stated previously, the exact nature of the evidence which the State refused to disclose does not appear in the record. However, the order entered by the trial court applies to "any exculpatory evidence . . . relating to the defendant's role in or noninvolvement in the killing of [the victim]." Under the terms of that order, the defendant would be entitled to present evidence regarding the circumstances of the crime, even if one of those*

[5]In Hartman, the defendant attempted to present evidence that the state paid an important trial witness for his testimony and that his prior defense team did not have this information at the prior trial. The witness did not testify at the resentencing hearing.

> *circumstances was that the defendant was not a participant. Any evidence within that definition would be consistent with the position taken by the defendant throughout these proceedings. He has consistently maintained that he is not guilty of first degree murder, the offense charged. He insisted on direct appeal in Teague I that the evidence was not sufficient to support the verdict and that the State withheld evidence of a "deal" with Skinner for his incriminating testimony. On appeal to the Court of Criminal Appeals in Teague III, the defendant asserted his innocence of the offense charged and claimed that his conviction was procured by fraud and misrepresentation.*
>
> *To the extent that the nature of evidence held by the State appears in this record, such evidence conforms to the indictment, the defendant's plea and the rules of evidence and, therefore, it would have been admissible at the sentencing hearings in the original trial.*
>
> *Both the statute and prior case law dictate that the defendant has the right to present at the sentencing hearing, whether by the jury which heard the guilt phase or by a jury on re-sentencing, evidence relating to the circumstances of the crime or the aggravating or mitigating circumstances, including evidence which may mitigate his culpability. Evidence otherwise admissible under the pleadings and applicable rules of evidence, is not rendered inadmissible because it may show that the defendant did not kill the victim, so long as it is probative on the issue of the defendant's punishment.*

Hartman, 42 S.W.3d at 55-56 (quoting Teague IV, 897 S.W.2d at 256 (with internal citations and footnotes omitted, emphasis deleted)).

"[R]esidual doubt is established by proof that casts doubt on the defendant's guilt. It is not limited to proof that mitigates the defendant's culpability for the crime." Id. at 57.

See also Rimmer II, 250 S.W.3d at 23-27 (discussion of residual doubt); State v. Bane, 57 S.W.3d 411, 427-28 (Tenn. 2001) (same).

4. Jury Instructions

a. Generally

Resentencing hearings must be conducted in accordance with the law in effect at the time of the commission of the offense. Cauthern, 967 S.W.2d at 732 (citing State v. Brimmer, 876 S.W.2d 75, 82 (Tenn. 1994)). In Cauthern, the court erroneously charged 1989 act language regarding the heinous, atrocious, or cruel aggravating factor for a pre-1989 act offense. The error was held to be harmless under the circumstances. See also State v. Henretta, 325 S.W.3d 112, 123 n.3 (Tenn. 2010) (jury charged that death could only be imposed if aggravators outweighed mitigators beyond a reasonable doubt rather than per the former statute, which only required finding that aggravators outweighed mitigators. Error harmless under the circumstances).

b. Non-Statutory Mitigators

Non-statutory mitigation is a statutory right, not a constitutional right. See State v. Hutchison, 898 S.W.2d 161, 173-74 (Tenn. 1994). Accordingly, if a retrial or new sentencing hearing takes place for an offense committed before the November 1989 criminal code was enacted, the court should not instruct the jury on non-statutory mitigating factors, as the former capital sentencing statutes did not provide for non-statutory mitigation.

Nevertheless, while the court should not instruct the jury on non-statutory mitigators in a pre-1989 case, the defendant still may present proof of such mitigation, as the former capital sentencing statute allowed the jury to consider "any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." Tenn. Code Ann. § 39-2-203(j) (1982) (repealed 1989). That provision, of course, remains in the current sentencing statutes. The trial court, accordingly, should instruct this "catch-all" mitigator regardless of when the offense was committed.

State v. Smith

993 S.W.2d 6 (Tenn. 1999) (Appendix)

In a pre-1989 act offense, the defendant at resentencing requested the court charge non-statutory mitigating factors in accordance with the 1989 act and the decision in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). The court held that the sentencing for the capital offense is governed by the statutory law in effect on the date of the commission of the offense. The pre-1989 law did not require the court to charge non-statutory mitigators and, therefore, the court did not err in refusing to charge them.

Chapter 10

Constitutional Challenges to Lethal Injection Protocol

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Constitutional Challenges to Lethal Injection Protocol

Defendants facing the death penalty will raise numerous challenges to capital punishment throughout the pendency of their capital litigation. In many instances, the challenges are filed to preserve those issues for future review. In addition to the challenges to capital punishment addressed in other chapters of this book, inmates may also challenge the state's lethal injection protocol.

The most recent lethal injection protocol as of the publication of this bench book, enacted July 5, 2018, is included in the Appendix for this chapter.

A. STATUTORY PROVISIONS

Tennessee statutes authorize execution by lethal injection (as the primary method) and electrocution (if lethal injection is declared unconstitutional or the Commissioner of the Department of Correction certifies the lethal injection drugs are unavailable through no fault of the Department):

> **Tenn. Code Ann. § 40-23-114: Death by lethal injection – Election of electrocution – Electrocution as alternative method**
>
> **(a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.**
>
> **(b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.**
>
> **(c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.**
>
> **(d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court**

declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution. No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Tennessee or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

(e) For any person who commits an offense or has committed an offense for which the person is sentenced to the punishment of death, the method of carrying out the sentence shall be by lethal injection unless subdivision (e)(1) or (e)(2) is applicable. If subdivision (e)(1) or (e)(2) is applicable, the method of carrying out the sentence shall be by electrocution. The alternative method of execution shall be used if:

(1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction in the manner described in subsection (d); or

(2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.

As stated above, persons who committed offenses before January 1, 1999, may choose to be electrocuted, but such an election would waive the condemned inmate's right to challenge the "elective" means of execution. See Stewart v. LaGrand, 526 U.S. 115, 119 (1999); Miller v. Parker, 909 F.3d 827, 830 (6th Cir. 2018).

While some states' protocols are statutory, the protocols for carrying out lethal injection and electrocution in Tennessee are left to the Department of Correction (TDOC). See Tenn. Code Ann. § 40-23-114(c). Thus, each time TDOC enacts a new protocol, inmates likely will respond by filing a new protocol challenge. Because TDOC, as a state agency, promulgates execution protocols, any challenges to the lethal injection or electrocution protocol must first be undertaken administratively through the TDOC grievance process.

Formerly, declaratory judgment actions challenging the lethal injection protocol were challenged via suit in the Chancery Court for Davidson County. See Tenn. Code Ann. § 4-5-225. However, **effective July 1, 2021**, such challenges are to be resolved by the three-judge chancery panel created to address constitutional challenges to state laws, executive orders, and administrative rules and regulations. See 2021 Tenn. Pub. Acts, Ch. 566 (H.B. 1130), Tenn. Code Ann. §§ 20-18-101 through -104.

Challenges to the means of execution will expose a judge to a different set of arguments than "traditional" challenges to the death penalty, previously addressed in this book.

> **NOTE**: This chapter focuses solely on lethal injection, as it is the primary statutory method of execution.

B. GENERAL PRINCIPLES

The death penalty is constitutional. Gregg v. Georgia, 538 U.S. 153, 177 (1976) (plurality opinion). "It necessarily follows that there must be a means of carrying it out." Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion). The state may not carry out a death sentence by cruel and unusual punishment, which is prohibited under the federal and state constitutions. See U.S. Const. Am. VIII; Tenn. Const. art. I, § 16.

In Baze, the Court emphasized that the mere fact a particular method of execution subjects an inmate to a risk of harm, standing alone, does not qualify as cruel and unusual punishment:

> *Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.*

553 U.S. at 47. Rather,

> *To establish that such exposure violates the Eighth Amendment, […] the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." Helling v. McKinney, 509 U. S. 25, 33, 34–35 (1993) (emphasis*

> *added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."* Farmer v. Brennan, *511 U. S. 825, 842, 846, and n. 9 (1994).*

Baze, 553 U.S. at 49-50. See also In re Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death[.] ... [Cruelty] implies ... something inhuman and barbarous, something more than the mere extinguishment of life."). Nor does "an isolated mishap alone ... give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of harm.'" Baze, 553 U.S. at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

Furthermore, to prevail on a challenge to a state's execution methods, the inmate "must [also] show that the risk [of severe pain] is substantial when compared to the known and available alternatives." Baze, 553 U.S. at 61; West v. Schofield, 380 S.W.3d 105, 113 (Tenn. Ct. App. 2012) ("West v. Schofield I"). The inmate will not prevail by showing the alternative method of execution is "a slightly or marginally safer alternative." Baze, 553 U.S. at 51.

> *Instead, the proffered alternatives must effectively address a "substantial risk of serious harm."* Farmer, *supra, at 842. To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.*

Id. at 52 (footnote omitted).

The conclusions reached by the controlling Baze opinion were reaffirmed in the Supreme Court's opinion in Glossip v. Gross, 576 U.S. 863, 875-93 (2015).

The Baze/Glossip standard applies for both facial challenges to a particular method of execution and "as-applied" challenges to a method of execution relative to a particular individual. See Bucklew v. Precythe, 587 U.S. ___, 139

S. Ct. 1112, 1126-29 (2019). Bucklew also stated explicitly what seemed obvious from the Supreme Court's prior capital punishment jurisprudence: "The Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, [is not] guaranteed to many people, including most victims of capital crimes." Id. at 1124 (alteration added).

C. BRIEF HISTORY OF TENNESSEE DEATH PENALTY PROTOCOL CHALLENGES

1. Initial Post-Furman/Gregg Cases

When the legislature reinstituted the death penalty in the late 1970s, electrocution, which had been Tennessee's method of execution before the death penalty was declared unconstitutional in the Supreme Court's Furman v. Georgia decision, was the designated method of execution. The Tennessee Supreme Court declared repeatedly that electrocution did not constitute cruel and unusual punishment under the federal and state constitutions. See generally State v. Black, 815 S.W.2d 166, 178-79 (Tenn. 1991). At least one Tennessee Supreme Court justice expressed concern that the Court's holdings on issues related to the death penalty and electrocution during this time were "made without any of the briefest discussion of the arguments posed by defendants" and that "in none of these cases ... was any evidence presented concerning the facts of electrocution, including proof of any unnecessary and wanton pain inflicted on the prisoner." Id. at 200 (Reid, C.J., dissenting). Nevertheless, electrocution withstood all constitutional challenges during the time when it was the primary method of execution in Tennessee.

In 1998, the legislature passed a law making lethal injection the primary means of execution for all persons convicted of a capital offense committed on or after January 1, 1999. Tenn. Code Ann. § 40-23-114(b) (Supp. 1998). At the time, persons sentenced to death for offenses committed before that date would be executed by electrocution but could elect to be executed by lethal injection. Id. § 40-23-114(a) and (c). Two years later, the statute was amended again, making lethal injection the primary means of execution for all death row inmates,

although persons convicted of committing a capital offense before January 1, 1999, could still choose electrocution. After the second change in the law, the court concluded a challenge to the constitutionality of electrocution was, ultimately, moot because under the new legislation, "the defendant is no longer under a penalty of death by electrocution, but rather, death by lethal injection. The issue of whether electrocution is cruel and unusual punishment is no longer properly before the Court." State v. Morris, 24 S.W.3d 788, 797 (Tenn. 2000).

The statute authorizing lethal injection left it to the Department of Correction "to promulgate necessary rules and regulations to facilitate the implementation" of lethal injection. Tenn. Code Ann. § 40-23-114 (Supp. 1998). Initially, TDOC instituted a three-drug protocol. The first drug, sodium thiopental, was intended to render the inmate unconscious. The second drug, pancuronium bromide, was a paralytic which stopped the inmate's breathing. The third drug, potassium chloride, stopped the inmate's heart. This combination of drugs was used in all five executions carried out by lethal injection in Tennessee between 2000 and 2009.

2. First Protocol Challenge: Abdur'Rahman v. Bredesen

In 2002, the first challenge to Tennessee's lethal injection protocol was filed. While his federal habeas corpus proceedings were still pending, Abu-Ali Abdur'Rahman filed a grievance with TDOC asking for administrative review of the lethal injection protocol. After TDOC denied that request, the petitioner filed suit challenging the protocol in Davidson County Chancery Court. Abdur'rahman's suit

> *alleged that the lethal injection protocol, which involves the use of sodium pentothal, pancuronium bromide (''Pavulon''), and potassium chloride, violated the Uniform Administrative Procedures Act, see Tenn. Code Ann. § 4–5–101 et seq. (1998 & Supp.2004); violated the Open Meetings Act, see Tenn. Code Ann. § 8–44–104 (2002); is contrary to the Nonlivestock Animal Humane Death Act, see Tenn. Code Ann. § 44–17–301 (2004); requires the unlicensed practice of medicine; violates public policy in Tennessee; is cruel and unusual punishment under the United States*

and Tennessee constitutions; and violates due process under the United States and Tennessee constitutions.

Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 300 (Tenn. 2003). The chancery court dismissed the petitioner's non-constitutional claims and held an evidentiary hearing. The chancery court denied the petitioner's claims, concluding "the petitioner 'failed to demonstrate that Tennessee's method of lethal injection is unconstitutional.'" Id. at 304. The Court of Appeals affirmed the trial court's order. Id. at 304-05. The Tennessee Supreme Court also affirmed, concluding:

- Despite the State's "fail[ure] to show a legitimate reason for the use of [pancuronium bromide] in the lethal injection protocol," the use of pancuronium bromide in all but two other states employing lethal injection led the Supreme Court to conclude Tennessee's use of pancuronium bromide did "not violate contemporary standards of decency." Id. at 307 (alterations added).

- The petitioner failed to establish the lethal injection protocol threatened him with the "infliction of unnecessary physical or psychological pain and suffering." Id. Therefore, the protocol did not constitute cruel and unusual punishment. Id. at 309.

- The protocol did not violate the petitioner's procedural or substantive due process rights, nor did the protocol deny him access to the courts. Id. at 309-11.

- The protocol was not enacted in violation of the Uniform Administrative Procedures Act. Id. at 311-12.

- The protocol did not violate the Nonlivestock Animal Humane Death Act, as that Act did not apply to human beings or TDOC, and the lethal injection statute did not reference the Act. Id. at 312-13.

- The protocol did not constitute the unlicensed practice of medicine, given the state's authority to implement the lethal injection statute, which did not require the participation of licensed medical professionals. Id. at 313.

- The protocol, which involved the mixture and handling of the lethal injection chemicals by TDOC personnel, did not violate the Drug Control Act of 1989 and the Pharmacy Practice Act of 1996. "Indeed, reading any conditions or restrictions into the lethal injection provisions would risk frustrating the Tennessee General Assembly's considered decision to adopt execution by lethal injection as the primary method of execution in Tennessee." Id. at 314.

3. 2007 Protocol Revisions and Edward Harbison's Federal Challenge

In February 2007, the governor issued an executive order[1] repealing Tennessee's former lethal injection protocol and ordering TDOC to conduct a "comprehensive review" of the lethal injection protocol. TDOC assembled a Protocol Committee that, among other things, reviewed medical evidence and lethal injection protocols in other states. See Harbison v. Little, 511 F. Supp. 2d 872, 875 (M.D. Tenn. 2007). The committee ultimately recommended the use of a single-drug protocol (sodium thiopental) which was not used anywhere at that time, but the TDOC Commissioner, who "had not been present for any of the input from the three physicians that the committee consulted and had not participated in any of the committee's discussions," rejected the proposal and instead retained a three-drug protocol which used the same three drugs from the former protocol. Id. at 880.

In advance of his scheduled September 2007 execution date, inmate Edward Jerome Harbison filed a 42 U.S.C. § 1983 action in federal district court. He alleged the revised protocol violated the Eighth Amendment's prohibition against cruel and unusual punishment. After an evidentiary hearing in which both parties presented medical experts and in which members of the protocol review committee testified regarding the committee's actions, the district court concluded the protocol violated the Eighth Amendment because the protocol presented a "substantial risk that Mr. Harbison will not be unconscious

[1] See Tennessee Governor Phil Bredesen Executive Order No. 43, "An Order Directing the Department of Correction to Complete a Comprehensive Review of the Manner in Which the Death Penalty is Administered in Tennessee" (Feb. 1, 2007), available at https://publications.tnsosfiles.com/pub/execorders/exec-orders-bred43.pdf (accessed Dec. 17, 2021).

when the second and third drugs are administered." Id. at 884. If the inmate was not unconscious, he would suffer extreme pain from the administration of both the second drug (pancuronium bromide, which would paralyze his muscles and render him unable to breathe, thus suffocating him) and third drug (potassium chloride, which would burn while administered and induce a heart attack). See id. at 883-84. In the district court's view, this unconstitutionally impermissible risk was presented by:

- The failure to include a check for consciousness before the other drugs were administered, id. at 884-86;
- The failure to select adequately trained executioners, id. at 886-91; and
- The failure to monitor administration of the drugs adequately, id. at 891-92.

The district court, citing to then-existing Supreme Court precedent in which an Eighth Amendment violation entailed the "wanton infliction of pain," which itself required "'deliberate indifference' to the prisoner's 'serious' medical needs," see id. at 884, concluded the state was aware of substantial risks of harm but nevertheless disregarded them:

- The protocol committee recommended a one-drug protocol, which eliminated the risk of harm presented by the other two drugs, but the TDOC Commissioner disregarded this suggestion and stayed with the three-drug protocol, id. at 895-96; and
- The committee suggested certain safeguards regarding the training of execution team members and monitoring the anesthetic depth of the inmate, but these recommendations were not in the final protocol. Id. at 896-98.

4. Supreme Court Opinion in Baze v. Rees (2008)

Between the district court ruling in Harbison and the Sixth Circuit's opinion on appeal, the Supreme Court decided Baze v. Rees. This case involved a challenge to Kentucky's lethal injection protocol, which

provided for the use of the same drugs as Tennessee's protocol, though in differing amounts. The Supreme Court rejected the petitioners' cruel and unusual punishment challenge to the protocol, concluding:

- The risk of maladministration of sodium thiopental (based on difficulty in mixing the drug and placing it in syringes, failure of the IV lines, risk of infiltration into the tissue, delivery of an inadequate dose to anesthetize the inmate, lack of training of execution team members, and lack of consciousness checks) did not establish a substantial risk of harm under the Eighth Amendment. Baze, 553 U.S. at 54-56. The Court noted testimony stating that mixing the drugs was not difficult and noted there were adequate training measures, redundancy measures (i.e., administering another dose of sodium thiopental if the initial dose was inadequate), and IV observation measures to obviate the concerns raised by the petitioners. See id. Particularly, the Court stated, "a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated." Id. at 59. "The risks of failing to adopt additional monitoring procedures are thus even more 'remote' and attenuated than the risks posed by the alleged inadequacies of Kentucky's procedures designed to ensure the delivery of thiopental." Id.

- Kentucky's failure to adopt a one-drug protocol did not constitute an objectively intolerable risk of pain, given that no other state used such a protocol at the time and the petitioners offered no evidence that the one-drug protocol was "an equally effective manner of imposing a death sentence." Id. at 56-61.

  In the lead Baze opinion, Chief Justice Roberts wrote, "A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard"—i.e., the analogous protocol would not create a substantial risk of serious harm or objectively intolerable risk of harm in light of feasible and readily implementable alternatives that would significantly reduce the risk. Id. at 61.

5. Sixth Circuit's Application of Baze v. Rees in Harbison

The Sixth Circuit reversed the district court's ruling in Harbison, concluding the petitioner's concerns regarding failure to check for consciousness, inadequate training and selection of execution team members, failure to monitor the IV lines, and failure to adopt alternative procedures did not constitute cruel and unusual punishment under the Eighth Amendment as interpreted by Baze. Harbison v. Little, 571 F.3d 531, 536-39 (6th Cir. 2009).

6. 2009 State Protocol Challenge (Stephen West and Billy Irick)

The post-2007 protocols were challenged for the first time in state court via a declaratory judgment action filed by Stephen West and later joined by Billy Irick. Following an evidentiary hearing, the Davidson County Chancery Court concluded the Tennessee lethal injection protocol violated the constitutional prohibition against cruel and unusual punishment. As the Tennessee Court of Appeals summarized,

> *In its ruling, the trial court found that Plaintiffs had carried their burden to demonstrate that the three-drug protocol was cruel and unusual because it allowed death by suffocation while the prisoner is conscious. Upon review of the medical evidence, the trial court found that Plaintiffs had ''carried [their] burden to show that the first injection of 5 grams of sodium thiopental followed by rapid injection of the second drug will result in the inmate's consciousness during suffocation.'' The trial court determined that Plaintiffs had demonstrated that ''the Tennessee protocol does not insure that the prisoner is unconscious before the paralyzing drug ... the second [drug] ... is injected and becomes active in the body.''*

West v. Schofield, 380 S.W.3d 105, 110 (Tenn. Ct. App. 2012) ("West v. Schofield I"). The Chancery Court emphasized that unlike Harbison and Baze, in which all parties agreed that proper administration of the protocol-mandated dose of sodium thiopental would render the inmate unconscious and eliminate the risk of pain caused by the other two drugs, even a properly-administered five-gram dose of sodium thiopental was insufficient to ensure the inmate's unconsciousness:

> *This Court finds that the current amount and concentration of sodium thiopental are insufficient to insure unconsciousness*

> *because the body's ability to and the body's actual use of this drug depends on so many variables, and both medical experts agree that that was the case.*
>
> ...
>
> *...[T]his Court is unable to find what level of sodium thiopental is sufficient to insure unconsciousness because I don't think there is one, given the medical proof that the Court is relying on; given the medical proof in this case.*

Stephen Michael West and Billy Ray Irick v. Gayle Ray, Davidson Co. Chancery Ct. No. 10-1675-I, bench ruling at 35-36 (hearing of Nov. 19, 2010; filed Nov. 22, 2010).

Following this ruling, the Department of Correction amended the lethal injection protocol to include consciousness checks. The Chancery Court held a hearing on the revised protocol, and on March 24, 2011, the court concluded the revised protocol was "constitutional and d[id] not violate the prohibition against cruel and unusual punishment." West v. Schofield I, 380 S.W.3d at 110. On appeal, the Court of Appeals affirmed the trial court's ruling. Id. at 117. The Tennessee Supreme Court denied the petitioner's application for permission to appeal.

However, no executions were carried out under the three-drug protocol following the West case. During the pendency of the West litigation the sole American manufacturer of sodium thiopental stopped making the drug. TDOC later obtained the drug from an alternate source, but in spring 2011 TDOC surrendered the drug to federal authorities. By that time, other states had begun using the drug pentobarbital, both in a single-drug protocol and as the first drug in a three-drug protocol. The sole commercial manufacturer of pentobarbital, a European company, soon stopped supplying the drug to state correctional departments. As a result, some states began using other drugs in their lethal injection protocols, while some of those states which kept pentobarbital in the protocol began contracting with compounding pharmacies to manufacture it. It was against this backdrop that TDOC again revised its lethal injection protocol in September 2013. That revision led to another challenge.

7. 2013-17 State Protocol Challenge (Stephen West, et al.)

In 2013, TDOC adopted a new lethal injection protocol, which was amended a year later to specify the drug to be used was a single dose of compounded pentobarbital. In June 2015, a contract between a compounding pharmacist and TDOC was added to the protocol.

In November 2013, a challenge was filed in Davidson County Chancery Court by several death row inmates, with Stephen West again being the lead plaintiff. The proceedings were delayed following the plaintiffs' failed attempt to challenge the chancery court's ruling that the cause of action was limited to a facial challenge to the protocol (rather than an "as-applied" challenge). See West v. Schofield, 460 S.W.3d 113, 129-32 (Tenn. 2015) ("West v. Schofield II"). The inmates also attempted to obtain the identities of certain persons involved in the lethal injection protocol—their identities are shielded from public disclosure by statute—but the Tennessee Supreme Court rejected this argument. Id. at 121-29. See also Tenn. Code Ann. § 10-7-504(h)(1) (portion of Public Records Act specifically making identities of persons participating in executions confidential).

The inmates also attempted to challenge the electrocution protocol, but following an interlocutory appeal the Tennessee Supreme Court dismissed the electrocution claim as unripe; the court reasoned the litigants were "not currently subject to execution by electrocution and [would] not ever become subject to execution by electrocution unless one of two statutory contingencies occurs in the future." West v. Schofield, 468 S.W.3d 482, 484-85 (Tenn. 2015) ("West v. Schofield III"). The chancery court also dismissed claims alleging civil conspiracy, violation of the Supremacy Clause, and violation of state and federal drug laws.

Ultimately, the case proceeded to a hearing, and the chancery court rejected the inmates' claims. On direct appeal, the Tennessee Supreme Court affirmed, concluding:

> *[T]he Plaintiffs' Eighth Amendment claim in this case that the Protocol exposes them to a substantial risk of severe pain must fail. First, the proof does not preponderate against the trial court's*

conclusion that the Plaintiffs "did not carry their burden to establish [that] Tennessee's protocol using compounded pentobarbital imposed a substantial risk of serious harm and qualifies as cruel and unusual." The Plaintiffs' proof on this point consisted of experts opining on the pain that an inmate would feel if the LIC infiltrated into the tissue surrounding the inmate's vein. Such an event could occur if the LIC had precipitated or if the IV line were not successfully placed or maintained or if the LIC were injected too quickly. We hold that these mere possibilities are not sufficient to satisfy the Plaintiffs' burden to establish a substantial risk of severe pain. See Baze, 553 U.S. at 62, 128 S. Ct. 1520 (holding that "[t]he risks of maladministration [that the petitioners] have suggested—such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel—cannot remotely be characterized as objectively intolerable") (internal quotation marks omitted); see also, e.g., Wood v. Collier, 836 F.3d 534, 540 n.26 (5th Cir. 2016) (rejecting Eighth Amendment challenge to compounded pentobarbital and noting that "[t]he prisoners aver that, because the drug is produced by compounding pharmacies, it could be contaminated or perhaps be some drug other than pentobarbital. This argument does not close the distance between a mere possibility and a sure or very likely risk that contamination will occur and will bring extreme pain"); Zink v. Lombardi, 783 F.3d 1089, 1101 (8th Cir. 2015) (rejecting Eighth Amendment challenge to execution protocol using compounded pentobarbital because "[t]he prisoners rely on allegations of generalized harms resulting from the use of a compounding pharmacy to produce the pentobarbital and have failed to provide anything more than speculation that the current protocol carries a substantial risk of severe pain"); Terrell v. Bryson, 807 F.3d 1276, 1279 (11th Cir. 2015) (Marcus, J., concurring) (expert's opinion that there was a "real possibility" that compounded pentobarbital could have an undetected dangerous pH level or be invisibly polluted with contaminants and "could result in excruciating pain and suffering upon injection" does not meet the burden of proof imposed by Glossip/Baze) (internal quotation marks omitted), petition for cert. docketed, (U.S. Dec. 8, 2015); Wellons v. Comm'r, Ga. Dep't of Corrs., 754 F.3d 1260, 1265 (11th Cir. 2014) (rejecting Eighth Amendment challenge to compounded pentobarbital because "speculation that a drug that has not been approved [by the Food and Drug Administration] will lead to severe pain or suffering 'cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering' " (quoting Mann v. Palmer, 713 F.3d 1306, 1315 (11th Cir. 2013))); Whitaker v. Livingston, 732 F.3d 465, 468 (5th Cir. 2013) (rejecting Eighth

*Amendment challenge to compounded pentobarbital when inmates "pointed to only hypothetical possibilities" that the state's choice of pharmacy, its lab results, and its training of its executioners were defective and were unable to "point to some hypothetical situation, based on science and fact, showing a likelihood of severe pain"), cert. denied, —— U.S. ——, 134 S. Ct. 417, 187 L.Ed.2d 274 (2013); Whitaker v. Livingston, No. CV H-13-2901, 2016 WL 3199532, at *8 (S.D. Tex. June 6, 2016) (rejecting inmates' Eighth Amendment challenge to execution by compounded pentobarbital and holding that "[n]o allegation that rises above the speculative exists that maladministration—however generated—causes unintended suffering from Texas's use of compounded pentobarbital"); Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794, 802–03 (2014) (rejecting inmate's attack on compounded pentobarbital because inmate's proof "that there is some risk that a lack of sterility could lead to symptoms that are irrelevant to a person being executed [and] that there is an undetermined risk that a compounding pharmacy acting in its routine role of producing a well-known medication according to the directions in a prescription will fail to produce an effective drug free of visible precipitates" "fall[s] far short of satisfying the legal standard applied under the Eighth Amendment, which involves a showing of a 'substantial risk of serious harm' that is 'sure or very likely to cause serious illness and needless suffering' " (quoting Baze, 553 U.S. at 49–50, 128 S. Ct. 1520)).*

*The Plaintiffs also have failed to carry their burden of proving their claim that the Protocol's lack of specificity exposes them to a substantial risk of severe pain. As our Court of Appeals has recognized, "[a] lethal injection protocol is not constitutionally infirm simply because it does not specify every step of the procedure in explicit detail." Abdur'Rahman v. Bredesen, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, at *17 (Tenn. Ct. App. Oct. 6, 2004) (citing LaGrand v. Lewis, 883 F.Supp. 469, 470 (D. Ariz. 1995), aff'd sub nom. LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998); Sims v. State, 754 So.2d 657, 668 (Fla. 2000), aff'd, 181 S.W.3d 292 (Tenn. 2005)).*

Second, the Plaintiffs failed to demonstrate "a known and available alternative method of execution that entails a lesser risk of pain." Glossip, 135 S. Ct. at 2731. Indeed, the Plaintiffs affirmatively abandoned any effort to satisfy this Eighth Amendment prerequisite. Apparently, the Plaintiffs concluded that they did not need to meet the second Glossip/Baze requirement based upon some language used by this Court in an order filed in a different case involving Plaintiff West, State v. Stephen Michael West, No. M1987–

000130–SC–DPE–DD (Tenn. Nov. 29, 2010), which this Court referred to in passing in West v. Schofield [II], 460 S.W.3d 113, 117 n.2 (Tenn. 2015). In that 2010 order, this Court stated the following:

> *In any proceedings on remand, the standards enunciated in the plurality opinion in Baze v. Rees, 553 U.S. 35, 51, 128 S. Ct. 1520, 170 L.Ed.2d 420 (2008) apply. The burden is on Mr. West to prove that the revised protocol creates an "objectively intolerable risk of harm that qualifies as cruel and unusual." Baze v. Rees, 553 U.S. at 52, 128 S. Ct. 1520. In order to carry this heavy burden, he must demonstrate that the revised protocol imposes a substantial risk of serious harm, and he must either propose an alternative method of execution that is feasible, readily implemented, and which significantly reduces the substantial risk of severe pain, Baze v. Rees, 553 U.S. at 52–53, 128 S. Ct. 1520, or demonstrate that no lethal injection protocol can significantly reduce the substantial risk of severe pain.*

State v. Stephen Michael West, No. M1987–000130–SC–DPE–DD, at 3 (Tenn. Nov. 29, 2010) ("the West Order") (final two emphases added). This Court cited to no authority in the West Order for the proposition that a condemned inmate may raise a successful Eighth Amendment challenge by proving that "no lethal injection protocol can significantly reduce the substantial risk of severe pain," and Glossip does not construe Baze in this manner.

This Court may not construe the Eighth Amendment of the United States Constitution in a manner that is contrary to the United States Supreme Court's interpretation. See, e.g., James v. City of Boise, Idaho, —— U.S. ——, 136 S. Ct. 685, 686, 193 L.Ed.2d 694 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."). Glossip, which was filed after the 2010 West order but before the trial in this matter began, made clear the burden of proof that a condemned inmate must satisfy in Eighth Amendment challenges to a lethal injection protocol. The Plaintiffs did not satisfy that burden of proof.

> *Because the Plaintiffs have failed to satisfy either prerequisite imposed by the Supreme Court for a successful Eighth Amendment challenge to an execution protocol on the basis that the Protocol creates an unacceptable risk of severe pain, we hold that the Plaintiffs are not entitled to relief under the Eighth Amendment on this basis.*

West v. Schofield, 519 S.W.3d 550, 564-66 (Tenn. 2017) (footnote omitted) ("West v. Schofield IV").

The Tennessee Supreme Court also rejected the inmates' claims that the protocol created a risk of lingering death, see id. at 566-67, and rejected other various constitutional claims, see id. at 567-68. Finally, the court affirmed the chancery court's pre-hearing dismissal of the drug act and conspiracy claims referenced above. See id. at 568-72.

D. CURRENT LETHAL INJECTION PROTOCOL

1. Generally

The most recent version of the lethal injection protocol, adopted July 5, 2018, replaced the one-drug protocol with a three-drug protocol: 500 milligrams of midazolam (designed to render the inmate unconscious), followed by 100 milligrams of vecuronium bromide (to paralyze the inmate) and 240 milliequivalents of potassium chloride (which stops the inmate's heart). The protocol provides specific procedures for the "procurement, storage, accountability, and transfer" of the lethal injection drugs.

The injection of the first drug (which is administered from two syringes) is followed by a two-minute waiting period. At the end of the waiting period, the Warden of Riverbend Maximum Security Institution (where executions take place) conducts a "consciousness check," in which the Warden will perform actions such as "brushing the back of his hand over the condemned inmate's eyelashes, calling the condemned inmate's name loudly two times, and grabbing the trapezius muscle of the shoulder with the thumb and two fingers and twisting."

If the inmate responds, a second injection of midazolam is administered. If the inmate does not respond, the executioner will administer the second and third drugs. After the potassium chloride is administered, there is a five-minute waiting period. After five minutes pass, a physician conducts an examination of the inmate to determine whether the inmate is dead. If the inmate is not dead, the three-drug process is repeated (presuming the backup syringes containing the first drug were not used).

2. Execution Team Membership

Among the members of the execution team, three members are described as "EMTs-Paramedic," i.e., certified emergency medical technicians, while three members are correctional staff members who have "Received IV training through the Tennessee Correction Academy by qualified medical professionals." Lethal Injection Execution Manual (July 2018 ed.) at 31. Although not explicitly stated, it appears the EMTs and IV-trained correctional staff members comprise the "IV Team" referenced in the lethal injection manual (see below).

3. Training of Execution Team Members

The Lethal Injection Execution Manual provides:

> *Execution Team*
>
> *The Execution Team shall consist of: the Warden [of Riverbend], Associate Warden of Security, IV Team, Extraction Team, Death Watch Team, Lethal Injection Recorder, Facility Maintenance Supervisor, ITS Security Systems Technician(s), and Escort Officers.*
>
> *Training*
>
> 1. *All Execution Team members must read the Lethal Injection Execution Manual when they become members of the Execution Team. Additionally, the Warden or designee holds a class during which the manual is reviewed and clearly understood by all participants. At least annually,*

the Warden or designee holds an Execution Manual review class for all members of the Execution Team.

2. *The Execution Team simulates Day 3 (Execution Day) of the Death Watch Procedures and the steps outlined in Section 4 [sic[2]] for at least one (1) hour each month. Additional training is held within two weeks before a scheduled execution. A training record is maintained to document all staff members who participate in the training.*

   The simulation includes all steps of the execution process with the following exceptions:

   (A) Volunteers play the roles of the condemned inmate and physician.
   (B) Saline solution is substituted for the lethal chemicals.
   (C) A body is not placed in the body bag.

3. *All training that occurs is documented. The documentation includes the times and dates of the training, the participants, and the training content.*

Executioner:

The Executioner receives initial and periodic instruction from a qualified medical professional.

Lethal Injection Execution Manual at 32.

4. Establishing IV Line

An EMT is responsible for placing the catheter into the inmate's vein. The Lethal Injection Execution Manual states, "Size, location, and resilience of veins affect their desirability for infusion purposes." Id. at 42. The manual provides specific instructions for inserting the catheter; the EMT first must attempt to place the catheter "into a vein on the right

[2] Section 4 of the protocol manual addresses the training and qualifications of execution team members. The death watch/protocol administration procedures presumably referenced by this item appear in Section 5 of the manual.

side of the inmate in the anticubital fossa area." Id. Should the EMT be unsuccessful in placing the catheter there, the manual then provides a specific order of locations into which the EMT must attempt to insert the catheter: (1) forearm, (2) wrist, (3) back of hand, (4) top of foot, (5) ankle, lower leg, or another appropriate location "as determined by the EMTs." Id.

After locating a vein, the manual provides specific duties for IV team members regarding placing catheters and establishing IV lines:

> *1. The EMT(s):*
>
> > *a. Place a tissue towel under the limb or body part to be used to start an IV.*
> >
> > *b. Place a tourniquet around the limb or body part 6-8 inches above the vein to be used.*
> >
> > *c. Find the best vein to use according to the succession outlined.*
> >
> > *d. Swab the area with an alcohol pad.*
> >
> > *e. Determine the size of the catheter to be used which is determined by the size of the vein, 18 gauge being the largest.*
> >
> > *f. Insert a catheter into the vein bevel side up at a shallow angle, feeding the plastic catheter sleeve into the vein.*
>
> *The flash chamber of the catheter fills with blood, which is the first indicator the catheter is inside a vein.*
>
> *2. An IV Team member attaches the Solution Set line from the right Sodium Chloride bag to the catheter. This is a friction coupling and requires the line to be pushed into the catheter and twisted to secure the connection.*
>
> *3. An IV Team member in the Execution Chamber signals the IV Team member in the Lethal Injection Room to open the clamp on the right bag of Sodium Chloride, near the spike, to allow a flow of Sodium Chloride into the vein.*
>
> *4. Members of the IV Team observe the IV for indication of a well-functioning line. The first indicator is that when the clamp is opened, there is a steady flow/drip inside the drip chamber. The second*

indicator is that the flash chamber becomes clear of blood as the Sodium Chloride begins to flow. When the IV Team is confident that there is a well-functioning line, the IV Team member in the Lethal Injection Room deactivates the telephone indicator light, signaling that there is a successful IV line.

5. A member of the IV Team places the Tegaderm transparent dressing over the catheter and secures the line in place with tape.

6. The second IV is then started on the left side of the condemned inmate and Steps 1-5 are repeated, using the left bag of Sodium Chloride.

Id. at 42-43.

5. Chemical Administration and IV Monitoring

Per the manual:

1. All members of the IV Team monitor both catheters to ensure that there is no swelling around the catheter that could indicate that the catheter is not sufficiently inside the vein. The IV Team member in the Lethal Injection Room monitors the catheters by watching the monitor in his room, which displays the exact location of the catheter(s) by means of a pan-tilt zoom camera. The IV Team Members observe the drip chambers in both lines to ensure a steady flow/drip into each Solution Set line.

2. Next, an IV Team member tapes both hands, palms up, to the arm support to prevent movement. The palms will be down should the back of the hand be used for the catheter.

3. When the hands are taped in place, the members of the IV Team leave the Execution Chamber.

4. Designated members of the IV Team enter the Lethal Injection Room and assume their pre-assigned stations.

a. One IV Team member observes the process, monitoring the catheter sites for swelling or discoloration, and enters the times of

the LIC and Saline administration on the Chemical Administration Record sheet.

b. One IV Team member observes the process and hands the labeled/numbered/colored syringes to the Executioner in the prescribed order.

5. The Executioner selects either the left or right Solution Set line based on the flow/drip inside the drip chamber. If both lines are equal, the left line nearest the Executioner is used.

6. When the Warden gives the signal to proceed with the execution, the Executioner clamps the line near the spike. The Executioner receives the first syringe from the member of the IV Team and inserts and twists it into the extension line.

#	DRUG SEQUENCE INDENTIFIER LABEL	VOLUME
1.	MIDAZOLAM [DRUG NAME, RED #1]	50 cc
2.	MIDAZOLAM [DRUG NAME, RED #2]	50 cc
3.	SALINE FLUSH [DRUG NAME, RED #3]	50 cc
4.	VECURONIUM BROMIDE [DRUG NAME, RED #1]	50 cc
5.	VECURONIUM BROMIDE [DRUG NAME, RED #2]	50 cc
6.	SALINE FLUSH [DRUG NAME, RED #3]	50 cc
7.	POTASSIUM CHLORIDE [DRUG NAME, RED #1]	60 cc
8.	POTASSIUM CHLORIDE [DRUG NAME, RED #2]	60 cc
9.	SALINE FLUSH [DRUG NAME, RED #3]	50 cc

*7. The Executioner pushes on the plunger of the **#1** syringe (red) with a slow, steady pressure. Should there be or appear to be swelling around the catheter or if there is resistance to the pressure being applied to the plunger, the Executioner pulls the plunger back. If the*

extension line starts to fill with blood, the execution may proceed. If there is no blood, the Executioner discontinues with this line. He starts the process on the other line with the back-up set of syringes starting with syringe #l (blue) and following all of Step 6.

8. An IV Team Member hands the syringes to the Executioner and both IV Team Members observe the correct order of the syringes as the Executioner injects the [lethal injection drugs] and saline solution.

9. After the last syringe has been injected, the Executioner closes the extension line with a clamp and opens the line below the spike to allow a drop of 1-2 drops per second in the drip chamber.

10. The Executioner, signals the Warden that all of the LIC and saline solution have been administered.

Lethal Injection Protocol Manual at 44-45.

E. CHALLENGE TO CURRENT PROTOCOL: ABDUR'RAHMAN v. PARKER

1. Petition and Chancery Court Hearing

In January 2018, TDOC adopted the current three-drug protocol as an alternative to the prior one-drug protocol. The new protocol used the same drugs as the Oklahoma protocol which was reviewed by the United States Supreme Court in Glossip v. Gross. This prompted the State to file motions to seek execution dates for several inmates who had exhausted their constitutional challenges. In response, attorneys for several death row inmates filed challenges to the revised protocol. In addition to arguing the midazolam-based protocol constituted cruel and unusual punishment, the inmates, per the mandate established by Baze and successive cases, identified the one-drug protocol as an alternative. While the January 2018 protocol allowed the two protocols (one-drug and three-drug) to be used in the alternative, the July 2018 revisions to the protocol, which remain in effect today, eliminated the one-drug,

pentobarbital-based protocol, leaving the three-drug, midazolam-based protocol as the only protocol.

The case proceeded to a hearing on July 9, 2018. After a ten-day hearing, the chancery court dismissed the complaint. The Tennessee Supreme Court summarized the chancery court's ruling:

> *On July 26, 2018, two days after closing arguments, the trial court dismissed the complaint for declaratory judgment. Regarding the claims that the protocol, on its face, amounts to cruel and unusual punishment, the trial court found that the Plaintiffs failed to prove an essential element—that an available alternative method of execution exists—and, on this basis alone, their claims must be dismissed. Though not necessary for its ruling, the trial court also found that the Plaintiffs failed to prove the other essential element—that the three-drug protocol creates a demonstrated risk of severe pain. In addition, the trial court denied relief as to the Plaintiffs' other constitutional claims that included substantive due process, procedural due process, and access to the courts.*

Abdur'Rahman v. Parker, 558 S.W.3d 606, 613 (Tenn. 2018).

2. Direct Appeal

On direct appeal, the Tennessee Supreme Court assumed direct jurisdiction, bypassing review in the Court of Appeals. The main issue on appeal focused on the chancery court's conclusion that the State had established pentobarbital was unavailable, and therefore the inmates' reliance on the previously-approved, single-drug protocol did not satisfy the burden of establishing a known and available alternative. The Tennessee Supreme Court concluded,

> *Our recent decision in West v. Schofield [IV] did not analyze what it means for a proposed alternative method of execution to be available because the condemned inmates in that case affirmatively abandoned any effort to satisfy this prerequisite. 519 S.W.3d at 565. For lethal injection drugs, the term "available" under the Glossip standard has been construed to mean the ability of the state to obtain the drugs with ordinary transactional effort:*
>
> > *Ohio itself contacted the departments of correction in Texas, Missouri, Georgia,*

> *Virginia, Alabama, Arizona, and Florida to ask whether they would be willing to share their supplies of pentobarbital. All refused. Granted, for the one-drug protocol to be "available" and "readily implemented," Ohio need not already have the drugs on hand. But for [the Glossip] standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot.*

In re Ohio Execution Protocol, 860 F.3d 881, 891 (6th Cir. 2017), cert. denied sub nom. Otte v. Morgan, —— U.S. ——, 137 S. Ct. 2238, 198 L.Ed.2d 761 (2017); see also McGehee v. Hutchinson, 854 F.3d 488, 493 (8th Cir. 2017) ("We do not say that an alternative method must be authorized by statute or ready to use immediately, but we concur with the Eleventh Circuit that the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly.") (citation omitted), cert. denied, —— U.S. ——, 137 S. Ct. 1275, 197 L.Ed.2d 746 (2017).

We will not judge the reasonableness of Tennessee's efforts to obtain lethal injection drugs by the ability of other states to do so. [(citations omitted)] Proof that lethal injection drugs are available with ordinary transactional effort requires more than mere speculation, more than just a showing of hypothetical availability. See In re Ohio Execution Protocol, 860 F.3d at 891 (discounting testimony that the witness "believed 'there are pharmacists in the United States that are able to compound pentobarbital for use in lethal injections because other states have been reported to have obtained compounded pentobarbital for use in executions,'" because "that is quite different from saying that any given state can actually locate those pharmacies and readily obtain the drugs"). The fact that other states have or can obtain pentobarbital for executions is not proof that Tennessee can do so with ordinary transactional effort. See id.

The trial court ruled that the Plaintiffs failed to prove that their proposed alternative method of execution, a one-drug protocol using pentobarbital, is available to the Defendants. The Plaintiffs offered no direct proof as to availability of this alternative method of execution. All of the Plaintiffs' expert witnesses confirmed that they were not retained to identify a source for pentobarbital and that they had no knowledge of where TDOC could obtain it. The

Plaintiffs attempted to prove availability of pentobarbital by discrediting the testimony of the following witnesses for the Defendants: the TDOC Commissioner, the TDOC Deputy Commissioner for Administration, and the Warden of Riverbend Maximum Security Institution who is responsible for carrying out executions.

The trial court found nothing in the demeanor of these TDOC officials, nor the facts to which they testified, to overcome the presumption that they had discharged their duties in good faith and in accordance with the law. See West v. Schofield [II], 460 S.W.3d at 131. The trial court found convincing their testimony that TDOC would use pentobarbital if it were available, because this Court recently upheld the one-drug protocol using pentobarbital. See West v. Schofield [IV], 519 S.W.3d at 552. We agree with the trial court that the Plaintiffs' argument—that TDOC would not make a good-faith effort to locate pentobarbital—defies common sense.[ ]Moreover, the trial court accredited the testimony of the TDOC officials, finding them all to be credible. We will not second-guess the trial court's credibility determinations without clear and convincing evidence to the contrary, which this record does not contain. See King v. Anderson Cnty., 419 S.W.3d 232, 246 (Tenn. 2013).

The Commissioner and the Deputy Commissioner provided testimony regarding TDOC's unsuccessful efforts to obtain pentobarbital for use in the lethal injection protocol. The trial court found that "they proceeded reasonably as department heads to delegate the task of investigating supplies of pentobarbital to a member of their staff." A PowerPoint presentation, introduced as part of trial exhibit 105, detailed those unsuccessful efforts. The trial court found "that trial exhibit 105 and the testimony of the TDOC officials establish that Tennessee does not have access to and is unable to obtain [pentobarbital] with ordinary transactional effort." Our review of this finding of fact is accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. See Tenn. R. App. P. 13(d) ("Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.").

The Plaintiffs assert that uncontroverted proof shows pentobarbital was available for purchase in 2017 and would still be good for use in executions in 2019 and 2020. They also contend that

> *the Defendants have (1) a physician willing to write a prescription for pentobarbital, (2) a pharmacy and pharmacist with the proper licensing to obtain pentobarbital, and (3) two contracts with two different compounding pharmacists to compound pentobarbital for executions. None of this evidence is relevant, however, if pentobarbital is not now available. The Plaintiffs' argument—that the Defendants acted in bad faith by choosing not to obtain pentobarbital when it was feasible and readily available—is totally inconsistent with the trial court's credibility determinations.*[ ] *We conclude that the evidence does not preponderate against the trial court's finding that Tennessee does not have access to and is unable to obtain pentobarbital with ordinary transactional effort for use in lethal injections.*
>
> *In summary, we agree with the trial court's finding that pentobarbital—the only alternative method of execution that the Plaintiffs sufficiently pleaded—is not available for use in executions in Tennessee. Therefore, the Plaintiffs failed to carry their burden of showing availability of their proposed alternative method of execution, as required under the Glossip standard set forth by the United States Supreme Court and recently adopted by this Court in West v. Schofield [IV] for state constitutional purposes. As we noted earlier, this requirement is an independent requirement, separate and apart from the requirement to prove that the protocol creates a demonstrated risk of severe pain. Therefore, for this reason, we hold that the Plaintiffs failed to carry their burden to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution or article 1, section 16 of the Tennessee Constitution. As a result, we need not address the Plaintiffs' claim that the three-drug protocol creates a demonstrated risk of severe pain. Accordingly, we affirm the trial court's dismissal of this action.*

Abdur'Rahman v. Parker, 558 S.W.3d at 623-25 (some alterations added, footnotes omitted).

3. Subsequent Federal Challenges: West v. Parker and Middlebrooks v. Parker

Stephen West also challenged the 2018 protocol in federal court. After the Tennessee Supreme Court issued its opinion in Abdur'Rahman v. Parker, the District Court concluded the state court conclusion "was entitled to preclusive effect and therefore res judicata bar[red] West's

claims for relief. West v. Parker, 783 Fed. Appx. 506, 510-11 (6th Cir. 2019). On appeal, the Sixth Circuit agreed that based on Abdur'Rahman v. Bredesen, West's protocol challenges were barred on res judicata grounds. Id. at 515.

The Sixth Circuit also concluded the 2018 lethal injection protocol, which was not in effect at the time of West's initial sentencing or at the time he began his protocol challenge, did not violate the petitioner's rights under the Ex Post Facto clause because an ex post facto challenge could not be sustained where the evidence established the new execution method was "more humane" than the former method—and the 2018 lethal injection protocol was more humane than electrocution. Id. at 515-16 (citing Miller v. Parker, 910 F.3d 259, 261 (6th Cir. 2018)). Furthermore, the Sixth Circuit concluded Mr. West's having to choose between lethal injection and electrocution was not cruel and unusual punishment, as neither method of execution was unconstitutional. West, 783 Fed. Appx. at 516 (citing Miller, 910 F.3d at 261).

Death row inmate Donald Middlebrooks also challenged the lethal injection protocol. The district court dismissed the petitioner's facial and as-applied claims on res judicata grounds based on the Tennessee Supreme Court's opinion in Abdur'Rahman. See Middlebrooks v. Parker, 15 F.4th 784, 789 (6th Cir. 2021). However, the Sixth Circuit remanded the petitioner's case to the district court for a hearing on the facial claims. The Sixth Circuit concluded that Middlebrooks, who "propose[d] pentobarbital and nitrogen hypoxia as alternatives to the three-drug protocol," id. at 788, successfully alleged facts, if taken as true, would allow the court to "draw the reasonable inference that pentobarbital is available to Tennessee for use in executions":

> *First, Middlebrooks points to evidence indicating that the federal government has access to pentobarbital, including an October 2019 filing in the United States District Court for the District of Columbia that the federal government obtained pentobarbital from a domestic bulk manufacturer; and a July 2019 statement by then-Attorney General William P. Barr that pentobarbital is "widely available," R. 13 PID 188 (quoting Katie Benner, U.S. to Resume Capital Punishment for Federal*

> *Inmates on Death Row, N.Y. Times, July 25, 2019). Middlebrooks also alleges facts showing that states have access to pentobarbital, including that in 2019 five states carried out fourteen executions using pentobarbital; that the May 2019 [Department of Justice Office of Legal Counsel] opinion made it possible for states, including Tennessee, to obtain pentobarbital from foreign manufacturers;*[3] *and that three states have either obtained a license to import pentobarbital or are in the process of applying for one. See also Barr v. Lee, —— U.S. ——, 140 S. Ct. 2590, 2591, 207 L.Ed.2d 1044 (2020) (per curiam) (describing pentobarbital as "a mainstay of state executions"). Finally, Middlebrooks alleges, based on the substance of heavily redacted emails, that Tennessee is struggling to obtain the drugs in the three-drug protocol, is considering importing pentobarbital, and may have a source of pentobarbital. Taken together, Middlebrooks has pled plausible post-Abdur'Rahman facts that allow us to reasonably infer that pentobarbital is available to Tennessee from a domestic supplier or through importation.*

Middlebrooks, 15 F.4th at 790-91.

F. ISSUES RAISED IN LETHAL INJECTION PROTOCOL CHALLENGES

Issues not listed below generally have not been addressed in appellate opinions. In such instances, the principles established in Baze and Glossip and set forth by the Tennessee Supreme Court in Abdur'Rahman, generally prevail. As stated above, a petitioner has a high burden to meet if the petitioner wishes to establish an Eighth Amendment violation. Generalized accusations regarding possible negative outcomes (i.e., what "might" happen) are not enough to carry the day.

[3] Department of Justice, Office of Legal Coun, *Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions,* 43 Op. O.L.C. ____, 2019 WL 2235666 (May 3, 2019) (slip op.) (concluding "articles" to be used in executions cannot be regulated as "drugs" or "devices" under the Federal Food, Drug, and Cosmetic Act; accordingly, FDA has no jurisdiction to regulate articles to be used in executions).

1. "As-Applied" Challenges to Lethal Injection Protocol

In Bucklew v. Precythe, 139 S. Ct. 1112 (2019), a Missouri death row inmate claimed Missouri's single-drug, pentobarbital-based protocol constituted cruel and unusual punishment as applied. He argued his particular medical condition, which caused vascular tumors to grow in his head, neck, and throat, could prevent the pentobarbital from circulating. He also claimed the use of a chemical dye to flush the intravenous line would cause the tumors to rupture, and he claimed the pentobarbital would negatively interact with his other medications. Any or all of these, he claimed, would cause great pain. In the lower courts, he argued there was no need for him to prove an alternative; ultimately, he asserted nitrogen asphyxia was a known and readily-implementable alternative.

The case ultimately reached the Supreme Court, which held that as-applied challenges to methods of execution were to be judged by the same standards applied to facial challenges—i.e., the Baze/Glossip standard.

Regarding Mr. Bucklew, the Court concluded he had failed to prove his alternative method was feasible and capable of being implemented. The Court also concluded Missouri had a legitimate reason not to experiment with an entirely new method of execution in Mr. Bucklew's case. As the Court stated, "The Eighth Amendment prohibits States from dredging up archaic cruel punishments or perhaps inventing new ones, but it does not compel a State to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution." 139 S. Ct. at 1130.

The Court also concluded Bucklew had failed to prove the proposed new method would significantly reduce a substantial risk of severe pain.

2. Issues of Lack of Training on Part of Executioners or Potential Maladministration of Drugs

In Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005), a case involving the former 3-drug protocol, the petitioner's stated issues

included his contentions regarding failure to "insert and monitor" the IV line and "failing to ensure the proper handling, labeling, and administering of the drugs." Id. at 308. Citing a lack of evidence of such incidences in other states with the present protocol as applied in Tennessee, the court rejected these contentions, stating, "we cannot judge the lethal injection protocol based solely on speculation as to problems or mistakes that might occur." Id.

In Harbison v. Little, 571 F.3d 531 (6th Cir. 2009), the arguments rejected in this appeal included Harbison's concerns regarding the poor training certain execution team members received and the substance abuse and mental health issues encountered by some execution team members. Id. at 537. The court, citing Baze, noted that the Supreme Court had approved Kentucky's lethal injection protocol, which incorporated many of the same training requirements for its execution team members as Tennessee's did. Id. at 538. The court also rejected Harbison's assertion that tactile monitoring of the IV lines was required, as the visual observation of the IVs by the Warden and other execution team members was adequate. Id.

In Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007), the Sixth Circuit rejected Workman's motion for stay of execution, stating he had little chance of success on the merits. Workman challenged the use of non-medical personnel (who he claims were poorly trained), but the Court concluded the employees had "considerable training to handle executions." Id. at 909. The court noted that "the risks of pain that Workman complains about remain remote (and do not occur when the procedure is properly implemented[.]" Id. at 910. The court also noted the visual observations by the Warden (standing next to the inmate) and execution team (observing via closed-circuit TV and one-way glass) were adequate, and "exceedingly practical" safety concerns prevented the execution team from being in the execution chamber with the inmate. Id.

In State v. Banks, 271 S.W.3d 90, 160 (Tenn. 2008), the court rejected the claim that the Eighth Amendment is violated by lethal injection drugs not being prepared, administered, or monitored by medical professionals.

In Broom v. Shoop, 963 F.3d 500, 508-16 (6th Cir. 2020), Ohio attempted to execute an inmate by lethal injection, but during the attempted execution the execution team could not find a suitable vein for an IV line. When the state announced plans to try the execution again, the inmate sued, claiming the second execution attempt amounted to cruel and unusual punishment and violated the inmate's protections against double jeopardy. The Ohio Supreme Court rejected the inmate's challenge, and the federal courts concluded the state courts did not unreasonably apply established precedent by concluding no Eighth Amendment and/or double jeopardy violations occurred.

In Malicoat v. State, 137 P.3d 1234, 1237-38 (Okla. Crim. App. 2006), in a motion for stay of execution, the defendant raised concerns regarding the potential for errors in mixing and administering drugs and lack of training of execution team members. Oklahoma's highest appellate court rejected these arguments, noting that the lethal injection process was overseen by a non-participating physician and that the execution team members had undergone sufficient training. Citing opinions from other states, the court acknowledged mistakes could occur, but this possibility was not enough to conclude the lethal injection protocol violated the Eighth Amendment. Id. at 1238-39.

In People v. Davis, 108 P.3d 78, 146 (Cal. 2009), the court held "anecdotal evidence of 'botched' lethal injections in other states is insufficient here to compel further scrutiny under the Eighth Amendment."

In Nooner v. Norris, 594 F.3d 592 (8th Cir. 2010), the appellate court rejected a challenge to Arkansas's lethal injection protocol. Training of the IV team was deemed adequate, as was the direct monitoring of the IV infusion sites. The petitioner's assertions regarding problems with the execution facility (poor lighting, small size of control room, poorly labeled syringes) were not supported by the evidence. Id. at 607.

3. Issues Concerning Midazolam's Ineffectiveness

See Glossip v. Gross, supra, in which the Supreme Court approved the three-drug, Midazolam-based protocol like the one presently used in

Tennessee. It should be noted that Glossip did not foreclose all challenges to midazolam-based lethal injection protocols.

4. Failure to Consider Individualized Inmate Needs/Concerns
(inmate is allergic to drugs, too obese to be executed, etc.)

For one example, see Bucklew, supra.

In Moore v. State, 771 N.E.2d 46, 55 n.3 (Ind. 2002), the defendant claimed execution by lethal injection would be "especially cruel and unusual as applied to him because of his obesity." The Indiana Supreme Court rejected this challenge, as the defendant "only raise[d] possible difficulties without substantiation of their probability" and had not "demonstrated how this procedure [would] be uniquely onerous to him because of his particular characteristics." Id.

In Ritchie v. State, 809 N.E.2d 258, 262 (Ind. 2004), in challenging lethal injection as cruel and unusual, Ritchie cited "two instances where lethal injection did inflict excessive pain": one instance in which a defendant's "abnormally small" veins required a "cut down" procedure, and another in which executioners spent about an hour attempting to insert a needle into an obese inmate's vein. The Indiana Supreme Court concluded, "These two isolated cases do not establish that lethal injection is an inherently cruel or unusual method. To be sure, these two examples demonstrate that problems may occur in unusual circumstances, but that possibility does not rise to a systematic or inherent flaw in the lethal injection process." Id.

5. Cut-Down Procedure
(exposing vein for inserting IV if traditional vein insertion proves unsuccessful)

In Abdur'Rahman v. Bredesen, supra, the court approved a 3-drug protocol that included a cut-down contingency.

In Nooner v. Norris, supra, the federal appellate court rejected a challenge to Arkansas's lethal injection protocol, which included provisions for a cut-down procedure if intravenous access was not achieved. The court noted a licensed, qualified physician would carry

out the procedure, and "all attempts to obtain IV access must avoid unnecessary pain by using local anesthetic as necessary." 594 F.3d at 604.

6. Use of Drugs to Execute not Part of Doctor-Patient Relationship, not a Legitimate Medical Purpose, and Violates State and Federal Drug Laws

In Abdur'Rahman v. Bredesen, supra, the Tennessee Supreme Court rejected the petitioner's contentions that the lethal injection protocol ran afoul of the Uniform Administrative Procedures Act, the Nonlivestock Animal Humane Death Act, and the Drug Control and Pharmacy Practice Act; the court also rejected the petitioner's contention the protocol allowed for the practice of medicine by unlicensed persons. See 181 S.W.3d at 311-14. The court noted the Department of Correction was not referenced in the applicable statutes, and interpreting the medical and drug laws in a way that included lethal injection "would have the practical effect of frustrating the Tennessee General Assembly's considered decision to adopt execution by lethal injection as the primary method for carrying out capital punishment in Tennessee." Id. at 313.

In the case of In re: Federal Bureau of Prisons' Execution Protocol Cases (Roane v. Barr), 980 F.3d 123 (D.C. Cir. 2020), federal inmates challenging the federal government's revised lethal injection protocol brought actions under the Administrative Procedure Act (APA) alleging the Bureau of Prisons' (BOP) protocol violated the federal Food, Drug, and Cosmetic Act (FDCA). The Circuit Court agreed, concluding the protocol was "not in accordance" with the FDCA in that the protocol allowed the distribution of the execution drug without a prescription. Id. at 136-37. However, the Circuit Court concluded a permanent injunction was not required because the inmates failed to establish irreparable harm would likely result from the administration of pentobarbital that was not prescribed by a physician. Id. at 137.

In Heckler v. Chaney, 470 U.S. 821 (1985), a group of Texas and Oklahoma death row inmates filed a petition against federal Food and Drug Administration (FDA), alleging the use of lethal injection drugs violated the Federal Food, Drug, and Cosmetic Act (FDCA). The FDA

refused, stating the FDA had no jurisdiction to do so. Ultimately, the Supreme Court rejected the petitioners' claims. The Court concluded that decisions of federal agencies not to take certain enforcement actions generally enjoyed a presumption against reviewability, and that presumption was not rebutted in this case. This presumption may be rebutted where the statute provides guidelines for the agency to follow in exercising enforcement powers, but in this case substantive prohibitions against misbranding and introduction of new drugs without agency approval did not provide such a basis of review. Also, the provision of the statute allowing for the FDA to report violations of the Act for prosecution does not give rise to agency proceedings to discover the existence of violations; rather, the statute only applied when "a violation has already been established to the satisfaction of the agency." Id. at 837.

In State v. Deputy, 644 A.2d 411 (Del. Super. Ct. 1994), the State lethal injection protocol allowing for the administration of execution drugs by non-licensed personnel was not preempted by the federal Drug Abuse Prevention and Control Act (DAPCA) or the Food, Drug, and Cosmetic Act (FDCA). Provisions of DAPCA (limiting administration of controlled substances to licensed medical personnel) were designed to attack illegal drug use, while FDCA was designed to stem the tide of mislabeled and misbranded drugs, devices, and cosmetics. Lethal injection protocol did not conflict with federal statutes because intents of each were different.

In State v. Ellis, 799 N.W.2d 267, 297 (Neb. 2011), the court rejected an inmate's claims Nebraska's lethal injection protocol was preempted by the federal Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act; the Nebraska Supreme Court concluded that neither of these federal laws "provide[d] a private right of action that [an inmate] can assert:"

> *The CSA expressly gives the Attorney General the power to enforce its provisions, and where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons, and a statute that focuses on the agency that will do the regulating is yet another step further*

> *removed. The CSA's focus is on those who handle controlled substances and on the authority of the Attorney General to enforce the act—it does not focus on the individuals protected by it, and evinces no intent to create a private remedy.*

Id. (footnotes omitted)

7. Compounding Pharmacy Issues
(lack of regulation of compounded drugs, lack of regulation of pharmacies, risk of impure drugs, pharmacies' failure to comply with local, state, and federal inspections)

In West v. Schofield IV, 519 S.W.3d at 552, the Tennessee Supreme Court approved the use of a compounding process in upholding the one-drug protocol at issue—a protocol which expressly included a contract between TDOC and a compounding pharmacy. Of note, the fact that the name of the pharmacist compounding the drugs was withheld from the inmate did not create a substantial risk of severe pain or otherwise violate the Eighth Amendment.

In Wellons v. Commissioner, Ga. Dept. of Corrections, 754 F.3d 1260 (11th Cir. 2014), the petitioner argued the risks associated with compounded pentobarbital constituted an Eighth Amendment violation, as did the risks associated with unidentified execution personnel and drug sources. The appellate court rejected these claims, noting that the speculative risks associated with compounded pentobarbital and concerns over the training of execution team members did not constitute demonstrated proof of an objectively intolerable risk of harm. Id. at 1264-65.

See also Whitaker v. Livingston, supra.

8. Miscellaneous Issues: Overly Speculative Nature of Claim

In Zink v. Lombardi, 783 F.3d 1089 (8th Cir. 2015), one of many cases addressing the Missouri protocol, the Eighth Circuit rejected the petitioner's claims as too speculative to satisfy an Eighth Amendment challenge. The circuit court concluded the petitioners "rel[ied] entirely on hypothetical and speculative harms that, if they were to occur, would

only result from isolated mishaps." Id. at 1102. "The prospect of an isolated incident does not satisfy the requirement that prisoners adequately plead a substantial risk of severe pain to survive a motion to dismiss their Eighth Amendment claim." Id. at 1101. See also Gissendaner v. Commissioner, 779 F.3d 1275, 1283 (11th Cir. 2015) (Georgia case; reaching same result); Ladd v. Livingston, 777 F.3d 286 (5th Cir. 2015) (Texas case; same conclusion).

In Bucklew, 139 S. Ct. at 1130-31, the petitioner's listing of the potential problems which could result from Missouri's application of its lethal injection protocol—putting an IV in the wrong vein, potential use of a cut-down procedure, forcing him to lie on his back (thus affecting his breathing), the stress of the lethal injection causing his tumors to rupture—was speculative and could not support a claim that the protocol presented a substantial risk of significant pain.

9. Secrecy of Pharmacist/Drug Supplier

For one example, see West v. Schofield IV, 519 S.W.3d at 568 (inmate's rights not violated by statutes withholding identity of pharmacist supplying lethal injection drugs).

In First Amendment Coalition of Arizona, Inc. v. Ryan, 938 F.3d 1069, 1080 (9th Cir. 2019), the First Amendment does not entitle the public to information regarding execution drugs and identifying information of the execution team; nor do such restrictions violate inmates' First Amendment rights of access to the courts. Elsewhere in the opinion, the Ninth Circuit did state that the right of access did encompass "a right to hear the sounds of executions in their entirety;" i.e., Arizona could not turn off the microphone inside the execution chamber after the drugs were administered. Id. at 1075-76.

CHAPTER ONE APPENDIX

Attorney Appointment Checklist For Lead Counsel in Capital Cases

Lead Counsel must:

_____ (1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;

_____ (2) have regularly participated in criminal jury trials for at least five years;

_____ (3) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter; and

_____ (4) have at least one of the following:

- _____ (A) experience as lead counsel in the jury trial of at least one capital case;
- _____ (B) experience as co-counsel in the trial of at least two capital cases;
- _____ (C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case;
- _____ (D) experience as lead counsel or sole counsel in at least three murder jury trials or one murder jury trial and three felony jury trials; or
- _____ (E) experience as a judge in the jury trial of at least one capital case.

Attorney Appointment Checklist For Co-Counsel in Capital Cases

Co-counsel must:

_____ (1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;

_____ (2) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter; and

_____ (3) have at least one of the following qualifications:

- _____ (A) qualify as lead counsel under (c) above; or
- _____ (B) have experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

MEMORANDUM

To: Trial Judge
Subject: Capital Defendant Wanting to Self-Represent

The following is a **brief** summary of the standards on the right to self-representation and suggested questions to ask the defendant.

The right to represent oneself should be granted only after a determination by the trial court that the defendant is both knowingly and intelligently waiving the valuable right to assistance of counsel.

Although a defendant need not have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he/she should be made aware of the dangers and disadvantages of self-representation, so that he/she knows what he/she is doing and his/her choice is made with his/her eyes open.

The information a defendant must possess/be provided in order to make an intelligent choice will depend on a range of case specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charges, and the stage of the proceeding.

Warnings of pitfalls of proceeding to trial without counsel must be rigorously conveyed.

Tenn. R. Crim. Pro. 44(b) specifies that the court inquire into the background, experience, and conduct of the accused and such other factors as the court may deem appropriate.

The competency standard for waiving counsel is the same as competency to stand trial but, the court also must determine that the waiver is both intelligent and voluntary before it can be accepted.

QUESTIONS TO ASK

How old are you?

How far did you go in school?

Can you read and write?

Have you ever studied law?

Have you ever represented yourself or someone else in a criminal action?

Have you ever sat through a capital trial or a trial of any kind as opposed to a guilty plea?

You realize, do you not, that you are charged with various separate offenses which include: [HERE LIST OFFENSES CHARGED]

(1) *Premeditated First Degree Murder*
(2) *Felony First Degree Murder*
(3)
(4)

You realize, do you not, that if you are found guilty of *Premeditated and/or Felony* First degree murder that the jury could sentence you to the death penalty, life imprisonment without parole, or life imprisonment?
(**The italicized language would need to be modified dependent upon the charges) (This paragraph should be repeated for each offense with the sentence for each included, e.g., You realize, do you not, that if you are found guilty of aggravated assault, a class C felony, that the court could sentence you to anywhere from 3 to 15 years?)**

You realize, do you not, that if you are found guilty of more than one of these offenses that the court could order that the sentences be served consecutively, that is, one after the other?

You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your cases or even advise you as to how to try your cases?

Do you know how to select a jury?

Do you know how to examine a witness?

Do you know what the rules of procedure and rules of evidence are in the state of Tennessee?

You realize, do you not, that the Tennessee Rules of Evidence, the Tennessee Rules of Criminal Procedure and any other applicable rules, laws or statutes govern what evidence may or may not be introduced at trial and the way the trial will proceed and, in representing yourself, you must abide by those rules?

You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking yourself questions and that you cannot just take the stand and tell your story? You must proceed question by question.

You realize, do you not, that if you are found guilty of first degree murder the trial will have a second phase at which the jury will determine your sentence for that offense? This is often referred to as the capital sentencing phase of the trial because this is when the jury hears evidence to determine whether a person receives the death penalty, life imprisonment without parole or life imprisonment.

Do you understand that the state will present evidence of any aggravating factors and then you will have the opportunity to present any mitigating evidence you may have?

Do you understand that there are specific statutory procedures which govern this part of the trial and that you will be expected to follow these statutory provisions and any laws or cases related to them?

You realize, do you not, that there are various pretrial motions and other procedures that are involved in a capital case some of which may involve ex parte hearings and that you must follow the appropriate rules and laws related thereto?

You realize, do you not, that should you choose to represent yourself, you have no right to access to a law library?

You realize, do you not, that the trial is scheduled for _____, and that absent any court determined need for a continuance, you would be expected to proceed at that time and that the trial would proceed at the same pace as if you were represented by counsel?

You realize, do you not, that the same rules set forth previously by this court regarding the issuance of subpoenas will still apply?

You realize, do you not, that if you represent yourself that you must abide by the court's rules regarding courtroom behavior and demeanor and that you may only address the court, the witness, and those individuals the court deems appropriate? You would not be permitted to freely communicate with spectators at the trial, do you understand this?

You understand that you have the right to be represented by counsel. Is it your desire to give up that right to the assistance of counsel and proceed without counsel and represent

yourself?

If you represent yourself, do you understand that you would be held to the same standard as an attorney would be?

If you get in a bind and don't know how to object or how to present proof or do something that is beyond what the rules allow, you'll be held to the same standards as an attorney; you will not be given any special preferential treatment because you are representing yourself. Do you understand that?

I must advise you that in my opinion you would be far better defended by a trained lawyer than you would if you represented yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure or the governing rules and laws. I would strongly urge you not to try to represent yourself.

Now, in light of the penalties that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

Is your decision entirely voluntary on your part?

****

At this point you must make findings on the record as to the knowing, intelligent and voluntary nature of his/her waiver

If you determine the defendant is making a valid waiver, it is within your discretion to allow or not allow advisory counsel to be on standby to assist the defendant if you find the defendant is indigent and qualifies for appointed counsel.

If the defendant is not indigent, there is no basis for court-appointed advisory counsel.

IN THE CRIMINAL COURT OF XXXXXXXXX COUNTY, TENNESSEE
DIVISION XXX

STATE OF TENNESSEE)
)
vs.) Case No. _____
)
_____)

RULE 44(b) WRITTEN WAIVER & ORDER
PRO SE REPRESENTATION

1. How old are you?_____

2. How far did you go in school?_____

3. Can you read and write?_____

4. Have you ever studied law?_____

5. Have you ever been in criminal court before?_____
Have you ever pled guilty before? _____ To what?_____
_____
_____
In which court?_____
Have you ever represented yourself or any other defendant in a criminal action? _____

6. Have you ever sat through a capital trial or trial of any kind as opposed to a guilty plea?
_____

7. You realize, do you not, that you are charged with the following crime(s)?
List Charges.
_____
_____
_____
_____
_____

8. You realize, do you not, that if you are found guilty of the crime of _____ as charged that the Court can sentence you to _____, and a fine not to exceed _____ as well as court costs and other costs?
[**THIS SHOULD BE REPEATED FOR EACH DIFFERENT TYPE OF OFFENSE]**

9. You realize, do you not, that if found guilty of more than one of the crimes listed in the formal charges against you, that this Court can order the sentences to be run consecutive, that is, one after the other?_____

10. You realize, do you not, that if you represent yourself you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case. ____

_____

11. Do you know how to select a jury?_____

12. Do you know how to examine a witness?_____

13. Are you familiar with this state's rules of evidence?_____

14. You realize, do you not, that the rules of evidence govern what evidence may or may not be introduced at trial, and, in representing yourself, you must abide by these rules?

_____

15. Are you familiar with this state's rules of criminal procedure?_____

16 You realize, do you not, that those rules govern the way in which a criminal action is tried in this Court? _____

17. You realize, do you not, that the trial will proceed and, in representing yourself, you must abide by the rules of evidence, rules of procedure, and other applicable state laws and statutes?_____

18. You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking yourself questions and that you cannot just take the stand and tell your story, rather you must proceed question by question?_____

19. You realize, do you not, that if you are found guilty of first degree murder that the trial will have a second phase at which the jury will determine your sentence for that offense?

_____

(This is often referred to as the capital sentencing phase of the trial because this is when the jury hears evidence to determine whether a person receives the death penalty, life imprisonment without parole or life imprisonment).

20. Do you understand that the state will present evidence of any aggravating factors and then you will have the opportunity to present any mitigating evidence you may have?

_____

21. Do you understand that there are specific statutory procedures that govern this part of the trial and that you will be expected to follow these statutory provisions and any laws or cases related to them?_____

22. You realize, do you not, that there are various pretrial motions and other procedures that are involved in a capital case, some of which may involve ex parte hearings and that you must follow the appropriate rules and laws related thereto? _____

23. You realize, do you not, that should you choose to represent yourself, you have no right to access to a law library? _____

24. You realize, do you not, that the trial is scheduled for _____, and that absent any court determined need for a continuance, you would be expected to proceed at that time and that the trial would proceed at the same pace as if you were represented by counsel? _____

25. You realize, do you not, that the same rules set forth previously by this court regarding the issuance of subpoenas will still apply?_____

26. You realize, do you not, that if you represent yourself that you must abide by the court's rules regarding courtroom behavior and demeanor and that you may only address the court, the witness, and those individuals the court deems appropriate? _____ You would not be permitted to freely communicate with spectators at the trial, do you understand this? _____

This Court must advise you that in my opinion you will be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself.

This Court would strongly urge you not to represent yourself.

27. Now, in light of the penalty that you might suffer if you are found guilty and in light of all the difficulties involved in representing yourself, is it still your desire to represent yourself and give up your right to be represented by a lawyer?_____

28. Is your decision entirely voluntary?_____

29. Do you know what the consequences are and do you know what you are doing by giving up your right to counsel?_____

30. Did anybody force you to do this, threaten you to do this, or coerce you to do this?

_____

31. Are you taking any medication? If so, describe how much and for what condition (including over the counter medication)._____

_____

_____

WRITTEN WAIVER

I hereby acknowledge my right to have counsel in all matters necessary to the defense of my case and at every stage of the proceedings. I also acknowledge that if I cannot afford counsel, the court will appoint counsel to represent me. I hereby waive this right and request that I be allowed to represent myself.

_____
Defendant

_____
Date

ORDER

The Court having discussed the foregoing with the defendant in open court and on the record, the Court finds the defendant has fully acknowledged that he understands his right to counsel, and has nevertheless waived this right. Accordingly, the Court will allow the defendant to act as his own attorney.

Enter this the____ day of _____, _____.

_____
XXXXXXXXXXX, Judge
Criminal Court

CHAPTER TWO APPENDIX

MEDIA COVERAGE CHECKLIST

■ PRELIMINARY QUESTIONS:

Has Tennessee Supreme Court Rule 30 been triggered by a timely written request for media coverage from a member of the broadcast media?

> [Rule requires notice within 2 business days of proceeding. Court has discretion to enforce or ignore the two-day rule in the case of untimely filing.]

If multiple requests have been received, has the media selected a liaison for purposes of coordinating pooling arrangements?

> [Court should not get involved in process, but should receive notice of name, business address, phone, and email for media liaison.]

■ PRE-TRIAL INSTRUCTIONS TO MEDIA LIASION

[These instructions may be provided in a face-to-face meeting; through correspondence, by order, or through any combination thereof.]

_____ Inform media they are expected to comply with Tennessee Supreme Court Rule 30 and all orders of the court.

_____ Inform media that, per Rule 30, they will only be allowed 1 or 2 broadcast camera(s) with one operator per camera; 2 still photographers with 1 camera each; and 1 audio system for radio broadcast.

[To comply with Rule court must allow at least one (1) and no more than two (2) cameras, with one operator for each; two still photographers with no more than two cameras each; and one audio system for radio broadcast.]

_____ Inform media that no video or still camera shall make distracting noises or have flashing or distracting light features.

_____ Inquire as to the equipment that will be needed by media personnel and arrange for appropriate accommodations, including instructions for where equipment may be located (especially cameras, camera operators, and any microphones which the media may wish to place at the lectern or witness stand).

_____ Inform media liaison that personnel should not move excessively during the proceeding; and inform media that equipment may not be moved for any reason while court is in session; equipment shall only be moved in and out of the courtroom during a recess.

_____ Admonish media against filming, taping, or photographing any (1) witness, party, or victim who is a minor (except for minor defendants); (2) jury selection; or (3) seated jurors. Court should also remind media that, while uncommon, the court may order certain other witnesses and proceedings not to be filmed.

_____ Admonish media that no audio or close-up camera coverage will be allowed for communications between the defendant and his attorneys, or between the attorneys.

_____ Admonish media that no audio or video of bench conferences will be allowed.

_____ Admonish media that no recording or broadcasting will be permitted while court is not in session.

_____ Admonish media regarding use of cell phones, tablets, and/or computers in courtroom—either prohibiting their use in the courtroom to post online content or, if posting online content is permitted, putting specific limits on

such use (i.e., not allowing use at specific times, not permitting coverage of things prohibited under Rule 30, prohibiting use of device camera unless approval granted under Rule 30, etc.).

_____ Admonish media to wear proper attire and maintain decorum during proceedings.

_____ Inform media that they may incur sanctions for noncompliance with Rule 30 and court orders.

■ PRE-TRIAL INSTRUCTIONS TO COURT PERSONNEL

_____ Direct court personnel to refrain from releasing sealed documents or other sealed evidence to the press.

_____ Discuss procedure for handling press requests and instruct court personnel to confer with the court if they have any questions regarding the propriety of releasing requested evidence to the public or the press.

_____ Instruct court personnel to refrain from commenting on the pending proceedings.

■ HIGH PROFILE CASES

In extremely high profile cases, you may wish to contact the Administrative Office of the Courts regarding assistance they may be able to provide in dealing with media matters, including the assistance of a court representative who can assist you in dealing with media requests and other media matters.

■ USE OF JUDICIAL DISCRETION

LIMITING OR EXCLUDING MEDIA:

If you decide to limit or exclude media, Tennessee Supreme Court Rule 30 requires you to find substantial evidence exists to warrant the refusal of, termination of, limiting, or temporarily suspending media coverage, in that such action is necessary to:

_____ Control the conduct of the proceeding(s) before the court; and/or

_____ Maintain decorum and prevent distractions; and/or

_____ Guarantee the safety of any party, witness or juror; and/or

_____ Ensure the fair and impartial administration of justice in the pending case.

Before issuing an order refusing to allow, terminating, limiting, or temporarily suspending media coverage, you must:

_____ Hold a hearing or review affidavits of parties contesting coverage and/or the media organizations seeking access to the proceeding(s), and

_____ Enter written findings of fact detailing the evidence supporting the refusal to allow, termination of, limiting, or temporarily suspending media coverage.

RESTRICTING PUBLIC COMMENT BY PARTIES (gag order):

If you choose to limit public comment by the parties in this case, you must first consider:

_____ The nature and circumstances of the judicial proceeding, including concerns about:

(1) media coverage;
(2) intimidation of witnesses;
(3) the parties' manipulation of the media; and
(4) the expedition and ultimate resolution of the judicial proceeding.

_____ Reasonable alternative measures that would ensure a fair trial without restricting speech, including:

(1) change of venue;
(2) postponement of the trial to allow public attention to subside;
(3) searching questions of prospective jurors; and
(4) *emphatic* instructions to jurors to decide the case on the evidence.

_____ The scope of the "gag order."

After considering the above factors, you may issue a "gag order" only if you conclude that the potential public comments of any and all trial participants pose a substantial likelihood of prejudicing a fair trial.

JUDICIAL ETHICS COMMITTEE ADVISORY OPINION NO. 12-01

October 23, 2012

The Judicial Ethics Committee has been asked to provide an ethics opinion as to whether judges may utilize social media such as Facebook, Twitter, LinkedIn, and MySpace and, if so, the extent to which they may participate. As we will explain, while the Code of Judicial Conduct allows judges to do so, it must be done cautiously. For the purposes of this opinion, we shall utilize Facebook to refer to social media, for it is one of the most widely- used sites and appears to operate in a fashion similar to others.

Maryland Judicial Ethics Committee Opinion No. 2012-07 explains the services offered by Facebook:

> Facebook is used by millions of people worldwide. After joining this networking site, participants create personal profile pages containing various types of information about themselves, and then send "friend requests" to others, through a process known as "friending." Typically, "Facebook friends" are people who knew one another before joining the site, have mutual acquaintances and/or common interests. By becoming "friends," they are able to see photos, videos and other information posted by or about one [an]other on their respective Facebook pages. Many people post their thoughts, views and opinions on almost any subject, as well as details of their daily lives. Moreover, unless specific privacy settings are used to limit those with whom information is shared, others in the network can view that information. Thus, information posted by a judge on a social networking site can be quickly and widely disseminated, and possibly beyond its intended audience.

Several provisions of the Code of Judicial Conduct are relevant to this question.

Tennessee Supreme Court Rule 10, Canon 1, Rule 1.2 requires that

"judge[s] shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Comments to this rule provide, in pertinent part, Comment [1], that it applies to "both the professional and personal conduct of a judge"; Comment [2], that "[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens"; Comment [3], "[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary"; and Comment [5], that a judge must avoid "conduct [that] would create in reasonable minds a perception that the judge violated [the Code of Judicial Conduct] or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 1.3 provides that "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Canon 2, Rule 2.4(B) and (C) provides, in part, that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment"; and that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

Rule 2.9(A) provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter[.]"

Rule 2.11 sets out the procedures for disqualification in situations where the judge has a conflict or there is an appearance that this is the case. Of particular relevance to a judge's use of social media are subsections (A)(1) and (A)(5), providing that the impartiality of a judge might be reasonably questioned if it appears the judge "has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding"; or, the judge "has made a public statement, other than in a court proceeding, judicial decision, or opinion,

that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Additionally, a judge's use of social media may require that the judge "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Rule 2.11, Comment [5].

Canon 3, Rule 3.1 sets out the extent to which judges may participate in non-judicial activities:

> A judge may engage in personal or extrajudicial activities, except as prohibited by law or this Code. However, when engaging in such activities, a judge shall not:
>
> (A) participate in activities that will interfere with the proper and timely performance of the judge's judicial duties;
>
> (B) participate in activities that will lead to frequent disqualification of the judge;
>
> (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality[.]

Judicial ethics committees of several states have addressed this question, with the majority concluding that judges may utilize social networking sites, but must do so with caution. See Maryland Judicial Ethics Committee Opinion No. 2012-07 ("While they must be circumspect in all of their activities, and sensitive to the impressions such activities may create, judges may and do continue to socialize with attorneys and others."); Florida Judicial Ethics Advisory Opinion 2009-20 (while judges may participate in social media, they may not "friend" lawyers who may appear before them); Oklahoma Judicial Ethics Advisory Opinion 2011-3 (judges may participate in social media, "friending" those who do not "regularly appear or [are] unlikely to appear in the Judge's court"); Massachusetts Judicial Ethics Committee Opinion 2011-6 (judges may participate in social media but

"may only 'friend' attorneys as to whom they would recuse themselves when those attorneys appeared before them").

California Judicial Ethics Committee Opinion 66 sets out several matters a judge should consider before participating in a particular social media site:

> (1) the nature of the site, the more personal sites creating a greater likelihood that "friending" an attorney would create an appearance of favoritism;
>
> (2) the number of persons "friended" by the judge, with the greater the number of friends resulting in less likelihood of an appearance that any one "friend" would be in a position to influence the judge;
>
> (3) the judge's procedure for deciding whom to friend, such as allowing only some attorneys to become "friends," while excluding others; and
>
> (4) how regularly an attorney who is a friend appears in the judge's court, the more frequent the appearance, the greater the likelihood of the appearance of favoritism.

Maryland Judicial Ethics Committee Opinion No. 2012-07 concludes that "the mere fact of a social connection" does not create a conflict, but, quoting California, "'[i]t is the *nature* of the [social] interaction that should govern the analysis, not the *medium* in which it takes place.'"

Accordingly, we conclude that, while judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will be scrutinized *[sic]* various reasons by others. Because of constant changes in social media, this committee cannot be specific as to allowable or prohibited activity, but our review, as set out in this opinion, of the various approaches taken by other states to this area makes clear that judges must be constantly aware of ethical

implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.

FOR THE COMMITTEE:

_____

ALAN E. GLENN, JUDGE

CONCUR:

CHANCELLOR THOMAS R. FRIERSON, II
JUDGE CHERYL A. BLACKBURN
JUDGE JAMES F. RUSSELL
JUDGE BETTY THOMAS MOORE
JUDGE PAUL B. PLANT
JUDGE SUZANNE BAILEY

CHAPTER THREE APPENDIX

Ex Parte Motion Checklist

Initial Review of Motion

Must a hearing be granted? Only if the motion contains the following (see different requirements for expert services AND investigative services):

Motion for Funds for **Experts** or SimilServices – must contain:

1. the nature of the services requested;
2. the name, address, qualifications, and licensure status, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;
3. the means, date, time and location at which the services are to be provided; and
4. a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected or additional or incidental costs.

Motion for Funds for **Investigative** or Similar Services - must contain:

1. the type of investigation to be conducted;
2. the specific facts that suggest the investigation likely will result in admissible evidence;
3. an itemized list of anticipated expenses for the investigation;
4. the name and address of the person or entity proposed to provide the services; and
5. a statement indicating whether the person satisfies the licensure requirement of Tennessee Supreme Court Rule 13.

If these items are met for the respective motion, the Court **must** conduct an ex parte hearing on the motion to determine if the requested services are necessary to ensure the protection of the defendant's constitutional rights.

SUMMARY OF STEPS TO REVIEW OF EX PARTE MOTIONS:

FIRST: The judge should first review the ex parte motion to see if it contains the necessary prerequisites to grant a hearing (see requirements for motion for expert and/or investigative services).

SECOND: If the motion contains the prerequisites, the Court SHALL conduct an ex parte hearing.

THIRD: At the hearing, the Court must determine if the defendant[1] has made a showing of a particularized need. The showing must reference the particular facts and circumstances of the case. For definition of "particularized need," see Tennessee Supreme Court Rule 13, section 5(c)(2) (for trials) and Rule 13, section 5(c)(3) (for capital post-conviction hearings).

FOURTH: Is the expert within 150-mile radius? If not, did the motion adequately explain the reason to extend beyond the radius.

FIFTH: Is the hourly rate within the Rule 13 guidelines? Does the motion also include the estimated number of hours?

SIXTH: If funds are granted, the Order should indicate the prerequisites were met to conduct a hearing, that the defendant has made a showing of particularized need for the funds (including that the funds are necessary to ensure defendant's constitutional rights), and that the funds requested are reasonable. In conclusion the motion should indicate the name of the expert or investigator approved, the approved hourly rate and the estimated number of total hours (for a grant total of funds sought). The motion should also include language for payment or reimbursement of expenses by the director via the parameters of Rule 13 and at the direction of the AOC

[1] Or petitioner, in the case of a capital post-conviction proceeding.

Director.

SEVENTH: A copy of the motion (and attachments) and order is to be emailed or faxed to the AOC contact person.

Notes:

Funding for investigative, expert, and other similar services is not available in non-capital post-conviction cases. See Tenn. S. Ct. R. 13, § 5(a)(2).

In capital post-conviction cases, the court may only authorize $20,000 for all investigative services and $25,000 for all experts unless the court, in its discretion, determines extraordinary circumstances exist and the petitioner has established these circumstances by clear and convincing evidence. See Tenn. S. Ct. R. 13, § 5(d)(4)-(5).

CHAPTER FOUR APPENDIX

State v. Hooper Factors On Whether To Grant A Change Of Venue

(1) Nature, extent, and timing of pretrial publicity.

(2) Nature of publicity as fair or inflammatory.

(3) The particular content of the publicity.

(4) The degree to which the publicity complained of has permeated the area from which the venire is drawn.

(5) The degree to which the publicity circulated outside the area from which the venire is drawn.

(6) The time elapsed from the release of the publicity until the trial.

(7) The degree of care exercised in the selection of the jury.

(8) The ease or difficulty in selecting the jury.

(9) The veniremen's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire.

(10) The defendant's utilization of his preemptory challenges.

(11) The defendant's utilization of challenges for cause.

(12) The participation by police or by prosecution in the release of publicity.

(13) The severity of the offense charged.

(14) The absence or presence of threats, demonstrations or other hostility against the defendant.

(15) Size of the area from which the venire is drawn.

(16) Affidavits, hearsay or opinion testimony of witnesses.

(17) Nature of the verdict returned by the trial jury.

IN THE CIRCUIT COURT FOR DICKSON COUNTY, TENNESSEE
AT CHARLOTTE
23RD JUDICIAL DISTRICT

STATE OF TENNESSEE	)	
	)	
vs.	)	NO. 22CC-2018-CR-267
	)	David D. Wolfe, Judge
STEVEN JOSHUA WIGGINS	)	Death Penalty

DEFENDANT FILING NO. 70

MOTION FOR ORDER ESTABLISHING PROCEDURES PURSUANT TO *STATE v. REID* AND MEMORANDUM OF LAW IN SUPPORT

Comes now the Defendant, STEVEN JOSHUA WIGGINS, through undersigned appointed counsel, pursuant to the provisions of the Federal and State Constitutions, namely: Due Process Clause (5th and 14th Amendment, U.S. Constitution; Article I §§ 8 and 17, Tennessee Constitution); Equal Protection Clause (14th Amendment, U.S. Constitution; Article XI, § 8, Tennessee Constitution); Effective Assistance of Counsel (6th Amendment, U.S. Constitution; Article I, § 9, Tennessee Constitution); Prohibition Against Cruel and Unusual Punishment (8th Amendment, U.S. Constitution; Article I, § 16, Tennessee Constitution); and respectfully moves this Honorable Court for an order stablishing the procedures to be followed pursuant to *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998), with respect to Mr. Wiggins's presentation of expert mental condition evidence at the sentencing phase of his trial.

NOW COMES the Defendant, STEVEN J. WIGGINS, by and through his attorneys, and for his Motion for Order Establishing Procedures Pursuant to *Reid*, states as follows:

I. Introduction

On June 1, 2021, Mr. Wiggins filed his Amended Notice of Intent to Introduce Expert Evidence Relating to a Mental Disease or Defect on the Issue of Punishment. At the most recent status conference, the State stated its intention to move the Court to order Mr. Wiggins to be examined by its own expert. Mr. Wiggins therefore moves the Court to set in place procedures for such an evaluation that provide the State with a reasonable opportunity to obtain rebuttal evidence while ensuring that Mr. Wiggins's rights under the Fifth, Sixth and Eighth Amendments to the United States Constitution and Article 1, §§ 9, 16 of the Tennessee Constitution are fully protected.

II. Requested Procedures

Mr. Wiggins respectfully requests that the Court order as follows:

1. Now that Mr. Wiggins has filed his Notice of Intent to Introduce Expert Evidence Relating to Mental Condition under *Reid,* the State may move the Court for an order permitting a rebuttal examination of Mr. Wiggins for the sole purpose of confirming or rebutting the expert evidence of mental condition outlined in the Notice.

2. If the Court grants the State's request and orders a rebuttal examination, the State shall file a notice with the Court advising Mr. Wiggins of the date and time that the examination will occur; the identity of the expert who will perform the examination; the expert's qualifications; the referral question that the expert is directed to answer; and the names of any tests that the expert proposes to administer. This notice is to be filed at least two weeks prior to the date of the proposed examination.

3. Mr. Wiggins may file objections to the State's proposed expert and/or the scope of the rebuttal examination and any proposed tests within one week of the filing of the State's notice as described in paragraph 2, above. No rebuttal examination or testing shall be conducted until the Court has held a hearing and made a final decision on all disputed issues.

4. The scope of the State's evaluation shall be limited to rebutting or confirming that Mr. Wiggins suffers from brain abnormalities, impaired cognitive functioning, a seizure disorder and the psychological and neurobiological effects of chronic exposure to childhood trauma. Under no circumstances shall the State's rebuttal expert question or otherwise assess Mr. Wiggins on any of the following topics:

(a) The facts and circumstances of the death of Sgt. Baker;

(b) Mr. Wiggins's feelings of remorse or lack thereof for the kidnapping and/or death of Sgt. Baker;

(c) The likelihood that Mr. Wiggins will be a danger to others in the future;

(d) The facts and circumstances of any prior acts of violence;

(e) Any other questions or topics designed to induce statements by Mr. Wiggins that may be used to support the State's alleged statutory aggravating factors.

5. The State's examiner may video or audio record the examination; however, the State is prohibited from utilizing and/or presenting said recording to the jury for any purpose.

6. The State's expert shall be provided with a copy of the Notice of Intent to Introduce Expert Evidence Relating to Mental Condition. If the expert thereafter requests any additional material from the defense, defense counsel shall provide all requested materials, subject to Fifth, Sixth and Eighth Amendment guarantees and Attorney-Client, Work Product or other applicable privileges.

7. The State's rebuttal expert must prepare a report that addresses the components of his/her evaluation and the results of the evaluation, including diagnostic impressions and professional opinions.

8. The State's rebuttal expert must file his/her results, in the form of the report described in paragraph 4, above, with the Court, under seal.

9. The State's rebuttal expert's results and report will be released to the defense at the time it is filed under seal with the Court. The State's rebuttal expert's results and report will not be released to the State unless and until the jury reaches a verdict of guilty on a capital charge at the conclusion of the culpability phase of the trial and Mr. Wiggins thereafter confirms in a written pleading his continuing intent to offer expert evidence of his mental condition during the penalty phase.

10. The State's rebuttal expert shall not discuss his/her examination, the results thereof or any information derived therefrom with any person unless and until the expert's report has been unsealed and released to the State.

11. Before conducting his/her examination, the State's rebuttal expert shall sign a written confirmation demonstrating that he/she understands the obligation not to discuss the examination, the results thereof or any information derived therefrom with any person unless and until the expert's report has been unsealed and released to the State.

12. If the jury reaches a verdict of guilty on a capital charge at the conclusion of the culpability phase of the trial, Mr. Wiggins shall have 24 hours in which to file a pleading with the Court either confirming or disavowing his intent to offer expert evidence of his mental condition during the penalty phase. If Mr. Wiggins disavows his continuing intent to offer such

expert evidence, the report of the State's rebuttal expert shall remain sealed and will not be disclosed to the State.

13. If, after the jury reaches a verdict of guilty on a capital charge, Mr. Wiggins confirms his continuing intent to offer such expert evidence, the report of the State's rebuttal expert shall be immediately unsealed and released to the State. Additionally, the defense shall immediately release to the State the reports from all experts whose testimony regarding Mr. Wiggins's mental condition the defense intends to present during the penalty phase.

14. At any time prior to the presentation of his expert testimony regarding mental condition at sentencing, Mr. Wiggins may withdraw his notice of intent to present such expert testimony. In that event, neither the fact of the notice nor the results or reports of any mental examination, nor any facts contained therein, shall be admissible against Mr. Wiggins.

MEMORANDUM OF LAW IN SUPPORT OF REQUESTED PROCEDURES

III. COMPELLING A DEFENDANT TO UNDERGO A MENTAL HEATH EVALUATION BY A STATE EXPERT IMPLICATES IMPORTANT CONSTITUTIONAL GUARANTEES.

A court order directing Mr. Wiggins to submit to a mental health examination by an expert retained by the State implicates his constitutional rights under both the Fifth and Sixth Amendments, applicable to the states by the Fourteenth Amendment, and Article 1, § 9 of the Tennessee Constitution. "The Fifth Amendment . . . commands that no person shall be compelled in any criminal case to be a witness against himself." *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (internal alterations omitted). *See also* TN. Const. Article 1, § 9 ("in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"). The availability of the Fifth Amendment privilege depends not on the setting in which the statements are compelled, but on the nature of those statements and the consequences that may flow from

making them. *Id.* In *Smith*, as will likely be the case here, the statements the defendant made during an examination by the prosecution's expert were used against him in the penalty phase of his capital trial. *Id.* The potential consequence of what he told the prosecution's expert was accordingly "the ultimate penalty of death." *Id.* The Fifth Amendment thus applies with equal force to a compelled mental health evaluation as to forced testimony by the defendant at trial, *id.* at 463, and custodial interrogation by police, *id.* at 467.

To be sure, a defendant can be deemed to have at least partially waived his Fifth Amendment privilege under some circumstances. One such circumstance is when he asserts and exercises his right to present expert mental health evidence on his own behalf. *Kansas v. Cheever*, 571 U.S. 87, 94 (2013); *Buchanan v. Kentucky*, 483 U.S. 402, 423-24 (1987). In such a case, the Fifth Amendment is not violated by the use of a compelled State examination for "the limited purpose of rebutting the defendant's evidence." *Cheever*, 571 U.S. at 98. *See also Buchanan*, 483 U.S. at 424 (finding no Fifth Amendment violation where excerpts of report were used for "limited rebuttal purpose"); *State v. Martin*, 950 S.W.2d 20, 24 (Tenn. 1997) (noting that prosecution's use of evaluation "is expressly limited to impeachment or rebuttal of the evidence concerning mental state introduced by the defendant").

The scope of the defendant's waiver, and therefore what constitutes appropriately limited rebuttal, is determined in the same way that courts determine the scope of the waiver when a defendant elects to take the stand at trial and testify on his own behalf. *Powell v. Texas*, 492 U.S. 680, 684 (1989) (per curiam) (holding that "defendant's use of psychiatric testimony might constitute a waiver of the Fifth Amendment privilege, just as the privilege would be waived if the defendant himself took the stand"); *Cheever*, 571 U.S. at 94 (allowing State to present limited rebuttal testimony "harmonizes with the principle that when a defendant chooses to testify in a

criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross- examination").

Accordingly, a defendant waives the privilege "as to matters he himself has put in dispute." *Brown v. United States*, 356 U.S. 148, 156 (1958). *See also State v. Huskey*, 964 S.W.2d 892, 897 (Tenn. 1998) (holding that evidence gained from evaluation of defendant by prosecution expert admissible "only for impeachment or rebuttal of evidence of mental condition . . . introduced by the defendant"). The defendant "determines the area of disclosure and therefore of inquiry." *Brown*, 356 U.S. at 155. The "breadth of his waiver is determined by the scope of the relevant cross-examination." *Id.* at 154-55. *See also State v. Cazes*, 875 S.W.2d 253, 264-67 (Tenn. 1994) (holding that defendant who testifies in capital sentencing proceeding regarding mitigating factors unrelated to the circumstances of the offense may not be cross-examined regarding the offense); *State v. Riels*, 216 S.W.2d 737, 746-47 (Tenn. 2007) (holding that defendant who testifies in capital sentencing proceeding regarding his remorse for the offense may not be cross-examined regarding the circumstances of the offense). In the case of psychiatric testimony, a defendant waives his Fifth Amendment privilege only with respect to those issues that his own experts' testimony put in dispute. The Constitution then permits the State to use its own expert witness to the extent necessary to rebut those issues.

Permitting a prosecution psychiatric evaluation to exceed these constitutional bounds also implicates the Eighth Amendment and Article 1, § 16 of the Tennessee Constitution. Without these protections, "a capital defendant could avoid [inadvertently generating harmful evidence against himself] only at the price of not providing what may be his 'life or death' [evidence in mitigation]. This is too high a price to require the accused to pay for the maintenance of his fifth amendment privilege." *Cazes*, 875 S.W.2d at 265. *Cazes* involved the cross-examination of a

defendant during a capital sentencing hearing regarding the facts of the crime after he testified on direct only about unrelated mitigating factors. *Id.* at 264. The Tennessee Supreme Court reversed, finding it constitutionally intolerable to force the defendant to choose between waiving his Fifth Amendment protections and being compelled to testify about the crime or foregoing his Eighth Amendment right to have his sentencer consider all relevant mitigating evidence. *Id.* at 266. If a prosecution psychiatric evaluation is not appropriately limited in accordance with the Fifth Amendment, a defendant is similarly placed between the proverbial Scylla and Charybdis.

A compelled examination by a State expert must also separately comport with the strictures imposed by the Sixth Amendment right to the assistance of counsel. It is well-established that a criminal defendant has "a Sixth Amendment right to the assistance of counsel before submitting to [a] pretrial psychiatric interview." *Smith*, 451 U.S. at 469. He is entitled to counsel's assistance "in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471. The Supreme Court recognizes that, in a capital case, this decision "is literally a life or death matter that is "difficult even for an attorney,'" and that a defendant may therefore not be forced to resolve such an important issue without the advice of counsel. *Id.* (internal quotations omitted). *See also Powell*, 287 U.S. at 681 (quoting *Satterwhite v. Texas*, 486 U.S. 249, 254 (1988)); *Huskey*, 964 S.W.2d at 898 (holding that "a defendant does have the constitutional right to counsel in making the decision whether to assert a mental condition defense and thereby submit to a psychiatric examination").

The right to the assistance of counsel in this context means that a defendant has the right to discuss the examination and its scope with his lawyers prior to deciding whether to submit to the procedure. *Buchanan*, 483 U.S. at 424. It follows that, in order to ensure that counsel's

advice is effective, it must be "based on counsel's being informed about the scope and nature of the proceeding . . . [and] counsel's awareness of the possible uses to which [defendant's] statements in the proceeding could be put." *Id.* at 424-25. *See Powell*, 287 U.S. at 685-86 (finding Sixth Amendment violation where prosecution used defendant's statements from psychiatric evaluation addressing future dangerousness when neither defendant nor his counsel were informed that evaluation would encompass the topic).

IV. THE TENNESSEE SUPREME COURT ESTABLISHED THE PROCEDURAL FRAMEWORK THAT MUST BE FOLLOWED IN A CAPITAL CASE REGARDING SEALING AND DISCLOSURE OF EXPERT MENTAL CONDITION RESULTS AND REPORTS IN *STATE v. REID.*

In its opinion in *State v. Reid,* 981 S.W.2d 166, 174 (Tenn. 1998), the Tennessee Supreme Court outlined the procedures regarding the sealing and disclosure of expert reports that must be followed in a capital case in order to permit the State a reasonable opportunity to obtain information rebutting a defendant's expert evidence of mental condition in mitigation whilst ensuring that the defendant's constitutional rights are fully protected. These procedures are as follows:

> 1. If a capital defendant intends to introduce expert mental condition testimony as mitigation at the sentencing hearing, he or she must file pretrial written notice of intent no later than an appropriate date set forth by the trial court. The notice shall include the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine if an evaluation is necessary and, if so, the area in which its expert must be knowledgeable.
>
> 2. If a capital defendant files notice that he or she intends to introduce expert mental condition testimony at the sentencing hearing, the defendant shall, if requested by the State, be examined by a psychiatrist or other mental health professional selected by the State. The examination shall take place within a reasonable time frame set forth by the trial court. The State and defense will cooperate to provide the court-ordered professional with all necessary and relevant information. Said examination may be videotaped in accordance with the guidelines adopted in *State v. Martin*, 950 S.W.2d 20 (Tenn.1997). The report of

> that examination and the report of any psychiatric examination initiated by the defendant shall be filed under seal with the Court before the commencement of jury selection. The Court-appointed professional conducting the examination for the State shall not discuss his/her examination with anyone unless and until the results of the examination are released by the Court to counsel for the State following the guilt phase of the trial.
>
> 3. The results of any examination by the State expert and the defense expert shall be released to the defense prior to trial to enable the defendant, with the assistance of counsel, to determine whether or not to introduce expert mental condition testimony as mitigation at the sentencing hearing. The results of any examination shall be released to the State only in the event the jury returns a verdict of guilty of first degree murder and only after the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation at the penalty phase. After the return of a guilty verdict, the defendant shall file a pleading confirming or disavowing his or her intent to introduce expert mental condition testimony at a penalty phase. If the defendant withdraws the previously-tendered notice, the results of any mental condition examinations concerning the defendant will not be released to the State. The reports of any examinations, whether by the State or defense experts, concerning the defendant shall be released to the State immediately after the filing of a pleading confirming the earlier notice. Even if the defendant confirms his or her intent to offer mental condition evidence, the defendant may withdraw the notice of intent to introduce expert mental condition proof at any time before actually presenting such evidence, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed only therein, will be admissible against the defendant.

Id. at 174.

Thus, the procedures required by the *Reid* decision are triggered when the defendant files notice of his intent to present expert evidence of mental condition at the penalty phase and the State moves for an evaluation by its own expert. *Id.* Thereafter, if the court grants the State's motion, the State's rebuttal expert must file his or her report with the court under seal and may not discuss any aspect of the examination or its results with anyone unless and until the report is unsealed and disclosed to the State. *Id.* At the time that the report is filed under seal a copy must be given to counsel for the defendant. *Id.*

Only if the jury returns a verdict of guilty on a capital charge is the report of the State's rebuttal expert disclosed to the State. *Id.* In order to ensure that the State's expert understands these restrictions upon disclosure, the expert should be ordered to sign a written confirmation demonstrating that he/she understands the obligation not to discuss the examination, the results thereof or any information derived therefrom with any person unless and until the expert's report has been unsealed and released to both Mr. Wiggins and the State. *See United States v. Ciancia,* 13-cr-902 (C.D. Cal. May 13, 15) (imposing written confirmation requirement in case involving closely analogous Fed. R. Crim. P. 12.2); *United States v. O'Reilly,* No. 05-cr-80025 (E.D. Mich. February 19, 2010) (same).

Upon the return of a verdict of guilty, if the defendant affirms his continued intention to present expert mental health evidence, the rebuttal expert's report will be disclosed to the State along with the results and reports of the defense experts. *Reid,* 981 S.W.2d at 174. Mr. Wiggins's requested procedures regarding sealing and disclosure of results and reports and the timing thereof fully comport with the requirements of *Reid.*

V. THE COURT SHOULD DIRECT THE STATE TO DISCLOSE THE NATURE AND SCOPE OF ITS PROPOSED REBUTTAL EXAMINATION TO THE DEFENSE IN ADVANCE.

As noted above the Sixth Amendment requires that, before deciding whether to submit to a mental health evaluation by a State expert, a defendant be afforded the opportunity to discuss the nature and scope of the proposed evaluation with his counsel. *Smith,* 451 U.S. at 469; *Buchanan,* 483 U.S. at 424. In order to facilitate this constitutionally-mandated consultation, the State should be directed to disclose to defense counsel, in advance of the proposed evaluation, the following information: (1) the referral question that the expert has been directed to answer; and (2) the names of any tests that the expert proposes to administer in order to respond to the

referral question. *See* Section II, para. 2, *supra.* Within one week of the required disclosure, Mr. Wiggins should be permitted to file any objections to the State's chosen expert, the scope of the evaluation as defined by the referral question, and/or any of the tests that the expert proposes to give. *See* Section II, para. 3, *supra.*

1. Referral Question

Mr. Wiggins is entitled to know in advance the scope of the State's proposed rebuttal examination, as defined by the referral question that the expert has been instructed to answer, in order to ensure that the examination does not veer off into territory into which the State is not permitted to go. *See Martin*, 950 S.W.2d at 27 (holding that "the trial court has the authority to designate in its order not only the expert who is to perform the examination, but also the objective of the examination"). As noted, when a defendant decides to introduce mental health evidence at the penalty phase of a capital case, he may be deemed to have waived his rights under the Fifth Amendment with respect to an examination by a State expert, but "'that waiver is not limitless; it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense.'" *United States v. Williams*, 731 F. Supp. 2d 1012, 1019 (D. Haw. 2010) (quoting *Gibbs v. Frank*, 387 F.3d 268, 274 (3d Cir. 2004)). *See also Huskey*, 964 S.W.2d at 897 (holding that "the admissibility of the defendant's statements made during an examination at trial is expressly limited to impeachment or rebuttal of the mental condition evidence introduced by the defendant. In other words, such material may not be used by the prosecution to prove the guilt of the defendant"); *State v. Thompson*, 768 S.W.2d 239, 248 (Tenn. 1989) (holding that examination may only be used to rebut or impeach defendant's proof and "it must not exceed the scope of the purpose for which the evaluation was requested").

The district court in *Williams* rejected the State's argument that the defendant's 12.2

notice opened the door for it to assert diagnoses or defects other than those specifically placed in issue by the defendant. *Id.* Rather, it held, the State's experts are limited to rebutting the defendant's mental health evidence, "*not ascertaining another possible motive for Defendant's actions.*" *Id.* at 1017 (emphasis in original). The court wrote:

> To allow the State experts to go beyond rebutting Defendant's expert testimony that he has [borderline intellectual functioning] and affirmatively assert that Defendant suffers from psychosis or Anti-Social Personality Disorder and that either of those conditions actually caused him to commit the alleged acts, is tantamount to using Defendant's own statements, for which he has not waived his Fifth Amendment rights, against him in a criminal proceeding. The State may *rebut* the Defendant's mental status defense, not *prosecute* based upon Defendant's mental health. Accordingly, the Court finds that the State's rebuttal expert testimony must be limited in scope to that which directly rebuts Defendant's assertion of borderline intellectual functioning and which is based upon expert examinations that parallel the exploration of the examinations conducted by defense experts.

Id. at 1020 (emphases in original).

Here, we have given notice that the defense intends to present expert evidence that Mr. Wiggins suffers from brain abnormalities, impaired cognitive functioning, a seizure disorder and the psychological and neurobiological effects of chronic exposure to childhood trauma. The State's examination is therefore limited to confirming or refuting those issues. Mr. Wiggins is entitled to advance notice of the referral question put to the State's rebuttal expert so that he may enter his objection if the proposed examination exceeds this narrow scope.

2. Tests

Just as the State's rebuttal evaluation overall is limited to issues made relevant by the defendant's own expert mental health evidence, so too must any tests employed be limited to those appropriate to answering the precise questions at issue. In *Taylor*, 320 F. Supp. 2d at 791, the defendant gave notice under Fed. R. Crim. P. 12.2(b)(2) that he intended to introduce expert

evidence at the penalty phase regarding his developmental history and mental condition relating to substance abuse. He further noted that one of his experts had performed three specific testing instruments relating to substance abuse. *Id.* at n.1. In response, the State filed notice that it wished to have its rebuttal expert administer three broad-ranging personality assessment inventories – the Minnesota Multiphasic Personality Inventory ("MMPI"), the Personality Assessment Inventory ("PAI") and the Millon Clinical Multiaxial Inventory ("MCMI") – and a fourth measure, the Interview Schedule for the Psychopathy Checklist Revised ("PCL-R"), that is designed to determine whether or not an individual is a "psychopath." *Id.* at 794.

The court rejected the State's attempt to use the PCL-R out of hand, noting that uncertainty regarding the instrument's validity and reliability precluded its use in capital sentencing proceedings for any purpose. *Id.* Additionally, the court ruled that the State's expert "must be limited to a parallel testing of substance abuse rather than allowing the State to use [the defendant's] limited notice as an open door for any type of mental testing." *Id.* It therefore ordered that the State was permitted to use the tests it identified only to the extent that they contained testing scales for substance abuse and that it would be precluded from introducing any materials outside the scope of testing as it relates to substance abuse. *Id. See also Williams*, 731 F. Supp. 2d at 1023-24 (disallowing use of PCL-R by State rebuttal expert as any diagnosis made as a result would exceed the scope of permissible rebuttal).

In order to afford Mr. Wiggins an adequate opportunity to raise any objections to the tests, if any, that the State's rebuttal expert intends to use, this Court should direct the State to submit in advance a list of all tests that its expert proposes to use. *See, e.g., United States v. Sampson*, 335 F. Supp. 2d 166, 245-46 (D. Mass. 2004) ("*Sampson I*") (directing prosecution to file notice of tests its experts planned to perform at least five days prior to examination); *United*

States v. Sampson, 82 F. Supp. 3d 502, 518 (D. Mass. 2014) ("*Sampson II*") (same); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1085 (N.D. Iowa 2005) (same); *O'Reilly*, 05-cr-80025 at ECF No. 444, p.7) (same); *United States v. Roof*, No. 15-472 ECF No. 260, p. 2 (D.S.C. July 19, 2016) (same); *United States v. Basham*, No. 02-cr-992 (D.S.C. January 8, 2004) (requiring prosecution to disclose its list of tests); *Taylor*, 320 F. Supp. 2d at 791 (same); *United States v. Richardson*, No. 08-CR-139 ECF No. 319, p. 16 (N.D. Ga. July 12, 2010) (same); *Ciancia*, 13-cr-902 at ECF No. 139 at p. 2 (directing prosecution to file list of tests at least two weeks in advance of examination).

The Court should order that the list of tests be disclosed no later than two weeks prior to the date of the State's rebuttal examination. *See* Section II, para. 2. The Court should further order that, if Mr. Wiggins files objections within one week of receiving the list of tests, no examination or testing shall be performed by the State's expert until those objections have been ruled upon by the Court. *See* Section II, para. 3. *See, e.g., O'Reilly*, 05-cr-80025 at ECF No. 444, p.7; *Ciancia*, 13-cr-902 at ECF No. 139 at p. 2.

VII. THE STATE'S REBUTTAL EXAMINATION SHOULD BE APPROPRIATELY LIMITED IN SCOPE.

In accordance with the principal that the scope of a State rebuttal evaluation is limited, it is apparent from the outset that there are some topics that are outside the scope of what is permissible under Rule 12.2 and the Fifth Amendment and the Court should therefore preclude the State's expert from questioning Mr. Wiggins on those subjects. *See* Section II, para. 4. These topics fall into two categories: (1) questions regarding the facts and circumstances of the kidnapping and/or death of Sgt. Baker; and (2) questions to develop evidence in support of the

State's alleged statutory aggravating factors including, but not limited to, Prior Violent Felony Convictions, Murder for the Purpose of Avoiding Arrest and Knowing Mutilation of the Body.

1. The State's Rebuttal Expert Must be Precluded from Questioning Mr. Wiggins About the Facts and Circumstances of Sgt. Baker's Death.

The State's rebuttal expert must be instructed not to question Mr. Wiggins regarding any aspect of the facts and circumstances of Sgt. Baker's death during his/her examination. Such questioning is beyond the scope of what is necessary to rebut Mr. Wiggins's own expert evidence of his mental condition and constitutes potentially aggravating evidence from a defendant on subjects other than "matters he himself has put in dispute," in violation of the Fifth Amendment privilege against self-incrimination. *Brown*, 356 U.S. at 156. *See also Cazes*, 875 S.W.2d at 264-67; *Riels*, 216 S.W.2d at 746-47.

Using evidence to enhance punishment in a capital case is "comparable to introducing it for the purpose of proving guilt." *Watters v. Hubbard*, 725 F.3d 318, 384 (6th Cir. 1984) (citing *Smith*, 451 U.S. at 467). "Fifth Amendment rights are relevant even after a defendant calls his own medical experts to the stand, with respect to the issue of his commission of the acts. Evidence of a defendant's inculpatory statements may not be used to prove guilt" or enhance punishment, unless he himself puts them in issue. *Id.* at 384-85 (finding no error in allowing prosecution to cross examine defense experts regarding defendant's incriminatory statements during evaluation where those experts relied upon those statements to form their opinions). *See also Thompson*, 768 S.W.2d at 248 (holding that examination "may not include incriminating statements about the crime"); *Martin*, 950 S.W.2d at 24 (material obtained through evaluation by prosecution expert "may not be used by the prosecution to prove the guilt of the defendant").

Mr. Wiggins's experts will not testify regarding any statements made by Mr. Wiggins about the crime during the evaluation process and nor will they base any of their opinions on any such statements. Accordingly, "neither need nor fairness requires such inquiries" by the State's expert. *United States v. Johnson*, 383 F. Supp. 2d 1145, 1165 (N.D. Iowa 2005) (internal quotations omitted). The court in *Johnson* reached this conclusion under circumstances indistinguishable from those present here. The court appropriately found that the defendant could validly assert her Fifth Amendment privilege because the subject of the crime fell outside of the scope of the evidence that she herself would present. *Id.* at 1163-65. The same result should obtain here.

2. The State's Rebuttal Expert Must be Precluded from Questioning Mr. Wiggins to Develop Evidence in Support of the State's Alleged Aggravating Factors.

The State's rebuttal expert must also be instructed not to question Mr. Wiggins on subjects that may develop evidence affirmatively supporting the State's alleged statutory aggravating factors. Again, the Fifth Amendment limits the State from obtaining and presenting evidence from the defendant on subjects other than "matters he himself has put in dispute," *Brown*, 356 U.S. at 156, including matters relating to aggravating evidence in a capital sentencing proceeding, *see Watters*, 725 F.2d at 384-85. *See also Cazes*, 875 S.W.2d at 264-67; *Riels*, 216 S.W.2d at 746-47. Accordingly, the State may not use its rebuttal expert as a tool to gather evidence in support of its alleged aggravating factors if, as is the case here, Mr. Wiggins will introduce no expert mental health evidence regarding those factors.

The district court in *Sampson I* so held with respect to the State's attempt to use evidence gleaned from its rebuttal evaluation in support of the aggravating factor of future dangerousness. "Dr. Michael Welner was engaged by the State to examine Sampson pursuant to the Federal

Rules of Criminal Procedure 12.2. The information that he obtained in that process could only be used in connection with his testimony on Sampson's mental condition. *See* Fed. R. Crim. P. 12.2(c)(4) ('[n]o statement made by a defendant in the course of any examination conducted under this Rule . . . and no other fruits of the statement may be admitted into evidence against the defendant except on an issue regarding mental condition.'). It could not be used on the issue of future dangerousness." 335 F. Supp. 2d at 222, n.27.

Similarly, in *Williams*, 731 F. Supp. 2d at 1024, the court precluded the State's rebuttal expert from administering the PCL-R to the defendant as part of his evaluation. Finding the State's argument that evidence of psychopathy or anti-social personality was an appropriate rebuttal to the defendant's expert evidence of borderline intellectual functioning to be "not tenable," *id.* at 1023, the court noted that the instrument was also inappropriate because it necessarily addressed issues such as "Lack of Remorse or Guilt," *id.* at 1024. Such a topic was found to be outside of the scope of an examination necessary to rebut the defendant's expert evidence and the test was therefore deemed inadmissible. *Id.* As the court wrote, "any diagnosis which requires a broader examination of Defendant, or which is used to assert a theory of prosecution not just to rebut the Defendant's mental status defense, is inadmissible." *Id.* at 1022.

And in *Basham*, No. 02-cr-992 at ECF No. 248, p. 10 the defendant urged the court to preclude the State's expert from questioning him regarding uncharged misconduct that could then be used to establish aggravating factors. The defendant argued that, where the State uses its rebuttal examination to build its own case for aggravating factors, it has gone beyond what is permissible under 12.2. *Id.* at 10-11. The court appropriately held that the scope of the defendant's own expert evaluation determined whether the State's expert could delve into that area. *Id.*at 11. If the defense expert's evaluations were "purely diagnostic," there would be no

occasion for the State's expert to address uncharged offenses. *Id.* The Court should therefore order the State's rebuttal expert to refrain from questioning Mr. Wiggins on any topics related to any alleged aggravating factors.

VIII. MR. WIGGINS MAY NOT BE COMPELLED AT THIS JUNCTURE TO PROVIDE THE STATE'S EXPERT WITH MATERIAL THAT IS PROTECTED BY THE FIFTH AND SIXTH AMENDMENTS AND/OR THE ATTORNEY-CLIENT, WORK PRODUCT OR OTHER PRIVILEGES.

Consistent with the *Reid* requirement that "[t]he State and defense will cooperate to provide the court-ordered professional with all necessary and relevant information," *id.* at 174, Mr. Wiggins asks the Court to order as follows: "The parties are encouraged to cooperate with requests for information from the State's expert, subject to the attorney-client or other privileges." This request duplicates the language of the order entered by the trial court in *Huskey,* 964 S.W.2d at 895. At this juncture, when the contours of the expert mental condition evidence that he will present at sentencing cannot be determined, many of the materials in Mr. Wiggins's possession are protected from disclosure by the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to the effective assistance of counsel, the Attorney-Client privilege and/or the Work Product Doctrine. If the State's designated expert requests information from the defense counsel will, of course, produce to the expert any such information that is appropriately and lawfully disclosed.

A defendant's reciprocal pretrial discovery obligations are set forth in Tenn. R. Crim. P. 16(b):

> **(b) Disclosure of Evidence by the Defendant.**
>
> (1) *Information Subject to Disclosure.*
>
> (A) Documents and Tangible Objects. If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall

permit the state, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial; or

(iii) the defendant intends to call as a witness at trial the person who prepared the report, and the results or reports relate to the witness's testimony.

(2) *Information Not Subject to Disclosure*. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of:

(A) reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or agents in connection with the investigation or defense of the case; or

(B) a statement made by the defendant to the defendant's agents or attorneys or statements by actual or prospective state or defense witnesses made to the defendant or the defendant's agents or attorneys.

Additionally, as noted above, for reasons of efficiency and avoidance of unnecessary delay, when a defendant gives notice of his provisional intent to present expert mental condition at sentencing he is required to provide to the State with "the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine if an evaluation is necessary and, if so, the area in which its expert must be knowledgeable." *Reid*, 981 S.W.2d at 174. But not

until the conclusion of the guilt phase of the trial, after Mr. Wiggins has reviewed the State expert's report and reaffirmed his intent to proceed with his expert mental condition evidence, is the State entitled to disclosure of the defense experts' reports. *Id.* Rather, "the report of any psychiatric examination initiated by the defendant shall be filed under seal with the Court before the commencement of jury selection." *Id.*

Thus, unless and until a guilty verdict is rendered and Mr. Wiggins determines what, if any, expert mental condition evidence he will present, the reports of his experts are protected from disclosure by *Reid,* and Rule 16(b)(1)(A)(ii). Compelled disclosure before that time would also violate the Fifth Amendment, the Sixth Amendment, Attorney-Client Privilege and the Work Product Doctrine. Necessarily, the reports of defense experts who have interviewed Mr. Wiggins and rely on statements made by him are protected by the Fifth Amendment privilege against self-incrimination. *See Smith,* 451 U.S. at 468 (holding that a defendant's statements to a mental health examiner are subject to Fifth Amendment protection); *Powell,* 492 U.S. at 681 (same); *Martin,* 950 S.W.2d at 24 (same); *Huskey,* 964 S.W.2d at 897 (same). That privilege is not waived unless Mr. Wiggins makes a final determination that he will present expert mental condition evidence on his own behalf. *See Smith,* 451 U.S. at 468.

For similar reasons, statements by Mr. Wiggins to his experts are also protected by Attorney-Client Privilege at this stage. "It is now settled that a psychiatrist retained by defense counsel to assist in the preparation of the defense is an agent of defense counsel for purposes of the attorney client privilege." *Miller v. District Court,* 737 P.2d 834, 838 (Colo. 1987) (collecting

cases).[1] When a mental health expert is retained to assist the defense, "the communications made by the accused to the psychiatrist in response to his interrogation as to . . . matters bearing upon his mental processes, and so also the consequent mental diagnosis and opinion, are privileged, just as much so as if the revelations had been made by the accused directly to his attorneys." *State v. Kociolek*, 129 A.2d 417, 430 (N.J. 1957). That privilege, also, remains intact until Mr. Wiggins decides to present the testimony of each expert. *Miller*, 737 P.2d. at 838-39 (rejecting claim that privilege is waived upon a defendant declaring his mental condition is at issue and finding no waiver where psychiatrist was not called to testify by defense).

Mandating disclosure of the defense expert reports prior to a determination that the expert will be called to testify would also violate Mr. Wiggins's Sixth Amendment right to the effective assistance of counsel in multiple respects. "To safeguard the defense attorney's ability to provide the effective assistance guaranteed by [federal and state] constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of the investigation which he chooses not to use at trial." *State v. Mingo*, 392 A.2d 590, 581-82 (N.J. 1978). Additionally, "'[t]he effective assistance of counsel with respect to the preparation of a [mental condition] defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting.'" *Id.* at 583 (quoting *United States v. Alvarez*, 519

[1] Although, as noted in *Miller*, many courts have addressed the issue of whether a psychiatrist retained by the defense is an agent of the attorney protected by attorney-client privilege and answered in the affirmative, it appears that the precise question has not arisen in the Tennessee state courts. However, Tennessee law does extend the privilege to other agents of an attorney, *see Smith Cty. Educ. Ass'n. v. Anderson*, 328 S.W.2d 328, 333 (Tenn. 1984), and so it undoubtedly covers a defense-retained mental health professional.

F.2d 1036, 1046 (3d Cir. 1975) (collecting cases). This aspect of the constitutional right would also be infringed if a defendant lacks assurance that his statements will be protected until he decides to waive that protection. *Id.*

The specter of premature disclosure of information that the defense has not yet decided to present would also impact the Sixth Amendment right to the effective assistance of counsel by crippling the ability of counsel to fully benefit from the expert's expertise. *See Hutchinson v. People*, 742 P.2d 875, 882 (Colo. 1987) ("We believe the confidentiality and loyalty of expert consultants traditionally enjoyed by defendants and defense counsel is a crucial element in the effective legal representation of the defendant. A relationship of trust permits the defendant, counsel and the expert to engage in a full and frank interchange, affording counsel an accurate and honest assessment of the defendant's case. Without such a relationship, the assistance of the expert, and thus defense counsel, is likely to be ineffective."). Too, the premature disclosure of expert reports will compromise Mr. Wiggins's Sixth Amendment right by requiring counsel to reveal strategy and internal processes related to materials provided to their experts. *See United States v. Sampson*, 335 F. Supp. 2d 166, 243 (D. Mass. 2004).

Finally, the Work Product Doctrine, codified in Tenn. R. Crim. P. 16(b)(2)(A) and (B), protects defense expert reports from disclosure until the final determination to waive that privilege is made by Mr. Wiggins. *See State v. Harrison*, 270 S.W.3d 21, 30 (Tenn. 2008) (noting with approval trial court's finding that defense psychiatrist's report was confidential attorney work product prior to expert being called as a witness). *See also State v. Dunn*, 571 S.E.2d 650, 656-60 (N.C. App. 2002) (permitting state to receive reports of defense expert that defense decided not to call and to present testimony of that expert itself violated work product

privilege); *Commonwealth v. Kennedy*, 876 A.2d 939, 948-49 (Pa. 2005) (same); *People v. Spiezer*, 735 N.E.2d 1017, 1020-25 (Ill. App. 2000) (same); *Mingo*, 392 A.2d at 584-87 (same).[2]

In sum, Mr. Wiggins Mr. Wiggins has complied with the requirements of *Reid* and Tenn. R. Crim. P. 16 by filing his Notice. If the State's expert requests additional information that is not subject to Fifth, Sixth or Eighth Amendment protection or shielded by privilege, Mr. Wiggins will promptly provide it to him. If the defense ultimately decides to present expert mental condition testimony, following a guilty verdict and prior to the beginning of the sentencing proceeding, the State will then receive the reports of those experts he decides to call as directed by *Reid.* In the meantime, if it so requests the State will have access to Mr. Wiggins to conduct its own examination of him. The State is also at liberty to subpoena documents and interview collateral witnesses at will. There is no justification for nevertheless allowing it to invade the defense camp and avail itself of Mr. Wiggins's own expert materials as well in violation of his constitutional rights. *See Beckford*, 962 F. Supp. at 764 n. 15 (denying prosecutor's request for information about defense experts' opinions and noting "[i]f the Government has the ability to have the defendant examined by its own expert, that expert can reach his own conclusions concerning the defendant's mental status").

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[2] Indeed, requiring disclosure of defense expert reports at this time, in addition to providing the State's expert with access to defense strategy and mental impressions to which he is not entitled, also risks defeating the very purpose of the procedures set forth in *Reid.* As his Notice of Intent to Introduce Expert Mental Condition Evidence makes clear, Mr. Wiggins has retained multiple experts to assist him in this death penalty case. In the event that he decides to call some, but not all, of those experts to testify, the State will never receive the reports of the non-testifying individuals. *Reid*, 981 S.W.2d at 174. If its expert has nevertheless reviewed them, that expert's evidence will be tainted by exposure to constitutionally protected and privileged material and he will be precluded from testifying. The State will then be in the position of trying to secure a new expert to conduct a new evaluation in the middle of trial – the very result that *Reid* is designed to avoid.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. STEVEN JOSHUA WIGGINS

Circuit Court for Dickson County
No. 22CC-2018-CR-267

No. M2021-00782-CCA-R10-CD

ORDER

This matter is before the Court upon the renewed application of the Defendant, Steven Joshua Wiggins, for an appeal pursuant to Rule of Appellate Procedure 10. The Defendant originally filed his application on July 2, 2021. Docket No. M2021-00743-CCA-R10-CO. This Court entered an order on July 7, 2021, denying that application as incomplete. The Defendant has now remedied that problem with the filing of this renewed application on July 12, 2021. The Clerk has assigned the matter a different docket number.

Rule 10 provides for the granting of an extraordinary appeal in the discretion of this Court where the trial court has "so far departed from the accepted and usual course of judicial proceedings as to require immediate review," or "if necessary for complete determination of the action on appeal." Tenn. R. App. P. 10(a). As explained in the Advisory Commission Comment to Rule 10, "[t]he circumstances in which review is available . . . are very narrowly circumscribed to those situations in which the trial court . . . has acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on a later appeal."

As the Tennessee Supreme Court has explained:

> An appellate court should grant a Rule 10 extraordinary appeal only when the challenged ruling represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party's day in court, is without legal authority, is a plain or palpable abuse of discretion, or results in either party losing a right to interest that may never be recaptured.

Gilbert v. Wessels, 458 S.W.3d 895, 898 (Tenn. 2014) (citing *State v. McKim*, 215 S.W.3d 781, 791 (Tenn. 2007) and *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980)). Appeals pursuant to Rule 10 "are reserved only for *extraordinary* departures from the accepted and usual course of judicial proceedings." *Id.* (emphasis in original).

As previously noted, the Defendant in this case has been charged in a twelve-count indictment with first degree murder and related offenses and the State has filed notice of its intent to seek the death penalty. Trial is set to commence July 26, 2021. The Defendant has filed notice of his intent to introduce expert mental health testimony as mitigating evidence during sentencing. He initially filed notice on or about June 29, 2020, and then amended his notice of experts on June 2, 2021. The State has also moved the trial court to allow its mental health expert to interview the Defendant. In response, the Defendant filed a motion in the trial court on June 17, 2021, requesting certain procedures to be established before the State's expert conducts his evaluation. *See State v. Reid*, 981 S.W.2d 166, 173-74 (Tenn. 1998) ("adopt[ing] the notice, examination, and disclosure requirements . . . as the governing procedure in this State in every death penalty trial in which the capital defendant intends to introduce expert mitigation evidence relating to mental condition at the sentencing hearing of his or her trial"). The Defendant sought "an order permitting a rebuttal examination of [the Defendant] for the sole purpose of confirming or rebutting the expert evidence of mental condition outlined in the Notice" of his own proposed experts. The Defendant requested that the State's expert evaluation

> be limited to rebutting or confirming that [the Defendant] suffers from brain abnormalities, impaired cognitive functioning, a seizure disorder and the psychological and neurobiological effects of chronic exposure to childhood trauma. Under no circumstances shall the State's rebuttal expert question or otherwise assess [the Defendant] on any of the following topics:
>
> > (a) The facts and circumstances of the death of Sgt. Baker;
> > (b) [the Defendant's] feelings of remorse or lack thereof for the kidnapping and/or death of Sgt. Baker;
> > (c) The likelihood that [the Defendant] will be a danger to others in the future;
> > (d) The facts and circumstances of any prior acts of violence;
> > (e) Any other questions or topics designed to induce statements by [the Defendant] that may be used to support the State's alleged statutory aggravating factors.

The Defendant also requested that he not be compelled to provide the State's expert with any of the reports of his own experts or any of the material or background information his experts relied upon in drafting their reports until he "ultimately decides to present expert

mental condition testimony, following a guilty verdict and prior to the beginning of the sentencing proceeding."

The trial court held a hearing on the matter on June 23, 2021. The court directed the Defendant to furnish the State's expert with his defense experts' reports, including "all material" relied upon by the expert in arriving at his or her conclusions and opinions. The trial court declined to place any formal limitation on the scope of the State's expert's evaluation. The Defendant had until July 9, 2021, to provide the reports to the State's expert. The trial court denied the Defendant's motion, filed on or about July 8, 2021, asking to extend the July 9th deadline until July 16, 2021.

In the meantime, on June 28, 2021, the Defendant moved the trial court to grant him an interlocutory appeal on its ruling. *See* Tenn. R. App. P. 9. Following a hearing, the trial court denied that motion by written order on June 29, 2021. The Defendant now suggests Rule 10 is his only recourse for review of the trial court's ruling requiring him to turn over his experts' materials. The denial of a Rule 9 appeal, however, does not equate to a departure so far from the accepted and usual course of judicial proceedings as to require immediate appellate review under Rule 10. The reasons supporting the granting of an interlocutory appeal pursuant Rule 9 are quite different than those allowing an extraordinary appeal under Rule 10. *Compare* Tenn. R. App. P. 9(a) (need to prevent irreparable injury, need to prevent protracted litigation, and need to develop uniform body of law) *with* Tenn. R. App. P. 10(a) (consideration of whether trial court so far departed from accepted and usual course of judicial proceedings as to require immediate review). When a trial court previously denies a party's application for permission to appeal pursuant to Rule 9, the supreme court has stated:

> [U]nless the trial court's alleged error qualifies for immediate review under the specific criteria indicated by Rule 10, the appellate court must respect the trial court's discretionary decision not to grant permission to appeal under Rule 9 and refrain from granting a Rule 10 appeal. Those alleged errors not rising to the level required by Rule 10 can be reviewed in the normal course of an appeal after a final judgment has been entered.

Gilbert, 458 S.W.3d at 899.

In *Reid*, our supreme court held "that an independent psychiatric examination is essential to afford the State its right to rebut expert defense proof of mental condition." 981 S.W.2d at 171. The court further held "that requiring a capital defendant to submit to a psychiatric examination by a State selected mental health expert is constitutionally permissible." *Id.* at 173. The court then "set forth a procedural framework which both accommodates the State's right of rebuttal and safeguards a capital defendant's

constitutional right against self-incrimination." *Id.*

> [W]e adopt the notice, examination, and disclosure requirements approved in this appeal as the governing procedure in this State in every death penalty trial in which the capital defendant intends to introduce expert mitigation evidence relating to mental condition at the sentencing hearing of his or her trial. The specific procedure is set out below.
>
> 1. If a capital defendant intends to introduce expert mental condition testimony as mitigation at the sentencing hearing, he or she must file pretrial written notice of intent no later than an appropriate date set forth by the trial court. The notice shall include the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine if an evaluation is necessary and, if so, the area in which its expert must be knowledgeable.
>
> 2. If a capital defendant files notice that he or she intends to introduce expert mental condition testimony at the sentencing hearing, the defendant shall, if requested by the State, be examined by a psychiatrist or other mental health professional selected by the State. The examination shall take place within a reasonable time frame set forth by the trial court. *The State and defense will cooperate to provide the court-ordered professional with all necessary and relevant information.* Said examination may be videotaped in accordance with the guidelines adopted in *State v. Martin*, 950 S.W.2d 20 (Tenn.1997). The report of that examination and the report of any psychiatric examination initiated by the defendant shall be filed under seal with the Court before the commencement of jury selection. The Court-appointed professional conducting the examination for the State shall not discuss his/her examination with anyone unless and until the results of the examination are released by the Court to counsel for the State following the guilt phase of the trial.
>
> 3. The results of any examination by the State expert and the defense expert shall be released to the defense prior to trial to enable the defendant, with the assistance of counsel, to determine whether or not to introduce expert mental condition testimony as mitigation at the sentencing hearing. The results of any examination shall be released to the State only in the event the jury returns a verdict of guilty of first degree murder and only after the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation at the penalty phase. After the return of a guilty

> verdict, the defendant shall file a pleading confirming or disavowing his or her intent to introduce expert mental condition testimony at a penalty phase. If the defendant withdraws the previously-tendered notice, the results of any mental condition examinations concerning the defendant will not be released to the State. The reports of any examinations, whether by the State or defense experts, concerning the defendant shall be released to the State immediately after the filing of a pleading confirming the earlier notice. Even if the defendant confirms his or her intent to offer mental condition evidence, the defendant may withdraw the notice of intent to introduce expert mental condition proof at any time before actually presenting such evidence, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed only therein, will be admissible against the defendant.

Id. at 174 (emphasis added).

In the case at hand, the trial court recognized its obligations under the procedure set forth in *Reid*. The transcript of the hearing on June 23, 2021, reflects the trial court issued the following ruling:

> The question about what the expert can rely upon, this Court is of the opinion after reviewing the *Reed* [sic] cases and other cases that there's nothing in *Reed* [sic] that indicates that the Defense is limited to only asking those questions that the Defense -- I'm sorry -- that the State's expert is only limited to asking those questions that the Defense Counsel wishes to have them address. If the Defense expert witness relies upon a piece of evidence or a factor, that evidence or that factor is something that the State's expert would necessarily have to be able to have made available to him or her so that they can then evaluate their own expert opinion, whether that results in the same analysis that the Defense expert comes up with. In other words, this Court is of the opinion that the Defense expert will provide to the State's expert not only the report but all materials that the Defense expert relied upon in arriving at his or her conclusions and opinions.
>
> Now, if under the questions that the Defense has raised about those things that they want to have off limit, such as the facts and circumstances of the death of Sergeant Baker, [the Defendant's] feelings of remorse or lack thereof and so forth, if the Defense expert touched on those in his evaluation and relied upon those in clearly providing his opinion, then clearly the State's expert would be entitled to have that same information and input and be able to form his own conclusions about that.

To the extent that that violates the Fifth Amendment Rights of the defendant, this Court is of the opinion that the *Reed* [sic] Court has clearly made it obvious and stated that it is not a denial of the Fifth Amendment Right of a defendant who seeks to introduce mental health information at a sentencing hearing. It is not a denial of the Fifth Amendment Rights to require him to submit to this type of examination, and if he is providing information to an expert that's going to testify on his behalf at that sentencing hearing then the State is entitled to have their expert have that same information to consider.

Keeping in mind that all of this information is to be treated as totally confidential by the State's expert, and that the State's expert will be under a Court order not to reveal or discuss any aspect of that information that is being used to prepare the State's report, and that it will be confidential until such time, if at all, the defendant seeks at a sentencing hearing to introduce the mental health evaluation that they have obtained. Then and only then would the State be entitled to see what the State's expert has opined about the report that he or she makes.

So clearly it seems to me that there's no -- at the guilt or innocence phase there's certainly no indication that any sort of Fifth Amendment violation simply because of the fact that the State will not have access to any of that information until the sentencing hearing, and only then if the defendant seeks to introduce evidence that relies upon those factors and those pieces of evidence, and then and only then would the State be entitled to see what their expert report says.

The court also stated:

I believe that also addresses the issue about number four which has to do with limiting the scope of the State's evaluation to the suffering from brain abnormalities and paracognitive function and seizure disorder. Those are such broad terms that I think it would be unwise and unfair to limit the State's expert to simply addressing those issues without being able to touch on corollary issues. That's why in my opinion it's important because this is a rebuttal expert witness to allow that rebuttal expert witness to see what the Defense has relied upon as their expert witness has relied upon and then determine whether he needs to also consider that in making his determination. So that's why I'm not limiting it. But if there's some information that comes out in that report that the Defense, once they receive

it, feels should be addressed in a Motion in Limine, then we'll address it in a Motion in Limine before it's ever introduced in the trial.

During the hearing on the Rule 9 motion, held on June 29, 2021, the trial court made the following additional remarks about its ruling:

> So for those reasons, the Court has found that the Defense expert should be required to provide the same information to the State's expert that it relied upon in determining or arriving at its decision or opinion and that that information was necessary and reasonable. Otherwise, the State would have to conduct a wholesale examination of [the Defendant] just based on those loose and very broad areas that are identified in the defendant's notice, which I believe would possibly subject the defendant to a far greater invasion of his rights than what we are talking about with requiring the Defense expert to provide. And this is again just limiting the State's expert witness to only those items of information that the Defense expert relies upon to arrive at his opinion.
>
> But when you have an expert that's going to testify about childhood trauma that they claim imposed some sort of psychological effect on [the Defendant], then clearly the State's expert is entitled to know what that alleged childhood trauma is in order to form their own opinions. I don't know how that could be anything but necessary and reasonable, and it requires the cooperation of both the State and the Defense to obtain that. And I think that the *Reed* [sic] safeguards, as I have outlined by our Supreme Court, have made it very clear that the information will be protected and so forth.

The Defendant argues the trial court's ruling, that he provide the State's expert with all necessary and relevant information relied upon by his experts, "is without authority and contravenes well-established constitutional principles." He also argues the trial court erroneously ruled that the State does not have to provide him advance notice of the scope of its expert's evaluation. We have reviewed the material provided by the Defendant. The trial court's ruling reflects that it considered the arguments of the parties and recited the relevant authorities before rendering its decision. The Defendant has failed to demonstrate how the trial court's actions can be considered "arbitrary." To the contrary, based upon a review of the information at hand, the trial court did not act arbitrarily but, instead, followed the accepted and usual course of judicial proceedings prior to issuing its ruling. The trial court ordered the Defendant to furnish only that information relied upon by his own experts in reaching their conclusions: "If information was not relied upon, it was not required to be turned over to the State expert." Moreover, the court observed the Defendant maintains

the right, if necessary, to file a motion in limine prior to the beginning of the sentencing hearing if he believes the State's expert will testify about anything outside of the scope of information contemplated by *Reid*. The Defendant merely disagrees with the trial court's interpretation of the language in *Reid* that "[t]he State and defense will cooperate to provide the court-ordered professional with all necessary and relevant information." 981 S.W.2d at 174. However, even an alleged erroneous legal ruling, in and of itself, does not necessarily warrant halting the prosecution just days before the start of the trial and granting an extraordinary appeal. And even if that ruling is ultimately considered to be incorrect, the trial court's actions cannot, at this time, be considered fundamentally illegal or a patent abuse of discretion. We do not reach the issue of whether the trial court's ruling was proper, however. Rather, we conclude the trial court's interpretation of the language in *Reid* does not rise to the level contemplated by the high standards required of a Rule 10 extraordinary appeal. Contrary to the Defendant's assertion otherwise, he will have the opportunity to challenge the trial court's ruling on direct appeal following final judgment, if necessary. The Defendant has simply failed to satisfy any of the *Willoughby* factors recited above.

For these reasons, the Defendant's application for an extraordinary appeal pursuant to Rule 10 is hereby denied. The motion to stay is also denied. Because it appears the Defendant has been declared indigent, costs are taxed to the State.

Easter, Wedemeyer, Holloway, JJ.

CHAPTER FIVE APPENDIX

SAMPLE CAPITAL CASE VOIR DIRE CHARGE
(To Assist Jurors in understanding the process before completing the questionnaire)

To assist in the jury selection process, I would like to tell you a little bit about what will happen during the course of the proceedings. I want to describe basically how the trial will be conducted and what the attorneys, jurors, and judge will be doing over the course of the trial.

The defendant has been charged by the State of Tennessee with first degree murder. The document containing the charges is referred to as an indictment. An indictment is the formal accusation charging a defendant with a crime and is not evidence of anything.

The defendant is presumed innocent and may not be found guilty by the jury unless, after hearing all of the evidence, attorneys' arguments, and instructions of law, the 12 jurors seated in this case unanimously find that the State has proven its case beyond a reasonable doubt.

The first step in the trial will be the attorneys' opening statements. Any opening statement is not evidence.

Next will be the State's case-in-chief, in which the State will present its evidence. The evidence in the case will most likely consist of physical exhibits, documents, and the testimony of witnesses. The witnesses will testify by answering questions asked by the attorneys.

After the State completes its case-in-chief, the defense will be given an opportunity to present evidence through witnesses and exhibits. A defendant is not required to put on any evidence or to testify. The burden is always on the State to convince the jury that the defendant is guilty beyond a reasonable doubt. If the defense does present proof, the State may then put on what is known as "rebuttal" proof. After the State's rebuttal, the defense may put on further proof.

After the jury has heard all of the evidence, the State and the defense may present final arguments. I previously explained that opening statements by the attorneys are not evidence. Likewise, closing arguments are not evidence. In closing arguments, the parties will attempt to summarize their cases and help the jury understand the evidence that was presented.

The final part of the trial occurs when I instruct the jury about the rules of law that it is to use in reaching its verdict. The jury will then begin its deliberations to

make a decision in the case. The jury's deliberations will be secret, and no juror will be required to explain his/her verdict to anyone.

Now that I have described in outline form the trial itself, let me explain the functions that the jury and I will perform during the trial. I will decide which rules of law apply to the case. My decisions will be reflected in my responses to questions and objections the attorneys raise during the trial as well as in my final jury instructions. It is the jury's job to determine what the facts are from the evidence. The jury must then apply the law in my instructions to the facts, and from that application the jury will arrive at a verdict.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the entire case. The jury must keep in mind that the defendant is presumed to be innocent of the charges against him. Thus, a defendant is not required to prove his innocence, to have his attorney make any statements or arguments, or to produce any evidence.

The jurors must decide whether the State has proven beyond a reasonable doubt that the defendant has committed the crimes charged in the indictment. The jury must base that decision only on the evidence in the case and my instructions about the law. An important part of the jurors' job will be making judgments about the testimony of the witnesses who testify. Each juror should decide whether he/she believes what each person says and the importance of his or her testimony.

In reaching a verdict, jurors should not base any decisions on the fact that there were more witnesses on one side than on the other. Likewise, they should not reach a conclusion on a particular point just because more witnesses testified for one side on that point. Each juror's job is to think about the testimony of each witness heard and decide the facts.

If after its deliberations the jury finds the defendant not guilty, this would conclude the jury's service.

If after its deliberations the jury finds the defendant not guilty of first degree murder but guilty of a lesser included offense of first degree murder, the Court will set the punishment at a separate sentencing hearing. The jury would not be involved in setting the punishment for any lesser included offense.

If, however, the jury finds the defendant guilty of first degree murder, it will then be the jury's duty after a separate sentencing hearing to determine whether the

defendant will be sentenced to death, life imprisonment without the possibility of parole (which means no release eligibility ever), or life in prison (which means the first release eligibility is only after full service of 51 years in prison).

At the separate sentencing hearing, it is the jury's duty to determine the penalty which shall be imposed as punishment for first degree murder. Tennessee law provides that a person convicted of murder in the first degree shall be punished by death, by imprisonment for life without possibility of parole, or by imprisonment for life.

In arriving at this determination, each juror is authorized to weigh and consider any of the statutory aggravating circumstances proved beyond a reasonable doubt, and any mitigating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or sentencing phase or both. The jury is the sole judge of the facts, and of the law as it applies to the facts in the case. In arriving at its verdict, the jury is to consider the law in connection with the facts; but the Court is the proper source from which the jury will get the law. In other words, the jurors are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the state to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of the verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the verdict.

The law makes the jury the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence in the sentencing hearing as well.

Tennessee law provides that no sentence of death or sentence of imprisonment for life without possibility of parole shall be imposed by a jury but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which the court would instruct you on further at the appropriate time.

The jury shall not consider any other facts or circumstances as an aggravating circumstance in deciding whether the death penalty or imprisonment for life without possibility of parole would be appropriate punishment in the case.

Tennessee law also provides that in arriving at the punishment, the jury shall consider any mitigating circumstances raised by the evidence which shall include any mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, any aspect of the circumstances of the offense favorable to the defendant, or any other factor which may lessen or mitigate the sentence which is supported by the evidence.

The defendant does not have the burden of proving a mitigating circumstance. There is no requirement of jury unanimity as to any particular mitigating circumstance, or that the jurors agree on the same mitigating circumstance.

If the jury does not unanimously determine that a statutory aggravating circumstance has been proved by the state beyond a reasonable doubt, the sentence shall be life imprisonment.

If the jury unanimously determines that a statutory aggravating circumstance has been proved by the state beyond a reasonable doubt but that said statutory aggravating circumstance has not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or to imprisonment for life. In choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, the jury shall weigh and consider the statutory aggravating circumstance proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances.

If the jury unanimously determines that at least one statutory aggravating circumstance has been proven by the state, beyond a reasonable doubt, and said circumstance has been proven by the state to outweigh any mitigating circumstance or circumstances, beyond a reasonable doubt, the sentence shall be death.

Any verdict must be unanimous and signed by each juror.

This completes my explanation of the proceedings. We will now proceed with jury selection.

In Case of an Emergency

Please give these names and numbers to family and friends so that in the event an emergency arises during your stay in [- City -], you can be notified.

Monday - Saturday
Between 8:00 a.m. - 8:00 p.m. (_____ Standard Time)
Contact:

Jane Doe: XXX-XXX-XXXX
Sue Doe: XXX- XXX-XXXX
Jim Doe: XXX-XXX-XXXX

Monday - Saturday
Between 8:00 p.m. - 8:00 a.m. (_____ Standard Time)
Contact:

Jane Doe: XXX-XXX-XXXX
Larry Doe: XXX-XXX-XXXX

All day Sunday
Contact:

Jim Smith XXX-XXX-XXXX

THIS INFORMATION WILL BE AVAILABLE ONLY TO THE COURT AND ITS EMPLOYEES

JUROR #_____

PLEASE COMPLETE THE FOLLOWING

SMOKER _____ NON-SMOKER ____ INDIFFERENT ____

Name: _____ MALE___ FEMALE ___
Address: _____
City: _____ Zip _____
Phone: Home (____)_____ Work (_____)_____
Cellular # (____)_____
Spouse's Name _____
Employer's Name _____
Employer's Number _____

In Case of Emergency, please notify:

Name: _____ Relationship: _____
Address: _____
City: _____ State _____ Zip _____
Phone: Home (____)_____ Work (____)_____
Cellular # (____)_____

OR

Name: _____ Relationship: _____
Address: _____
City: _____ State _____ Zip _____
Phone: Home (____)_____ Work (____)_____
Cellular # (____)_____ Beeper (____)_____

Please list any medical problems we should be aware of: _____
_____
_____
Please list any allergies you may have:_____
_____
Please list any medications you are now taking: _____
_____

Physician: _____ **Phone:** (___)_____

Insurance: _____ **ID#**_____
Group # _____
Covers Hospitalization? _____ Yes _____ No
Preferred Hospital (if any) _____
Any information you feel might be important in an emergency: _____
_____
_____

Sample Juror Information Sheet
(This information may need to be modified for each case/area)

Prepare to stay in _____ no less than two (2) weeks.
Laundry services will be provided for all types of clothing or will be available at the hotel guest laundry (bring laundry supplies).
Provided in each room will be: Iron, ironing board, coffee pot, and hair dryer.

What to bring:
NOTE: all rooms are subject to officer inspection for exempted items

- Clothes (enough for 2 weeks) (Comfortable - Prepare for any temperature inside and outside.)
- Comfortable shoes – tennis shoes
- Toiletries
- Snacks, bottled water (You may bring a cooler. This will be for breaks during Court and after you return to your hotel rooms after Court.)
- Cigarettes
- Money (for items not provided, such as cigarettes, vending machines, etc.)
- Games, Cards, books (subject to officer review)
- Medications
- Special Dietary Needs (You will need to provide for your own **special dietary** needs.)(this item is often provided by the courts so it may not be needed on the list)

What NOT to bring:

- Reading material that in any way pertains to the subject matter of this trial. Court officers will review all reading material.
- Alcohol
- Radio, TV, Videos, etc.
- Video Games
- **Computers or tablets or anything with WiFi capability**
- Jewelry (Anything of personal or monetary value should be brought at your own risk.)

****If brought, cell phones must be turned over to officers in a ziplock bag with your name on the bag and your charger cable inside the bag with the phone.**

Reminder: You will be away from home no less than two (2) weeks. Arrange for mail pickup, pay any bills and/or taxes due during this period. If you have prescriptions, please fill them if possible prior to your service. If this is not possible, please let us know asap.

Arrange to be dropped off at the meeting site on _____ _____, 20___, as there are no provisions in place for the parking of your automobiles. At the conclusion of the trial, you will be allowed to call to arrange for pickup at the meeting site upon return to_____.
THIS IS ONLY IF PARKING IS NOT AVAILABLE.

If an emergency arises and you have a problem meeting the bus on **_____, at _____ p.m.** (_____ **Standard Time**), a member of the staff can be reached at **XXX-XXX-XXXX.**

A bus will be chartered to transport you on **_____,20___** to _____, Tennessee. The bus will pick you up at **3:15 p.m. (_____ Standard Time) in front of the _____ building, _____, Tennessee.**

SAMPLE JUROR INFORMATION SHEET

You have been selected as a potential juror in the case of State v. ????????????. This is a _____ County case that is set for jury selection in _____ (Town) the week of _____ _____, 20_____. The trial will begin _____ _____, 20_____, in _____. The sixteen (16) jurors that are selected will leave Doe Town _____ _____, 20_____, to go to _____, _____ County for the trial. The jury will be sequestered at a hotel in _____ from _____ _____, 20_____, until the completion of the trial. The trial is expected to take approximately two weeks.

Today you will be given a questionnaire to complete and then a specific date and time to return the week of_____ _____, 20___, to be questioned individually by the Court and attorneys. You will be scheduled for a time the week of _____ _____, 20_, at either 9:00 am OR 1:00 pm. We will make every attempt to keep the waiting time down to a minimum. Please bring reading materials (other than a newspaper) or other materials to occupy your waiting time.

There are certain individuals who may not qualify or will be exempt from serving as jurors. People who do not qualify to serve as jurors include the following:

- Under eighteen (18) years of age
- Not a citizen of the United States
- Not a resident of the State of Tennessee
- Not a resident of _____ County or have been a resident of _____ County for less than twelve months
- Previously been convicted of a felony
- Previously been convicted of perjury or subornation of perjury

If you are qualified to be a juror but believe it would be an undue hardship to serve on this jury, you will be given a form to be completed under oath which states your hardship. You will be questioned by the Court and the parties in the Courtroom concerning your claimed hardship. You will need to remain until questioned by the Court. If you are not excused by the Court, you will need to complete one of the questionnaires and be scheduled for a time during the week of _____ _____, 20___, to be questioned by the Court. Your hardship may or may not qualify you for excusal from jury service.

The rest of you will fill out the questionnaire. After completing the questionnaire, turn it in and we will schedule you a time to return for individual questioning. This will be the week of _____ _____, 20___, at either 9:00 am, or 1:00 pm. (If you are responsible for picking up children in the afternoon, please advise the scheduler). These questions will be under oath. After the individual questioning, you will be given a date and time later in the week to return to the courtroom for group questioning and the final selection of the jury. Between the time you complete the questionnaire and the time you return the week of _____ _____, 20___, you are not to discuss the questionnaire contents with anyone except to talk to your family and employer as to any arrangements that will need to be made to serve as a juror in the event that you are chosen. DO NOT DISCUSS THE FACTS OF THE CASE OF THE NAME OF THE CASE

WITH ANYONE. We will provide letters for your employers regarding jury service should they have questions about legal obligations in this matter.

If you are selected as one of the 16 jurors, we will provide you with an information sheet as to what to bring with you for jury service and an emergency information sheet. This information will be available to the Court employees only. Should there be questions or an emergency that may arise between today and _____ _____, 20___, you can contact Jane Doe, Larry Doe or Ann Doe at XXX-XXX-XXXX between 8:30 a.m. - 4:30 p.m. (_____ Standard Time). Please identify yourself as a potential juror in this matter.

IN THE CRIMINAL COURT FOR _____ COUNTY

STATE OF TENNESSEE	)	
	)	
VS.	)	**_____County**
	)	**CASE NO: _____**
_____	)	

REQUEST FOR UNDUE HARDSHIP

I, the undersigned prospective juror, do hereby request to be excused from jury service in this case for the following reason(s)[1]:_____

_____

_____

_____

_____

NAME (PLEASE PRINT):_____ _____

JUROR'S OATH OR AFFIRMATION

I, the undersigned, hereby make oath or affirmation under penalty of perjury that the information provided is complete and accurate to the best of my knowledge.

_____

Signature of Juror

_____

Date

---

[1]Jurors will only be excused if serving will cause an **undue or extreme physical or financial hardship or an unavoidable scheduling conflict with the trial date, beginning on , 20_____**. Pursuant to Tenn. Code Ann. § 22-1-103**, s**uch an "undue or extreme physical or financial hardship" is limited to circumstances in which the juror would:

> (A) Be required to abandon a person under the juror's personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury;
>
> (B) Incur costs that would have a substantial adverse impact on the payment of the juror's necessary daily living expenses or on those for whom the juror provides the principal means of support;
>
> (C) Suffer physical hardship that would result in illness or disease; or
>
> (D) Be deprived of compensation due to the fact that the prospective juror works out-of-state and the out-of-state employer is unwilling to compensate the juror pursuant to § 22-4-106 or that the prospective juror is employed by an employer who is not required to compensate jurors pursuant to § 22-4-106 and declines to do so voluntarily.

The juror, or the juror's personal representative, must provide the court with documentation from a physician licensed to practice medicine, verifying that a mental or physical condition renders the person unfit for jury service. Failure to provide satisfactory documentation may result in a denial of the request to be excused.

In addition,

> A person who is seventy-five (75) years of age or older is excused from jury service upon a showing that the person is seventy-five (75) years of age or older and that the person is incapable of performing jury service because of a mental or physical condition.

Any request to change the day and/or time the juror has been scheduled to report the week of _____ _____, 20____, should NOT be made on this form, but should be made to the _____ County Clerk's Office.

CHAPTER SIX APPENDIX

SAMPLE COLLOQUY

DEFENDANT'S
WAIVER OF RIGHT TO BE
REPRESENTED BY COUNSEL

Against the advice of the Court, you have indicated that you wish to waive your right to counsel. After you answer the following questions and carefully consider the Court's warnings regarding the dangers of representing yourself, you will be asked if you wish to formally waive your right to counsel both orally and in writing. If you choose to waive your right to counsel, the Court will permit you to represent yourself at trial [*with the assistance of advisory counsel]*. If you have any questions whatsoever regarding your right to counsel and/or your right to represent yourself, the Court strongly encourages you to discuss them with your attorneys or with the Court before waiving your right. Before the Court accepts your waiver, you must answer some questions. First, you will read through the questions with your attorney(s) and record your answers to each question in writing. Then the Court will go over the form with you on the record and ask you if each marked response is in fact your answer to each of the specified questions. Please mark your answers to the following questions:

(1) Do you understand that you have the right to have a minimum of two attorneys represent you at every stage of the proceedings against you?

☐ Yes ☐ No

(2) Have you ever studied law? ☐ Yes ☐ No

(3) Have you ever represented yourself or any other defendant in a criminal action?

☐ Yes ☐ No

(4) Do you realize that you are charged with *(list the charge(s) in each count of the indictment)*?

☐ Yes ☐ No

[*Where necessary:*
Do you understand that the Court will merge the felony murder and premeditated murder counts if you are convicted of more than one count of murder for either victim? In other words, do you understand that you can only be punished once for the murder of each victim?]

(5)(a) Do you understand that, if it is appropriate under the evidence presented at trial, the judge will instruct the jury to consider your guilt of lesser included offenses of the offense(s) alleged in the indictment?

☐ Yes ☐ No

[The offenses alleged in the indictment, their lesser included offenses, the elements of each and the possible penalties are as follows:]

Count	Charged Offense, Lesser Included Offenses, Elements of Each	Possible Penalties
One and Two	Lesser Included Offense: Second Degree Murder Elements: A knowing killing of another	Minimum of fifteen years, maximum of twenty-five years
One and Two	Lesser Included Offense: Voluntary Manslaughter Elements: The intentional or knowing killing of another in the state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner	Minimum of three years, maximum of six years
One and Two	Lesser Included Offense: Reckless Homicide. Elements: Reckless killing of another	Minimum of two years, maximum of four years
One and Two	Lesser Included Offense: Criminally Negligent Homicide Elements: Criminally negligent conduct which results in death	Minimum of one year, maximum of two years

(5)(b) Do you understand the elements of each of the offenses alleged in the indictment and the possible lesser included offenses? In other words, do you understand what the State must prove beyond a reasonable doubt to convict a person of those offenses?

☐ Yes ☐ No

(6)(a) Do you realize that if you are found guilty of *(list the offense)*, there will be a second phase to the trial where the jury may impose a punishment of life, life without the possibility of parole, or death?

☐ Yes ☐ No

[*Where necessary:*
Although there are ____ counts of first degree murder, do you realize that, if convicted, you cannot receive more than one sentence for the death of each of the victims? In other words, because there are only ____ victims, you cannot receive more than _____ death sentences, ____ sentences of life, or ____ sentences of life without the possibility of parole?]

[*If more than one count in the indictment repeat above language for each indicted offense. If the offense is not a capital offense ask defendant if he/she understands that if he/she is found guilty the Court will impose the sentence.*]

(6)(b) Do you understand that the State is relying upon ____ aggravating circumstances in this case and that they are as follows:

[*List aggravating circumstances*]

☐ Yes ☐ No

(7) Do you realize, that if you are found guilty of more than one of the crimes, charged in this case this Court can order that the sentences be served consecutively, that is, one after another?

☐ Yes ☐ No

[*Where appropriate:*
Do you realize that if you are found guilty of one or more of the crimes charged in this case this Court can order that the sentences be served consecutively to any other sentences you have received as a result of convictions in other cases? This includes, but is not limited to, (fill in any prior convictions received by the defendant)?]

☐ Yes ☐ No

(8) Do you realize that if you represent yourself, you are on your own? The Court cannot tell you how you should try your case or even advise you as to try your case. You will not receive leniency or other special consideration by the Court.

☐ Yes ☐ No

(9) Are you familiar with the Tennessee Rules of Evidence?

☐ Yes ☐ No

(10) Do you realize that the Tennessee Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

☐ Yes ☐ No

(11) Are you familiar with the Tennessee Rules of Criminal Procedure?

☐ Yes ☐ No

(12) Do you realize that those rules govern the way in which a criminal action is tried in this Court and that must abide by those rules?

☐ Yes ☐ No

(13) Do you realize that if you decide to take the witness stand, you must present your testimony by asking yourself questions? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

☐ Yes ☐ No

(14) Has any person pressured, forced, threatened, or intimidated you into waiving your right to counsel, or has any person made any promises to you in exchange for your waiver of your right to counsel?

☐ Yes ☐ No

(15) Are you currently under the influence of any alcoholic beverage or intoxicating drug?

☐ Yes ☐ No

(16) Are you currently taking any medications?

☐ Yes ☐ No

If so, what are you taking and when did you take it last?

_____

_____

(17) Were you under the influence of any alcoholic beverage or intoxicating drugs during your discussions with your attorney(s) concerning your waiver or your right to counsel?

☐ Yes ☐ No

(18) What is the highest grade level you completed in school?

☐ Sixth Grade	☐ Ninth Grade	☐ Twelfth Grade
☐ Seventh Grade	☐ Tenth Grade	☐ College
☐ Eighth Grade	☐ Eleventh Grade	☐ Law School

☐ Other (please specify) _____

(19) Have you had any difficulty reading and understanding this waiver form?

☐ Yes ☐ No

As the Court previously stated to you, it is the Court's opinion that you would be far better defended by a trained lawyer than you can be by yourself. The Court believes it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with Rules of Evidence. The Court strongly urges you not to try to represent yourself.

(20) Do you have any questions you wish to ask the Court regarding this form or your right to counsel?

☐ Yes ☐ No

(21) In light of the penalties that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

☐ Yes ☐ No

(22) Is your decision entirely voluntary on your part?

☐ Yes ☐ No

The Court again advises you that it is not in your best interest to represent yourself at trial in this case. The state is seeking the death penalty in this case. Therefore, if you are convicted of first degree murder, the jury may sentence you to death. If you choose to represent yourself in this case, you will not later be permitted to claim your trial counsel was ineffective. Therefore, if you represent yourself at trial and you are not convicted, you are greatly limiting the issues you can raise during future proceedings and/or appeals in this Court, the appellate courts of Tennessee, and the federal courts. However, you have the right to represent yourself if you intelligently and voluntarily waive your right to counsel. If you wish to do so, please proceed.

I HAVE READ THIS DOCUMENT AND HAVE CAREFULLY CONSIDERED ITS WARNINGS AND THE WARNINGS OF THE COURT REGARDING THE DANGERS OF REPRESENTING MYSELF. DESPITE THESE WARNINGS, I, _____, (print your name) HEREBY MAKE OATH OR AFFIRMATION THAT I WISH TO WAIVE MY RIGHT TO COUNSEL AND I WISH TO REPRESENT MYSELF DURING MY TRIAL AND DURING ANY FUTURE PRETRIAL PROCEEDINGS.

_____

[*Defendant's Name*]

_____

Date

PROPOSED COLLOQUY
Defendant's Waiver of Right to Testify

At any time before the conclusion of the proof, defense counsel shall request a hearing, out of the presence of the jury, to inquire of the defendant whether the defendant has made a knowing, voluntary, and intelligent waiver of the right to testify. This hearing shall be placed on the record and shall be in the presence of the trial judge. Momon v. State, 18 S.W.3d 152, 162 (Tenn. 2000).

Defense counsel is generally in the best position to voir dire the defendant concerning a waiver of the right to testify. Because the right to testify is the mirror image of the right to remain silent, the trial judge should play no role in this procedure unless the judge believes there is evidence the defendant is not making a valid waiver of the right to testify. Id. at 174. In such a case, the trial judge is obliged to question the defendant directly to the extent necessary to ensure a valid waiver. Id.

COLLOQUY:

(1) Do you understand that you have the right to testify, and if you wish to exercise that right, no one can prevent you from testifying?

(2) Do you also understand that you have the right not testify?

(3) Do you understand that if you choose not to testify the jury/court may not draw any inferences from your failure to testify?

(4) Have you consulted with your attorney(s) in making the decision whether or not to testify?

(5) Did your attorney(s) discuss with you the advantages and disadvantages of testifying?

(6) Is it your personal decision to waive your right to testify?

(7) Have you reached this decision voluntarily?

(8) Has anyone threatened or coerced you into making this decision?

(9) Has anyone promised you anything in exchange for you waiving your right to testify?

Defendants may waive the right to testify either by signing a written waiver or by engaging in the voir dire procedure. Momon v. State, 18 S.W.3d 152 (Tenn. 2000). If a written waiver is executed, the written form must show at a minimum that the defendant knew and understood items 1-7 above.

A written waiver should not be executed before the close of the prosecution's case-in-chief. Id. at 175.

This procedure should be repeated in the penalty phase if the trial reaches that point.

Sample Preliminary Jury Instructions in Capital Case

IN THE _____ COURT FOR _____ COUNTY
DIVISION _____

STATE OF TENNESSEE	**)**	
	)	
	)	
VS.	**)**	**CASE NO: _____**
	)	
	)	
_____,	**)**	
Defendant	**)**	

PRELIMINARY JURY INSTRUCTIONS

Before we begin the trial, I would like to tell you a little bit about what will happen during the course of the proceedings. I want to describe basically how the trial will be conducted and what the attorneys, jurors, and judge will be doing over the course of the trial. At the end of the trial, I will give you more detailed instructions on how you are to go about reaching your decision, but now I simply want to explain how the trial will proceed.

The/Each defendant has been charged by the State of Tennessee with a violation of state law. The document containing the charge(s) is referred to as an indictment. An indictment is the formal accusation charging a defendant with a crime and is not evidence of anything.

The defendant(s) is/are charged with _____. The crime(s) is/are defined as _____.

OPTIONAL

The essential elements of the offense(s) are: _____

_____.

The/Each defendant has pled not guilty to the charge(s). He/She is presumed innocent and may not be found guilty by you unless, after hearing all of the evidence, attorneys' arguments, and instructions of law, the 12 jurors seated in this case unanimously find that the State has proven its case beyond a reasonable doubt.

The first step in the trial will be the attorneys' opening statements. The State will tell you about the evidence it intends to present so that you will have an idea what the State's case is about. This opening statement is not evidence. Its only purpose is to help you understand what the evidence will be and what the State will attempt to prove. After the State's opening statement, an attorney for the defendant(s) may make an opening statement if he or she should so choose. Again, statements of attorneys are not evidence.

Next will be the State's case-in-chief, in which the State will present its evidence. The evidence in the case will most likely consist of physical exhibits, documents, and the testimony of witnesses. The witnesses will testify by answering questions asked by the attorneys.

After the State completes its case-in-chief, the defense will be given an opportunity

to present evidence through witnesses and exhibits. A defendant is not required to put on any evidence or to testify. The burden is always on the State to convince you that the defendant is guilty beyond a reasonable doubt. If the defense does present proof, the State may then put on what is known as "rebuttal" proof. After the State's rebuttal, the defense may put on further proof.

[Languages other than English may be used during this trial. The evidence that you are to consider is only that provided through the official court interpreter. Although some of you may know the language of the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.]

After you have heard all of the evidence, the State and the defense may present final arguments. I previously told you that opening statements by the attorneys are not evidence. Likewise, closing arguments are not evidence. In closing arguments, the parties will attempt to summarize their cases and help you understand the evidence that was presented.

The final part of the trial occurs when I instruct you about the rules of law that you are to use in reaching your verdict. After you hear my instructions, I will *[select and excuse] [excuse]* the alternate juror(s), and the final 12 jurors will leave the courtroom together as a group. You will then begin your deliberations to make a decision in the case.

Your deliberations will be secret, and you will not be required to explain your verdict to anyone.

Now that I have described in outline form the trial itself, let me explain the functions that you and I will perform during the trial. I will decide which rules of law apply to the case. My decisions will be reflected in my responses to questions and objections the attorneys raise during the trial as well as in my final jury instructions. It is your job to determine what the facts are from the evidence. You must then apply the law in my instructions to the facts, and from that application you will arrive at a verdict.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the entire case. Keep in mind that the defendant is presumed to be innocent of the charge(s) against him/her. Thus, a defendant is not required to prove his/her innocence, to have his/her attorney make any statements or arguments, or to produce any evidence.

You, as jurors, must decide whether the State has proven beyond a reasonable doubt that the defendant [each of the defendants] has committed the crime(s) charged in the indictment. **(OPTIONAL: You must consider the evidence in each Count and each defendant separately.)** You must base that decision only on the evidence in the case and my instructions about the law. An important part of your job will be making judgments about the testimony of the witnesses who testify. You should decide whether you believe what each person says and the importance of his or her testimony. In making

that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a memory of the events he or she testified about? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did he or she appear to understand the questions clearly and answer them directly? Did a witness' testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of each witness' testimony.

In making up your mind and reaching a verdict, do not base any decisions on the fact that there were more witnesses on one side than on the other. Likewise, do not reach a conclusion on a particular point just because more witnesses testified for one side on that point. Your job is to think about the testimony of each witness you heard and decide the facts.

Some of you have probably heard the terms "circumstantial evidence" and "direct evidence." These are the two basic types of evidence that exist in law. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case. Keep in mind that you may consider both kinds of evidence, which are considered to be of equal value in the law.

The Court will not provide you with a transcript of the testimony at the end of the trial. Therefore, you must listen very carefully to the testimony. Each of you will be allowed to take notes during the trial for your own use during your deliberations. You are not required to take notes. Independent memory can be as accurate as written notes. You will be provided with paper and a pen if you decide to take notes.

During the course of the trial, you should not talk with any witness, defendant, or attorney involved in this case. Please do not talk with them about any subject whatsoever. You may see them in the hallway, on an elevator, or at some other location. If you do, perhaps the best standing rule is not to say anything.

You also should not discuss this case among yourselves until I instruct you on the law and you start deliberating at the end of the case. It is important that you wait until all of the evidence is received and you have heard all of my instructions on the rules of law before you deliberate among yourselves.

During the course of the trial, you will receive all of the evidence you may properly consider to decide the case. Because of this, you should not attempt to do any research on your own or gather any information on your own that you think might be helpful. Do not engage in any outside reading, visit any places mentioned in the case, or try to learn about the case outside of this courtroom in any other manner.

I do not know if there will be any media reports in the newspapers, on TV, or on the radio about this particular case. If there are, you are not permitted to read, watch, or

listen to those reports. You, as jurors, must base your decision solely on the evidence you hear in the courtroom.

At times during the trial, an attorney may make an objection to a question that is asked by another attorney or to an answer that a witness gives. This simply means that the attorney is requesting that I make a decision on a particular rule of law. Do not draw any conclusions from the fact that an objection was made or from my ruling on that objection. My rulings only relate to the legal questions that I must determine and should not influence your thinking.

If I sustain an objection to a question, the witness will not be permitted to answer the question. Do not attempt to guess what the answer might have been, had the witness been permitted to give it. Similarly, if I tell you not to consider a particular statement that was made, you should put that statement out of your mind and you may not refer to that statement in your later deliberations.

INSERT OPTION A

You may not ask questions. It is the responsibility of the attorneys to present the evidence. You must decide the case on the evidence presented to you.

OR

INSERT OPTION B

If you have a question about the testimony of a witness, write it down and present it to a court officer at the end of the witness' testimony. The court officer will then present the question to me. After consultation with the attorneys, I will decide whether the question may be asked of the witness.

(OPTIONAL)

During the course of the trial, I may ask a question or two of a witness. If I do, that does not indicate that I have any opinion about the facts in the case or that I have any opinion with respect to that witness' credibility.

Finally, during the course of the trial, I may have to interrupt the proceedings to confer with the attorneys about the rules of law that should apply. In some cases, we may have bench conferences in the courtroom outside of your hearing. And in some instances, I may ask you to retire to the jury room while we discuss a matter out of your presence. I will try to avoid as many of these interruptions as possible. We will try to resolve some of these things in the morning before we get started. I ask your patience because these interruptions are necessary points in the trial where we have to resolve legal issues. In the long run, they save time for all of us.

If, after its deliberations, the jury finds the defendant not guilty, this would conclude the jury's service.

If after its deliberations the jury finds the defendant not guilty of premeditated first

degree murder but guilty of a lesser included offense of premeditated first degree murder, the Court will set the punishment at a separate sentencing hearing. The jury would not be involved in setting the punishment for any lesser included offense.

If, however, the jury finds the defendant guilty of premeditated first degree murder, it will then be the jury's duty after a separate sentencing hearing to determine whether the defendant will be sentenced to death, life imprisonment without the possibility of parole, or life in prison.

At the separate sentencing hearing, it is the jury's duty to determine the penalty which shall be imposed as punishment for first degree murder. Tennessee law provides that a person convicted of murder in the first degree shall be punished by death, by imprisonment for life without possibility of parole, or by imprisonment for life.

In arriving at this determination, each juror is authorized to weigh and consider any of the statutory aggravating circumstances proved beyond a reasonable doubt, and any mitigating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or sentencing phase or both. The jury is the sole judge of the facts, and of the law as it applies to the facts in the case. In arriving at its verdict, the jury is to consider the law in connection with the facts; but the Court is the proper source from which the jury will get the law. In other words, the jurors are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the state to prove any statutory aggravating

circumstance or circumstances beyond a reasonable doubt.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of the verdict. Absolute certainty is not demanded by the law, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the verdict.

The law makes the jury the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence in the sentencing hearing as well.

Tennessee law provides that no sentence of death or sentence of imprisonment for life without possibility of parole shall be imposed by a jury but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which would be explained further at the separate sentencing hearing. The jury is limited to the statutory aggravating circumstances which would be defined by the court and the jury shall not consider any other facts or circumstances as an aggravating circumstance in deciding whether the death penalty or imprisonment for life without possibility of parole would be appropriate punishment in the case.

Tennessee law also provides that in arriving at the punishment, the jury shall consider any mitigating circumstances raised by the evidence which shall include any mitigating factor which is raised by the evidence produced by either the prosecution or

defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, any aspect of the circumstances of the offense favorable to the defendant, or any other factor which may lessen or mitigate the sentence which is supported by the evidence.

The defendant does not have the burden of proving a mitigating circumstance. There is no requirement of jury unanimity as to any particular mitigating circumstance, or that the jurors agree on the same mitigating circumstance.

If the jury does not unanimously determine that a statutory aggravating circumstance has been proved by the state beyond a reasonable doubt, the sentence shall be life imprisonment.

If the jury unanimously determines that a statutory aggravating circumstance has been proved by the state beyond a reasonable doubt but that said statutory aggravating circumstance has not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or to imprisonment for life. In choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, the jury shall weigh and consider the statutory aggravating circumstance proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances.

If the jury unanimously determines that at least one statutory aggravating

circumstance has been proven by the state, beyond a reasonable doubt, and said circumstance has been proven by the state to outweigh any mitigating circumstance or circumstances, beyond a reasonable doubt, the sentence shall be death.

Any verdict would be required to be unanimous and signed by each juror.

This completes my opening comments to you. We will now proceed with the reading of the indictment.

NOTE: If the defendant is charged with first degree murder under the "act of terrorism" provision, T. C. A.§ 39-13-202(a)(4), these instructions will have to be modified, as life in prison will not be a sentencing option. See T.C.A. § 39-13-202(c)(2). In such instances, consult your Capital Case Attorney for a revised instruction.

CHAPTER SEVEN APPENDIX

Waiver of Mitigation Procedure

Pursuant to Zagorski v. State, 983 S.W.2d 654, 660-61 (Tenn. 1998), the following procedures must be followed when a defendant wishes to waive mitigation:

> [W]hen a defendant, against his counsel's [advice], refuses to permit the investigation and presentation of mitigating evidence, counsel must inform the trial court of these circumstances on the record, outside the presence of the jury. The trial court must then take the following steps to protect the defendant's interests and to preserve a complete record:
>
> 1. Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial;
>
> 2. Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and
>
> 3. After being assured the defendant understands the importance of mitigation, inquire of the defendant whether he or she desires to forego the presentation of mitigating evidence.
>
> This procedure will insure that the accused has intelligently and voluntarily made a decision to forego mitigating evidence. Trial judges, however, shall not inquire of counsel as to the content of any known mitigating evidence. To hold otherwise would potentially force counsel to act against the client's wishes and would risk the disclosure of privileged or confidential information.

See also State v. Johnson, 401 S.W.3d 1, 13-20 (Tenn. 2013) (thorough discussion of issues and trial court's handling of issue when defendant's competency also raised as an issue).

IN THE CRIMINAL COURT OF _____ COUNTY, TENNESSEE

STATE OF TENNESSEE	)	
	)	
VS.	)	**NO. _____**
	)	
_____	)	

SENTENCING ORDER

The Defendant, _____, was asked to stand for sentence and was further asked if he had anything to say before the Court imposed the sentence returned by the jury.

The Court announced that it concurred in both the verdict of first degree murder and the sentence rendered by the jury and then issued the following statement:

> Upon the verdict of the Jury finding you, _____, to be guilty of murder in the first degree as charged in the indictment, and upon the further verdict of the Jury fixing punishment as death, it is, therefore, **ORDERED** that you shall be put to death by lethal injection in the mode prescribed by law, pursuant to the provisions of Tenn. Code Ann. § 40-23-114.
>
> You shall be transferred to the custody of the Warden at the State Penitentiary at Nashville, Tennessee, pending appellate review.

ENTERED this _____ day of _____, 20___.

_____

Judge _____

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record for the defendants, and the State this the _____ day of _____, 20___.

CHAPTER EIGHT APPENDIX

POST-CONVICTION CHECKLIST
for first post-conviction petitions

I. Was the petition filed in the court of conviction?

☐ Yes *(Proceed to next section.)*

☐ No *(You may dismiss the petition.)*

II. Was the petition filed within the one-year statute of limitations?

☐ Yes *(Proceed to next section.)*

☐ No *(You may dismiss the petition)*

BUT:

_____ The petition raises a newly-recognized Constitutional right with retroactive application and was filed within one year of the ruling establishing the right.

_____ The petition asserts new scientific evidence would establish petitioner's actual innocence.

_____ The petition alleges a previous conviction used to enhance petitioner's sentence has subsequently been invalidated; the previous sentence was not the result of a guilty plea; and the petition was filed within one year of the final ruling holding the previous conviction to be invalid.

If you check any of the above, proceed to the next question. If not, you must still consider whether due process requires the tolling of the statute of limitations.

DUE PROCESS CONSIDERATIONS:

◆ When would statute of limitations period normally have begun to run?

◆ Did the grounds for relief actually arise after the limitations period would have normally commenced?

◆ Would a strict application of the limitations period effectively deny the petitioner a reasonable opportunity to present the claim?

◆ Is petitioner mentally incompetent?

If you did not check any of the exceptions to the statute of limitations listed above and you find due process does not require the tolling of the limitations period, you may dismiss the petition.

III. Is the petition signed by petitioner and does it contain a clear and specific statement of all grounds upon which relief is sought?

☐ Yes *(Proceed to next section.)*

☐ No *(You may dismiss the petition)*

Is it a pro se petition?

☐ Yes *(Enter an order giving petitioner fifteen (15) days to enter an amended order that is in compliance with the statute and appoint counsel.)*

☐ No *(You may dismiss the petition.)*

IV. Does the petition state a colorable claim?

☐ Yes *(Proceed to next section.)*

☐ No *(You may dismiss the petition.)*

V. Is a petition challenging the same conviction already pending in either the trial court or an appellate court, or have any of the claims been previously resolved on the merits?

☐ Yes *(You may dismiss the petition in whole or in part.)*

☐ No *(Proceed to the next section.)*

VI. Has the Post-Conviction Court dealt with all preliminary matters?

_____ Entered a Stay of Execution

_____ Appointed Counsel

[OR- Court has determined petitioner is Competent to proceed with self-representation and has effectively waived their statutory right to counsel. See Waiver of Counsel form for Post-Conviction Petitioners]

_____ Entered a Scheduling Order setting date(s) for:

_____ Filing of Amended Petition

_____ Filing of State's Response and/or Motion to Dismiss.

_____ Filing motions for services and other preliminary matters

_____ Hearing on Preliminary Matters

_____ Status/Report on progress of investigation/ request and acquisition of expert services, etc.

_____ Hearing *(either one date or multiple dates as needed)*

_____ Filing written argument, if allowed

_____ Filing State's response to written argument, if allowed

_____ Entering Final Post-Conviction Order

_____ Disposed of all pre-hearing matters such as:

_____ Granting/Denying requests for investigative services

_____ Granting/Denying request for expert services

_____ Motions to Dismiss

_____ Motions for Continuance

_____ Issues Regarding Petitioner's Competency

VII. Has the Court completed the post-conviction hearing and entered a written order detailing the Court's findings of fact and conclusions of law with regard to each of the petitioner's claims and either denied or granted the requested relief?

☐ Yes

☐ No *(Has the Court set a date for entering the Court's final order? Is the Court waiting for material/response from either the petitioner or the state?)*

Notes on Case Status

PROPOSED
WAIVER FORM & COLLOQUY
(for petitioner's wishing to waive post-conviction counsel)

Against the advice of the Court, you have chosen to waive your right to counsel. After you answer the following questions, carefully consider the Court's warnings regarding the dangers of representing yourself, and formally waive your right to counsel both orally and in writing, the Court will permit you to represent yourself at the post-conviction hearing with the assistance of advisory counsel. If you have any questions whatsoever regarding your right to counsel and/or your right to represent yourself, the Court strongly encourages you to discuss them with your attorneys or with the Court before signing this document. If you wish to proceed, please answer the following questions:

(1) Are you aware that by statute you are entitled to have attorneys from the Tennessee Post-Conviction Defender's Office represent you in these matters and that, since you have been convicted of first degree murder and sentenced to death, you are entitled to at least two attorneys to represent you during your post-conviction proceedings?

(2)(a) Have you ever studied law?

(2)(b) Are you familiar with the Tennessee Rules of Evidence?

(3) Have you ever represented yourself or any other defendant in a criminal action?

(4) Have you previously represented yourself at any post-trial hearing?

(5) Do you realize that you have the right to have certain claims presented in a petition for post-conviction relief and this Court has granted a hearing on those claims?

(6) Do you realize that once these claims have been heard, you may be prevented from raising such claims in a subsequent post-conviction proceeding?

(7) Do you realize that if you represent yourself, you are on your own? The Court cannot tell you how you should try your case or advise you as to how to proceed. You will not receive leniency or other special consideration by the Court.

(8) Do you realize that if you decide to take the witness stand, you must present your testimony by asking yourself questions? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(9) Has any person pressured, forced, threatened, or intimidated you into waiving your right to counsel, or has any person made any promises to you in exchange for your waiver of your right to counsel?

(11) Are you currently taking any medication?

If so, what are you taking and when did you take it last?

_____

_____

As the Court has previously stated to you, it is the Court's opinion that you would be far better represented by a trained lawyer than by yourself. The Court believes that is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the Rules of Evidence. The Court strongly urges you not to try to represent yourself.

(12) What is the highest grade level you completed?

☐ Sixth Grade	**☐ Seventh Grade**	**☐ Eighth Grade**
☐ Ninth Grade	**☐ Tenth Grade**	**☐ Eleventh Grade**
☐ Twelfth Grade	**☐ College**	**☐ Law School**

☐ Other (please specify) _____

(13) Have you had any difficulty reading or understanding this wavier form?

(14) Do you have any questions you wish to ask the Court regarding this form or your right to counsel?

(15) In light of the severity of your conviction and sentence and the gravity of the proceedings before this Court and in light of the difficulties of representing yourself, is it still your desire to represent yourself and give up your right to be represented by a lawyer?

(16) Is your decision entirely voluntary on your part?

The Court again advises you that it is not in your best interest to represent yourself at the post-conviction hearing. This is an important proceeding and if this Court finds you are not entitled to post-conviction relief, you may not be able to raise these issues in this Court in the future, and a new execution date may be set in your case. However, you have the right to represent yourself if you intelligently and voluntarily waive your right to counsel. You have signed the following statement indicating that you wish to waive your right to counsel?

I HAVE READ THIS DOCUMENT AND HAVE CAREFULLY CONSIDERED ITS WARNINGS AND THE WARNINGS OF THE COURT REGARDING THE DANGERS OF REPRESENTING MYSELF. DESPITE THESE WARNINGS, I _____, HEREBY MAKE OATH OR AFFIRMATION THAT I WISH TO WAIVE MY RIGHT TO COUNSEL AND I WISH TO REPRESENT MYSELF DURING MY POST-CONVICTION PROCEEDINGS.

Is this your signature?

PETITIONER'S WRITTEN WAIVER OF COUNSEL AT POST-CONVICTION PROCEEDINGS

(1) Are you aware that by statute you are entitled to representation by attorneys from the Tennessee Post-Conviction Defender's Office and that, since you have been convicted of first degree murder and sentenced to death, you are entitled to at least two attorneys to represent you during your post-conviction proceedings?

☐ **Yes** ☐ **No**

(2)(a) Have you ever studied law?

☐ **Yes** ☐ **No**

(2)(b) Are you familiar with the Tennessee Rules of Evidence?

☐ **Yes** ☐ **No**

(3) Have you ever represented yourself or any other defendant in a criminal action?

☐ **Yes** ☐ **No**

(4) Have you previously represented yourself at any post-trial hearing?

☐ **Yes** ☐ **No**

(5) Do you realize that you have the right to have certain claims presented in a petition for post-conviction relief and this Court has granted a hearing on those claims?

☐ **Yes** ☐ **No**

(6) Do you realize that once these claims have been heard, you may be prevented from raising such claims in a subsequent post-conviction proceeding?

☐ **Yes** ☐ **No**

(7) Do you realize that if you represent yourself, you are on your own? The Court cannot tell you how you should try your case or advise you as to how to proceed. You will not receive leniency or other special consideration by the Court.

☐ **Yes** ☐ **No**

(8) Do you realize that if you decide to take the witness stand, you must present your testimony by asking yourself questions? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

☐ **Yes** ☐ **No**

(9) Has any person pressured, forced, threatened, or intimidated you into waiving your right to counsel, or has any person made any promises to you in exchange for your waiver of your right to counsel?

☐ **Yes** ☐ **No**

(11) Are you currently taking any medication?

☐ **Yes** ☐ **No**

If so, what are you taking and when did you take it last?

_____

_____

(12) What is the highest grade level you completed?

☐ **Sixth Grade**	☐ **Seventh Grade**	☐ **Eighth Grade**
☐ **Ninth Grade**	☐ **Tenth Grade**	☐ **Eleventh Grade**
☐ **Twelfth Grade**	☐ **College**	☐ **Law School**

☐ **Other (please specify)** _____

(13) Have you had any difficulty reading or understanding this wavier form?

☐ **Yes** ☐ **No**

(14) Do you have any questions you wish to ask the Court regarding this form or your right to counsel?

☐ **Yes** ☐ **No**

(15) In light of the severity of your conviction and sentence and the gravity of the proceedings before this Court and considering the difficulties of representing yourself, is it still your desire to represent yourself and give up your right to be represented by a lawyer?

☐ **Yes** ☐ **No**

(16) Is your decision entirely voluntary on your part?

☐ **Yes** ☐ **No**

I HAVE READ THIS DOCUMENT AND HAVE CAREFULLY CONSIDERED ITS WARNINGS AND THE WARNINGS OF THE COURT REGARDING THE DANGERS OF REPRESENTING MYSELF. DESPITE THESE WARNINGS, I _____ (print your name), HEREBY MAKE OATH OR AFFIRMATION THAT I WISH TO WAIVE MY RIGHT TO COUNSEL AND I WISH TO REPRESENT MYSELF DURING MY POST-CONVICTION PROCEEDINGS.

_____

Signature of Defendant

_____

Date

COMPETENCY TO BE EXECUTED TIMELINE
Per *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999) and
Tennessee Supreme Court Rule 12:

1. After defendant exhausts three-tier appeals process, State (attorney general) files motion for execution date in Tennessee Supreme Court. *See* Tennessee Supreme Court Rule 12, § 4(A); *Van Tran*, 6 S.W.3d at 267.

2. *Within 10 days* after State files motion for execution date, defendant files response, which includes reasons for any stay. This motion should raise the issue of incompetency to be executed, if applicable. *See Van Tran*, 6 S.W.3d at 267; Tenn. S. Ct. R. 12, § 4(A). If competency to be executed is raised, the Tennessee Supreme Court shall remand the case to the trial court.

3. *Within three days of entry of Tennessee Supreme Court's remand order*, defendant shall file petition regarding incompetency to be executed. *See Van Tran*, 6 S.W.3d at 267. "The petition shall have attached to it affidavits, records, or other evidence supporting the factual allegations of mental incompetence." *Id.* In addition to identifying prior proceedings regarding the defendant's mental incompetence, the petition "shall set forth the name, location, hourly rate, and qualifications of any mental health professionals who would be available and willing to evaluate the prisoner if the trial court determines an evaluation is required." *Van Tran*, 6 S.W.3d at 267-68. **Maximum total elapsed days: 13**. **Maximum total days in trial court: 3**.

4. *No later than three days after defendant's trial court filing*, State (district attorney) files a response to petition. State shall identify name, location, hourly rate, and qualifications of its mental health experts. *See id.* at 268. **Maximum total elapsed days: 16**. **Maximum total days in trial court: 6**.

5. *No later than four days after State's response*, trial court issues order determining whether hearing is warranted. For hearing to occur, defendant must make threshold showing that competency to be executed is at issue. *See id.* "This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency." *Id.* at 269. **Maximum total elapsed days:** 20. **Maximum total days in trial court: 10**.

6. If trial court determines hearing is warranted, its order shall appoint "at least one, but no more than two, mental health professionals from each list submitted by the respective parties." *Id*.

7. The trial court's order shall direct the mental health experts to evaluate the defendant regarding competency to be executed. The experts shall complete written reports *no later than ten days following the order of appointment* (threshold finding order). These orders shall be provided to the state attorney general, the district attorney, and counsel for the defendant. *See id.* at 269-70. **Maximum total elapsed days: 30**. **Maximum total days in trial court: 20**.

8. *No later than ten days after the written evaluations are filed*, the trial court shall conduct a hearing regarding the defendant's competency to be executed. *See id.* at 270. **Maximum total elapsed days: 40. Maximum total days in trial court: 30.**

9. *Within five days of the conclusion of the evidentiary hearing*, the trial court must issue a written order containing detailed findings of fact and conclusions of law granting or denying the petition. *See id.* at 271. **Maximum total elapsed days: 45. Maximum total days in trial court: 35.**

10. *Within ten days of the trial court's finding* either concluding there is no threshold finding or ruling on a petition after a hearing has been conducted, the unsuccessful party shall file a notice of appeal in the Tennessee Supreme Court *in Nashville*. The record below shall also be filed at that time. *See id.* at 272. **Maximum total elapsed days: 55**

11. *Within five days of the filing of the record on appeal*, the unsuccessful party must file its initial brief. *See id.* **Maximum total of elapsed days: 60.**

12. *Within five days of the filing of the initial brief*, the other party shall file its responsive brief. *See id.* **Maximum total elapsed days: 65**

13. Absent extraordinary circumstances, no reply brief and no oral argument. Tennessee Supreme Court reviews the record and the briefs and writes an order or opinion addressing the appeal. *See id.*

NO APPENDIX FOR CHAPTER 9

CHAPTER TEN APPENDIX

LETHAL INJECTION EXECUTION MANUAL

EXECUTION PROCEDURES

FOR

LETHAL INJECTION

This manual contains a summary of the most significant events and departmental procedures to be followed in the process of carrying out the orders of the Tennessee Supreme Court regarding the imposition of death by lethal injection. It contains a detailed listing of some of the duties and responsibilities of certain key departmental personnel. In addition, the manual covers institutional perimeter security prior to, during, and subsequent to an execution.

It will be used as a guideline for the Warden to assure that operational functions are properly planned with the staff who have designated responsibilities in performing a judicially ordered execution by lethal injection.

SECTION VIII (PERIMETER SECURITY) IS

CONFIDENTIAL

AND IS NOT FOR PUBLIC RELEASE.

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LETHAL INJECTION CON'T

I. INTRODUCTION

RIVERBEND MAXIMUM SECURITY INSTITUTION

The Tennessee Department of Correction is responsible for the incarceration of convicted felons serving sentences ranging from one year to death. Individuals sentenced to death are executed at Riverbend Maximum Security Institution. Upon the exhaustion of an inmate's appeals, the execution process shall begin.

In the capacity as Commissioner of the Tennessee Department of Correction, it is my duty by law to oversee the humane and constitutional execution of individuals sentenced to death by judicial authority in Tennessee. Tennessee law establishes lethal injection as the primary method for carrying out a death sentence and authorizes the Department to promulgate rules and regulations for the procedures for lethal injection. This manual explains the procedures for lethal injection. It will be reviewed annually, or as needed, by a designated panel.

Commissioner

July 5, 2018
Date

II. DEFINITIONS

RIVERBEND MAXIMUM SECURITY INSTITUTION

DEFINITIONS

The definitions listed below pertain only to the Lethal Injection Process within this manual.

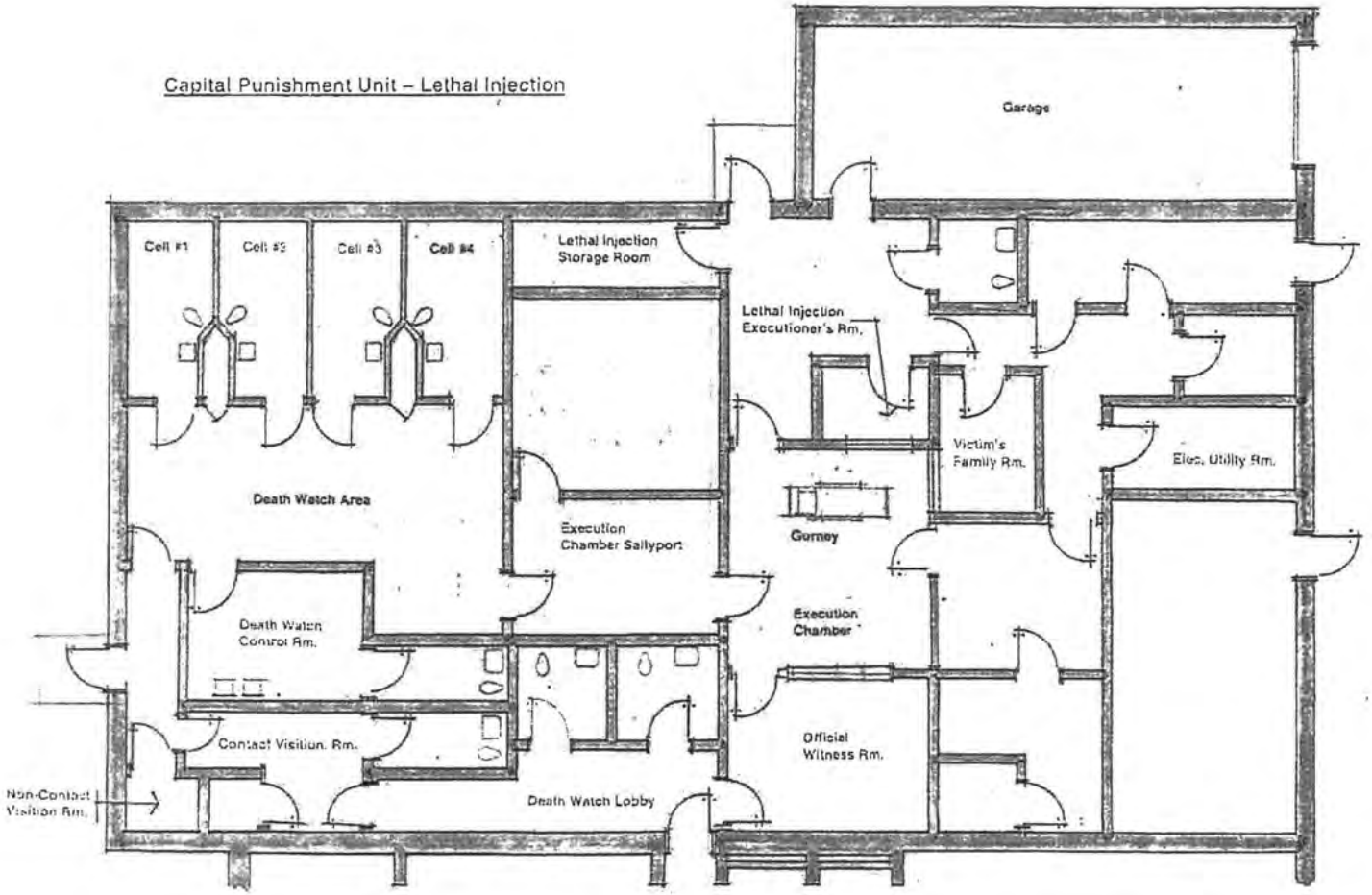
Catheter	A thin flexible tube that is inserted into a part of the body to inject fluid.
Death Watch	A period of time immediately prior to an execution during which special procedures are implemented in order to ensure that the execution is carried out in a safe and orderly manner.
Death Watch Area	An area that includes the inmate's cell(s), contact and non-contact visitation areas, the control room, and the secured monitoring area.
Drip Chamber	A hollow device that provides a visual of the drip/flow.
EMT	Emergency Medical Technician
Execution Team	The Execution Team shall consist of: the Warden, Associate Warden of Security, Executioner, Extraction Team, Death Watch Team, IV Team, Lethal Injection Recorder, Facility Maintenance Supervisor, ITS Security Systems Technician(s), and Escort Officer(s).
Extension Line	The clear tubing used to administer fluids.
Extraction Team	Execution Team members who are responsible for the removal, restraint, and movement of the inmate during the time of execution.
Flash Chamber	A device that precludes blood leakage as a needle is removed from the catheter and an IV unit is coupled to the catheter.
Gurney	A wheeled stretcher for transporting.
IV	Intravenous
Inventory Ledger	Permanent record of Lethal Injection Chemicals maintained in the key control area of the armory area of Building 7 at RMSI
Lethal Injection Room	A room where the Executioner administers the lethal injection chemical(s) at the direction of the Warden.
LIC	Lethal Injection Chemical(s)
Pan Tilt Zoom Camera (PTZ)	The camera used by the Execution Team in the Lethal Injection Room. The camera monitors the condemned inmate's IV site(s).
Solution Set	Equipment designed to administer an IV.

DEFINITIONS – CON'T

Syringe — A medical instrument used to inject fluids into the body or draw them from it.

Tourniquet — A compression device used to cut off the flow of blood to a part of the body, most often an arm or leg. It may be a special surgical instrument, a rubber tube, a strip of cloth, or any flexible material that can be tightened to exert pressure.

Note: Whenever the masculine pronoun is used in this manual, it applies equally to a female.


Capital Punishment Unit – Lethal Injection
Garage
Cell #1
Cell #2
Cell #3
Cell #4
Lethal Injection Storage Room
Lethal Injection Executioner's Rm.
Victim's Family Rm.
Elec. Utility Rm.
Death Watch Area
Execution Chamber Sallyport
Gurney
Execution Chamber
Death Watch Control Rm.
Contact Visition. Rm.
Official Witness Rm.
Non-Contact Visition Rm.
Death Watch Lobby

III. DUTIES OF MANAGEMENT AND ADMINISTRATIVE PERSONNEL

RIVERBEND MAXIMUM SECURITY INSTITUTION

RIVERBEND MAXIMUM SECURITY INSTITUTION
PERSONNEL

WARDEN

Primary Role

To ensure that the procedures prescribed by law and as outlined in this manual are performed, either by personal performance or by delegation.

Duties:

1. To ensure that the security of the institution is maintained.

2. To ensure that condemned inmates sentenced prior to January 1, 1999, are given the opportunity to select electrocution or lethal injection as a legal means of execution at least 30 days before the execution by presenting the inmate with the Affidavit Concerning Method of Execution Form (See p. 92).

3. To explain to the inmate the procedures and activities which will take place during Death Watch.

4. To control any contact between the condemned inmate and other persons.

5. To coordinate the notification of official witnesses of the date and time to be at the institution to witness the scheduled execution.

6. To coordinate the appointment of execution team staff member(s).

7. To select a person to serve as Executioner.

8. To set the precise hour and minute of execution, subject to approval of the Commissioner and the Department's General Counsel.

9. To arrange for the presence of a physician to carry out functions as set forth on page 19.

10. To coordinate with the Medical Examiner for disposition of the body.

11. To keep the Commissioner and Assistant Commissioner of Prisons informed of the progress towards and implementation of the execution.

12. To control activation of closed circuit TV to the victim family witness room.

13. To order the Executioner, either verbally or by gesture, to proceed with execution.

14. To cause the announcement to significant parties and the public of the fact that the sentence of execution has been carried out.

ASSOCIATE WARDEN OF SECURITY

Primary Role

Assist the Warden in performing execution procedures and substitute for the Warden if he is unable to perform his duties.

Duties:

1. To ensure the security of the condemned inmate.

2. To supervise preparation of the Death Watch cell area, Execution Chamber, and the condemned inmate for execution.

3. To coordinate and/or approve, with assistance by assigned security staff, visits and phone calls permitted to the condemned inmate.

4. To provide the final inspection of restraint devices to ensure the condemned inmate is secured on the gurney prior to placing IV catheters in each arm.

5. To ensure that any blinds between the witness room and the Execution Chamber are closed prior to the witnesses entering and opened after the witnesses are seated.

6. To supervise the removal of the body from the Execution Chamber.

7. To coordinate the release of the condemned inmate's body to the authorized recipient or coordinate burial at State expense in the event no one claims the body.

LETHAL INJECTION RECORDER

Primary Role

Assist the Warden in carrying out his duties.

Duties:

1. To coordinate and supervise the movement of the Execution Team to and from the Execution Chamber, and aid in maintaining the team's anonymity.

2. To process applications for the selection of news media representatives to attend executions.

3. To complete the Lethal Injection and Execution Recorder Checklist. (See Section IX Forms)

DEATH WATCH SUPERVISOR

Primary Role

To coordinate all security requirements for the inmate during the Death Watch and to supervise all correctional officers assigned any responsibilities for direct supervision of the inmate during Death Watch, including preparation of the condemned inmate.

Duties:

1. To prepare a duty schedule for officers assigned this detail.

2. To review post orders for correctional officers and to become familiar with all functions of subordinates.

3. To ensure that the condemned inmate personally inventories his personal property and packs away all items he is not permitted to retain. The Death Watch Supervisor, inmate, and one witness will sign the property inventory. The sealed property will be retained in storage in the Property Room until removed by the inmate's designee.

4. To maintain a bound ledger of information related to Death Watch associated activities. This log will contain a record of all visitors, meals served, shaving, handling of mail, inmate behavior, movement, communications, etc.

5. To permit only authorized persons to enter the Death Watch area. The Warden will provide a list of authorized personnel.

6. To maintain a sufficient amount of clothing in the inmate's size in order to provide a change of clothing each time the inmate leaves the cell. The Death Watch Officers will have custody of the clothing to be stored.

7. To ensure that cellular phones, cameras, audio, and video equipment are not taken into the Death Watch area or the Execution Chamber at any time during Death Watch or at the time of execution, unless authorized by the Warden.

8. To coordinate movement of witnesses entering and exiting witness rooms during the execution process.

9. To activate and deactivate the closed circuit TV and audio speaker systems at the prescribed times during the execution process.

10. To ensure the events pertaining to the execution are documented by the Lethal Injection Recorder on the Lethal Injection Execution Recorder Checklist.

INSTITUTIONAL CHAPLAIN

Primary Role

To offer and deliver chaplaincy services to the condemned inmate and the inmate's family as needed.

Duties:

1. To ask the inmate to specify in writing the preferred funeral arrangements and the preferred recipients of personal property. If a legal will is requested, the Chaplain will coordinate with the TDOC Staff Attorney.

2. To say a brief prayer of intercession immediately prior to execution (if requested).

3. To assist in the release of the executed inmate's body to the authorized next-of-kin recipient or mortician through the State Medical Examiner.

SECURITY SYSTEMS TECHNICIANS

Primary Role

To ensure that the closed circuit television and the audio systems between the Execution Chamber and witness room(s) are functioning properly at the scheduled time of execution.

PHYSICIAN

Physician's Primary Role

To pronounce death.

Duties:

1. To be present at the time of execution in the capital punishment garage.

2. As an ultimate and last option, the physician may perform a venous cut-down procedure should the IV Team be unable to find a vein adequate to insert the catheter.

3. To examine the body for vital signs five minutes after the LIC has been injected.

4. To notify the Warden if the inmate is not legally dead.

5. To pronounce death if no vital signs are detected.

IV TEAM

Primary Role

To establish properly functioning IV lines for administration of the lethal injection chemical(s).

Duties:

1. To prepare the IV equipment.
2. To make sure the equipment used is in working order.
3. To locate sites for intravenous use.
4. To make sure vascular access is properly established.
5. To make sure the IV lines are flowing properly.
6. To document the injection of the LIC(s) on the Lethal Injection Chemical Administration Record sheet.

FACILITY MAINTENANCE SUPERVISOR

Primary Role

To assist with the witnesses.

EXTRACTION TEAM

Primary Role

To escort and secure the condemned inmate during the execution process.

ESCORT OFFICER(S)

Primary Role

To accompany and guide witnesses during the execution process.

CENTRAL OFFICE PERSONNEL

COMMISSIONER

Primary Role

To oversee the administration of judicial executions in Tennessee.

Duties:

1 To ensure that the chemical(s) used for lethal injection has/have been properly acquired, stored, and accounted for.

2 Approximately ten minutes prior to the time scheduled for the execution, the Commissioner will establish telephone contact with the Governor's Legal Counsel.

3 To communicate to the Warden any circumstances that could alter or delay the execution.

4 To arrange for or mandate an Employee Assistance Program (EAP) debriefing as needed.

ASSISTANT COMMISSIONER OF PRISONS

Primary Role

To be stationed at the Command Post or location designated by the Commissioner and to work directly with the Commissioner and perform any assigned duties.

Duties:

1. To serve as liaison to all support units and to conduct an operational debriefing of all security and procedural personnel after the execution.

2. To maintain telephone and/or radio contact with the Warden and other personnel.

3. To coordinate with the Metropolitan Nashville Police Department and Tennessee Highway Patrol and any additional security forces required.

DIRECTOR OF COMMUNICATIONS AND PUBLIC RELATIONS

Primary Role

To coordinate all media operations associated with the execution.

Duties:

1. To provide assistance to the Warden in obtaining telephone communications needed by media representatives.

2. To coordinate all visits by media representatives both prior to and subsequent to an execution.

3. To notify the media of the witness lottery by faxing an advisory to the Associated Press.

4. To attend the media drawing held at RMSI and send out a notification to the Associated Press regarding who was selected.

5. To compile a press kit including guidelines, specifics of the case for which the inmate is being executed, and other related policies and statutes needed for the execution.

6. To communicate with the Governor's communication staff about who will be available to address media inquiries.

7. To coordinate with the Governor's Director of Communications any press releases and public messages.

8. To establish a contact sheet with names, assignments, and contact numbers of each Public Information Officer involved. The Warden will be issued a copy.

9. To coordinate with the Facility Maintenance Supervisor to create a staging area with a podium for news briefings.

10. To establish a schedule for news briefings.

DIRECTOR OF THE OFFICE OF INVESTIGATION AND COMPLIANCE

Primary Role

To coordinate all external security and tactical activities associated with the execution.

Duties:

1. No less than a week before the execution, to schedule a security meeting with participating external agencies.

2. To coordinate security assignments with participating external agencies.

3. In consultation with the Assistant Commissioner of Prisons, to coordinate tactical activities as necessary.

4. To work with the Escort Officer(s) in accompanying witnesses.

DIRECTOR OF VICTIM SERVICES

Primary Role

To work with victims, family members, and other interested parties involved in the execution process.

Duties:

1. To confirm the list of individuals registered for notification.
2. To mail execution notification letters and packets. (See Section IX Forms)
3. To work closely with the victim liaison from the Attorney General's office.
4. To work with the Escort Officer(s) in accompanying witnesses.

IV. SELECTION AND TRAINING OF STAFF

RIVERBEND MAXIMUM SECURITY INSTITUTION

EXECUTION TEAM MEMBER SELECTION CRITERIA
LETHAL INJECTION

Certain persons are members of the Execution Team by virtue of their official position (i.e. Warden, Associate Warden of Security). The Warden selects the remaining team and considers at a minimum the following general criteria for other members:

1. Length of service.
2. Ability to maintain confidentiality.
3. Maturity.
4. Willingness to participate.
5. Satisfactory work performance.
6. Professionalism.
7. Staff recommendations to the Warden.
8. Review of personnel files by the Warden prior to selection.

The following positions on the Execution Team are specialized and have specific requirements:

1.	Three (3) EMTs – Paramedic	Certified Emergency Medical Technician
2.	Three (3) Correctional Staff	Received IV training through the Tennessee Correction Academy by qualified medical professionals.
3.	Facility Maintenance Supervisor	A person knowledgeable of the institution's physical plant and equipment.
4.	Security Systems Technician(s)	Must be an Electronic Security Systems Specialist 1 or above with audio/visual experience.

TRAINING OF EXECUTION TEAM MEMBERS

Execution Team

The Execution Team shall consist of: the Warden, Associate Warden of Security, Executioner, IV Team, Extraction Team, Death Watch Team, Lethal Injection Recorder, Facility Maintenance Supervisor, ITS Security Systems Technician(s), and Escort Officers.

Training

1. All Execution Team members must read the *Lethal Injection Execution Manual* when they become members of the Execution Team. Additionally, the Warden or designee holds a class during which the manual is reviewed and clearly understood by all participants. At least annually, the Warden or designee holds an *Execution Manual* review class for all members of the Execution Team.

2. The Execution Team simulates Day 3 (Execution Day) of the Death Watch Procedures and the steps outlined in Section 4 for at least one (1) hour each month. Additional training is held within two weeks before a scheduled execution. A training record is maintained to document all staff members who participate in the training.

   The simulation includes all steps of the execution process with the following exceptions:

   A. Volunteers play the roles of the condemned inmate and physician.
   B. Saline solution is substituted for the lethal chemicals.
   C. A body is not placed in the body bag.

3. All training that occurs is documented. The documentation includes the times and dates of the training, the participants, and the training content.

Executioner

The Executioner receives initial and periodic instruction from a qualified medical professional.

V. PROCUREMENT, PREPARATION, INTRODUCTION OF THE LETHAL INJECTION CHEMICAL, AND PROCEDURES OF ACCOUNTABILITY

RIVERBEND MAXIMUM SECURITY INSTITUTION

CHEMICALS USED IN LETHAL INJECTION

The Department will use the following protocol for carrying out executions by lethal injection:

Midazolam	100 ml of a 5mg/ml solution (a total of 500 mg)
Vecuronium Bromide	100 ml of a 1mg/ml solution (a total of 100 mg)
Potassium Chloride	120 ml of a 2 mEq/ml solution (a total of 240 mEq)

Chemicals used in lethal injection executions will either be FDA-approved commercially manufactured drugs; or, shall be compounded preparations prepared in compliance with pharmaceutical standards consistent with the United States Pharmacopeia guidelines and accreditation Departments, and in accordance with applicable licensing regulations.

COMPOUNDED PREPARATIONS: PROCUREMENT, STORAGE, ACCOUNTABILITY, AND TRANSFER OF THE CHEMICAL

Procurement

Upon receipt of an order setting an execution date, the Commissioner or his designee shall contact a physician to obtain a physician's order for the LIC. The Commissioner or his designee shall submit the physician's order to a licensed pharmacy or pharmacist to be filled. The Pharmacist shall compound all drugs in a clean sterile environment in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments and in accordance with applicable licensing regulations pertaining to pharmacies compounding sterile preparations. (See pp. 99-104) The Pharmacist shall arrange for independent testing of the compound for potency, sterility, and endotoxins. Compounded preparations shall be transferred, stored and maintained in accordance with the directions of the Pharmacy with which the Department has a Pharmacy Services Agreement which shall be in compliance with pharmaceutical standards and consistent with United States Pharmacopeia guidelines.

Storage of LIC

1. When the LIC is received, a member of the Execution Team and the Warden take the LIC to the armory area of Building 7 at RMSI. The LIC is not stored in the weapon area of the armory due to the occasional employee traffic but rather in the key control section of the armory where there is the least employee need for access. The LIC is placed in an unmovable heavy gauge steel container with security grade locks.

2. All locking devices and storage containers are designed to prevent access to anyone without the proper keys or result in such destruction that entry into the container is unmistakable. There is only one key to access the storage container. That key is issued permanently to the Warden of RMSI. The Warden also has the pattern key to the container in his possession. There are no other duplicates produced. The Warden surrenders the key to no one other than the one member of the Execution Team designated for inventorying the LIC and only for the duration of the count and expiration checking of the LIC. Only the Warden or designee is allowed to access the storage container.

3 The LIC on hand is monitored for expiration dates. All of the LIC boxes/bottles have an expiration date, and all are in tamper-proof containers. As the LIC reaches its expiration date, it shall be disposed of by hazardous waste pick-up.

Accountability of LIC

1. A permanently bound ledger is maintained in the armory/key control area where all employees, including the armory/key control officer(s), sign each time they enter the area. The armory/key control officer performs a visual inspection of each container upon arrival at his workstation to ensure the proper band is in place and that the container has not been compromised in any way.

2. A permanently bound ledger is maintained in the storage area that contains a record of the LIC. Any LIC removed for use, disposal due to expiration, or for any other reason is deducted from the inventory. Any LIC received into the storage container is added to the inventory.

3. The storage container has a numbered security band that is broken prior to opening the container. The number of the band is recorded in the ledger. When the storage container is opened for any reason, the band is broken and the justification for entry is recorded in the ledger adjacent to the band number. When the storage container is secured and a new band is placed on the container, a new number is recorded in the ledger.

4. Upon receipt of the LIC, the Warden or designee proceeds to the armory storage area, secures the LIC, and adjusts the inventory appropriately. Prior to the LIC being placed in storage, the expiration date and lot number or other identifying marking is recorded to ensure that the LIC is properly disposed of at the time of expiration.

5. The Warden and the designee jointly verify the inventory of LIC on a semi-annual basis (January/July), at a minimum, and subsequent to each execution. The Warden and the designee make appropriate entries in the ledger with their full signatures that verify the correctness of the LIC count.

Transfer of Location

1. After the LIC is signed out on the appropriate ledger in the armory for execution purposes, the LIC is placed in an inconspicuous container for transport to the Execution Chamber. The Warden's designee is responsible for the delivery of the LIC to the appropriate individuals in the Execution Chamber.

2. If the LIC is not used and not compromised in any way, the LIC is returned to the armory, re-entered on the perpetual inventory ledger, and secured in the refrigerator. The LIC is used only for the execution of the inmate for whom it was ordered.

COMMERCIALLY MANUFACTURED DRUGS: PROCUREMENT, STORAGE, ACCOUNTABILITY, AND TRANSFER OF THE CHEMICALS

Procurement

Upon direction from the Commissioner or his designee, a member of the Execution Team checks the supply of chemicals and expiration dates. If it is determined that additional chemicals are needed, the member contacts the Procurement Officer at RMSI. The RMSI Procurement Officer contacts the Procurement Officer at DeBerry Special Needs Facility (DSNF) to order the needed chemicals. When the chemicals are delivered, the Procurement Officer at DSNF contacts the Procurement Officer at RMSI. One of the members of the Execution Team picks up the chemicals at either the DSNF or RMSI warehouse. A member of the Execution Team checks the supply of the chemicals, the concentration, and expiration dates. The Commissioner or his designee ensures that there are enough lethal injection chemicals kept in inventory at RMSI to carry out three executions.

Storage of LIC

1. The member of the Execution Team and the Warden take the chemicals to the armory area of Building 7 at RMSI. The lethal injections chemicals (LICs) are not stored in the weapon area of the armory due to the occasional employee traffic but rather in the key control section of the armory where there is the least employee need for access. The chemicals are placed in unmovable heavy gauge steel containers with security grade locks.

2. All locking devices and storage containers are designed to prevent access to anyone without the proper keys or result in such destruction that entry into the container is unmistakable. There is only one key to access each storage container. That key is issued permanently to the Warden of RMSI. The Warden also has the pattern key to the container in his possession. There are no other duplicates produced. The Warden surrenders the key to no one other than the one member of the Execution Team designated for inventorying the LICs and only for the duration of the count and expiration checking of the LICs. Only the Warden or designee is allowed to access the storage containers.

3 The chemicals on hand are monitored for expiration dates. All of the chemical boxes and bottles have an expiration date, and all chemicals are in tamper-proof bottles or containers. As the chemicals reach their expiration dates, they are disposed of by hazardous waste pick-up.

Accountability of LICs

1. A permanently bound ledger is maintained in the armory/key control area where all employees, including the armory/key control officer(s), sign each time they enter the area. The armory/key control officer performs a visual inspection of each container upon arrival at his workstation to ensure the proper band is in place and that the container has not been compromised in any way.

2. A permanently bound ledger is maintained in the storage area that contains a record of each LIC. Any LICs removed for use, disposal due to expiration, or for any other reason are deducted from the inventory. Any LICs received into the storage container are added to the inventory.

3. Each storage container has a numbered security band that is broken prior to opening the container. The number of each band is recorded in the ledger. When the container is opened for any reason, the band is broken and the justification for entry is recorded in the ledger adjacent to the band number. When the container is secured and a new band is placed on the container, a new number is recorded in the ledger.

4. Upon receipt of the LICs, the Warden or designee proceeds to the armory storage area, secures the LICs, and adjusts the inventory appropriately. Prior to the LICs being placed in storage, the expiration date and lot number or other identifying marking is recorded to ensure that the LIC is properly disposed of at the time of expiration.

5. The Warden and the designee jointly verify the inventory of LICs on a semi-annual basis (January/July), at a minimum, and subsequent to each execution. The Warden and the designee make appropriate entries in the ledger with their full signatures that verify the correctness of the LIC count.

Transfer of Location

1. After the LICs are signed out on the appropriate ledger in the armory for execution purposes, the LICs are placed in an inconspicuous container for transport to the Execution Chamber. The Warden's designee is responsible for the delivery of the LICs to the appropriate individuals in the Execution Chamber.

2. In the event the LICs are not used and not compromised in any way, the LICs are returned to the armory, re-entered on the perpetual inventory ledger, and secured in the appropriate container.

LETHAL INJECTION CHEMICAL SET-UP AND PREPARATION

1. Prior to an execution, a minimum of two members of the Execution Team bring the LICs from the armory area directly to the Lethal Injection Room. The amount of chemicals and saline is sufficient to make two complete sets of nine (9) syringes each. One set is color coded red and the back-up set is color coded blue. Each syringe is numbered in the order it is to be administered and labeled with the name of its contents. Only the Warden and one member of the Execution Team have a key to the Lethal Injection Room.

2. The LICs are drawn into syringes by one member of the Execution Team. Another member of the Execution Team observes and verifies that the procedure has been carried out correctly.

3. Only one syringe is prepared at a time. As they are prepared, the two sets of syringes are positioned in specific holding places in two separate trays color coded red and blue. The syringes are numbered, labeled, and placed in the order they will be administered. One member of the Execution Team will perform this procedure while another member of the Execution Team observes and verifies that the procedure has been carried out correctly. The Chemical Preparation Time Sheet will document the preparation of the LIC. (See Section IX Forms)

4. Preparation in accordance with the directions of the Pharmacy with which the Department has a Pharmacy Services Agreement to create of one set of syringes as follows:

    a. **Midazolam**: The member of the execution team draws 50 cc of a 5 mg/ml solution of Midazolam in each of two syringes, for a total of 500 mg of Midazolam. These syringes are labeled **Midazolam** with numbers one (1) and two (2), respectively.

    b. **Saline**: The member of the Execution Team draws 50 cc of saline solution from the IV bag into a syringe, which is labeled **Saline** with the number three (3).

    c. **Vecuronium Bromide**: The Vecuronium is in powder form and must be reconstituted with bacteriostatic water. The Vecuronium comes in 10mg vials each of which need to be reconstituted with 10 mL of bacteriostatic water. A total of 10 vials is required to produce 100 mg of the chemical. The member of the execution team draws 50 cc of Vecuronium (1 mg/mL solution) in each of two syringes, for a total of 100 mg of Vecuronium. These syringes are labeled **Vecuronium** with numbers four (4) and five (5), respectively.

d. **Saline:** The member of the Execution Team draws 50 cc of saline solution from the IV bag into a syringe, which is labeled **Saline** with the number six (6).

e. **Potassium Chloride:** The member of the execution team draws 60 cc of a 2 mEq/ml solution of Potassium Chloride in each of two syringes for a total of 240 mEq/mL of Potassium Chloride. These syringes are labeled **Potassium Chloride** with numbers seven (7) and eight (8), respectively.

f. **Saline:** The member of the Execution Team draws 50 cc of saline solution from the IV bag into a syringe, which is labeled **Saline** with the number nine (9).

5. The tray is placed on the workstation in the Lethal Injection Room.

6. **THIS PROCESS WILL BE REPEATED FOR THE SECOND SET OF SYRINGES**

7. When the execution is complete, all syringes and any of the prepared but unused LIC are sent to the Medical Examiner's office with the body.

IV LINE SETUP

REQUIRED ITEMS:

2 BAGS OF 0.9% SODIUM CHLORIDE
2 SOLUTION SETS
2 HEMOSTATS
EXTENSION SETS
TAPE

1. Two (2) bags of 0.9% Sodium Chloride Injection USP are hung in the injection room. The expiration dates must be checked.

2. A Solution Set spike is inserted into each bag with the clamp turned to the off position. The drip chamber is compressed until it is approximately 1/3 filled. The Solution Sets are 85 inches long. The length of the Solution Set may be purchased longer or shorter just as long as there is a port near the spiked end.

3. The port nearest the spiked end is opened. This may be done by tearing the plastic and rubber off leaving an open hole.

4. Once the port is opened, an extension is inserted. Extensions can be purchased in different lengths. The extension into the first port should be 18 to 24 inches in length. Extensions are added to each end of the Solution Set until it reaches the desired length. The ends should reach from head to toe of the condemned inmate.

5. Once the desired length is obtained, the lines should be filled with Sodium Chloride. The clamp is opened, allowing the port to fill. When it is filled it is clamped and capped off. The line that goes to the body continues to fill. The clamp is turned off and the line is capped.

6. The line is taped to the port (where the syringe is inserted) in place. The remainder of the line is placed out of the ports in the window. It should be taped in place to keep it from being pinched closed.

7. The Sodium Chloride bag and line on the left goes to the left side of the condemned inmate. The left side of the condemned inmate is nearest the wall / window and requires fewer extensions. **Repeat #5 and #6. IV lines are ready.**

INSERTION OF A CATHETER AND CONNECTION OF IV LINES

Strap Down and Location of the Vein

1. The Extraction Team straps the inmate to the gurney in the Death Watch Area.

2. The Extraction Team moves the gurney into place in the Execution Chamber and straps it to the floor. Members of the team place arm supports on the gurney and restrain the condemned inmate's arms securely to the gurney. The restraints are secure but not tight enough to slow or stop blood circulation.

3. The Extraction Team exits the Execution Chamber after the condemned inmate is in place and secure.

4. The IV Team enters the Execution Chamber with an instrument cart. One member of the IV team remains in the Lethal Injection Room.

5. The member of the IV Team in the Lethal Injection Room signals the IV team to insert IV lines.

6. Size, location, and resilience of veins affect their desirability for infusion purposes. The EMT inserts the first catheter into a vein on the right side of the inmate in the antecubital *fossa* area. If a catheter cannot be successfully inserted into the antecubital area, the EMT examines other locations for insertion in the following order:

    a. Forearm
    b. Wrist
    c. Back of the hand
    d. Top of the foot
    e. Ankle, lower leg, or other appropriate locations as determined by the EMTs

7. In the unlikely event that none of these veins are usable, the physician is called into the Execution Chamber to perform a cut-down procedure.

Venipuncture and IV Lines

1. The EMT(s):

    a. Place a tissue towel under the limb or body part to be used to start an IV.
    b. Place a tourniquet around the limb or body part 6-8 inches above the vein to be used.
    c. Find the best vein to use according to the succession outlined.
    d. Swab the area with an alcohol pad.
    e. Determine the size of the catheter to be used which is determined by the size of the vein, 18 gauge being the largest.
    f. Insert a catheter into the vein bevel side up at a shallow angle, feeding the plastic catheter sleeve into the vein.

The flash chamber of the catheter fills with blood, which is the first indicator the catheter is inside a vein.

2. An IV Team member attaches the Solution Set line from the right Sodium Chloride bag to the catheter. This is a friction coupling and requires the line to be pushed into the catheter and twisted to secure the connection.

3. An IV Team member in the Execution Chamber signals the IV Team member in the Lethal Injection Room to open the clamp on the right bag of Sodium Chloride, near the spike, to allow a flow of Sodium Chloride into the vein.

4. Members of the IV Team observe the IV for indication of a well-functioning line. The first indicator is that when the clamp is opened, there is a steady flow/drip inside the drip chamber. The second indicator is that the flash chamber becomes clear of blood as the Sodium Chloride begins to flow. When the IV Team is confident that there is a well-functioning line, the IV Team member in the Lethal Injection Room signals the IV team that there is a successful IV line.

5. A member of the IV Team places the Tegaderm transparent dressing over the catheter and secures the line in place with tape.

6. The second IV is then started on the left side of the condemned inmate and **Steps 1-5 are repeated**, using the left bag of Sodium Chloride.

CHEMICAL ADMINISTRATION AND IV MONITORING

1. All members of the IV Team monitor both catheters to ensure that there is no swelling around the catheter that could indicate that the catheter is not sufficiently inside the vein. The IV Team member in the Lethal Injection Room monitors the catheters by watching the monitor in his room, which displays the exact location of the catheter(s) by means of a pan-tilt zoom camera. The IV Team Members observe the drip chambers in both lines to ensure a steady flow/drip into each Solution Set line.

2. Next, an IV Team member tapes both hands, palms up, to the arm support to prevent movement. The palms will be down should the back of the hand be used for the catheter.

3. When the hands are taped in place, the members of the IV Team leave the Execution Chamber.

4. Designated members of the IV Team enter the Lethal Injection Room and assume their pre-assigned stations.

    a. One IV Team member observes the process, monitoring the catheter sites for swelling or discoloration, and enters the times of the LIC and Saline administration on the Chemical Administration Record sheet. (See Section IX Forms)
    b. One IV Team member observes the process and hands the labeled/numbered/colored syringes to the Executioner in the prescribed order.

5. The Executioner selects either the left or right Solution Set line based on the flow/drip inside the drip chamber. If both lines are equal, the left line nearest the Executioner is used.

6. When the Warden gives the signal to proceed with the execution, the Executioner clamps the line near the spike. The Executioner receives the first syringe from the member of the IV Team and inserts and twists it into the extension line.

#	DRUG SEQUENCE	INDENTIFIER LABEL	VOLUME
1.	MIDAZOLAM	[DRUG NAME, RED #1]	50 cc
2.	MIDAZOLAM	[DRUG NAME, RED #2]	50 cc
3.	SALINE FLUSH	[DRUG NAME, RED #3]	50 cc
4.	VECURONIUM BROMIDE	[DRUG NAME, RED #4]	50 cc

5.	VECURONIUM BROMIDE	[DRUG NAME, RED #5]	50 cc
6.	SALINE FLUSH	[DRUG NAME, RED #6]	50 cc
7.	POTASSIUM CHLORIDE	[DRUG NAME, RED #7]	60 cc
8.	POTASSIUM CHLORIDE	[DRUG NAME, RED #8]	60 cc
9.	SALINE FLUSH	[DRUG NAME, RED #9]	50 cc

7. The Executioner pushes on the plunger of the **#1 syringe (red)** with a slow, steady pressure. Should there be or appear to be swelling around the catheter or if there is resistance to the pressure being applied to the plunger, the Executioner pulls the plunger back. If the extension line starts to fill with blood, the execution may proceed. If there is no blood, the Executioner discontinues with this line. He starts the process on the other line with the back-up set of syringes starting with syringe #1(blue) and following all of Step 6.

8. An IV Team Member hands the syringes to the Executioner and both IV Team Members observe the correct order of the syringes as the Executioner injects the LIC and saline solution.

9. After the last syringe has been injected, the Executioner closes the extension line with a clamp and opens the line below the spike to allow a drop of 1-2 drops per second in the drip chamber.

10. The Executioner signals the Warden that all of the LIC and saline solution have been administered.

VI. DEATH WATCH PROCEDURES

LETHAL INJECTION

RIVERBEND MAXIMUM SECURITY INSTITUTION

STAFF RESPONSIBILITIES AND SPECIAL PROCEDURES FOR INMATES ON DEATH WATCH

Purpose: The purpose of this operating procedure is to designate staff responsibilities and establish uniform property, privileges, and institutional guidelines for condemned inmates with signed court orders for execution.

Application: All inmates who have exhausted all appeals available to them and have an execution date within the next four days.

1. Housing and Security Assignments

   A. The inmate is transferred to Building 8 (Capital Punishment) three (3) days prior to the scheduled execution.

   B. Correctional officers are assigned to the housing area in a manner consistent with TDOC Policy #506.16.2, which sets forth the guidelines for the Death Watch Supervisor.

2. Middle Tennessee Institutional Notification and Advisement of Law Enforcement Agencies

   Upon determination of the execution date and time, the Commissioner, Director of Communications and Community Relations, Assistant Commissioner of Operational Support, Assistant Commissioner of Prisons, Correctional Administrator, Correctional Program Director, Wardens of Tennessee Prison for Women, Deberry Special Needs Facility, and Turney Center may be advised by Riverbend's Warden or his designee. Should circumstances develop which necessitate it, tactical activities are coordinated by the Director of Investigation and Compliance after conferring with the Assistant Commissioner of Prisons. Formulation of security personnel is at the discretion of the Assistant Commissioner of Prisons.

3. State-Issued Property and Possession Limit

   The inmate is allowed only the items listed below. Any other item is considered contraband and confiscated in accordance with institutional policy.

   A. Standard issue of outer clothing
   B. One bed
   C. One mattress, pillow, and standard issue of linens
   D. One toothbrush
   E. One tube of toothpaste
   F. One bar of soap
   G. One electric razor (to be issued and used under direct supervision only)
   H. Two towels, one washcloth
   I. Two pairs of shorts and t-shirts (male inmates). Two pairs of panties and bras (female inmates). Underwear will be exchanged daily.
   J. Toilet tissue as needed

K. Stationery – 12 sheets, 3 stamped envelopes, 3 pencils. Pencils will be in possession of officer when not in use.
L. Religious materials as issued by institutional chaplain
M. Legal documents, books, and papers as requested
N. Medication prescribed by the institutional doctor (to be issued and used under direct supervision only)
O. One walkman type radio (state owned)
P. One television outside door in front of cell (state owned)
Q. Newspapers as requested and available (no more than two in cell at a time)
R. Feminine hygiene items as necessary and appropriate

4. Commissary Privileges

The inmate has commissary privileges with purchasing and possession limits specified in post orders. Glass, aerosol, and metal containers are not allowed during the final days of pre-execution monitoring.

5. Disposition of Unauthorized or Contraband Items

Contraband items found in the possession of condemned inmates are confiscated and disposed of in accordance with institutional Policy #506.15.1.

6. Package Permits

Package permit privileges are suspended for inmates on Death Watch. Any package already mailed is received and stored with the inmate's other property.

7. Library, Legal Library Services, Periodical Subscriptions

A. The condemned inmate may request legal materials from the law library in writing. Such materials are carefully inspected by the Death Watch Supervisor. There will be no exchanges of communication with inmate legal clerks and the condemned inmate.

B. The inmate may continue to receive periodical subscriptions, but may not order new subscriptions. Periodicals, newspapers, etc., are allowed to accumulate during the final week. Only two periodicals and two newspapers may be retained by the inmate.

8. Diet

Three (3) meals per day are fed to all condemned inmates, except holidays and weekends, which will be two meals just as general population. Special dietary instructions for medical reasons are followed.

9. Recreation

Recreational activities for inmates on Death Watch are suspended.

10. Television and Radio Privileges

Television and radio privileges are the same as routinely provided, except that during the Death Watch period, the television is located outside the inmate's cell.

11. Personal and Legal Phone Calls

The inmate may make unlimited calls to anyone on his pre-approved telephone list. He may make and receive phone calls to legal counsel without restriction.

12. Visitation Privileges

A. Social

1. Only those individuals on the inmate's approved visiting list are allowed visits during the Death Watch.

2. All visits are held in the Death Watch area, and physical contact between the visitor(s) and inmate is not permitted. Visits are between the hours of 9:00 am and 3:00 pm, and limited to two hours duration.

3. The number of visitors allowed to visit at any one time is as flexible as circumstances permit, and is at the discretion of the Associate Warden of Security.

4. A final visit, during which physical contact between the inmate and immediate family is permitted, may be authorized by the Warden. The Warden's decision is based on the individual circumstances of each case.

   a. Security procedures, including searches, are of the minimum deemed necessary by the Associate Warden of Security.

   b. Contact visits are supervised by no fewer than two correctional officers chosen by the Death Watch Supervisor with the concurrence of the Associate Warden of Security.

B. Religious

1. Priest(s), or ministers, of recognized religious faiths may visit the inmate in the same manner as provided for social visits in 12 (A).

2. A final visit by the inmate's priest, minister, or spiritual advisor may be permitted by the Warden between 3:00 pm - 5:00 pm, prior to the execution. This visit takes place at the front of the inmate's cell.

a. The priest, minister, or spiritual advisor may not accompany the inmate into the Execution Chamber.

b. At the inmate's request, a staff chaplain may visit on request and/or accompany the inmate into the Execution Chamber.

C. Legal Services

1. The attorney of record or other Tennessee licensed attorney representing the inmate may visit up to one (l) hour before the time of execution.

2. The attorney is permitted telephone contact with the condemned inmate during the last hour prior to execution.

3. Visits with attorneys are non-contact and are conducted with provision for the privacy of verbal exchange but under full and continuous observation by at least two correctional officers.

D. Media

1. No media interviews are held with the inmate after placement on Death Watch.

2. Telephone interviews with media representatives are not permitted.

3. **Representatives of the news media are not allowed inside the secure perimeter of the institution during the time of active Death Watch or during an execution for any purpose whatsoever, unless selected as a witness to the execution.**

EXECUTION TEAM

1. The purpose of this operating procedure is to outline the duties and responsibilities of the Execution Team members in carrying out the death sentence by lethal injection.

2. The Execution Team shall consist of: the Warden, Associate Warden of Security, Executioner, IV Team, Extraction Team, Death Watch Team, Lethal Injection Recorder, Facility Maintenance Supervisor, Security Systems Technician(s), and Escort Officer(s). The identity of the Execution Team is confidential.

3. Readily available to the Execution Team are radios with holster, keys, and restraints.

4. The following procedures shall apply:

   A. The Execution Team's Officer in Charge and/or the Assistant Officer in Charge conducts a training session at least once each month at which time all equipment will be tested. The training includes a simulated execution (i.e. IV lines, IV Drip).

   B. A week before a scheduled execution, the Officer in Charge and Assistant assembles the Execution Team in the Execution Chamber area to prepare and test all appliances and equipment for the scheduled execution.

   C. The Warden ensures that the Execution Team carries out the following instructions:

      1. Assemble all other members of the Execution Team in the Execution Chamber before the scheduled execution and review their specific assignments and duties.

      2. Ensure that all equipment is properly placed.

      3. The inmate is removed from the holding cell and placed in the Execution Chamber by the Extraction Team members previously assigned those duties, under the direction of the Assistant Officer in Charge.

      4. When the condemned inmate is secured in place in the Execution Chamber, all members of the Extraction Team will retire to the holding cell area.

      5. When the lethal injection process has been completed, the Warden/designee is advised.

      6. After the physician pronounces the inmate deceased, the designee informs the Commissioner that the sentence has been carried out.

7. The body is removed and placed in a body bag by the Execution Team and Medical Examiner's staff. The LIC and syringes used are placed in the body bag and closed.

8. The body is placed in the Medical Examiner's vehicle.

9. The Execution Team, under the direction of the Officer in Charge, cleans the equipment and Death Watch area. The holding cell is cleaned thoroughly with the mattress and pillow sanitized. Equipment shall be stored in its proper location. An entry is made in the post log documenting the completion of these procedures.

10. The Execution Chamber and Death Watch areas are secured. The Execution Team reports to the Warden's Office for additional instructions.

DEATH WATCH SUPERVISOR

1. The duties and responsibilities of this post are that of observation and supervision of all activities concerning a condemned inmate(s) during pre-execution (Death Watch) monitoring. The post is the entrance area leading into the Death Watch area. The Death Watch Supervisor assumes authority of all personnel assigned to pre-execution monitoring (Death Watch). The duties are the general supervision and control of other security personnel assigned to monitor the condemned inmate during the time under Death Watch to include preparation of the condemned inmate(s) prior to execution. There may be one Floor Officer per shift assigned.

2. This officer must be a Correctional Lieutenant or higher. The officer reports directly to the Warden or Associate Warden of Security. During off-duty hours, he will remain on standby status unless relieved by another Lieutenant or Captain upon orders of the Warden or Associate Warden of Security.

3. Equipment needed: radio with holster, keys, and restraints.

4. Specific duties and responsibilities

   A. Immediate Action

      1. Upon notification of the assignment (normally when a Death Watch reaches active stage), the Death Watch Supervisor prepares to assume the duty schedule reflected above.

      2. He reviews the post orders for the Control Officer and Floor Officer and becomes familiar with all functions of subordinates.

      3. He ensures that the condemned inmate, upon reaching active Death Watch status, personally inventories and packs away all items he is not permitted to retain. The inmate is permitted to retain a copy of the inventory. The sealed property is retained in storage in Building 8 until ordered removed or surrendered to the inmate's designee.

      4. He is responsible for escorting the condemned inmate to Building 8 and placing him in a cell after strip searching and exchanging his clothing.

      5. He ensures that all significant information is entered on the Supervisor's Log. ALL PERSONS ENTERING THIS AREA FOR ANY PURPOSE WILL SIGN IN AND OUT, and a record of activity must be logged accurately.

      6. He ensures that sufficient clothing in the inmate's size is retained in the preparation area to accommodate an exchange each time the condemned inmate leaves his cell.

B. Subordinate Personnel

1. He supervises all subordinate personnel.

2. He ascertains the phone numbers and addresses of all subordinate personnel in order that they may be contacted after hours.

3. He ensures that all orders and instructions are read and understood by all subordinate personnel.

C. Routine Security Measures, Checks, Logs

1. He maintains or causes to be maintained (by the Control Officer) a "Supervisor's Log" of activities.

2. He personally supervises the feeding of all meals during his shift. He ensures that no inmates are utilized in the feeding of any meal during an active Death Watch, including preparing the trays.

3. He keeps all unauthorized personnel out of the area.

4. He ensures that the security of the area is reported to the Control Room each half-hour during an active Death Watch.

5. He does not permit anyone to enter the condemned inmate's cell except by order of the Warden, Associate Warden of Security or Shift Captain. The only exception is a life-threatening emergency.

6. He ensures that the condemned inmate is handcuffed from behind anytime he leaves his cell. The inmate remains handcuffed until he is returned to his cell. (The inmate may be handcuffed in the front if a restraint belt is used. Restraints may be removed if the inmate is secured in a non-contact visiting room.)

7. Any time the inmate is moved, he will receive a double escort.

8. At least one (1) officer remains in the area, even if it is temporarily vacant.

9. He ensures that the area is kept clean and orderly. The inmate's holding cell is cleaned daily by assigned staff. The inmate is moved to an adjoining cell while the cleaning process is being accomplished.

D. Normally the inmate receives telephone calls from a special extension plugged in at his cell location. When the telephone is not in use, ensure its security and storage away from the cell.

E. Emergencies and Other Contingencies

1. In the event of self-inflicted or other injury to the inmate, the Death Watch Supervisor takes immediate and decisive action. He contacts the medical clinic immediately to send assistance.

2. He personally supervises the dispensing of any medication on a single unit dosage basis.

3. He immediately notifies the Shift Supervisor, Associate Warden of Security, or Warden in the event of an emergency.

CONTROL MONITOR

1. At the beginning of the Death Watch, the officer assigned to this post will assume his duties.

2. This officer must be a Correctional Corporal or higher. The officer reports directly to the Death Watch Supervisor, Associate Warden of Security, or Warden at the beginning of pre-execution monitoring until relieved or until the execution is stayed or carried out.

   A. Immediate Action

      1. Upon notification, the officer assumes the duties and responsibilities as described herein and the shift supervisor is alerted of the delegated assignment.

      2. The Control Monitor begins maintenance of the Death Watch Supervisor's log ensuring the recording of significant detailed information.

      3. During pre-execution monitoring, the Control Monitor ensures that only the following persons are authorized to enter the area:

         a. Warden
         b. Associate Warden
         c. Captain/Lieutenant
         d. Officers to assist in routine functions (i.e., showers, escort, shakedown) as authorized by Death Watch Supervisor
         e. Any medical or security personnel deemed appropriate in an emergency situation
         f. Prison Chaplain
         g. Commissioner
         h. Assistant Commissioner of Operational Support
         i. Assistant Commissioner of Prisons
         j. General Counsel

      4. He ensures the cleanliness of the area as well as the cell area during pre-execution monitoring.

   B. Routine Security Measures, Security Checks, and Logs

      1. He keeps an accurate chronological log of post activities.

      2. He keeps a sign-in and sign-out log for every person who enters or leaves the Death Watch area.

      3. He maintains close surveillance of subordinate personnel.

4. He keeps all unauthorized personnel out of the area, to include inmates, other employees, and visitors.

5. He reports the security of the post to the Control Room every thirty minutes.

6. He personally ensures that the condemned inmate is handcuffed (behind his back) anytime he leaves his cell. A restraint belt may be used. The handcuffs may be removed when the inmate is receiving non-contact visits.

7. He ensures that when a condemned inmate is moved, he is escorted by two officers designated by the Death Watch Supervisor.

8. He ensures that when the condemned inmate is moved from his cell, he is searched and placed in different clothing. The same clothing may be reused until soiled, so long as it is thoroughly inspected before reissuing.

C. Visiting

1. He ensures that all visiting is non-contact and is held in the visiting area next to the Control Room, unless otherwise directed.

2. He ensures escorts for visiting during pre-execution monitoring are provided by two experienced correctional officers assigned by the Death Watch Supervisor.

3. He ensures that supervision of visiting for condemned inmates in pre-execution monitoring is designated by the Death Watch Supervisor.

4. He ensures that an accurate log of pertinent information to include names of each visitor, time of arrival and departure of each visitor, and inmate is maintained by the officer assigned to a supervised visitation.

   a. The number of persons authorized and the visiting hours are in accordance with specific instructions issued by the Warden or Associate Warden of Security.

   b. Allowable commissary items are listed in Section E.

D. He ensures that the inmate is allowed only the items listed below. Any other item is considered contraband and confiscated in accordance with institutional policy.

1. Standard issue of outer clothing

2. One bed

3. One mattress, pillow, and standard issue of linens

4. One toothbrush

5. One tube of toothpaste

6. One bar of soap

7. One electric razor (to be issued and used under direct supervision only)

8. Two towels, one washcloth

9. Two pair of shorts and t-shirts (male inmates). Two pairs panties and bras (female inmates). Underwear will be exchanged daily.

10. Toilet tissue as needed

11. Stationery – 12 sheets, 3 stamped envelopes, 3 pencils (Pencils will be in possession of officer when not in use.)

12. Religious tracts as issued by Institutional Chaplain

13. Legal documents, books, and papers as requested

14. Medication prescribed by institutional doctor (to be issued and used under direct supervision only)

15. One walkman type radio (state owned)

16. One television outside door in front of cell (state owned)

17. Newspapers as requested and available (no more than two in cell at a time)

18. Feminine hygiene items as necessary and appropriate

E. The inmate may order and purchase the following items on the first day of Death Watch status:

1. Soft Drinks (opened by officer and served in a paper cup)

2. Candy bars

3. Cookies, crackers, potato chips

Note: All orders and deliveries are inspected and delivered by the officer. This includes removal of non-transparent candy wrappers. He avoids handling of contents except with a napkin, tissue, or sanitary disposable gloves.

F. Telephone Calls

1. The condemned inmate may receive authorized telephone calls while in pre-execution monitoring status.

2. Specific instructions for each phone call are given by the Warden, Associate Warden of Security or Death Watch Supervisor, and are logged (no exceptions). Each phone call is supervised.

3. The inmate receives telephone calls from a special extension plugged in at his cell location. When the telephone is not in use, the Control Monitor personally ensures its security and storage away from the cell.

G. Emergencies and Other Contingencies

1. If any employee is taken hostage, he is without authority regardless of rank.

2. In the event of self-inflicted or other injury to the inmate, the Control Monitor takes immediate and decisive action. He contacts the medical clinic immediately to send a physician or ranking medical person if a physician is not available.

3. The Control Monitor immediately notifies the Warden, Associate Warden of Security, Death Watch Supervisor, and Shift Supervisor.

FLOOR OFFICER MONITOR

1. The duties and responsibilities of this post are in the direct supervision and monitoring of a condemned inmate's activities during the final days of pre-execution monitoring.

2. This officer may be a correctional officer or higher. The officer reports directly to the Control Monitor. The officer is posted in the area directly in front of the cells. He must remain alert on his post at all times, maintaining direct observation of the condemned inmate.

3. Equipment required: radio with holster and restraints

4. Specific Duties and Responsibilities

   A. Immediate Action

      Upon notification, the officer assumes the duties and responsibilities as described herein, and the shift supervisor is alerted of the delegated assignment.

   B. Routine Security Measures, Security Checks, and Logs

      1. The Floor Officer Monitor closely observes the condemned inmate's activities and immediately reports to the Death Watch Supervisor or Control Monitor any unusual circumstances or activities.

      2. He ensures that all eating utensils and trays are removed from the cell when not in use.

      3. He remains posted at the cell front, but may enter the condemned inmate's cell with the assistance of a second officer if circumstances warrant it.

      4. The cell door key(s) remains in the possession of the Control Monitor except as needed.

      5. He converses freely with the inmate, but avoids opinionated or inflammatory statements. He does not discuss personal feelings regarding the death penalty. He does not make promises to the inmate. All requests by the inmate not covered herein are referred to the Death Watch Supervisor.

      6. He does not leave his post unless properly relieved.

      7. He visually inspects and thoroughly examines all items permitted into or out of the inmate's cell. He carefully examines all clothing sent from the clothing room.

8. He performs a very thorough strip search of the inmate any time the inmate enters or exits his cell.

9. He exchanges the inmate's clothing any time the inmate enters or exits the cell. The same clothing may be reused until it becomes soiled.

10. He ensures that the condemned inmate is handcuffed behind his back any time he leaves his cell. The inmate remains handcuffed until he is returned to his cell. The inmate may be handcuffed in front if a restraint belt is used. Restraints may be removed if the inmate is placed in a secure, non-contact visiting room.

11. He ensures that all post orders are being followed. It is expected that all floor officer monitors conduct themselves in a professional manner. A calm, mature atmosphere should be maintained.

12. The officer is responsible for the daily cleanliness of his area and the cell areas. Normally, the day shift is responsible for sweeping and mopping the entire area. However, the officer ensures that the area remains in a state of cleanliness and trash containers are emptied during his tour. All trash is to be personally removed by staff and deposited in the appropriate containers located outside the secure confines of the institution.

13. He maintains or causes to be maintained (by the Control Officer) a Supervisor's Log of Activities.

14. He personally supervises the feeding of all meals during the shift. He ensures that no inmates are utilized in the feeding of any meal to the condemned inmate during an active Death Watch, including preparing the trays.

15. He keeps all unauthorized personnel out of the area.

16. When the inmate on death watch is female, the floor officer monitor ensures that a privacy screen is used to shield the inmate from sight of male staff and visitors while she is showering, using the toilet, or changing clothing.

DEATH WATCH PROCEDURES - LETHAL INJECTION

DAY 1

1. Security staff are assigned to posts in the Death Watch area. The supervisor is a Correctional Lieutenant or higher.

2. Death Watch logs are activated during the entire Death Watch period. All activity unique to the Death Watch and execution must be documented. Areas addressed include, but are not limited to: **inmate's behavior, actions, movements, communications initiated and received concerning Death Watch activities.**

3. The condemned inmate is moved to Death Watch status in Building 8.

4. The inmate's property is inventoried and stored as specified in TDOC Policy #504.02.

5. The institutional chaplain begins daily visits with the inmate.

6. The visiting status of the inmate changes to non-contact.

8. Designated personnel test execution-related equipment to include the closed circuit TV, telephones, intercoms, etc.

9. Inmate clothing is obtained and issued as needed.

10. The Chaplain requests instructions for release of the inmate's body in writing. If no recipient is designated, the Warden arranges for a pauper's burial.

DAY 2

1. The Food Service Manager is advised of meal needs for TDOC and other agency support staff.

2. The inmate orders his last meal.

3. The Chaplain confirms funeral arrangements with the family, if available.

DAY 3 – EXECUTION DAY

1. Security Systems personnel test the closed circuit TV system and the audio system.

2. The Food Service Manager prepares and serves the last meal. The inmate may request a special meal. The meal is provided within reason as determined by the Warden. Cost must not exceed $20.00.

3. The Director of Communications and Public Relations arrives to handle media inquiries.

4. The LIC(s) is/are removed from secured storage and delivered to the Lethal Injection Room.

DAY 3 –EVENING SCHEDULE

5:00 pm

1. By prior planning, the Execution Team arrives and reports directly to the Executioner waiting area in Building 8. Their identities are known by the fewest number of staff necessary.

2. Beginning at 5:00 pm, the only staff authorized in the capital punishment unit are:

    a. Commissioner or designee
    b. Warden
    c. Associate Warden
    d. Lethal Injection Recorder
    e. Death Watch Supervisor and assigned officers
    f. Chaplain
    g. Physician and associate
    h. Executioner (Executioner waiting area)
    i. IV Team
    j. Extraction Team

    Any exceptions to the above must be approved by the Warden or Commissioner.

3. The inmate is dressed in cotton trousers, shirt, cotton socks, or cloth house shoes.

4. Official witnesses report to the Administration Building conference room no later than 5:30 pm. They are greeted by Escort Officers, processed through checkpoint, and moved to the Parole Board Room in Building 8, where they remain until final movement to the witness room.

5. Immediate family members of the victim report to the Administration Building no later than 6:15 pm and are greeted by Escort Officers. These witnesses are security cleared and escorted to the conference room in Building 8, where they remain until final movement to the victim family members witness room.

6. The Lethal Injection Recorder or designee and designated EMTs report to the Execution Chamber for preparation. The Lethal Injection Recorder or designee checks the phones in the Execution Chamber.

7. The Medical Examiner's staff and the physician are stationed in the capital punishment garage.

6:30 pm

1. Victim family member witnesses are secured in the Building 8 conference room by the Escort Officers no later than 6:45 pm.

2. Official witnesses are secured in the Building 8 Parole Board Room by the Escort Officers no later than 6:45 pm.

7:00 pm

1. Beginning at 7:00 pm, the only staff authorized to be in the Execution Chamber are the Warden, those TDOC employees designated by him to carry out the execution, the Attorney General/designee, and the Defense Counsel witness.

2. At the command of the Warden or Associate Warden of Security, the Extraction Team approaches the holding cell and asks the condemned inmate to approach the cell door and be handcuffed. After being handcuffed, he is asked by the Extraction Team Leader to step back and place his hands above his head on the wall at the rear of the holding cell. (If the condemned inmate refuses to cooperate, the Extraction Team enters the holding cell and removes the inmate).

3. The Extraction Team places the condemned inmate on the gurney and secures him in restraints.

4. The condemned inmate is moved to the Execution Chamber.

5. The Lethal Injection Recorder or designee records the time the condemned inmate enters the Execution Chamber.

6. The IV Team establishes IV lines into both arms as instructed in Section V of this manual.

7. Official witnesses and victim family members are secured in the appropriate witness rooms.

8. The Attorney General/designee and the Defense Counsel witness will exit the execution chamber and be secured in the official witness room.

9. The closed circuit television camera and audio system are activated.

7:10 pm

1. Blinds to the witness room(s) are opened by the Warden and Associate Warden of Security.

2. The Warden contacts the Commissioner to ensure that no last minute stay or reprieve has been granted.

3. The Warden permits the condemned inmate to make a last statement.

4. The Warden gives the signal to proceed and the Executioner begins to administer the first chemical. The Lethal Injection Recorder documents the time the process begins.

5. After 500 mgs of midazolam and a saline flush have been dispensed, the Executioner shall signal to the Warden, and await further direction from the Warden.

6. The Warden shall wait two minutes following the administration of midazolam and the saline flush before assessing the consciousness of the inmate.

7. At this time, the Warden shall assess the consciousness of the condemned inmate by brushing the back of his hand over the condemned inmate's eyelashes, calling the condemned inmate's name loudly two times, and grabbing the trapezius muscle of the shoulder with the thumb and two fingers and twisting. Observation shall be documented. The condemned inmate's unresponsiveness will demonstrate that the inmate is unconscious, and the Warden shall direct the Executioner to resume with the administration of the second and third chemicals. If the condemned inmate is responsive, the Warden shall direct the Executioner to switch to the secondary IV line. See Contingency Issues on p. 69.

8. Following the completion of the lethal injection process, and a five-minute waiting period, all blinds are closed, the closed circuit TV camera is disengaged, and the privacy curtain is closed. The Warden then asks the Physician to enter the room to conduct an examination. The Physician reports his findings to the Warden or designee. If the inmate is not deceased, the procedures on p. 69 shall be followed.

9. The inmate is pronounced deceased by the Physician. The Lethal Injection Recorder or designee records the time that death is pronounced.

10. The Warden or designee announces that the sentence has been carried out and invites the witnesses to exit. The Warden announces the following: "The sentence of _____ has been carried out. Please exit."

11. The witnesses are then escorted from the witness rooms by Escort Officers. After the witnesses exit, the Warden or designee notifies the Commissioner that the sentence of death has been carried out.

12. The Commissioner or designee notifies all appropriate State officials that the sentence has been carried out. Media representatives are notified by the TDOC Director of Communications and Public Relations or designee.

13. The Extraction Team removes the restraints.

14. The Medical Examiner staff assists in removal of the body and placement in the Medical Examiner's vehicle, which is in the capital punishment garage.

15. The Medical Examiner's vehicle is cleared to exit the facility.

16. The Lethal injection Recorder completes the Lethal Injection Execution Recorder Checklist.

POST EXECUTION

1. The body is transported to the State Medical Examiner for examination and release.
2. The Assistant Commissioner of Prisons conducts an operational debriefing at the appropriate time.
3. The Commissioner arranges for or mandates an EAP debriefing as needed.

CONTINGENCY ISSUES

IV Line Alternatives

The cut-down procedure is used unless the Physician chooses a different method to find an IV site.

Interruptions of the delivery of the lethal injection drugs in the primary IV line or inmate exhibits signs of consciousness following administration of first syringes containing midazolam.

The Executioner switches to the secondary IV line and, starting with **syringe #1 (blue)**, begins the administration of the second set of syringes using the reserve tray. Following the administration of the second set of syringes containing midazolam and the saline flush, the Warden shall conduct a second consciousness check as set forth on p. 66 herein before proceeding with the administration of the second and third chemicals.

Repeating the Lethal Injection Process

If the inmate is not deceased after the initial set of syringes has been injected, the physician returns to the designated waiting area. The curtain is opened, blinds raised, camera activated, and the Warden gives the command to repeat the lethal injection procedure with the second set of syringes (blue). After this procedure is completed, the blinds will once again be closed, closed-circuit TV camera disengaged, and the privacy curtain closed. The Warden will once again ask the Physician to enter the room and check for signs of life.

VII. VICTIM SERVICES

RIVERBEND MAXIMUM SECURITY INSTITUTION

VICTIM SERVICES

Notification

The TDOC Victim Services Director works closely with the victim liaison from the Attorney General's Office, to confirm the list of victims/family members/interested parties registered for notification. Letters and packets are sent to each. The letter is specific to the registrant's permission to view the execution, as mandated by law:

- Victim family members: Those who are permitted to witness the execution. These persons receive a letter, requesting their choice to witness or attend the execution.
- Other victim family members: Extended family members who may wish to *attend* the execution to provide support to those who are permitted to view the execution, but by law, are not personally allowed to view the execution.
- Other interested party/support persons: Persons identified by victim family members who would attend the execution to provide support to those who are permitted to view the execution, with permission granted on a case-by-case basis by the Warden.

Packets include:

- Cover letter
- Official letter
- Official response forms
- Copy of the TN law 40-23-116 Manner of executing sentence of death -- Witnesses
- DVD "The Other Side of Death Row"
- Booklet "What to Expect at an Execution"
- Map
- Media guidelines
- Critical Incident Stress Management flier

These notifications are sent out to correspond in time to the announcement of the media lottery.

The Victim Services Director prepares a list of persons who plan to witness the execution, and of those who plan to attend the execution. The Victim Services Director will communicate any desire to speak to the media to the TDOC Director of Communications and Public Relations.

Accompaniment

The facility provides a private room in the Administration Building for persons viewing and attending the execution to use. Those witnessing or attending the execution are brought to the facility by the Attorney General's Office at a time agreed upon by TDOC Central Office and the Warden. The Victim Services Director meets them at the facility and escorts them to the private room. This room provides a place for witnesses to leave belongings and for attendees to wait for the return of the witnesses.

The Victim Services Director will accompany witnesses through the execution process. A designee will be assigned to remain and wait with any persons who accompany and wait in the Administration Building for witnesses to return.

At the time determined by the Warden/designee, the witnesses are processed through the check-point and taken into the prison facility room(s) next to the visitor galley, where they will remain until escorted into the victim's viewing room for the execution.

After the execution is completed, the witnesses are escorted back to the Administration Building where they are reunited with any persons who were there waiting for them. The TDOC Director of Communications and Public Relations will arrange for witnesses to speak to the media should they desire to do so. Afterward, the entire group will be escorted out of the prison to their awaiting vehicles.

CONFIDENTIAL

NOT FOR PUBLIC RELEASE

VIII. PERIMETER SECURITY

PRIOR TO, DURING, AND SUBSEQUENT TO AN EXECUTION

RIVERBEND MAXIMUM SECURITY INSTITUTION

CONFIDENTIAL

IX. FORMS

RIVERBEND MAXIMUM SECURITY INSTITUTION

NOTIFICATION LETTER TO SHERIFF'S OFFICE TO WITNESS EXECUTION OF INMATE

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
RIVERBEND MAXIMUM SECURITY INSTITUTION
7475 COCKRILL BEND BOULEVARD
NASHVILLE, TENNESSEE 37243-0471
TELEPHONE (615) 350-3100 FAX (615) 350-3400

Date

John Doe, Sheriff
Tennessee County Sheriff's Department
PO Box 000
City, TN 37209

Dear Sheriff Doe:

Records of the Tennessee Department of Correction reflect that on _____, inmate _____ was convicted of First Degree Murder and sentenced to Death regarding _____ County case #_____. An order has been received scheduling inmate _____'s execution for _____. The execution is scheduled for _____ (CST) on that date.

Pursuant to TCA 40-23-116, the sheriff of the county in which the crime was committed is entitled to be present at the carrying out of such death sentences.

The Tennessee Department of Correction needs to know if you are interested in viewing the legal execution of inmate _____. In order to expedite this process, please sign and date on the respective line below indicating your intentions. Afterwards, fax the letter with your signature to my office at the Riverbend Maximum Security Institution at 615-350-3400. If you plan to attend, provide a telephone number where you may be contacted day or night. Further, you should be at the Riverbend Institution by 5:30 pm on _____ and bring your notification letter with you, along with a picture ID. Upon arrival at the facility, please present the letter to the Checkpoint Officer. If you have any questions regarding this matter, please feel free to contact me by calling 615-350-1103, , extension 3103, for further information.

_____
Warden

ABC:aa

I will attend. _____ Signature _____ Date _____
Telephone No. _____

I will not attend. _____ Signature _____ Date _____
Telephone No. _____

NOTIFICATION LETTER TO INMATE'S FAMILY TO WITNESS EXECUTION

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
RIVERBEND MAXIMUM SECURITY INSTITUTION
7475 COCKRILL BEND BOULEVARD
NASHVILLE, TENNESSEE 37243-0471
TELEPHONE (615) 350-3100 FAX (615) 350-3400

Date

Ms. Mary Jane Smith
PO Box 000
City, TN 37209

Dear Ms. Smith:

Records of the Tennessee Department of Correction reflect that on _____, inmate _____ was convicted of First Degree Murder and sentenced to Death regarding _____ County case #_____. An order has been received scheduling inmate _____'s execution for _____. The execution is scheduled for 7:00 pm on that date.

Pursuant to TCA 40-23-116, members of the condemned inmate's immediate family may be present at the carrying out of such death sentence. Records indicate that you are the _____ of inmate _____; therefore, you are eligible to be present.

The Tennessee Department of Correction needs to know if you are interested in viewing the legal execution of inmate _____. In order to expedite this process, please sign and date on the respective line below indicating your intentions. Afterwards, fax the letter with your signature to my office at the Riverbend Maximum Security Institution at 615-350-3400. If you plan to attend, provide a telephone number where you may be contacted day or night. Further, you should be at the Riverbend Institution by 5:30 pm on _____ and bring your notification letter with you, along with a picture ID. Upon arrival at the facility, please present the letter to the Checkpoint Officer. If you have any questions regarding this matter, please feel free to contact me by calling 615-350-1103, extension 3103, for further information.

_____
Warden

ABC: aa

I will attend. _____ Signature _____ Date _____
Telephone No. _____

I will not attend. _____ Signature _____ Date _____
Telephone No. _____

PHYSICIAN'S INVENTORY CHECKLIST

_____ (4) 5cc syringes

_____ (4) Small tubes Betadine ointment

_____ (12) Pair gloves (sterile), size 7½

_____ (12) Pair gloves (sterile), size 8

_____ (2) Prep kits

_____ (2) BP cuffs

_____ (2) Stethoscope(s)

_____ (1) Flashlight with batteries

_____ (8) Chux

_____ (4) Cut-down trays

_____ (2) Lidocaine 2%

_____ (2) Lidocaine 2% with Epinephrine

_____ (2) 4-0 vicryl

_____ (2) 4-0 ethilon sutures

_____ (1) 5-0 vicryl

_____ (2) 5-0 ethilon sutures

_____ (2) PPE size XL

_____ (1) PPE size XXL

_____ (2) Faceshields

_____ (1) Scissors

_____ (2) Scalpel #11 & #15

IV TEAM INVENTORY CHECKLIST

_____ Normal saline 1000 cc or more

_____ Solution set

_____ Extension tubing sufficient to reach condemned inmate

_____ Tourniquets – various styles

_____ Assortment of IV catheters (range 18 gauge to 21 gauge)

_____ Assortment of surgical tape

_____ Arm boards

_____ Tegaderm transparent dressing

_____ Alcohol pads

_____ Sharps container

_____ 4x4 Gauge pads

_____ Red biohazard bag

_____ Chux

_____ Latex-free gloves

CHEMICAL PREPARATION TIME SHEET

Date_____

RED

500 mg Midazolam **Time**

2-Syringes prepared by _____ at _____.

Witnessed by _____

100 mg Vecuronium Bromide

2-Syringes prepared by _____ at _____.

Witnessed by _____

240 mEq Potassium Chloride

2-Syringes prepared by _____ at _____.

Witnessed by _____

Saline

3-Syringes prepared by_____ at _____.

Witnessed by _____

BLUE

500 mg Midazolam **Time**

2-Syringes prepared by _____ at _____.

Witnessed by _____

100 mg Vecuronium Bromide

2-Syringes prepared by _____ at _____.

Witnessed by _____

240 mEq Potassium Chloride

2-Syringes prepared by _____ at _____.

Witnessed by _____

Saline

3-Syringes prepared by_____ at _____.

Witnessed by _____

DAY OF EXECUTION – LETHAL INJECTION EXECUTION RECORDER CHECKLIST

Inmate Name_____ **Inmate #**_____

Date_____

TIME

_____ Report to designated area for final briefing

_____ Extraction Team and IV Team report to Death Watch Supervisor's office for final briefing. IV Team sets up IV system.

_____ Physician in place

_____ IV Team in place (EMTs and Officers)

_____ Medical Examiner in place

_____ Team Leader in place

_____ Check blinds and curtains

_____ Advise Escort Officer to transport Official Witnesses to Parole Room

_____ Advised by Escort Officer that Official Witnesses are in Parole Room

_____ Advise Escort Officers (2) to escort Victim's Witnesses to Viewing Room

_____ Advised by Escort Officers (2) that Victim's Witnesses are in place

_____ Warden or designee checks to ensure execution is to proceed

_____ Gurney positioned in Death Watch Area

_____ Extraction Team enters cell and secures condemned inmate to gurney

_____ Advise Escort Officer to transport Official Witnesses to Death Watch vestibule

_____ Advised by Escort Officer that Official Witnesses are in the vestibule

_____ IV Team enters the Execution Chamber

_____ IV Team exits the Execution Chamber

_____ Advise Escort Officer to "Transport Official Witnesses in place"

Recorder's Initials_____

DAY OF EXECUTION – LETHAL INJECTION EXECUTION RECORDER CHECKLIST (continued)

Inmate Name_____ **Inmate #**_____

Date_____

TIME	
_____	Advised by Escort Officer that "Witnesses are in place"
_____	Warden checks with Command Center to proceed
_____	Warden orders blinds opened, closed circuit TV activated, and audio activated for viewing rooms.
_____	Warden asks inmate for any last comments
_____	Warden orders Execution Team to proceed
_____	Lethal Injection process completed
_____	Blinds and curtains closed and closed circuit TV deactivated
_____	Physician enters the Execution Chamber
_____	Physician pronounces death – exact time
_____	Audio deactivated to witness rooms
_____	Advise Escort Officers (2) to remove Victim's Witnesses
_____	Advise Commissioner or designee in Command Center that execution is completed
_____	Physician and EMTs depart
_____	Medical Examiner escorted to chamber to take possession of body. Pictures will be taken of body and Execution Chamber prior to removal of body
_____	Advised by Escort Officer (2) Victim's Witnesses are at Checkpoint
_____	Advise Escort Officer to remove Official Witnesses
_____	Advised by Escort Officer that Official Witnesses are at Checkpoint
_____	The body removed from the institution

Recorder's Initials _____

DAY OF EXECUTION – LETHAL INJECTION EXECUTION RECORDER CHECKLIST (continued)

Inmate Name_____ **Inmate #**_____

Date_____

Inmate's Comments if any:

_____

_____

_____

_____

_____

_____

_____

_____

_____ _____

Lethal Injection Recorder **Date**

_____ _____

Warden **Date**

LETHAL INJECTION CHEMICAL ADMINISTRATION RECORD

Inmate Name_____ **Inmate #**_____

Date_____

SET 1 (Red)

	Chemical	Time Begin
Syringe 1	Midazolam	_____
Syringe 2	Midazolam	_____
Syringe 3	Saline	_____

(Two minute waiting period)

Consciousness check notes: _____

_____

Syringe 4	Vecuronium Bromide	_____
Syringe 5	Vecuronium Bromide	_____
Syringe 6	Saline	_____
Syringe 7	Potassium Chloride	_____
Syringe 8	Potassium Chloride	_____
Syringe 9	Saline	_____

End Time _____

Recorder Signature _____

Warden_____

LETHAL INJECTION CHEMICAL ADMINISTRATION RECORD

Inmate Name_____ **Inmate #**_____

Date_____

SET 2 (Blue)

	Chemical	**Time Begin**
Syringe 1	Midazolam	_____
Syringe 2	Midazolam	_____
Syringe 3	Saline	_____

(Two minute waiting period)

Consciousness check notes: _____

_____

Syringe 4	Vecuronium Bromide	_____
Syringe 5	Vecuronium Bromide	_____
Syringe 6	Saline	_____
Syringe 7	Potassium Chloride	_____
Syringe 8	Potassium Chloride	_____
Syringe 9	Saline	_____

End Time _____

Recorder Signature _____

Warden_____

State of Tennessee

DEPARTMENT OF CORRECTION

News Release

The Department of Correction reports that pursuant to the order of the Tennessee Supreme Court and in accordance with state law, the capital punishment sentence of _____ has been carried out.

Time of execution was _____ am/pm on _____.
(date)

_____ was pronounced dead by attending
(Inmate's name)

physician at _____ am/pm.

Affidavit Concerning Method of Execution

Under Tennessee law, you have the right to have your execution carried out by lethal injection. You also have the option of waiving this right ---and choosing electrocution as the method of your execution. The purpose of this affidavit is to allow you an opportunity to either waive your right to have your execution carried out by lethal injection or to decline to waive that right. Failure to complete this form will result in the execution being carried out by lethal injection. You will not be given another opportunity to waive your right to have your execution carried out by lethal injection. If you waive your right to have your execution carried out by lethal injection, you may rescind that waiver by contacting the Warden **no later than 14 days prior to the date of the execution** and signing a new affidavit to that effect.

I, _____, TDOC.# _____, make the following choice concerning the method of my execution set to be carried out on the ____ day of _____, _____:

_____ I waive the right to have my execution carried out by lethal injection and choose to be executed by electrocution.

_____
Signature of Inmate

_____ I have been given the opportunity to waive my right to have my execution carried out by lethal injection and I decline to waive that right.

_____
Signature of Inmate

I certify that I presented this Affidavit Concerning Execution to inmate _____, TDOC No. _____, and

_____ The inmate refused to sign.

_____ I witnessed the inmate sign this affidavit.

_____
Signature of Warden/Designee

Sworn to and subscribed before me this _____ day of _____, 20____.

_____
Notary Public

My Commission expires _____.

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
4th FLOOR RACHEL JACKSON BLDG.
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

APPLICATION FOR NEWS MEDIA REPRESENTATIVE TO ATTEND AN EXECUTION OF A SENTENCE OF DEATH

Name of Inmate Under Sentence of Death _____

Name of News Media Outlet _____

Name of News Media Representative _____

Mailing Address _____

Phone _____ Fax _____

E-Mail Address _____

Indicate the news media pool to which the applicant news media agency is to be assigned.

_____ **News Media Agency (print, radio or television) in the county where the offense occurred (if print, also designate Metro or Community below)**

_____ **Associated Press**

_____ **Metro Print Media Agency**

_____ **Community Print News Media Agency**

_____ **Other Television News Media Agency**

_____ **Other Radio News Media Agency**

PLEASE NOTE: The Department will accept only one (1) application from each news media agency. A person may be named as a News Media Agency Representative on only one (1) application. No news media agency representative selected to witness the execution of a sentence of death shall have exclusive rights to the story. Immediately after the execution of the death sentence is complete, all media representative witness shall make themselves available for a news conference for other news media representatives not selected to attend the execution. Submission of an application constitutes acceptance of this condition.

RULES
OF
DEPARTMENT OF CORRECTION
ADULT SERVICES DIVISION

CHAPTER 0420-3-4
SELECTION OF NEWS MEDIA AGENCY REPRESENTATIVES TO ATTEND AN EXECUTION OF A DEATH SENTENCE

TABLE OF CONTENTS

0420-3-4-.01 PREFACE

Under the authority of T.C.A. §40-23-116, the Department of Correction is authorized to promulgate rules that establish criteria for the selection of news media representatives to attend an execution of a sentence of death.

Authority: T.C.A. §40-23-116. Administrative History: Original rule filed July 28, 1999; November 29, 1999. Repeal and new rule filed November 22, 2000; effective February 6, 2001.

0420-3-4-.02 APPLICABILITY

Pursuant to the authority of T.C.A. §40-23-116, these rules shall apply to all news media agencies and their representatives.

Authority: T.C.A. §40-23-116. Administrative History: Original rule filed July 28, 1999; November 29, 1999. Repeal and new rule filed November 22, 2000; effective February 6, 2001.

0420-3-4-.03 DEFINITIONS

(1) Community Print News Media Agency: A Print News Media Agency other than a Metro Print News Media Agency.

(2) General Interest and Coverage: The handling of a broad range of spot news such as traffic accidents, fires, disasters, governmental events, as well as economic, business, social, sports, and human interest news.

(3) Metro Print News Media Agency. A Print News Media Agency which maintains a full-time presence at the state Capitol, covering day-to-day operations of state government.

(4) News Media Agency: A Print, Radio or Television News Media Agency or The Associated Press.

(5) News Media Agency Representative: A person Regularly Employed by a News Media Agency and designated by such News Media Agency to attend and witness an execution of a death sentence on behalf of the New Media Agency.

(6) Print News Media Agency: A newspaper of general circulation, bearing a title or name, regularly issued at least as frequently as once a week for a definite price, having second class mailing privilege, being not less than four (4) pages, published continuously during the immediately preceding one-year period, which is published for the dissemination of news of general interest, coverage and circulation in an area within Tennessee

(Rule 0420-3-4-.03, continued)

(7) Radio News Media Agency: The Tennessee Radio Network or a radio broadcast station which regularly disseminates news of general interest and coverage and has either its city of license (as determined by the federal government) or broadcast transmitter located in Tennessee.

(8) Regularly Employed: Employed on a consistent, continuing basis and not solely for the purpose of witnessing an execution of a sentence of death or otherwise on a temporary or short-term basis.

(9) Television News Media Agency: A television broadcast station which regularly disseminates news of general interest and coverage and has either its city of license (as determined by the federal government) or broadcast transmitter located in Tennessee.

(10) Warden: Warden of the Riverbend Maximum Security Institution.

Authority: T.C.A. § 40-23-115; § 40-23-116. Administrative History: Original rule filed November 22, 2000; effective February 6, 2001.

0420-3-4-.04 APPLICATION AND SELECTION PROCESS

(1) The selection of News Media Agency Representatives shall be by drawing to be held at Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee.

(2) The Public Information Office of the Department of Correction shall notify all News Media Agencies of a scheduled drawing through issuance of an advisory to the Associated Press. An announcement will also be published in the Tennessee Administrative Register; provided, however, in the event the Department has insufficient advance notice of an execution date to meet publication deadlines for the Tennessee Administrative Register, the announcement shall be issued as soon as practicable after the Department receives notice of the execution date.

(3) The advisory and announcement shall include the following:

(a) Deadline date, time and location for receiving applications from a News Media Agency desiring to be included in the open drawing to witness the execution of the death sentence.

(b) Date, time, and location where the open drawing will take place.

(4) To be eligible for the drawing, a News Media Agency shall submit an application on a form provided by the Department of Correction on or before the deadline specified in the advisory and/or notice. The applicant agency shall designate its News Media Agency Representative and the news media pool for which it qualifies under these rules. The Department will accept only one (1) application from each News Media Agency. A person may be named as a News Media Agency Representative on only one (1) application.

(5) The Warden or designee shall assign an identifying number to each application received. Prior to the commencement of the drawing the Warden or designee shall post a list containing the News Media Agency name, News Media Agency Representative name, number and assigned category of each application which meets the requirements set forth in this rule.

(6) Procedure for Drawing:

(a) From those applications received which meet the requirements set forth in this rule, a total of seven (7) News Media Agencies shall be selected. The agencies shall be selected from the following categories in the following order:

1 The Associated Press (one application);

(Rule 0420-3-4-.04, continued)

2. One News Media Agency in the county where the offense occurred;

3. One Metro Print News Media Agency;

4. One Community Print News Media Agency;

5. Two Television News Media Agencies; and

6. One Radio News Media Agency.

(b) In the event more than one qualifying application is received for category (a)(ii), the applications not selected in that category shall be reassigned to appropriate categories.

(c) If one or more categories cannot be filled due to an insufficient number of qualifying applications in the category, qualifying applications remaining after all other selections have been made shall be combined into one selection pool from which an application shall be drawn to fill each unfilled position.

(d) After seven (7) News Media Agency Representatives have been selected through the process set out in (a) through (c), all remaining applications shall be combined into one selection pool from which a first alternate and a second alternate shall be drawn. Alternates shall be allowed, in order of selection, to substitute for a News Media Agency Representative selected as a witness who is unable to attend and witness the execution of a death sentence.

(7) After the drawing the Department of Correction shall promptly issue an advisory to the Associated Press identifying the News Media Agency Representatives selected.

(8) News Media Agency Representatives shall be subject to the approval of the Warden. The Warden may, in the Warden's discretion, disapprove or exclude a witness for reasons of safety or security. No News Media Agency Representative shall be related to the condemned prisoner or the condemned prisoner's victim or victims or have any personal interest in the case. News Media Agency Representatives must be eighteen (18) years of age or older.

(9) The Department of Correction will allow no substitution of News Media Agencies or News Media Agency Representatives.

(10) In the event the execution does not take place within one (1) year of the date of the drawing, the Commissioner, in the Commissioner's sole discretion, may cancel the result of a drawing and, if necessary, direct that a new drawing be held.

Authority: T.C.A. § 40-23-116. Administrative History: Original rule filed November 22, 2000; effective February 6, 2001.

0420-3-4-.05 WITNESS GUIDELINES

(1) No News Media Agency Representative allowed to witness the execution of a death sentence shall have exclusive rights to the story. Immediately after the execution of the death sentence is complete, all News Media Agency Representatives shall make themselves available for a news conference of other news media representatives and shall remain at the news conference until it is completed.

(2) The news conference shall be held at a location designated by the warden immediately following the execution.

(Rule 0420-3-4-.05, continued)

(3) Photographic or recording equipment are prohibited at the execution site during the execution.

(4) News Media Agency Representatives shall abide by all departmental and institutional rules and policies, and the directives of authorized staff. Failure of a witness to do so may result in the witness being excluded and /or removed from the premises. The News Media Agency Representative and the News Media Agency being represented shall be ineligible to attend future executions without the specific approval of the Commissioner.

Authority: T.C.A. § 40-23-116. Administrative History: Original rule filed November 22, 2000; effective February 6, 2001.

Affidavit to Select Defense Counsel Witness to Execution

Under Tennessee law, TCA 40-23-116, you may select one (1) defense counsel to witness your scheduled upcoming execution. The Department of Correction needs to know who you are selecting to be your witness.

_____

I,_____, TDOC#_____, select the

following defense counsel witness: _____

_____ _____
Signature of Inmate Date

_____

I certify that I presented this Affidavit to Select Defense Counsel Witness to Execution to inmate

_____, TDOC# _____, and

_____ The inmate refused to sign.

_____ I witnessed the inmate sign this affidavit.

_____ _____
Signature of Warden/Designee Date

_____

Sworn to and subscribed before me this _____ day of _____, 20_____

_____ My Commission expires _____
Notary Public

This PHARMACY SERVICES AGREEMENT ("Agreement") is being made and entered into by and between _____ ("Pharmacy") and _____ ("Department") on this ___**day** _____, **20**___, and is being made for the purposes and the consideration herein expressed.

WITNESSETH:

WHEREAS, Pharmacy is a pharmacy licensed in the _____ that provides controlled substance and compounded preparations to practitioners for office use; and

WHEREAS, Department is a State of Tennessee governmental agency that is responsible for carrying out sentences of death by means of lethal injection; and

WHEREAS, Department desires to engage Pharmacy to provide Department with certain controlled substances and/or compounded preparations for lethal injection administration by the Department to those individuals sentenced to death; and

WHEREAS, Pharmacy and Department have agreed to enter into this Agreement setting forth the terms under which Pharmacy will provide certain controlled substances and/or compounded preparations to Department for use in lethal injection.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, Pharmacy and Department hereby agree as follows:

Article 1
SERVICES

1.1 Controlled substance. Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested controlled substance. Quantities of the controlled substance shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the controlled substance and is reasonable considering the intended use of the controlled substance and the nature of the services offered by the Department. For controlled substance, Pharmacy shall dispense all drugs in accordance with applicable licensing regulations adopted by the _____ and the United States Food and Drug Administration that pertain to pharmacies dispensing controlled substance.

1.2 Compounding Preparations. Upon a written request, which may be sent electronically via facsimile or electronic mail, by Department, Pharmacy shall provide Department with the requested compounded preparation. Quantities of the compounded preparation shall be limited to an amount that does not exceed the amount the Department anticipates may be used in the Department's office or facility before the expiration date of the compounded preparation and is reasonable considering the intended use of the compounded

preparation and the nature of the services offered by the Department. For compounded preparations, Pharmacy shall compound all drugs in a clean sterile environment in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In addition, Pharmacy shall compound all drugs in accordance with applicable licensing regulations adopted by the _____ that pertain to pharmacies compounding sterile preparations.

1.3 **Limitation on Services.** Pharmacy shall only provide controlled substance and compounding preparations that it can prepare to ensure compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation Departments. In the event Department requests a controlled substance or compounded preparation which Pharmacy is not able to fill, Pharmacy shall notify Department.

1.4 **Recalls.** In the event that Pharmacy determines that a recall for any controlled substance or compounded preparation provided hereunder is warranted Pharmacy shall immediately notify Department of the medication and/or preparations subject to the recall. Pharmacy shall instruct Department as how to dispose of the medication or preparation, or may elect to retrieve the medication or preparation from Department. Pharmacy shall further instruct Department of any measures that need to be taken with respect to the recalled medication or preparation.

Article 2
OBLIGATIONS OF DEPARTMENT

2.1 **Written Requests.** All requests for controlled substances and compounded preparations must be in writing and sent to Pharmacy via electronic mail or facsimile. The following shall appear on all requests:

A. Date of request;
B. FOR COMPOUNDED PREPARATIONS ONLY: Name, address, and phone number of the practitioner requesting the preparation;
C. Name, strength, and quantity of the medication or preparation ordered; and
D. Whether the request needs to be filled on a STAT basis.

2.2 **Use of Controlled Substance and Compounded Preparations.** Department agrees and acknowledges that all controlled substance and compounded preparations provided by Pharmacy may only be used by Department in carrying out a sentence of death by lethal injection and may not be dispensed or sold to any other person or entity. Department assumes full responsibility for administering any controlled substance or compounded preparations.

2.3 **Recordkeeping.** Department agrees to maintain records of the lot number and beyond-use date of a controlled substance or compounded preparation to be administered or administered by Department that was prepared by Pharmacy. Department agrees to maintain inventory control and other recordkeeping as may be required by applicable federal and state laws and regulations.

Article 3
TERM AND TERMINATION

3.1 Term. The Effective Date of this Agreement shall be the date first specified above. The term of this Agreement shall be for a period of one (1) year unless sooner terminated by either party pursuant to the terms and provisions hereof. If this Agreement is not terminated by either party prior to the anniversary date of this Agreement or any renewal term, this Agreement shall automatically renew for an additional one (1) year term.

3.2 Termination.

A. Either party to this Agreement may terminate this Agreement, with or without cause, by providing the other party sixty (60) days prior written notice of said termination.

B. Pharmacy may immediately terminate this Agreement in the event of any of the following:

1. Department ceases to provide professional services for any reason.
2. Department's professional license is revoked, terminated, or suspended.
3. Department declares bankruptcy.
4. Department fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

C. Department may immediately terminate this Agreement in the event of any of the following:

1. Pharmacy's professional license is revoked, terminated, or suspended.
2. Pharmacy is excluded or debarred from participation in the Medicare and/or Medicaid programs for any reason.
3. Pharmacy declares bankruptcy.
4. Pharmacy fails to comply the terms of this Agreement and fails to cure such breach within 5 business days of receiving notice of the breach.

Article 4
REPRESENTATION

4.1 Representation by TN Attorney General. The Tennessee Attorney General's Office will represent or provide representation to Pharmacy in any civil lawsuit filed against Pharmacy for its acts or omissions arising out of and within the scope and course of this agreement except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain. Any civil judgment leveled against Pharmacy arising out it's acts or omissions pursuant to this agreement will be reimbursed by the State in accordance with the terms of T.C.A. § 9-8-112. The Attorney General's Office will advocate before the Board of

Claims for full payment of any judgment against Pharmacy arising out of a civil lawsuit in which the Attorney General's Office represents or provides representation to Pharmacy.

Article 5
Miscellaneous

5.1 **Amendment.** This Agreement may be amended only by mutual agreement and reduced to writing and signed by both parties hereto.

5.2 **Payment.** Pharmacy agrees to submit invoices within thirty (30) days after rendering services and/or providing controlled substances or compounded preparations to: TDOC Fiscal Director, Rachel Jackson Building, 6th Floor, 320 6th Avenue North, Nashville, Tennessee, 37243. Department agrees to pay an annual fee to Pharmacy in the amount of $5,000.00 (five thousand dollars).

5.3 **Captions.** Any caption or heading contained in this Agreement is for convenience only and shall not be construed as either broadening or limiting the content of this Agreement.

5.4 **Sole Agreement.** This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter herein.

5.5 **Controlling Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee. The parties hereto expressly agree that this Agreement is executed and shall be performed in Davidson County, Tennessee, and venue of all disputes, claims and lawsuits arising hereunder shall lie in Davidson County, Tennessee.

5.6 **Severability.** The sections, paragraphs and individual provisions contained in this Agreement shall be considered severable from the remainder of this Agreement and in the event that any section, paragraph or other provision should be determined to be unenforceable as written for any reason, such determination shall not adversely affect the remainder of the sections, paragraphs or other provisions of this Agreement. It is agreed further, that in the event any section, paragraph or other provision is determined to be unenforceable, the parties shall use their best efforts to reach agreement on an amendment to the Agreement to supersede such severed section, paragraph or provision.

5.7 **Notice**. Any notices under this Agreement shall be hand-delivered or mailed by certified mail, return receipt requested to the parties at the addresses set forth on the signature page of this Agreement, or such other addresses as the parties may designate to the other in writing from time to time.

5.8 Agreement Subject to State and Federal Law. The parties recognize that this Agreement, at all times, is subject to applicable state, local and federal laws including, but not limited to, the Social Security Act and the rules, regulations and policies adopted thereunder and adopted by the _____, as well as the public health and safety provisions of state laws and regulations. The parties further recognize that this Agreement shall be subject to amendments of such laws and regulations, and to new legislation. Any such provisions of law that invalidate, or otherwise are inconsistent with the terms of this Agreement, or that would cause one or both of the parties to be in violation of the laws, shall be deemed to have superseded the terms of this Agreement; provided, however, that the parties shall exercise their best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the requirements of applicable laws and regulations.

5.9 Compliance With All Applicable Laws. The parties hereto hereby acknowledge and agree that each party shall comply with all applicable rules regulations, laws and statutes including, but not limited to, any rules and regulations adopted in accordance with and the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The parties hereby specifically agree to comply with all privacy and security rules, regulations and provisions of HIPAA and to execute any required agreements required by all HIPAA Security Regulations and HIPAA Privacy Regulations whether presently in existence or adopted in the future, and which are mutually agreed upon by the parties. In addition, in the event the legal counsel of either party, in its reasonable opinion, determines that this Agreement or any material provision of this Agreement violates any federal or state law, rule or regulation, the parties shall negotiate in good faith to amend this Agreement or the relevant provision thereof to remedy such violation in a manner that will not be inconsistent with the intent of the parties or such provision. If the parties cannot reach an agreement on such amendment, however, then either party may terminate this Agreement immediately. This section shall survive the termination of this Agreement.

5.10 Referral Policy. Nothing contained in this Agreement shall require, directly or indirectly, explicitly or implicitly, either party to refer or direct any patients to the other party.

5.11 Assignment. This Agreement is not assignable without the other party's prior written consent.

5.12 Independent Contractor Status. In performing their responsibilities pursuant to this Agreement, it is understood and agreed that Pharmacy and its pharmacists and other professionals are at all times acting as independent contractors and that the parties to this Agreement are not partners, joint-venturers, or employees of one another.

5.13 Non-Waiver. No waiver by one of the parties hereto of any failure by the other party to keep or perform any provision, covenant or condition of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same, or any other provision, covenant or condition.

5.14 Counterparts/Execution. This document may be executed in multiple counterparts, each of which when taken together shall constitute but one and the same instrument. In addition, this Agreement may be executed by facsimile or electronic signature, which shall constitute an original signature.

5.15 No Third-Party Beneficiaries. No provision of this Agreement is intended to benefit any third party, nor shall any person or entity not a party to this Agreement have any right to seek to enforce or recover any right or remedy with respect hereto.

5.16 Confidentiality. Both parties agree to keep this Agreement and its contents confidential and not disclose this Agreement or its contents to any third party, other than its attorneys, accountants, or other engaged third parties, unless required by law, without the written consent of the other party.

IN WITNESS WHEREOF, the parties have hereunto caused their authorized representatives to execute this Agreement as of the date first set forth above.

By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: TDOC Commissioner
Date: _____	Date: _____
Address: _____	Address: 320 6th Ave. North, 6th Floor
_____	Nashville, TN 37243