TNNESSEE JUDICIAL CONFERENCE
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CRIMINAL LAW UPDATE: 2022-2023

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UNITED STATES SUPREME COURT
2022-2023 TERM

POST-CONVICTION DNA ANALYSIS ACT – STATUTE OF LIMITATIONS
Reed v. Goertz, 598 U.S. 230, 143 S.Ct. 955, 215 L.Ed.2d 218 (2023)

Defendant convicted of first-degree murder in Texas state court filed a petition for DNA testing of the belt used to strangle the murder victim. State court denied on multiple grounds including that the belt had not been subject to a proper chain of custody. Defendant exhausted state appeals and then filed a procedural due process claim in federal court under 42 U.S.C § 1983. Federal court dismissed as having been filed outside the two-year SOL. HELD: When a prisoner pursues state post-conviction DNA testing through state provided litigation process the SOL for a 1983 action begins to run when state litigation (including appellate) ends, not when initial ruling is made.

DOUBLE JEOPARDY: RETRIAL AFTER REVERSAL ON APPEAL:
Smith v. United States, 599 U.S. 236, 143 S.Ct. 1594, 216 L.Ed.2d 238 (2023)

Timothy Smith, a software engineer and avid angler from Mobile was indicted in the Northern District of Florida for theft of trade secrets from a website owned by StrikeLine. Before trial, Smith moved to dismiss for lack of venue, citing the Venue Clause [Art. III, § 2 – in state where crime occurred] and the Vicinage Clause [Sixth Amendment – impartial jury of state and district where crime occurred]. He argued that he had accessed the data from his home in Mobile from a server in Orlando. The trial court denied the motion holding that the jury should be required to resolve any factual issues pertaining to the venue. After the jury returned a verdict of guilt, Smith moved for judgment of acquittal based on improper venue. On appeal, the 11th Circuit agreed that the venue was not proper but ordered a new trial finding no violation of double jeopardy principles. ISSUE: Does Constitution permit retrial of a defendant following a trial in an improper venue and before a jury drawn from the wrong district. HELD: No. As a general rule, when a defendant obtains a reversal of a conviction Double Jeopardy does not prevent retrial.

CONFRONTATION CLAUSE; BRUTON; LIMITING INSTRUCTIONS:
Samia v. United States, 599 U.S. 635, 143 S.Ct. 2004, 216 L.Ed.2d 597 (2023) 6-3

FACTS: Adam Samia and his codefendants, Joseph Hunter and Carl Stillwell were arrested by the DEA and charged with a variety of offenses related to the murder-for-hire of Catherine Lee. Stillwell gave a confession. Stillwell admitted that he had been in the van when Lee was killed, but he claimed he was only the driver and that Samia had shot Lee. All three men were indicted for multiple offenses. Prior to their joint trial, the Government moved *in limine* to admit Stillwell's confession. Because Stillwell was not expected to testify and the full confession implicated Samia, the Government proposed that an agent testify as to the content of Stillwell's confession in a way that eliminated Samia's name while avoiding any obvious indications of redaction. The District Court

granted the Government's motion. The Government's theory at trial was that Hunter had hired Samia and Stillwell and that all three men were in a van that Stillwell was driving when Samia shot the victim. During the agent's testimony he said that Stillwell "described a time when the *other person* he was with pulled the trigger on that woman in a van." Other portions of the agent's testimony also used the "other person" descriptor to refer to someone with whom Stillwell had traveled and who carried a particular firearm. During the agent's testimony, the District Court instructed the jury that his testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. The Court also provided a similar instruction before the jury began its deliberations. The jury convicted Samia and his codefendants on all counts. Samia was sentenced to life plus 10 years imprisonment.

SECOND CIRCUIT: Samia appealed to the Second Circuit. He argued that admission of Stillwell's confession – even as altered and with limiting instructions – was constitutional error because other evidence and statements at trial enabled the jury to immediately infer that the "other person" was Samia. The Second Circuit rejected Samia's view that the confession should be considered in the greater context of the trial. It held that the confession should be considered in isolation from the other evidence admitted at the trial. Considering the confession in isolation, the Court found no Confrontation Clause violation and pointed to the established practice of replacing a defendant's name with a neutral noun or pronoun in a non-obvious redaction. The United States Supreme Court granted certiorari in part to determine whether confessions should be considered in isolation or in the context of the trial in deciding whether they directly inculpate the defendant.

ISSUE: Whether admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's rights under the Confrontation Clause?

HELD: "Considering longstanding historical practice, the general presumption that jurors follow their instructions, and the relevant precedents of this Court, we conclude it does not." Confrontation Clause was not violated by the admission of a nontestifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction. In deciding whether a confession directly inculpates a defendant the confession must be considered in isolation from other evidence.

Confrontation Clause only applies to witnesses "against the accused." When proper instructions are given that evidence is not to be considered against an accused, the witness is not considered a witness "against the accused." There is no Confrontation required.

For most of our Nation's history, longstanding practice allowed a nontestifying codefendant's confession to be admitted in a joint trial so long as the jury was properly instructed not to consider it against the nonconfessing defendant. While some courts would omit the defendant's name or substitute a generic reference, it is unclear whether such alterations were required. In any event, what is clear is that the combination of limiting instructions and such alterations was sufficient to allow introduction of the confession in a joint trial. This historical evidentiary practice is in accord the law's

broader assumption that jurors can be relied upon to follow the judge's instructions. *Bruton* recognized a narrow exception to the presumption that juries follow their instructions, holding that a defendant is deprived of the right of confrontation when a facially incriminating confession of a nontestifying codefendant is introduced in their joint trial even with a proper instruction. In *Richardson v. Marsh* we declined to extend the rule to confessions that do not name the defendant and that become incriminating only when linked with other evidence introduced at trial. *Gray v. Maryland* later qualified *Richardson* by holding that certain obviously redacted confessions [replacing a name with a blank or the word "deleted"] might be "directly accusatory" and fall within the *Bruton* rule, even if they did not specifically use a defendant's name. Thus, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly. Under these precedents, and consistent with longstanding historical practice, the introduction of Stillwell's altered confession coupled with the limiting instructions did not violate the Confrontation Clause. Stillwell's confession was redacted to avoid naming Samia, satisfying *Bruton*. And it was not obviously redacted in a manner resembling *Gray*; the neutral references to some "other person" were not akin to an obvious blank or the word "deleted." The *Bruton* rule applies only to "directly accusatory" incriminating statements, as distinct from those that do "not refer directly to the defendant" and "become incriminating only when linked with evidence introduced later at trial." "Accordingly, neither *Bruton*, *Richardson*, nor *Gray* provides license to flyspeck trial transcripts in search of evidence that could give rise to a collateral inference that the defendant had been named in an altered confession."

Dissent: Under this decision, prosecutors can always circumvent Bruton's protections. *Bruton* will prohibit use of the defendant's name or a blank or symbol or the word "deleted" but no worries all you need to do is substitute a generic term and the *Bruton* issue will go away.

COMMENT: It appears that the Court has clarified [as there was a split of authority] in deciding whether a confession directly inculpates a defendant, the confession must be considered in isolation. Many cases have been decided by the CCA in the past which adopted a contextual analysis and, I submit are no longer good law. Caution should be used in relying upon some of these cases as authority in the wake of *Samia.*

In summary, the Bruton rule will continue to prohibit use of the defendant's name or a blank or symbol or the word "deleted," but so long as the confession is redacted using a more generic or neutral descriptor in place of the defendant's name, it is not obviously redacted, and the judge gives appropriate limiting instructions, there will be no *Bruton* violation.

TENNESSEE SUPREME COURT
2022-2023

EIGHTH AMENDMENT; JUVENILE LIFE SENTENCES:
State v. Booker, 656 S.W.3d 49 (Tenn. 2022)

Automatic life sentence [which amounts to 60 years in prison no possibility of parole before serving 51 years] when imposed on a juvenile homicide offender violates the prohibition against cruel and unusual punishment under the 8th Amendment of the United States Constitution. To remedy this violation the life sentence remains in place, but the Defendant will be given a parole hearing sometime between 25 and 36 years.

CONSECUTIVE SENTENCING' "EXTENSIVE" CRIMINAL RECORD:
State v. Perry, 656 S.W.3d 116 (Tenn. 2022)

Defendant entered an open or blind guilty plea to 24 counts of aggravated exploitation of a minor alleged to have taken place in 2016 and 2017 involving 174 images of child pornography which he downloaded to his electronic file sharing account. Although he had no prior criminal convictions, the trial judge ordered partial consecutive sentencing resulting in an effective 18 year sentenced based on his finding that the Defendant was "an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). CCA: Affirmed, in split opinion finding that "extensive record" could be supported based primarily on the number of images in the case. DISSENT: "The record shows the trial court justified consecutive sentencing based solely upon the number of convictions to which the Defendant pleaded guilty without consideration of the pervasiveness of the Defendant's illegal behavior. There is no question that the Defendant knowingly transferred or exchanged 174 images of child pornography as charged in the multiple count indictment. While this conduct was repulsive and repugnant, there was no proof in the record that the Defendant engaged in a continuous course of downloading or uploading the materials for the year long period alleged in each of the twenty-four counts of the indictment." SUPREME COURT: We clarify certain principles for imposing consecutive sentences and set forth a non-exclusive list of considerations to aid in determining whether a defendant qualifies as an offender whose record of criminal activity is extensive. "Extensive" refers to that which is "considerable or large in amount, time, space, or scope." Courts must look to facts from which they can determine whether a defendant's criminal record is "considerable or large in amount, time, space, or scope." With this general definition in mind, courts should look to the following non-exclusive considerations in making this evaluation:

(1) The amount of criminal activity, often the number of convictions, both currently before the trial court for sentencing and prior convictions or activity;
(2) The time span over which the criminal activity occurred;

(3) The frequency of the criminal activity within the time span;
(4) The geographic span over which the criminal activity occurred;
(5) Multiplicity of victims of the criminal activity, and
(6) Any other fact about the defendant or circumstance surrounding the criminal activity or convictions, present or prior, that informs the determination of whether an offender's record of criminal activity was considerable or large in amount, time, space, or scope.

The presumption of reasonableness is conditioned on the trial court providing reasons on the record establishing a ground for consecutive sentencing. Trial court adequately articulated his reasons on the record such that his decision is entitled to the presumption of reasonableness. Although Defendant contends that trial judge relied solely on the number of convictions, we do not find that to be the case. Trial judge relied not only on the 24 convictions, but also on the fact that the offenses involved 174 images that were shared or traded with other individuals. Although the trial judge did not discuss the time span and frequency of the activity, the record does not support that they took place in a single occurrence. Affirmed.

CONFESSIONS; FOURTEENTH AMENDMENT DUE PROCESS ANALYSIS SIMILAR BUT DISTINCT FROM FIFTH AMENDMENT MIRANDA ANALYSIS:
State v. McKinney, 669 S.W.3d 753 (Tenn. 2023).

FACTS: Defendant, a seventeen-year-old juvenile, went with two other men to a gas station to meet the victim, who had listed his 2015 Chevrolet Camero on Craiglist for sale. While en route to meet the victim, Defendant sent a text message to a friend stating he was about "to go handle some business." He also sent a photograph of two handguns, one of which was later identified as the murder weapon. At the gas station while the three men walked around the Camero as to examine it, Defendant positioned himself behind the victim and one of the other men got into the car and began to drive away. When this occurred, the victim attempted to also enter the car and, according the Defendant, appeared to reach for a concealed gun. Defendant fired two shots hitting the victim in the back with one shot and hitting a bystander in the arm with another. The Defendant then fled the acene and the man in the Camero drove it away. Defendant was later developed as a suspect and sheriff's deputies went to his home in Clarksville to interview him. At that time, they learned that the Defendant's mother was at work so they called her and asked her to meet them at the police station. Defendant was then transported to the police station where he was put into an interview room with his mother alone for eight-and-a-half minutes. While alone, Defendant asked his mother whether he should tell the detectives what happened and his mother advised him to "Tell them what you know." Two detectives then entered the room and all four individuals engaged in small talk for about four minutes. The overall tone of the conversation was friendly and relaxed and although both detectives possessed visible holstered firearms on their hips, neither detective touched or brought attention to his weapon. Detective Kendrick advised the Defendant that they had some questions but that: …one of the most important things is we're going to read you your rights. Okay?

So you make sure you understand your rights….. Detective Kendrick then read Defendant his Miranda rights using a rights-waiver form. Although the pacing was somewhat fast it was understandable. Detective Arms then asked Defendant: “Do you understand?’ Defendant affirmatively shook his head and verbally said. mmm hmm.” Detective Arms then incorrectly told Defendant that the rights-waiver for was “just saying that” he read him his Miranda rights. Defendant then signed the form without displaying any confusion or asking any questions. Defendant then proceeded to answer the detectives’ questions. At first Defendant said that he had no advance knowledge of the plan to steal the victim’s car, but roughly a minute later he said that one of the other men in the car told him on the way that he would harm Defendant’s family if he did not fire his gun if necessary. Defendant then admitted knowledge of the plan while en route to the gas station. Regarding the shooting, Defendant claimed he shot the victim when it appeared he was reaching for a weapon.

MOTION TO SUPPRESS: Trial court denied the motion, finding that the Defendant “did knowingly and voluntarily waive his rights and agreed to speak” to the detectives. The trial court emphasized the Defendant previously held two jobs, was a few months from his eighteenth birthday, had received a passing grade in English in his last in-person semester, the mother was preset the entire time and expert testimony opined that Defendant’s vocabulary suggested roughly average intelligence.

TRIAL RESULT: Defendant was convicted of one count of premeditated murder, two counts of felony murder, one count of aggravated robbery, and one count of Theft over $10,000. He received an effective sentence of life imprisonment.

CCA: Court of Criminal Appeals found that trial judge erred in denying the motion to suppress finding that the Defendant “did not freely and voluntarily give his statement after a knowing and intelligent waiver of his constitutional rights.” They also found insufficient evidence of premeditation. They granted a new trial as to all other charges. As a part of its analysis, the intermediate court used the words “inextricably linked” in its discussion of the matter:

> Because the test for voluntariness is the same regardless of whether the defendant was provided with Miranda warnings, and because the question whether the defendant voluntarily provided a statement to the police is inextricably linked with the question whether the defendant voluntarily waived his constitutional right to remain silent by providing a statement after the warnings were given, we will consider those issues together to determine whether, under the totality of the circumstances, the defendant’s statement was freely and voluntarily given after a knowing and intelligent waiver of his constitutional rights.

RULE 11 GRANT: Supreme Court granted permission to appeal to consider whether (1) CCA erred in stating that the involuntary confession claim is “inextricably linked” to a Miranda waiver claim such that the two inquiries can be considered together, (2) whether CCA erred in finding confession involuntary and (3) whether evidence was sufficient to support premeditation.

HELD: (1) Whether a waiver of Miranda is voluntary is a separate and distinct inquiry from a determination whether a statement is voluntary for due process purposes. These issues are distinct inquiries, carry different evidentiary ramifications, require separate analysis, and should not be conflated.

> Although both inquiries utilize a totality-of-the-circumstances test, the 'issue under Miranda is whether a suspect received certain warnings and knowingly and voluntarily waived certain rights, whereas the essential inquiry under the voluntariness test is whether a suspect's will was overborne so as to render the confession a product of coercion. In other words, the Miranda-waiver inquiry analyzes the voluntary and knowing nature of the waiver. In contrast, the due process voluntariness inquiry is broader in scope and analyzes whether a defendant was coerced into providing a statement. Thus, it is possible for a statement to be voluntary under a due process analysis but otherwise fail to abide by the requirements of Miranda. Conversely, although it may be rare, it is possible for a defendant to be coerced into providing a statement after validly waiving his or her Miranda rights.

(2)(a) Defendant's waiver of his Miranda rights was both knowing and voluntary. Defendant was two months shy of his eighteenth birthday and had previously worked two jobs in the restaurant industry. He was enrolled in virtual high school and was capable of graduating. He had received some passing grades in English and scored a 13 on the ACT. Further the circumstances of the interrogation reveal that Defendant was read his rights and indicated he understood them, signed the form and proceeded to answer questions with his mother present the entire time. Specifically concerning the voluntariness prong of Miranda the record does not support a finding that the detectives engaged in coercive activity such that the waiver was not "the product of a free and deliberate choice rather than intimidation, coercion or deception." The most-concerning aspect involves the misleading statement involving the meaning of the waiver form. "This classification skirts the edge of what is permissible police conduct but stops short of being deceptive. When viewed in the totality of the circumstances, we hold this single misclassification does not render the waiver involuntary. Note: We give little weight to the officers merely possessing their holstered, job-related firearms during the questioning. We also give little weight to officers using language like "we need to talk" as implying an expectation that Defendant would waive his rights. As far as "knowing" the circumstances indicate that Defendant was fully aware of his rights and his asking his mother if he should talk is further indication of that fact. Although the detectives never orally asked Defendant if he wished to waive his rights, we conclude that he explicitly, knowingly and voluntarily waived his Miranda rights.
(2)(b) Defendant's statement to the police was voluntary. We incorporate the same facts discussed in our Miranda analysis involving the Defendant's education, intelligence, and all the circumstances of the waiver. "**As we stated in the section above [5th Amendment], we do not find those facts sufficient to rise to the level of coercion or to indicate Defendant's will was overborne.** However, because the scope of the due process voluntariness inquiry is larger than the scope of the Miranda-waiver inquiry, the following additional post-waiver facts must also be considered in determining

whether Defendant's statement was voluntary." Defendant admitted shooting the victim 25 minutes after entering the interrogation room. He was in the room only three hours and the officers were only in the room for one hour. Defendant was never deprived of any essential needs and there was no evidence he was threatened with or suffered any physical abuse. Based on the totality of the circumstances we find the statement was voluntary.
(3) Evidence was sufficient to support jury's finding of premeditation for multiple reasons, including lack of provocation of victim, defendant's failure to render aid, and motive to eliminate witness who could implicate him.

Note: A waiver of Miranda must be voluntary in the sense that it must be the product of a free and deliberate choice rather than intimidation, coercion, or deception. Berghius v. Thompkins, 590 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).
Question: 14th Amendment analysis allows some deception. Defendants have often argued that for Miranda purposes any deception no matter how slight vitiates the waiver, even if it is not the type that would render a statement involuntary for due process analysis. What do you think?

With regard to the Miranda voluntariness requirement, Courts apply the same general ***standard*** applicable to Due Process analysis and conclude that a waiver of Miranda is only involuntary if it was obtained by overbearing the will of the suspect. See Colorado v. Connelly, 479 U.S. 157, 169-170, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986): "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the Miranda waiver context than in the Fourteenth Amendment confession context." See also People v. Guerra, 37 Cal.4th 1067, 1093, 129 P.2d. 321, 343 (2006) (after discussing the test whether a defendant's will was overborn-"We make the same inquiry to determine the voluntariness of a Miranda waiver."). See also State v. McKinney, (Tenn. 2023) ("As we stated in the section above [discussing Miranda] we do not find those facts sufficient to rise to the level of coercion or to indicate Defendant's will was overborne."). Thus, the standard for determining voluntariness of a waiver for Miranda purposes appears to be the same as that for due process voluntariness. Nevertheless, although the standards are the same, McKinney teaches us that inquiries are distinct.

Determining whether a waiver of Miranda is voluntary is similar to an inquiry as to whether or not a confession is voluntary for due process purposes. However, whether a waiver of Miranda is voluntary is a separate and distinct inquiry from a determination whether a statement is voluntary for due process purposes. These issues are distinct inquiries, carry different evidentiary ramifications, require separate analysis, and should not be conflated.

FORGERY; FILING FALSE UCC-1; SUFFICIENCY OF EVIDENCE:
State v. Lyons, 669 S.W.3d 775 (Tenn. 2023)

The UCC provides a mechanism for secured creditors to give notice to the world of their security interest in debtors' property as collateral for a debt by filling out a form [referred to as a UCC-1] financing statement and posting it on a website for the Tennessee Secretary of State. In this case the defendants filed over 100 bogus financing statements regarding over 40 victims which falsely claimed liens for the defendants' alleged security interest in the victims' property as collateral for millions of dollars of fictitious debt. After a jury trial, all the defendants were convicted of multiple counts of filing a lien without a reasonable basis [39-17-117(a)(1)], a Class E felony, and forgery of at least $250,000, a Class A felony. The defendants were sentenced to various terms of imprisonment. The shortest sentence was 20 years, the longest 50 years. CCA affirmed. Rule 11 was granted to address only the forgery convictions. HELD: Defendants' conduct fits within the statutory definition of forgery and the evidence was sufficient to support the jury's finding that the apparent value associated with the financing statements was over $250,000. We affirm the CCA. Court rejects defense argument that Defendants' actions did not fit with the definition of forgery to include making false entries in books and records [39-14-114(b)(1)(B)]. More specifically, also Court rejects argument that the filings were not "false entries" because the statute does not encompass "genuine" documents that merely contain false information. Court rejects argument that the entries were not in "books and records." CONCURRING IN PART AND DISSENTING IN PART: UCC-1's really had no readily apparent value.

RESTITUTION; FINAL ABSENT PAYMENT TERMS:
State v. Cavin, 671 S.W.3d 520 (Tenn. 2023)

Defendant pled guilty to burglary and theft of wood stolen from the victim's barn. The initial judgment did not list an amount of restitution but indicated that restitution "based on defendant's ability to pay" would be a condition of probation. The amount of the restitution was to be determined after a later restitution hearing. After conducting the hearing, the court ordered payment of $5,500 in restitution during the probationary period but did not specify any payment terms. The defendant appealed but the CCA dismissed the appeal holding that the restitution order was not final and appealable because it lacked payment terms. Supreme Court granted permission to appeal to determine whether a restitution order is final and appealable under TRAP 3 when it directs a defendant to pay a specific amount but does not set payment terms, and, if the order is final whether the trial court erred in ordering restitution. HELD: T.C.A. § 40-35-304 allows – but does not require – trial courts to specify payment terms. A restitution order does not have to include a payment schedule or payment terms to be a final order. A trial court may order payment terms but need not do so. Decision of CCA that the order was not final is reversed. Trial court's order of restitution is affirmed. Trial court considered conflicting testimony as to the amount and considered the defendant's ability to pay. Although the judge must consider defendant's ability to pay, "we decline to

require trial courts to make individual determinations of findings of fact regarding the defendant's ability to pay restitution."

RESTITUTION; FINALITY ABSENT DATE OF PAYMENT:
State v. Gevedon, 671 S.W.3d 537 (Tenn. 2023)

Defendant drove through a cemetery in Giles County, damaging multiple gravestones. He pled guilty to DUI and leaving the scene and was sentenced to concurrent 11 month and 29 day sentences with all but 48 hours suspended. Both the plea agreement and the judgment indicated that restitution would be determined at a subsequent hearing. Before that hearing could be conducted the defendant was arrested for driving on a revoked license. The court conducted a combined probation revocation hearing and restitution hearing, after which, the judge ordered the defendant to serve the rest of his sentence in confinement and ordered restitution of $30,490.76. Defendant appealed on multiple grounds including an allegation that the trial court erred in setting the restitution without considering his financial resources and ability to pay. CCA dismissed appeal finding restitution order was not final because it failed to set the date of payment. HELD: Restitution order was final. The date of payment of the restitution was, by default, the expiration of the defendant's sentence based on T.C.A. § 40-35-304(g). When trial court orders restitution as a part of a "sentence" [not as a condition of probation] 40-35-304(g) sets the default as the expiration of the sentence. CCA reversed on finality issue. However, trial judge clearly did not consider the defendant's financial resources and ability to pay so trial court's order is reversed and the matter is remanded to the trial court for further proceedings.

RULE 13; NO RIGHT TO APPEAL CHIEF JUSTICE:
Jessie Dotson v. State, 673 S.W.3d 204 (Tenn. 2023)

Although trial judge authorized funds under Tennessee Supreme Court Rule 13 for expert witnesses to assist petitioner in capital post-conviction proceeding, both the Director of the Administrative Office of the Courts and the Chief Justice denied approval for some of the requests. After an evidentiary hearing, the post-conviction court denied relief. The CCA affirmed the ruling without deciding the Petitioner's Rule 13 constitutional challenges. We hold that the provisions of Rule 13 are constitutional as applied, the Petitioner was not unconstitutionally denied appellate review of the denial of his request for expert funds, and the Petitioner was not deprived of a full and fair post-conviction hearing due to the denial of expert funds.

Petitioner's claim that the AOC Director and the Chief Justice improperly exercised judicial authority is without merit as Rule 13 does not authorize either of them to substantively review the trial court's order. Under Rule 13, denial or prior approval by the AOC Director and the Chief Justice can be based on a prior authorization order that is noncompliant with Rule 13 or an administrative funding decision. Since there is no

suggestion that these orders were noncompliant, "we conclude that the AOC Director and the Chief Justice denied prior approval based on an administrative funding decision."

Petitioner's claim that the process by which the AOC Director and Chief Justice conduct their review denied him procedural due process because it failed to provide him with notice of the evidence considered in denying the funding requests and denied him the ability to contest the decision is likewise without merit. Because the Petitioner cannot establish a constitutionally protected right. Because Petitioner has no constitutionally protected right in the finite pool of indigent funds authorized by the legislature, he cannot establish that the provisions deny him procedural due process.

When a trial court *denies* or limits Rule 13 funding, a petitioner may seek interlocutory review under TRAP 9 or 10, or under appeal under TRAP 3 after entry of the final order. But when the trial court approves the funding but it is denied by Chief Justice, there is no appellate review. This fact does not violate the Open Courts Clause of the Tennessee Constitution, nor does it deny equal protection of the law or due process. Although there is no appellate review of denial by Chief Justice, petitioner's claim that he was denied full and fair hearing on the stated post-conviction grounds due to a denial of expert funds is reviewable on appeal. "[W]hen a petitioner asserts he has been denied a full and fair hearing due to the denial of expert funds, he should identify the grounds for post-conviction relief he was either unable to present or unable to fully and fairly present at the hearing without the assistance of the desired experts. This specificity allows the court to identify the grounds, assess the available evidence relevant to those grounds, and consider whether the absence of the desired expert denied a full and fair hearing on those grounds." "Here, the Petitioner failed to clearly identify and support with argument the post-conviction grounds he was unable to fully and fairly present at the evidentiary hearing without expert assistance. Such failures typically result in waiver. However, we have chosen as part of our broader review…to examine a particular ground of ineffective assistance of counsel that was raised in the petition and considered by the post-conviction court to which expert testimony from Dr. Merikangas and Dr. Leo could conceivably have been relevant."

Petitioner alleged that trial counsel were ineffective for failing to obtain or properly utilize expert assistance in the guilt and penalty phase investigations, focusing on counsel's choice of mental health experts and false confession expert. Trial counsel explored whether deficits could be used to challenge the reliability and voluntariness of the defendant's statements and retained a psychologist, Dr. Walker, a neuropsychologist and Dr. Leo, a false confession expert. Both psychologists found no support for a mental health defense. Dr. Walker diagnosed the defendant has having antisocial personality disorder. Trial counsel did not want the jury to hear this diagnosis. Defense counsel decided not to use Dr. Leo in order to avoid admission of recordings from *The First 48*. The post-conviction court concluded that trial counsel's decision not to call Dr. Walker and Dr. Leo were strategic decisions. Petitioner sought funding to retain Dr. Merikangas to show that counsel was ineffective in failing to call Dr. Walker and Dr. Leo and for failing to obtain the services of a psychiatrist. "It seems unlikely that any testimony from Dr. Merikangas would alter the outcome. Thus, he has failed to show that the absence of Dr. Merikangas testimony denied him a full and fair hearing.

GANG ENHANCEMENT; NOTICE REQUIREMENTS:
State v. Shackleford, 673 S.W.3d 243 (Tenn. 2023)

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

HELD": State is not required to specify in the indictment a criminal defendant's subset or that defendant is in the same gang subset as individuals whose criminal activity establishes gang's pattern of criminal activity.

PROBATION ELIGIBILITY; STATUTORY CONSTRUCTION, REPEAL BY IMPLICATION:
State v. Robinson, M2021-01539-SC-R11-CD, 2023 WL 6323462 (Tenn. Sept. 29, 2023)

While intoxicated, the Defendant ran over two children who were riding their bikes. One died. Defendant pled guilty to vehicular homicide by intoxication along with other offenses. The trial court imposed an effective ten-year sentence to be served on probation with periodic confinement each year near Christmas and each victim's birthday. On appeal, State argues that the trial court erred by granting probation because Defendant was not statutorily eligible. T.C.A. §40-35-303 (as amended in 2017) prohibits probation for vehicular homicide by intoxication. Earlier passed statute, T.C.A. 39-13-213(b)(2)(B) which allowed for probation after serving a mandatory minimum sentence of 48 hours is not necessarily inconsistent, but if so, the former statute is repealed by implication. Defense argues that two statutes create an ambiguity and "full" probation may be prohibited, but "periodic" confinement is not. HELD: No need to employ principle of repeal by implication as the two statutes are not inconsistent. Vehicular homicide state was written such that it was subject to the probation eligibility statute, i.e. "pursuant to §40-35-303."

Comments: As interpreted by the defense, the probation ineligible list would be essentially meaningless as the trial judge could impose split time of one hour or periodic confinement of one hour and grant "probation," despite being on the ineligibility list.

CASES PENDING IN TENNESSEE SUPREME COURT

BRADY; ACCOMPLICE COROBORATION:
Argued April 5, 2023
State v. Tony Thomas and Laronda Turner, W2019-01202-SC-R11-CD

CCA Opinion: 2021 WL 5015255 (Tenn. Crim. App. Oct. 28, 2021):
Both Defendants were convicted of three counts of first-degree premeditated murder. They appealed (1) challenging the sufficiency of the evidence based primarily on a claim that their accomplice's testimony was not sufficiently corroborated; (2) contending that the trial judge should have granted a motion to dismiss due to a *Ferguson* violation by failing to preserve photographic lineups and the co-defendant's cell phone; (3) that a new trial should have been ordered due to a *Brady* violation; (4) that the trial court committed error when it *sua sponte* prohibited the introduction of a printout of the co-defendant's message to his girlfriend implicating himself in the murders, and in doing so, made an improper comment of the evidence; and (5) that the trial judge erred in the jury instructions by including language, "or either of them" throughout the instructions. CCA affirmed in a 2-1 opinion noting that the evidence corroborating the accomplice's testimony as to Defendant Turner was less than that as to Defendant Thomas, but sufficient and that there was no showing that the inconsistent statement not disclosed to the defense was "material" under the *Brady* rule. **DISSENT**: The corroboration was insufficient as to Defendant Turner and I would reverse and dismiss as to her. The State's *Brady* violation also entitles both to a new trial.

ISSUES: (1) Whether there was a *Brady* violation when State failed to disclose statements made by a co-defendant which were inconsistent with co-defendant's formal statement. (2) Whether evidence was sufficient as to Defendant Turner.

Comments: With regard to *Brady*, this was a delayed disclosure case in which the defense was provided statements made by the co-defendant pretrial which indicated that Defendant Turner never entered the residence where the shooting occurred, but was provided additional statements at the time of trial from that same co-defendant that Defendant Turner entered the residence and actually shot the victim. Defense was able to use the inconsistent statement at trial, but claims had it known earlier a different strategy would have been employed. Defense struggles to show "materiality" in this context. With regard to the sufficiency of the evidence as to Defendant Turner, State acknowledges that under the traditional corroboration rule, this is a "close" case. So much so that it argues for "abrogation" of the corroboration rule.

DOUBLE JEOPARDY; SINGLE THEFT FROM MULTIPLE VICTIMS, SEVERANCE: Argued May 24, 2023
State v. David Wayne Eady, M2021-00388-SC-R11-CD

CCA Opinion: 2022 WL 7835823 (Tenn. Crim. App. 2022)
Defendant was convicted of eleven counts of aggravated robbery and one count of attempted aggravated robbery. He was sentenced as a repeat violent offender and was given eleven concurrent sentences of life without parole. The aggravated robberies were committed in various convenience stores located in Davidson County in the month of November, 2017. Defendant gave a statement to the police confessing to most of the robberies and indicated that his goal in committing the aggravated robberies was to get money to fuel his opioid habit.

With regard to severance, the State argued against severance because the crimes were part of a continuing plan or conspiracy and committed towards a common goal or purpose of procuring money to support a drug addiction. The defense argued that proof of each robbery was not admissible in a trial of the other robberies to prove identity and the location and time frame of the robberies were inadequate to support consolidation to prove identity. More particularly, the defense argued that "a shared motivation to get money for drugs is insufficient to prove a common scheme or plan even when the offenses share some similarities." The trial judge sided with the State holding that the counts should be consolidated under Rule 14(b) in that identity was a material issue and the multiple robberies constituted a continuing plan or conspiracy. The trial judge relied upon the similar nature of the robberies, the narrow time frame in which they were committed, the limited geographical area, and that the money from the robberies was used to purchase heroin.

Defendant also filed a motion to disqualify the Davidson County District Attorney's Office from prosecuting the case because the elected District Attorney had represented the Defendant in a criminal case in Cheatham County in 1989 in which the Defendant had pled guilty to aggravated robbery. That robbery was also listed in the present case as a basis for repeat violent offender status. Defense argued further that the elected District Attorney had been involved in the decision to seek repeat violent offender status, that he was disqualified and that disqualification should apply vicariously to the entire office. The trial judge denied the motion finding "no basis for recusal in light of the mandatory nature of the repeat violent offender sentencing statute."

On appeal, Defendant contended, among other things, that (1) his convictions for aggravated robbery in counts one and two violate double jeopardy; (2) the trial judge abused its discretion in not granting a severance of offenses; and (3) the trial judge abused its discretion in denying the motion to disqualify the District Attorney General's office.

Held: **Double jeopardy**: Unit of prosecution for aggravated robbery is number of thefts, not number of people threatened during the robbery. When a defendant is charged with multiple counts of aggravated robbery based on a single taking from a business, only one conviction can stand. Because the facts and circumstances support only one conviction for aggravated robbery as charged in counts one and two, we merge the two counts, and remand for entry of amended judgments in counts one and two reflecting the merger. In all other respects, we affirm the judgments of the trial court. **Severance:** Trial judge finds common scheme or plan based largely on expressed shared motivation to obtain money for drugs. **Disqualification:** "Although this court is concerned by the apparent lack of screening procedure and General Funk's decision to have a second conversation with ADA King in which he reiterated his earlier assessment for the repeat violent offender status *after* learning from Defendant's motion to disqualify that he had previously represented Defendant, we are constrained to hold that the trial court did not abuse its discretion."

CONCURRING AND DISSENTING, IN PART:

I would conclude that trial judge erred in denying request for severance. The offenses cannot be classified as parts of a larger, continuing plan or conspiracy. Defendant's confession provided his reason or motivation to commit the robberies-and nothing more. "His behavior amounts to random, opportunist criminal acts and not the product of any preconceived plan as required for joinder." Harmless except for counts 8 and 12.

Rule 11 Granted: Severance and Disqualification

Comments: This case illustrates a need for clarification in the law as to what constitutes a "larger, continuing plan or conspiracy." As with so many areas of the law, the Tennessee appellate cases are all over the place on this issue. In its appellate brief, the defense argues for a "restrictive" approach citing Edward J. Imwinkelried, *Uncharged Misconduct Evidence*, § 3:24(West 2023) (in order for offenses to be a part of a larger, continuing plan or conspiracy, the defendant must decide to commit all the offenses before he commits the first one). The State argues for a more lax approach claiming in large part all the offenses were motivated by the same desire to obtain money for drugs.

Consider: Edward J. Imwinkelried, "Using a Contextual Construction to Resolve the Dispute Over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)," 43 U. KAN. L. REV. 1005 (1995).

There are three contrasting conceptions: (1) the unlinked plan theory; (2) the linked methodology theory and (3) the linked acts theory. He concludes that the "linked act theory emerges as the only version of the doctrine that courts may legitimately apply with any regularity."

CORAM NOBIS; ACTUAL INNOCENCE AND EQUITABLE TOLLING:
Argued June 1, 2023
Thomas Edward Clardy v. State, M2021-00566-SC-R11-ECN
CCA Opinion: 2022 WL 2679026

For a July 29, 2005 shooting, a Davidson County jury convicted the Petitioner of one count of first-degree murder, two counts of attempted first degree murder and three counts of reckless endangerment. The trial court imposed a life sentence. The facts of the underlying convictions involved a situation in which three men fired shots at three individuals at a body shop in Madison, Tennessee. After the shootings, the assailants retreated to a vehicle and left the scene. Several spent shell casings were found at the scene but no weapons were recovered believed to have belonged to the assailants. At trial, one of the victims identified the Petitioner, a man who he previously knew, as one of the assailants.

After his conviction was affirmed on appeal, Petitioner filed a timely petition for post-conviction relief during which, inter alia, he claimed actual innocence as he had an alibi for the time of the crime and he had developed Dantwan Collier as a viable alternative suspect. During the post-conviction proceedings, Petitioner introduced evidence that ballistic testing showed that a .40 caliber cartridge found at the scene of the crime matched a weapon that Mr. Collier had used in a shooting on June 5, 2006. Petitioner also offered evidence that ballistic testing in January of 2016 had shown that Mr. Collier's cousin, Thomas Collier, had been in possession of another firearm used at the scene in connection with another incident on January 5, 2006. The trial court denied the post-conviction petition and the Court of Criminal Appeals affirmed finding that the new evidence, while exculpatory, did not prove Petitioner's innocence by clear and convincing evidence. More specifically, the Court said:

> "There were three individuals who participated in the shooting in this case. The newly discovered evidence suggests that Dantwan Collier and/or Thomas Collier may have been involved. However, it does not mean that Petitioner was not one of the three men. Furthermore, it is possible that Petitioner possessed one of the firearms before Dantwan or Thomas Collier. So even though the evidence is exculpatory, it does not prove Petitioner's innocence by clear and convincing evidence."

On December 8, 2020, Petitioner filed a writ of error *coram nobis*, alleging newly discovered evidence in the form of an affidavit *allegedly* showing that he did not participate in the crime. Petitioner acknowledged that he did not file within the applicable statute of limitations but claimed he was entitled to equitable tolling. The State agreed.

More specifically, the State and Defense entered into a "joint stipulation" which provided, among other things, a recitation of the prior post-conviction proceedings including the discovery of the ballistics information matching two firearms to Dantwan and Thomas Collier. The stipulation went on to assert that Petitioner's counsel had asked for review by the "Davidson County District Attorney's Conviction Review Unit," but that review was ongoing. It was also stipulated that Dantwan Collier had given an affidavit on December 10, 2019, to the effect that he did not know the Petitioner and had never received any property from the Petitioner. Based on this affidavit, the parties further stipulated that the affidavit contradicted CCA opinion on post-conviction that petitioner had not ruled out possibility that Petitioner and Dantwan Collier were accomplices or that Petitioner had possessed the gun before Collier. Based on this affidavit and the circumstances the **State stipulated that "Petitioner was entitled to relief"** and he "was entitled to equitable tolling of the statute of limitations. The *coram nobis* court dismissed the petition as untimely.

The trial court noted that the evidence was exculpatory, but that it did not prove actual innocence "by clear and convincing evidence." Citing Nunley v. State, 552 S.W.3d at 828, the trial judge concluded that the affidavit, taking it at face value, does not amount to "new evidence of actual innocence."

CCA: Petitioner claims that the *coram nobis* court applied the wrong standard and instead of focusing on the *Nunley* equitable tolling criteria it focused on the merits of the claim. State claims court "implicitly considered" *Nunley* and properly considered the merits. CCA concludes that the ballistics evidence and affidavit were discovered after expiration of SOL and strict application of SOL would effectively deny a reasonable opportunity to present his claims. Petitioner is entitled to equitable tolling.

ISSUE: Whether an error *coram nobis* petitioner must present "new evidence of actual innocence" to obtain due-process tolling of SOL and, if so, whether this evidence meets that standard.

Comments: Standard for newly discovered evidence to obtain relief is whether it may have led to a different result. Is there a different standard for equitable tolling? Judge mentioned "clear and convincing evidence" in ruling. *Nunley* mentions "new evidence of actual innocence" if claim arose after SOL and strict application of limitations would deny reasonable opportunity to present claim. Would result be different if judge had denied due-process tolling by concluding that, taking the information in the affidavit as true, she could not say that the information may have led to a different result?

Court of Criminal Appeals – Selected Cases

CONFRONTATION; FORMER TESTIMONY; BRADY:

State v. Joseph Z. Kibodeaux, 2023 WL 6366218 (Tenn. Crim. App. 2023)

Trial court entered order denying State's motion to admit preliminary hearing testimony of one of the victims who had subsequently died. Defense argued that former testimony exception should not allow as the State had withheld exculpatory evidence prior to the preliminary hearing. Defense relied upon State v. Allen, 2020 WL 7252538 (Tenn. Crim. App. 2020). Held: Brady does not apply to preliminary hearings and Brady analysis is not the appropriate vehicle to address this situation. "Where prosecution seeks to admit at trial the preliminary hearing testimony of an unavailable witness, and the defense did not possess the full plethora of exculpatory information at the preliminary hearing that it would have had at trial, the admission of that witness's prior testimony should be governed by the well-established principles concerning confrontation and hearsay. In these cases, the question will be whether the defendant had a similar motive and opportunity to cross-examine the witness at the preliminary hearing given the lack of the exculpatory information."

INTELLECTUAL DISABILITY; JURISDICTION TO MODIFY CONSECUTIVE SENTENCING:

State v. Pervis Tyronne Payne, 2023 WL 5599723 (Tenn. Crim. App. 2023)

In this case of first impression, State appeals the trial court's sentencing hearing order that the Defendant's two life sentences be served concurrently after he was determined to be ineligible for the death penalty due to intellectual disability pursuant to T.C.A. 39-13-203(g) (Supp. 2021). The State argued that the consecutive alignment of the Defendant's original sentences remined final and that the trial court lacked jurisdiction to consider the manner of service. HELD: "After considering the arguments of the parties, the rules of statutory construction, and other applicable legal authority, we conclude that the trial court properly acted within its discretion in conducting a hearing to determine the manner of service of Defendant's life sentences."

Defendant was convicted in 1988 of two first degree murders and an assault with intent to commit murder. The jury returned two death sentences and the trial judge ordered them to be served consecutively because "we have to anticipate what might occur in the future…." The Defendant did not challenge the consecutive sentencing in his direct appeal, nor in any of his multiple collateral attacks. On May 11, 2021, the General Assembly amended TCA 39-13-203 addressing intellectual disability in the context of capital sentencing allowing defendant's whose sentence of death is final to petition for a determination as to whether they are intellectually disabled. Defendant did so and the

parties agreed he met the definition of intellectual disability. The only possible sentence available was life imprisonment.

The Defense argued that the trial court should not only vacate the two death sentences but also should consider the manner of service of the sentences based on new evidence that the Defendant is not a dangerous offender. The State argued that the intellectual disability finding did not affect the consecutive alignment of the sentences and that the trial court lacked discretion to consider the matter under res judicata and the law of the case doctrine.

Trial judge agreed with defense. In doing so the Court noted that the first-degree murder statutes do not explicitly provide for a new sentencing hearing as to the manner of service should a defendant be declared intellectually disabled, but the murder statutes do not explicitly exclude such a hearing either, such that the matter falls within the Court's discretion. The Judge relied upon State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998) ("when issues arise for which no procedure is otherwise specifically prescribed, trial courts in Tennessee have inherent power to adopt appropriate rules of procedure")

HELD: "In light of the silence of the statutory text, the broader statutory scheme, and the legislative history, the rule of lenity requires that this court resolve the ambiguity regarding the trial court's sentencing authority under subsections 203(g) and 206((e) in the Defendant's favor. Court had jurisdiction to conduct sentencing hearing on manner of service.

SELF-DEFENSE; AFFIRMATIVE DUTY TO RETREAT INSTRUCTIONS:

State v. Shaquil Murphy, 2023 WL 3167879-CD (Tenn. Crim. App. 2023)

The Defendant was convicted by a Knox County Criminal Court jury of various offenses, including attempted first-degree premeditated murder. On appeal he alleges, among other things, that the trial judge erred by including duty to retreat language in the jury instruction on self-defense. More specifically, Defendant acknowledges that he was not entitled to the "no duty to retreat" language, but contends that trial judge erred by not following the pattern jury instructions which omit language that the Defendant has an affirmative duty to retreat if engaged in unlawful activity. Defendant notes many cases approving use of the pattern jury instructions omission of an affirmative duty and contends that these cases are in conflict with the many cases approving the affirmative duty instruction. HELD: Trial judge's instructions including an affirmative duty to retreat were a correct statement of the law. Further, we disagree that there is a conflict in the opinions that needs resolving.

CRITICAL RESPONSIBILITY:

State v. Antonio Donte Jenkins, No. M2022-00693-CCA-R3-CD, 2023 WL 5813706 (Tenn. Crim. App. Sept. 8, 2023)

The Defendant and a Mr. Miray were present and armed in the same residential neighborhood as Mr. Hill and three others. Mr. Hill had been having conflicts with the Defendant, so the Defendant and Mr. Miray waited for Mr. Hill's group for as long as forty five minutes, and the Defendant and Mr. Miray then split up to confront Mr. Hill's group. As part of this planned confrontation, the Defendant fired at Mr. Hill's group with a pistol, and Mr. Hill returned fire, effectively resulting in a gunfight in which an innocent bystander, a 16 year-old girl sitting on a porch, was struck and killed by a bullet fired from Mr. Hill's weapon. The trial judge instructed the jury on Criminal Responsibility, and the Defendant was convicted of Murder Second Degree. The Court reversed the conviction, holding that under the particular theory of criminal responsibility, "the evidence must establish that a defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted or assisted its commission." The Defendant and Mr. Miray approached Mr. Hill's group from different directions, and the video evidence shows that Mr. Hill's group was walking down the street until they were fired upon. In other words, Mr. Hill and his group were caught by surprise. The nature of the attack can only support the inference that the Defendant and Mr. Miray intended for Mr. Hill to be killed or incapacitated, not that the Defendant intended for Mr. Hill to shoot back at him and thereby knowingly kill another person. For criminal responsibility to apply under the State's theory, the "State must establish that the defendant knowingly, voluntarily and with common intent united with the principal offender in the commission of the crime." No proof was offered to show that the Defendant united with Mr. Hill in the knowing murder of the 16 year-old girl or that the killing of the girl was something the Defendant sought to bring about or, by his actions, make it succeed. On the contrary, the Defendant and Mr. Hill were antagonists from the start, wholly adverse to each other in their respective intentions and actions.

ADVICE OF COUNSEL IS NOT A DEFENSE

State v. Wendy D. Hancock, No. M2022 00483 CCA R3 CD, 2023 WL 3413599 (Tenn. Crim. App. May 12, 2023).

In a trial for Custodial Interference, the proof showed that the Defendant, at the suggestion of her attorney, hid out with her child in a hotel after her visitation period had expired to keep the father from having the child. The trial judge removed the words "after the expiration of the non-custodial natural parent's lawful period of visitation" from the pattern jury instruction elements of the offense, not feeling that it was necessary. The Court reversed the conviction, holding that that element was an essential element

that the jury must find before conviction was warranted. The defense also urged the court to charge the jury that it was a defense that she acted on advice of counsel, doing what her attorney told her to do. The trial judge as well as the appellate court rejected this defense, holding that acting on the advice of counsel was not a defense in Tennessee, citing Hunter v. State, 12 S.W.2d 36, 362 (Tenn. 1928).

A JUDGMENT SHEET MUST BE ENTERED FOR EACH COUNT DISMISSED:

State v. Luis Santiago, No. W2022-01044-CCA-R3-CD, 2023 WL 3451556 (Tenn. Crim. App. May 15, 2023

"Finally, our review of the transcript from the guilty plea colloquy as well as the special condition box in count one reflects that counts two, four, and five were to be dismissed as part of the plea agreement. However, the record does not contain separate judgment forms for these counts reflecting dismissal. Accordingly, we remand this matter for entry of separate judgment forms in counts two, four, and five reflecting dismissals of those charges consistent with the plea agreement. See Tenn. R. Crim. P. 32(e)(3) ("If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall enter judgment accordingly."); State v. Berry, 503 S.W.3d 360, 364 (Tenn. 2015) (order) ("For charges resulting in a not guilty verdict or a dismissal, the trial court should "enter judgment accordingly" as to the respective count."). Based on the above reasoning and authority, the judgment of the trial court is affirmed, but the case is remanded for entry of judgment forms to reflect dismissals of counts two, four, and five as specified in this opinion."

RESPONDING TO JURY QUESTIONS:

State v. Randall A. Murphy, No. M2022-00396-CCA-R3-CD, 2023 WL 4677496 (Tenn. Crim. App. July 21, 2023).

In this aggravated kidnapping trial, in response to jury questions, the trial judge engaged in a rather long, two-way conversation, or discussion, with them, indicating the judge's personal opinion about which of the White factors were more meaningful or important than the others given certain situations.
In reversing the conviction because of this, the Court stated that although a trial court has the authority to respond to jury questions with supplemental instructions, State v. Bowers, 77 S.W.3d 776, 790 (Tenn. Crim. App. 2001) (citing Forbes, 918 S.W.2d at 451), the "appropriate course of action" for the trial court in responding to a question from the jury is "to bring the jurors back into open court, read the supplemental instruction ... along with a supplemental instruction emphasizing that the jury should not place undue emphasis on the supplemental instructions, and then allow the jury to resume its deliberations." Id. at 791. The failure to follow the proper procedure is subject to harmless error analysis, and reversal is not required if the defendant has not been prejudiced. Id.; State v. Tune, 872 S.W.2d 922, 929 (Tenn. Crim. App. 1993). But any

supplemental instructions must be: (1) appropriately indicated by questions or statements from jurors, or from the circumstances surrounding the deliberative and decisional process, (2) comprehensively fair to all parties, and (3) not unduly emphatic upon certain portions of the law to the exclusion of other parts equally applicable to the area of jury misunderstanding or confusion.

DUI - DRIVING OR MERELY IN PHYSICAL CONTROL - NO ELECTION NEEDED:

State v. Ovitta Vaughn, No. W2022-00364-CCA-R3-CD, 2023 WL 3730890 (Tenn. Crim. App. May 31, 2023).

When convicted of DUI, the Defendant argues on appeal that the trial court erred in failing to require the State to make an election as to whether the defendant was driving the vehicle or merely had physical control. The State contends that, because DUI is a continuing offense, an election was not required.

The Court held that In Tennessee, a defendant is entitled to a unanimous jury verdict. State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999) (citing State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993); Tidwell v. State, 922 S.W.2d 497, 501 (Tenn. 1996)). Requiring an election “safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence.” State v. Johnson, 53 S.W.3d 628, 631 (Tenn. 2001) (citing Brown, 992 S.W.2d at 391). However, when the evidence does not establish that multiple offenses have been committed, the need to make an election never arises. State v. Adams, 24 S.W.3d 289, 294 (Tenn. 2000) (discussing that no election is required for continuing offenses). This Court has repeatedly held that DUI is a continuing offense, and therefore, the State was not required to make an election as to whether the defendant was driving the vehicle or merely had physical control. See State v. Joseph Scott Morrell, No. E2013 02431 CCA R3 CD, 2014 WL 4980400, at *8 (Tenn. Crim. App. July 22, 2014), perm. app. denied (Tenn. Oct. 7, 2014); State v. Corder, 854 S.W.2d 653, 654 (Tenn. Crim. App. 1992); State v. Rhodes, 917 S.W.2d, 708, 713 (Tenn. Crim. App. 1995); State v. Ford, 725 S.W.2d 689, 690 (Tenn. Crim. App. 1987). The defendant is not entitled to relief on this issue.

DETERMINING RESTITUTION FOR PSYCH. COUNSELING AND TREATMENT:

State v. Donald Wayne Haynes, No. M202200828CCAR3CD, 2023 WL 4947926 (Tenn. Crim. App. Aug. 3, 2023).

The Defendant pleaded guilty to two counts of attempted aggravated sexual battery in exchange for an effective sentence of eight years to be served on probation. At a subsequent restitution hearing, the trial court ordered the Defendant to pay $42,000 in

restitution to the victim in monthly installments of $500. On appeal, the Defendant contends that there was insufficient evidence of pecuniary loss to support an order of restitution. The victim testified about her pain meds, counseling, etc., but did not have documentation. She was asked "But sitting here today you can't tell the Judge accurately what you actually paid. You're just estimating based on that it's the best you can do." The victim responded, "Absolutely." The victim stated that the amounts she testified to were a "very fair estimate." She stated that she could not remember her expenses from thirty one years ago but was certain that she "did pay it."

She testified that the total amount of her expenses for mental health treatment was $179,500. On re-cross, the victim admitted that she first claimed $411,000 was her pecuniary loss and later changed it to $383,000 but was now testifying to a total amount of $179,500. The victim requested restitution for expenses in three categories: (1) psychiatric visits, (2) medication, and (3) counseling. The victim provided no documentation during the hearing on this matter but relied solely on her testimony. In addition to failing to find the victim's actual pecuniary loss, the trial court did not identify what testimony the trial court found credible in support of ordering $42,000 as a "reasonable" figure. An order of restitution may not be based on arbitrary estimates. The Court held that it is the victim's responsibility to provide sufficient facts about the loss for the trial court to make a reasonable determination about the amount of pecuniary loss, and the mental health treatment expenses paid could not be established through the victim's testimony alone. She candidly admitted that she had no recollection of the costs associated with her treatment or specific dates as to when her treatment began or ended with a given provider. The Court further held that "We do not think a new hearing is appropriate in this case because the victim was given ample time to present sufficient proof of her pecuniary loss. The victim either did not have the proper documentation or elected not to produce what documentation she possessed. Therefore, an additional hearing is not necessary. The Defendant argues that we should vacate the restitution award entirely given the lack of evidence supporting the order of restitution. We are not persuaded that this is the appropriate remedy either. In this case, we remand to the trial court to enter an order of restitution that contains: (1) a finding as to the victim's pecuniary loss based upon the evidence presented at the February 9, 2022 hearing. Because the only evidence presented was the victim's testimony, the trial court must determine what credible testimony offered by the victim is reliable evidence that supports a reasonable determination of the victim's pecuniary loss, if any; and (2) a determination of how much of that amount the Defendant can reasonably be expected to pay; and (3) the appropriate restitution amount, if any. The trial court has stated that the evidence is insufficient, but, upon remand, should the trial court order restitution, the trial court should explain which credible evidence it relied upon to determine the victim's pecuniary loss, if any.

DENYING DIVERSION - MUST CONSIDER ELECTROPLATING FACTORS:

State v. Sarah N. Eakes, No. M2022-01275-CCA-R3-CD, 2023 WL 5605636 (Tenn. Crim. App. Aug. 30, 2023).

The Defendant pleaded guilty to one count of child neglect, and the trial court sentenced her to serve eighteen months in confinement and denied her request for both an alternative sentence and judicial diversion. In doing so, the State admitted on appeal that the trial court did not discuss or weigh the Electroplating factors, aside from arguably the circumstances of the offense, when denying judicial diversion. Instead, the trial court cited only the effect of the offense on the victim, found that it outweighed the defendant's lack of sustained intent (which is not an Electroplating factor), and denied judicial diversion. The court did not make factual findings or credibility findings. It did not discuss the defendant's amenability to correction, social history, physical or mental health, or the deterrence value of diversion. Likewise, the trial court did not weigh these factors, either in favor or against judicial diversion. For that reason, the Court could remand the case back for rehearing or conduct a de novo review if appropriate under the circumstances. In this case, the Court, rather than remanding the case back to the trial court, did a de novo review and granted diversion.

CONSECUTIVE SENTENCING - WILKERSON FACTORS - MUST STATE FACTS TO SUPPORT THESE FACTORS:

State v. Tondre Durpress Ragland, No. W2022-01303-CCA-R3-CD, 2023 WL 3947501 (Tenn. Crim. App. June 12, 2023),

The defendant was convicted of attempted second degree murder, possession of a firearm during the commission of a dangerous felony and aggravated assault, for which he received an effective sentence of twenty years in confinement. On appeal, the defendant contends the trial court erred in imposing partial consecutive sentences.

In determining whether to require the defendant to serve his sentences consecutively, the trial court first determined the defendant had no hesitation about committing a crime in which the risk to human life was high. See Tenn. Code Ann. § 40 35 115(b)(4). As a result, the trial court determined the defendant was a dangerous offender. The trial court then proceeded to consider the Wilkerson factors. Although the trial court stated on the record that an extended sentence was necessary to protect the public from further criminal conduct by the defendant and that the length of the defendant's sentence reasonably related to his offenses, it failed to state the specific facts it found to satisfy its conclusion. The mere recitation of the Wilkerson factors is not a substitute for the requirement of making specific findings. A mere statement that confinement is necessary to protect society and that the severity of the sentence is reasonably related

to the convicted offenses, without more, is insufficient to justify consecutive sentences under Wilkerson; Wilkerson, 905 S.W.3d at 938 (holding the trial court must make "specific findings regarding the severity of the offenses and the necessity to protect society before ordering consecutive sentencing under Tenn. Code Ann. § 40 35 115(b)(4)," Because the trial court failed to make the required findings regarding factor (4), this factor does not support consecutive sentencing. When trial courts fail to include the two additional findings before classifying a defendant as a dangerous offender, they have failed to adequately provide reasons on the record to support the imposition of consecutive sentences. Accordingly, this Court cannot defer to the trial court's exercise of discretion nor presume that the imposition of consecutive sentences was reasonable.

MOTION TO SUPPRESS - DOG SNIFFING - HEMP OR MARIJUANA?

State v. Andre Jujuan Lee Green, No. M2022-00899-CCA-R3-CD, 2023 WL 3944057(Tenn. Crim. App. June 12, 2023)

The defendant filed a motion to suppress asserting that the search of his backpack was conducted without probable cause. More specifically, the defendant argued a canine sweep "is no longer valid" to provide probable cause for a search because a canine cannot distinguish between the smell of hemp, which is now legal, and marijuana, which is illegal. After a traffic stop, the officer smelled what he thought was marijuana and ordered the men out of the vehicle. Once the men were out of the vehicle, the officer made the decision to conduct an open air sniff of the vehicle with his police service dog, Arlo, who indicated on the vehicle. Then, when he inquired about the backpack between the defendant's feet, both the driver and the defendant denied ownership. Once the dog alerted on the vehicle and the officer informed the driver that he could be charged with anything found in the vehicle, the driver encouraged the defendant to talk. At that point, the defendant claimed that it was his brother's backpack and that he was unaware of its contents. A search of the backpack revealed a little less than an ounce of marijuana, a loaded Smith & Wesson nine millimeter handgun, Ziploc bags, and a working scale.

The Court held that clearly, the totality of the circumstances surrounding the stop in conjunction with the alert by a trained drug detection canine is sufficient to establish probably cause to search the vehicle and the defendant's backpack. This conclusion is consistent with the approach outlined by the United States Supreme Court in Florida v. Harris, 568 U.S. 237, 248 (2013), "whether all the facts surrounding a dogs alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." The trial judge's order suppressing was reversed and the indictments were reinstated.

2023 CRIMINAL PUBLIC ACTS

PC 2, eff. 4/1/23, amends 7-51-1407 to create an offense for a person who engages in an adult cabaret performance on public property or in a location where the adult cabaret performance could be viewed by a person who is not an adult. First offense is an A misdemeanor; 2nd offense is an E felony. Declared unconstitutional my Judge Parker in June.

PC 20, eff. 1/1/24, amends 55-10-411(h) to redefine "Functioning ignition interlock device" as a device that: (A) Connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if a driver's blood alcohol level exceeds the calibrated setting on the device; (8) Employs technology capable of taking a photo identifying the person providing the breath sample, recording the date, time, and test result along with the photo of the person providing the breath sample and storing such information on the device for transfer to remote storage and reporting; and (C) On all new installations on or after January 1, 2024, employs global positioning system (GPS) technology that will geotag the motor vehicle's location whenever an initial startup test, a random retest, or a skipped test occurs, or when circumvention of the device is detected. The GPS technology shall not be used for continuous tracking of the vehicle.

PC35, eff. 3/14/23, amends 38-6-118(b) to allow a defendant or defendant's counsel, in addition to a judge or district attorney general, to request a certificate from the Tennessee bureau of investigation relative to a defendant's eligibility for pretrial diversion.

PC 41, eff. 7/1/23, amends 36-1-156 to authorizes the responding law enforcement officer or the district attorney general's office to extend criminal immunity to persons who are experiencing a subsequent drug overdose and who are seeking medical assistance. It originally only allowed immunity for the first overdose.

PC 64, eff. 7/1/23, enacts the "Sergeant Chris Jenkins Law." 55-7-1?? A person who operates a motor vehicle upon a public roadway while transporting a ladder on the motor vehicle or in an open bed or trailer commits an offense if the ladder falls onto the roadway and causes or contributes to a motor vehicle accident. It is a Class C misdemeanor, except, that if death or bodily injury results from the motor vehicle accident, then a violation of this section is a Class A misdemeanor.

PC 90, eff. 7/1/23, amends Title 62, Chapter 38 to prohibits the sale or distribution of tattoo and body piercing paraphernalia to minors.) "Body piercing paraphernalia" means equipment, needles, body ornaments, or other instruments used

or intended for use in piercing a part of the body for nonmedical purposes. Class A misdemeanor.

PC 103, eff. 3/31/23, amends 55-10-402(a)(2)(B)(ii) by changing from 25 to 17 the number of days of incarceration a person convicted of a second offense of driving under the influence of an intoxicant must serve before the person can participate in a substance abuse treatment program. However, 40-11-118(f)(1), is amended by adding that if "a person is charged with a third or subsequent offense of driving under the influence of an intoxicant under § 55-10-401 and the alleged offense involved the use of alcohol, then the judge or magistrate shall order the person, upon release on bail, to wear a transdermal alcohol monitoring device for a minimum period of ninety (90) days of continuous sobriety without any confirmed drinking or tampering events, unless the person's criminal case is resolved prior to the completion of the ninety-day period." Also, "Upon a third or subsequent conviction for violating § 55-10-401, involving the use of alcohol, the court shall order the person to wear a transdermal alcohol monitoring device for a minimum period of ninety (90) days of continuous sobriety without any confirmed drinking or tampering events upon release on probation. This requirement may be waived by the judge in the best interest of justice, if the person has already completed a ninety-day period of continuous sobriety as a condition of release on bail.

PC137, eff. 4/6/23, amends 40-32-101 (a)(1)(A)(ii) to state that all public records of a person who has been charged with an implied consent violation under § 55-10- 406 must, upon petition by that person to the court having jurisdiction in the previous action, be removed and destroyed without cost to the person if the violation was dismissed without cost. They are not eligible for expunction if, at the time of the offense of the implied consent violation, the person held a commercial driver license or a commercial learner permit, or any driver's license and the offense was committed within a commercial motor vehicle as defined in § 55-50-102.

PC 139, eff. 4/6/23, amends 24-7-123(a) expands the admissibility of a forensic interview to include statements made by a child under 18 years of age rather than under 13 years of age; expands admissible forensic interviews from statements made by a child describing sexual contact performed with or on the child by another to statements describing sexual or physically violent contact performed with or on the child by another or performed by a person with or on another and witnessed by the child. It now states as follows:
"Notwithstanding this part to the contrary, a video recording of a child by a forensic interviewer containing a statement made by the child under eighteen (18) years of age describing an act of sexual or physically violent contact performed with or on the child by a person or describing an act of sexual or physically violent contact performed by a person with or on another and witnessed by the child is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at any stage of a criminal proceeding of the person for any offense arising from the sexual or physically violent contact if the requirements of this section are met."

It also expands the type of interviewer allowed to include:

experience equivalent to three (3) years of full-time professional work in one (1) or a combination of the following areas: (a) Child protective services; (b) Criminal justice; (c) Clinical evaluation; (d) Counseling; (e) Forensic interviewing or other comparable work with children, or someone who had been supervised by an experienced forensic interviewer for a minimum of twenty (20) forensic interviews.

PC 142, eff. 7/1/23, amends 39-17-1309(b) to exempt from the offense of possessing or carrying a weapon on school property the possession or carrying of a pocket knife by a nonstudent adult on election day if the knife remains concealed at all times while the adult is on school property for the sole purpose of voting in an election for which the school is the adult's designated polling place.

PC 149, eff. 7/1/23, amends 39-17-1309 to allow to carry firearms on school property "All faculty, staff, and other persons who are employed on a full-time basis by a public institution of higher education; and (b) all faculty, staff, and other persons who are retired federal, state, or local law enforcement officers who served as a federal, state, or local law enforcement officer for at least twenty (20) years prior to retirement, retired in good standing as certified by the chief law enforcement officer of the organization from which the officer retired and are employed on a part-time basis by a public institution of higher education.

PC 155, eff. 7/1/23, amended the statutes for Especially Aggravated Kidnapping, Aggravated Rape and Rape by stating in each statute that "a person convicted of a violation of this section shall be punished as a Range II offender; however, the sentence imposed upon such person may, if appropriate, be within Range III but in no case shall it be lower than Range II." However, PC 283, passed April 17, 2023, and signed by the Governor 4/28/23, one week later, again amended the rape statute only stating as follows:

If the victim of the offense is at least thirteen (13) years of age but less than eighteen (18) years of age, rape is a Class B felony and … the defendant shall be punished as a Range II offender; however, the sentence imposed upon the defendant may, if appropriate, be within Range III but in no case shall it be lower than Range II.

It apparently repealed the new PC 155, so that Rape is only at least Range II if the victim is a minor between 13 and 18.

PC 179. Eff. 7/1/23, amends 55-8-151 to allow schools to install cameras in the rear of school buses to use as proof that defendants pass them illegally without stopping when the bus stops. Failure to stop is an A misdemeanor, fine only ($250-$1000 for first, $500-$1000 for second offense) but an E felony if someone is struck and a C felony if someone is struck which results in death.

PC 182, eff. 4/28/23, amends 40-30-114, to grant the attorney general and reporter, in cases where a defendant has been sentenced to death and is seeking collateral or direct review of a conviction or sentence, exclusive control over the state's defense of the request for review and reimbursement for expenses incurred in connection with the request/petition.

PC 189, eff. 7/1/23, creates the crime of "parentage fraud" if the defendant (1) seeks to legally establish another individual as the biological parent of a child in the person's custody with intent to deprive the individual of property or to prevent the child's actual biological parent from exercising parental rights to the child and the person knows or reasonably should know that the individual is not the child's biological parent; or (2) Seeks to be legally established as a child's parent based on the person's status as a biological parent of the child and the person knows or reasonably should know that the person is not the child's biological parent. It is an exception to this offense if (1) the child involved was conceived as a result of rape, (2) The child involved has been or is in the process of being adopted; or (3) The victim of the offense was the defendant's spouse at the time of the offense. Class B misdemeanor.

PC 209, eff. 7/1/23, changes the definition of "sexual activity" in Sexual Exploitation of a Minor, Agg. Sexual Exp of a Minor, Esp Agg Sex. Exp. Of a Minor and Exploitation of a minor by electronic means to get rid of the word "lascivious." Instead of "lascivious exhibition of the female breast or the genitals, buttocks, anus, or pubic or rectal area of any person," it is now "exhibition of the female breast, genitals, buttocks, anus, or pubic or rectal area of any person that can reasonably be construed as being for the purpose of the sexual gratification of the defendant or another."

PC 212, eff. 4/25/23, creates 38-1-801, et seq. to create "Sexual Assault Response Teams."
"(a) By January 1, 2024, each local law enforcement agency must begin collaboration between existing law enforcement agency resources and available community resources as an adult sexual assault response team (SART), which will assist in identifying gaps in service and improving response systems for sexual assault involving adult victims that occur within the agency's jurisdiction. A team may meet, in person or by telephone or virtual means, periodically as needed.
(b) A team may include members who respond to and work with victims and have expertise in a variety of disciplines relevant to sexual assault response. A SART may include, but is not limited to: (1) Victim advocates; (2) Law enforcement; (3) Criminal prosecutors; (4) Healthcare services providers; and (5) Mental health services providers.
(c)(1) Except by court order or as provided in subdivision (c)(2), communications occurring at a SART meeting are confidential and not subject to [the Tenn. Pub. Records Act]. (2) This subsection (c) does not prevent the district attorney general and counsel for a defendant from providing to each other in a pending criminal case, where

the constitutional rights of the defendant require it, information which otherwise would be held confidential under this subsection (c)."

PC 217, eff. 7/1/23, amends restitution for vehicular homicide as follows:

If the offense is committed on or after 7/1/23, notwithstanding T.C.A. § 40-35-304, a surviving parent or guardian who is awarded restitution may convert the restitution order to a civil judgment at any time by filing a certified copy of the restitution order with an appropriate civil court having jurisdiction over the total amount of restitution ordered. The civil court may convert the restitution order into a civil judgment in the manner provided in T.C.A. § 40-35-304(h).

If the surviving parent or guardian of the child brings a civil action against the defendant prior to the sentencing court ordering child maintenance payments as restitution and the surviving parent or guardian obtains a judgment in the civil suit, then any maintenance ordered must be offset by the amount of damages that has been received by the surviving parent or guardian prior to the sentencing court entering an order of restitution.

If the court orders the defendant to make child maintenance payments as restitution under this section and the surviving parent or guardian subsequently brings a civil action and obtains a judgment, then the child maintenance order must be offset by the amount of damages received by the surviving parent or guardian pursuant to the civil action.

PC218, eff. 7/1/23, amend 70-4-123 and 70-4-103(b) to state that a person who is not otherwise prohibited by law from possessing a handgun may carry a handgun as defined in§ 39-11-106, so long as the handgun is not used for the taking of game, and that it is unlawful for a person hunting big game with a bow and arrow to be in possession of a firearm or be accompanied in hunting by a person possessing a firearm during the archery-only deer season.

PC 219, eff. 7/1/23, adds to the grounds upon which initiation of termination of parental or guardianship rights may be based in 36-1-113 that the parent has been confined in a correctional or detention facility of any type, by order of the court as a result of one or more criminal acts, under a sentence of six or more years, and one or more other grounds in current law exists.

PC 222, eff. 4/25/23, amends 49-5-413 to prohibit public charter schools and the state board of education from employing individuals found by DCS to have committed an act of child abuse in the same manner as other educational entities; the state board is prohibited from granting, reactivating, or restoring an educator license or temporary teaching permit for such individuals and adds the state board and public charter schools

to the list of educational entities to which the department is required to make certain disclosures when one of its employees is alleged to have committed an act of child abuse.

PC 226, eff. 7/1/23, amends 44-8-408 to add that a person convicted of a violation of this section in which the dog running at large causes bodily injury, serious bodily injury, or death of another, or damage to the property of another, shall be ordered by the court to make full restitution for all damages that arise out of or are related to the offense, including incidental and consequential damages incurred by the person or property owner.

PC 237, eff. 7/1/23, requires district attorneys general to designate one assistant district attorney general as the lead prosecutor in cases involving crimes committed against children; requires the Tennessee bureau of investigation to provide annual training to assistant district attorneys designated as lead prosecutors in crimes committed against children.

PC 238, eff. 7/1/23, makes it a crime for a foster parent from a kinship placement to knowingly allow a child in the foster parent's care to visit with the child's parent if the foster parent had knowledge of a current court order prohibiting the parent from visiting with the child. A first violation is a Class C misdemeanor punishable by a fine only. A second or subsequent violation is a Class B misdemeanor.

PC 241, eff. 4/25/23, amends 37-1-107, the procedure for appealing a magistrate's order for a new hearing before the juvenile judge, as follows:
(1)
(A) A party may, within ten (10) days after entry of the magistrate's order, file with the court a written request for a review of the record by the juvenile court judge. The request must include written exceptions to the magistrate's findings, conclusions, or recommendations, and specify the findings to which the party objects, the grounds for the objection, and the party's proposed findings, conclusions, or recommendations.
(B) The juvenile court judge shall not grant a review when the party requesting the review did not participate in the hearing before the magistrate in good faith.
(C) A review by the juvenile court judge is not a hearing and is limited to those matters for which exceptions have been filed.
(D) The juvenile court judge shall afford the magistrate's findings, conclusions, and recommendations a presumption of correctness. The judge shall modify the magistrate's findings only when, after review, the judge makes a written finding that an abuse of discretion exists in any or all of the magistrate's findings, conclusions, or recommendations.
(E) The judge shall issue written findings, conclusions, or recommendations, or may schedule the matter for a new hearing of any issues the judge deems necessary, with notice to all parties.

(2) Notwithstanding subdivision (d)(1), no later than ten (10) days after the entry of the magistrate's order, the judge may, on the judge's own initiative, order a new hearing of any matter heard before a magistrate.
(3) If a child pleads guilty or no contest before a magistrate in a delinquency or unruly proceeding, then the child waives the right to request a review by the juvenile court judge, and the judge shall not order an adjudicatory hearing or review in such proceeding. If the plea includes an agreement as to disposition, then the child also waives the right to request a review before the HB1186 judge regarding disposition, and the judge shall not order a hearing or review in such proceeding.
(4) This section does not alter the court's jurisdiction to hear postdispositional issues, including, but not limited to, judicial reviews or collateral challenges.
(5) If a delinquency or unruly petition is dismissed by the magistrate after a hearing on the merits, then there is no right to a hearing or review.
(6) Unless the judge orders otherwise, the order of the magistrate is the order of the court pending any review or hearing.
(e) If no review before the judge is requested, or a review is expressly waived by all parties within the specified time period, then the magistrate's order becomes the order of the court. A party may appeal the order pursuant to§ 37-1-159.

PC 242, eff. 7/1/23, amends 39-17-311(a), is amended by allowing the desecration of a place of worship or burial or a state or national flag to be done "intentionally, knowingly, or recklessly" instead of just intentionally.

PC 243, eff. 7/1/23, creates 55-10-427, a new offense, as follows:
(a) It is an offense for a person to knowingly provide a motor vehicle to another person who the provider of the vehicle knows or reasonably should know is under the influence of an intoxicant, marijuana, controlled substance, controlled substance analogue, drug, substance affecting the central nervous system, or combination thereof.

(b) It is an offense for a person to knowingly provide a motor vehicle to another person who the provider of the vehicle knows or reasonably should know is a person whose driver license has been suspended or revoked by the court pursuant to § 55-10-404 unless:
(1) The person receiving the motor vehicle has been granted a restricted driver license pursuant to § 55-10-409; and
(2) The motor vehicle is being provided for a purpose permissible under the court order granting the person's restricted driver license.

It is a Class A misdemeanor. First offense carries a minimum of 48 hours in jail. Second offense, 72 hours minimum in jail. Third offense, 7 days minimum consecutive in jail.

PC 255, eff. 4/28/23, sets out the procedure for paying experts in intellectual disability to be executed cases. Payment must be made from funding provided for indigent defendants' counsel as set forth within the annual appropriations act. The payment must be made only after receipt by the administrative director of the courts of a certified copy of the order and only upon receipt of a bill from the expert. The bill must set forth the name of the petitioner, the amount of the bill, and the name and address of the expert to which payment is to be made.

PC 260, eff. 7/1/23, amends 40-11-139 to require the court to place a defendant for whom a bench warrant is issued due to failure to appear on a felony or a Class A or Class B misdemeanor that is violent or sexual in nature as determined by the court, or who is charged with a failure to appear on any available state or federal list or database as a fugitive from justice, within 10 days of the defendant's failure to appear. A surety is not liable for any undertaking if the defendant has not been placed in such a database within the time required by law.

PC 264, eff. 7/1/23, Amends 37-5-206 to allow a juvenile court to transfer a juvenile 16 years of age or older to a criminal court of competent jurisdiction to be tried as an adult for committing the offense of escape from a youth development center (an A misdemeanor).

PC 270, eff. 4/28/23, adds a new statute to Title 24, Chapter 7, to protect a defendant’s statement regarding the use or possession of marijuana to certain licensed health providers that was made in the course or scope of the person's medical care for the purpose of obtaining medical advice on possible adverse effects of marijuana use in combination with other medications or medical treatment from being admissible as evidence in any criminal trial, hearing, or proceeding in which the person is a defendant.

PC 278, eff. 7/1/23, amends 39-17-902(a) to make it a Class E felony for a book publisher, distributor, or seller to knowingly sell or distribute obscene matter to a public school serving any of the grades K-12. It is a Class E felony with not less than a ten thousand dollar ($10,000) to one hundred thousand dollars ($100,000) fine.

PC 282, eff. 7/1/23, mandates that “victim advocates” (employee or volunteer of a domestic violence shelter, crisis line, or victim services provider who provides services for victims of domestic violence, sexual assault, stalking, or human trafficking and who has completed a minimum of twenty (20) hours of relevant training), cannot disclose the following:
(1) A communication, including verbal, written, or otherwise stored information, received by the advocate from a victim;
(2) Records regarding a victim stored by the advocate in the course of business;
(3) Counseling that a victim received;
(4) Crisis intervention services that a victim received; or
(5) The location of the shelter that accommodated a victim.

This does not apply to advocates with child advocacy centers and child protective investigator teams. The court can compel disclosure if, upon the motion of a party, the court determines after an in-camera review that: (1) The information sought is relevant and material evidence of the facts and circumstances involved in an alleged criminal act that is the subject of a criminal SB 1205 proceeding or a proceeding brought by the department of children's services under title 37; (2) The probative value of the information outweighs the harmful effect of disclosure, if any, on the victim, the victim-advocate relationship, and the treatment services; and (3) The information cannot be obtained by reasonable means from any other source.
The victim may waive the privilege of the communication only by express written consent.

PC 286, eff. 7/1/23, amends 39-13-306 to create a sixth way to commit Custodial Interference, an E felony, by harboring or hiding a child knowing that that the child had been placed in the custody of the department of children's services pursuant to a protective or emergency court order entered by a court. It is expressly not a defense that the defendant had not been served with an actual copy of a protective custody order or emergency custody order.

PC 301, eff. 4/28/23, adds a new statute in Title 41, Chapter 2 requiring that as of 1/1/24. a prisoner of a county workhouse or jail who is released from custody on work release or otherwise allowed to leave the grounds of the county workhouse or jail for employment or to perform work in the community, whether paid or unpaid, to use an electronic monitoring device at all times when the prisoner is not on the grounds of the county workhouse or jail, and requires the employer or person utilizing the prisoner for work to pay the costs of the electronic monitoring device.

PC 302, eff. 7/1/23, amends 39-14-411 to change the punishment for Critical Infrastructure Vandalism to a C felony at a minimum if over $1,000 in damages.

PC 304, eff. 7/1/23, creates the following new Class A misdemeanor:
“It is an offense to possess a device, tool, machine, implement, or other item capable of programming a smart key or key fob with the intent to use it or allow it to be used to commit theft.”

PC 306, eff. 7/1/23, creates a new enhancement factor in sentencing:
“The defendant committed the offense of aggravated assault, as defined in § 39-13-102(a), or attempted first degree murder, as defined in § 39- 13-202, on the grounds or premises of a healthcare facility … "healthcare facility" means a hospital licensed under title 33 or 68.”

PC 308, eff. 7/1/23, raises Voluntary Manslaughter to a Class B felony from a C felony.

PC 313, eff. 4/28/23, amends 39-15-213(a)(1), the definition of abortion, to exempt terminating an ectopic or molar pregnancy (when the fertilized egg does not make it down to the uterus) from that definition.

PC 315, eff. 7/1/23, allows expunction of an illegal voting or registration conviction after 15 years if no other convictions and all costs and fines have been paid.

PC 318, eff. 7/1/23, creates a new enhancement factor in sentencing, that the defendant committed an assaultive offense, criminal homicide, kidnapping, false imprisonment, robbery, or a sexual offense while engaged in the performance of official duties as a law enforcement officer.

PC 326, eff. 4/28/23, requires by January 1, 2024, that each law enforcement agency develop and enforce a policy that prohibits an officer from using a drone or other substantially similar device as a weapon under any circumstances while in the exercise of the officer's official duties; but permits an officer qualified to operate a drone to utilize a drone or a substantially similar device for the purpose of remotely detonating a bomb or similar incendiary or explosive device.

PC 329, eff. 5/5/23, prohibits a court clerk, upon request by an individual on a payment or installment plan, from requiring the individual to pay outstanding court-assessed fines, fees, taxes, or costs arising from a criminal proceeding during the 180-day period following the individual's release from a term of imprisonment sentence of one year or more, excluding restitution owed to a victim and certain fines, fees, taxes, or costs that have been sent to a collection agency.

PC 330, eff. 5/5/23, allows for expungement of public records, without cost, of a person who has been charged with a felony or a misdemeanor if the charge is abated by death.

PC 334, eff. 7/1/23, requires mental health evaluation and treatment for juveniles who commit aggravated animal cruelty.

PC 347, eff. 7/1/23, creates a Class A misdemeanor for a warden or chief administrative officer employed by a penal institution, who knows that certain offenses have occurred within the institution, to fail to report such offenses to the district attorney general for the judicial district in which the institution is located and the district attorney general who prosecuted the offense for which the offender is incarcerated within five business days of becoming aware of the offense being committed.

PC 349, eff. 7/1/23, amends 39-17-315 to add placing an electronic tracking device on the victim or victim's property as another way of committing stalking. This

does not include the installing, concealing, or placing of an electronic tracking device by or at the direction of a law enforcement officer in furtherance of a criminal investigation that is carried out in accordance with applicable state or federal law.

PC 365, eff. 7/1/23, amends 40-11-115. -116 and -148 to state that a person charged with a Class A or B felony, aggravated assault, aggravated assault against a first responder or domestic assault if the violation is a felony offense, shall not be released on bail without the approval of a general sessions judge, criminal court judge, or circuit court judge having jurisdiction. If the defendant is charged with another crime while on bond or ROR for an offense, "the magistrate or judge shall set the defendant's bail on each new offense in an amount not less than twice that which is customarily set for the offense charged."

PC 375, eff. 7/1/23, amended 39-13-204 to add the following regarding expediting the death penalty:

(l) If the jury has imposed a sentence of death, then the jury may determine whether the defendant's sentence must be expedited pursuant to this subsection (l), and, if the jury unanimously determines that an expediated sentence is required, return such findings to the judge upon a form provided by the court. A defendant's sentence may be expedited if the jury finds that:
(1)
(A) The offense involved the death of three (3) or more victims whom the defendant killed using one (1) or more deadly weapons;
(B) The defendant committed the offense by using one (1) or more deadly weapons on the grounds of a public or private elementary, secondary, or postsecondary school; or
(C) The defendant committed the offense by killing a first responder, as defined in § 39-13-116, who was acting in the course of the first responder's employment at the time of the offense; and
(2) The evidence presented at trial proving the defendant's guilt was incontestable, which may include, but is not limited to:
(A) Video evidence depicting the defendant committing the offense; or
(B) Deoxyribonucleic acid evidence linking the defendant to the offense.

The PC also amends 40-23-114 to state that "If the person has been sentenced to the punishment of death and the jury has determined that the sentence must be expediated, then the sentence must be carried out within thirty (30) business days of the conclusion of any appeal and the exhaustion of all available methods of post-conviction relief."

PC 383, eff. 7/1/23, adds child endangerment to BUI, enhancing its punishment similar to our DUI charges in 38.01. It also adds mandatory fines to the punishment ($350-$1,500 for a first, $600-$3,500 for a second, etc.), similar to the DUI fines. It also

changes the definition of "Drugs producing stimulating effects on the central nervous system" to the same one in the DUI statute.

PC 386, eff. 7/1/23, the "One Pill Will Kill" Act, amends 39-17-417(c)(1) to make manufacturing, delivering, or selling fentanyl, carfentanil, remifentanil, alfentanil, or thiafentanil a Class B felony along with cocaine and methamphetamine if the amount involved is point five (0.5) grams or more of any substance containing those drugs (they are only C felonies now).

PC 392, eff. 5/11/23, requires the bureau to develop a request for certification form to be completed by the court and submitted to the bureau prior to entering an order of expunction and requires the bureau to determine and certify whether a submitted offense is eligible for expunction; prohibits entry of an order of expunction on or after January 1, 2024, unless a certificate of eligibility from the bureau is attached to the order of expunction.

PC 402, eff. 5/11/23 and 1/1/24, creates the "inmate disciplinary oversight board" for the purpose of granting or denying sentence credits for good institutional behavior and determining whether sentence credits previously awarded should be removed for commission of certain disciplinary offenses.

PC 412, eff. 7/1/23, creates 39-17-456, an A misdemeanor for possessing xylazine, an animal tranquilizer used for large animals like horses, without a valid prescription from a licensed veterinarian. Apparently, some are using it as a substitute for opium, but it is deadly in large amounts and has horrible withdrawal symptoms. To manufacture, deliver, or sell or possess for that purpose is a C felony.

PC 413, eff. 7/1/23, amends 39-17-315 to add a stalking victim's being 65 or older as another way of turning stalking into aggravated stalking.

PC 416, eff. 7/1/23, amended to make vehicular homicide by reckless conduct and by drag racing committed on or after 7/1/23 a 100% offense and the defendant "shall serve one hundred percent (100%) of the sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn." For offenses committed on or after 7/1/22, but prior to 7/1/23, it was a 100% crime with the ability to earn 15% credits toward release. Now all 4 vehicular homicides are at 100% with no credits toward release.

PC 427, eff. 7/123, requires the superintendent or jail administrator to notify the department of corrections of the amount of sentence reduction credits for good institutional behavior that a convicted felon should receive for the felon's time incarcerated prior to imposition of sentence. Formerly the superintendent or jail administrator would have to object to an award of credits at the rate of eight days for each month served to have it changed.

PC440, eff. 7/1/23, amends 39-13-102(e)(1)(A)(2) so that if an Aggravated Assault was by strangulation or attempted strangulation and the victim was pregnant, it becomes a Class B felony instead of a C felony.

PC 459, eff. 7/1/23, amends 40-39-207(a) to remove those convicted of criminal exposure to HIV from having to register as a sex offender, and allows those that have to apply to be removed.

PC 481, eff. 7/1/23, allows a court to sentence a defendant convicted of two or more criminal offenses to consecutive sentences if the defendant is sentenced for criminal offenses involving more than one victim and the court finds that a separate consecutive sentence for each offense is in the interest of justice.

PC486, eff. 7/1/23, amends 1-3-105 to define “sex,” which means “a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex. As used in this subsection (c), "evidence of a person's biological sex" includes, but is not limited to, a government-issued identification document that accurately reflects a person's sex listed on the person's original birth certificate.

PC 487, eff. 7/1/23, amends 39-12-202 thru -205 by simplifying the elements of the RICO act, changing the culpable mental state by dropping “with criminal intent,” eliminating collection of unlawful debts as an element, adding many more predicate offenses such as sex trafficking, and making attempting or conspiring to commit the offense a Class B felony, the same punishment as committing it.