**TENNESSEE JUDICIAL CONFERENCE**
**October 16, 2024**

# *CRIMINAL LAW UPDATE: 2023-2024*

Presented by:

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Judge, Criminal Court
Div. VIII, 30th Judicial District at Memphis

W. Mark Ward
Senior Judge
State of Tennessee

## *Table of Contents*

## *CASES PENDING IN TENNESSEE SUPREME COURT*

**AGGRAVATED ASSAULT: "INVOLVED THE USE OR DISPLAY OF A DEADLY WEAPON"; VICTIM AWARENESS; CAUSATION:**
**Argued May 22, 2024**
State v. William Rimmel, III, M2022-00794-SC-R11-CD

**CCA Opinion**

Defendant was convicted of attempted aggravated assault, reckless endangerment, attempted reckless endangerment, vandalism and attempted burglary of an automobile. Facts: Road rage incident on I-24 in which Defendant was riding a motorcycle and apparently became upset at the victim, who was driving a car. As he was riding his motorcycle, among other things, he kicked the driver's side door of the victim's car, motioned for her to pull over, and attempted to force her off the road. He and another motorcyclist eventually were able to force the victim to stop, after which, the Defendant beat the hood of the victim's car and began slamming her passenger side window with his fist; and then his foot. He then pulled an object out of his pocket and broke the window. He later admitted to an officer that the object was a loaded handgun. At trial, Defendant testified that he intended to use the weapon as a "tool" to break the window. Trial judge granted post-trial judgment of acquittal on attempted reckless endangerment, finding that offense is not recognized in Tennessee.

Defendant challenges the sufficiency of the evidence to support his conviction for attempted aggravated assault. "A person commits aggravated assault who …[i]ntentionally or knowingly commits an assault as defined in 39-13-101, and the assault…[i]nvolved the use or display of a deadly weapon." T.C.A. §39-13-102(a)(1)(iii).

Defendant argues that because the victim did not see Defendant's gun, she did not perceive a threat sufficient to put her in fear of imminent bodily injury. Evidence was sufficient. "A rational juror could certainly have concluded that Defendant took a substantial step toward intentionally causing [victim] to reasonably fear imminent bodily injury and that he used a deadly weapon in doing so.

Defendant also challenges the sufficiency with regard to reckless endangerment arguing that he never put the victim in danger of death or serious bodily injury. A person commits reckless endangerment "who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury. T.C.A. §39-13-103(a). If the offense is committed with a deadly weapon, it becomes a Class E felony. T.C.A. § 39-13-103(b)(2). Gun could have discharged. Evidence was sufficient.

**Rule 11 granted: "Whether the convictions for attempted aggravated assault with a handgun and reckless endangerment with a handgun where the victim is unaware of the handgun conflict with the Supreme Court's opinion and other opinions of the Court of Criminal Appeals that the victim must be reasonably in**

**fear of imminent bodily injury?"** (Referring to cases that say in dicta that the deadly weapon must "cause" the fear…..)

**"Within the sufficiency inquiry, the Court is particularly interested in whether the evidence satisfied the 'involved the use or display of a deadly weapon' element of attempted aggravated assault and the 'committed with a deadly weapon' element of felony reckless endangerment."**

**(1) Aggravated assault**

T.C.A. 39-13-102(a)(1) A person commits aggravated assault who:
(A) Intentionally or knowingly commits an assault as defined in §39-13-101, and the assault:
(iii) Involved the use or display of a deadly weapon;…

T.C.A. 39-13-101(a) A person commits an assault who:
(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury;…

**Note:** Aggravated assault does not require fear of ***imminent death or serious bodily injury***.

***Questions*:**

Were the actions of the Defendant sufficient to cause reasonable fear of imminent bodily injury?

Did the assault "involve the use or display of a deadly weapon"?

For the assault to "involve" either the "use" or "display" of a deadly weapon, does the victim have to be aware that the deadly weapon is being used or displayed?

Is there a "causation" requirement, i.e. does the fear of bodily injury have to be caused by the deadly weapon?

***Aggravated Assault Legislative History:***

**1932 Code:(possession and intent to intimidate)** If any person assaults and beats another with a cowhide, stick, or whip, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person assaulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not less than two (2) years nor more than ten (10) years.

**1973 Code Commission (proposed draft never adopted) (uses a deadly weapon): 39-1402(a)(2):** An individual, corporation, or association commits aggravated assault, if he commits assault as defined in 39-1401, and:
He ***causes*** serious bodily injury to another; or
He ***uses a deadly weapon***.

**39-1401(a)(2):** An individual, corporation, or association commits an assault if: he intentionally or knowingly ***causes*** another to fear imminent bodily injury.

*First real aggravated assault statute:*
**1977 Tenn. Pub. Acts, ch. 142 (codified as 39-2-101(b)(display or victim awareness**): Any person who:

(1) Attempts to cause or ***causes*** serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
(2) Attempts to ***cause*** or willfully or knowingly ***causes*** bodily injury to another with a deadly weapon;
(3) Assaults another ***while displaying a deadly weapon or while the victim knows such a person has a deadly weapon in his possession***….is guilty of the offense of aggravated assault.

Under this statute see State v. Carter, 681 S.W.2d 587 (Tenn. Crim. App. 1984): Victim was struck from behind and did not see the weapon. "This evidence supports the jury's finding that the defendant displayed the blackjack when he struck the victim with it. The word "display" is defined by the Random House College Dictionary, Revised Edition, as meaning 'to show, exhibit, make visible…' ***The defendant's open and visible use of the blackjack was a display of the weapon, regardless of whether the victim or any other witnesses saw it. The weapon was there to be seen had anyone happened to look in that direction."*** See also State v. Beasley, 1990 WL 26760 (Tenn. Crim. App. 1990).

**1989 Tenn. Pub. Acts, ch. 591 (codified as T.C.A. 39-13-102(a)(1)(B)(uses):** A person commits aggravated assault who….[i]ntentionally or knowingly commits an assault and ***uses*** a deadly weapon.

**1990 Tenn. Pub. Acts, ch. 1030 (codified as T.C.A. 39-13-102(a)(1)(B)(uses or displays):** A person commits aggravated assault who….[i]ntentionally or knowingly commits an assault and ***uses or displays*** a deadly weapon.

**1993 Tenn. Pub. Acts, ch 306 (uses or displays):** (a) A person commits aggravated assault who:
(1) Intentionally or knowingly commits an assault as defined in Section 39-13-101 and:
(A) ***Causes*** serious bodily injury to another; or
(B) *Uses or displays* a deadly weapon.

**2011 Tenn. Pub. Acts, ch. 401 (uses or displays but "causation" explicit with regard to strangulation**): (a) A person commits aggravated assault who:
(1) Intentionally or knowingly commits an assault as defined in Section 39-13-101 and:
(A) ***Causes*** serious bodily injury to another;
(B) ***Uses or displays*** a deadly weapon; or
(C) Attempts or intends to ***cause*** bodily injury to another by strangulation;…

**2013 Tenn. Pub. Acts, ch. 461 (codified as T.C.A. 39-13-102: (adds word "involved" the use or display): (a)(1)**A person commits aggravated assault who:
(A)Intentionally or knowingly commits an assault as defined in §39-13-101, and the assault:
(i) ***Results*** in serious bodily injury to another;
(ii) ***Results*** in the death of another;
(iii) ***Involved*** the use or display of a deadly weapon;
(iv) Was ***intended*** to cause bodily injury to another by strangulation…..;

**Current law (2015 Tenn. Pub. Acts, ch. 306) (same but removed causation from strangulating and replaced was intended with involved"):**
**T.C.A. 39-13-102: (a)(1)** A person commits aggravated assault who:
(A) Intentionally or knowingly commits an assault as defined in §39-13-101, and the assault:
(i) Results in serious bodily injury to another;
(ii) Results in the death of another;
(iii) Involved the use or display a deadly weapon;
(iv) ***Involved*** strangulation or attempted strangulation;

**Summary: Causation:** The legislature has modified the aggravated assault statute over the years. First, all the words of "causation" have been replaced with either "results in or "involved." The legislature knows how to insert words of causation and has over the years but no such language has ever been associated with the "deadly weapon" prong of the statutory offense.

**Victim awareness:** The 1977 statute (which was the first) specifically punished causing fear of bodily injury by either the **"display"** of a deadly weapon **or when the victim is aware** the defendant is in possession of a deadly weapon. Victim awareness was a requirement of the second element, but not the first "display."

***Subsequent amendments:***

1989: "uses"
1990: "uses or displays"
2013: "involved the use or display"
The current statute contains no language requiring victim awareness.

***Cases relied upon by Defendant that suggest a causation requirement:***

State v. Hatfield, 130 S.W.3d 40 (Tenn. 2004): Defendant was indicted for causing bodily injury by use of a deadly weapon. The issue before the Court was whether felony reckless endangerment was a lesser included offense. Court held that when aggravated assault is charged as actually causing bodily injury, felony reckless endangerment is a lesser included offense. Defendant was not charged with causing reasonable fear of bodily injury, but Justice Barker included some language in describing the then elements of aggravated assault as ***"intentionally or knowingly causing another to reasonably fear imminent bodily injury by use of a deadly weapon."*** From this loose language…he now contends that the present aggravated assault statute requires that the reasonable fear in an aggravated assault must be caused by the deadly weapon**. Note:** There was no issue of "causation" in this case and statute at the time required "causation" as to "causing serious bodily injury."

State v. Cox, 1999 WL 1179578 (Tenn. Crim. App. 1999): "Under Tennessee law, a person commits Class C felony aggravated assault when he or she intentionally or knowingly ***displays or uses a deadly weapon to cause*** another to reasonably fear imminent bodily injury." *Issue in case was whether weapon was used or displayed, not causation.*

State v. Franklin, 130 S.W.3d 789 (Tenn. Crim. App. 2003): "One who intentionally or knowingly ***displays a gun to another, and thereby causes*** the other to reasonably fear imminent bodily injury, has committed an aggravated assault." *Again, no issue of causation, just a lesser included offense case.*

**Is there a "causation" requirement, i.e. does the fear of bodily injury have to be caused by the deadly weapon?**

To the extent that these old cases which are based on former statutes imply, in dicta, the "fear" has to be caused by the "deadly weapon," the cases are in conflict with the existing aggravated assault statute that places no such causation element in the offense. Fact that court used this imprecise language is explained, in part, by the fact that at the time, "causation" was a required element of actually inflicting serious bodily injury.

**For the assault to "involve" either the "use" or "display" of a deadly weapon, does the victim have to be aware that the deadly weapon is being used or displayed?**

The case now before the Tennessee Supreme Court "involved" the "use" and "display" of a deadly weapon. Although the legislature at one time made victim awareness an element of the offense, it is not an element under the current statute. Since a gun is a deadly weapon, regardless of its intended use or the manner of its use, the Defendant's subjective intent is of no consequence. Furthermore, since this is a sufficiency case, the jury was free to reject the Defendant's innocent explanation.

**Remember:** State v. Thorpe, 463 S.W.3d 851 (Tenn. 2015): Trial court may include an instruction on "attempt" if the charged offense has an intent element even though the proof fairly raises a completed offense. In such cases, proof sufficient to support a conviction for a completed offense would also support a conviction for attempt to commit the offense. If evidence is sufficient to support an aggravated assault it is deemed sufficient to support an attempted aggravated assault. *Squabbling over whether the Defendant intended to commit the aggravated assault when he in fact actually committed it, is a red herring.*

**Reckless endangerment:**

A person commits reckless endangerment "who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury. T.C.A. §39-13-103(a). If the offense is committed with a deadly weapon, it becomes a Class E felony. T.C.A. § 39-13-103(b)(2)

You are in the driver's seat of your car. A person who you know is angry at you forces you off the road and attempts to break the driver's side window with his fists and feet. Your head is less than 12 inches from the glass. The person then takes out a metal object and breaks the glass in your window. You find out later it was a loaded gun.

***Questions:***
Is the conduct of the person reckless?

Are you in the zone of danger?

Is the driver in imminent danger of death or serious bodily injury?

Could gun have discharged?

Could breaking of glass and/or protrusion of metal object caused serious bodily injury?

**ROBBERY; CRIME OF VIOLENCE OR NOT:**
**Argued April 3, 2024**
State v. Christopher Oberton Curry, Jr., W2022-00814-SC-R11-CD

Defendant was convicted of, among other things, convicted felon in possession of a firearm. At trial, the State established evidence of the Defendant's "possession" and a certified judgment of conviction for **robbery**. Defendant contends the evidence is insufficient to support his conviction for being a felon in possession of a firearm, found in T.C.A. 39-17-1307(b)(1)(A), because the underlying conviction, robbery, is not a crime of violence as defined by T.C.A. 39-17-1301(3) (Crime of violence "includes"….). The State responds that although robbery does not appear in the statutory definition, the crimes listed in that definition are not an exclusive list. The State contends that the statute should be interpreted to include robbery. The Defense argues that robbery is not always committed by violence and thus its omission from the list by the legislature was intentional. Further, since no proof was introduced at trial as to the underlying facts, the evidence that the robbery was a crime of violence is insufficient.

**CCA notes when a statute uses the word "includes" followed by a list of specific items, the enumerated items are illustrative and not exclusive**. This principle combined with prior precedent, allows us to conclude that robbery is a crime of violence. Court points out that even if the crime was committed by placing the victim in "fear," it was "fear of present personal peril from violence offered or impending."

***After oral argument, the Court ordered the parties to file supplemental briefs addressing whether the trial judge's instructions properly defined the term "crime of violence."***

Trial judge instructed jury that the State had to prove: (1) that Defendant had been convicted of robbery and ….(4) that the conviction was for a felony crime of violence. Judge did not define "felony crime of violence."

T.C.A. § 39-17-1307"(b)(1) A person commits an offense who possesses a firearm as defined in §39-11-106, and:
(A) Has been convicted of a felony **crime of violence**, an attempt to commit a felony crime of violence, or a felony involving the use of a deadly weapon."

T.C.A. §39-17-1301 As used in this part, unless the context otherwise requires:
(3) "**Crime of violence**" includes any degree of murder, voluntary manslaughter, aggravated rape, rape, rape of a child, aggravated rape of a child, aggravated sexual battery, especially aggravated robbery, aggravated robbery, burglary, aggravated burglary. especially aggravated burglary, aggravated assault, kidnapping, aggravated kidnapping, especially aggravated kidnapping, carjacking, trafficking for commercial sex act, especially aggravated sexual exploitation, felony child abuse, and aggravated child abuse.

***Questions:***

Was evidence sufficient to support conviction?

Is 39-17-1301 meant by the legislature to be an exclusive list?

If not, does judge or jury decide if it is a "crime of violence."?
If not, and jury decides, how do you define crime of "violence" for jury?
If not, can Judge decide without violating Apprendi?
What test: Statutory elements? Sims procedure?

Even if it is an exclusive list, who decides if it is a "felony involving use of a deadly weapon."?
Statutory elements or facts?

Is criminally negligent homicide, reckless homicide, vehicular homicide, and vehicular assault a crime of violence?

If not, is there a vagueness problem?

**Legislative history:**

**1989 Criminal Code (1989 Tenn. Pub. Acts, ch. 591)**

Under the 1989 Code there were only nine crimes listed as "crimes of violence" and that definition was only linked to 39-17-304 which prohibited possession of restricted firearm ammunition. As such, originally the definition of "crime of violence" was not linked to 39-17-1307.

**39-17-301(2):** "Crime of violence" includes any degree of murder, voluntary manslaughter, aggravated rape, rape, especially aggravated robbery, aggravated robbery, burglary, aggravated assault or aggravated kidnapping." (listing nine crimes)

**39-17-304(a)(1):** "It shall be an offense for any person to possess, use or attempt to use restricted firearm ammunition while committing or attempting to commit a crime of violence."

**39-17-1307:** "(2)(A) The person possessed a handgun, and
Has been convicted of a ***felony involving the intentional or knowing use or attempted use of force*** or a deadly weapon……."

*As originally written, 39-17-1307 required a finding by somebody that defendant had been convicted of a felony involving the intentional or knowing use or attempted use of force or a deadly weapon……."*

**The word "violence" was not included, and it was not tied to any specific list of crimes**

**1990 Tenn. Pub. Acts, ch. 1029: (changed slightly adding word 'violence")**

"(b)(1) A person commits an offense who possesses a handgun and:
has been convicted of a felony ***involving the use or attempted use of force, violence, or a deadly weapon."***

**Cases decided under the old statute: 'felony involving violence"**

**Facilitation**: State v. Theus, 2017 WL 2972231 (Tenn. Crim. App. 2017) (although facilitation of first- degree murder does not contain element of violence, force, or use of a deadly weapon, since proof of the underlying felony is required and murder is a violent felony, we conclude facilitation is also.)

State v. Moses, 2022 WL 1038383 (Tenn. Crim. App. 2022) (conviction for ***aggravated burglary*** was a crime of violence under pre-2018 version which required a prior conviction for a felony involving use of force, violence or a deadly weapon. Note: Burglary was listed but not aggravated burglary. legislature has now added aggravated burglary to 39-17-1301(3).)

Consider State v. Dean, 2020 WL 1899612 (Tenn. Crim. App. 2020) (Defendant was indicted under old statute and charged with having a prior conviction for "Reckless Endangerment, a felony, involving the use or attempted use of violence." CCA says the crime is not specifically listed in definition of "crime of violence" and state offered no evidence that it was a crime of violence.)

**Restoration of Second Amendment Rights**: Fischer v. State, 2017 WL 2839742 (Tenn. App. 2017): (39-17-1351(j)(3) prohibits person who has been convicted of a felony involving the use or attempted use of force, violence, or a deadly weapon, from regaining the right to carry a firearm, even if other rights are properly restored**.**

**By 2017, the language "involving the use or attempted use of force, violence, or a deadly weapon" was linked not only to the crime of unlawful possession of a weapon,…….. but also to preventing the right to carry a firearm, even after a convicted felon's rights had been restored. i.e. upon restoration of rights a convicted felon could apply for a permit etc, but not if convicted of a crime "involving the use or attempted use of force, violence, or a deadly weapon." As you will see the next year, the Legislature placed the term "crime of violence" in Statutory construction:39-17-1307 for the first time:**

## *There was a major change in the statute in 2018.*

**2018 Tenn. Pub. Acts, ch. 903 (the current statute, 39-17-1307):**

"(b)(1) A person commits an offense who possesses a firearm as defined in §39-11-106, and:
Has been convicted of a felony crime of violence, an attempt to commit a felony crime of violence, or a felony involving the use of a deadly weapon."

**In summary, in 2018, the language of 39-17-1307 was changed from "involving the use or attempted use of force, violence, or a deadly weapon" to the current felony "crime of violence, an attempt to commit a felony crime of violence, or a felony involving the use of a deadly weapon."**

**Significantly, the same Public Act made the same change in language in 17-1351(j)(3) (can't get right to carry firearm if convicted of crime of violence, even if other rights restored) and 17-1352(a)(4) (permit revoked if arrested for crime of violence).**

**In addition, the same Public Act expanded the list of crimes that are included in definition of crime of violence contained in 39-17-1301(3) from (9) nine listed crimes to (21) listed crimes.**

***Questions:***
Does this history suggest that the intent of the legislature was to limit "crimes of violence" to those listed?
Considering that the phrase "crime of violence" is now used to limit the Second Amendment right to bear arms would the legislature intend a broad meaning to the phrase or a more narrow meaning?

Might the Legislature have made this change to avoid *Apprendi* and vagueness problems?

Do you think the decisions of the U.S. Supreme Court regarding the ACCA might have caused some of the legislative modifications?

***Statutory construction:***

"The more appropriate rule of construction is that a ***broad statutory definition*** followed by language stating that the definition "includes" specific items conveys the understanding that there are other includable items that have not been specifically mentioned. Norman J. Singer, Statutes and Statutory Construction § 47.07, at 152 (rev. 5th ed. 1992)." Kendrick v. Kendrick, 902 S.W.2d 918, 923–24 (Tenn. Ct. App. 1994) Accord Cohen v. Cohen, 937 S.W.2d 823, 828 n. 4 (Tenn. 1996) (citing Singer §47.07); Gragg v. Gragg, 12 S.W.3d 412, 415 (Tenn. 2000) (citing Kendrick); But see State v. Marshall, 319 S.W.3d 558, 561 (Tenn. 2010) (citing Gragg v. Gragg)

Question: Does T.C.A. §39-17-1301(3) contain a broad definition followed by "includes" or is there no definition followed by the word "includes"?

***Most courts recognize that the term "includes" can sometimes be a limiting term.***

Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 39–43, 849 S.E.2d 441, 448–50 (2020):

> In sum, this Court and other courts have construed "includes" as both a term of limitation and as a term of expansion in the context of different statutes. Particularly for this Court, the upshot of these cases is that "[a]s used in statutes, the word 'including' and the specific terms that follow it may serve to expand, to limit, or to confirm by illustration the meaning of a more general term that precedes it" and "[d]etermining the sense in which the legislature used 'including' in a particular statute depends on the exact language, context, and subject matter of the statute." Wetzel, 298 Ga. at 32, 779 S.E.2d 263 (citing Berryhill, 281 Ga. at 440-442, 638 S.E.2d 278). In context, "include," followed by seven specifically enumerated examples in OCGA § 31-6-40 (a), introduces an exhaustive list of "new institutional health services" for which a CON is required.

See also State v. Scheetz, 63 Kan. App. 2d 1, 19–21, 524 P.3d 424, 439–40 (2023), review granted (Apr. 20, 2023), rev'd in part, vacated in part, 318 Kan. 48, 541 P.3d 79 (2024)

The text of K.S.A. 2021 Supp. 60-455(g) provides "As used in this section, 'act or offense of sexual misconduct' includes:" It then lists in 10 subsections, 21 specific criminal offenses and statutory schemes. Recognizing the meaning of the word "includes" can be either exhaustive or illustrative depending on the context, the subject matter, and legislative intent, Court concludes that the statutory list comprises the universe of items that satisfy the definition.

## *ARMED CAREER CRIMINAL ACT*

It is a federal crime for a convicted felon to possess a firearm. 18 U.S.C. § 922(g). The Armed Career Criminal Act (ACCA) 18 U.S.C. § 924(e) is a federal law that increases the sentence of felons who have multiple convictions for violent felonies or serious drug offenses and then possess a firearm. A mandatory minimum sentence of 15 years in prison for felons with three or more prior convictions for violent felonies or serious drug offenses.

It defines violent felonies as those (1) that have an element of threat, attempt, or use of physical force against another; (2) that involve burglary, arson, or extortion (3) that constitute a crime similar to burglary, arson, or extortion; or (4) under the residual clause –crimes that otherwise involve conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(i): "Physical force" means "violent force – that is capable of causing physical pain or injury to another person.

Focus is on the elements of the conviction rather than the actual underlying conduct.

Sessions v. Dimaya, 584 U.S. 148 (2018)
Residual Clause which defined "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force against a person or property of another may be used in the course of committing the offense" is unconstitutionally vague.

Mathis v. United States, 579 U.S. 500 (2016)
Prior conviction cannot count as a violent felony if the statute enumerates multiple, alternative means of satisfying one or more elements. A state offense cannot count as a prior violent felony if its elements are broader than the generic version.

Borden v. Unites States, 593 U.S. 420 (2021)
Offense requiring only mens rea of recklessness cannot qualify as violent felony.

United States v. Taylor 596 U.S. 845 (2022)
Attempted robbery does not constitute crime of violence because it does not require the use, attempted use, or threatened use of force

*Erlinger v. United States* 144 S.Ct. 1840 (2024)
Although judge may decide fact of prior conviction and elements of offense, jury must decide if offenses were committed on separate occasions.

**INTELLECTUAL DISABILITY; RESENTENCING; SENTENCE ALIGNMENT:**
State v. Pervis Tyrone Payne, W2022-00210-SC-R11-CD
***Oral Argument set for November 6, 2024, in Jackson (fully briefed)***

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). State argues that the consecutive alignment of the Defendant's original sentences remained final and that the trial judge did not have jurisdiction to change the sentence alignment. The Defendant responds that the trial court had jurisdiction to re-sentence him, including realigning his sentences, and that the trial court did not abuse its discretion in doing so. CCA notes that 39-13-203(g) is silent on the matter but concludes that trial court had jurisdiction to determine the sentence alignment based upon multiple factors, including the "inherent power" of the court and application of the rule of lenity.

ISSUE: Whether a trial court lacks jurisdiction to reconsider consecutive alignment of a defendant's original sentence after a determination of intellectual disability pursuant to a petition under T.C.A. § 39-13-203(g)?

State argues that the decision to impose consecutive sentences became final more than 30 years ago and court lacks jurisdiction to modify a final judgment except to the extent authorized by the legislature.

State argues that 39-13-203 only authorized a determination of intellectual disability and whether the defendant may be constitutionally executed. It did not confer any other sentencing authority.

State argues that CCA made three fundamental errors:

(1) it wrongly took the legislature's silence as resentencing authority;

(2) reliance on trial court's "inherent power" was wrong as courts do not have the "inherent power" to expand their jurisdiction; and

(3) the rule of lenity does not apply to non-penal statutes.

**MIRANDA: CUSTODY; TEMPORARY SEIZURE OF WEAPON; INEVITABLE DISCOVERY:**
State v. Ambreia Washington, No. W2022-01201-SC-R11-CD
***Oral Argument set for Dec. 4, 2024 SCALES at Austin Peay***

Defendant was convicted of unlawful possession of a weapon by a convicted felon, a Class B felony, among other offenses and received an effective 15-year sentence. The Convictions relate to a police officer's encounter with the Defendant when the officer responded to an automobile accident call and found the Defendant in the car with a handgun.

More specifically, the officer testified that he was dispatched to an "auto accident" call at 3:20 a.m. and was advised that the car was on the wrong side of the road and was off the roadway and had struck a mailbox. When he arrived, he parked his patrol car, but did not turn on his emergency lights. He further testified that the engine was still running and that, in fact, it appeared the car had run off the road and hit a mailbox. Video evidence showed the car on the wrong side of the road. As he approached the car, the officer shined his flashlight toward the driver and saw the Defendant, who appeared to be waking up. As he approached, the Defendant began getting out of the car, but the officer asked him to stay in the car until he noticed a handgun lying on the front passenger seat. He then told the Defendant to "go ahead and step out" of the car. As the Defendant was getting out of the car, the officer asked the Defendant if he was a convicted felon, and the Defendant replied that he was. At that point, the officer decided to detain the Defendant. Eventually, the Defendant attempted to flee and the officer used his taser to stop him. The Defendant was taken into custody and a criminal history check in fact showed he was a convicted felon. Officer said that Defendant was not free to leave, as he was investigating the car accident, but that the time from his arrival on the scene until he deployed his taser was only about two minutes**.**

Defendant filed a motion to suppress both his statement at the scene admitting he was a convicted felon and the handgun found in the car. The trial court denied the motion to suppress the handgun, concluding that the officer had a duty to investigate pursuant to the community caretaking function, but suppressed the statement of the Defendant admitting he was a convicted felon.

Defendant argued in the CCA that the trial court erred in denying his motion to suppress the handgun. He argued that the handgun could not be seized under the plain view doctrine because the illegality of the weapon was not immediately apparent and that the scope of the community caretaking exception did not allow the officer to ask him if he was a convicted felon. The State argued that the Defendant voluntarily got out of the car, that it was reasonable to allow the Defendant to get out of the car because after

seeing the handgun the officer was concerned for his safety, and that the officer was justified in seizing the handgun because it was in plain view.

CCA: Officer's decision to detain the Defendant was justified under community caretaking doctrine. Officer believed Defendant was intoxicated and was concerned for Defendant's well-being. Defendant's argument that handgun could not be seized under plain view doctrine because its incriminating nature was not immediately apparent is of no consequence as once the officer ran a criminal history check and discovered that Defendant was a convicted felon, the incriminating nature of the handgun was apparent and it could then be seized pursuant to the plain view doctrine. Even if the statement was improperly obtained, the independent source doctrine would justify denying the motion to suppress.

Defendant filed Rule 11 claiming the following issues: "Whether the trial court erred by declining to suppress the handgun seized from a car driven by the defendant, when the illegal nature of the firearm was not immediately apparent to the officer under the plain view doctrine, the investigation into the defendant's criminal history went beyond the scope of the officer's community caretaking function, and the officer failed to give Miranda warnings before inquiring into the defendant's status as a convicted felon."

Supreme Court granted: "In addition to the issues raised in the application, the Court asks for briefing on the following issues: (1) whether the temporary seizure of the firearm or the defendant was permissible under the Fourth Amendment because of the threat to the officer's safety. see e.g. United States v. Bishop, 338 F.3d 623, 628 (6th Cir. 2003); United States v. King, 990 F.2d 1552, 1561 (10th Cir. 1993); United States v. Pervis, 663 F.Supp. 3d 1233, 1249 (D.N.M. 2023) and, if so, whether there was a basis for the State to thereafter seize the firearm permanently without a warrant; and (2) whether evidence of the firearm was admissible under the inevitable discovery/inevitable seizure exception to the exclusionary rule, see State v. Scott, 619 S.W.3d 196, 205 (Tenn. 2021); United States v. Frederick, 152 F. App'x 470, 474 (6th Cir. 2005); Purvis, 663 F.Supp. 3d at 1257."

***Questions:***

At what point in the encounter was the 4th Amendment implicated?

If so, was there any reason to detain the Defendant other than community caretaking?

Was it permissible to ask the Defendant to step out of the car?

Assuming the Defendant was detained, was the detention legal?

Assuming the detention was legal, was asking about being a convicted felon permissible? Arizona v. Johnson (2009)?

Was Defendant in “custody” for purposes of Miranda (5th Amendment), when the officer asked him if he was a convicted felon?

Would you have suppressed the Defendants statement that he was a convicted felon? Did officer have probable cause to believe the gun was contraband or evidence of a crime at the time it was seized?

Even if there was no valid reason to detain the Defendant other than community caretaking, was asking the Defendant if he was a convicted felon and determining immediately whether the possession of the gun was legal relate in any way to community caretaking, i.e. the safety of the officer and others?

Even if illegality of gun is not readily apparent, is it reasonable (for safety of officer and others) to temporarily seize gun while officer is investigating situation?

**Officer and public safety:**

United States v. Pervis, 663 F.Supp. 3d 1233, 1249 (D.N.M. 2023)
Officers observance of gun in plain view in car justified brief detention of Defendant and actions separating him from the weapon, including ordering him out of car.

United States v. Bishop, 338 F.3d 623, 628 (6th Cir. 2003)
“We hold that a police officer who discovers a weapon in plain view may at least temporarily seize that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to officer or public safety.”

United States v. King, 990 F.2d 1552, 1561 (10th Cir. 1993)
Officer’s separation of defendant from weapon was justified for her own safety.

See also United States v. Clark, 2023 WL 2541114 (E.D. Virginia March 16, 2023)

United States v. Frederick, 152 F. App’x 470, 474 (6th Cir. 2005)
4th Amendment allows officers to seize “objects dangerous in themselves” even if illegality is not immediately apparent; once defendant admitted being convicted felon the temporary seizure could be made permanent.

**Community caretaking:**

State v. McCormick, 494 S.W.3d 673 (Tenn. 2016) vs. Caniglia v. Strom, 141 S.Ct. 1596 (2021)

**JUVENILES; BINDOVER STANDARD OF REVIEW; CONFESSIONS:**
State v. Antonio Demetrius Adkisson a/k/a Antonio Demetrius Turner, Jr., W2022-01009-SC-R11-CD
***Application granted August 14, 2024***

CCA: 2024 WL 1252173
Defendant, a 17 year old juvenile was charged with two counts of first degree murder. Defendant filed a motion to suppress his confession in juvenile court, which was granted. Even in the absence of the confession, the juvenile court found probable cause to bind the Defendant over for trial as an adult, more particularly finding probable cause that he committed the delinquent act.

On appeal, the Defendant challenged the sufficiency of the evidence to support the bindover. The majority concluded that the "abuse of discretion" standard was applicable to such an evaluation and noted that the evidence showed Defendant and Mr. Walton were present at the scene prior to the shooting where they interacted with one of the victims. The proof also showed that Mr. Walton was armed with a gun and that the Defendant and Mr. Walton were seen speedwalking away from the area of the shooting, shortly after the shooting. Additionally, the evidence supported the fact that two different weapons had been used in the shooting.

Defendant also argued that his confession which had been suppressed in juvenile court, should have also been suppressed in Circuit Court. Defendant argued that his statement was coerced and that he was not permitted to have his mother present. More particularly, he claimed psychological coercion, including threats that he would face the death penalty and that he would be forced to take a gunshot residue test and a lie detector test. The trial judge denied the motion to suppress finding that the Defendant was 17 years old at the time of the interrogation, was intelligent, understood his Miranda warnings, was not intoxicated or under the influence and the interrogation only lasted an hour. Majority finds that Defendant was not in "custody" at the time he gave his confession. Nevertheless, Defendant was given Miranda warnings and his waiver was knowing and voluntary.

"Applying the Callahan factors, we conclude that the trial court did not err in finding the defendant's waiver was valid. At the time of the defendant's interview, he was seventeen years old and in the twelfth grade; however, no proof was presented regarding the defendant's grades or school records. Although the defendant did not have prior experience with the criminal justice system, the trial court 'was impressed from a viewing of the interview with the intelligence of the [d]efendant and it was clear the [d]efendant understood the Miranda warnings and the consequences of waiving the rights set forth in the warnings,' The defendant does not contend that he was intoxicated during the interview, and the trial court found 'no indication of intoxication or drug influence.' The trial court likewise found that the defendant was not suffering from any mental disease or defect. While the Court is troubled by the fact that the defendant did not have the advice of a parent, guardian, or interested adult, 'the admissibility of a

juvenile's confession is not dependent upon the presence of his parents at the interrogation." State v. Carroll, 36 S.W.3d 854, 864 (Tenn. Crim. App. 1999). Accordingly, we conclude that under the totality of the circumstances the defendant's waiver was voluntary, knowing, and intelligent."

"Our review of the record affirms the trial court's finding that the defendant's statement was voluntary and uncoerced….During the defendant's interview, he appeared calm, was not overly emotional, and did not appear to be under the influence of intoxicants. Moreover, the defendant was read his Miranda rights three times….and at no time did the defendant indicate he wished to exercise his rights and terminate the interrogation or speak with a lawyer. Additionally, no proof was offered showing that the defendant's mother requested termination of the interview. The defendant was provided food and water, he was not restrained at any time, and he was not physically abused or threatened with abuse if he did not provide a statement. While the defendant was interviewed off and on for six hours, he provided a significant portion of the statement in question and implicated himself in the murder after only one hour."

"Finally, although Investigator Williams incorrectly stated the law in regard to minors being eligible for the death penalty, a fact which was later corrected in front of the defendant by the chief of police, the proof taken together, confirms that the defendant's statement was not 'extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence,' or law enforcement reach.

DISSENT: Evidence presented in juvenile court in transfer hearing was insufficient to establish probable cause that the Defendant committed a delinquent act. Defendant was in "custody" at the time he gave his statement. 'The confession was obtained from a juvenile with no prior experience with the police, after six hours of interrogation in the middle of the night, during which he was denied access to his mother and threatened with the death penalty." Waiver of Miranda was not voluntary (5th Amendment) and statement was not voluntary (14th Amendment). Dissent disputes majority's conclusion that the death penalty reference was corrected by the chief of police, that the defendant essentially incriminated himself within the first hour, and notes that the officers also implied to the defendant that he would be abused in prison. Cites cases holding juvenile confessions inadmissible after officers incorrectly tell juvenile they might receive death penalty.

***Rule 11 Issues:***
(1) Whether Juvenile Court had probable cause to believe the child committed a delinquent act in order to bind case over to the Circuit Court for trial as an adult?
(2) Is the standard of review in the appellate court de novo (as suggested by the dissent) or abuse of discretion (as suggested by majority)?

(3) Whether the juvenile Defendant's statement should have been suppressed as involuntary and in violation of Miranda?

Questions:

Was Defendant in custody? When?

Remember: State v. McKinney, 669 S.W.3d 753 (Tenn. 2023)

**MOOTNESS DOCTRINE:**
State v. Shanessa Sokolosky, No. M2022-00873-SC-R11-CD
***Rule 11 granted September 12, 2024***

**Sole issue:** Whether Defendant's probation revocation appeal was rendered moot by completion of her sentence after a subsequent probation revocation.

CCA Opinion: 2024 WL 1780085: Defendant pled guilty on August 16, 2019, to marijuana possession and possession of drug paraphernalia and received two, consecutive eleven-month, twenty-nine-day sentences to be served on probation. On February 19, 2020, a probation violation warrant was signed by the trial judge alleging that the Defendant had not reported to her probation officer since November 1, 2019, and had failed to make any payments toward court costs. On May 23, 2023, the Defendant filed a motion to dismiss the revocation proceedings on the basis that the policies and practices of the former, private, for-profit probation company supervising the Defendant's probation violated principles of due process and the requirements for warrants. Although a hearing was conducted on the motion and significant evidence supported some irregularities in the warrant procedures utilized by the private probation company, the trial judge denied the motion to dismiss, primarily because there was no evidence of any irregularity with regard to Defendant's case.

After conducting the probation revocation hearing, the trial judge found that the State had proven the violations by a preponderance of the evidence (failure to report and non-payment of costs) but returned her to probation, after extending the supervision period by eleven months. Two witnesses testified at the revocation hearing. Mary Bush testified that she had no personal knowledge of the allegations in the probation violation warrant, but that the file she inherited from the former private probation company reflected that the Defendant's last scheduled appointment with her probation officer was November 11, 2019, and the file reflected no further appointments. Ms. Bush did testify that since she took over the probation in April 2021, the Defendant had not reported. The other witness to testify was a court clerk, who indicated the Defendant had never made any payments toward costs and fines. Defendant appealed claiming that the State had failed to prove the violations by a preponderance of the evidence and that the probation violation warrant should have been excluded from evidence because it contained inadmissible hearsay.

While the appeal was pending a subsequent probation violation was filed, Defendant's probation was revoked, and she completed her sentence in full. CCA dismissed appeal pursuant to the mootness doctrine. On this issue, Defendant relied upon State v. Rogers, 235 S.W.3d 92 (Tenn. 2007) (mootness doctrine did not apply when juvenile had reached age of majority because juvenile violation of probation had potential collateral consequences as it could be used in the future to enhance punishment as an adult). CCA declines to extend the principles espoused in Rodgers to the present case in which the Defendant challenges the probation revocation but has fully served her misdemeanor sentence. CCA notes that Rogers involved a challenge to the revocation by way of post-conviction procedure, while the present case involves a direct appeal.

**CIRCUMSTANTIAL EVIDENCE: SUFFICIENCY:**
State v. Ginny Elizabeth Parker, No. M2022-00955-SC-R11-CD
***Rule 11 granted September 12, 2024***

**Sole issue:** Whether the evidence is sufficient to sustain the defendant's conviction for forgery?

CCA Opinion: 2024 WL 468690: This case involves five checks with a total value of $1,230 that were drawn on the joint bank account of Lloyd and Rose Gordon, the Defendant's grandparents. Each check was written to the Defendant, endorsed by the Defendant, cashed at the same Bank, and purportedly signed by Ms. Gordon, who had passed away and did not testify at the trial. A month after Ms. Gordon's death Mr. Gordon reported the checks as stolen. An investigation revealed video footage of the Defendant at the Bank, cashing the checks. The Defendant did not testify at trial nor did she offer any defense proof. The State's proof consisted primarily of the testimony of Mr. Gordon and the investigating officer. The officer testified, at length, as to the Defendant's statements given in response to questioning. Defendant denied stealing the money from her grandparents and said she had permission from Ms. Gordon to write the checks. In this bench trial, the trial judge found the evidence was sufficient, based primarily on circumstantial evidence and the credibility of Defendant's explanations. The trial court noted:

1. The Defendant lied about making deposits, including the $4,000 deposit, into the Gordon's account.
2. The Defendant claimed that some of the money in the account was hers, but the $1,000 loan and repayment would not have been necessary if that were true.
3. The Defendant laid blame on others by pointing out her aunt and uncle had obtained a new truck, boat, and jet ski, however, these relatives only received $832.33, which Detective Cox opined was not enough to purchase these items.

4. The Defendant admitted responsibility for the PayPal account, and five of these PayPal transactions occurred while Ms. Gordon was either hospitalized, being admitted or discharged, or deceased.
5. The Defendant lied about the number of PayPal transactions.
6. The Defendant claimed that the checks were for doctor's appointments and prescriptions, but all of the checks were cased at a bank.
7. Every check was for a round number which is not typical for a commercial transaction.
8. The Gordon's bank account was overdrawn and to believe these acts were authorized would require the belief that Mr. Gordon consented to have his money spent.
9. The checks had widely varying dates…..

**CCA HOLDING:**

Viewed in the light most favorable to the State, the evidence shows that Mr. Gordon reported these five checks as stolen to both law enforcement and First Federal Bank. During questioning, the Defendant made conflicting statements, stating first that Ms. Gordon gave the Defendant these checks because the Defendant had no job or insurance and needed to borrow money for medical bills. She then claimed to have commingled her own funds into the account and drew these checks from her own money, but the Gordons' bank records indicate that $4,000 of the Defendant's money was never deposited into their account, as the Defendant claimed. The Defendant then stated that she repaid the Gordons for these checks with a $1,000 check dated December 19, 2019, with funds that she obtained from Ms. Montgomery's Estate. However, the evidence reflects that this transaction was actually a repayment from a separate $1,000 loan from the Gordons' account. Additionally, the $1,000 was deposited prior to check No. 4055, purportedly written to the Defendant on February 7, 2020, and cashed February 10, 2020, and therefore could not have been a repayment for all the checks at issue. The Defendant further contradicted herself by describing an arrangement where Ms. Gordon would give Ms. Montgomery checks to cash and give to the Defendant and then stated that she would cash checks from Ms. Gordon and give the money to Ms. Montgomery. Moreover, Mr. Gordon claimed that he and Ms. Gordon were not in the habit of helping others with their bills. See Tenn. R. Evid. 406 (providing that evidence of the habit of a person "is relevant to prove that the conduct of the person ... was in conformity with the habit"). He claimed to only recall Ms. Gordon writing two checks to the Defendant for $15 and $30. While the Defendant challenges the reliability of Mr. Gordon's testimony, the trial court was able to personally observe Mr. Gordon while he testified, and this court does not reweigh or reassess the credibility of witnesses. See Bland, 958 S.W.2d at 659 (citing Cabbage, 571 S.W.2d at 835); Carroll, 370 S.W.2d at 527.

While the Defendant claimed these checks were for medical bills, all five checks were cashed at a bank, were for round numbers, and had greatly varying dates between the

date each check was written and when it was cashed, including check Nos. 4028 and 4029, which were both written on October 24, 2019, but cashed eleven days apart. Furthermore, the Defendant admitted to opening a PayPal account linked to the victims' bank account and to having Ms. Gordon write checks to Mr. Clark, all allegedly for medical purposes. While the Defendant only reported conducting three or four PayPal transactions, the evidence shows that twenty-one transactions occurred before the Gordons' bank account was depleted and closed. Several of these transactions were for online purchases and not for cash withdrawals. Also, several transactions involving both the PayPal account and checks written to the Defendant and Mr. Clark occurred while Ms. Gordon was either hospitalized, being admitted or discharged from the hospital, or deceased.

While the Defendant contends that other family members had checks written to them in similar amounts, Mr. Gordon did not report these checks as stolen. During her interview, the Defendant attempted to shift blame to an aunt and uncle, stating they recently bought a new boat, truck, and jet ski. The record reflects, however, that these relatives only received $832.33, which Detective Cox opined was insufficient to purchase these items. Further, the evidence shows that the checks written to the Defendant, the PayPal transactions, and the checks written to Mr. Clark, totaled $6,350.29, more than went to the other family members combined. As such, a trier of fact could infer from the circumstantial evidence and its experience that the checks written to the Defendant were for personal use and not authorized by Ms. Gordon.

**SEVERANCE OF OFFENSES; "LARGER, CONTINUING PLAN"; DISQUALIFICATION OF DISTRICT ATTORNEY:**
State v. Eady, 685 S.W.3d 689 (Tenn. 2024)

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 in the trial court 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."

**CCA**: On appeal, Defendant contended, among other things, (1) the trial judge abused its discretion in not granting a severance of offenses; and (2) in denying the motion to disqualify the District Attorney General's office. The majority of the intermediate court affirmed the denial of the severance with one judge dissenting because she believed the evidence did not reflect that the offenses were a part of a larger, continuing plan.

[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."] The court unanimously concluded that the trial court did not abuse his discretion by denying the disqualification. The intermediate court seemed to proceed on the assumption that an actual conflict of interest existed, but that it did not require disqualification.

**Supreme Court**:

**Severance:** The record does not establish that the offenses were part of a larger, continuing plan. The trial court erred in denying a severance. However, the error is harmless with respect to all convictions except count eight. The concept of a larger, continuing plan is not always straightforward. Because of the wide variety of facts that constitute any number of criminal endeavors, the concept is better understood as amorphous. As such, determining whether multiple offenses reflect a larger, continuing plan sometimes can prove challenging. Direct evidence of a plan is the exception. Courts more typically are left to infer the existence of a plan from the evidence as a whole.

Our courts have crafted several guiding principles. The "larger, continuing plan" category encompasses groups or sequences of crimes in order to achieve a common goal or purpose. It is not necessarily the similarity between the offenses, but rather the common goal or purpose at which they are directed. In fact, there is no requirement that the offenses be similar at all. The mere fact that the defendant has committed a series of crimes being of the same or similar character does not necessarily reflect a larger, continuing plan. Instead, courts should look to whether there is evidence that the defendant had a working plan operating towards the future such as to make probable the crime with which the defendant is charged. This category contemplates offenses committed in furtherance of a plan that has a readily distinguishable ultimate goal or purpose, not just a string of similar offenses.

A larger, continuing plan connotes a series of acts done with a relatively specific goal or outcome in mind. The less specific the goal, the greater the chance the plan in actuality amounts to no more than a general desire to engage in criminal behavior for personal gain or satisfaction. And the more generalized the plan inference, the more like character it becomes, and the greater the danger of unfair prejudice from its use at trial.

In this case, both the trial court and the CCA relied upon a finding that (1) the common, ultimate goal of the robberies was to provide money to finance the Defendant's heroin addiction and (2) the various robberies involved a similar methodology and were committed in a one-month time frame and in a close geographic area. In our view, the shared generic motivation for the offenses – needing money to satisfy his drug addiction – does not go very far in establishing a *larger*, continuing plan. Although a shared

motivation can factor into a determination, if offenses could be joined simply because the defendant was inspired by a desire for money, the duty of the courts to inquire whether the offenses were part of a common scheme or plan would in most cases be rendered meaningless as profit is often intrinsic to crime. Similarly, it can be relevant to establishing a larger, continuing plan that the various offenses are closely connected in time, place, and means of commission. But in this case, the similarities in methodology are relatively generic and the geographic area while limited to Nashville, involved multiple neighborhoods. "In our view, these characteristics do not reveal a readily distinguishable, relatively specific ultimate goal or purpose." Just because a defendant has committed a series of crimes of the same or similar character does not necessarily reflect a larger, continuing plan. We do not believe it is enough to show that each offense was "planned" in the same way. There must be evidence from which to infer an overall plan of which each [offense] is a part."

> We believe that the trial court's severance decision failed to recognize that the appropriate standard calls for evidence from which it can infer a *larger*, continuing plan among the offenses. The offenses in this case were robberies. In this context, we find instructive the guidance from the Virginia Supreme Court that a common plan entails offenses 'related to one another for the purpose of accomplishing a particular goal,' and '[t]he key factor … is that the goal furthered by the offenses must be *extrinsic* to at least one of them.' Walker, 770 S.E.2d at 201; see also Brooks, 856 S.E.2d at 605 ('A common plan is established "when the constituent offenses occur sequentially or independently to advance some common, extrinsic objective."'); Imwinkelried, supra, 43 U. Kan. L. Rev. at 1019 (stating that a common plan 'ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses'), 1 Kenneth S. Brown, McCormack on Evidence § 190, at 1034 (7th ed. 2013) (stating that to constitute a common plan, 'each crime should be an integral part of an over-arching plan')

Although the goal of each of these offenses was to obtain money to satisfy the Defendant's drug addiction, that goal was completed with each offense. "In our view, then, the record does not establish that the eleven incidents were tied together through an objective 'not obtainable by the commission of any of the individual offenses.' Walker, 770 S.E.2d at 199; see also Imwinkelried, supra, 43 Kan. Law Rev. at 1019."

Any doubt about the consolidation of similar offenses over a defendant's objection should be resolved in favor of the defendant. "Based on our review of the record, we do not believe that the existence of a larger, continuing plan among the various offenses with a readily distinguishable goal or purpose reasonably could be inferred from the evidence. Instead, we believe the evidence in this case reflects simply a string of similar offenses.

**Disqualification**: We conclude that the trial court correctly denied the motion to disqualify as there was no actual conflict of interest. Tenn. Sup. Ct. R.8, RPC 1.9(a) provides that "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which the person's interests are materially adverse….." The present case is clearly not the "same" matter nor is it "substantially related" as there was no substantial risk that confidential factual information from the prior case would be used in the present case. Further, in light of its omission from the RPC we do not believe the "appearance of impropriety" standard previously adopted in Clinard v. Blackwood continues to serve as an independent basis for disqualification. To the extent that CCA opinions have continued to follow Clinard on this issue after adoption of the RPC, they are overruled.

**BRADY; ACCOMPLICE COROBORATION:**
State v. Thomas, 687 S.W.3d 223 (Tenn. 2024)

Both Defendants, Tony Thomas and Laronda Turner were convicted of three counts of first-degree premeditated murder. Another co-defendant, Demarco Hawkins, was also implicated in the killings but his case was severed and he testified against Thomas and Turner. CCA affirmed in a 2-1 opinion. The dissenting judge believed the corroboration was insufficient as to Defendant Turner and that the State had violated Brady by failing to disclose pre-trial the inconsistent statements of Co-defendant Hawkins.
ISSUES: (1) Whether evidence was sufficient as to Defendant Turner and (2) Whether there was a Brady violation when State failed to disclose pre-trial the statements made by Hawkins which were inconsistent with his formal statement.
***Abolishment of Rule***: In this case, the State [apparently in recognition that the corroboration as to Defendant Turner was weak], argued for "abrogation" of the corroboration rule. HELD: "Today, we abolish Tennessee's court-made accomplice-corroboration rule in its entirety." The overwhelming majority of jurisdictions have either declined to adopt an accomplice-corroboration rule or have repealed such a rule. "Today, we adopt the majority view and abolish the accomplice-corroboration rule, but we do so only on a prospective basis. "We … hold that, in the interest of fairness, we will apply the common law accomplice-corroboration rule to Ms. Turner's case, but the rule will be abolished in its current form going forward and that change shall be applied to all trials commencing after the date of the mandate."

Until such time as a pattern instruction is adopted the trial courts should utilize the following:

> The prosecution has presented a witness who claims to have been a participant with the defendant in the crime charged. While you may convict upon this testimony alone, you should act upon it with great caution. Give it careful examination in light of the other evidence in the case. You are

not to convict upon this testimony alone, unless you are convinced beyond a reasonable doubt that it is true.

***Sufficiency of corroboration under old rule:*** There was insufficient corroboration as to Ms. Turner. We reverse and dismiss her convictions. In this posture, there is no need to consider the alleged Brady violation as to her and will consider it solely as to Mr. Thomas.

***Brady:*** With regard to the alleged Brady violation claimed by Mr. Thomas, this was a delayed disclosure case in which the defense was provided statements made by Hawkins 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 Hawkins 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. Court finds that Mr. Thomas failed to establish a reasonable probability of a different result. Whether a different strategy would have caused a different result is speculative at best. We find no violation of Brady. Affirmed as to Mr. Thomas.

***Campbell, J., concurring in and dissenting in part***. I agree with the decision to abrogate the accomplice-corroboration rule but would add that the rule was a departure from the common law from the beginning. I disagree with the decision to apply the holding prospectively.

**CORAM NOBIS; ACTUAL INNOCENCE AND EQUITABLE TOLLING:**
Clardy v. State, 691 S.W.3d 390 (Tenn. 2024)

FACTS: 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 from Dantwan Collier allegedly showing that he did not participate in the crime. In reality, the affidavit of Dantwan Collier simply stated: I do not know Thomas Clardy and I never received any property from him. Petitioner acknowledged that he did not file within the applicable statute of limitations but claimed he was entitled to equitable tolling. The State agreed and asked the trial court to consider the petition on its merits.

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.

CORUM NOBIS COURT: 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 is entitled to equitable tolling. 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. CCA did not discuss whether the evidence offered was newly discovered evidence of actual innocence.

ISSUES: (1) Whether an error coram nobis petitioner must present "new evidence of actual innocence" to obtain due process tolling of SOL? (2) If so, whether the evidence in this case meets the standard of actual innocence?

HELD: Yes. Petitioner must present evidence of actual innocence to obtain due process tolling of the SOL; and No, the evidence in this case does not meet that standard. CCA reversed.

When a petition for coram nobis relief is filed outside the statute of limitations, the petitioner may seek to toll the statute of limitations by presenting "new evidence" of actual innocence. "Actual innocence" evidence must contain proof that the petitioner did not commit the underlying crime. Further, the evidence must "clearly and convincingly show that the petitioner is actually innocent and the petition must be filed no more than one year after discovery of the new evidence. In making the determination whether to grant tolling, the coram nobis court need not have a hearing, but may make the determination from the face of the petition. Procedurally,

> [If] a petition for a writ of error coram nobis is not timely filed, and the petition seeks tolling of the one-year statute of limitations, the coram nobis court should first ascertain whether the petition cites new evidence discovered after expiration of the limitations period, and whether the coram nobis petition shows it was filed no more than one year after petitioner discovered the new evidence. If so, the coram nobis court should assume *arguendo* the veracity of the new evidence cited in the coram nobis petition, for the purpose of assessing whether to toll the statute of limitations. To grant tolling, the coram nobis court must find that the new evidence would, if credited, clearly and convincingly show that the petitioner is actually innocent of the underlying crime, i.e., that the petitioner did not commit the crime. [citation omitted]. If tolling is granted, the coram nobis court may then proceed to address the merits of the coram nobis petition under the standard of the coram nobis statute, Tennessee Code Annotated section 40-26-105(b).

In this case, we agree with the analysis of the coram nobis court. The only new evidence was the affidavit of Dantwan Collier. Assuming it to be true, it still would not show actual innocence.

CONCURRENCE: We agree with the result in this case but have reservations about holding the proof of actual innocence must rise to the level of clear and convincing evidence since that issue was not addressed by either party in the briefs or at oral argument.

**CAN ALERT OF DRUG DOG SUPPORT SEARCH SINCE HEMP IS LEGAL?**
State v. Andre JuJuan Lee Green, 2024 WL 3942511 (Tenn. 2024)

Defendant was indicted for possession of marijuana with intent to manufacture, sell or deliver, possession of a firearm with intent to go armed during the commission of a dangerous felony, and possession of drug paraphernalia arising out of a search of his backpack during a traffic stop of a vehicle in which he was a passenger. The Defendant filed a motion to suppress asserting that the search of his backpack was conducted without probable cause. More specifically, he argued that the 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.

**Stipulated facts**: Officer conducted traffic stop of a vehicle driven by Julio Chavez for operating on high beams. When the officer approached vehicle he could smell strong odor of a fragrance coming from the vehicle. The driver asserted that the odor came from three fragrance pine trees he had hanging on the rearview mirror. The officer noticed a backpack in between the Defendant's feet, who was riding as a passenger. When the officer inquired about the backpack, both occupants denied owning it. Mr. Chavez denied consent to search and the officer ordered a canine sweep. Arlo indicated on the vehicle, after which, both occupants denied anything was in the vehicle. The officer then informed the men that they could be charged with anything found in the vehicle, after which, the driver looked at the Defendant and encouraged him to talk. The Defendant then said he had picked up the backpack from his brother but did not know what was in it. A search revealed a little less than an ounce of marijuana, a 9mm handgun, Ziplock bags, and a scale.

Based on these stipulated facts, the trial court granted a motion to suppress. State appealed. CCA: Trial court erred in granting motion to suppress. Although we believe the alert of a trained drug detection canine is alone sufficient, a review of the totality of the circumstances in the present case bolster a finding of probable cause. "Clearly, the totality of the circumstances surrounding the stop in conjunction with the alert by a trained drug detection canine is sufficient to establish probable cause to search the vehicle and the defendant's backpack." This conclusion is consistent with Florida v. Harris, 568 U.S. 237, 238 (2013) ("whether all the facts surrounding a dogs alert, viewed through the lens of common sense, would make a reasonable prudent person think that a search would reveal contraband or evidence of a crime.")

Issue: Whether the scent of marijuana detected by a canine during a protective sweep can provide probable cause for a warrantless search where the canine cannot

distinguish between the illegal marijuana or legal hemp, which are indistinguishable by smell.

HELD: To the extent that any prior opinions of the Court of Criminal Appeals or this Court imply that there is a *per se* rule that probable cause is established solely by a positive alert from a drug-sniffing dog, they are overruled. Determining whether probable cause exists is a totality-of-the-circumstances inquiry. The positive alert from a drug-sniffing dog may continue to be considered in a totality-of-the-circumstances analysis and may continue to contribute to a probable cause determination, even though there is a possibility that the dog alerted to a legal substance.

Based on the totality of the circumstances in this case we believe the officer had probable cause to search the vehicle. Here, the owner of the vehicle had three fragrance pine trees hanging from his mirror which put forth a strong odor. Both men gave suspicious answers to questions posed by the officer. Both denied owning the backpack that was between Defendant's feet. The drug-sniffing dog then made a positive alert, but both men indicated that nothing was inside the vehicle. Thereafter, Chavez looked at the Defendant and prodded him to talk. The Defendant then said the backpack belonged to his brother, but he did not know what was in it. All the facts in this case, including the dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of crime.

Consider State v. Torrian Seantel Bishop, No. W2023-00713-SC-CD (Tenn 2024)
***Rule 11 granted September 12, 2024, for purpose of remanding to CCA in light of Andre JuJuan Lee Green***

**Note**: Certified question may control……..Whether officer had probable cause "based exclusively on plain smell of marijuana….."

**UNITED STATES SUPREME COURT**
**2023-2024 TERM**

**DOUBLE JEOPARDY; RETRIAL AFTER ACQUITTAL; NOT GUILTY BY REASON OF INSANITY, INCONSISTENT VERDICTS:**
McElrath v. Georgia, 601 U.S. 87, 144 S.Ct. 651, 217 L.Ed.2d 419 (2024)

Defendant killed his mother. Georgia charged him with three crimes: malice murder, felony murder and aggravated assault. The jury returned a verdict of not guilty by reason of insanity for the malice murder, but guilty but mentally ill on the felony murder and aggravated assault. Defendant appealed directly to Georgia Supreme Court claiming that the verdicts for the offenses for which he was found guilty were inconsistent with his acquittal and should be set aside under Georgia's so-called repugnancy doctrine. The Georgia Supreme Court agreed, but set all the verdicts aside and ordered a retrial on all counts including the malice murder. On remand, Defendant argued that the Fifth Amendment prohibited his retrial on the malice murder for which he had been found not guilty by reason of insanity. The Georgia courts rejected his argument. HELD: The jury's verdict of not guilty by reason of insanity constituted an acquittal for double jeopardy purposes notwithstanding any inconsistency with the other verdicts. An "acquittal" is any ruling that the prosecution's case is insufficient to establish criminal liability. Whether an "acquittal" has occurred is a question of federal law, not state law, and does not depend of the "label" attached to the verdict but to its "substance."
CONCURRENCE: Trial judge accepted the inconsistent verdicts and entered judgment on them.
[T]he situation here is different from one in which a trial judge refuses to accept inconsistent verdicts and thus sends the jury back to deliberate further. Some states follow this practice, and our decision does not address it……Nothing that we say today should be understood to express any view about whether a not-guilty verdict that is inconsistent with a verdict on another count and is not accepted by the trial judge constitutes an 'acquittal' for double jeopardy purposes.

**ASSET FORFEITURE; NO NEED FOR PRELIMINARY HEARING:**
Culley v. Marshall, 601 U.S. 377, 144 S.Ct.1142, 218 L.Ed.2d 372 (2024)

Plaintiffs loaned their automobiles to persons who were arrested in Alabama for drug offenses. The automobiles were seized under an Alabama law allowing seizure incident to an arrest so long as forfeiture proceedings are initiated promptly. Plaintiffs filed §1983 actions claiming that state officials violated their due process rights by retaining their automobiles during the forfeiture process without holding preliminary hearings. Eleventh Circuit upheld a dismissal of the claims holding that a preliminary hearing is not required.

HELD: In civil forfeiture cases involving personal property, the Due Process Clause requires a timely forfeiture hearing but does not require a separate preliminary hearing.

**INEFFECTIVE ASSISTANCE OF COUNSEL; DEATH PENALTY MITIGATION:**
Thornell v. Jones, 602 U.S. ___, 144 S.Ct. 1302, 218 L.Ed.2d 626 (2024)

In order to steal a gun collection, the defendant, Jones, committed three gruesome murders, including the cold-blooded murder of a 7-year-old child. He beat all the victims with a baseball bat and smothered the child with a pillow. A jury found him guilty of two counts of premeditated first-degree murder and one count of attempted premeditated first-degree murder. Under Arizona law, the judge is required to impose a death sentence if the judge finds one or more statutorily enumerated aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. The sentencing judge found three aggravating circumstances: (1) the commission of multiple homicides; (2) the murders were committed for pecuniary gain; and (3) they were especially heinous, cruel and depraved. With regard to the child, he also found as a fourth aggravating circumstance that the murder was of a young child. During the sentencing hearing substantial mitigating evidence was introduced and the judge concluded that the defendant had established (1) he suffered from long-term substance abuse; (2) head trauma; (3) he was under the influence of alcohol and drugs and (4) he was abused as a child. However, the court concluded that these circumstances were not sufficiently substantial to outweigh the aggravating circumstances and imposed a death sentence. The Arizona Supreme Court affirmed and his claim of ineffective assistance of counsel did not succeed in the state post-conviction proceedings.

Jones next filed a habeas corpus petition claiming he received ineffective assistance of counsel in the sentencing hearing claiming additional mitigation should have been presented to the jury. The District Court held an evidentiary hearing, after which, it concluded that Jones could not show "prejudice" because the additional information "barely…altered the sentencing profile presented to the sentencing judge." The Ninth Circuit reversed. The U.S. Supreme Court granted certiorari to review the Ninth Circuit's "interpretation and application of Strickland. HELD:

When a capital defendant claims he was prejudiced at sentencing because counsel failed to present available mitigating evidence, a court must decide whether it is reasonably likely that the additional evidence would have avoided a death sentence. This analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of the aggravating and mitigating factors. The Ninth Circuit did not heed that instruction, rather, it downplayed the serious aggravating factors present here and overstated the strength of the mitigating evidence that differed very little from the evidence presented at sentencing. Had the Ninth Circuit engaged in the analysis required by Strickland, it would have had no choice but to affirm.

To determine, whether a defendant has shown prejudice a court must consider the totality of the evidence, both mitigating and aggravating circumstances. In this case, the Ninth Circuit barely acknowledges the weighty aggravating circumstances. In addition, the Ninth Circuit did not take into account the District Judge's evaluation of the defense expert's report and testimony and the District Judge's attaching diminished value to the mental health conditions because there was no link between them and defendant's conduct when he committed the murders. The additional mitigation offered in this case did little to change the balance.

**EXPERT WITNESSES; ULTIMATE ISSUE:**
Diaz v. United States, 602 U.S. ___, 144 S.Ct. 1727, 219 L.Ed.2d 240 (2024)

Petitioner Diaz was stopped at the border. Border patrol officers searched the car she was driving and found 54 pounds of methamphetamine. She was charged with importing Meth and government was required to prove she "knowingly" transported the drugs. She denied any knowledge. Government offered a Homeland Security Special Agent as an expert witness to testify that "most" couriers know that are transporting drugs because drug traffickers generally do not entrust large quantities of drugs to people who are unaware they are transporting them. Diaz claimed that the testimony violated Fed. R. Evis 704(b). Diaz was found guilty. Fed. R. Evid 704(a) provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(b) provides an exception to the general rule: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Court of Appeals found no violation of the rule because the officer did not testify as to the Defendant's state of mind or knowledge but only that "most" couriers are aware. HELD: Expert testimony that "most" people in a group have a particular mental state is not an opinion about "the defendant" and this does not violate Rule 704(b).

Note: Tenn. R. Evid. 704 simply says: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."
But see T.C.A. §39-11-501(c): "No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone."

**TRIAL BY JURY; FACTS OF PRIOR CONVICTION THAT INCREASE PUNISHMENT:**
Erlinger v. United States, 602 U.S. ___, 144 S.Ct. 1840, 219 L.Ed.2d 451 (2024) 6-3

Erlinger pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §922(g). For this conviction alone he faced a maximum punishment of 10 years. However, at sentencing, the judge found Erlinger eligible for an enhanced sentence under the Armed Career Criminal Act because he had previously been convicted of three violent felonies or serious drug offenses on separate occasions. This increased the minimum sentence to 15 years and the maximum sentence to life imprisonment. At the sentencing stage, Erlinger insisted his prior convictions occurred on separate occasions and argued that the decision as to whether his prior convictions were committed during a single episode or on separate occasions [the occasions inquiry] was a question for the jury, not the judge. The District Court rejected his argument. Likewise, the Seventh Circuit also rejected the claim, despite the Government's concession of error.
ISSUE: Whether a judge may decide that a defendant's past offenses were committed on separate occasions by a preponderance of the evidence or whether the Fifth and Sixth Amendments dictate that this is a matter for the jury to decide beyond a reasonable doubt?
HELD: Because only a jury may find facts that increase the range of punishment, the occasions inquiry is for a jury to determine beyond a reasonable doubt. Note: Judge may decide fact of prior conviction and whether those convictions are for violent felonies, but occasions inquiry is for jury. Interesting comments about bifurcation of trials to avoid prejudice to defendants from introduction of prior convictions.

**SECOND AMENDMENT:**
United States v. Rahimi, 602 U.S. ____, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024) 8-1

Respondent was indicted under 18 U.S.C. §922(g)(8) which prohibits individuals subject to domestic violence restraining orders from possessing a firearm. Respondent filed a motion to dismiss claiming the statute violated the Second Amendment on its face. District Court denied, but Fifth Circuit reversed finding that the Government had failed to show such a law was "within our Nations's historical tradition of firearm regulation."
HELD: When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment.

**CONFRONTATION CLAUSE; EXPERT TESTIMONY; BASIS OF OPINION:**
Smith v. Arizona, 602 U.S. ____ , 144 S.Ct. 1785, 219 L.Ed.2d 420 (2024) 5-2-2

Arizona law enforcement officers found Smith with a large quantity of what appeared to be drugs. Lab testing indicated that it was methamphetamine, marijuana and cannabis. The technician prepared detailed notes and a report. However, by the time of trial, the technician who conducted the testing was no longer working for the lab, so the State called a second technician 'to provide an independent opinion on the drug testing" done

by the absent technician. At trial, the non-testing technician testified as to the testing that was actually conducted and then gave his own opinion as to the identity of the substances. Smith was convicted. He argued on appeal that the use of the substitute expert to convey the results of the testing violated his Confrontation Clause rights. The Arizona Court of Appeals rejected the challenge holding that the substitute expert could present his own expert opinion based on a review of the work of the testing technician because they were only used to show the basis of his opinion and not to prove their truth. ISSUE: Whether admission of the substitute's testimony violated the Confrontation Clause? HELD: Yes, (1) if the out of court statement is offered for its truth and (2) it is testimonial. Statement was offered for its truth. Some state courts, like Arizona's, take the position that when an expert recites another analyst's statements as the basis for his opinion, the statements are not being offered for their truth. "Today, we reject that view." Mere fact that Arizona Rules of Evidence label this as non-hearsay and allow experts to testify to matters that form the basis of their opinions does not control. Evidentiary rules do not control whether a statement is admitted for its truth under Confrontation Clause analysis. "If an expert for the prosecution conveys an out-of-court statement in support of his opinion. And the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." Vacated and remanded to State court to address whether the statement was testimonial.

Note: Court mentions permissible forms of forensic expert testimony, despite its ruling: (1) Expert who worked in same lab could testify from personal knowledge about how the lab typically functioned – the standards, practices, and procedures it used to test substances as well as the way it maintained a chain of custody; (2) Even if expert did not work in same lab, he could testify in general terms about forensic guidelines and techniques – what it means for a lab to be accredited and what requirements accreditation impose; (3) or the expert could be asked any number of hypothetical questions, taking the form of: If or assuming some out-of-court statement was true…..

Thomas: Would not limit consideration of whether testimonial to only the primary purpose test but would also look at formality of statements etc.
Gorsuch: Also not sure about primary purpose test.
Alito and Roberts: This expert went too far, but Court did not need to find that basis testimony is always hearsay. Suggesting a return to hypothetical questions is returning us to a practice that was abandoned for the most part over 50 years ago.

Note: State v. Hutchison, 482 S.W.3d 893, 914 (Tenn. 2016): Statements will be deemed "testimonial" (1) if its primary purpose is to prove past events potentially relevant to a criminal prosecution and either (2) the primary purpose is to accuse a targeted individual or (3) it has sufficient indicia of solemnity.

# *Court of Criminal Appeals – Selected Cases*

**AGGRAVATED ASSAULT; IS POSSESSION REQUIRED?**
State v. Kirsten Janine Williams, 2022 WL 17728231 (Tenn. Crim. App. 2022)

The Defendant assaulted the victim while an accomplice held a gun. Defendant told victim if she tried to escape "they" would shoot her. Defendant was convicted of aggravated assault. On appeal, Defendant argued that she could not be convicted of aggravated assault as she never possessed the gun. Issue: Did legislature intend the language "involved the use or display of a deadly weapon" to apply to a case in which the accused does not actually possess a deadly weapon? Court reviews legislative history and notes a prior version of the aggravated assault statute made possession an element, but that element is not retained in the current statute. Court concludes, based in part on the legislative history that the Defendant's actual possession of the gun was not required to convict.

**SELF-DEFENSE: DUTY TO RETREAT INSTRUCTION:**
State v. Michael Taylor, 2024 WL 1697775 (Tenn. Crim. App. 2024)

Trial judge found the defendant was not in a place the defendant had a right to be. As a result, trial judge followed the pattern jury instruction and took out the "no duty to retreat" language. Trial judge refused to instruct jury on the law applicable when a defendant has a duty to retreat. Such failure to instruct was reversible error.

To summarize: If the trial judge finds the defendant was either engaged in conduct that would constitute a felony or Class A misdemeanor or was in a place where he or she had no right to be, the defendant would not be entitled to the "no duty to retreat" instruction. Nevertheless, the defendant is still entitled to raise self-defense so long as the defendant complies with the duty to retreat. In such cases, whether the defendant complied with the duty to retreat is a question for the jury and the defendant is entitled to a proper jury instruction informing the jury of the right to self-defense so long as the defendant complied with the duty to retreat. For example:

> "The defendant had a duty to retreat before (threatening)(using) force against the (deceased)(alleged victim). A duty to retreat requires the defendant to employ all means in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat, if, and to the extent, that it can be done in safety."

**NECESSITY; DEFENSE TO HOMICIDE:**
State v. Craft, 2024 WL 225363 (Tenn. Crim. App. 2024)

Trial judge correctly instructed on self-defense, but correctly denied instruction on necessity for two reasons: First, necessity cannot be used as a defense to a homicide as the harm sought to be avoided could never be less than the harm inflicted. Second, the evidence did not establish that a non-human act prompted the murder of the victim. As to the second reason, see State v. Bledsoe, 226 S.W.3d 349, 356 n. 5 (Tenn. 2007) ("In Tennessee, the statutory defenses of duress and necessity are not limited to any particular source of harm, following the Model Penal Code in this respect.")

**ATTORNEYS; PROHIBITING THEM FROM PRACTICING IN YOUR COURT:**
In re: Attorney Russell E. Edwards, 2024 WL 302132 (Tenn. Crim. App. 2024)

Trial court granted defense attorneys motion to withdraw, but then entered an Order prohibiting attorney from practicing law in the Criminal Court of Sumner County. HELD: The Tennessee Supreme Court oversees the practice of law in this State. Trial court exceeded its authority.

**UNTIMELY MOTION FOR NEW TRIAL: LOSS OF SUJECT MATTER JURISDICTION:**
State v. Claude Harvey Banner, 2024 WL 1928647 (Tenn. Crim. App. 2024)

On March 15, 2022, Defendant was convicted of attempted second degree murder and unlawful possession of a firearm. Trial judge approved verdict as 13th Juror on same date. Judgments were ultimately entered on August 19, 2022. Motion for new trial was untimely filed on September 26, 2022. Trial judge erred in granting motion for new trial as 13th juror as court had lost subject matter jurisdiction.

**INTERSTATE COMPACT ON DETAINERS; CONVICTED BUT NOT SENTENCED:**
State v. Servadio M. Boyd, 2024 WL 3219282 (Tenn. Crim. App. 2024)

Defendant was convicted on a plea of guilty to possession of more than .5 grams of cocaine with intent to sell in 2014. The plea agreement provided for an eight-year sentence with the manner of service to be determined by the trial judge. Prior to sentencing, Defendant left the jurisdiction and was arrested and convicted in another jurisdiction and received a thirteen-year sentence. Defendant filed a motion to dismiss the detainer on the grounds of an alleged violation of the Interstate Compact on Detainers. The trial court granted the motion and dismissed the case. State appealed. HELD: Reversed. Where a defendant has been convicted of a crime as a result of a guilty plea, but has not yet been sentenced, a sentencing detainer lodged against the defendant is not subject to the provisions of the interstate compact.

**CONSECUTIVE SENTENCES. DANGEROUS OFFENDER; WILKERSON FACTORS:**
State v. Jevon Brodie and Tavares Harbison, 2024 WL 3272795 (Tenn. Crim. App. 2024)
State v. William Roger Campbell, 2024 WL 3888342 (Tenn. Crim. App. 2024)

Although the trial court stated that consecutive sentences were necessary to protect the public and reasonably related to the severity of the offenses, the trial court failed to state the specific facts on which it relied to satisfy this conclusion. The mere recitation of the Wilkerson factors is not a substitute for the requirement to make specific findings.

**CONSTRUCTIVE AMENDMENT OF INDICTMENT:**
State v. Jeremie Scott Modine, 2024 WL 3043270 (Tenn. Crim. App. 2024)

Defendant was charged with multiple offenses including rape by force or coercion. T.C.A. § 39-13-503(1). Trial judge instructed jury that it could find the Defendant guilty if the act was committed either by force or coercion ***or*** without the consent of the victim. Trial judge constructively amended indictment to allow a conviction under a mode of liability not charged in the indictment. Reversed as plain error.

**DRUG FREE ZONE ACT: HEARING REQUIRED:**
State v. James Leon Parker, 2024 WL 1708343 (Tenn. Crim. App. 2024)

Defendant as convicted of various offenses committed prior to September 1, 2020, pursuant to the Drug Free Zone Act and received a 25-year sentence for those counts which was ordered to be served consecutive to an 8-year sentence on other counts. Defendant filed a *pro se* motion for resentencing under T.C.A. § 39-17-432(h), and the trial court appointed counsel. While the motion was pending Governor Lee granted executive clemency commuting the 25-year sentence. Trial court dismissed the motion for resentencing finding the Defendant ineligible. CCA grants writ of certiorari and reverses the trial court's summary dismissal of the motion for resentencing. Statute mandates a hearing. Remands for hearing without ruling on merits.

**JUVENILE LIFE SENTENCE; JUDGMENT FORM:**
State v. Taeshaun K. Patterson, 2024 WL 4224270 (Tenn. Crim. App. 2024)

Trial judge should note on special conditions section of judgment form for juvenile sentenced to life imprisonment should show that defendant is entitled to an individualized parole hearing, at which the defendant's age and other circumstances shall be considered, after serving between 25 and 36 years of his life sentence.

## 2024 CRIMINAL PUBLIC ACTS

PC 525, eff. 7/1/24, adds the offense of continuous sexual abuse of a child to the list of qualifying criminal misconduct that is sentenced to community supervision for life.

PC 530, eff. 3/7/24, deletes the law allowing a municipality or county to pass an ordinance permitting a person charged with violating certain traffic ordinances or statutes to deposit the person's driver license instead of making bail.

PC 541, eff. 7/1/24, makes it a Class B misdemeanor for a person to operate a vehicle if, by altering it the height of the vehicle's front fender is four or more inches greater than the height of the rear fender.

PC 545, eff. 7/1/24, amends 40-35-207(a)(4) to add aggravated prostitution convictions as eligible for expunction if certain requirements are met; removes such offense as "a sexual offense" or "violent sexual offense" for which a person is required to register on sexual offender registries; authorizes a prior offender who is required to register because the offender was convicted of such offense that was committed prior to July 1, 2024, to file a request for termination of registration requirements with the TBI headquarters immediately rather than having to wait 10 years after probation/parole/supervision expires..

PC 565, eff 7/1/24, amends 37-1-126 to require a video or audio recording to be made of any interrogation of a child who has been taken into custody on suspicion that the child committed a delinquent act or unruly conduct unless a) the law enforcement officer in good faith believed the interview or interrogation was being recorded, and a technical issue with the equipment prevented the recording; or b) exigent circumstances existed at the time of the interview.

PC 612, eff 7/1/24, revises various provisions regarding pretrial release of a defendant charged with a criminal offense to require the magistrate to give first consideration to ensuring the safety of the community when determining whether to impose conditions of release or require a deposit of bail.

PC 627, eff 7/1/24, adds to the ways to commit critical infrastructure vandalism the following: using, altering, encrypting, ransoming, destroying, or otherwise rendering unavailable without authorization, electronic data, electronic devices, or network providers. In other words, no hacking allowed.

PC631, eff 3/28/24, prohibits a local governmental entity or official from adopting or enacting a resolution, ordinance, or policy that prohibits or limits the ability of a law

enforcement agency to conduct traffic stops based on observation of or reasonable suspicion that the operator or a passenger in a vehicle has violated a local ordinance or state or federal law.

PC 632, eff 4/2/24, expands the eligibility for filing a petition to obtain a lifetime order of protection to include victims of aggravated stalking, especially aggravated stalking, and felony harassment.

PC 635, eff 7/1/24, allows a juvenile court to transfer a child, who is 15 or older, to be tried as an adult in criminal court for committing or attempting to commit any organized retail crime or theft of a firearm, and the juvenile court may order confinement in an adult detention facility if the sheriff can keep the juvenile separate and removed from adult detainees.

PC 644, eff. 4/4/24, extends the statute of limitations for a civil action for an injury or illness based on a sexual assault that occurred when the injured person was eighteen (18) years of age or older, to three years, and to five years if law enforcement was notified of the assault.

PC 649, eff 4/4/24, requires that each District Attorney must designate one assistant DA as the lead prosecutor in cases involving crimes committed against children, and requires the Tennessee bureau of investigation to provide annual training to these lead prosecutors in crimes committed against children.

PC 655, eff 7/1/24, amends 71-6-118(c)(2), by making absolutely confidential in elderly/vulnerable adult cases that the identity of the person who reported the alleged conduct must remain confidential, shall be exempt from other provisions of law, shall not be a public record, and shall not be disclosed for any other purpose other than criminal investigation or criminal prosecution.

"(2) Notwithstanding subsections (a) and (b), adult protective services:
(A) May report to law enforcement or public health authorities any information from its investigations or records regarding illness, disease, injuries, or any offense for which reports are made confidential under subsection (a) obtained in the course of an investigation; but (B) adult protective services must provide to the district attorney general a complete and unredacted copy of their entire investigative file, including the identity of the person who reported the alleged conduct, upon the commencement of a criminal prosecution for alleged conduct involving an elderly or vulnerable adult victim obtained in the course of an investigation; "provided, however, that the identity of the person who reported the alleged conduct must remain confidential, must be exempt from other provisions of law, shall not be a public record, and shall not be disclosed for any other purpose other than criminal investigation or criminal prosecution."
71-6-118(c) is also amended by adding that "Upon the return of a criminal indictment or presentment arising from a report of alleged conduct involving an elderly or vulnerable adult victim where the identity of the person reporting the conduct has been provided to the district attorney general ... , the district attorney general shall request and the court

shall enter a protective order preventing further release of the identity of the person reporting for any purpose other than criminal prosecution.

PC 671, eff 71/24, “Ledford’s Law,” amends 40-28-117(a) by stating that the conditions of parole for a prisoner convicted of vehicular homicide by intoxication, or aggravated vehicular homicide must specifically include that the prisoner, upon release, must (A) attend substance abuse treatment for the duration of parole, and failure to attend shall be punished as a violation of parole, and (B) is prohibited from possessing or consuming alcohol or a controlled substance without a prescription, and shall be punished as a violation of parole.

PC682, eff 7/1/24, changes the definition of “harassment” only in stalking offenses, from “repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress,” to “ conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that is committed with reckless disregard for whether the victim will suffer emotional distress as a result of the conduct and the victim suffers emotional distress as a result of the conduct.”

PC 704, eff. 7/1/24, prohibits the government from entering private property without probable cause to believe that a criminal offense has occurred or is occurring, the consent of the property owner, a warrant, or a recognized warrant exception; and requires a member of a society incorporated for the prevention of cruelty to animals to notify the appropriate local law enforcement agency of the member's intent to make an arrest or interfere to prevent an act of cruelty and the circumstances justifying the action before doing so.

PC 708, eff. 7/1/24, creates a Class C felony offense of acquiring or otherwise exercising control over bees or a structure or equipment used to keep, handle, house, exhibit, breed, or offer bees for sale, without the consent of the owner and with the intent to deprive the owner of the bees, structure, or equipment.

PC 721, eff. 7/1/24, increases from a Class C misdemeanor to a Class B misdemeanor the penalty for a student's parent, guardian, or legal custodian failing to report an adjudication that the student committed certain delinquent acts to the school principal.

PC 727, eff 7/1/24, requires the juvenile court to include in the disposition for a juvenile who has been found to have made a threat to commit mass violence on school property or at a school related activity, the suspension of the juvenile's driving privileges or ability to obtain a driver license for a period of one year.

PC 743, eff 4/22/24, amends 40-35-302(d), misdemeanor sentencing, by deleting "seventy percent (70%) but not in excess of seventy five percent (75%)" and substituting "seventy percent (70%), seventy five percent (75%), eighty percent (80%), ninety percent (90%), or one hundred percent (100%)."

PC 758, eff. 7/1/24, adds to the “spoofing” statute enacted in 2017, creating an offense for a person, on behalf of a debt collector or inbound telemarketer service, to knowingly cause a caller identification service to transmit misleading or inaccurate caller identification information to a subscriber with the intent to defraud or cause harm to another person or to wrongfully obtain anything of value, rather than with the intent to induce the subscriber to answer. Class A misdemeanor.

PC 760, eff 4/22/24, requires a probation officer to set required in-person meetings at times and locations that reasonably accommodate the work schedule of the probationer; authorizes the probation officer to zoom the probationer instead of an in person meeting upon approval from the department of correction.

PC 774, eff. 4/23/24, states that the court, rather than the sheriff or administrative officer of a local jail, may authorize the use of “alternative facilities” for the incarceration of an offender convicted of a first DUI. "Alternative facilities" include, but are not limited to vacant schools or office buildings or any other building or structure that would be suitable for housing DUI offenders for short periods of time.

PC 784, eff. 4/23/24, “Jillian’s Law,” makes various changes relative to being adjudicated as a mental defective or judicially committed to a mental institution, including requiring a person judicially committed to remain committed until the competency of the person to stand trial is restored or, if competency is unable to be restored but the person no longer meets the standard, until the court with criminal jurisdiction over the charges approves a mandatory outpatient treatment plan that accounts for the safety of the community.
“There is a rebuttable presumption that a person meets the standards ... for judicial commitment if the person was charged with a felony or Class A misdemeanor and found by a court to be incompetent to stand trial for the offense due to an intellectual disability. ... The presumption established ... may only be rebutted by clear and convincing evidence that the person does not pose a substantial likelihood of serious harm.”

PC 790, eff 7/1/24, extends the civil statute of limitation as follows:
“Notwithstanding § 28-3-104, a civil action for an injury or illness based on trafficking for a commercial sex act that occurred when the injured person was a minor must be brought:
(1) For a commercial sex act that occurred before July 1, 2024, but was not discovered at the time of the commercial sex act, within three (3) years from the time discovery of the abuse by the injured person; or (2) For a commercial sex act that occurred on or after July 1, 2024, within thirty (30) years from the date the person becomes eighteen (18) years of age.

PC 791, eff. 7/1/24, enacts the "Laken Riley Act of 2024," which prohibits a public college or university from prohibiting adults lawfully present on the institution's property from carrying a non-lethal weapon for purposes of self defense; they can prohibit them if armed security guards are present. "Non lethal weapon" means pepper spray, a pepper spray gun, pepper gel, mace, a stun gun, an electronic control device, or other conducted energy device.

PC 797, eff 7/1/24, amends 39-17-308(e) by adding “bullying” and “cyber-bullying” as another way to commit Harassment, an A misdemeanor. "Bullying" means an act committed by a student that substantially interferes with another student's educational benefits, opportunities, or performance; and "Cyber bullying" means bullying undertaken through the use of electronic
devices.

If the act takes place on school grounds, at any school sponsored activity, on school provided equipment or transportation or at any official school bus stop, the act has the effect of: (i) Physically harming the other student or damaging the other student's property; or (ii) Knowingly placing the other student or students in reasonable fear of physical harm to the other student or damage to the student's property.

If the act takes place off school property or outside of a school sponsored activity, it must be directed specifically at another student or students and have the effect of creating a substantial disruption to the education environment or learning process;
The officer must also give the offense report to the parents or guardian of the victim.

PC 805, eff 4/29/24, enacts "The District Attorney General Second Opinion Act," which authorizes, in any investigation involving human trafficking, organized crime or an A or B felony, in which a district attorney general declines prosecution, an investigating state or local law enforcement agency to report and submit evidence of the offense to the district attorney general for another judicial district in which jurisdiction and venue over the offense are proper.

PC 811, eff 4/29/24, amends 40-35-304 to expand the definition of "victim" for the purpose of restitution to include a “reciprocal,” as defined in 56-16-102, when the reciprocal has compensated a subscriber for loss incurred as a result of the offense to the extent that the reciprocal paid compensation to the subscriber.

PC 821, eff 4/29/24, prohibits the department from using state funds to administer hormone replacement therapy to state inmates incarcerated in a state penitentiary or a county jail or workhouse, or for sex reassignment surgery.

PC 844, eff 7/1/24, expands the offense of aggravated rape to include when the defendant commits rape knowing that the defendant is infected with HIV.

PC 869, eff. 5/1/24, prohibits a magistrate from considering a defendant's ability to pay when determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public.

PC 870, eff. 7/1/24, creates the offense of license plate flipping. Purchasing or possesses a license plate flipper is a B misdemeanor. Manufacturing, selling or offering to sell, or distributing a license plate flipper is an A misdemeanor.
"License plate flipper" means: a device designed or adapted to be installed on a motor vehicle that either alternates between two or more license plates for the purpose of allowing a motor vehicle operator to change the license plate displayed on the operator's vehicle; or hides a license plate from view by flipping the plate, making the license number not visible.

PC 872, eff. 5/1/24, creates a Class E felony for an entity that is supported in whole or in part by public funds to provide meeting spaces or other forums, including electronic and print platforms, to certain groups or organizations designated, or have been found by a court in the U. S, to have engaged in an act of terrorism, or for the purpose of soliciting material support, recruiting new members, or encouraging violent action by or for those groups.

PC 874, eff 7/1/24, creates a Class B misdemeanor for the tampering or otherwise making ineffective certain monitoring devices ( transdermal monitoring, global positioning monitoring, etc.) required as a condition of bail, probation or parole. The bonding company can ask that the bail be revoked.

PC 885, eff. 7/1/24, amends the crime of child abuse/neglect to change the punishment for placing a child 8 years of age in imminent danger of death, bodily injury, or physical or mental impairment from a Class D felony to a Class B felony.

PC 887, eff. 7/1/24, increases the penalty for the offense of threatening to commit an act of mass violence on school property or at a school related activity from a Class A misdemeanor to a Class E felony.

PC 888, eff, 7/1/24, expands the delinquent acts that constitute a violent juvenile sexual offense for purposes of the sexual offender registry to include an adjudication of delinquency for an act that, if committed by an adult, constitutes the criminal offense of rape of a child if the victim is less than four years younger than the offender and the judge, taking into account the facts and circumstances surrounding the delinquent act, orders that the juvenile be required to register as a violent juvenile sexual offender.

PC 892, eff. 5/1/24, amends 55-10-506 to authorize a law enforcement officer to execute a search warrant for medical records of blood content or a DUI test to

determine the alcohol or drug content of a person's blood for DUIs, Vehicular Homicides, etc., anywhere in the state, rather than just in the county in which the warrant was issued, and adds that “If the sample of a person's blood was procured pursuant to§ 55 10 406, then the limited testing of the blood sample for the alcohol content, drug content, or both shall be considered a reasonable search for all evidentiary purposes and shall be allowed into evidence without further need of a search warrant or court order.” One of these ways in 55-10-406 is “exigent circumstances.”

PC 911, eff 7/1/24, specifies that for the purposes of sexual exploitation of children offenses, the term "material" includes computer generated images created, adapted, or modified by artificial intelligence, which includes “generative artificial intelligence,” defined as “an artificial intelligence system that is capable of creating new content or data, including text, images, audio, or video, when prompted by an individual.”

PC 928, eff 7/1/24, the "Dr. Benjamin Mauck Act," created the new criminal offenses of assault within a healthcare facility and aggravated assault within a healthcare facility. Assault if the defendant knowingly causes physical contact within a healthcare facility and a reasonable person would regard the contact as extremely offensive or provocative, including, but not limited to, spitting, throwing, or otherwise transferring bodily fluids, bodily pathogens, or human waste onto the victim. A misdemeanor but a mandatory 30 days in jail and $5,000 mandatory fine. To be aggravated, it would have to results in serious bodily injury, death, involve the use or display of a deadly weapon; or involve strangulation or attempted strangulation. In that case it is a C felony with minimum 90 days in jail and a $15,000 mandatory fine.

"Healthcare facility" means the portion of an institution, place, building, or office devoted to providing healthcare services, as defined in § 56 61 102, and includes the reception and administrative areas of the facility.

PC 942, eff. 7/1/24, creates a Class A misdemeanor to violate a condition of release on bail and authorizes a law enforcement officer to arrest a person without a warrant based on probable cause to believe that the person has violated a condition of release.

PC 951, eff. 7/1/24, amended 39-13-522 (b) to change the punishment for rape of a child. If the defendant was a juvenile at the time of the offense, then the defendant must be sentenced as a Range II offender, however the sentence imposed may, if appropriate, be within Range III, but in no case shall it be lower than Range II. If the defendant was an adult at the time of the offense, then the sentence must be death, imprisonment for life without possibility of parole, or imprisonment for life. A death sentence, in the opinion of the TPI-Crim. Committee, would be unconstitutional as the United States Supreme Court has held in *Kennedy v. Louisiana*, 554 U. S. 407 (2008), that the Eighth Amendment prohibits the death penalty for the rape of a child where the

crime did not result, and was not intended to result, in the death of the victim. This new act also changes the wording of the aggravating and mitigating circumstances from "the murder" to "the offense" and other tweaks.

PC 952, eff. 7/1/24, specifies that a parent or guardian who knowingly leaves their child under the care or supervision of a person who is required to register as a sexual offender commits a Class A misdemeanor.

PC 973, in Section 3, eff. 7/1/24, makes it an A misdemeanor to possess a firearm if the defendant was under age 25 and was adjudged delinquent as a juvenile after 7/1/24 for certain offenses (aggravated assault, etc.).

PC 987, eff. 7/1/24, creates in Section 3 a new statute that lists 34 misdemeanors as "qualifying misdemeanors" and states that if the defendant has 5 or more convictions for any of those, at least one of which has occurred in the last 10 years (if so you can go back 10 more years) the defendant is adjudged a "recidivist misdemeanant" and should be sentenced to an E felony on his 6th misdemeanor conviction. This must be pled by the DA on a separate count of the indictment. The defendant is also a "recidivist misdemeanant" if the defendant commits a third misdemeanor of any of the following offenses: assault against a first responder or nurse, child abuse, neglect or endangerment, domestic assault, certain firearms violations or violation of a protection order or no contact order.

PC 1008, eff. 7/1/24, requires, when a person is arrested, booked, or confined in the jail of a county or municipality, the arresting law enforcement agency and the keeper of a jail to collaborate to verify the citizenship status of the person and the sheriff to report the status of those who are not lawfully present, or whose status cannot be determined, to the district attorneys general conference.

PC 1011, eff. 7/1/24, lowers the threshold for enhancing the minimum sentence of a person convicted of driving under the influence of an intoxicant, from a blood alcohol concentration of 0.20% or more to a blood alcohol concentration of 0.15% or more.

PC 1023, eff. 7/1/24, adds to indecent exposure the offense of "invites, entices, or fraudulently induces a minor into the person's residence" between ages 13 and 18 for the purpose of intentionally engaging in indecent exposure." PC 1049, eff. 7/1/24, increases the penalty for indecent exposure from a Class A misdemeanor to a Class E felony if the person was confined in a penal institution at the time of the commission of the offense and the offense was committed with the intent to abuse, torment, harass, or embarrass a guard or staff member; requires a mandatory minimum sentence of 14 days of incarceration consecutive to any sentence being served at the time of the commission of the offense.

PC 1032 makes it a Class A misdemeanor to commit "abortion trafficking," which is to recruit, harbor or transport a pregnant un-emancipated minor to conceal or procure an

abortion or to obtain an abortion-inducing drug for her. It does not apply to the parents or legal guardian, anyone who obtained the consent of the parents or legal guardian or ambulance driver or medical personnel acting in the scope of their duties. It is not a defense for the biological father if he caused the pregnancy in his daughter.

PC 1033, eff. 7/1/24, makes revisions to the law related to global positioning monitoring system devices, including requiring the court to order an offender to wear such a device under certain circumstances unless the court finds the offender no longer poses a threat to the alleged victim or public safety, requiring a cellular device application or electronic receptor device provided to the victim to be capable of notifying the victim if the offender is within a prescribed proximity of the victim's cellular device or electronic receptor device.

PC 1038, eff. 71/24, makes revisions to law relating to the sentencing of a defendant prior to 2024 and one who commits a nonviolent property offense, allowing parole 15% sooner in many offenses, but does not shorten the sentence expiration dates.

PC 1039, eff 7/1/24, creates a presumption that a person driving within 24 hours of being given medicine for an opiate overdose is still under the influence, and requires a first responder who administers an opioid antagonist to an individual experiencing an opioid related overdose to provide information on the risks associated with driving for a 24 hour period following administration.

PC 1045 creates “assault against a participant in a judicial proceeding” in which it is a Class E felony to cause bodily injury to or offensive physical contact with, while on the premises of the building in which judicial proceedings occur, anyone the defendant reasonably should know is a judge, district attorney general, attorney for a party in a criminal or civil case, court employee, bailiff, courtroom security personnel, and other person who works in the building in which judicial proceedings occur; a juror, witness, or party to a criminal or civil case or a victim in a criminal case; and a victim's status as a member of the public lawfully present in a courtroom during a criminal or civil proceeding.

PC 1052, eff 7/1/24, allows a prisoner of a county workhouse or jail to be 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, without using an electronic monitoring device if the judge of the sentencing court and the sheriff of the county where the jail or workhouse is located approve the prisoner's release in writing.

PC 1063, eff 7/1/24, adds another statute to allow a <u>life sentence without parole</u> to be given by the trial judge under any of these three circumstances:

“Notwithstanding another law to the contrary, and in addition to the enhancement factors prescribed under § 40-35-114, a court may enhance the statutory penalty up to imprisonment for life without the possibility of parole for a conviction under the following circumstances:
(1) The conviction is for the commission of a violent crime [listed in 40-38-11(g)] and the defendant was an illegal alien at the time the offense was committed;
(2) The conviction involves the use or display of a deadly weapon and the defendant was an illegal alien at the time the offense was committed; or
(3) The conviction is for the commission of a violent crime committed by an adult and the offense occurred on the property of a school while students or other children were present.”
(c) An arrest and subsequent conviction to which the enhancement factors would apply under subdivision (b)(1) or (2) must also be reported to the department of safety.

It also makes being in the United States illegally a new bail setting factor in 40-11-118. Pursuant to *State v. Gomez,* adopting *Blakely v. Washington*, the jury would have to find the defendant was in the United States illegally, not the trial judge.