TENNESSEE JUDICIAL CONFERENCE
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CRIMINAL LAW UPDATE: 2020-2021

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UNITED STATES SUPREME COURT
2020-2021 TERM

FOURTH AMENDMENT; SEIZURE OF PERSON: 5-3
Torres v. Madrid, 592 U.S ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021)

Officers with the New Mexico State Police arrived at an Albuquerque apartment complex to execute an arrest warrant and approached Petitioner, Roxanne Torres. The officers attempted to speak to her as she was getting into the driver's seat of her vehicle. Believing the officers to be carjackers, Torres hit the gas to escape. The officers fired their service pistols 13 times to stop Torres, striking her twice, but Torres managed to escape and drove herself to a hospital. Torres filed suit under §1983 claiming the officers used excessive force against her and that shooting her constituted an unreasonable seizure under the Fourth Amendment. The District Court granted the officers summary judgment and the Tenth Circuit affirmed holding that a suspects continued flight after being shot by police negates a Fourth Amendment excessive force claim. More specifically, the Court held that no "seizure" can occur unless there is (1) physical force or show of authority that (2) terminates the suspect's movement. HELD: The application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. REASONING: The seizure of a person can occur either by "physical force" or by "show of authority" that in some way restrains the liberty of a person. In California v. Hodari D., 499 U.S. 621 (1991), we held, based on the common law of arrest, that with regard to a "show of authority" a seizure does not occur unless the arrestee complies with the demand. On the other hand, the common law of arrest did not require submission to seizures made by physical force. The mere touching of the suspect constituted an arrest even if the suspect was not subdued. Applying that rule here, the application of physical force [shooting and wounding the suspect] is a seizure even though the suspect failed to stop. Not every "touching" constitutes a seizure. The touching must be done with "intent to restrain." Accidental force and intentional force applied for some purpose other than to restrain is not a seizure. Whether a seizure is made with intent to restrain is determined on an objective basis not on the subjective motivation of the officer nor on the subjective perceptions of the suspect. DISSENT: Would require actual termination of the suspect's movement. Majority ignores original and ordinary meaning of the constitution, as well as the common law of criminal arrests and conflates a seizure with an attempt to seize and an arrest with a battery. **Note:** In State v. Randolph, 74 S.W.3d 330, 335-337 (Tenn. 2002), the Tennessee Supreme Court rejected Hodari D., as controlling whether a person has been "seized" under the Tennessee Constitution. "Whether a person has been physically restrained or has stopped or yielded to the show of authority is not dispositive of whether there has been a seizure."

FEDERAL HABEAS CORPUS; DEFERENCE TO STATE COURT:
Mays v. Hines, 592 U.S. __, 141 S.Ct. 1145, 209 L.Ed.2d 265 (2021) Per Curiam

A Tennessee jury found Anthony Hines guilty of murdering Katherine Jenkins at a motel. Witnesses saw Hines fleeing in the victim's car and wearing a bloody shirt, and his family members heard him admit to stabbing someone at a motel. On state post-conviction it was discovered for the first time that the man who found the body at the hotel was not there just by happenstance but because he was having an affair. The post-conviction court found no "prejudice" as a result of trial counsel's decision not to mention the affair during the trial, based primarily on the overwhelming evidence of the Defendant's guilt. The Sixth Circuit disagreed finding that defense counsel should have presented the man that discovered the body as an alternative suspect. HELD: Sixth Circuit failed to give proper deference to the state court ruling and ignored the overwhelming evidence of Defendant's guilt.

JUVENILE; LIFE WITHOUT PAROLE:
Jones v. Mississippi, 593 U.S. __, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021) 6-3

Miller v. Alabama held that the 8th Amendment permits a life-without-parole sentence for a defendant who committed a homicide when he or she was under 18 years of age, but only if the sentence is not mandatory and the sentencer has discretion to impose a lesser punishment. Jones, who had once been given a non-discretionary life without parole sentence was resentenced after Miller. At the new sentencing hearing the judge acknowledged that he had discretion to impose a lesser sentence, but again found the life-without-parole sentence to be appropriate. ISSUE: Whether in light of Miller, a sentencer must make a separate factual finding that a murderer under 18 is permanently incorrigible before imposing a sentence of life-without-parole. HELD: As long as the sentencer has discretion to impose a lesser sentence, there is no requirement of a specific finding of permanently incorrigibility nor any requirement of an on-the-record explanation of the sentence.
See: State v. Tyshone Booker, 2020 WL 1697367 (Tenn. Crim. App. 2020)
Permission to appeal granted; orally argued February 24, 2021.

RETROACTIVITY; "WATERSHED" RULES REJECTED:
Edwards v. Vannoy, 593 U.S. __, 141 S.Ct. 1547, 209 L.Ed.2d 651 (2021)

Defendant was convicted of various crimes in Louisiana, some on a 10-2 verdict and others on a 11-1 verdict. After losing all direct appeals, Defendant filed for federal habeas corpus. District Court and Court of Appeals rejected Defendant's complaint that he was convicted by less than a unanimous jury. While the writ of certiorari was pending Ramos v. Louisiana was decided. HELD: Ramos jury unanimity rule does not apply retroactively on federal collateral review. New rules of criminal procedure apply

retroactively to cases still on direct appeal but they do not apply to cases on collateral review unless the new rule amounts to a "watershed" rule of criminal procedure. We have never found any rule to reach the level of being a "watershed" rule and to continue to use this formulation is misleading to the bench and bar. Hence, we reject this "watershed" exception.

COMMUNITY CARE-TAKING EXCEPTION:
Caniglia v. Strom, 593 U.S. __, 141 S.Ct. 1596, 209 L.Ed.2d 604 (2021)

Facts: After an argument with his wife, Petitioner put a gun on a dining room table and asked his wife to shoot him. Instead, she left and spent the night at a hotel. The next morning she could not reach her husband by phone, so she called the police and asked them to make a welfare check. The officers arrived and found the Petitioner on the front porch. Although he denied being suicidal, he agreed to go to the hospital for an evaluation, after the officers promised not to confiscate his guns, and an ambulance was called. After he left for the hospital, the officers entered his home and took two handguns. Petitioner sued claiming his Fourth Amendment rights had been violated by the officers entering and seizing his guns without a warrant. The District Court granted the officers a summary judgment. The First Circuit Court of Appeals affirmed relying solely on the "community caretaking" exception to the warrant requirement. The Court failed to consider any other justification for the officers' actions; including consent, exigent circumstances and the state's mental health laws. HELD: "Caretaking" duties of police officers do not create a standalone exception to the warrant requirement and we refuse to extend the holding of Cady v. Dombrowski, 413 U.S. 433 (1973) which involved the search of an automobile that had already been impounded for an unsecured firearm to allow the search of a home. "But, this recognition that police officers perform many civic tasks in modern society was just that – a recognition that these tasks exist, and not an open-ended license to perform them anywhere." Vacated and remanded for further consideration.

Note: State v. McCormick, 494 S.W.3d 673 (Tenn. 2016) (adopting community caretaking as an exception to the 4TH Amendment and Article I, Section 7)(1. officer must have specific and articulable facts when viewed objectively and under the totality of the circumstances which warrant a belief that a caretaking function is needed and 2. the behavior and scope of the intrusion must be reasonably restrained and tailored to the need.

What does this mean for the Tennessee Community-Caretaking Exception?

FOURTH AMENDMENT; EXIGENT CIRCUMSTANCES; HOT PURSUIT:
Lange v. California, 594 U.S. __ 141 S.Ct. 2011, 210 L.Ed.2d 486 (2021)

Facts: Lange drove by a California highway patrol officer playing loud music and honking his horn. The officer followed him and turned on his blue lights. Rather than stopping, Lange drove a short distance to his driveway and entered his garage. The officer followed him into his garage and observed signs of intoxication. After a field sobriety test, Lange was arrested. A later blood test showed his blood alcohol was three times the legal limit. Lange moved to suppress the evidence on the grounds that the officer's warrantless entry into his garage violated the 4th Amendment. The California Court of Appeal affirmed the denial of the motion holding that the hot pursuit of a fleeing misdemeanant always provides exigent circumstances to allow entry into a home. ISSUE: Whether pursuit of a fleeing misdemeanor suspect always – or more legally put, categorically – qualifies as an exigent circumstance. **HELD:** No. The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit to determine whether there is a law enforcement emergency. On many occasions the officer will have good reason to enter – to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when an officer has time to get a warrant, he must do so – even though the misdemeanant fled. Our cases have generally applied the exigent-circumstances exception of a case-by-case basis applying the totality of the circumstances rather than a categorical approach. **Roberts, Concurring in Judgment:** Police should be able to enter premises without a warrant when they are in hot pursuit of a fleeing suspect, regardless of the level of the suspected crime. **Kavanaugh, Concurring:** The distinction between the majority view and Roberts is mostly academic because the fleeing misdemeanant will "almost always" also involve a recognized exigent circumstance – such as a risk of escape, destruction of evidence, or harm to others – that will justify the warrantless entry. **Thomas, concurring in part and concurring in judgment:** I would not apply exclusionary rule in any case in which the suspect fled the police.

INEFFECTIVE ASSISTANCE OF COUNSEL; FAILURE TO CALL DEFENSE LAWYER AS WITNESS CANNOT BE PER SE REASON FOR DENYING RELIEF:
Dunn v. Reeves, 594 U.S. __, 141 S.Ct. 2405, 210 L.Ed.2d 812 (2021)

Years after being convicted of murder and sentenced to death, Reeves sought state post-conviction relief in Alabama arguing among some 80 other issues that his trial counsel were ineffective in failing to hire an expert to develop sentencing phase mitigation evidence of intellectual disability. In the post-conviction proceeding, Reeves failed to call as witnesses any of the lawyers who represented Reeves. The Alabama Court of Criminal Appeals denied relief stressing the lack of evidence about trial counsel reasoning. The Court noted that the decision whether or not to hire an expert is

typically a strategic decision that will not constitute deficient performance per se but is dependent on the reasoning behind counsel's actions. Since the record was silent as to the reasons for his attorneys actions, the Court concluded that Reeves had failed to overcome the presumption of effectiveness. On federal habeas review the Eleventh Circuit held that the imposition of a per se rule requiring trial counsel to testify in all cases in order to prove ineffective assistance of counsel violated the Sixth Amendment and that trial counsel were ineffective in failing to develop more evidence of intellectual disability. ISSUE: Did the Alabama Court violate clearly established federal law when it rejected Reeves' claim that his attorneys should have hired an expert? No. The Alabama Court did not apply a blanket rule. It simply held that under the facts of this case, the failure to call the attorneys to testify as to "why" they failed to hire an expert resulted in a silent record. Further this silent record could not overcome the presumption that counsels decision was within the range of reason for defense lawyers. Reversed and remanded. DISSENT: A per se rule that a petitioner cannot prove ineffective assistance of counsel if his attorney does not testify at a post-conviction hearing violates Strickland v. Washington, and that is what the majority implicitly recognizes in its opinion and that is exactly what the Alabama court did in the present case.

TENNESSEE SUPREME COURT
2020-2021

POST-CONVICTION; CONSIDERATION OF ISSUE NOT RAISED BY PETITIONER:
Holland v. State, 610 S.W.3d 450 (Tenn. 2020)

The Petitioner pled guilty to attempted first degree murder and especially aggravated robbery with an agreed sentence of 17 years to be served concurrently with a federal sentence. Subsequently, he filed a Petition for Post-Conviction Relief and alleged numerous grounds, none of which complained about the fact that his sentence was to be served concurrently to another federal sentence. The trial judge conducted an evidentiary hearing in which there was no evidence or argument relating to the concurrent federal sentence, and denied the Petition. CCA affirmed the denial of the Petition but remanded the case to the trial court to conduct an evidentiary hearing to consider one issue: "Whether the Petitioner was advised of the consequences of entering a guilty plea based on an agreement that the state sentence be served concurrently with a prior federal sentence." CCA took this action despite fact that the issue had not been raised in the direct appeal. HELD: Because the Petitioner did not raise the issue of concurrent sentencing in his petition for post-conviction relief, during the post-conviction hearing, or on appeal, the issue was waived, and the CCA was without authority to remand the case for consideration of the issue. Plain error review is not available to an appellate in a post-conviction appeal. Generally, issues in a post-conviction proceeding are limited to those raised in the written pleadings. However, the appellate courts may consider an issue not contained in the pleadings if the issue was argued in the post-conviction proceeding and decided by the post-conviction court without objection. In this case, there was no mention of the concurrent sentencing issue in the pleadings and the matter was not argued in the trial or appellate court and the post-conviction judge did not rule on the issue.

RECUSAL; TRIAL JUDGE FORMER DEPUTY DISTRICT ATTORNEY:
State v. Griffin, 610 S.W.3d 752 (Tenn. 2020)
State v. Styles, 610 S.W.3d 746 (Tenn. 2020)
State v. Clark, 610 S.W.3d 739 (Tenn. 2020)

Trial judge served as Deputy District Attorney General for Knox County at time the Defendants were indicted. Defendant filed motions asking the trial judge to recuse himself based on statements he made in his judicial application and his campaign website that emphasized his supervisory authority over "all" criminal prosecutions in Knox County. Trial judge denied the motion for recusal stating that he was not the direct supervisor of the ADA currently assigned to the case and he did not participate personally or substantially in the present case at the time he was Deputy District Attorney. CCA reversed and ordered recusal. HELD: WE hold that the trial judge

properly denied the motion for recusal because a person of ordinary prudence in the judge's position, knowing all the facts known to the trial judge, would not find a reasonable basis for questioning the judge's impartiality. Supervisory authority without more is not enough to require disqualification.

"PROMOTIONAL MONEY LAUNDERING"
State v. Allison, 618 S.W.3d 24 (Tenn. 2021)

FACTS: Defendant provided confidential informant with 8 pounds of marijuana, 3 pounds of which he "fronted" and agreed to be paid later. Four days later (on January 13) informant paid the Defendant the $3,000 that was owed for the fronted portion of the marijuana. At that time the Defendant advised that he was trying to get his "money together" to purchase more marijuana, and, after a phone call to his supplier, Defendant advised the informant that he would have more the next night. Three days later (January 16) the informant met with the Defendant again and obtained more marijuana, some of which was paid for and some was again "fronted." Defendant advised that he had already paid his supplier for this marijuana such that he was not in a rush to obtain payment for the "fronted" portion. Four days later (January 20) the informant paid the Defendant another $3,000 representing partial payment for the "fronted" drugs. The next day the Defendant was taken into custody and, among other things, $2,460 of the second $3,000 in marked money was found in his possession.

Defendant was convicted of two counts of delivering marijuana and two counts of money laundering, corresponding to the January 13 and January 20 meetings with the informant. Defendant contended that (1) the evidence was insufficient to support convictions for money laundering; (2) his convictions violated double jeopardy principles; and (3) the money laundering statute is unconstitutionally vague. HELD: Evidence was sufficient to support conviction for money laundering arising out of January 13 meeting, but insufficient as to the January 20th meeting. Tenn. Code Ann. § 39-14-903 criminalizes two forms of money laundering. First, it is most commonly understood to refer to financial transactions that are aimed at concealing the nature or source of funds resulting from criminal activity. However, there is a second form of money laundering which criminalizes acts involving criminally derived proceeds that are undertaken with intent to promote the carrying on of unlawful activity. This form of money laundering is referred to as "promotional" money laundering. Defendant argues that in order to support a conviction for money laundering there must be proof that the Defendant used the proceeds in a subsequent financial transaction with intent to promote unlawful activity. We agree that Defendant's mere receipt of payment for the marijuana he fronted, *standing alone*, would not support a conviction for money laundering. However, the proof in this case is such that a rational juror could infer that the cash received by the Defendant on January 13 was used by the Defendant to obtain the additional marijuana he delivered to the informant on January 16th. This proof shows a drug dealer using the proceeds of a drug transaction to purchase additional drugs and consummate future sales which is a classic form of "promotional" money laundering. As to the meeting of January 20th, since the evidence does not show what the Defendant did with the proceeds, the evidence is insufficient to support that conviction. There is no double jeopardy violation as the statute (39-14-903) specifically

allows for separate punishment for the underlying offense and the offense of money laundering. As for the claim that the phrase “carry on” is unconstitutionally vague, we believe that the common understanding of the phrase gave the Defendant ample notice that his conduct was criminal.

INEVITABLE DISCOVERY; EXIGENT CIRCUMSTANCES; CONSENT EXCEPTIONS:
State v. Scott, 619 S.W.3d 196 (Tenn. 2021)

Warren County Deputies were dispatched to the Defendant’s home armed with arrest warrants out of White County for Ronnie Dishman, the Defendant’s step-brother. Mr. Dishman did not live in the Defendant’s residence, but the Deputies were advised by White County Deputies that they believed Mr. Dishman was at the home and armed. When the Deputies arrived at the scene they observed an unknown male [Mr. Bell] enter the Defendant’s residence and lock the door. The officers believed the male to be Mr. Dishman. The Deputies then surrounded the house and ordered the Defendant and the male outside. They eventually exited the house and were detained. The officers then learned that the man [Mr. Bell] was not the suspect they were looking for [Mr. Dishman]. The Defendant advised that Mr. Dishman was not inside the house and eventually gave written permission to search the house for Mr. Dishman. While conducting the search, a Deputy saw, but did not seize drugs. That Deputy exited the home and advised his supervisor, at which time the Defendant refused to allow a further search of her home. The Deputies then obtained a search warrant, reentered the house and collected the drugs. Defendant filed a motion to suppress. The trial judge held that because the Deputies believed the man who entered the house upon seeing them approach was the man they were looking for, they had authority to seize the property and the subsequent consent to search was not rendered involuntary by their seizure.

The Defendant, Samantha Grissom Scott, pleaded guilty in the Circuit Court for Warren County to possession with the intent to deliver more than twenty-six grams of methamphetamine and to possession of drug paraphernalia. See T.C.A. §§ 39-17-434 (2018) (possession with the intent to deliver methamphetamine), 39-17-425 (2018) (possession of drug paraphernalia). The trial court sentenced the Defendant to an effective eight years and ordered her to serve 180 days’ confinement with the remainder on probation. On appeal, the Defendant presented a certified question of law regarding the legality of the warrantless entry into her home. That question, in essence, was whether the actions of the officers in surrounding the home were illegal rendering the subsequent consent invalid and/or whether they had exigent circumstances justifying their actions.

In a split decision, the Court of Criminal Appeals upheld the denial of the motion to suppress on the ground that the certified question was not dispositive of the case as the officers could have obtained a search warrant if the consent had not been given such

that the evidence would have been "inevitably discovered." The Dissent argued that the majority has misapplied the inevitable discovery doctrine. If such doctrine is applied anytime an officer "could have" obtained a warrant, but didn't, the Fourth Amendment warrant requirement would be meaningless. As such, the Dissent was of the opinion that the consent to search was not voluntary and that neither the exigent circumstances nor the inevitable discovery rule were applicable, such that the certified question was, in fact, dispositive of the case.

Held: The certified question is dispositive of the case. The "inevitable discovery" doctrine does not apply in this case and the State failed to carry its burden of proving either exigent circumstances or a voluntary consent. We reverse the Court of Criminal Appeals and dismiss the Defendant's convictions.

The "inevitable discovery doctrine" is "an exception to the exclusionary rule that applies when the evidence in question would inevitably have been discovered without reference to the police error or misconduct." It rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a later, *lawful* seizure that is *genuinely independent* of an earlier tainted seizure. "The ultimate test is whether the evidence would have been discovered through an independent proper avenue that comports with the Fourth Amendment." The test is not whether the officer "could" have obtained a warrant, but whether he "would" have discovered the evidence by lawful means. "We must not conflate these important distinctions." "Tennessee courts have long interpreted the inevitable discovery doctrine as requiring more than a mere showing that evidence *could have* been obtained through independent and lawful means; rather, proof of inevitable discovery must show, with a level of certainty, that evidence *would have* been obtained based on 'no[n]-speculative elements …focuse[d] on demonstrated historical facts capable of ready verification or impeachment.'" "This fact-specific inquiry requires this Court to examine if the record provides sufficient proof that the evidence *would have*, not just *could have*, been inevitably discovered through independent, lawful means."

In this case, not only is there nothing in the record to show that the State *would have* obtained a warrant, there is also nothing in the record to show that they *could have* obtained a warrant as the record is devoid of evidence that the State had probable cause to get a warrant. The Court of Criminal Appeals erred in finding the inevitable discovery doctrine applied to this case.

Nothing in the record supports a finding that exigent circumstances existed to justify the constructive seizure of the Defendant's home. The man who entered the house and closed the door [Mr. Bell] did not threaten the officers with a weapon so it cannot be said that the officers were responding to an immediate risk of harm to the officers or others. Likewise, there is no evidence that the officers' actions were needed to prevent the destruction of evidence.

Under the circumstances of this case, Defendant's consent to search her house was not freely and voluntarily given. At least nine officers surrounded the Defendant's home

armed with assault rifles and ordered the Defendant to come out of her home. The Defendant refused for 30 minutes. When she eventually exited the officers continued to press her for consent for another 30 minutes and this continued even after they discovered that Mr. Bell was not the man they were looking for. The proof also showed that while the Defendant was being detained outside her home she was extremely upset and crying.

MOTION FOR JUDGMENT OF AQUITTAL; APPLICATION OF CORRECT STANDARD:
State v. Weems, 619 S.W.3d 208 (Tenn. 2021)

Shalonda Weems, Defendant, was indicted in a two-count indictment for aggravated child neglect and felony murder in connection with the starvation death of her six-month-old child. The jury found Defendant guilty of aggravated child neglect and reckless homicide. Defendant filed a Tennessee Rule of Criminal Procedure 29(e) Motion for Judgment of Acquittal ("the Motion") as to both counts. Following a hearing, the trial court granted the Motion in part, set aside the guilty verdict for aggravated child neglect, and entered a judgment of acquittal. More specifically, the trial judge found insufficient evidence of the *mens* rea element of "knowingly." The court denied the Motion as to the reckless homicide verdict and entered a judgment of conviction. The State appealed claiming that the trial court erred in granting the Motion and that the trial judge improperly substituted its own credibility determination for those of the jury and failed to consider the evidence in the light most favorable to the State. Court of Criminal Appeals affirmed the trial court's judgment of acquittal for aggravated child neglect; finding that the evidence was not sufficient to prove that the Defendant "knowingly" did not feed or neglect the child because the Defendant repeatedly denied any neglect, medical records showed the child was healthy weeks before her death and that the Defendant had taken her to regular doctor's visits, and there was testimony that the child looked healthy before her death. **HELD**: Contrary to the trial judge's conclusion, a reasonable jury could have found all the elements of aggravated child neglect, including the *mens rea* beyond a reasonable doubt. While the trial judge articulated the correct standard of review, he failed to apply that standard. Specifically, he failed disregard certain points of countervailing evidence or recognize the jury's ability to make inferences and conclusions from the evidence. Instead, he substituted his own assessment of the credibility of the Defendant and assigned her testimony more weight than the medical evidence. Hence, we reverse the judgment of the Court of Criminal Appeals, vacate he trial court's decision and reinstate the conviction.

RULE 36.1; MOTION TO CORRECT ILLEGAL SENTENCE; VOID VS. VOIDABLE:
State v. Reid, 620 S.W.3d 685 (Tenn. 2021)

Defendant pled guilty to possession of cocaine with intent to sell and possession of a firearm by a convicted felon. Pursuant to the criminal gang enforcement statute, the firearm offense was enhanced from a Class C to a Class B felony. Ten months after his guilty plea the Court of Criminal Appeals declared the criminal gang enforcement statute unconstitutional. The Petitioner did not file a petition for post-conviction relief. Instead, more than two years after the opinion of the Court of Criminal Appeals declaring the act unconstitutional and almost four years after entering his guilty plea, the Petitioner filed a Rule 36.1 Motion to Correct an Illegal Sentence. The trial court denied the Motion. The CCA reversed holding that the enhanced sentence was illegal and void. HELD: A sentence is not rendered void merely because the statute under which the sentence was imposed is later declared unconstitutional. Such a sentence is voidable and may only be attacked by a timely petition for post-conviction relief.

DOUBLE JEOPARDY; PRESERVATION OF EVIDENCE; 404(B):
State v. Rimmer, 623 S.W.3d 235 (Tenn. 2021)

Motion to Dismiss felony murder counts of indictment on double jeopardy grounds was properly denied when jury that found him guilty of premeditated first degree murder in prior trial was charged sequentially not to consider felony murder if it returned a guilty verdict as to premeditated murder. Assertion that double jeopardy principles barred the Defendant's second trial based on prosecutorial misconduct is misplaced. Prosecutorial misconduct only prevents retrial when such misconduct is intended by the prosecution to force the defendant into moving for a mistrial and a mistrial is granted. Defendant's Ferguson motion to dismiss the indictments or suppress DNA evidence collected from the Honda automobile because the police eventually released the vehicle before the defense had an opportunity to inspect and independently test it was properly denied. The State had no duty to retain the vehicle. The State collected considerable evidence from the vehicle and the vehicle itself had little apparent exculpatory value. Even if the State had a duty to preserve the Honda, which it did not, application of the Ferguson factors shows that release of the vehicle did not result in a fundamentally unfair trial. The vehicle was released pursuant to policy, the vehicle itself had little evidentiary value, and the evidence at trial was overwhelming. Trial judge followed the mandates of Tenn. R. Evid. 404(b) and properly allowed evidence of the Defendant's prior convictions for rape and aggravated assault against the murder victim and his statements of intent to harm the victim after his release from prison. The trial court found this evidence probative of intent, identity, motive and premeditation. Likewise, trial court properly allowed evidence of Defendant's attempts to escape after his arrest for the murder. This evidence was relevant to show guilt, knowledge of guilt, and consciousness of guilt. Trial judge weighed probative value of evidence against the danger of unfair prejudice and mitigated the danger of unfair prejudice by excluding evidence as to the details of the rape and aggravated assault. Trial court also gave limiting instruction that prior crimes could only be considered to show *motive* and by giving "flight" instruction. ***Practice Pointer: Make sure your 404(b) instruction***

matches the non-propensity reason you find the evidence relevant; and make sure it is the right reason. Also see State v. Robert Huse (appellate court will not consider a non-propensity reason for admitting 404(b) evidence if the jury is not instructed on that reason. Sentence of death was proper.

Court of Criminal Appeals – Selected Cases

RULE 404(B); APPLICATION TO WITNESSES:
State v. William Eugene Moon, No. M2019-01865-CCA-R3-CD (Tenn. Crim. App. 2021)
Permission to appeal granted May 13, 2021.

Although harmless error, trial judge erred in allowing State to impeach a defense *witness* with prior bad acts of alleged drug dealing. Trial judge did not comply with Rule 404(b) requirements such that we will review the matter de novo. Evidence did not establish prior act of drug dealing by clear and convincing evidence. In addition, the evidence was not relevant to any material issue in the case and, as such, its probative value was not outweighed by its prejudicial effect. ***Significantly, CCA takes for granted that T.C.A. § 24-7-125 has the effect of overruling the Supreme Court's opinion in State v. Stevens, 78 S.W.3d 817 (Tenn. 2002) (holding that a "person" under Rule 404(b) is limited to a criminal defendant, not to just any witness).*** Could this case be before the court for the purpose of resolving the conflict?

POST-CONVICTION; PREJUDICE FORM FAILURE TO FILE MOTION TO SUPPRESS:
Tommie Phillips v. State, No. W2019-01927-CCA-R3-PC (Tenn. Crim. App. Feb. 26, 2021)
Permission to appeal granted June 17, 2021 ("The Court is particularly interested in the applicable standard of review, including the petitioner's burden to establish prejudice when the petitioner alleges counsel was constitutionally ineffective for failing to file a motion to suppress or, as here, for failing to include a particular ground in the motion to suppress.")

Facts: Petitioner was convicted of four counts of felony murder along with multiple other crimes. On direct appeal he challenged the fact that the trial judge had denied a motion to suppress his confession that was made on 5th Amendment grounds. The trial judge was affirmed on appeal and the appellate court indicated that any error would have been harmless in light of the eyewitness testimony of three of the victims identifying the Petitioner as the culprit. Petitioner then filed the present petition for post-conviction relief claiming in part that his trial counsel were ineffective in failing to challenge his confession on 4th amendment grounds. More specifically, he claimed that there had been a violation of the requirements of *Gerstein v. Pugh* when he was held for 48 hours without being charged.

Post-conviction court:
Testimony in trial court: Mr. Nance recalled discussing and considering the issue of the Memphis Police Department 48 hour hold policy during his representation, but did not raise the issue during the motion to suppress. He could not recall "why" he chose not to raise the 48 hour hold issue. Exhibit 1 was a copy of the arrest ticket. Exhibit 2 was a copy of a court order finding probable cause and authorizing the detention of the Defendant.

Standard applied by trial court: With regard to the failure to file a motion to suppress, Petitioner has the burden of proving that his trial attorney's decision not to file a motion to suppress was deficient. When petitioner fails to show deficiency, trial counsel's decision will be given deference, so long as the tactical choice is an informed one based on adequate preparation. Further, assuming arguendo that the failure to file a motion to suppress is deficient, petitioner must establish prejudice ***by demonstrating a reasonable probability that the motion to suppress would have been granted and a reasonable probability that it would have made a difference in the outcome of the case***. See Antwan Yumata Hunter v. State, M2013-01142-CCA-R3-PC, 2014 WL 3058425 (Tenn. Crim. App. July 8, 2014).

Ruling of trial court: Petitioner contends that trial counsel were ineffective in failing to file a motion to suppress his statements given to the police as being in violation of the Petitioner's Fourth amendment rights. At least one of the victim's identified the Petitioner as the culprit. As such, it is clear that the police had probable cause to arrest the Petitioner, even if he had not voluntarily turned himself into the police. More specifically, it appears as though the Petitioner is making a claim that his 4th Amendment rights were violated because he was not given a Gerstein probable cause determination as required by law. See Gerstein v. Pugh, 420 U.S. 103. 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). It appears that the police responded to the scene of the crime around 3:00 p.m. on December 9, 2008. The Petitioner turned himself into the police at around 12:40 p.m. on December 10, 2008. Probable cause was determined by a judicial commissioner on December 10, 2008 (document is stamped filed at 7:13 p.m.). According to the finding of probable cause the defendant had already turned himself in and confessed at the time the probable cause determination was made. As such, a Gerstein determination was, in fact, made within seven (7) hours of defendant coming into custody. Accordingly, there was no Gerstein violation. See State v. Gonzales, 2018 WL 5098204 Tenn. Crim. App. Oct. 18, 2018) (neither defendant's presence nor an adversary hearing is required to satisfy Gerstein; the only question is whether there is probable cause justifying detention). Accordingly. Petitioner has failed to demonstrate either "deficient performance" or "prejudice."

> **CCA:** "In order to prevail on a claim that his counsel was ineffective for failing to challenge his statement on Fourth Amendment grounds, the petitioner "must also ***prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate prejudice.'*** *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) Stated differently, whether counsel rendered deficient services that prejudiced the petitioner on this matter depends entirely on the merit of the underlying motion.

> In our view, the record supports the denial of post-conviction relief. The petitioner failed to present any evidence at the evidentiary hearing that suggests that a Fourth Amendment challenge to his statement would have been sustained by the trial court. [The court then noted that on direct appeal it had already ruled that the failure to suppress the statement would have been harmless error in light of the other overwhelming evidence.] Consequently, even if the petitioner had presented facts to support a conclusion that a Fourth Amendment challenge would have been successful, he still cannot show that the result of his trial would have been different given the overwhelming proof of his guilt.

PROBATION REVOCATION; REQUIREMENTS ON RESENTENCING:
State v. Dagnan, No. M2020-00152-CCA-R3-CD, 2021 WL 289010 (Tenn. Crim. App. 2021). ***Permission to appeal granted*** April 7, 2021

Defendant pled guilty to theft and was sentenced to six years as a Range II offender. At the time of sentencing the Defendant had 171 days of jail credit, so the trial judge suspended the balance of the sentence and placed the Defendant on probation. The Defendant violated the probation six times and after each violation the trial judge imposed some split time followed by yet another suspension of the sentence. After the last violation the trial judge ordered the Defendant to serve the balance of his sentence in custody and refused to order yet another alternative sentence. Defendant appealed claiming that the trial judge abused his discretion by ordering him to serve the balance of his sentence in custody. HELD: We find no abuse of discretion. CONCURRANCE: " I write separately to simply express my belief that once a determination is made that a defendant has violated the conditions of his or her probation, neither an additional hearing nor any additional findings are statutorily mandated of a trial court to determine the manner in which the original sentence should be served. Thus, there is no opportunity for an abuse of discretion when a 'second exercise of discretion' is not required by either section 40-35-310 or 40-35-311 of Tennessee Code Annotated."

SELF-DEFENSE: NEXUS REQUIREMENT:
State v. Tyshone Booker, 2020 WL 1697367 (Tenn. Crim. App. 2020)
Permission to appeal granted; orally argued February 24, 2021.

During a botched robbery, sixteen year-old Booker shot and killed the victim, but claimed self-defense. The trial judge deleted the language from the Pattern jury instruction that says a defendant has "no duty to retreat" and instead substituted language stating that the defendant had an affirmative duty to retreat. The Defendant was convicted of two counts of felony murder and two counts of especially aggravated robbery. On appeal, the Defendant argued that there was no "causal nexus" between his illegal act of being a minor in possession of a firearm and his need to defend himself and, as a result, he was entitled to a "no duty to retreat" instruction. The CCA agrees

with this analysis, in principle, and concludes in "that a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary before the trial court can instruct the jury that the defendant had a duty to retreat." The CCA reasons that "[t]o interpret the statute without a nexus between the 'unlawful activity' and the duty to retreat would lead to absurd results." Applying the "nexus" requirement the CCA upheld the jury instructions on the basis that there was a "nexus" between the illegal act of robbery and the need for self-defense, even if there was no "nexus" between the illegal possession of a firearm and the need for self-defense. QUESTION: Does this mean that the CCA analysis with regard to a minor in possession of a firearm was DICTA?

Note: In State v. Perrier, 536 S.W.3d 388 (Tenn. 2017) the Tennessee Supreme Court declined to address whether there needed to be a "nexus" between the illegal activity and the need for self-defense, but held that [the status offense] of being a convicted felon in possession of a firearm is the type of illegal activity that prevents the no duty to retreat language from being applicable. Question: If there is a requirement that there be a nexus between the status offense of illegally possession a weapon and the need for self-defense doesn't this effectively eliminate illegal possession of a weapon from ever being the type of illegal activity that requires a duty to retreat? Also, in Perrier the Tennessee Supreme Court relied heavily on Dawkins v. State, 252 P.3d 314 (Okl. Crim. App. 2011), in its analysis of whether the illegal activity is tied to the duty to retreat. In that case the highest court in Oklahoma refused to apply a nexus requirement between the act of illegally possessing a sawed-off shotgun and the need for self-defense. See also Dorsey v. State, 74 So.3d 521 (Fla. App. 2011) (refusing to apply nexus requirement to possession of a firearm by a convicted felon).

Note: 2021 Tenn. Pub. Acts, ch. 115 (effective July 1, 2021) : deletes language "not engaged in unlawful activity" and replaces it with "not engaged in conduct that would constitute a felony or Class A misdemeanor"

BRADY; FORMER TESTIMONY EXCEPTION; OPPORTUNITY TO CROSS:

State v. Lawrence Eugene Allen, No.M2019-00667-CCA-R3-Cd, 2020 WL 7253538 (Tenn. Crim. App. 2020)

Defendant was arrested for aggravated rape and domestic assault of his wife, based primarily upon the statement of the wife given to a Detective. Before the preliminary hearing, the wife sent two emails to the Detective stating that her husband did not rape her and that she had a consensual sexual encounter with another man the same day as her husband's arrest. A preliminary hearing was held in which both the wife and the Detective testified, but the State failed to make disclosure of the wife's emails prior to

the preliminary hearing. A few days after the preliminary hearing the wife was murdered and hence unavailable to testify at the time of defendant's trial. Prior to trial, Defendant moved to exclude the wife's preliminary hearing testimony based on Tenn. R. Evid. 804 and the Confrontation Clauses of both the State and Federal Constitutions. The trial judge denied the motion finding that the defense had both an opportunity and similar motive to cross-examine the wife. CCA: We hold that the State's failure to disclose the exculpatory emails before the preliminary hearing deprived the defendant of the opportunity to cross-examine the wife about the emails, violated Brady and deprived the Defendant of the right to due process of law. We reverse.

MIRANDA; CUSTODY; BURDEN OF PROOF:
State v. Moran, 621 S.W.3d 249 (Tenn. Crim. App. 2020)

Police were dispatched to a residence which was the scene of a domestic disturbance. [The police dispatcher was advised that there were weapons inside the home.] Upon arrival, the victim met the police in the front yard and advised that she had been raped by her boyfriend. A police officer knocked on the front door and when the defendant answered the door the officer handcuffed the defendant and walked him a few feet and sat him down in the back seat of the patrol car with the back door left open. Thereafter, the police officer asked the defendant "what happened" without advising the defendant of his Miranda rights.

Defendant filed a motion to suppress alleging a violation of Miranda. Trial judge ruled that Defendant did not carry his burden of proving that he was in "custody" for Miranda purposes, based in large part upon the fact that the parties (both the State and the defense) failed to present evidence during the motion to suppress hearing on the various factors deemed relevant by the Tennessee Supreme Court to determine if a person is in "custody" for Miranda purposes.

(1) The time and location of the interrogation
(2) The duration and character of the questioning
(3) The officer's tone of voice and general demeanor
(4) The suspect's method of transportation to the place of questioning
(5) The number of police officers present
(6) Any limitation of movement or other form of restraint
(7) Any interactions between the officer and the suspect
(did officer tell suspect he was under arrest or not under arrest)
(8) The extent to which the suspect is confronted with officer's suspicion of guilt or evidence
(9) The extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

See State v. Anderson, 937 S.W.2d 865 (Tenn. 1996)

HELD: "Appellate courts should consider the entire record, affording the prevailing party the strongest legitimate view of the evidence and all reasonable inferences drawn

from that evidence." The question of who has the burden of establishing custody for the purposes of Miranda is a matter of first impression in Tennessee. The majority of other jurisdictions that have addressed this issue place the burden of defendant. We see no reason to depart from the majority view.

"After carefully reviewing the proof at the motion hearing and trial, we conclude the trial court erred in finding the defendant was not in custody at the time of the statement. Upon arriving at the scene, Officer Lin observed the victim outside of the apartment building, and the victim told Officer Lin that she had been raped by the defendant, her boyfriend. Officer Lin knocked on the defendant's residence and asked him to identify himself and his relationship to the victim. Officer Lin then immediately handcuffed the defendant and placed him in the back of the police car, which was parked in front of the defendant's apartment. Once the defendant was detained, Officer Lin asked him, "What happened?" In response, the defendant admitted, in part, that, because he was unable to maintain an erection, he rubbed his penis on the victim's vagina. <u>During the questioning, Officer Lin never told the defendant that he was not under arrest or that he did not have to answer any questions.</u> Viewing the matter in the totality of the circumstances, we conclude a reasonable person in the defendant's position would have considered himself or herself deprived of freedom of movement to a degree associated with formal arrest."

……….

"…Additionally, courts have repeatedly held that an officer may handcuff a suspect or place him in a police car for safety purposes….. However, in the present case, <u>Officer Lin never articulated to the defendant that he was being handcuffed or placed in the back of the police car for safety reasons, and his testimony at the suppression hearing did not indicate the handcuffs or the police car were used due to concerns for the officers' safety."</u>

Trial judge erred in denying motion to suppress, but error was harmless.

VOLUNTARY MANSLAUGHTER; NO EVIDENCE OF ADEQUATE PROVOCATION: <u>State v. Laron Rashawn Lumpkin</u>, No. M2019-01912-CCA-R3-CD (Tenn. Crim. App. 2020)

Defendant was indicted for felony murder and especially aggravated robbery. Defendant was convicted of voluntary manslaughter and especially aggravated robbery. Majority finds evidence of voluntary manslaughter insufficient and reduces conviction to reckless homicide, but affirms conviction for especially aggravated robbery. FACTS: Three men armed with handguns approached the victim who was sitting in the driver's seat of a car. The three men pointed their guns at the victim and one said: "Give me everything you got." The victim handed one of the men his wallet, but when one also demanded that the victim give up is cell phone and reached into the car, the victim

punched the robber and one of the men shot the victim in the back of the head. MAJORITY states:

> Defendant rested without offering any proof. No evidence, direct or circumstantial, was introduced at trial to support a conclusion that the perpetrator who shot the victim in the head acted in a state of "passion," produced by "adequate provocation," which was legally sufficient to cause a reasonable person to act in an irrational manner. If we were to conclude that the victim's resistance to Defendant reaching to take his cell phone, without any other evidence of the shooter's state of mind, supported this element of voluntary manslaughter, it would be precedent to require trial judges to instruct voluntary manslaughter as a lesser-included offense whenever a homicide victim offers any resistance to a robbery.

DISSENT: "…, I think that a reasonable jury could have found that [the shooter] shot the victim in anger that was provoked by the victim's punch and that Defendant was criminally responsible for [the shooter's] conduct."

PROOF OF OTHER CRIMES; INTENT:
State v. Robert E. Huse, 2021 WL 1100758 (Tenn. Crim. App. 2021)

Defendant was convicted of aggravated child abuse and first degree felony murder in connection with the death of his infant son. State was allowed to introduce prior bad act evidence that Defendant abused another child four years before for the purpose of proving intent, identity and common scheme or plan. HELD: Admission to show "identity" was not proper as the circumstances of the crime were not so unique as to constitute a "signature crime." Admission to show "intent" was also improper in this case. In order to admit prior crimes to show intent the State must be able to demonstrate that the prior crime is "connected" to the present crime in some unique way such that it has probative value on the issue of intent apart from any inference that the defendant simply has the propensity to commit that type of offense. The State failed to show such connection" in this case. The crimes were four years apart and involved two different children. Furthermore, since the defense offered to stipulate that the injuries were not accidental and the State had ample other evidence to establish intent the danger of prejudice outweighed any potential probative value. Admission to show "common scheme or plan" was improper because this category is not an independent purpose. For it to apply the common plan or scheme must show (1) a signature crime; (2) a larger plan or conspiracy or (3) involve the same criminal transaction. Since none of these apply, using the catch-all phrase "common scheme or plan" cannot be justified. Finally, admission to show "absence of mistake or accident" was improper, among other reasons, because the trial judge did not instruct the jury that it could consider the 404(b) evidence for this purpose.

ATTEMPT TO SOLICIT A MINOR:
State v. Russell Wheeler, Jr., No. W2020-00030-CCA-R3-CD (Tenn. Crim. App. 2021)

Crime of "attempted" solicitation of a minor does not exist under Tennessee law because solicitation statute itself prohibits an attempt. When a statutory offense includes an attempt to commit an act there is no separate crime of attempt to commit that offense.

SAVINGS STATUTE:
State v. Marvin Maurice Deberry, No. W2019-01666-CCA-R3-CD (Tenn. Crim. App. 2021) ***Permission to Appeal Granted September 23, 2021.***

Defendant was convicted by a jury of driving while being a HMVO. After his conviction, but prior to his sentencing, an amendment to the statute that was the basis of his HMVO conviction went into effect, so that Defendant's conduct was no longer criminalized. The trial court after initially sentencing the Defendant to serve five years, modified the judgment to reflect no penalty. We hold that the savings statute in 39-11-112 applies because the legislature's act of removing punishment for the offense constitutes a lesser penalty.

DETERMINING RANGE OF SENTENCE: 24-HOUR MERGER RULE:
State v. William Gossett, No. W2019-02282-CCA-R3-CD (Tenn. Crim. App. 2021)

Defendant's two juvenile convictions for rape of a child committed within 24 hours of each other fall within the exception to the "24-hour-merger rule" in that rape of a child would inherently involve injury or threatened injury although the elements of rape of a child do not include injury or threatened injury. **Note:** The wording of the 24-hour-merger rule was changed for offenses committed after June 7, 2005. For offenses committed before that date the merger rule did not apply if the offenses actually involved injury or threat of injury. For offenses committed after June 7, 2005, the legislature changed the wording so that the merger rule does not apply if the statutory elements of an offense involve injury or threatened injury. **Question:** Did this panel rely on cases decided under the previous version of the Merger rule and disregard the legislative change?

GUILTY PLEA; PROCEDURE; WHEN TRIAL JUDGE IS AMBUSHED:
State v. Maurice "Ricky" Blocker, No. W2020-00543-CCA-R3-PC (Tenn. Crim. App. 2021)

What does the trial judge do when, after the indictment is read to the jury, a defense attorney stands up and says the defendant "pleads guilty" to one of the counts of the indictment?

The "better practice" is to send the jury out and hold a discussion outside the presence of the jury in order to clarify the defendant's intentions regarding the entry of the guilty plea. If it is determined the defendant desires to plead guilty the judge could either decline to accept the guilty plea or accept the guilty plea following the normal Rule 11 procedures. In the latter case, the charge would then be removed from the jury's consideration. ***Only thing jury instructions would need to say, if at all, is that "this count has been removed from your consideration."***

If the defendant "clarified that he did not wish to enter a guilty plea, the trial court could have instructed trial counsel to refrain from characterizing [the defendant's] trial strategy as a guilty plea and to instead use words such as 'not contesting' or 'conceding' or 'admitting' [defendant's] involvement [in the crime]. The State would then be on notice that it was [still] required to put on proof of the charge, and the charge would be presented to the jury."

What do the jury instructions say with regard to this latter situation?

T.P.I. -- CRIM. 1.01
CRIME CHARGED AND PLEA

The defendant is charged in Count ____ of the indictment with the crime of __________________. The defendant pleads not guilty to this offense.

In this case the trial judge said: "The Defendant pleads not guilty to the first count and guilty to the second count."

On direct appeal, the CCA discouraged such an instruction. See State v. Maurice Blooker, No. W2015-0053-CCA-R3-CD, 2016 WL 3009255 (Tenn. Crim. App. 2016) (the decision to inform the jury of a defendant's partial or incomplete guilty plea to a charge is fraught with peril and such practice is discouraged in the future).

On appeal of the denial of post-conviction, the CCA says: ""The trial court properly instructed the jury that [defendant] pled guilty to the theft because that was what trial counsel told the jury."

Does anyone have suggestions as to how to best address this situation in the jury instructions?

If the defense attorney announces a guilty plea and it is determined in the jury out hearing that the defendant does not wish to plead guilty or the plea is rejected, how do you rule on a motion for mistrial made by the defense?

INSTRUCTIVE REVERSALS AND REMANDS

State of Tennessee v. Jason Monroe Griffith
E2020-00259-CCA-R3-CD - 2/25/21

The defendant entered an open Alford plea to 17 burglaries and thefts. The trial court imposed an effective sentence of 15 years and ordered the defendant to pay $10,750 in restitution. On appeal, the Defendant argues that the trial court should have held a hearing regarding his ability to pay restitution and the reasonableness of the restitution amount. After review, we reverse the judgment of the trial court with respect to restitution and remand this case for a restitution hearing and entry of amended judgments that reflect the amount of restitution and the manner of payment.

State of Tennessee v. Erick Eugene Jones, Jr.
E2019-01737-CCA-R3-CD – 4/7/21

The defendant's facilitation of felony murder (agg child abuse) conviction was upheld while the facilitation of felony murder (agg child neglect) was reversed, along with a couple of other facilitation counts, because he was merely present on the reversals but gave substantial assistance on those affirmed.

Larry Brown v. State of Tennessee
W2019-01803-CCA-R3-PC – 4/13/21

Petitioner, Larry Brown, appeals from the Shelby County Criminal Court's denial of his petition for post-conviction relief, in which he alleged that his trial counsel was ineffective for failing to "ensure the enforcement of a plea agreement promising concurrent service of Petitioner's state and federal sentences." Upon review, we conclude that the petition was filed outside the one-year statute of limitations applicable to post-conviction proceedings. However, because we are unable to determine from the record whether due process requires the tolling of the statute of limitations, we vacate the post-conviction court's order and remand the case to the post-conviction court for a determination of whether due process tolling applies.

State of Tennessee v. Lafaris Brown
E2019-02222-CCA-R3-CD – 4/27/21

Under the totality of the circumstances, officers do not have reasonable suspicion to conduct an investigatory stop of a Defendant simply because he was standing in a private parking lot for "[m]aybe a few seconds" before approaching the apartment complex. See State v. Moats, 403 S.W.3d 170, 180 (Tenn. 2013) (citing United States v. See, 574 F.3d 309, 315 (6th Cir. 2009)) (stating "that the early hour of the morning, the high crime area, and the request that the officer be on the lookout for loiterers, among the other factors present, did not qualify as reasonable suspicion," and "explaining that the officer was not responding to a complaint, did not suspect the men of a specific crime, did not observe the men acting suspiciously, and did not cause them to flee upon seeing his police car"), overruled on other grounds by State v. McCormick, 494 S.W.3d 673 (Tenn. 2016); State v. Herbert Lee Massey, No. 01C01-9406-CR-00218, 1995 WL 518872, at *4 (Tenn. Crim. App. Sept. 5, 1995) ("That the defendant might be guilty of criminal trespass for standing on a public street corner does not qualify as an articulable, reasonable suspicion."). Because the officers did not have reasonable suspicion to conduct the investigatory stop, the trial court erred in denying Defendant's Motion to Suppress the firearm Defendant was carrying.

State of Tennessee v. Lynn Frank Bristol
M2019-00531-CCA-R3-CD - 4/29/21

The defendant was indicted for sexual battery and rape of a child. After a jury trial, Defendant was convicted of aggravated sexual battery in Count One and the lesser-included offense of aggravated sexual battery in Count Two. Although not raised by either party on appeal, the CCA found that as the lesser included offenses, although given to the jury orally, were missing from the written instructions given to the jury, the trial court erred by failing to submit the complete written charge to the jury, in violation of Tennessee Rule of Criminal Procedure 30(c), and reversed on plain error, even though no objection had been made.

State of Tennessee v. Desiree Petty
M2020-00303-CCA-R3-CD - 4/30/21

The defendant was ordered to pay $94,000 in restitution and had been paying $150 per month for 14 years when she violated her probation. The judge put her back on probation after ordering her to do 90 days, but increased her restitution payment to $400 without taking any proof on her ability to pay. The CCA held that "a trial court may modify the terms of probation on its own motion after a revocation hearing, however, there must be evidence supporting the trial court's decision. In this case, there is no evidence supporting the trial court's finding to increase the Defendant's restitution. The trial court heard no evidence on the matter, despite the fact that the Defendant's general manager was present and available to testify.... We reverse the trial court's increase of restitution, and we remand this case to the trial court for entry of an order reinstating the Defendant's original restitution payment of $150 per month."

State of Tennessee v. Chad M. Varnell
E2020-01352-CCA-R3-CD - 7/1/21

The defendant, charged with violation of his probation, agreed off the record to stipulate to his violation if the judge would consider him for substance abuse treatment. On the record, the judge granted the violation and sentenced him to serve his 8 years, rejecting the program. The defendant appealed, stating that the judge didn't order "an updated validated risk and needs assessment to assist the trial court in making its determination." The CCA remanded the case for a hearing because, even though there was no requirement for the court to consider an updated risk assessment, no proof had been presented at a hearing that he had violated. No oral or written waiver was present in the record.

State of Tennessee v. Mickey Verchell Shanklin
W2019-01460-CCA-R3-CD - 8/9/21

A jury convicted the Defendant of the sale of heroin, the delivery of heroin, the sale of fentanyl, and the delivery of fentanyl and assessed fines of $50,000 for the heroin convictions and $25,000 for the fentanyl convictions. He was sentenced to 30 years as a Range III offender, and the trial court also affirmed the total fines of $75,000. The CCA remanded the case to the trial court for a hearing with regard to the fines. "The trial court made no findings in imposing the total fine of $75,000 fixed by the jury. As a result, the trial court's decision is not entitled to a presumption of reasonableness, and we may not defer to the trial court's exercise of its discretionary authority. See State v. Pollard, 432 S.W.3d 851, 863 64 (Tenn. 2013). While the Defendant requests that this court conduct a de novo review and impose appropriate fines, the factors to be considered and weighed in imposing a fine require a fact intensive inquiry. Furthermore, where the trial court fails to place on the record any reason for a particular sentencing decision, the most appropriate action is to remand the case to the trial court for reconsideration." The dissent stated that the fines should just be set at the minimum instead of a remand to the trial court.

State of Tennessee v. Stephen Maurice Mobley
E2020-00234-CCA-R3-CD - 8/16/21

The defendant was convicted of first degree murder. During voir dire, the state exercised a challenge to an African-American juror and a Batson objection was made. The trial judge denied it because it was the first juror removed and therefore the State had not shown a "pattern" of discrimination, without making the State give a race-neutral reason. The CCA remanded the case to the trial judge for a hearing on the objection, stating that "The trial court improperly found that the Defendant was required to show a

pattern of discrimination in order to establish a prima facie case of purposeful discrimination. Both the Tennessee Supreme Court and this court have held that it is not necessary to show a "pattern" of strikes against potential jurors of a particular race. ... The exclusion of a single juror of a particular race may be sufficient to constitute a prima facie case." (Citations omitted).

Darryl Robinson v. State of Tennessee
W2020-00942-CCA-R3-PC - 8/18/21

The trial judge entered findings of fact and conclusions of law on most of the allegations in the petition, but not on allegations in the petition that had no proof presented, but were argued. The CCA remanded the case back to the trial judge stating that "When determining the merits of a post conviction petition, the Post Conviction Procedure Act requires the post conviction court to make written findings of fact and conclusions of law. A trial court's final disposition of a petition for post conviction relief 'shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each such ground.' Tenn. Code Ann. § 40 30 111(b) (emphasis added). The use of the word "shall" clearly indicates the Tennessee General Assembly intended that the duty of the postconviction court to make findings of fact is mandatory. Not only do the post conviction court's findings of fact facilitate appellate review but, in many cases, they are necessary for such review. Id. Where the post conviction court fails to make "a clear and detailed finding of fact," either orally or on the record, the appellate court is 'at a complete loss to know the basis of the trial judge's decision and judgment; assignments of error and appellate review are seriously frustrated if not completely thwarted by lack of a definitive finding of fact by the trial judge.'"

State of Tennessee v. William Darnell Richardson
M2020-00286-CCA-R3-CD - 8/17/21

A drug conviction was reversed because the only proof the controlled substance in question was Alprazolam in this drug case was that the officer testified that he looked the pills up on pillidentifier.com, which was inadmissible hearsay. The hearsay exception on which the State relied, 803(17), extended only to the market reports or commercial publications themselves, not his testifying as a lay witness to what he read on a website.

2021 CRIMINAL PUBLIC ACTS
(plus one from 2020 Executive Session)

2020 (2nd Ex. Sess.), ch. 3, eff. 8/20/20, created 39-13-116, Assault against a First Responder. It reads in pertinent part as follows:

(a) A person commits assault against a first responder, who is discharging or attempting to discharge the first responder's official duties, who:
   (1) Knowingly causes bodily injury to a first responder; or
   (2) Knowingly causes physical contact with a first responder 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 person of a first responder.
(b) A person commits aggravated assault against a first responder, who is discharging or attempting to discharge the first responder's official duties, who knowingly commits an assault under subsection (a), and the assault:
   (1) Results in serious bodily injury to the first responder;
   (2) Results in the death of the first responder;
   (3) Involved the use or display of a deadly weapon; or
   (4) Involved strangulation or attempted strangulation.

Assault under subsection (a) is a Class A misdemeanor, with a mandatory fine of five thousand dollars ($5,000) and a mandatory minimum sentence of thirty (30) days. Aggravated assault under subsection (b) is a Class C felony with a mandatory fine of fifteen thousand dollars ($15,000) and a mandatory minimum sentence of ninety (90) days incarceration.

A first responder is defined as a firefighter, emergency services personnel, POST-certified law enforcement officer, person who responds to calls for emergency assistance from a 911 call, capitol police officers, Tennessee highway patrol officers, Tennessee bureau of investigation agents, Tennessee wildlife resources agency officers, and park rangers.

PC 56, eff. 3/29/21, clarifies in 55-8-101 that a “motorized wheelchair” is not a motor vehicle for purposes of the rules of the road, accidents, and crimes involving motor vehicles.

PC 60, eff. 7/1/21, creates a new statute that permits service of an ex parte order of protection for up to one year from issuance, and creates a lifetime order of protection that can be issued to a victim of any felony offense in Title 39, Article 13, parts 1 (assaults), 2 (homicides), 3 (kidnapping and false imprisonment) or 5 (sex offenses), to prohibit the offender from coming about or communicating with the victim. “At the hearing on the petition, the court shall, if the petitioner has proved the respondent was

convicted of an offense … and that the petitioner was the victim of the offense, issue a lifetime order of protection that remains in effect until the death of the petitioner or the respondent."

PC 83, eff. 4/7/21, enacted the "2020 Defense Doctrine" by adding "grave sexual abuse" to "well-grounded apprehension of death or serious bodily injury" as a reason to justify using deadly force in self-defense, in the defense of duress, and a valid reason for a law enforcement officer to use deadly force to effect the arrest of a fleeing felon pursuant to 39-11-620. It defines "grave sexual abuse" as rape, aggravated rape, rape of a child, or aggravated rape of a child.

PC 104, eff. 7/1/20, revises the sentence for aggravated rape of a child, 39-13-531,when committed by a juvenile, as required by the U.S. Supreme Court in Miller v. Alabama, from mandatory life imprisonment without parole to a Class A felony, to be sentenced within Range III (40 to 60 years); applies to sentences imposed on or after July 1, 2021; specifies that a person who was a juvenile at the time of committing the offense of aggravated rape of a child must serve 100 percent of the sentence imposed less sentence credits earned and retained, not to reduce the sentence imposed by more than 15 percent.

PC 107, eff. 7//1/21, enacts "Evelyn Boswell's Law," a Class A misdemeanor for failing to report a missing child. "Whenever the parent knows, learns, or believes that a minor child under the parent's charge and care is missing, the parent shall make the report … within a reasonable time after determining that the child is missing, but in no event more than twenty-four (24) hours after determining that the child is missing. As used in this section, "minor child" means a person who is twelve (12) years of age or younger.

PC 108, eff. 7/1/21, amends 39-17-1307 to create the "permitless carry" law. It creates an exception to the offense of unlawful carrying of a firearm if a person is at least 21 years old (or at least 18 and is a veteran, or in the reserves or armed forces), that person lawfully possesses the handgun, and is in a place where the person is lawfully present. It also amends 39-14-105 to make theft of a firearm less than $2,500 a Class E felony with a minimum mandatory 180 days to be served, and increases the parole eligibility for convicted felons with handguns or firearms to 85%

PC 115, eff. 7/1/21, enacts an important change to the self-defense statute, 39-11-611. The wording in section (b), "a person who is not engaged in unlawful activity and is in a place where the person has a right to be" has been changed to "a person who is not engaged in a felony or Class A misdemeanor" as having no duty to retreat. Also, "a person is not engaged in conduct that would constitute a felony or Class A misdemeanor or in a place where the person does not have a right to be if the person is engaged in the activity or in the place due to the person's status as a victim of human trafficking. The person must prove the person's status as a victim of human trafficking by clear and convincing evidence. The person may provide clear and convincing evidence of the person's status as a victim of human trafficking through testimony."

When you combine this change with PC 83, it means that if you are being trafficked against your will, you have a right to use deadly force against a person making you have sex against your will, as it is “grave sexual abuse.” You can use deadly force on a pimp or a customer, even if you are using your own residence. You also would have no duty to attempt to retreat first. The defense attorney would have to prove the defendant was being trafficked by clear and convincing evidence before being entitled to that instruction.

PC 210, eff. 7/1/21, amends 39-13-523 to add the offense of trafficking a person for a commercial sex act to the meaning of “predatory offenses” for purposes of sentencing a person as a child sexual predator.

PC 215, eff. 7/1/21, amends 39-13-204 to create the “Good Samaritan Sentencing Enhancement Act” which adds a new aggravating circumstance the jury may use to sentence to death or life without parole:

The victim of the murder was acting as a Good Samaritan at the time of the murder and the defendant knew that the person was acting as a Good Samaritan. "Good Samaritan" means a person who helps, defends, protects, or renders emergency care to a person in need without compensation.

PC 230, eff. 7/1/21, amends 39-17-402 to exclude from the definition of marijuana "a product," instead of "a cannabidiol product" approved as a prescription medication by the United States food and drug administration.

PC 236, eff. 7/1/21, amends 39-16-201 to lower possession of a telecommunications device in a penal institution from a D to a fine only E felony up to $3,000. A second or subsequent violation is a minimum fine of $3,000.

PC 246, eff. 7/1/21, amends 39-13-513 to exclude juveniles from being prosecuted for prostitution. Instead, a “law enforcement officer who takes a person under eighteen (18) years of age into custody for a suspected violation of this section shall, upon determination that the person is a minor, provide the minor with the telephone number for the Tennessee human trafficking resource center hotline, notify the department of children's services, and release the minor to the custody of a parent or legal guardian or transport the minor to a shelter care facility designated by the juvenile court judge to facilitate the release of the minor to the custody of a parent or legal guardian.

PC 278, eff. 7/1/21, amends 39-16-603 to increase the penalty for evading arrest that results in the serious bodily injury of a law enforcement officer to a Class C felony,

and evading arrest that results in the death of a law enforcement officer to a Class A felony.

PC 282, eff. 4/30/21, creates a process by which the commissioner of correction may certify as eligible for parole certain chronically debilitated or incapacitated inmates; clarifies that medical conditions for which an inmate may be granted a furlough by the commissioner of correction must be chronically debilitating or incapacitating.

PC 348, eff. 7/1/21, amends 39-15-219 and other statutes to require that disposition of remains from a surgical abortion performed at an abortion facility be by burial or cremation; requires the department of health to promulgate certain rules and forms; and makes certain other changes regarding the disposition of fetal remains.

PC 354, eff. 7/1/21, repeals part of 39-13-605, Photographing in Violation of Privacy, to remove the requirement that the picture was taken when the person was in a place in which there was an expectation of privacy, but adds an element of focusing on intimate areas of the victim's body, defined, and adds social media and other means of dissemination to enhance it to a felony instead of an A misdemeanor.

PC 355, eff. 7/1/21, enacts 40-30-401 et seq. to require a law enforcement agency that discovers potentially exculpatory evidence to report that evidence, and creates the "Post-Conviction Fingerprint Analysis Act of 2021," to allow convicted defendants to test evidence not tested if it might exonerate or lessen the grade of conviction if retried, with no statute of limitation.

PC 358, eff. 7/1/21, amends 40-35-302 to require a judge to notify, if practicable, a defendant at the time of sentencing if the conviction is for an expungable offense and the time period after which a petition to expunge may be filed. It also requires the administrative office of the courts to provide judges handling criminal matters with a reference document containing all of the expungement information.

PC 361, eff. 7/1/21, amends 40-32-101 to allow a person who was convicted of a nonviolent offense committed prior to January 1, 1980, and received a pardon for the offense, to have the person's criminal records related to the offense expunged. They formerly had to be convicted on or after 1/1/80.

PC 362, eff. 7/1/21, amends 39-13-519 to read "A victim of a sexually-oriented crime is entitled to a forensic medical examination without charge to the victim as provided in§ 29-13-118. Within twenty-four (24) hours of the conclusion of the forensic examination, the healthcare provider shall notify the applicable law enforcement agency that a sexual assault evidence collection kit or hold kit is ready for release. Within seven (7) days of being notified, the law enforcement agency shall pick up the sexual assault evidence collection kit or hold kit for storage or transmission to the state crime lab or other similar qualified laboratory for either serology or deoxyribonucleic acid (DNA) testing." "If an adult victim elects not to report the alleged offense to police at the time of the forensic medical examination, the sexual assault evidence collection kit

becomes a hold kit, and the healthcare provider shall assign a number to identify the kit rather than use the victim's name. The healthcare provider shall provide the victim with the identifying number placed on the victim's hold kit; information about where and how long the kit will be stored; procedures for making a police report and information about the electronic tracking system procured by the Tennessee bureau of investigation … contact information for local rape crisis centers, if any; and a copy of the rights of a victim of a sexually-oriented crime as set forth in Section 9. The hold kit must be released to the appropriate law enforcement agency for storage pursuant to subdivision (d)(2). Once a victim makes a police report, the law enforcement agency shall change the kit status in the system prior to submitting the kit to the state crime lab or other similar qualified laboratory for either serology or DNA testing.

PC 363, eff. 7/1/21, removes the statute of limitation for prosecution of trafficking for commercial sex act when committed against a child on or after July 1, 2021.

PC 364, eff. 7/1/21, aims to stop “porch pirates” by creating the new crime of “Theft of Mail,” taking mail from a mailbox or curtilage, punishable as theft. The taking doesn’t have to be “knowing,” unlike a normal theft, but it must be with intent to deprive the addressee of the mail, defining “addressee.” A “second or subsequent offense of mail theft” may not be punished as less than a Class E felony. It will probably be codified at 39-14-155.

PC 365, eff. 7/1/21, amends 39-13-703 to expand the sexual offenses for which a defendant is required to submit to an evaluation and be subject to a standardized plan of sex offender treatment as part of the defendant's sentence.

PC 371, eff. 7/1/21, in 39-17-1002(8), the definition section of sex crimes against children, changes “lascivious” to “for the purpose of the sexual arousal or gratification of the defendant or another.”

PC 394, eff. 7/1/21, amends 39-13-202 to state that “a person convicted of attempted first degree murder may be sentenced to imprisonment for life without possibility of parole if the court finds” that the defendant “knew or reasonably should have known” that the victim was a law enforcement officer, correctional officer, department of correction employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter, who was engaged in the performance of official duties.
Constitutionally, the jury would have to make this finding rather than the trial judge, despite the wording in the statute, to make this sentence an option. If the defendant is indicted in the same count of the indictment for both the victim’s being an official in the performance of duties and also for suffering serious bodily injury, the trial judge would need to instruct on both.

PC 395, eff. 7/1/21, creates the Class A misdemeanor of communicating a threat to commit an act of mass violence on school property or at a school-related activity; creates the Class B misdemeanor of knowing failure to report a threat of mass violence on school property or at a school-related activity.

PC 399, eff 5/11/21, amends 39-13-203 to define "intellectual disability" as:
(1) Significantly subaverage general intellectual functioning;
(2) Deficits in adaptive behavior; and
(3) The intellectual disability must have manifested during the developmental period, or by eighteen (18) years of age.
Significantly, it deleted the prior statutory language of "as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below."

It also states that "A defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure. … A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits."

PC 402, eff. 7/1/21, amends 39-17-312 to add a 4th way to commit abuse of a corpse, by "engaging in sexual contact with a corpse without legal privilege."

PC 409, eff. 7/1/21, enacts the Governor's Sentencing Reform Project, making many significant changes in this 6 page bill to many statutes. It encourages drug or recovery courts and treatment programs instead of incarceration. It allows the department to contract with entities and organizations, including local governments, to create or operate community-based alternatives to incarceration; rewrites various provisions regarding community corrections, probation, probation revocation, and release on bail.

40-11-115 is amended to read:
In determining under subsection (a) whether or not a defendant shall be released, and if so, the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of the community, the magistrate must consider any available results of a validated pretrial risk assessment conducted regarding the defendant for use in the jurisdiction and the defendant's financial resources. In making this determination, the magistrate may also consider:
(1) The defendant's length of residence in the community;
(2) The defendant's employment status;
(3) The defendant's prior criminal record, including prior releases on recognizance or bail;
(4) Whether, at the time of being charged with the offense, the defendant was on release pending trial, sentencing, or appeal in connection with another offense;

(5) The nature of the offense, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance;
(6) Any substance use or mental health issues that would be better addressed in a community-based treatment program; and
(7) Any other factors indicating the defendant's ties to the community or bearing on the defendant's risk of willful failure to appear.

40-36-106(a)(1) is amended to read:

The court shall strongly consider utilizing available and appropriate sentencing alternatives for any defendant who, as appropriately documented, including through a validated risk and needs assessment under§ 40-35-207(a)(10), has a behavioral health need, such as a mental illness as defined in § 33-1-101, or is chemically dependent as defined in § 16-22-103. The court has sole discretion whether to utilize available sentencing alternatives under this subsection.

40-35-303 is amended to read:

If the court imposes a period of probation for only one (1) conviction, then the period of probation shall not exceed eight (8) years, including instances where a period of probation is imposed after a period of confinement. If the court imposes a period of probation for more than one (1) conviction, then the total period of probation imposed shall not exceed ten (10) years.

40-35-308 is amended to read:

Notwithstanding the actual sentence imposed under§ 40-35-303(c), at the conclusion of a probation revocation hearing, the court shall have the authority to extend the defendant's period of probation supervision for a period not exceeding one (1) year upon determining on the record that:
(A) The defendant has repeatedly and intentionally failed to comply with court-ordered treatment programming;
(B) The defendant has intentionally violated the conditions of probation regarding contact with the victim or the victim's family; or
(C) The defendant has intentionally failed to comply with restitution orders despite having the ability to pay the restitution owed, and extending the period of probation would be more effective than other available options to ensure that the defendant pays the remaining amount of restitution owed.
(2) For each subsequent determination that the defendant has violated a provision or provisions of subdivision (c)(1), the court may extend probation for an additional period not exceeding one (1) year.

40-35-311(d) is amended by adding the following:

(2) Notwithstanding subdivision (d)(1), the trial judge shall not revoke probation, whether temporarily under subdivision (e)(1) or otherwise, based upon one (1) instance of technical violation or violations.
(3) As used in this subsection (d), "technical violation" means an act that violates the terms or conditions of probation but does not constitute a new felony, new class A misdemeanor, zero tolerance violation as defined by the department of correction

community supervision sanction matrix, or absconding.
….
If the trial judge revokes a defendant's probation and suspension of sentence after finding, by a preponderance of the evidence, that the defendant engaged in conduct that is a second or subsequent instance of a technical violation pursuant to subdivision (d)(2), then the trial judge may temporarily revoke the probation and suspension of sentence by an order duly entered upon the minutes of the court, and:
(A) Impose a term of incarceration not to exceed:
(i) Fifteen (15) days for a first revocation;
(ii) Thirty (30) days for a second revocation;
(iii) Ninety (90) days for a third revocation; or
(iv) The remainder of the sentence for a fourth or subsequent revocation [or resentence if violating a community correction sentence.

There are many other changes in this bill, affecting probation, community correction, bail and jail credits.

PC 410, eff. 7/1/21, still part of the Governor's Reform Project, extensively reforms parole, including reentry supervision release one year prior to the inmate's "RED" date, or if a 100% crime, the expire of sentence date. To be an eligible inmate in 40-35-506, the inmate must be an inmate who:
(1) Is serving a felony sentence for an offense that occurred on or after July 1, 2021;
(2) Is eligible for parole consideration;
(3) Is calculated to have one (1) year or less remaining until expiration of all sentences that the inmate is serving or set to serve, or is calculated to reach the inmate's release eligibility date with less than one (1) year remaining until expiration;
(4) Does not have an active detainer for new or untried charges or sentences to serve in other jurisdictions;
(5) Has not been classified as maximum or close custody for disciplinary reasons in the previous two (2) years; and
(6) If the inmate has previously had the inmate's probation or parole revoked, has served at least six (6) months since returning to custody after revocation of probation or parole.
….
(1) The department of correction shall determine whether an inmate is an eligible inmate. Notwithstanding § 40-35-503, an eligible inmate must be released on mandatory reentry supervision one (1) year prior to the inmate's sentence expiration date as calculated by the department or, if the inmate is not eligible for parole one (1) year prior to the inmate's sentence expiration date, upon reaching the inmate's release eligibility date. Upon release, an eligible inmate is subject to mandatory reentry supervision until the inmate's sentence expiration date. The release must be under the terms and conditions established by the department of correction. The board of parole shall issue a certificate of mandatory reentry supervision to such offenders.
(2) Eligible inmates released on mandatory reentry supervision must be considered released on parole and must be supervised and subject to violations or revocation under chapter 28 of this title to the same extent as discretionary parolees. All provisions

relative to imposition of graduated sanctions under chapter 28 of this title apply to eligible inmates released on mandatory reentry supervision.
(3) Upon the issuance of a violation warrant regarding an eligible inmate, the inmate does not earn credit toward completion of the sentence until the removal of the delinquency.
(4) Mandatory reentry supervision for eligible inmates is not a commutation of sentence nor any other form of executive clemency.
(c) Notwithstanding § 40-35-111, upon expiration of a sentence of confinement for a person who is not an eligible inmate, the inmate must be released and subject to mandatory reentry supervision for a period of one (1) year following the inmate's sentence expiration date under conditions to be prescribed by the department of correction. Noncriminal, technical violations of supervision conditions by ineligible inmates must not result in revocation of supervision or incarceration. The mandatory reentry supervision period must be calculated by the department of correction.

There are many other changes in this bill as well, scattered over many statutes.

PC 413, eff. 1/1/22, reallocates payments in a new 40-24-105(a) to say that “the first moneys paid in a case shall first be credited toward the payment of restitution owed to the victim, if any, and once restitution has been paid in full, the next moneys shall be credited toward payment of litigation taxes, and once litigation taxes have been paid, the next moneys shall be credited toward payment of costs; then additional moneys shall be credited toward payment of the fine.”

PC 418, eff. 7/1/21, amends 39-14-411 to add that “critical infrastructure vandalism” also applies to destroying or injuring a farm.

PC 430, eff. 7/1/21, amends 39-15-404(d) to add a mandatory minimum $1,000 fine for the A misdemeanor of giving alcoholic beverages to a child or enticing or purchasing alcoholic beverages for a child, or allowing a child to drink on defendant’s premises, also imposing 100 hours of community service. The judge can also revoke the defendant’s license (if no valid license to start with the judge can increase the hours up to 200).

PC 434, eff. 7/1/21, amends 69-9-219(c)(1), the penalty for Boating Under the Influence and other boating statutes by eliminating fines but adding a mandatory minimum 48 hours for a first offense, increasing the punishment for subsequent offenses for prior DUIs, just like DUI and allowing the judge to impose alcohol treatment as a condition of probation, adding BUI as a means of vehicular assault, homicide, etc.

PC 440, eff. 7/1/21, amends 39-17-303 to add two more ways to commit “aggravated riot,” by getting paid to riot, or to riot after coming from another state to commit a crime.

This offense prior to the amendment was a Class E felony with a minimum mandatory “45 days of incarceration,” and “the court shall include an order of restitution for any injury, property damage, or loss incurred as a result of the offense.” The new amendment increases this minimum sentence to 60 days if someone not rioting is injured or substantial property damage occurred. “Riot” is defined as “a disturbance in a public place or penal institution involving an assemblage of three (3) or more persons, whether or not participating in any otherwise lawful activity, which, by tumultuous and violent conduct, creates grave danger of substantial damage to property or serious bodily injury to persons or substantially obstructs law enforcement or other governmental function.”

PC 458, eff. 7/1/21, adds “nurse” to the definition of First Responder.

PC 462, eff. 5/18/21, amends 39-13-609, privacy rights, to allow police to use drones for providing or enhancing security for a public event, including concerts, athletic events, festivals, protests, and other outdoor events and to investigate the scene of a crime that is occurring or has occurred. However, nothing discovered is “admissible as evidence in a criminal prosecution in any court of law in this state if it was collected or obtained in violation of subsection (c) or (d);” which contain exceptions such as a search warrant, used to save life, when searching for a fugitive, etc.

PC 494, eff. 7/1/21, extends eligibility for expunction to a person convicted of Class A misdemeanor assault prior to July 1, 2000, even though it is a crime against the person.

PC 500, eff. 10/1/21, amends the elements of elder abuse crimes by changing the definitions of “caregiver.” “financial exploitation,” “physical harm,” “relative,” and “sexual exploitation” in 39-15-501. It also adds “vulnerable adult, as defined in § 39-15-501, with an intellectual disability” to the list of victims.

PC 501, eff. 7/1/21, adds a new statute to control the “zooming” of experts:

(a)(1) "Forensic analyst" means an expert in the scientific detection of crime; and
(2) "Remote testimony" means any method by which a forensic analyst testifies from a location other than the location where the hearing or trial is being conducted and outside the physical presence of a party or parties.
(b)The court may permit remote testimony by a forensic analyst in any criminal proceeding only if:
(1) The state has provided a copy of any report produced by the forensic analyst that the state is seeking to admit into evidence through remote testimony to the defendant at least fifteen (15) days prior to the proceeding;
(2) The defendant agrees to permit remote testimony;
(3) The court finds that the defendant's agreement was knowing and voluntary; and

(4) The court and the state agree to permit remote testimony.
(c) Any remote testimony conducted under this section must allow all parties to observe the demeanor of the analyst as the analyst testifies in a similar manner as if the analyst were testifying in the location where the hearing or trial is being conducted. The court shall ensure that the defendant has a full and fair opportunity for examination and cross-examination of the analyst.

PC 505, eff. 7/1/21, amends 39-13-103 to add another way to commit Reckless Endangerment with a Deadly Weapon, by discharging a firearm from within a motor vehicle. This raises the punishment for this discharging offense from an E felony to a Class C felony.

PC 509, eff. 7/1/21, amends 39-13-505 to add situations in which the victim is incapable of consenting to sexual contact. Prior to the amendment, the sexual contact is accomplished without the consent of the victim and the defendant had to know or have reason to know at the time of the contact that the victim did not consent. For offenses committed on or after 7/1/21, the victim is incapable of consenting if the sexual contact occurred during the course of a consultation, examination, ongoing treatment, therapy, or other provided professional service rendered by the defendant, whether licensed by the state or not, as a member of the clergy, healthcare professional, or alcohol and drug abuse counselor, and the defendant was treating the victim for a mental, emotional, or physical condition.
A problem with this addition to the element is that even if the victim fell under one of these treatment situations, it seems the defendant would still have to "know or have reason to know" that the victim did not consent, even if the victim legally was incapable of consenting.

PC 511, eff. 7/1/21, amends 39-15-401 to create another way to commit this offense, which is worded "Any person who negligently, by act or omission, engaged in conduct that placed a child in imminent danger of death, bodily injury or physical or mental impairment." Therefore because of 39-11-302, the "culpable mental state" statute, the judge will have to charge "criminally negligent" to the jury. It is said that this was enacted because of the increase in children being exposed to illegal drugs in the home.

PC 525, eff. 7/1/21, amends 39-13-524 to require that a person convicted of facilitation of rape of a child or aggravated rape of a child be sentenced to community supervision for life and to serve 100 percent of the sentence imposed before becoming eligible for release, with no more than 15 percent in sentence reduction credits.

PC 528, eff. 7/1/21, creates a 4th way to commit Murder First Degree. It strikes "act of terrorism" from the list of crimes for which felony murder applies, and creates 39-

13-202(a)(4), “a killing of another in the perpetration or attempted perpetration of an act of terrorism in violation of 39-13-805.” It is punishable only by death or life without possibility of parole. This PC also corrects many other statutes, such as changing eligibility for parole for Murder First from 25 years, to 51 years until release, what we have already been charging the jury. It also adds another element to committing an act of terrorism, which reads as follows:

Serve as a premeditated, politically motivated act of violence, or violence in pursuit of religious, ideological, or social objectives, perpetrated against first responders, including law enforcement officers, correctional officers, department of correction employees, probation or parole officers, paramedics, firefighters, or other emergency medical rescue workers acting in their official capacity, which results in loss of life, in which case it must be prosecuted and sentenced under § 39-13-202.

PC 539, eff. 7/1/21, amends 40-32-101 to authorize the clerk to charge a fee of less than $100 for expunction and expands the list of offenses for which expunction is permitted and is not permitted, but inserts some unique rules, like the following:
A person is not an eligible petitioner for purposes of this subsection (g) if the person was convicted of an offense involving the manufacture, delivery, sale, or possession of a controlled substance and at the time of the offense the person held:
(A) A commercial driver license, as defined in § 55-50-102, and the offense was committed within a motor vehicle, as defined in § 55-50-102; or
(B) Any driver license and the offense was committed within a commercial motor vehicle, as defined in § 55-50-102.

It also states that
At the time of the filing of the petition for expunction at least:
(i) Five (5) years have elapsed since the completion of the sentence imposed for the most recent offense, if the offenses were both misdemeanors or a Class E felony and a misdemeanor; and
(ii) Ten (10) years have elapsed since the completion of the sentence imposed for the most recent offense, if one (1) of the offenses was a Class C or D felony …

It also creates a subsection (b) in 40-6-204 that mandates as follows:

The affidavit of complaint must contain instructions informing the defendant that if the defendant's charge is dismissed, a no true bill is returned by a grand jury, the defendant is arrested and released without being charged with an offense, or the court enters a nolle prosequi in the defendant's case, the defendant is entitled, upon petition by the defendant to the court having jurisdiction over the action, to the removal and destruction of all public records relating to the case without cost to the defendant.

From the positioning of the new subsection, the term “affidavit of complaint” seems to refer to affidavits for arrest warrants, not just affidavits filled out by officers after an arrest without a warrant is made and the arrestee is being booked into the jail.

Therefore, any arrest warrant affidavit without this language may be deemed insufficient in the future, causing the suppression of any evidence seized at the time of arrest and voiding the tolling of any statute of limitation upon the issuance of the warrant.

PC 540, eff. 7/1/21, makes it a Class E felony for “any personnel, including elected and appointed officials, of this state, a local governmental entity, or a political subdivision of this state, when acting in the person's official capacity or disclosing information obtained in the person's official capacity, to intentionally disclose information that identifies another person as the purchaser or owner of a firearm, firearm ammunition, or firearm accessory for the purpose of: (1) compiling or facilitating the compilation of a federal firearms registry or database; or (2) the confiscation of firearms.

PC 541, eff. 7/1/21, amends 40-35-311(e) by adding the following as a new subdivision: (3) If a person is serving two (2) or more concurrent probationary sentences and the person's probation is revoked on one (1) probationary sentence, then the person must receive credit for the time served as a result of that probation revocation against any other concurrent probationary sentence that is subsequently revoked in any jurisdiction in this state.

PC 544, eff. 7/1/21, amends 22-1-103 to exempt from jury service, upon request and sufficient proof of age, persons 75 years of age and older who are incapable of providing service due to a mental or physical condition if they submit documentation or a declaration drafted by the jury commissioner.

PC 545, eff. 7/1/21, repeals Burglary, Aggravated Burglary and Especially Aggravated Burglary by deleting 39-14-402, -403 and -404, but reenacts them at 39-13-1002, -1003 and -1004. Chapter 14 is the “Offenses against Property” chapter of the code, and Chapter 13 is the “Offenses against the Person” chapter. The PC also adds aggravated burglary and especially aggravated burglary to 39-13-105, a list of “crimes against the person.” These are crimes that must be given judicial and prosecutorial priority over cases involving property crimes, requiring a certificate be filed by the trial judge if not disposed of within 180 days of indictment (40-38-105). It also makes these offenses ineligible for Community Corrections (40-36-106(a)(1)(B)), and ineligible for contract sentencing programs with the Board of Parole (40-34-103(c)). Everywhere else in the Code that these three statutes are mentioned, they have been changed to the new statute numbers by this PC.

PC 551, eff. 7/1/21, amends several statutes in Title 39 to add use of vapor products to the acts that are prohibited in enclosed public places under the Non-Smoker Protection Act; revises provision whereby a local government may prohibit smoking by a distance of up to 50 feet from a hospital's entrance, public swimming pools, etc., and to also apply to the use of vapor products.

PC 554, eff. 7/1/21, makes it a Class E felony for a state or local government entity, official, employee, or agent to knowingly create or maintain any firearm registry with the intent to record the possession or ownership of a firearm or firearm accessory by individuals or non-governmental entities.

PC 563, eff. 7/1/21, amends 40-35-501, the 100% crime statute, by adding the following new subsection:

(x)(1) Notwithstanding any provisions of this section to the contrary, there shall be no release eligibility for a person committing an offense, on or after July 1, 2021, that is enumerated in subdivision (x)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn. The person shall be permitted to earn any credits for which the person is eligible and the credits may be used for the purpose of increased privileges, reduced security classification, or for any purpose other than the reduction of the sentence imposed by the court.
(2) The offenses to which subdivision (x)(1) applies are:
(A) Female genital mutilation, as defined in§ 39-13-110;
(B) Domestic assault, as defined in § 39-13-111, when the offense is a felony offense;
(C) Trafficking for a commercial sex act, as defined in § 39-13-309;
(D) Advertising commercial sexual abuse of a minor, as defined in § 39-13-315;
(E) Rape, as defined in § 39-13-503;
(F) Aggravated sexual battery, as defined in§ 39-13-504;
(G) Sexual battery, as defined in§ 39-13-505;
(H) Aggravated statutory rape, as defined in§ 39-13-506(c);
(I) Indecent exposure, as defined in § 39-13-511, when the offense is a felony offense;
(J) Patronizing prostitution, as defined in§ 39-13-514(b)(3);
(K) Promoting prostitution, as defined in§ 39-13-515;
(L) Public indecency, as defined in§ 39-13-517(d)(3);
(M) Continuous sexual abuse of a child, as defined in § 39-13-518;
(N) Sexual battery by an authority figure, as defined in § 39-13-527;
(0) Solicitation of a minor, as defined in § 39-13-528, when the offense is a felony offense;
(P) Soliciting sexual exploitation of a minor, as defined in § 39-13-529;
(Q) Statutory rape by an authority figure, as defined in § 39-13-532;
(R) Promoting travel for prostitution, as defined in§ 39-13-533;
(S) Unlawful photographing in violation of privacy, as defined in §39-13-605, when the victim is under thirteen (13) years of age;
(T) Observation without consent, as defined in§ 39-13-607(d)(2);
(U) Incest, as defined in§ 39-15-302;
(V) Child abuse or child neglect or endangerment, as defined in §39-15-401;
(W) Aggravated child abuse or aggravated child endangerment or neglect, as defined in §39-15-402;
(X) Using a minor to produce, import, prepare, distribute, process, or appear in obscene material, as defined in§ 39-17-902(b);

(Y) Unlawful sale, distribution, or transportation with intent to sell or distribute of a child-like sex doll, as defined in§ 39-17-910(f);
(Z) Sexual exploitation of a minor, as defined in § 39-17-1003;
(AA) Aggravated sexual exploitation of a minor, as defined in § 39-17-1004;
(BB) Especially aggravated sexual exploitation of a minor, as defined in§ 39-17-1005;
(CC) Conspiracy, under § 39-12-103, to commit any of the offenses listed in this subdivision (x)(2);
(DD) Criminal attempt, under§ 39-12-101, to commit any of the offenses listed in this subdivision (x)(2); or
(EE) Solicitation, under § 39-12-102, to commit any of the offenses listed in this subdivision (x)(2).

PC 573, eff. 7/1/21, amends 55-10-502 to increase drag racing to a Class A misdemeanor from a B misdemeanor.

PC 574, eff. 7/1/21, amends 39-17-1551 to allow municipalities to ban vaping from public areas (parks, playgrounds, etc.) other than buildings, sidewalks or roads.

PC 580, eff. 7/1/21, amends 39-14-212, aggravated cruelty to animals, by deleting the definition section, including the definition of “aggravated cruelty,” and instead describes different specific ways the animal is cruelly treated that are aggravated, when the defendant intentionally or knowingly:
(1) Kills, maims, tortures, crushes, burns, drowns, suffocates, mutilates, starves, or otherwise causes serious physical injury, a substantial risk of death, or death to a companion animal; or
(2) Fails to provide food or water to the companion animal resulting in a substantial risk of death or death.

PC 586, eff. 7/1/21, enacts 40-17-102, which allows the DA to request a protective order to keep a defendant and his/her attorney, after getting information in discovery, from publishing the name, contact information, statements of a victim of a sexual offense, law enforcement informant, or a witness who is expected to testify against a defendant charged with a crime involving a weapon or the use of force. If, after reviewing the petition, the trial judge finds there is good cause for prohibiting the publishing of the information, then the court shall issue the protective order expressly limiting the publication of the victim, informant, or witness's information at any time prior to or during the trial. It does not restrict the right of a defendant or defendant's counsel to conduct an investigation or interviews to be used at trial. If the protective order is violated it is a Class E felony.

PC 590, eff. 7/1/21, enacts 37-5-107, making it a Class A misdemeanor for any person to attempt to access or obtain confidential information from the Department of Children’s

Services regarding alleged child abuse or neglect that the person knows is in violation of state or federal laws and regulations regarding confidentiality. The statute says that investigative bodies (like child abuse review teams, the DA, etc.) can access this information, but not others. That is why defense attorneys should routinely ask the judge to do an in camera inspection of DCS records, etc., so that any material can be turned over to the defense that is discoverable under Tenn. R. Crim. P. 16, “that is both favorable to the accused and material to guilt or punishment" pursuant to Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).