TENNESSEE BAR ASSOCIATION
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CRIMINAL LAW UPDATE: 2019-2020

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UNITED STATES SUPREME COURT
2019-2020 TERM

DEATH PENALTY; REWEIGHING BY APPELLATE COURT:
McKinney v. Arizona, 589 U.S ___, 140 S.Ct. 702, 206 L.Ed.2d 69 (2020)

Trial judge found aggravating circumstances, weighed them against the mitigation and imposed death sentences. Twenty years later on collateral review it was determined that trial judge failed to consider a mitigating circumstance in violation of Eddings v. Oklahoma, 455 U.S. 104 (1982). Case returned to Arizona Supreme Court where the Court reweighed the aggravating and mitigating circumstances as authorized by Clemons v. Mississippi, 494 U.S. 738 (1990) and upheld the death sentences. HELD: State appellate courts may conduct a Clemons reweighing of aggravating and mitigating circumstances on collateral review. Argument that Clemons involved a reweighing after a finding of an inappropriate aggravating factor is a distinction without a difference. Same rule should apply with an ignored mitigating circumstance. Argument that Clemons is no longer good law in light of Ring v. Arizona is misplaced. Although a jury must now find an aggravating circumstance, states are still free to allow the trial judge to weigh the aggravation against the mitigation and make the ultimate determination to impose the death sentence. Finally, argument that Ring should apply on collateral review is misplaced. We have already held that Ring should not be applied retroactively. DISSENT: This is really a new direct review, not a collateral review. Accordingly, Ring should apply and the trial judge's determination as to the existence of an aggravating circumstance was unconstitutional.

DUE PROCESS; INSANTITY DEFENSE:
Kahler v. Kansas, 589 U.S. __, 140 S.Ct. 1021, 206 L.Ed.2d 312 (2020) 6-3

James Kahler was charged with capital murder after he shot and killed four family members. Kansas law provides that mental illness is only a defense to criminal responsibility if the mental illness prevented the defendant from forming the requisite criminal intent. i.e. if as a result of the mental illness the defendant lacked the culpable mental state required as an element of the offense. Prior to trial, Kahler argued that Kansas' insanity defense law violated Due Process because it permitted the State to convict a defendant whose mental illness prevented him from distinguishing between right and wrong. The trial court disagreed. Kahler was found guilty and despite presentation of his mental illness during the sentencing phase, the jury returned a death sentence. The Kansas Supreme Court likewise rejected the Due Process argument. HELD: Due process does not require a state to adopt an insanity test that turns on the defendant's ability to recognize that the crime was morally wrong. Due process does not require States to adopt a specific test for insanity. **Note:** Excellent discussion of the

two prongs of the M'Naugten rule: Cognitive Capacity and Moral Capacity. Appendix lists Tennessee as following both prongs.

TRAFFIC STOP; REASONABLE SUSPICION:
Kansas v. Glover, 589 U.S. __ 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020) 6-2-1

A law enforcement officer in Kansas on routine patrol ran the license plate of a truck and received information that its registered owner had a revoked driver's license. Based solely on that fact he initiated a traffic stop. The driver was the registered owner and his license had been revoked. In his prosecution for driving on a revoked license, defendant filed a motion to suppress claiming that the officer did not have reasonable suspicion to make the traffic stop. The trial court granted the motion to suppress. The intermediate court reversed finding that the officer had sufficient articulable facts based on his common sense inference that the driver would be the registered owner. The Kansas Supreme Court reversed finding that the officer had acted on nothing but a "hunch." HELD: When an officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been "revoked" is reasonable under the Fourth Amendment. Majority contends that "common senses suffices to justify this inference," but that the fact that Kansas almost never revokes a driver's license except for serious and repeat offenders who are likely to continue to drive despite not having a valid license also "reinforces" the inference. Note: Three Justices would not find reasonable suspicion if the officer hand merely discovered that the license had been "suspended."

TRIAL BY JURY; UNANIMOUS VERDICT REQUIRED:
Ramos v. Louisiana, 590 U.S. ___ (2020)

Right to a jury trial as envisioned by the 6th Amendment carries with it the right to a unanimous verdict. Since the 6th Amendment right is incorporated against the States under the 14th Amendment, the right to a jury trial in a state court requires a unanimous verdict.

INEFFECTIVE ASSISTANCE OF COUNSEL; FAILURE TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE:
Andrus v. Texas, 590 U.S. __ (2020)

Defendant was convicted of murder in a Texas court and sentenced to death. At trial, defense counsel made no opening statement in guilt phase and offered no evidence. Trial counsel also made no opening statement in penalty phase. State provided three days of testimony regarding aggravation. Defense counsel presented only the testimony of the Defendant's parents and then attempted to rest his case. When confronted by

the trial judge about the wisdom of not calling further witnesses, trial counsel changed his mind and called three more witnesses, including the defendant, all of whom offered very little by way of mitigation. After losing his direct appeal, Defendant filed for post-conviction relief claiming ineffective assistance of counsel in not investigating and presenting mitigating evidence during the penalty phase of his trial. The Texas trial court concluded, after an 8 day evidentiary hearing in which a "tidal wave" of mitigating evidence was presented, that counsel provided ineffective assistance of counsel by not investigating and presenting this "tidal wave" of evidence and granted a new sentencing hearing. The Texas Court of Criminal Appeals reversed the trial court providing as its only explanation and without elaboration that the defendant failed to show by a preponderance of the evidence that counsel performed deficiently *and* that he was prejudiced. HELD: It is clear that counsel performed deficiently in failing to investigate and present this mountain of mitigation evidence. It is not clear whether the Texas Court of Criminal Appeals considered the "prejudice" prong. [In other words, since the Court of Criminal Appeals, in it's one sentence opinion without analysis, found that the defendant failed to establish deficient performance *and* prejudice, it is not clear whether they thought he had not established "both" prongs or that he did not establish "either" prong.] As such, we remand for the Court of Criminal Appeals to clearly consider the "prejudice" prong. In order to establish prejudice in this context, defendant need only show a reasonable probability that at least oe juror would have struck a different balance regarding defendant's moral culpability and would have chosen a lesser punishment.

TENNESSEE SUPREME COURT
2019-2020

DEFENSES; FAIRLY RAISED BY THE EVIDENCE; NECESSITY; DURESS:
State v. Brandon Cole Pugh, 588 S.W.3d 254 (Tenn. 2019)

Facts: Defendant charged with being a convicted felon in possession of a handgun. Defendant obtained the handgun during a physical altercation in which the handgun became loose from another person's possession and fell to the floor. The defendant was able to grab the gun off the floor before the person who dropped it. That person then ran away. The defense orally requested an instruction on the defense of necessity. The trial judge denied the request as there was no personal testimony from the defendant that he reasonably believed he was facing imminent bodily injury. HELD: Defense was properly raised by the evidence. Defendant's personal testimony is not required when the defense can be inferred from the circumstances. Failure to make written request for the defense instruction did not result in a waiver of the issue for appeal.

THEFT: AGGREGATION OF OFFENSES:
State v. Jones, 589 S.W.3d 747 (Tenn. 2019)

Facts: Defendant stole electronic fitness monitors from the sporting goods department on five occasions at two different Target stores in Knoxville over a 15 day time period. T.C.A. § 39-14-105(b)(1) (2014) provides that "[i]n a prosecution for theft of property,…the state may charge multiple criminal acts committed against one (1) or more victims as a single count if the criminal acts arise from a common scheme, purpose, intent or enterprise." Relying on this provision the five thefts were consolidated into a single count of the indictment. The defense filed a motion in limine arguing that under State v. Byrd, 968 S.W.2d 290, 291 (Tenn. 1998), the aggregation could only take place if the separate thefts (1) were from the same owner, (2) from the same location and (3) pursuant to a single continuing criminal impulse or a single sustained larcenous scheme; or were based on the simultaneous of the stolen property. The trial court denied the motion in limine, the jury found the defendant guilty, and he was sentenced for a Class D theft as a career offender to six years confinement. CCA affirmed. Supreme Court granted permission to appeal to determine (1) whether the state properly indicted the defendant in one count for property stolen on five different days from two different locations and (2) whether the evidence sufficiently established that the thefts arose "from a common scheme, purpose, intent, or enterprise. HELD: The 2012 statute does not incorporate the limitations expressed in Byrd and the trial court had sufficient information to determine that the prosecution had probable cause that the five offenses arose from a "common scheme, purpose, intent or enterprise." Accordingly, the aggregation of the five thefts into one count was proper. In addition, the evidence was sufficient to support a finding that all five theft offenses arose from a common scheme, purpose, intent or enterprise. Among other things, they all involved the same victim, the same type of merchandise, sing the same modus operandi, and were committed within a 15 day time period.

Note: Court provides definition for "common scheme", "common purpose", "common intent" and "common enterprise" and suggests jury instruction: requiring jury as a first step to determine which of the multiple thefts the state has proven beyond a reasonable doubt; if at least two thefts have been proven beyond a reasonable doubt, the second step is for the jury to determine if any of them arose from a common scheme, purpose, intent or enterprise. If the jury so finds, the third step is for the jury to determine the aggregate value. Court invites Pattern Jury Instruction Committee to "create and adopt" a pattern instruction, but provides one for use in the "meantime."

THEFT; CRIMINAL SAVINGS STATUTE; SENTENCED AFTER:
State v. Menke, 590 S.W.3d 455 (Tenn. 2019)

Defendant committed a theft of exactly $1,000 and pled guilty to a Class D felony prior to the effective date [Jan. 1, 2017] of the legislative changes in the grading of theft offenses. T.C.A. § 39-14-105 (as amended by the Public Safety Act of 2016). Defendant was sentenced after the effective date and the trial judge reduced the conviction to a Class A misdemeanor and sentenced the defendant to eleven months and twenty-nine days. The trial judge based his decision on an application of the Criminal Savings Statute, T.C.A. § 39-11-112 which requires courts to apply a subsequent statute to a defendant's sentencing if the subsequent statute provides for a lesser penalty:

> When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under § 40-35-117, in the event the subsequent act *provides for a lesser penalty*, any punishment imposed shall be in accordance with the subsequent act.

HELD: Affirmed: The Criminal Savings Statute applies to the changes in the grading of theft offenses. A defendant convicted before the effective date of the changes in the grading of theft, but sentenced after is entitled to the benefit of the new law.

THEFT; CRIMINAL SAVINGS STATUTE; SENTENCED BEFORE:
State v. Keese, 591 S.W.3d 75 (Tenn. 2019)

Defendant was convicted of D felony theft (more than $1,000 but less than $10,000) before effective date of changes in theft grading. Defendant was sentenced before effective date, but trial judge applied the upcoming amendments to his case to reduce his felony conviction to an e felony (more than $1,000 but less than $2,500).
HELD: Trial court erred in applying savings statute to conviction and sentencing that occurred before the effective dates of the changes in theft grading.

THEFT; CRIMINAL SAVINGS STATUTE; PROBATION REVOCATION AFTER:
State v. Tolle, 591 S.W.3d 539 (Tenn. 2019)

Defendant was convicted and sentenced before changes in law and placed on probation. Probation was revoked after changes in the grading of theft and trial judge applied those changes and reduced the defendant's sentence after revocation of his probation. HELD: Trial court erred in applying the amendments to a conviction and

sentence that occurred prior to the effective date of the amendments. Any sentence after revocation of probation relates back to the original time of sentencing.

SEARCH AND SEIZURE; REASONABLE SUSPICION NOT REQUIRED TO SEARCH PROBATIONERS RESIDENCE:

State v. Hamm, 589 S.W.3d 765 (Tenn. 2019)

Angela Hamm was placed on probation for a drug offense. The probation order included a warrantless search provision, which stated: "I agree to a search, without a warrant, of my person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time." Two years into the probation officers received information that they thought gave them "reasonable suspicion" to make a warrantless "probation search" of her home that she shared with her husband. The search revealed illegal drugs, including meth, and drug-related contraband. Both Ms. Hamm and her husband filed motions to suppress which were granted by the trial judge who determined that the officers did not have reasonable suspicion. CCA affirmed. ISSUE: Whether law enforcement officers must have "reasonable suspicion" to support a search of a probationer's residence who has entered into a warrantless search agreement? HELD: No. However, the constitution still requires that the search be deemed "reasonable" under the totality of the circumstances. If the search was conducted for a reason other than a valid law enforcement concern or was conducted without knowledge that the person searched was a probationer, the search would be unreasonable. Here, the search was constitutionally reasonable. The officers were aware of the status of the defendant as a probationer and they had what they thought was credible information of drug activity. Further, the search was conducted in the daylight hours. There was no evidence that the officers were acting arbitrarily, that the officers sought to cause the defendant harm, acted out of animosity or that the search was one of a pattern of repetitive searches conducted against the defendant. Under the doctrine of common authority, the search of the bedroom that Ms. Hamm shared with her husband was permissible.

SURETY REMAINS LIABLE EVEN AFTER INDICTMENT ON GREATER OFFENSE:
In re: Rader Bonding Company, Inc., 592 S.W.3d 852 (Tenn. 2019)

Surety remains obligated under a bond agreement entered into on a defendant's arrest for driving under the influence second offense even after grand jury subsequently charges driving under the influence fourth offense.

RULE 36; CLERICAL MISTAKES; SOR and the TBI:
State v. Perkins, 593 S.W.3d 145 (Tenn. 2020)

On February 3, 2012, criminal court judge entered an order dismissing indictments for failure to register as a sex offender as required for "violent sex offenders" and as a part of the order held that the defendant was not a "violent sex offender" but merely a "sex offender." The order also included language which ordered the TBI to change the defendant's registration status from "violent sex offender" to merely a regular "sex offender." In 2014 defendant requested the TBI to terminate his registration requirements which is statutorily allowed for "sex offenders" ten years after completion of their sentences. "Violent sex offenders" must register for life. The TBI thereafter notified the defendant that they were reclassifying him as a "violent sex offender" and denied his request. The defendant sought review of the TBI denial in Chancery Court. In support of his claim he attached the criminal court order that had declared he was merely a "sex offender" not a "violent sex offender." Faced with this order, on December 1, 2014, almost three years after the criminal court order became final, the TBI then filed in criminal court, a Tenn. R. Civ. P. 24.01 motion to intervene in the criminal case that had been dismissed and a Tenn. R. Civ. P. 60.02 motion for relief from judgment. The TBI argued that the criminal court had exercised civil jurisdiction when it entered its order dismissing the criminal indictments. On May 3, 2017, the criminal court granted the TBI's motions and vacated the portion of its 2012 order which ordered the TBI to change the defendant's registration status from "violent sex offender" to "sex offender." Defendant appealed, but CCA summarily dismissed holding that the defendant had no right to appeal. HELD: Defendant had right to appeal pursuant to Tenn. R. Crim. P 36.[motion to correct clerical mistake]. Argument that criminal court exercised civil jurisdiction when it dismissed the indictments "lacks any legal or factual foundation." Argument that criminal court could grant relief under Rule 60.02 is likewise without merit. The criminal court order became final 30 days after its entry. Further, although Tenn. R. Crim. P. allows courts to correct clerical mistakes and errors in the record arising from oversight or omission, in this case the vacation of a portion of the order was more than just a correction of a clerical mistake and exceeded the court's authority under Rule 36.

SHOPLIFTING AS BURGLARY:
State v. Welch, 595 S.W.3d 615 (Tenn. 2020)

Defendant entered a Walmart to steal merchandise after having been Banned from the store for prior acts of shoplifting. HELD: Plain language of burglary statute does not preclude its application in this scenario. Likewise, its application does not violate due process or prosecutorial discretion.

DOCTRINES OF CURATIVE ADMISSIBILITY AND OPENING THE DOOR:
State v. Vance, 596 S.W.3d 229 (2020)

Defendant was on trial for multiple charges including murder. Co-defendant made statements implicating defendant. Trial of co-defendant was severed and trial judge granted motion in limine prohibiting statements of co-defendant. Defense counsel vigorously cross-examined police detective and implied that that only one witness had implicated the defendant at trial. State argued that defense counsel had "opened the door" to admission of the severed co-defendant's statement implicating defendant on trial. Defense counsel objected on various grounds claiming that: (1) that they had not opened the door; (2) the trial court had granted the motion in limine, (3) the declarant was incompetent, and (4) the statement was hearsay. Defense counsel failed to mention any confrontation clause argument at trial, but included it in the motion for new trial. The trial court allowed the prosecution to ask the detective: "Was there, other than Prince Myles, was there a witness with independent and personal knowledge who was at the scene and implicated [the defendant] in this case? The detective responded affirmatively. The trial court based its ruling on two concepts: the doctrine of curative admissibility and the doctrine of "opening the door." CCA ruled that trial court did not abuse its discretion in ruling that the defense had "opened the door" to the admission of the statement to prevent the impression that only a single witness had implicated the defendant.

Court notes that doctrines of "curative admissibility" and "opening the door" are distinct, but that courts, frequently and incorrectly refer to them as if they are synonymous. "Curative admissibility" permits the admission of evidence by a party in response to the opposing party admitting *inadmissible* evidence. The threshold requirement for application of this doctrine is the elicitation of inadmissible evidence. The party opposing the inadmissible evidence must make a contemporaneous objection and request a curative instruction. Then, only if the party opposing the inadmissible evidence suffers some particular and significant prejudice from the evidence being heard by the jury, inadmissible evidence offered as a "cure" may be admitted if it is both relevant and "proportional." In this case, the inadmissible proof was offered in response to cross-examination by defense counsel that did not elicit inadmissible testimony. Accordingly, the doctrine of curative admissibility" is not applicable.

"Opening the door" applies to situations in which one party has introduced admissible evidence that creates a misleading advantage and the opponent is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage. "Opening the door" is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence. A party may open the door to inadmissible evidence even if the evidence that opens the door is admissible. Most commonly, a party opens the door to inadmissible evidence by raising the subject of that evidence at trial. However, the remedy sought after a party has opened the door must be both relevant and

proportional. The otherwise inadmissible evidence sought to be introduced by the opposing party should be limited to that necessary to correct the misleading advantage created by the evidence that opened the door. The fact that the door has been opened does not permit all evidence to pass through because the doctrine is intended to prevent prejudice and not be subverted into a rule for the injection of prejudice. The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any prejudice, including an application of Tenn. R. Evid 403.

In this case, defense counsel "opened the door" by trying to imply during its cross-examination that the police investigation was inadequate and that the charges were the result one person's allegations. Defense counsel was trying to take advantage of the pretrial rulings that the co-defendant's statements were inadmissible. Thus, the defense opened the door to "proof sufficient to correct the misleading impression." But trial court erred in allowing State to introduce testimony "that an unidentified eyewitness had been at the scene and had implicated the defendant as one of the perpetrators." The prejudicial impact of this evidence substantially outweighed the misleading impression created by the cross-examination.

Non-constitutional error is harmless. A party is bound by the grounds asserted in making an objection and cannot assert a new or different theory on appeal. Hence, under "plain error" review constitutional error did not rise to the level of plain error.

BONDING COMPANIES: TRIAL COURT'S INHERENT AUTHORITY:
In Re: Cumberland Bail Bonding, 599 S.W.3d 17 (Tenn. 2020)

Trial court has inherent power and wide discretion to regulate bonding companies. As a result, trial court may suspend a bonding company for violating a local rule of court requiring an agent of the bonding company to be present at all court appearances of defendants for whom the bonding company serves as surety. Local rule was not arbitrary, capricious or unreasonable.

SELF-DEFENSE; TRIAL JUDGE AS GATEKEEPER, QUANTUM OF PROOF:
State v. Antonio Benson 2020 WL 2079055 (Tenn. April 30, 2020)

FACTS: Victim was a small unarmed woman who punched the defendant in the nose during a verbal altercation causing a bloody nose. In response, the defendant pulled a gun and shot the victim five times, including twice in the back. The defendant did not testify at trial, but his statement was introduced into evidence which indicated the above facts, but did not contain any specific statement that he was acting out of fear of imminent death or serious bodily injury. Trial court refused special request for instruction on self-defense finding that being punched in the nose is not "serious bodily injury" and considering that the victim was unarmed and there was no indication that the victim had ever threatened or attempted to use unlawful deadly force against the defendant or to

cause him serious bodily injury, self-defense was not "fairly raised" by the evidence. CCA: Reversed and [without stating what quantum of proof it had utilized] determined that the jury should have been allowed to determine the reasonableness of the defendant's belief that he was in imminent danger and whether he used appropriate force. HELD: Trial court makes the threshold determination whether self-defense has been fairly raised by the evidence. In making this determination, Court rejects defense contention that a defense is "fairly raised" if "the slightest evidence" supports the defense. Court also seems to reject State's assertion that an instruction is only required if the evidence is such that a "reasonable juror" could find in defendant's favor. Court restates general rules (1) that the quantum of proof necessary to raise a general defense is less than that required to establish a proposition by a preponderance of the evidence and (2) a court must consider the evidence in the light most favorable to the defendant and draw all reasonable inferences in the defendant's favor. We agree with trial judge, the evidence in this case does not fairly raise the issue that the defendant reasonably feared imminent death or serious bodily injury to justify his use of deadly force. NOTE: Even if the trial judge erred, the error would be harmless because no "reasonable jury" would have found self-defense.

PROOF OF OTHER CRIMES; "AQUITTED-ACT EVIDENCE":
State v. Steve M. Jarman, 2020 WL 3638015 (Tenn. 2020).

FACTS: Defendant was convicted of voluntary manslaughter of his domestic partner and sentenced to five years imprisonment. The victim died of a single gunshot wound to the chest which was inflicted in 2015. Defendant was charged with premeditated murder and the issue at trial was whether the death was a homicide or a suicide. Over objection, the State was allowed to place into evidence the fact that the defendant had been violent toward the victim in 2013, despite the fact that the defendant was tried for aggravated assault arising out of the incident and acquitted. To establish clear and convincing evidence of the prior assault, the State relied upon the testimony of an eyewitness who did not testify in the earlier trial and the first responding officer who observed the victim's injuries. Apparently, at the former trial, the victim recanted and the defendant was found not guilty. During the trial the defense brought out the fact that the defendant had been found not guilty of the 2013 charges. The trial judge gave no limiting instructions to the jury regarding the 404(b) evidence and did not instruct the jury as to the defendant's acquittal. Significantly, the defendant made no special request for either instruction and did not object to the jury instructions. COURT OF CRIMINAL APPEALS: reversed and remanded for a new trial based primarily upon authority of State v. Holman, 611 S.W.2d 411 (Tenn. 1981) which held that "acquitted-act evidence" (evidence pertaining to an act for which the defendant was tried and acquitted) should never be admitted pursuant to Tenn. R. Evid. 404(b). HELD: (1) We explicitly overrule Holman to the extent that it can be read to categorically exclude acquitted-act evidence under all circumstances. Evidence of a defendant's conduct for which he was acquitted

may be introduced in a subsequent trial only after the evidence has met the requirements of 404(b). However, with regard to the "clear and convincing evidence" requirement, the fact that the defendant was acquitted will often weigh heavily against a finding that the evidence of the crime is clear and convincing. (2) Whether to allow the defense to elicit evidence that the defendant was acquitted of the prior acts must be determined by the trial judge on a case-by-case basis based on the specific facts and circumstances of each case. The trial court's decision whether to admit or deny such evidence will be reviewed under an abuse of discretion standard. Although, "…it would be a rare case, indeed, in which a trial court appropriately could exclude evidence of an acquittal." (3) Absent a request from the defense, the trial judge is not required to instruct the jury as to the limited purpose of the 404(b) evidence or that the defendant was acquitted of the acts in a previous trial. Requiring such instructions in all cases despite the lack of a request is not consistent with current Tennessee law. However, "[w]e stress that it certainly may be the best practice to give both a clear limiting instruction in most cases, because, in doing so, the trial court lessens the risk of unfair prejudice and ensures that jurors properly utilize the acquitted-act evidence…"
In summary, trial court did not abuse his discretion in allowing the evidence under 404(b) for the limited purpose of proving the defendant's intent to harm the victim and trial judge did not err in failing to give limiting instructions or an acquittal instruction.

POST-CONVICTION; DELAYED APPEAL; PREJUDICE NOT PRESUMED:
Antonio Howard v. State (Tenn. 2020)

Trial counsel filed an untimely motion for new trial resulting in the waiver of certain issues on the direct appeal. Petitioner filed post-conviction petition seeking a delayed appeal which was denied by the trial judge. Although the judge found "deficient performance" in failing to timely file the motion for new trial, the judge found that the defendant had not been "prejudiced" by the lack of a timely filed motion for new trial. The Court of Criminal Appeals reversed based on Wallace v. State, 121 S.W.3d 652 (Tenn. 2003) which held that the failure to file a timely motion for new trial is "presumptively prejudicial." HELD: Wallace is overruled. To prevail in such cases the petitioner must show actual prejudice from the act of deficiency.

2020 CRIMINAL PUBLIC ACTS

PC 570, eff. 7/1/20, amends 39-14-203(c)(1), 39-14-212 and 39-14-214(c), the animal cruelty statutes, by adding that in addition to any other penalty imposed, the court shall prohibit the defendant from having custody of any companion animal, as defined in § 39-14-212(b), for a period of at least two (2) years from the date of conviction and may impose a lifetime prohibition. The court shall prohibit any person convicted of a second or subsequent offense under this subdivision (c)(1) from having custody of any companion animal for the person's lifetime. Also, the court may order that the convicted person:

(A) Not harbor or own animals or reside in any household where animals are present;

(B) Participate in appropriate counseling at the defendant's expense; or

(C) Reimburse the animal shelter or humane society for any reasonable costs incurred for the care and maintenance of any animals taken to the animal shelter or humane society as a result of the crime.

PC 577, eff. 3/2/20, amends 40-38-601 et seq., the crime victim address confidentiality program, by adding Tennessee residency as a requirement for participation in the crime victim address confidentiality program; creates a cancellation exception for a program participant if the secretary of state determines the participant is residing at a shelter; decreases from 60 days to 20 days the period of time a program participant must be found to be unreachable prior to the cancellation of a program participant's certification; makes other revisions to the program.

PC 584, eff. 7/1/20, amends the evading arrest statute, 39-16-603, to state that "the court shall order a person who commits evading arrest and, in doing so, recklessly damages government property, including, but not limited to, a law enforcement officer's uniform or motor vehicle, to pay restitution to the appropriate government agency for the value of any property damaged."

PC 588, eff. 7/1/20, amends 39-13-531 by increasing the age of a victim in committing Aggravated Rape of a Child from "three (3) years of age or less" to "eight (8) years of age or less." The only sentence possible for this offense is now life without possibility of parole.

PC 607, eff. 3/20/20, adds the offenses of promoting the prostitution of a minor, and patronizing prostitution from a person who is younger than 18 years of age or has an intellectual disability to 40-35-313(a)(1)(B)(2) as sexual offenses for which a person can no longer qualify for judicial diversion.

PC 620, eff. 7/1/20, amends the old "organized retail crime" statute contained in 39-14-113(c) by changing the elements of organized retail crime to be as follows:

A person commits the offense of organized retail crime when the person:

(1) Acts in concert with one (1) or more individuals to commit theft of any merchandise with a value greater than one thousand dollars ($1,000) aggregated over a ninety-day period with the intent to:

(A) Sell, barter, or trade the merchandise for monetary or other gain; or

(B) Fraudulently return the merchandise to a retail merchant; or

(2) Receives, possesses, sells, or purchases, by physical or electronic means, any merchandise or stored value cards obtained from a fraudulent return with the knowledge that the property was obtained in violation of § 39-14-103 or § 39-14-106.

PC 635, eff. 4/1/20, creates a new Class E felony to provide or publish false or misleading information regarding the qualifications to vote, the requirements to register to vote, whether an individual voter is currently registered to vote or eligible to register to vote, voter registration deadlines, or polling dates, times, and locations. It also creates a Class D felony to tamper with voting machines, ballot boxes, vote tabulations, websites, etc.

PC 636, eff. 4/1/20, amends 40-39-211(c), listing conditions on which a person who commits a sexual offense or a violent sexual offense against a child under 12 years of age can reside, conduct an overnight visit, or be alone with a minor who is the offender's own child so long as (1) the offender's parental rights are not being terminated, (2) the sexual offender's victim was not the offender's child and (3) a circuit court exercising civil jurisdiction has not found by clear and convincing evidence that the offender presents a danger of substantial harm to the minor.

PC 681, eff. 7/1/20, amends 39-17-1306 to allow elected officials with handgun permits to carry guns in the courthouse and courtroom, but not in the courtroom when judicial proceedings are taking place.

PC 741, eff. 6/22/20, adds continuous sexual abuse of a child to the list of sex offenses in 40-35-313(a)(1)(B)(ii) that do not qualify for diversion.

PC 756, eff. 7/1/20, amends 39-13-101(b)(3) to require a minimum mandatory $100 to $200 fine in domestic abuse convictions, subject to the defendant's ability to pay.

PC 764, eff. 7/13/20, creates the Class C felony of performing or inducing, or attempting to perform or induce, an abortion upon a pregnant woman whose unborn child has a fetal heartbeat. This statute has already been declared unconstitutional by the federal courts.

PC 765, eff. 7/15/20, clarifies the release eligibility for life sentences and life without parole sentences, pretty much in line with present case law, stating that:

(1) Release eligibility for a defendant committing the offense of first degree murder on or after November 1, 1989, but prior to July 1, 1995, who receives a sentence of imprisonment for life occurs after service of sixty percent (60%) of sixty (60) years less sentence credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence, notwithstanding the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, any sentence reduction credits authorized by § 41-21-236, or any other provision of law relating to sentence credits.

(2) There shall be no release eligibility for a person committing first degree murder, on or after July 1, 1995, and receiving a sentence of imprisonment for life. The person shall serve one hundred percent (100%) of sixty (60) years less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).

(3) There shall be no release eligibility for a defendant receiving a sentence of imprisonment for life without possibility of parole for first degree murder or aggravated rape of a child.

PC 781, eff. 7/15/20, amends 40-7-118 to allow misdemeanor citations to be issued, signed and filed electronically.

PC 799, eff. 7/15/20, amends 70-6-101 to specify that the authority of wildlife resources officers to conduct certain searches does not permit search or inspection of the interior of an automobile without a search warrant.

PC 803, eff. 9/1/20, amends 39-17-432, the “Drug-Free School Zone Act,” by reducing the “zone” to 500 feet instead of 1,000 feet, and changing the word “shall” to “may,” so that the mandatory minimum sentences are now no longer mandatory, but discretionary. Instead of “shall be punished” one felony classification higher, it now reads “may be punished,” etc. The new amendment also states that “There is a rebuttable presumption that a defendant is not required to serve at least the minimum sentence for the defendant's appropriate range of sentence. The rebuttable presumption is overcome if the court finds that the defendant's conduct exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity.” Although under prior law, the defendant’s sentence could only be enhanced one letter grade for either violation of the drug-free zone act or that the minor sold to was under 18 years old (39-17-417(k), but not both,

the new amendment states that the defendant can now be enhanced under both (so that, for instance, a Class C felony can now be enhanced to an A felony if both statutes are violated).

PC 810, eff. 10/1/20, amends the arson statute to change the wording from "knowingly damages any structure by means of a fire or explosion" to “knowingly damages any structure or farm equipment by means of a fire or explosion.” The bill was signed by the governor 7/15/20, but the October effective date makes sure to protect all equipment needed during harvest season.

Court of Criminal Appeals – Selected Cases

GUILTY PLEAS; NEED TO EXPLAIN SENTENCING RANGE:

Darion Merriweather v. State, 2019 WL 4257010, No. W2018-01373-CCA-R3-PC (September 6, 2019)

Denial of post-conviction relief reversed, in part, as a result of the record reflecting an unknowing and involuntary guilty plea where defendant testified that he understood and that his trial counsel informed him that he would be facing a sentence of 8 to 30 years if he went to trial and was convicted; and trial judge explained in the plea colloquy (three times) that the sentence was 8-30 years. As a Range One offender, he only faced a sentence of 8 to 12 years.

MOTION TO RECUSE; MUST ENTER ORDER:

Frederick Leon Tucker v. State, 2019 WL 3782166, No. M2018-01196-CCA-R3-ECN (August 12, 2019)

Error coram nobis court erred by not ruling on the motion to recuse before entering an order denying the petition for writ of error coram nobis. Because the court so ruled in violation of Rule 10B, in order to avoid all possibility of impropriety, we further order that the orginal error coram nobis court judge is recused from hearing the matter on remand.

RULE 48(b) DISMISSAL WITH PREJUDICE:

State v. Rontavious S. Ferguson and Tramon T. Key, 2019 WL 4733477, No. W2018-01908-CCA-R3-CD (September 26, 2019)

Trial court's decision to dismiss indictment *with prejudice* because State requested *nolle prosequi* was reversed because trial judge failed to follow mandatory requirement to make express findings of fact on the factors listed in State v. Benn, 713 S.W.2d 308, 311 (Tenn. 2000) (length of delay, reasons for delay, prejudice to defendant, waiver by the defendant).

DOUBLE JEOPARDY; CONSPIRACY:

State v. Jordan Clayton, Carlos Stokes and Branden Brookins, 2019 WL 3453288, No. W2018-00386-CCA-R3-CD (July 31, 2019)

A defendant may be convicted of both conspiracy and the offense for which was the object of the conspiracy. Trial judge erred in merging conspiracy to commit first degree murder with first degree murder. Each offense contains elements that the other does not, so dual convictions do not violate double jeopardy.

GUILTY PLEA; RIGHT TO WITHDRAW IF NOT ACCEPTED BY JUDGE:

State v. Arnold Asbury, 2019 WL 4511926, No. E2018-01095-CCA-R3-CD (September 19, 2019)

When the State and the Defense enter into a plea agreement and agree to a specific sentence, the trial judge must either accept or reject the sentence or defer the decision until receipt of a presentence report. If the judge rejects the agreement, the defendant must be informed by the trial judge of, among other things, the right to withdraw his or her guilty plea.

COMMENTS ON FAILURE TO TESTIFY:

State v. Gregory Randall Spouth, 2019 WL 4777858, No. M2018-01360-CCA-R3-CD (September 30, 2019)

Prosecutor's closing argument in which he posed 18 questions to the defendant [e.g "Why, why, Gregory South, why did you open the door and let her in?] were of such a character that the jury would necessarily have taken them to be a comment on the defendant's failure to testify.

RIGHT TO PUBLIC TRIAL:

State v. Franklin, 585 S.W.3d 431 (Tenn. Crim. App. 2019)

Exclusion of Defendant's family from courtroom during testimony of child victim violated the Defendant's right to a public trial.

SELF-DEFENSE; DUTY TO RETREAT:

State v. Eddie Smith, 2020 WL 3572071 (Tenn. Crim. App. 2020)

Trial judge followed the law when he instructed jury that defendant had a duty to retreat (since he was acting illegally) when he claimed self-defense. Fact that pattern jury committee did not include such in their pattern instruction is of no importance.