

Tennessee Criminal Law Update

TENNESSEE ASSOCIATION FOR JUSTICE

October 2, 2008

By David Louis Raybin¹



Defense Counsel

- Ineffective Assistance of Counsel

[Ronnie Finch v. State of Tennessee](#) - M2004-02887-SC-R11-PC [View](#)

Davidson County - The Petitioner, Ronnie Finch, was convicted of one count of facilitation of first degree premeditated murder and two counts of facilitation of attempted first degree premeditated murder. In this post-conviction proceeding, the Petitioner contends that his lawyer provided ineffective assistance at trial. The Court granted this appeal to determine **whether counsel was ineffective in failing to object when the trial court erroneously took his motion for judgment of acquittal under advisement and in continuing to participate in the trial thereafter.**

The Petitioner alleges that had his lawyer stood on the motion for judgment of acquittal, the Petitioner would have had his convictions reversed on direct appeal due to insufficient evidence. Thus, he argues, his defense lawyer's inadvertent and uninformed waiver of appellate review of the motion prejudiced the defense. Accordingly, in order to assess the prejudice prong of the Petitioner's claim of ineffective assistance of counsel, we must determine whether the evidence was sufficient as of the close of the State's proof to support a denial of the Petitioner's motion for judgment of acquittal. If the State's proof was sufficient to withstand the motion, then trial counsel's failure to stand on the motion and challenge its denial on direct appeal did not prejudice the Petitioner because the appeal would have been denied on its merits.

Because defense counsel's representation did not prejudice the Petitioner, the Court of Criminal Appeals opinion was reversed and the judgments of conviction against the Petitioner were reinstated.

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Pretrial Diversion

- **Pretrial Diversion**

[State of Tennessee v. Stephen McKim](#) - W2005-02685-SC-S10-CD [View](#)

Shelby County - We accepted this extraordinary appeal in order to (1) determine the effect of a district attorney general's consideration of an irrelevant factor in deciding whether to grant pretrial diversion and (2) **clarify when an interlocutory appeal from a denial of pretrial diversion should be granted**. In this case, the defendant was indicted for *criminally negligent homicide following the death of his daughter after the defendant left her in his car on a hot summer day*. The defendant applied for pretrial diversion. The district attorney general's office denied diversion, in part on the basis of its judgment that diversion of a negligent homicide "appears to be an aberration of the law." The trial court refused to overturn the prosecutor's decision, and the defendant applied for permission to pursue an interlocutory appeal. The trial court denied permission, and the defendant then applied to the Court of Criminal Appeals for permission to pursue an extraordinary appeal. The Court of Criminal Appeals denied the defendant's application. We granted review and hold that the district attorney general abused his discretion when he relied upon an irrelevant factor in denying pretrial diversion.

That there may be substantial evidence to support the denial of pretrial diversion upon a proper consideration of all relevant factors, does not permit the district attorney general to short-circuit the analytical process. As we noted in [Bell](#), "a court cannot reasonably conclude that there is substantial evidence to support the district attorney general's decision if in fact the district attorney general has not first considered all of the relevant factors and their relative weight."

Discovery

- **Discovery – Public Records** ("law enforcement privilege")

[Richard Schneider, Tajuana Cheshier, Jamie Page and The Gannett Satellite Information Network dba The Jackson Sun v. The City of Jackson](#) - W2005-01234-SC-R11-CV [View](#)

Madison County - We granted this appeal primarily to determine **whether Tennessee common law includes a law enforcement investigative privilege ("law enforcement privilege") which operates to exempt from disclosure governmental records that would otherwise be accessible via the Tennessee Public Records Act ("Public Records Act")**. See Tenn. Code Ann. § 10-7-503 (Supp. 2006). We hold that Tennessee common law does not include the law enforcement privilege and that it should not be adopted herein. Accordingly, we reverse the judgment of the Court of Appeals, which adopted the law enforcement privilege and applied it as an exception to the Public Records Act. However,

we remand this case to the trial court to determine whether any of the police department records at issue are part of a pending, open, or ongoing criminal investigation and thus exempt from disclosure. We also reverse the Court of Appeals' judgment and reinstate the judgment of the trial court permitting Petitioners to recover their attorneys' fees pursuant to Tennessee Code Annotated section 10-7-505(g) (1999). On remand, the trial court shall calculate and award Petitioners the attorneys' fees they have incurred on appeal. Finally, we reverse the judgment of the Court of Appeals and reinstate the permanent injunction issued by the trial court requiring the City of Jackson ("City") to respond in writing to future Public Records Act requests of The Jackson Sun or its agents.

Motions to Dismiss and Amend Indictments

- **Motion to Dismiss**

State of Tennessee v. Ariel Ben Sherman and Jacqueline P. Crank -

E2006-01226-SC-R11-CD [View](#)

Loudon County - A Loudon County grand jury indicted the defendant, Ariel Ben Sherman, and co-defendant, Jacqueline Crank, for child neglect. The trial court dismissed the indictment against Sherman. The Court of Criminal Appeals reversed and remanded. We granted Sherman's application for permission to appeal to consider the issues presented for review, and hold as follows: (1) **when deciding a motion to dismiss an indictment, a trial court may consider undisputed facts that are clearly and unequivocally agreed upon by the parties;**

When ruling upon a motion to dismiss, a trial court may consider evidence beyond the face of the indictment. ... This may include undisputed facts or stipulations by the parties. The question does not hinge upon how the nature of these facts became apparent to the court but upon whether they qualify as "factual evidence of the defendant's conduct at the time of the alleged offense" or as "relevant only to the legal question presented by the defendant's motion, not to the general issue of guilt or innocence."

Id. This rationale extends to concessions by parties at any hearing, so long as the facts are not clearly in dispute and properly become a part of the record. Cf. *State v. Messamore*, 937 S.W.2d 916, 918 (Tenn. 1996) (holding that an indictment was timely filed, despite facial deficiencies, because "the record reflects, and the defendants conceded at oral argument, that prosecution had been timely commenced in each case"). If, on the record, the State and the defense unequivocally agree to those facts, whether written or verbal, then the trial court may rely upon those stipulations as "formal enough" to serve as the basis for deciding a motion to dismiss.

(2) a person standing in loco parentis to a child may have a legal duty of care, the breach of which may result in criminal culpability; and (3) the State is not bound at the outset of a trial by the legal theories espoused in its bill of particulars. Because the trial court erroneously dismissed the indictment, we affirm the Court of Criminal Appeals, reinstate the indictment against Sherman, and remand the case for further proceedings consistent with this opinion.

- **Dismissal of Indictment**

[State of Tennessee v. Melissa Ann Layman](#) - E2004-01471-SC-R11-CD and [State of Tennessee v. Jonathan Ray Taylor](#) - E2004-02866-SC-R11-CD [View](#) ([Concur/Dissent](#)) - [View](#)

Anderson County - We granted and consolidated the applications for permission to appeal filed on behalf of Melissa Ann Layman and Jonathan Ray Taylor to determine the scope of a trial court's discretion to deny a motion to nolle prosequi to which the defendant has consented. Layman's appeal also presents the issue of whether a victim's family has a right to be heard at a pretrial hearing concerning a plea agreement or a nolle prosequi. **We conclude that when an uncontested motion to nolle prosequi or dismiss a criminal charge is independent of a plea agreement, a trial court's discretion to deny the motion under Rule 48(a) of the Tennessee Rules of Criminal Procedure is limited to extraordinary circumstances indicating betrayal of the public interest. Because in each case the prosecutor's independent, uncontested motion to nolle prosequi the greater charge of the indictment was neither filed in bad faith nor motivated by considerations clearly contrary to manifest public interest, we hold that the trial court abused its discretion in rejecting the nolle prosequi.** We also hold in Layman's case that the victim's family did not have the right to be heard at the pretrial hearings concerning the plea agreement and nolle prosequi because such pretrial hearings are not critical stages of the criminal justice process as defined by Tennessee Code Annotated section 40-38-302(2). Any error in considering the statements of the family, however, was harmless. Accordingly, we reverse the judgments of the trial court and the Court of Criminal Appeals in each case and remand for further proceedings consistent with this opinion.

Joinder And Severance Of Offenses And Defendants

- **Joinder of Offenses**

State of Tennessee v. Andre Dotson - W2005-01594-SC-R11-CD [View](#)
SHelby County - The Defendant, Andre Dotson, was convicted of two counts of aggravated robbery and two counts of robbery.

Between July 11 and August 27, 2003, Andre Dotson (the “Defendant”), was involved in the robbery of four wholesale distributor trucks which were in the process of making deliveries to retail stores in Shelby County. The Defendant, accompanied by a second individual in each robbery, was indicted on the following charges:

- (1) robbery of Herbert Crain on July 11, 2003;
- (2) robbery of Gabriel Shears and Keith Richardson on August 5, 2003;
- (3) aggravated robbery of Willis Yarbrough on August 13, 2003; and
- (4) aggravated robbery of Deangelo Mitchell on August 27, 2003.

On the morning of trial, the State made a motion to consolidate the four separate indictments for trial. The trial court granted the State’s motion and then granted a motion for severance by a codefendant, Rodney Finley, because Finley was named in only two of the four indictments

On direct appeal of right, the Court of Criminal Appeals modified one robbery conviction to theft based upon insufficient evidence of the element of fear on the part of a victim, but otherwise affirmed. We granted permission to appeal in order to consider several issues, including those related to the consolidation of the four indictments in a single trial. We hold that (1) the **consolidation of the four charges constituted reversible error**; Because the trial court erroneously refused to order separate trials on each of the four indictments and the error cannot be classified as harmless, the judgment of the Court of Criminal Appeals is reversed and the Defendant is granted new trials on each indictment.

Motions To Suppress Searches And Seizures

- **Search and Seizure**

[State of Tennessee v. Eric Berrios](#) - W2005-01179-SC-R11-CD [View](#)

Shelby County - On February 25, 2004, Officer Kelly Nichols of the West Tennessee Drug Task Force observed Eric Berrios (“the Defendant”) driving fifty-three miles per hour in a construction zone on Interstate 40 in Shelby County. The posted speed limit for the area was forty-five miles per hour. When Officer Nichols activated his emergency equipment, the Defendant stopped his vehicle on the shoulder of the highway. The officer then approached the vehicle on the driver’s side, asked the Defendant for his license and vehicle registration, and directed him out of the vehicle. After glancing at the license and registration, Officer Nichols frisked the Defendant and led him to the backseat of the patrol car. The Defendant was questioned and ultimately agreed to the officer’s request for consent to search the vehicle. A large amount of cocaine was hidden in the fender area of the vehicle. The defendant, Eric Berrios, was charged with one count of possession with intent to sell or deliver more than three hundred grams of cocaine. After the trial court granted the defendant’s motion to suppress the cocaine seized during the traffic stop, the State was granted an interlocutory appeal pursuant to Rule 9 of the

Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals affirmed the suppression of the evidence. We granted the State's application for permission to appeal to determine whether the officer's actions amounted to an unconstitutional seizure and, if so, whether the defendant's consent to search the vehicle was sufficiently attenuated from that illegal act. **Because the seizure violated constitutional safeguards and because the consent to search was not sufficiently attenuated from the violation, we affirm the suppression of the evidence.** The judgment of the Court of Criminal Appeals is, therefore, affirmed.

- **Search and Seizure**

State of Tennessee vs. Randy Lee Meeks and Ernest Lonnie Snyder, Jr. -
M2006-01385-SC-R11-CO [View](#)

Coffee County - This appeal involves the warrantless search of a motel room containing an actively operating methamphetamine laboratory. After the occupants of the room were indicted for manufacturing methamphetamine and for possessing methamphetamine and drug paraphernalia, they filed a motion in the Circuit Court for Coffee County seeking to suppress the evidence found in the motel room. The trial court granted the motion to suppress and dismissed the indictment. The State appealed, and the Court of Criminal Appeals reversed the trial court's decision to suppress the evidence and vacated the order dismissing the indictment. State v. Meeks, No. M2006-01385-CCA-R3-CO, 2007 WL 1987797 (Tenn. Crim. App. July 10, 2007). We granted the defendants' Tenn. R. App. P. 11 application for permission to appeal to address more fully the principles applicable to warrantless searches of actively operating methamphetamine laboratories when the State asserts that the officers were acting to avert a serious and immediate risk of injury to themselves or others. Like the Court of Criminal Appeals, we have determined that the trial court erred by granting the motion to suppress and by dismissing the indictment

The intensity and strength of the odor, the fumes emanating from Room 110, and the effects of the odor and fumes on the inhabitants of Room 109 provided the officers with enough facts to believe that the persons in Room 110 were actively manufacturing methamphetamine. This conclusion provided the officers with an objectively reasonable basis for concluding that there was an immediate need to act to protect themselves and others from serious harm. The fact that the officers overlooked clearing the adjoining rooms before they entered Room 110 does not undermine the reasonableness of their decision to enter Room 110 without waiting for a search warrant. Accordingly, the officers' warrantless entry into and search of Room 110 was not an unreasonable search under either the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Constitution of Tennessee.

- **Search and Seizure**

State of Tennessee vs. Tyson Lee Day - M2006-00989-SC-R11-CD [View](#)

Separate Dissenting Opinion - [View](#)

Sumner County - After unsuccessfully moving to suppress evidence resulting from the traffic stop that led to his arrest, the defendant, Tyson Lee Day, pleaded guilty to third offense driving under the influence and driving on a revoked license. The plea agreement provided for reservation of a certified question of law regarding whether the traffic stop was based on reasonable suspicion, supported by specific and articulable facts, that a criminal offense had been or was about to be committed. On appeal, the Court of Criminal Appeals concluded that at the time the officer initiated the traffic stop, he lacked reasonable suspicion. Accordingly, the court reversed the judgment of the trial court and, because the question was dispositive, dismissed the case. We granted the State's application for permission to appeal to consider the question of whether the community caretaking rationale for traffic stops justified the stop in this case. **After carefully examining the certified question, however, we conclude that the community caretaking issue was not included within the scope of the question reserved for review. Accordingly, our review extends solely to the issue preserved, i.e., whether the traffic stop was based on reasonable suspicion, supported by specific and articulable facts, that a criminal offense had been or was about to be committed. We conclude that the facts do not support a finding of reasonable suspicion. Accordingly, we affirm the judgment of the Court of Criminal Appeals.**

- **Search and Seizure**

State of Tennessee v. R. D. S. - M2005-00213-SC-R11-JV [View](#)

(Separate concurring/dissenting opinion filed by Holder, J. - [View](#))

Clark, J. and Koch, J., not participating

Williamson County- This appeal arises out of a finding of delinquency following a denial of a motion to suppress incriminating statements and seized evidence. The trial court found that the juvenile defendant was not in custody at the time he made his incriminating statements, thus not triggering Miranda requirements; the Court of Appeals agreed. We affirm that part of the Court of Appeals' holding. **However, due to a lack of evidence in the record regarding the law enforcement officer's role as a school resource officer, we remand the case to the trial court for a new trial to determine whether the law enforcement officer was required to have reasonable suspicion or probable cause to search the juvenile defendant's truck.**

Motions To Suppress Confessions

- **Confessions**

State of Tennessee vs. Marco M. Northern - M2005-02336-SC-R11-CD [View](#)
Separate Dissenting Opinion - [View](#)

Davidson County - We granted this appeal to consider **whether the courts below correctly held that *Missouri v. Seibert*, 542 U.S. 600 (2004), does not bar the introduction into evidence of the defendant’s Mirandized videotaped confession which occurred after the defendant made an incriminating admission during a prior unwarned custodial interrogation.** This Court has not previously interpreted and applied *Seibert*. After carefully considering the plurality opinion, the concurring opinions, and the dissenting opinions in *Seibert*, we conclude that the courts below correctly held that *Seibert* does not bar admission of the defendant’s videotaped confession. We further hold that this Court’s decision in *State v. Smith*, 834 S.W.2d 915 (Tenn. 1992), interpreting the right against self-incrimination provided by article I, section 9 of the Tennessee Constitution, does not bar admission of the defendant’s videotaped confession. Accordingly, we affirm the judgment of the Court of Criminal Appeals, which affirmed the defendant’s conviction of second degree murder but remanded for resentencing.

Guilty Pleas and Other Non-trial Dispositions

- **Plea Agreement – Sentencing**

[Shaun Hoover v. State](#) - W2005-01921-SC-R11-HC [View](#)

Lauderdale County - We granted permission to appeal in this habeas corpus case to consider the legality of a sentence imposed pursuant to a plea agreement. The agreed sentence exceeds the maximum available term in the offender Range but does not exceed the maximum punishment authorized for the offense. For the reasons explained herein, we conclude that the plea-bargained sentence is legal.

The petitioner, Shaun Hoover (“Hoover”), was charged with first degree murder and especially aggravated robbery for the 1997 shooting and robbery of Berry Young. Subsequent to his indictment, Hoover negotiated a plea agreement with the State. In exchange for Hoover pleading guilty to the lesser-included offenses of second degree murder and attempt to commit especially aggravated robbery, the State agreed that Hoover should be classified as a **Range I, standard offender and that he should receive concurrent sentences of thirty-five years with a release eligibility of 100 percent for second degree murder** and twelve years with a release eligibility of thirty percent for attempt to commit especially aggravated robbery. On November 29, 1999, the Shelby County Criminal Court

entered a judgment in accordance with the plea agreement. Almost six years later, on March 3, 2005, Hoover filed a habeas corpus petition challenging the legality of the thirty-five-year sentence he received for second degree murder. Hoover argued that the sentence is illegal because it exceeds the maximum twenty-five-year sentence statutorily authorized for a Range I offender convicted of second degree murder. See Tenn. Code Ann. § 40-35- 112 (a)(1) (2006). The trial court granted Hoover habeas corpus relief, stating “the thirty-five[-]year sentence for second degree murder . . . is for [a] term in excess of the provisions of the 1989 Act.” The State appealed, and the Court of Criminal Appeals reversed the trial court’s judgment, holding that Hoover’s thirty-five-year sentence is legal because it does not exceed the maximum sixty-year sentence available for Class A felonies such as second degree murder. See Tenn. Code Ann. § 39-13-210(c) (2006); Tenn. Code Ann. § 40-35-111(a), (b)(1) (2006).

Thus, the judgment of the Court of Criminal Appeals dismissing the petition for writ of habeas corpus is affirmed.

Jury Selection, Sequestration and Conduct

- **Jury Selection**

[Patti Zakour v. UT Medical Group, & Scott Craig](#) - W2003-01193-SC-R11-CV [View](#)
Tipton County - The issue we review in this case is whether the Defendants exercised peremptory challenges during jury selection based on race and/or gender in a discriminatory manner contrary to the United States Supreme Court’s holding in *Batson v. Kentucky*. The Defendants used six of their seven peremptory challenges to strike women from the jury panel, including the only African-Americans who were seated in the jury box. In response to the Plaintiff’s race-based Batson challenge, the Defendants responded that one of the African-American women was dismissed because she had difficulty remembering the verdict in a previous civil jury case in which she had served as a juror and because she had a family history of cancer. As to the Plaintiff’s gender-based Batson objection, the Defendants responded that the women were excused based on “experience and body mechanics.” The trial court overruled the Plaintiff’s objections and the trial proceeded. Following a defense verdict, the Plaintiff appealed, and the Court of Appeals affirmed the judgment. After careful review of the record and applicable authorities, we hold that the Defendants’ stated reasons for exercising peremptory challenges to strike the African-Americans and women from the jury panel were insufficient to satisfy the requirements of *Batson v. Kentucky*. Because the trial court erred in overruling the Plaintiff’s Batson objections, we reverse and remand this case to the trial court for a new trial.

Trial Procedure

- **Waiver of Right to Testify**

State of Tennessee v. Michael Rimmer - W2004-02240-SC-DDT-DD [View](#)

The Defendant, Michael Rimmer, was convicted of one count of premeditated murder, one count of aggravated robbery, and one count of theft of property. In the penalty phase of the trial, the jury imposed a sentence of death for the first degree murder. Our review is mandatory. Tenn. Code Ann. § 39-13-206(c)(1) (2006). Upon careful review of the entire record, we hold as follows: (1) although the trial court erred during the sentencing hearing by excluding evidence solely on the grounds of hearsay, the evidence was either introduced through other means or lacking in relevance or reliability, so the error was harmless beyond a reasonable doubt; (2) **for a waiver of his right to testify to have been valid, a defendant need not state on the record that he was informed by counsel of our ruling in State v. Cazes, 875 S.W.2d 253, 266 (Tenn. 1994):**

In this appeal, however, he contends that his right to testify was not properly waived because his counsel did not inform him about the limits to cross-examination in capital cases. *Cazes*, 875 S.W.2d at 266. In *Cazes*, this Court held that a defendant does not waive his Fifth Amendment right against self-incrimination by testifying to mitigating factors that are wholly collateral to the murder. *Id.* The State conceded that *Cazes* should not have been subjected to cross-examination except as to the mitigating circumstances and this Court agreed. *Id.* at 264-266; see also *Harrison v. United States*, 392 U.S. 219, 222 (1968) (a “defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . .”). Here, the Defendant contends that if his counsel had informed him of the *Cazes* ruling, he would have chosen to testify instead of insisting upon his right to remain silent. The discrete question presented is whether a defendant must be informed of his ability to testify to collateral mitigating factors in a death penalty sentencing hearing without waiving his privilege against self-incrimination. That is, must a defendant be informed of the ruling in *Cazes* as part of a Momon hearing in capital sentencing cases? We say no.

3) the jury instruction defining reasonable doubt does not offend due process; (4) references by defense counsel and a defense witness that the defendant previously had been on “death row” did not, under these circumstances, entitle the defendant to a new sentencing hearing; and (5) the sentence of death satisfies the proportionality guidelines. As to the remaining issues, we agree with the conclusions reached by the Court of Criminal Appeals. The relevant portions of the opinion are appended. The judgment of the Court of Criminal Appeals is, therefore, affirmed.

- **Perjury**

[State of Tennessee v. Arthur Buford](#) - W2004-00786-SC-R11-CD [View](#)

Shelby County - We granted this appeal of the defendant's perjury conviction to determine whether the prosecutor must prove which of the defendant's two inconsistent statements was false. We hold that pursuant to Tennessee Code Annotated section 39-16-707 (1997), the **prosecutor was not required to prove which of the two statements made by the defendant was false**. Therefore, the State was relieved of any election requirement, and no enhanced unanimity instruction was warranted. We also hold that the evidence was sufficient to support the defendant's perjury conviction and that the trial court properly allowed the defendant's trial counsel to testify.

- **Child Pornography**

[State of Tennessee v. Kelly Michael Pickett](#) - M2004-00732-SC-R11-CD & [State of Tennessee v. Gregory T. Harwood](#) - M2004-01811-SC-R11-CO [View](#)

Davidson County - We granted the appeal in each of these cases to determine the constitutionality of Tennessee Code Annotated section 39-17-1003 (2003), **which prohibits the possession of child pornography. Initially, the statute is neither unconstitutionally vague nor overbroad**. Secondly, we hold that because the charges against Pickett were **multiplicitous**, only one conviction is permissible under the circumstances of that case. In consequence, the judgment of the Court of Criminal Appeals in each case is affirmed.

- **Deadly Weapon -- an unloaded pellet gun**

[State of Tennessee v. Thomas Martin McGouey](#) - E2005-00642-SC-R11-CD [View](#)

Knox County - The defendant, Thomas Martin McGouey, was convicted of aggravated assault and felony reckless endangerment, the aggravating factor of each being the use and display of a deadly weapon—an unloaded pellet gun. We granted permission to appeal in this case to determine whether the Court of Criminal Appeals erred in holding that a jury may conclude that an **unloaded pellet gun constitutes a “deadly weapon” under Tennessee Code Annotated section 39-11-106(a)(5) (2003)**. We hold that the pellet gun is **not a deadly weapon under subsection (a)(5)(A) because it is not a firearm, nor is it a deadly weapon under (a)(5)(B) because there** is no evidence in the record that the defendant used or intended to use the unloaded pellet gun in a manner capable of causing bodily injury or death. Because the defendant does not challenge the evidence supporting the lesser-included charges of simple assault or reckless endangerment, we enter convictions on those lesser charges and remand the case to the trial court for resentencing.

- **Criminally Negligent Homicide**

State of Tennessee v. Susan Marie Gilliam Campbell - E2005-01849-SC-R11-CD [View](#)

Hawkins County - We granted review to determine whether the Court of Criminal Appeals correctly determined that the evidence at trial was sufficient to support dual convictions of criminally negligent homicide and facilitating escape. Because the defendant, who was charged with the care of the five-year-old victim, **took him swimming at a lake without notifying his parents, drank beer and used marijuana, and dared the victim into the water and then failed to supervise his activities, the evidence was sufficient to support the conviction of criminally negligent homicide.** Because the defendant, after discovering the disappearance of the victim, discouraged immediate contact with the authorities so that her son, a fugitive from justice, could avoid the police, the evidence was also sufficient to support the conviction of facilitating escape. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

- **Double Jeopardy – Armed Robbery / Kidnapping**

State of Tennessee v. Antonio D. Richardson - M2005-01161-SC-R11-CD [View](#)

Davidson County - The defendant, Antonio Richardson, was convicted of two counts of especially aggravated kidnapping, one count of felony reckless endangerment, one count of aggravated assault, and one count of burglary. In addition, the defendant pleaded guilty to attempted especially aggravated robbery. **The Court of Criminal Appeals ruled that the kidnappings were essentially incidental to the attempted especially aggravated robbery and therefore the kidnapping convictions violated due process under the principles stated in State v. Anthony. We reverse the intermediate appellate court and reinstate the convictions.**

Witnesses and Evidence

- **Evidence –Hearsay-- Forfeiture by wrongdoing**

State of Tennessee v. Judge Brooks - W2004-02834-SC-R11-CD [View](#)

This case involves the applicability of the forfeiture by wrongdoing hearsay exception. We hold that the forfeiture by wrongdoing exception requires a showing that a defendant's actions were intended, at least in part, to prevent a witness from testifying. The prosecution in this case failed to prove that a motive for the murder was to make the victim unavailable as a witness. We now turn to our evaluation of the evidence in this case. The greatest risk of harm stemmed from the testimony of Mr. Smith concerning statements the victim made to him in the hours preceding her death. Included in his testimony were the victim's statements that the defendant had been beating her all day,

that she was afraid of him, and that she wanted to get away. Most significantly, the victim also identified the defendant as the person Mr. Smith heard threatening to kill the victim. Mr. Smith's testimony was therefore highly probative of premeditation and very damaging to the defense. Had the jury not heard the victim's statements to Mr. Smith, it would have been left with only two pieces of evidence supporting a finding of premeditation: 1) the extensive nature of the victim's injuries and 2) Ms. Zabt's testimony that she heard the defendant threaten to kill the victim approximately two months before the murder. Admission of her hearsay statements, therefore, violated Tennessee Rule of Evidence 804(b)(6). We further conclude that the error affected the result of the trial. Accordingly, we reverse the judgment of the Court of Criminal Appeals and remand the case for a new trial.

- **Evidence -- Dying Declaration ---DNA Expert**

[State of Tennessee v. Sabrina Renee Lewis](#) - M2004-02255-SC-R11-CD [View](#)
Davidson County - The Defendant, Sabrina Renee Lewis, was convicted of criminally negligent homicide and facilitation of especially aggravated robbery. The trial court imposed a twenty-one-year effective sentence. The Court of Criminal Appeals affirmed. We granted permission to appeal in order to consider three evidentiary questions, the last two of which require interpretations of the federal and state constitutional provisions relating to the right of confrontation: (1) whether a videotaped statement by the Defendant was admissible as "against interests"; (2) whether a statement by the victim was admissible as a dying declaration; and (3) whether expert testimony regarding DNA test results was admissible. **Because the videotaped statement by the Defendant was properly allowed as an admission by a party opponent, because a testimonial dying declaration does not violate the right of confrontation under the federal or state constitution, and because confrontation rights do not prohibit an expert evaluation of DNA data,** the judgment of the Court of Criminal Appeals is affirmed.

- **Proof of other Crimes (Harmless Error Rule)**

[State of Tennessee v. Edwardo Rodriguez](#) - M2005-02466-SC-R11-CD [View](#)
Wilson County - This appeal calls into question the verdict of a Wilson County jury finding the defendant guilty of two counts of child rape and aggravated sexual battery. After receiving two consecutive twenty-year sentences, the defendant appealed to the Court of Criminal Appeals. **He asserted that the trial court erred by admitting evidence suggesting that he possessed child pornography and that the trial court also erred by denying his requests for a mistrial after two of the State's witnesses referred to other uncharged allegations of sexual abuse. The Court of Criminal Appeals determined that the trial court did not err by declining to declare a mistrial but also determined that the trial court erred by admitting evidence regarding the defendant's possession of child**

pornography. However, the court decided that the admission of the evidence regarding the defendant's possession of child pornography was harmless error. We granted the defendant's application for permission to appeal. We concur with the Court of Criminal Appeals' conclusion that the trial court erred by admitting the evidence regarding the defendant's possession of child pornography.

However, we have determined that the admission of the evidence regarding the defendant's possession of child pornography was not harmless. This result follows because when the rules of evidence and procedure stand unenforced through a finding of harmless error, there is no deterrence that would encourage future adherence to the rule. The absence of deterrence may "tacitly inform" prosecutors that they can weigh the commission of evidentiary or procedural violations . . . against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt." Ultimately, a lenient harmless error analysis "encourages a prosecutorial team to trifle with a defendant's rights and is no more desirable than one which would reverse for trivial errors." Simply stated, "[e]very time an error is declared harmless in a particular situation, it diminishes the risk to the prosecutor in the use of the evidence or the technique." Thus, holding errors to be harmless may have the effect over time of extending the limits of the law, thereby effectively modifying the law itself. Thus, holding errors to be harmless may have the effect over time of extending the limits of the law, thereby effectively modifying the law itself.

Therefore, we reverse the defendant's conviction and remand the case for a new trial.

- **Evidence -- Chain of Custody**

State of Tennessee v. Kacy Dewayne Cannon - E2005-01237-SC-R11-CD [View](#)
(seperate Concurring Opinion filed by Wade, J.) - [View](#)

Hamilton County - Defendant was convicted of aggravated rape. The Court of Criminal Appeals affirmed his conviction but remanded for re-sentencing. Thereafter, we granted permission to appeal to consider the following issues: 1) whether the State failed to establish a proper chain of custody for the admission into evidence of pantyhose the victim was allegedly wearing at the time of the rape; 2) whether the evidence is sufficient to support the conviction; 3) whether the trial court erred in denying the defense motion to suppress the identification of his DNA profile from a DNA database; 4) whether admission of the victim's statements into evidence through third parties violated Defendant's constitutional right of confrontation; 5) whether the friendship between the trial court and one of the prosecuting attorneys created a serious appearance of impropriety and biased the trial court against Defendant; and 6) whether the Court of Criminal Appeals erred by remanding this case for re-sentencing. **After considering these**

issues, we conclude that the State failed to establish a proper chain of custody for the admission into evidence of the pantyhose [because there was no proof it came from the victim] and that the victim's statements describing the assault to the police officers and her statements to the sexual assault nurse examiner were testimonial and admitted in violation of Defendant's right of confrontation.

We conclude therefore that M.N.'s medical records containing her out-of-court statements to emergency room medical personnel that she had been raped were nontestimonial and properly admitted under Tennessee Rule of Evidence 803(4) (providing that "[s]tatements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment[]" are admissible under the hearsay rule). M.N. sought medical treatment at the emergency room after she was attacked in her home. Her statements to the nurses and the treating physician in the emergency room were objectively for the primary purpose of seeking medical diagnosis and treatment for injuries sustained in the attack.¹⁰ Accordingly, M.N.'s statements to the emergency room medical personnel were nontestimonial, and the admissibility of these medical records at the new trial will be governed by the rules of evidence.

.....

Finally, we turn to the issue of whether M.N.'s statements to Nurse Redolfo were testimonial or nontestimonial. The proper classification of out-of-court statements to persons other than law enforcement personnel is an issue of first impression for this Court. The Davis Court left this issue unresolved, explaining "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" Davis, 126S. Ct. at 2274 n.2. However, the Davis Court treated 911 emergency operators as agents of the police for purposes of that opinion, even though it recognized that the operators were not themselves police officers. Id. The State argues that M.N.'s statements to Nurse Redolfo "were nontestimonial in nature and thus properly admitted pursuant to the medical diagnosis exception to the hearsay rule." See Tenn.R. Evid. 803(4). The intermediate appellate court held that since M.N. had been discussing her injuries with emergency room medical personnel prior to speaking with Nurse Redolfo, the statements were nontestimonial and thus admissible pursuant to Tennessee Rule of Evidence 803(4). We disagree. M.N.'s statements to Nurse Redolfo were not "reasonably pertinent to diagnosis and treatment." Id. Emergency room medical personnel had examined and stabilized M.N. before she spoke with Nurse Redolfo. Furthermore, Detective Dudley testified that the medical needs of a victim take priority over the pursuit of a criminal investigation,

including whether a sexual assault nurse examiner interviews or examines the victim. We conclude that the victim's statements to Nurse Redolfo were testimonial as the primary purpose of these statements was "to establish or prove past events potentially relevant to later criminal prosecution." Davis, 126 S. Ct. at 2274. The following facts support our conclusion. The policy of both the CPD and of the hospital is to have a sexual assault nurse examiner speak with victims of sexually-related crimes. Nurse Redolfo testified that she had been trained to question suspected rape victims and that she had been instructed by speakers from law enforcement agencies and from the district attorney's office on how to collect evidence and how to ask questions. Nurse Redolfo often testifies at trials in her capacity as a sexual assault nurse examiner.

We further hold that the trial court properly denied Defendant's motion to suppress and Defendant's motion for recusal. Because the error in admitting the pantyhose into evidence was not harmless, however, we reverse Defendant's conviction for aggravated rape and remand for a new trial.

- **Expert Testimony -- Eyewitness expert**

[State v. Arthur T. Copeland](#) - E2002-01123-SC-DDT-DD [View](#)

Blount County - The Defendant, Arthur T. Copeland, was convicted of one count of first degree murder and sentenced to death. The jury found a single aggravating circumstance, that the Defendant previously had been convicted of one or more felonies involving violence to the person, see Tenn. Code Ann. § 39-13-204(i)(2) (1997), and further found that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt, see Tenn. Code Ann. § 39-13-204(g)(1) (1997). The Court of Criminal Appeals held that the trial court properly excluded expert testimony on eyewitness identification but committed plain error by failing to conduct a hearing pursuant to *Momon v. State*, 18 S.W.3d 152, 157 (Tenn. 1999), and ordered a remand for a determination of whether the error was harmless. Further, the Court of Criminal Appeals set aside the sentence of death as disproportionate. We granted the State's application for permission to appeal in order to resolve the dispositive issues. **We first hold that the trial court erred by prohibiting the Defendant from offering expert testimony regarding eyewitness testimony and overrule *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000).** Because the exclusion of the testimony cannot be classified as harmless under these circumstances, the Defendant must be granted a new trial. Although the trial court failed to conduct a *Momon* hearing, consideration of that issue is not necessary because of the grant of a new trial. Finally, we conclude that the Court of Criminal Appeals erred by finding that the death sentence was disproportionate; thus the State may choose to seek the death penalty upon remand. Accordingly, the judgment of the Court of Criminal

Appeals is affirmed in part, reversed in part, and the cause is remanded for a new trial.

Defenses

- **Defenses --- Duress --- Instructions**

[State of Tennessee v. Tevias Bledsoe](#) - W2004-01585-SC-R11-CD [View](#)
Shelby County - The Defendant, Tevias Bledsoe, was charged with premeditated murder, murder in the perpetration of a felony, especially aggravated robbery, and unlawful possession of a handgun by a convicted felon, all in connection with the shooting death of Nathan Maroney. Apparently accepting the Defendant's theory that the shooting was accidental, the jury acquitted him of all charges except felonious possession of a handgun. On direct appeal, the Defendant challenged for the first time the trial court's jury instructions, claiming that the court should have charged the jury on the defense of duress. **The Court of Criminal Appeals found that the trial court's failure to instruct the jury on the defense of duress was plain error and granted the Defendant a new trial. The State sought, and we granted, permission to appeal. We hold that the Defendant is not entitled to a new trial on the basis of plain error.**

In this case, the criminal act the Defendant contends he committed under duress was his taking possession of the handgun during his struggle with the victim. After examining the facts and circumstances of this case, we concur that the evidence—in particular the Defendant's own testimony—may have been sufficient to warrant a duress instruction. Nevertheless, under the unique facts and circumstances of this case, we conclude that the trial court's failure to instruct the jury on the defense of duress with respect to the weapons charge was not an error so egregious as to require the Defendant be afforded a new trial in order to “do substantial justice.” Our primary concern is the absence of any indication in the appellate record that duress was a theory of the defense. We note that neither the opening statements nor the closing arguments are included in the record on appeal. These might have provided more insight into the theory of the defense. It is the responsibility of the party raising an issue on appeal (in this case, the Defendant), to furnish the appellate court with a record that will enable that court to decide the issues raised. Tenn. R. App. Proc. 24; State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). Both duress and self-defense are “defenses,” as defined by 7 Tennessee Code Annotated section 39-11-203(1997), when the proof fairly raises an issue concerning whether the defendant was justified in acting in response to impending harm or unlawful force which involved an imminent danger of death or serious bodily injury. See Tenn. Code Ann. §§ 39-11-504 (1997) (duress) & 39-11-611 (1997) (self-defense). A close parsing of the statute setting forth the defense of duress reveals that it encompasses four elements. In the context

of this case, those four elements are (1) that the victim threatened the Defendant with a drawn gun so as to cause the Defendant to fear his own death or serious bodily injury if the Defendant did not obtain possession of the gun; (2) the victim's threat of shooting the Defendant was continuous throughout the Defendant's possession of the gun; (3) the Defendant could not safely withdraw from the victim's threat of shooting him; and (4) the desirability and urgency of the Defendant taking possession of the gun in order to avoid being shot by the victim clearly outweighed the harm sought to be avoided by the law proscribing convicted felons from possessing guns. Tenn. Code Ann. § 39-11-504 (1997). From the record provided, it is clear that the defense focused on the more serious crimes charged: premeditated murder, felony murder, and especially aggravated robbery. The tactical theory of the defense was that the victim was shot accidentally, and the Defendant did not rob him. In fact, when the trial court specifically asked whether he desired an instruction on self-defense, a defense closely akin to duress, the Defendant expressly declined such an instruction. Instead, the Defendant concentrated on a theory of "accident," which, apparently, the jury was willing to adopt as to the murder and robbery offenses. Not only did the Defendant not request a jury instruction on duress, but there is no indication in the record provided that such a theory was even contemplated. In fact, the Defendant's express rejection of an instruction on self-defense suggests otherwise. As set forth above, the test for plain error includes five prerequisites, each of which must be satisfied before the trial court's judgment may be overturned. The party advocating plain error bears the burden of establishing such claims. *Olano*, 507 U.S. at 734. A reviewing court must therefore undertake a close and careful analysis of each prerequisite in turn before determining that a plain error has been committed. Only when the reviewing court has satisfied itself that all five prerequisites have been met should it consider granting relief on the basis of "plain error." Where a defendant fails to carry his burden of establishing even one of the five plain error prerequisites, the reviewing court may discontinue its analysis and reject the defendant's claim of plain error. In this case, the Defendant failed to submit a record that included opening statements and closing arguments. By this omission, he has clouded the issue of whether the failure to request a duress instruction was a tactical decision. It is difficult to fault the trial court and find "plain error" for not charging duress when, based on the record provided, it was never discussed as a theory of the defense, and the Defendant affirmatively waived an instruction on self-defense which, under the facts of this case, was an analogous defense to duress. We disagree with the Court of Criminal Appeals that the jury's apparent accreditation of the defendant's accident defense on the murder and robbery charges necessarily indicates that the jury would likewise have accepted a duress defense on the

weapon charge. We therefore conclude that the Defendant has failed to carry his burden of establishing all five Adkisson factors, and thus, that consideration of the alleged error is not necessary to do substantial justice. Tenn. R. Crim. Proc. 52(b). For that reason, the claim that the trial court erred in failing to instruct on duress on the weapons charge should not be noticed as plain error and the Defendant is not entitled to relief.

Accordingly, we reverse the judgment of the Court of Criminal Appeals and reinstate the judgment of the trial court.

Jury Instructions

- **Instructions -- Lesser included Offense**

[State of Tennessee v. Roberto Vasques, Kevin Joel Hernandez](#), Luis Martin Vasquez, Hector Alonzo and Victor Hugo Garza - M2004-00166-SC-R11-CD [View](#) ([Concur/Dissent](#)) - [View](#)

Davidson County - Our grant of the applications for permission to appeal filed by the State of Tennessee and certain of the defendants was for the purpose of determining (1) whether the evidence at trial was sufficient to support the convictions for conspiracy to possess with intent to sell more than seventy pounds of marijuana within one thousand feet of a school zone; (2) **whether the waiver of lesser-included offense instructions under Tennessee Code Annotated section 40-18-110 violates constitutional principles**; and (3) whether the Court of Criminal Appeals applied the proper standard in affirming the grant of coram nobis relief to Vasquez and Garza, reversing the trial court, and denying the relief to Vasques, Hernandez, and Alonzo. We conclude that the trial evidence was sufficient to support the convictions and that the statutory waiver of the entitlement to complete jury instructions does not violate the right to a jury trial or the separation of powers principle. We also hold that Vasquez and Garza are entitled to a new trial based upon newly discovered evidence and that Vasques, Hernandez, and Alonzo are not entitled to coram nobis relief. In consequence, the judgments of the Court of Criminal Appeals are affirmed.

- **Instructions Lesser Included Offenses**

[State of Tennessee v. Joseph Wilson](#) - M2003-02151-SC-R11-CD [View](#)

Robertson County- Following a jury trial, the defendant was convicted of evading arrest, carjacking, one count of reckless endangerment, and driving on a revoked license. On appeal, the defendant argues that the evidence was insufficient to support his convictions for carjacking and reckless endangerment and that the trial court erred in not instructing the jury on robbery and theft as lesser-included offenses of carjacking. We hold that the evidence is sufficient to sustain the defendant's convictions for carjacking

and reckless endangerment. **We further hold that robbery and theft are not lesser-included offenses of carjacking** and that therefore the failure to give instructions with regard to these offenses was not plain error. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

- **Instruction –Lesser Included Offense**

[Wayford Demonbreun, Jr. vs. State of Tennessee, Ricky Bell, Warden](#) - M2005-01741-SC-R11-HC [View](#)

Davidson County - The petitioner, Wayford Demonbreun, Jr., filed this petition for habeas corpus to challenge his conviction for aggravated assault as being void because the indictment was for attempted first degree murder, not aggravated assault. The trial court dismissed his petition. The Court of Criminal Appeals reversed, granting the petitioner relief holding that the indictment was defective in that it failed to inform him of the essential elements of the offense for which he was convicted. We granted the State’s application for permission to appeal. We **reverse the Court of Criminal Appeals, holding that the petitioner, by affirmatively requesting a jury instruction on the offense of aggravated assault, effectively agreed to amend the indictment to include aggravated assault.** Therefore, the petition for writ of habeas corpus is dismissed.

Sentencing

- **Sentencing -- Consecutive Sentences**

State of Tennessee v. Anthony Allen - W2006-01080-SC-R11-CD - Consolidated opinion
State of Tennessee vs Eric Lumpkin - W2005-02805-SC-R11-CD - Consolidated opinion

[View](#) **Shelby County** - We granted permission to appeal in these consolidated cases to determine whether **Tennessee’s consecutive sentencing scheme passes constitutional muster** under the holdings of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). We also address the “physical facts rule” in Defendant Lumpkin’s case. We hold that the trial courts’ imposition of consecutive sentences in these cases did not violate the Defendants’ federal constitutional rights. We also hold that the physical facts rule does not require the reversal of Defendant Lumpkin’s convictions. Accordingly, we affirm the judgments of the Court of Criminal Appeals in both cases

- **Death Penalty --Cross-examination of defendant**

[State v. James Riels](#) - W2004-02832-SC-DDT-DD [View Appendix](#) Filed March 31, 2007 [View](#)

Shelby County - The defendant, James Riels, pled guilty to two counts of premeditated murder and two counts of felony murder for the murders of Mary Jane Cruchon and Franchion Pollack. He also entered guilty pleas to one count of especially aggravated robbery, one count of attempted especially aggravated robbery, and one count of aggravated burglary. Following a capital sentencing hearing, the jury found three aggravating circumstances in each murder: (1) the defendant was previously convicted of one or more felonies, the statutory elements of which involve the use of violence to the person; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was knowingly committed, solicited, directed, or aided by the defendant while the defendant had a substantial role in committing or attempting to commit a robbery. Tenn. Code Ann. § 39-13-204(i)(2), (5), (7) (2003). The jury found one additional aggravating circumstance with respect to Franchion Pollack: the victim of the murder was seventy years of age, or older. Tenn. Code Ann. § 39-13-204(i)(14) (2003). The jury also found that these aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Accordingly, the jury imposed a sentence of death for each of the murder convictions. In a separate sentencing hearing, the trial court imposed an effective thirty-five year sentence for the remaining noncapital convictions, to be served concurrently with the death sentences. The defendant appealed the sentences of death. After fully considering the issues raised by the defendant, the Court of Criminal Appeals affirmed the sentences. Upon automatic appeal pursuant to Tennessee Code Annotated section 39-13-206(a)(1) (2003), this Court entered an order specifying four issues for oral argument: (1) **whether the trial court erred in allowing the State to cross-examine the defendant regarding the circumstances of the offenses and, if it did, was the error harmful**; (2) whether the sentence was invalid under any of the mandatory issues for review set out in Tennessee Code Annotated section 39-13-206(c)(1)(A)-(D) (2003); (3) whether the trial court's instruction to the jury that aggravated robbery is a felony whose statutory elements involve the use of violence to the person violated the Sixth and Fourteenth Amendments of the United States Constitution; and (4) whether the trial court erred in denying the defendant's motion to suppress. After a careful review of the record and relevant legal authority, **we hold that the trial court erred in allowing the State to cross-examine the defendant and that the error was reversible**. Therefore, we reverse the judgment of the Court of Criminal Appeals and remand the case for a new capital sentencing hearing.

- **Death Penalty –Mental Retardation**

[State of Tennessee v. Danny Strode](#) - M2005-00906-SC-R11-DD [View](#)

Marion County - In this capital case, **we consider whether the State may pursue an interlocutory appeal from a trial court’s determination that a defendant is ineligible for the death penalty due to mental retardation. Upon holding that it may, we also consider whether the trial court erred in finding the Defendant, Danny Strode, mentally retarded as set forth in Tennessee Code** Annotated section 39-13-203(a) (2003). We hold that Tennessee Code Annotated section 39-13-203(a) requires that a defendant’s mental retardation must have been manifested by eighteen years of age. Because the proof in this case preponderates against the trial court’s finding that the Defendant’s mental retardation manifested by his eighteenth birthday, we hold that the trial court erred in finding the Defendant to be mentally retarded and therefore ineligible for the death penalty. Accordingly, we affirm the judgment of the Court of Criminal Appeals. This matter is remanded to the trial court for further proceedings consistent with this opinion.

- **Sentencing –modification of probation**

[State of Tennessee vs Carri Lane](#) - W2005-01998-SC-R11-CD [View](#)

Shelby County - The defendant pled guilty to two counts of theft in excess of \$60,000 after embezzling over \$630,000 from her employer. The trial court imposed a sentence requiring a term of confinement and probation. As a condition of her probation, the trial court ordered the defendant to make monthly restitution payments of approximately \$1,500 to her former employer upon her release from confinement. After her release, the defendant petitioned the trial court to modify the conditions of her probation by reducing her monthly restitution payments to \$500 per month. The trial court denied her motion to modify, and the defendant appealed. The Court of Criminal Appeals held that the defendant could not appeal as of right the trial court’s decision to deny her motion to modify under Tennessee’s rules of appellate procedure. Nevertheless, a majority of the intermediate appellate court reviewed the defendant’s challenge as a petition for a common-law writ of certiorari and concluded that the trial court’s decision constituted a “plain and palpable abuse of discretion.” The State appealed. **Upon review, we hold that the defendant does not have an appeal as of right to challenge the trial court’s denial of her motion to modify. Furthermore, we conclude that the intermediate appellate court erred in granting the defendant a common-law writ of certiorari and in finding that the trial court’s decision was erroneous. Accordingly, we reverse the Court of Criminal Appeals and remand with instructions that the trial court’s order be reinstated.**

- **Sentencing ---Probation**

State of Tennessee vs. Stacey Carter (State Appeal) - M2005-02784-SC-R11-CD

[View](#)

Robertson County - We granted the Defendant's application for permission to appeal in order to address how the 2005 revisions to the Criminal Sentencing Reform Act of 1989 impact the method of imposing a sentence. The Defendant was convicted by a jury of vehicular homicide and driving on a suspended license. The trial court sentenced the Defendant to serve ten years for the homicide and eleven months twenty-nine days for the driving offense, to be served concurrently. The trial court suspended both sentences. The State appealed, and the Court of Criminal Appeals reversed the trial court's judgment and modified the Defendant's homicide sentence to fifteen years to serve. **We hold that the trial court committed no reversible error in sentencing the Defendant to ten years on the homicide offense, but did commit reversible error in placing the Defendant on probation.**

We also hold that the Defendant's conduct in causing his nephew's death was sufficiently reprehensible and offensive, and the nature of the offense is such, as to require incarceration to avoid depreciating the seriousness of the offense. See *id.* at (1)(B); *State v. Trotter*, 201 S.W.3d 651, 654(Tenn. 2006). For no legitimate reason, the Defendant refused to yield to a patrol car and instead initiated a high-speed chase. With the Defendant was his severely intoxicated fifteen-year-old nephew. The Defendant lost control of his car and landed upside down in a river while trying to avoid apprehension. The Defendant managed to escape the car and, rather than assist his nephew to do likewise, continued trying to outrun the officers. Unable to escape the car, the Defendant's nephew drowned. The defendant's profound disregard for the safety of others while attempting to avoid apprehension is deeply disturbing to this Court. Moreover, while we appreciate the Defendant's (and thus the victim's) family's pleas for leniency, we are troubled by the message such leniency would send. Accordingly, we hold that the Defendant is not entitled to probation on his ten-year sentence for vehicular homicide and must serve his sentence in the Department of Correction.

We reinstate the Defendant's ten-year sentence and order that it be served in the Department of Correction.

Appeal

- Appeals.

Sentencing –Presumptive Sentencing

State of Tennessee v. Edwin Gomez & Jonathan Londono - M2002-01209-SC-R11-CD [View](#)

This matter is before us upon remand by the United States Supreme Court for reconsideration in light of that Court's decision in *Cunningham v. California*, 549 U.S. ___, 127 S. Ct. 856 (2007). In our initial disposition of this matter, *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), we concluded that the Defendants were not entitled under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny to relief as to their sentences. Upon further review following *Cunningham*, we now conclude that the trial court's enhancement of the Defendants' sentences on the basis of judicially determined facts other than the Defendants' prior convictions violated the Defendants' constitutional rights under the Sixth Amendment to the United States Constitution. In order to redress the unconstitutional enhancement of the Defendants' sentences, we vacate their sentences and remand this matter to the trial court for resentencing.

Habeas Corpus

- Habeas Corpus – Right to File

[Joseph Faulkner, aka Jerry Faulkner v. Tennessee](#) - W2004-02354-SC-R11-HC [View](#)

Shelby County - In this case, we granted permission to appeal to determine whether a prisoner serving concurrent state and federal sentences in a federal correctional institution may attack his state convictions pursuant to a petition for writ of habeas corpus filed in this state. **We hold that the petitioner, who is incarcerated in a federal correctional institution serving concurrent state and federal sentences, is not barred from challenging his state convictions by a state writ of habeas corpus.** Because the petitioner has failed to attach the requisite documentation in support of his claim that his sentences are illegal, however, we affirm the summary dismissal of the petition but do so on different grounds than either the trial court or the Court of Criminal Appeals.

- **Habeas Corpus –Right to file**

Randy L. May v. Howard W. Carlton, Warden - E2006-00308-SC-R11-HC [View](#)
(Separate dissenting opinion filed by Koch, J., with whom Clark, J., joins) [View](#)

Johnson County - Incident to a conviction for first degree murder, the petitioner was declared infamous, a status which involves the loss of rights of citizenship, including the right to vote. At the time of the offense, homicide was not listed as an infamous crime under the statute. We granted permission to appeal to determine whether the judgment could be corrected through the writ of habeas corpus. **Because the illegal disenfranchisement of the petitioner qualifies as a “restraint on liberty,” a threshold requirement under our statute, we grant limited habeas corpus relief but uphold the underlying conviction and the term of incarceration.** The opinion of the Court of Criminal Appeals is reversed, and the cause is remanded to the trial court for modification of the judgment.

- **Habeas Corpus – Sentence Correction**

Michael Dwayne Edwards v. State of Tennessee, Wayne Brandon, Warden - M2006-01043-SC-R11-HC [View](#)

Separate, Dissenting Opinion - [View](#)

Hickman County - We granted the State’s application for permission to appeal to consider whether the Court of Criminal Appeals erred in remanding this habeas corpus case to the trial court for a hearing on Michael Dwayne Edward’s claim that his sentence is illegal. After careful consideration we conclude that, even assuming the trial court erroneously classified Edwards as a persistent offender for sentencing, this non-jurisdictional error renders the judgment voidable, not void, and does not entitle Edwards to habeas corpus relief. Accordingly, we reverse the judgment of the Court of Criminal Appeals and reinstate the judgment of the trial court dismissing the habeas corpus petition.

END