

Tennessee Attorneys Memo

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A weekly summary of all new Tennessee law developments

A look at criminal cases on agenda of state's highest court

The Supreme Court has agreed to hear or has heard argument in cases involving whether to adopt the good faith exception to the exclusionary rule, whether to modify Tennessee's *ex post facto* analysis, whether a driver can be stopped for drifting out of a lane, and the effect, if any, of the "unlicensed physical intrusion" definition of a search.

Employing firearm during offense. The Supreme Court granted the state's application for permission to appeal in a case in which the Court of Criminal Appeals ruled that an indictment for employing a firearm during the commission of a dangerous felony was fatally flawed for failing to name the predicate felony. *State v. Duncan*, 39 TAM 49-27 (Tenn.Cr.App. 2014), *appeal granted 2/13/15*, oral argument 11/4/15.

In a similar case, the Supreme Court heard a case in which the indictment charged the defendant with employment of a firearm during the commission of a dangerous felony. The Court of Criminal Appeals held that the defendant was properly charged when there was only one dangerous felony that could serve as the underlying predicate felony, i.e., carjacking, and the defendant need only look back to the carjacking count of the indictment to have notice of the predicate felony relied on for the firearm charge.

Another issue in the case involves the trial court's failure to instruct the jury on possession of a firearm during the commission of a dangerous felony as a lesser included offense of employment of a firearm during the commission of a dangerous felony. The Court of Criminal Appeals ruled that the trial court's action did not constitute plain error when, at the time of the defendant's trial, possession of a firearm during the commission of a dangerous felony had not been recognized as a lesser included offense of employment of a firearm during the commission of a dangerous felony. It was only while the defendant's appeal was pending that the Tennessee Supreme Court made that enunciation. *State v. Martin*, 40 TAM 22-20 (Tenn.Cr.App. 2015), *appeal granted 5/15/15*, oral argument 11/4/15.

Exploitation of minor. The Supreme Court will hear a case in which the defendant was convicted of nine counts of especially aggravated sexual exploitation of a minor. The defendant secretly recorded his daughter in her bathroom and his daughter and her friend in his daughter's bedroom. All of the videos depicted the victims either fully or partially nude. The positions of the camera indicated that the defendant selected locations to film to best capture the victims' nudity.

The Court of Criminal Appeals ruled that the trial judge properly instructed the jury that visual depiction must be

intended or designed to elicit a sexual response in an average viewer rather than the defendant. The appeals court ruled that the trial judge did not err in refusing to instruct the jury that photography of an undressed minor alone was insufficient to convict the defendant of especially aggravated sexual exploitation of a minor when the definitions of "sexual activity" and "lascivious" were sufficient to instruct the jury that more than mere nudity was required to convict the defendant of the charged offense. *State v.*

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Highlights

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- Supreme Court says election of offenses doctrine does not require prosecution to identify single incident in cases where victim of child sexual abuse testified to repeated incidents of sexual contact occurring over substantial period of time but is unable to furnish specific details, dates, or distinguishing characteristics as to individual incidents of sexual battery, page 5.
- Court of Appeals affirms trial court's allocation of 60% of fault to Fire Rescue employee who was responding to emergency call in truck equipped with siren and emergency lights and was struck by vehicle driven by plaintiff, who did not see or hear truck and entered intersection on green light, page 7.
- Court of Appeals says chancery court does not have subject matter jurisdiction to entertain declaratory judgment action or action for injunctive relief regarding validity of local rules of criminal court, page 10.
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- Sixth Circuit, in affirming summary judgment in legal malpractice case based on statute of limitation, rules inconvenience, time, and expense that plaintiff incurred by retaining new counsel constituted "actual injury" under discovery rule, page 24.
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Virginia Mayo, Editor • Jean Simpkins, Associate Editor • Joe Lackey, III & Rachel Mayo, Assistant Editors

Whited, 40 TAM 25-22 (Tenn.Cr.App. 2015), *appeal granted* 9/22/15, oral argument 1/27/16.

Rape of child. The Supreme Court will decide whether the Court of Criminal Appeals erred in ruling that aggravated sexual battery is not a lesser included offense of rape of a child. *State v. Howard*, 40 TAM 45-16 (Tenn.Cr.App. 2015), *appeal granted* 12/11/15, oral argument 4/22/16.

Drug offenses. The Supreme Court will hear a case in which the defendant challenged the sufficiency of the evidence to support his conviction for facilitation of possession of .5 gram or more of cocaine with intent to deliver within 1,000 feet of a drug-free school zone. An officer executed a search warrant at a home, and the defendant's driver's license and clothes were found in a bedroom. Two bags of cocaine were found by officers in a bag close to where the defendant had been sitting, and the defendant acknowledged that one of the bags was his. The bags also contained the defendant's student identification card, two handguns, digital scales, and gloves. The defendant had on his person a small amount of cocaine and \$200 in cash. *State v. Gibson*, 40 TAM 39-21 (Tenn.Cr.App. 2015), *appeal granted* 11/24/15.

Exclusionary rule. The Supreme Court will decide whether it should adopt a good faith exception to the exclusionary rule pursuant to *United States v. Leon*, 468 US 897 (1984), and, if so, whether the good faith exception would preclude application of the exclusionary rule in the case under consideration. A defendant was at the hospital being treated for her injuries in a car accident when a blood sample was taken for law enforcement purposes. The Court of Criminal Appeals ruled that the warrantless blood draw was proper and that the evidence preponderated against the trial court's conclusion that a police officer lacked probable cause to believe that the defendant had consumed alcohol. *State v. Reynolds*, 40 TAM 2-22 (Tenn.Cr.App. 2014), *appeal granted* 3/16/15, oral argument 9/30/15.

The Supreme Court will decide (1) whether the Court of Criminal Appeals incorrectly held in *State v. Hayes*, 38 TAM 41-23 (Tenn.Cr.App. 2013), that the retroactive application of the Exclusionary Rule Reform Act, TCA 40-6-108, would violate constitutional protections against *ex post facto* laws, and (2) whether, in light of *Collins v. Youngblood*, 497 US 37 (1990), the court should modify Tennessee's *ex post facto* analysis adopted in *Miller v. State*, 584 SW2d 758 (Tenn. 1979). *State v. Pruitt*, 40 TAM 46-16 (Tenn.Cr.App. 2015), *appeal granted* 1/19/16.

Stop. The Supreme Court heard two cases in which vehicles were stopped based on the manner in which they were being driven. In one case, the Court of Criminal Appeals wrote that in both "probable cause" for arrest (or citation) cases and "reasonable suspicion for investigatory stop" cases involving Class C misdemeanor traffic offenses, it is not required that what the officer observes be enough evidence to support beyond a reasonable doubt that a driver has committed a Class C misdemeanor offense. According to the appeals court, for "probable cause" or "reasonable suspicion" analysis of a stop based upon a possible violation of TCA 55-8-123(1) — that a driver must maintain a vehicle entirely within a single lane "as nearly as practicable" — the conclusion in *State v. Martin*, 25 TAM 41-39 (Tenn.Cr.App. 2000), that "momentary drift out of a lane [does not constitute] driving a vehicle outside of a single lane," is misplaced and should not be followed. *State v. Smith*, 40 TAM 10-26 (Tenn.Cr.App. 2015), *appeal granted* 5/14/15, oral argument 9/30/15.

In the second case, the Court of Criminal Appeals ruled that the defendant's crossing of double yellow lines on a single occasion is sufficient to provide "probable cause" to initiate a traffic stop under either TCA 55-8-121 or 55-8-123. *State v. Davis*, 40 TAM 6-22 (Tenn.Cr.App. 2014), *appeal granted* 5/14/15, oral argument 9/9/15.

The Supreme Court has also agreed to hear the issue of whether the court should revisit its holding in *State v. Moats*, 403 SW3d 170 (Tenn. 2013), and prior Tennessee decisions that limited the community caretaking doctrine to third-tier consensual police-citizen encounters. In the case before the court, the Court of Criminal Appeals ruled that a trial court properly denied a defendant's motion to suppress given the fact an officer was exercising his role as community caretaker when he activated his emergency lights and stopped the defendant's vehicle. The intermediate appellate court stated that activation of emergency lights by an officer was an exercise of the community caretaking function and did not constitute a seizure. *State v. McCormick*, 40 TAM 20-25 (Tenn.Cr.App. 2015), *appeal granted* 9/25/15, oral argument 2/10/16.

Search & seizure. The Supreme Court will consider the affect, if any, of the "unlicensed physical intrusion" definition of a search as articulated in *Florida v. Jardines*, 133 SCt 1409 (2013), and if officers' entry into the curtilage of a defendant's home constituted a search and whether it was supported by probable cause and existence of exigent circumstances. In the case before the court, the Court of Criminal Appeals held that a "no trespassing" sign does not, standing alone, invalidate the "knock and talk" procedure by revoking the implied consent/invitation for officers to approach a defendant's front door. *State v. Christensen*, 40 TAM 33-20 (Tenn.Cr.App. 2015), *appeal granted* 9/22/15.

Confession. The Supreme Court will hear a case in which a defendant sought to suppress his audio-recorded conversation with a fellow jail inmate. The Court of Criminal Appeals ruled that the fellow inmate (Phillips) was not acting as a government agent. Although Phillips was using a recording device at the direction of the police, the detective gave the recording device to Phillips in order for Phillips to record a specific individual, who was not the defendant, with possible information about a cold case, and the detective had never even heard of the defendant when he gave the device to Phillips. *State v. Williams*, 40 TAM 39-16 (Tenn.Cr.App. 2015), *appeal granted* 1/15/16.

Access to counsel. The Supreme Court will hear a case in which the Court of Criminal Appeals ruled that a trial court did not abuse its discretion in requiring a defendant to sit behind his attorney during trial. The defendant argued that the seating arrangement "impinge[d]" on his "ability to communicate with the attorney" because he had to "tap on" his attorney's shoulder to get his attention before speaking to him. *State v. Smith*, 39 TAM 49-21 (Tenn.Cr.App. 2014), *appeal granted* 12/18/14, oral argument 11/5/15.

Death penalty. The Supreme Court heard a case in which a petitioner, who was sentenced to death, filed a petition for a writ of error coram nobis arguing that because he is intellectually disabled, he is ineligible for the death penalty. The Court of Criminal Appeals ruled that the petition was barred by the one-year statute of limitation for coram nobis petitions. The Supreme Court will consider (1) what is the appropriate remedy for an intellectual disability claim under these circumstances if coram nobis relief is not available, and (2) the relevance, if any, of the

holding in *Van Tran v. Colson*, 764 F3d 594 (6th Cir. 2014), regarding retroactive application of the Tennessee Supreme Court's decision in *Coleman v. State*, 341 SW3d 221 (Tenn. 2011). *Payne v. State*, 40 TAM 1-39 (Tenn.Cr.App. 2014), *appeal granted 2/13/15*, oral argument 9/30/15.

Pretrial diversion. The Supreme Court will hear two pretrial diversion cases. In one case, a former teacher's assistant, was charged with assault after engaging in an altercation with a student at the school where he was employed. The Court of Criminal Appeals ruled that the trial court did not properly review the district attorney's decision to deny the defendant's request for pretrial diversion. The appeals court wrote that the record did not contain substantial evidence supporting the district attorney's denial of diversion on grounds of circumstances of the offense, amenability to correction, "ends of justice," or deterrent effect on other criminal activity, i.e., that granting of pretrial diversion "could" send educators a message that the defendant's behavior was acceptable.

The appeals court said that even if the defendant was acting aggressively toward the victim, such behavior constitutes a circumstance of the offense, and such fact is not of "such overwhelming significance that [it necessarily] outweigh[s] all other factors." *State v. Hamilton*, 40 TAM 33-24 (Tenn.Cr.App. 2015), *appeal granted 11/24/15*, oral argument 4/22/16.

In the other case, the defendant was charged with two counts of statutory rape and two counts of contributing to the delinquency of a minor. The Court of Criminal Appeals ruled that the prosecutor abused his discretion in concluding that the defendant's amenability to correction weighed against granting pretrial diversion because the defendant had not demonstrated sufficient remorse for her actions.

The appeals court found that the record did not contain substantial evidence to support the conclusion that the ends of justice and best interest of the defendant and the public favored denying pretrial diversion, and the need for deterrence was not so exceptional as to outweigh all other factors to be considered. *State v. Stephens*, 40 TAM 33-25 (Tenn.Cr.App. 2015), *appeal granted 11/24/15*, oral argument 4/22/16.

Effective counsel. The Supreme Court heard a case in which the Court of Criminal Appeals ruled that trial counsel was ineffective in failing to file a written motion for instructions on the lesser included offense of especially aggravated kidnapping. The appeals court found the trial court's error in failing to charge the jury on aggravated kidnapping as a lesser included offense of especially aggravated kidnapping was not harmless when although both the petitioner and his co-defendant had weapons, the evidence and very nuanced differences in the elements of especially aggravated kidnapping and aggravated kidnapping presented reasonable doubt as to whether the failure to charge the lesser included offense affected the outcome of the petitioner's trial. *Moore v. State*, 39 TAM 28-36 (Tenn.Cr.App. 2014), *appeal granted 4/13/15*, oral argument 11/4/15.

Coram nobis. The Supreme Court will decide whether it should reconsider its 2012 opinion in *Wlodarz v. State*, 361 SW3d 490 (Tenn. 2012), which held that an inmate whose conviction is based on a guilty plea may challenge his or her conviction through a petition for a writ of error coram nobis based on newly discovered evidence. *Frazier v. State*, 40 TAM 43-35 (Tenn.Cr.App. 2015), *appeal granted 10/15/15*, oral argument 2/10/16.

Supreme Court

▼ **Parents are constitutionally entitled to fundamentally fair procedures in parental termination proceedings, but this constitutional mandate does not allow parents to collaterally attack orders terminating parental rights based on ineffective assistance of counsel; appellate courts must review trial court's findings regarding all grounds for termination and whether termination is in child's best interests, even if parent fails to challenge these findings on appeal**

FAMILY LAW: Parental Rights. CIVIL PROCEDURE: Effective Counsel. APPEAL & ERROR: Scope of Review. Mother gave birth to six children between 1996 and 2004. Carrington, sixth child, was born in 11/04. When Carrington was nearly 13 months old, juvenile court ordered all six children removed from their parents' custody through emergency removal process and placed them in temporary custody of their maternal grandmother and aunt. In 4/06, juvenile court placed children on 90-day home visit with father. Mother, by then divorced from father, received visitation with four oldest children every week-end and visitation on alternate weekends with two youngest children. About 14 months later, Department of Children's Services (DCS) filed dependency and neglect petition against mother. DCS sought to terminate mother's visitation privileges and to continue custody of children with father. Mother's visitation with all six children was later terminated, and children were also removed from father's home. Juvenile court concluded that children were dependent and neglected and ordered them to remain in DCS custody. By time DCS filed petition to terminate parental rights in 10/13, mother had been without physical custody of children since 12/05, almost eight years, and without visitation privileges since 7/07. In its petition, DCS alleged three grounds for terminating mother's parental rights — substantial non-compliance with requirements of permanency plan, persistence of conditions, and mental incompetence. Juvenile court granted DCS's petition, finding that mother had failed to substantially comply with requirements of permanency plan, that Carrington had been removed from mother's home for more than six months and that conditions that led to child's removal still persisted, that mother was incompetent to adequately provide for further care and supervision of Carrington, and that termination of mother's parental rights was in Carrington's best interest. Court of Appeals (39 TAM 45-8) affirmed trial court's judgment but declined to review any of mother's challenges to trial court's ground for termination. Intermediate appellate court reasoned that, because mother had not appealed trial court's finding that she lacked mental competency to parent Carrington, trial court's finding on that ground was final and furnished sufficient basis for appellate court to affirm trial court's decision terminating mother's parental rights. Court of Appeals subsequently granted appointed counsel's motion to withdraw as counsel for mother. Mother, proceeding *pro se*, filed application for permission to appeal in this court, arguing that her appointed counsel's representation was inadequate and deprived her of right to counsel statutorily guaranteed to indigent parents in termination proceedings. **Affirmed.** (1) Court of Appeals declined to consider mother's challenges to two of three grounds on which trial court based its decision to terminate her parental rights. Court of Appeals reasoned that because mother failed to challenge third ground for

termination, i.e., mental incompetency, trial court's finding on that ground became final and was sufficient to support trial court's decision terminating mother's parental rights. Court of Appeals has disagreed on scope of review in parental termination appeals. Some panels have declined to address any of grounds for termination when parent appeals fewer than all of grounds relied on by trial court for termination or only appeals trial court's decision as to child's best interests. At least one panel has held that when parent appeals only trial court's decision on child's best interests, Court of Appeals has duty to examine record to determine whether evidence is sufficient to prove by clear and convincing evidence at least one of grounds for termination. Other panels have exercised discretion TRAP 13 provides to review trial court's determination of child's best interests even though parent did not raise that issue on appeal, citing gravity of consequences of terminating parental rights. Although this issue has not previously been squarely presented to this court, we commented upon it in *In re Angela E.*, 303 SW3d 240 (Tenn. 2010), stating that Court of Appeals should review trial court's findings of fact and conclusions of law as to each ground for termination, even though statute only requires finding of one ground to justify terminating parental rights. Therefore, even though this issue was not raised in Court of Appeals, in appeal from order terminating parental rights, Court of Appeals must review trial court's findings as to each ground for termination and as to whether termination is in child's best interest, regardless of whether parent challenges these findings on appeal. (2) Mother argued that her right to appointed counsel in case included right to challenge trial court's order based on ineffective assistance of trial and appellate counsel. In *Lassiter v. Department of Social Services of Durham County*, 452 US 18 (1981), U.S. Supreme Court, in 5-4 decision, identified three-factor test for determining, on case-by-case basis, whether appointment of counsel is constitutionally required. Factors to be considered are parent's interest, state's interest in child's welfare and need for economic and efficient procedure, and risk of erroneous decision if counsel is not appointed. *Lassiter* held that Due Process Clause of Fourteenth Amendment does not require states to appoint counsel for parents in every parental termination proceeding. DCS argued that statutory right to counsel does not give rise to separate right of effective assistance of counsel and right to mount collateral attacks on judgments terminating parental rights in every case. But DCS conceded that if parent is constitutionally entitled to appointment of counsel based on *Lassiter* balancing test, parent is also entitled to effective assistance of counsel. This court has declined to recognize right to effective assistance of counsel in absence of constitutional right to appointed counsel. But this court has not previously decided whether parents have right to attack judgment terminating parental rights based on ineffective assistance of counsel. Moreover, no Tennessee statute provides procedure, comparable to post-conviction procedures, by which parents may attack judgments terminating parental rights based on ineffective assistance of counsel. Rather, Tennessee statute of repose provides that, if order terminating parental rights is affirmed on appeal, order is binding and may not "for any reason," be "overturned by any court or collaterally attacked by any person after one (1) year from the date of the entry of the final order of termination." While due process requires states to provide parents with fundamentally fair procedures, it does not require state to ignore other interests at stake in parental termination proceedings. By refusing to import criminal law post-conviction type remedies into termination of parental rights cases, this court is not disregarding well-established constitutional principle precluding ter-

mination of parental rights except upon fundamentally fair procedures. But this constitutional mandate may be achieved without compromising interests of children in permanency and safety. Tennessee court rules, statutes, and decisional law are already replete with procedures designed to ensure that parents receive fundamentally fair parental termination proceedings. Accuracy and fairness of parental termination proceedings are enhanced by elevated standard of proof and by judicial involvement that is more intensive than in other cases. Before parental rights may be terminated, state must prove at least one statutory ground for termination by clear and convincing evidence and prove that termination of parental rights is in child's best interest. In addition, trial courts must make specific written findings on each and every ground alleged for termination and findings on factors relevant to child's best interests. Appellate review of parental termination cases is expedited, and indigent parents are entitled to record at state expense complete enough to allow fair appellate consideration of parents' claims. Given these existing procedural safeguards, this court declines to hold that securing constitutional right of parents to fundamentally fair procedures requires adoption of additional procedure, subsequent to or separate from appeal as of right, by which parents may attack judgment terminating parental rights based upon ineffective assistance of appointed counsel. With regard to mother's representation in present case, mother's counsel actively represented her at termination proceeding. Mother's appointed counsel was only attorney to offer opening statement and asked questions on cross-examination designed to show that mother had substantially complied with permanency plan, that mother had corrected at least some of conditions that led to Carrington's removal, and that mother had participated in mental health treatment without incident for some period of time. Hence, appointed counsel's representation did not deprive mother of fundamentally fair parental termination proceeding. (3) Evidence was supported termination of mother's parental rights on ground of substantial non-compliance with requirements of permanency plan. Trial court found that mother had failed to comply substantially with requirements that she submit to random drug screens, take her medication as prescribed by treating professionals, and continue with mental health services. DCS offered proof to show that mother had failed to submit to random drug tests, that she had not taken medications as prescribed and had been hospitalized in 2011 and 2012 to receive treatment for opioid abuse, polysubstance dependence, and Xanax abuse, and that her mental health services had been terminated in 1/13 because she refused to sign behavior contract requiring her to counsel with particular staff member who would prescribe appropriate medications and would not prescribe medication mother requested. (4) Evidence supported termination of mother's parental rights on ground of persistence of conditions. Beasley, senior psychological examiner and licensed professional counselor, testified that mother's behavioral problems had not improved and were unlikely to improve sufficiently in near future to make it safe for Carrington to return to her care. Another mental health professional, Carrington's counselor, testified that placing Carrington in care of person with same mental health and behavioral disorders as mother would be "exact opposite of what the child needs." Trial court noted that mother had no "relationship of any kind with Carrington." (5) Evidence supported termination of mother's parental rights on ground of mental incompetence. DCS offered proof to show that mother's mental condition had been impaired for more than six years and was not likely to improve in short time, even with continued therapy and medication. Mother had been hospitalized on

number of occasions to obtain treatment for mental health issues and substance abuse issues. Mental health experts testified that mother's impaired mental condition would prevent her from assuming care and responsibility for Carrington in near future. (6) Evidence supported trial court's determination that termination of mother's parental rights was in Carrington's best interest. Mother has suffered from mental illness and behavioral disorders for many years, and these conditions have not improved, despite treatment, medication, and services provided by DCS. Mother has no meaningful relationship with Carrington and has had no contact with him since 2012. Returning Carrington to mother's care would have detrimental effect on his emotional, psychological, and medical condition. **Partial dissent:** Majority's decision in this case — that indigent parent has right to assistance of counsel, but not right to "effective" assistance of counsel, in parental termination proceeding — is empty gesture. There are numerous procedural safeguards in place to protect parent's right to continued care and custody of his or her child, including requirement that state prove by clear and convincing evidence at least one statutory ground for termination and that termination is in child's best interest. Majority has properly added another procedural safeguard by requiring Court of Appeals to review trial court's findings on all grounds for termination and whether termination is in child's best interest, even if parent does not challenge these findings on appeal. But these safeguards, as appropriate and well-meaning as they are, cannot protect parent's rights when his or her lawyer is ill-prepared, fails to make adequate pretrial investigation, fails to call necessary witness to testify, fails to advance appropriate legal arguments, or fails to otherwise adequately represent him or her. How can fairness of termination proceeding be ensured without requiring parent's lawyer to be effective? Most states require appointed counsel in termination proceedings to render effective assistance. Tennessee should join majority of states and recognize that parent has right to effective assistance of counsel in termination proceeding. By declining to recognize right to effective representation, majority distinguishes between constitutional and statutory right to counsel, noting that unless there is right to counsel under federal constitution, there is no constitutional right to effective assistance. This is distinction without difference in this case because, under *Lassiter*, mother in this case has constitutional right to counsel. Majority likens statutory right to counsel in parental termination proceedings to statutory right to counsel in post-conviction cases, which does not include right to effective assistance. But parent in termination proceeding is more akin to defendant in trial stage of criminal proceeding. No decision has been made by factfinder, and it is parent's first opportunity to defend herself in court against charges brought by state, which could forever sever relationship with her child. While majority is properly concerned that opportunity for repeated re-examination of parental termination judgment through ineffectiveness claims can inflict immeasurable damage upon children and that achieving finality is imperative, interest in finality should not trump parent's interest in maintaining parental bond and in correctness of decision to terminate parental rights. Issue should be referred to Tennessee Advisory Commission on Rules of Practice and Procedure to formulate process for parent to assert claim for ineffective assistance of counsel. Commission should study post-trial motion procedure adopted by Florida Supreme Court in *J.B. v. Florida Department of Children and Families*, 170 So3d (Fla. 2015), and procedures in other states that allow motions to be filed in appellate court for review. In present case, while mother was not deprived of fundamentally fair parental termination proceeding, she should

have had opportunity to present proof to support her claims of ineffectiveness. (*In re Carrington H.*, 41 TAM 5-1, 1/29/16, Nashville, Clark, partial dissent by Lee, 3-2, 44 pages.)

▼ **When prosecution in child sexual abuse case is based on such non-specific or "generic" evidence, requiring prosecution to elect single specific incident is not possible; to prevent infringement upon defendant's right to unanimous verdict, trial court must give modified unanimity instruction which informs jury that it must unanimously agree that defendant committed all acts described by victim in order to convict defendant; although absence of such modified unanimity instruction amounts to non-structural constitutional error, in case in which defendant was convicted of 37 counts of sexual battery by authority figure, by convicting defendant, jury expressed its unanimous conclusion that victims were credible and that defendant committed all acts described by victims, and hence, erroneous lack of modified unanimity instruction did not affect verdict obtained**

CRIMINAL LAW: Sexual Battery. CRIMINAL PROCEDURE: Election of Offenses. Defendant was indicted on 37 counts of sexual battery by authority figure and one count of incest in connection with sexual battery offenses committed against his two daughters (E.K.Q. and E.Q.) and incest offense committed against his adopted daughter (J.S.), whom defendant married in 1995. J.S. is mother of E.K.Q. and E.Q. At initial trial, jury convicted defendant of all charges. Defendant appealed, and state conceded that it had erroneously failed to make election of offenses for sexual battery by authority figure charges and that this failure constituted reversible error. Court of Criminal Appeals (37 TAM 19-21) affirmed defendant's conviction for incest but reversed his convictions of sexual battery by authority figure and remanded for new trial of those charges. Defendant was retried on 37 counts of sexual battery by authority figure, and state called three witnesses, E.K.Q., E.Q., and their mother, J.S. Defendant elected not to testify and did not present additional proof. State sought to cure its failure to elect in previous trial by electing specific type of abuse, limited to one incident per month — defendant's fondling of each victim's buttocks and vagina. Jury subsequently convicted defendant of 37 counts of sexual battery by authority figure, and trial court sentenced defendant to effective 35-year sentence at 30%. Trial court denied defendant's motion for new trial. Court of Criminal Appeals (39 TAM 49-24) once again held that state had failed to make proper election of offenses, holding that victim provided only general testimony regarding defendant's touching their buttocks and vaginal area during specified time frames in indictment and failed to provide particularity in order for jury to have rendered discrete verdicts for each of 37 counts. Accordingly, intermediate appellate court reversed convictions and remanded for new trial. **Judgment of Court of Criminal Appeals vacated; judgment of trial court reinstated.** Despite its importance to ensuring unanimity, applying election doctrine in child sexual abuse cases presents practical difficulties. As result, this court has not insisted upon single means of making election and has instead allowed state some latitude in prosecution of criminal acts committed against young children who are frequently unable to identify specific date on which particular offense was committed. For example, state may elect particular offense by "narrow[ing] the multiple incidents by asking the victim to relate any of the incidents to a specific month." This court has also affirmed election that identified offense for which prosecution sought conviction as assault that occurred night before victim's first menstrual period, even though that night "could have occurred on any date during that year." All of this

court's prior decisions addressing election doctrine have involved cases where child victims provided specific testimony about charged criminal acts and identified in some manner when those acts were perpetrated. Thus, those decisions have mandated prosecution to elect specific act or incident for which it seeks conviction. In addition, jury receives unanimity instruction, which supplements election requirement but does not substitute for it. But this court has not previously addressed how to deal with case involving testimony concerning commission of multiple instances of similar type of abuse where witnesses cannot or do not specifically differentiate events, and there are fewer counts in indictment than there is testimony about abuse. In present case, victims described with clarity type of sexual battery perpetrated on them but failed to identify specifically when each alleged act occurred. Instead, victims described pattern of abuse that occurred over extended period of time. One of victims testified that act of sexual battery occurred once per week. Both victims testified that abuse occurred regularly and happened at least once during time periods charged in each count of indictment. Courts in other jurisdictions have termed this type of testimony "generic evidence." To address this unusual situation, other states have adopted "either/or" approach to election. Under this approach, prosecution may choose either to make election at close of its proof-in-chief or to have jury instructed that it cannot render guilty verdict unless it unanimously agrees upon specific act or acts that constitute crime. California applies "either/or" approach to election doctrine, but as California Supreme Court recognized in *People v. Jones*, 792 P2d 643 (Cal. 1990), neither election nor unanimity instruction is very helpful when victim is unable to distinguish between series of acts, any one of which could constitute charged offense. Nevertheless, *Jones* court determined that protecting accused's rights to proof of guilty beyond reasonable doubt and jury unanimity may be achieved in generic evidence cases, but to do so, victim's generic testimony must (1) describe "kind of act or acts committed" with sufficient specificity, both to ensure that unlawful conduct indeed has occurred and to differentiate between various types of proscribed conduct, (2) identify number of acts committed with sufficient certainty to support each of counts alleged in information or indictment, for example, "twice a month" or "every time we went camping," and (3) designate general time period in which these acts occurred, for example, "the summer before my fourth grade" or "during each Sunday morning after he came to live with us" to ensure acts were committed within applicable limitation period. Although additional details regarding time, place, or circumstance of various assaults may assist in assessing credibility or substantiality of victim's testimony, such details are not essential to sustain conviction. To ensure unanimous jury verdicts in generic evidence cases, *Jones* court prescribed "modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." *Jones* court emphasized that credibility is usually "true issue" in generic evidence cases. Alabama was state with election law most similar to Tennessee when it adopted *Jones* approach for generic evidence. Like Alabama Court of Criminal Appeals, this court adopts *Jones* approach but limits it to cases involving only generic evidence. When prosecution presents non-generic evidence of distinguishable criminal acts, prosecution must elect specific act for which it seeks conviction in manner that identifies prosecuted offense for jury. In such instances, election is necessary to ensure unanimous verdict and avoid "grab-bag" theory of justice, which this court has explicitly rejected. But in generic evi-

dence cases prosecution need not elect specific criminal act or incident as basis of conviction for each charge. Instead, election doctrine may be satisfied in generic evidence cases by trial court providing modified unanimity instruction that allows conviction only if jury unanimously agrees defendant committed all acts described by victim. But, consistent with prior decisions involving election of offenses doctrine, trial court must determine at conclusion of state's case-in-chief whether proof is sufficiently specific as to apply strict election requirement or whether election requirement may be satisfied by giving modified unanimity instruction. Tennessee Pattern Jury Instruction Committee is invited to promulgate pattern jury instruction for use in child sexual abuse cases involving generic evidence. Until Committee develops appropriate instruction, trial courts should use following instruction in cases involving only generic evidence: "The State has offered proof in its case-in-chief of more than one criminal act allegedly committed [by the defendant] [by one for whom the State alleges the defendant is criminally responsible]. To ensure a unanimous jury verdict [on the charge] [on each count of the indictment], the State must prove beyond a reasonable doubt the commission of all of the acts described by the alleged victim [as occurring within the time period charged] [as occurring within the time period charged in each Count of the indictment]. In order to find the defendant guilty, you must unanimously agree that the State has proven beyond a reasonable doubt the commission of all of the acts described by the alleged victim [as occurring within the time period charged] [as occurring within the time period charged in each Count of the indictment]." In present case, erroneous lack of modified unanimity instruction did not contribute to verdict obtained, and jury's verdict would have been same had modified unanimity instruction been given. Defendant was convicted of 37 counts of sexual battery by authority figure. Both E.K.Q. and E.Q. testified that defendant made unlawful sexual contact with each of them on regular basis over extended period of time. Both victims described type of sexual contact, testifying that defendant fondled their buttocks and vaginal areas. Both victims testified that sexual contact occurred during time periods charged in indictment and that sexual contact occurred at least once during each of months charged in indictment, with one victim testifying that it occurred weekly. Each victim testified that she saw defendant touching other victim. J.S. also corroborated their testimony, affirming that she had witnessed defendant touching victims. Both victims testified that defendant would have beaten them had they disobeyed his instructions. Defendant's guilt or innocence hinged on jury's assessment of credibility of victims' testimony regarding defendant's touching them. Other elements of sexual battery by authority figure were established by undisputed proof. Although jury did not receive modified unanimity instruction, state elected type of sexual contact — defendant's act of fondling victims' buttocks and vaginal areas over their clothing — on which it was relying and sought convictions for one offense per month, per victim. In addition, defendant's defense was blanket denial to any sexual battery by authority figure. Although one of victims testified that sexual battery occurred once per week, there is no reasonable likelihood of juror disagreement as to particular acts. In other words, record demonstrates beyond reasonable doubt that by convicting defendant, jury expressed its unanimous conclusion that victims were credible and that defendant committed all acts described by victims. Thus, erroneous lack of modified unanimity instruction did not affect verdict obtained. (*State v. Qualls*, 41 TAM 5-2, 1/28/16, Jackson, Clark, 4-0, 23 pages.)

Workers' Comp Panel

▼ When employee suffered work-related injury to both knees in 2004, she settled claim in 2009, settlement order required employer to provide future medical treatment for knee injuries, employee fell at work and hurt both knees again on 2/6/11, she reported injury and sought medical attention from orthopedic surgeon who had treated her throughout years following first injury, doctor treated her with steroid injections and physical therapy but employee did not get same relief that she got from same treatment following first injury, doctor recommended bilateral knee replacement in 7/11, when employer refused to pay for surgery, employee filed motion in general sessions court in Warren County seeking to compel employer to cover expense under its continuing obligations in 2009 settlement, court found that need for knee replacements was causally connected to 2004 injury and treatment was covered by medical provisions of 2009 order, employee filed action seeking benefits for 2/11 fall, and employer filed action on 3/22/12 in Davidson County seeking declaration of rights of parties in relation to 2/11 fall in Warren County, trial court erred in ruling that claim for compensation was barred by doctrines of judicial and equitable estoppel; employee's position in Warren County case that her knee replacements were covered by continuing medical provisions settling 2004 case does not amount to claim that she did not sustain any injuries from 2011 accident, and hence, judicial estoppel is not bar to her claim; as there is no evidence that employer changed its position in reliance on employee's position in prior case, there is no basis for equitable estoppel claim

WORKERS' COMPENSATION: Causation. CIVIL PROCEDURE: Judicial Estoppel — Equitable Estoppel. On 3/20/04, employee, anesthesia technician for Vanderbilt University (employer) for over 20 years, suffered work-related injury to both knees. In 3/09, she settled her workers' compensation claim against employer. Settlement order required employer to provide future medical treatment for her knee injuries. On 2/6/11, employee fell at work and hurt both knees again. Employee reported injury and sought medical attention from Dr. Spindler, orthopedic surgeon, who had treated her throughout years following first injury. Spindler treated employee with steroid injections and physical therapy. Employee did not get same relief, however, that she got from same treatment following first injury. In 7/11, Spindler recommended bilateral knee replacement. When employer refused to pay for surgery, employee filed motion in General Sessions Court of Warren County seeking to compel employer to cover expense under its continuing obligations in 2009 settlement. Trial court entered order on 10/6/11 finding that need for knee replacements was causally connected to 2004 injury and treatment was covered by medical provisions of 2009 order. Employee then filed action in Warren County on 3/7/12 seeking benefits for 2/11 fall. On 3/22/12, employer filed this action in Chancery Court of Davidson County seeking declaration of rights of parties in relation to 2/11 fall. Case languished below while parties sparred in Warren County. On 1/2/13, trial court ordered parties to set case for trial or dismiss it by 4/5/13. Case finally got back on track and employer moved for summary judgment on ground that employee was judicially or equitably estopped from making

claim for benefits for 2/11 fall. Estoppel argument was based on employee's testimony and her attorney's argument in 2011 proceeding in Warren County seeking to get knee replacements covered by future medical provisions related to 2004 accident. Trial court granted motion for summary judgment and dismissed claim. **Reversed and remanded.** In granting summary judgment for employer, trial court ruled that employee was not entitled to recover benefits based on 2/11 incident under doctrine of judicial estoppel. Trial court held that employee was estopped from asserting claim for benefits attributed to 2011 fall because of her prior position that knee replacements were covered by medical benefits provision in order settling her claim. Employee's position in Warren County case — that her knee replacements were covered by continuing medical provisions settling 2004 case — does not amount to assertion that she did not sustain any injuries from 2011 incident. Judicial estoppel, therefore, is not bar to her claim. As there is no evidence that employer changed its position in reliance on her position in that case, there is no basis for equitable estoppel claim. In fact, employer has always staunchly resisted paying anything under 2009 order or for 2011 fall. It may turn out that employee's claims relating to 2011 fall will be difficult or impossible to prove, but that determination can only be made after proof is fully developed. (*Vanderbilt University v. Jones*, 41 TAM 5-3, 10/19/15, Nashville, Cantrell, 7 pages.)

Court of Appeals

▼ When Fire Rescue employee (Mundall), responding to emergency call in Ford F-250 truck equipped with siren and emergency lights, began making left turn against red light after stopping or slowing in attempt to make sure oncoming traffic lanes were clear, plaintiff, who had green light and did not hear or see emergency vehicle, drove into intersection and collided with truck, and plaintiff filed suit against Bradley County Fire Rescue and Bradley County, evidence did not preponderate against trial court's finding that Mundall was 60% at fault when Mundall admitted his duty to use "extreme caution" under circumstances, particularly since he did not have passenger to assist in working emergency warning equipment, there was evidence that Mundall did not stop before entering intersection, there was no evidence that he changed siren mode to "yelp" or "hyper-yelp" before entering intersection, which would have made his approach more audible, and Mundall admitted that when he entered plaintiff's lane of oncoming traffic, he could see no more than 10 or 15 feet; evidence did not preponderate against trial court's award of \$150,000 for pain and suffering and permanency of injuries and \$150,000 for medical expenses when plaintiff suffered injuries to her spine including compression fractures in two of her thoracic vertebrae and herniations of two cervical discs, injuries to her chest wall, and fractured clavicle that resulted in massive calcium deposit in her shoulder area, injuries caused pain that will become worse over time, she incurred pretrial medical expenses of \$45,610, and she will need two surgical procedures in future

TORTS: Automobile Accidents — Comparative Negligence. DAMAGES: Personal Injury — Pain & Suffering — Medical Expenses. On 7/18/12, accident occurred at intersection of Inman and Keith Streets in Cleveland. Keith Street has two northbound and two southbound traffic lanes, in addition to left turn lane and

right turn lane at intersection. Inman Street similarly has two eastbound and two westbound lanes and two turn lanes at traffic light. Roadways are generally straight and level around intersection and speed limit is 45 mph for both streets. Weather was clear. Mundall was driving F-250 Truck, equipped with siren and emergency lights, west on Inman Street in response to fire alarm. He testified that he activated truck's emergency lights and siren, and that they were operating as he approached intersection. Intending to make left turn onto Keith Street, Mundall moved into turn lane and check traffic to see if it was safe to make left turn against red light. He did not see Jones's oncoming Chrysler 300M heading north on Keith Street. Jones testified that she was traveling around 40 to 42 mph as she approached intersection. Plaintiff had green light. She did not see or hear emergency vehicle before collision. Both Jones and passenger Lane testified that car's windows were up, air conditioner was on, and radio was playing softly. Lane stated he did not hear siren or see emergency truck either, but that he was not really paying close attention. As emergency truck pulled forward into intersection in attempt to turn left, Jones's car collided with its front left side, resulting in injuries to Jones and Lane (plaintiffs). Plaintiffs filed suit alleging liability under Governmental Tort Liability Act against Bradley County Fire Rescue and Bradley County (Bradley County) for negligent operation of motor vehicle by county employee in scope of his employment. Following bench trial, trial court allocated 40% fault to Jones and 60% fault to Mundall. Trial court awarded Jones judgment against Bradley County for \$207,366. (Judgment of \$23,894 to Lane was not appealed.) (1) Bradley County relies on TCA 55-8-108, which provides privileges to emergency vehicle drivers under certain circumstances. Plaintiff argued that although this statute allowed Mundall to turn left against red light, he breached his duty "to drive with due regard for the safety of all persons" under circumstances and as found by trial court. Bradley County further asserts that trial court erred by declining to find that sole proximate cause of accident was Jones's breach of duty imposed by TCA 55-8-132, which provides that "[u]pon the immediate approach of an authorized emergency vehicle making use of audible and visual signals ... [t]he driver of every other vehicle shall yield the right-of-way." In applying this statute, this court has noted "the requirement of due care when entering an intersection even under authority of a green light" and observed that "[i]f plaintiff should have heard the siren or should have seen the blue lights flashing, she ... cannot evade her duty to yield to an emergency vehicle by saying that she did not hear and did not see because she did not look." Plaintiffs argue that Mundall breached standard of care by violating provisions of Bradley County Fire Rescue operations manual. Evidence did not preponderate against trial court's finding that Mundall was 60% at fault for accident. Mundall recognized and admitted his duty to use "extreme caution" under circumstances, particularly since he did not have passenger to assist in working emergency warning equipment. There was evidence from which trial court could reasonably conclude that Mundall did not stop before entering intersection. There was no evidence that he changed siren model to "yelp" or "hyper-yelp" before entering intersection, which would have made his approach more audible. Further, Mundall admitted that when he entered Jones's lane of oncoming traffic, he could see no more than 10 or 15 feet. Hill, traffic engineer and accident reconstructionist presented by defense as expert in traffic control and sight distance, stated that Jones was traveling about 40 mph, which is roughly 58 feet per second. Thus, Mundall's own testimony confirms that when he moved into Jones's lane, he could only see as far as distance that vehicle moving at lawful speed could travel in about one-quarter of second. Finally, many of trial court's findings of fact

were dependent in large part upon its credibility assessments. (2) Bradley County argues that trial court's award to Jones of \$150,000 for pain and suffering and permanency of injuries was excessive and unsupported by preponderance of evidence. It makes same argument with regard to Jones's award of \$150,000 for future medical expenses. Jones suffered injuries to her spine including compression fractures in two of her thoracic vertebrae and herniations of two cervical discs; injuries to her chest wall; and fractured clavicle that resulted in massive calcium deposit in her shoulder area. She incurred pretrial medical expenses of \$45,610 resulting from accident. Jones, who had pre-existing injuries and disabilities before accident, testified regarding her pain levels and ability to function both before and after accident. In addition, two physicians testified in-person at trial, including her treating physician, Dr. Frauwrith. Frauwrith treated Jones both before and after accident and had been seeing her for about four years. He stated that accident caused her intensified pain, permanent dysfunction, and "much more difficulty with daily life now." Frauwrith testified that "[t]hese are all permanent and they will continue to get worse. Her pain will become worse over time. These are actually structural problems." He concluded that Jones will likely need surgery and increasing amounts of pain medication in future "and it's a very poor prognosis." Trial court specifically credited testimony and opinions of plaintiff's witnesses Drs. Frauwrith and Sud, noting that "in this case it's one of the few I have ever seen, maybe the only one I have seen, where a treating doctor such as Frauwrith was doing pain management and was able to actually say what is new and what is old in the patient." Although Bradley County argues that possibility of future expenses for surgical treatment is speculative, Frauwrith stated that it was "inevitable" that Jones would need two surgical procedures: anterior discectomy and fusion of neck, and kyphoplasty of thoracic spine. He estimated cost of two surgeries to be \$120,000. Evidence did not preponderate against trial court's award of damages. (*Jones v. Bradley County*, 41 TAM 5-4, 1/15/16, ES, Susano, 15 pages.)

▼ **In case in which Department of Revenue (Department) assessed tax based on taxpayer's use of aircraft purchased out of state, taxpayer paid tax and filed complaint in chancery court seeking refund on ground that it qualified for sale for resale exemption in Tennessee Retailers' Sales Tax Act (Act) because it provided seller with certificate of resale and immediately leased aircraft to third party users, Department argued that leases did not satisfy exemption's "bona fide sale" requirement, and trial court reversed Department's assessment, because lease agreements satisfied definition of "resale" under Act, taxpayer is exempt from paying sales and use tax on its purchase of aircraft; because evidence demonstrated that leases served legitimate business purpose and were made for valuable consideration, they satisfy Act's definition of "bona fide sales"; General Assembly's addition of "bona fide sales" language to statute does not mandate application of "economic substance doctrine" to present case**

TAXATION: Sales Tax. In 1/04, Klee and Ingram founded Hometown Quotes LLC (Hometown), insurance shopping portal that provided insurance price quotes to consumers and old consumer information to insurance carriers. In 2008, Klee, who was taking private flying lessons at time, decided to purchase aircraft to make Hometown's business calls. In 4/08, Klee formed limited liability company (Niuklee) in order to purchase and hold title to aircraft and to lease it to Hometown and Klee. On 4/2/08, Niuklee purchased Cessna aircraft from company in Ohio and subsequently

entered into lease agreements with Hometown and Klee. Under terms of lease with Hometown, Niuklee agreed to lease aircraft to Hometown for business use at rate of \$80 per flight hour, and Hometown agreed to be responsible for all operating costs of aircraft. Under terms of lease with Klee, Niuklee agreed to lease aircraft to Klee for non-commercial transportation at rate of \$183 per flight hour, less cost of fuel. Department of Revenue (Department) subsequently assessed Niuklee with use tax based on Niuklee's use of aircraft purchased out of state. Niuklee paid tax and filed complaint in chancery court seeking refund on ground that it qualified for sale for resale exemption in Tennessee Retailers' Sales Tax Act (Act) because it provided seller with certificate of resale and immediately leased aircraft to third party users (Klee and Hometown Quotes LLC). Department argued that leases did not satisfy exemption's "bona fide sale" requirement. Trial court (39 TAM 37-30) reversed Department's assessment, concluding that exemption applied because leases were legitimate and not illusory and were not chiefly motivated by tax avoidance, economic substance doctrine has not been adopted in Tennessee to analyze "bona fide sale" requirement, and Department failed to present proof sufficient to pierce corporate veil of Niuklee. (1) Trial court properly determined that Niuklee's agreements to lease aircraft to Hometown Quotes and Klee were bona fide sales based on its finding that tax avoidance was not Klee's chief objective in forming Niuklee to purchase and lease aircraft. Tennessee Retailers' Sales Tax Act (Act) does not specifically define phrase "bona fide sale" as it appears in its definition of "resale." But meaning of phrase "bona fide sale" is clear and does not require construction. Term "bona fide," taken literally, means "in good faith." Moreover, term "bona fide sale" is defined as "sale made by a seller in good faith, for valuable consideration." Act defines "sale" to include lease or rental of tangible personal property. Accordingly, "bona fide sale" of tangible personal property consists of lease or rental of property in good faith and for valuable consideration. In this manner, it appears that bona fide sale requirement is not intended to direct departure from common law's approval of tax planning in commercial transactions, but to ensure that resale made pursuant to sale for resale exemption otherwise serves some legitimate business purpose and is made for valuable consideration. In present case, Klee's decision to form Niuklee to purchase and lease aircraft served legitimate business purpose other than tax avoidance. Klee's decision to limit his personal liability by forming limited liability company was perfectly logical one. While Klee admittedly considered tax consequences of forming Niuklee to purchase and lease aircraft, record supports trial court's finding that his decision to do so served legitimate business purpose other than tax avoidance. Niuklee's leasing of aircraft to Hometown and Klee was also supported by valuable consideration. Evidence presented supports trial court's finding that rates — \$80 per flight hour for Hometown and \$183 per flight hour less cost of fuel for Klee — were not pretextual, not sham, and were commercially reasonable. (2) Department argued that leases were not bona fide because Klee never intended to operate Niuklee as profitable enterprise. Department contended that because Niuklee did not have reasonable chance of profitability, its lease agreements with Hometown and Klee were not bona fide sales. Pursuant to economic substance doctrine, courts may disregard transactions that are motivated by tax avoidance and have no reasonable possibility of generating profit. No Tennessee court has applied economic substance doctrine, and Department's assertion that General Assembly's addition of bona fide sales language requires this court to apply it in present case is without merit. Sale for resale exemption's bona fide sale language clearly contemplates examination of resale transaction itself, not of

parties engaging in transaction. Plain language of Act states that lease of property made for legitimate business purpose and for valuable consideration constitutes bona fide sale. Leases Niuklee entered into with Hometown and Klee satisfy those requirements, and this court declines to impose additional requirements on top of those set forth by General Assembly. Because lease agreements satisfied definition of "resale" under Act, Niuklee is exempt from paying sales and use tax on its purchase of aircraft. (*Niuklee LLC v. Commissioner of Department of Revenue*, 41 TAM 5-5, 11/9/15, WS at Nashville, Goldin, 13 pages.)

▼ **In case in which taxpayer, which is in business of selling doors and individual door parts, was assessed taxes based on taxpayer's underreporting of tangible personal property in its personal property schedules for tax years 2009 and 2010, chancery court properly overturned assessment because taxpayer is not manufacturer and, hence, its inventory should not have been assessed as raw materials; taxpayer is not "manufacturer" under tax statutes when only 45% of its sales involve assembly of component door parts into completed doors, and remaining 55% of sales are of individual component parts**

TAXATION: Property Tax. Taxpayer, which is in business of selling doors and individual door parts, was assessed taxes based on taxpayer's underreporting of tangible personal property and raw materials, specifically door parts, in its personal property schedules for tax years 2009 and 2010. Administrative law judge (ALJ) ruled partially in favor of taxpayer but against taxpayer regarding raw materials. Taxpayer appealed to State Board of Equalization's (State Board's) Assessment Appeals Commission, and ALJ's ruling was upheld. Taxpayer then challenged Appeals Commission's

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ruling in chancery court. Chancellor properly overturned assessment because taxpayer is not manufacturer and, hence, its inventory should not have been assessed as raw materials. TCA 67-5-903(a) provides that all business associations must pay tax on all tangible personal property owned by such business and used or held for such business or profession, including “all raw materials.” Although tax code does not define “raw materials,” State Board defines raw materials as “items of tangible personal property, crude or processed, which are held or maintained by a manufacturer for use through refining, combining, or any process in production or fabrication of another item or product.” While there is no statutory definition of “manufacturer” for purposes of personal property tax, other sections of Title 67 do offer some clarification of what makes business “manufacturer” for other purposes. “Manufacturer” is defined as “one whose principal business is fabricating or processing tangible personal property for resale.” Taxpayer is not “manufacturer” under tax statutes when only 45% of its sales involve assembly of component door parts into completed doors, and remaining 55% of sales are of individual component parts. Hence, component door parts used in assembly of its completed doors are not raw materials under TCA 67-5-903(a). (*Central Woodwork Inc. v. Johnson*, 41 TAM 5-6, 11/24/15, WS, Gibson, 8 pages.)

▼ **Chancery court does not have subject matter jurisdiction to entertain action for declaratory or injunctive relief regarding validity of local rules of criminal court; Declaratory Judgment Act has not given courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought**

CIVIL PROCEDURE: Jurisdiction — Courts — Chancery Court — Declaratory Judgment. CRIMINAL PROCEDURE: Bail Bonds. Memphis Bonding Company (MBC) is bail bond company doing business in Shelby County. MBC filed petition for injunctive relief and declaratory judgment in Shelby County Chancery Court, naming as defendants Criminal Court for 30th Judicial District and each of its 10 judges. According to complaint, criminal court and its judges (respondents) were in process of amending existing Rules of Practice and Procedure for 30th Judicial Criminal Court in order to enact “Local Rules of Practice and Procedure for Bail Bond Companies,” with effective date of 3/1/15. MBC alleged that numerous sections of proposed rules violated certain statutory and constitutional provisions and were also arbitrary, capricious, and without basis of right or legal authority. Chancery court concluded that it had subject matter jurisdiction over matter and entered temporary injunction prohibiting respondents from enforcing section of local rule. This court granted application for extraordinary appeal filed by respondents. Chancery court does not have subject matter jurisdiction to entertain action for declaratory or injunctive relief regarding validity of local rules of criminal court. To allow chancery court to review validity or enjoin enforcement of local rules of criminal court would interfere with inherent power of criminal court to administer its affairs and impose reasonable regulations regarding making of bonds. Just as it is “implicit” in statutory scheme regarding local rules that “no court other than the Supreme Court can make rules governing the procedure in other courts,” applicable statutes and rules do not authorize chancery court review of local rules of criminal court. While power to grant injunctive relief is power that courts of equity (or chancery courts) have possessed for centuries, that power is not unlimited. Longstanding rule in Tennessee is that state courts of equity lack jurisdiction to enjoin enforcement of criminal statute that is alleged to be unconstitutional. Although present case involves local rule of criminal court rather than criminal statute, concerns are equally relevant. Permitting chancery court to enjoin

and otherwise interfere with administration of criminal court would cause confusion and disrupt orderly administration of judicial system. In effect, chancery court would be invading jurisdiction of criminal court. Likewise, in Tennessee, Declaratory Judgment Act has not given courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought. Consequently, Tennessee Supreme Court, in *Zirkle v. City of Kingston*, 396 SW2d 356 (Tenn. 1965), held that “declaratory judgment is proper in chancery, but only if chancery originally could have entertained a suit of the same subject matter.” Although Middle Section of this court declined to follow Tennessee Supreme Court’s decision in *Zirkle*, this court considers Supreme Court’s unequivocal statements in *Zirkle* and prior case, *Hill v. Beeler*, 286 SW2d 868 (Tenn. 1956), to be controlling. Hence, because MBC’s underlying claim for injunctive relief regarding local rules could not be brought in chancery court, chancery court could not exercise subject matter jurisdiction over declaratory judgment aspect of case either. (*Memphis Bonding Co. v. Criminal Court of Tennessee 30th District*, 41 TAM 5-7, 11/25/15, WS, Gibson, 11 pages.)

▼ **In case in which wife claimed that she received judgment against husband for \$24,000 at time of parties’ divorce, wife filed lien against real property that was awarded to husband in divorce after husband failed to pay judgment, and upon learning that real property in question was scheduled to be sold at auction, wife filed suit seeking to stop auction and enforce her lien, trial court erred in dismissing wife’s complaint and in dissolving underlying lien based on wife’s failure to have summonses issued or served at time of filing of complaint; pursuant to language of TRCP 3, if no process is issued at time of filing of complaint, plaintiff may have process issued for up to one year from complaint’s filing date; trial court erred in relying upon lack of issuance or service of process as ground for dismissal when wife had one year from date complaint was filed during which she could have process issued and served**

CIVIL PROCEDURE: Service of Process — Summons. PROPERTY: Liens. Parties were divorced in 2004 after 36 years of marriage. In conjunction with divorce, trial court distributed parties’ marital assets. Trial court awarded parties’ marital residence to wife but granted husband life estate in home should wife predecease him. Husband was awarded parties’ ownership in H.A.G., Inc., which included property consisting of golf course, rental house, and inn. Trial court also awarded husband rental home on Tittsworth Road, while awarding wife \$20,000 for her ownership in property. On appeal, this court (30 TAM 39-21) modified trial court’s marital property distribution by removing life estate in marital residence that had been granted to husband. Wife was instead declared to be sole owner of that residence. Trial court’s distribution of parties’ marital property was otherwise affirmed. Wife subsequently claimed that she received judgment against husband pursuant to their divorce entitling her to \$24,000. Wife claimed that because this judgment was never paid by husband, she filed lien against Tittsworth Road property which was awarded to husband in divorce. Upon learning that Tittsworth Road property was scheduled to be sold at auction, wife filed suit seeking to stop auction and enforce her lien. Trial court dismissed wife’s complaint and also dismissed and dissolved underlying lien. Trial court erred in dismissing wife’s complaint and in dissolving underlying lien based on wife’s failure to have summonses issued or served at time of filing of complaint. Wife did not request that summonses be issued at time complaint was filed, and clerk did not cause

summonses to be issued. Pursuant to language of TRCP 3, if no process is issued at time of filing of complaint, plaintiff may have process issued for up to one year from complaint's filing date. Failure to issue process will result in filing of complaint being ineffective to toll statute of limitation during year following filing date only if plaintiff or plaintiff's attorney intentionally causes delay in issuance or service of summons. Conversely, unintentional delay in issuance or service of summons would still properly commence action. Trial court erred in relying upon lack of issuance or service of process as ground for dismissal when wife had one year from date complaint was filed during which she could have process issued and served. Trial court's judgment of dismissal is reversed, and case is remanded to trial court for summonses to be issued and served upon defendants. (*Christenberry v. Christenberry*, 41 TAM 5-8, 1/14/16, ES, Frierson, 8 pages.)

▼ **In case in which plaintiff filed suit to pierce corporate veil of defendant company and hold its sole shareholder personally liable for debt, trial court initially declined to issue findings of fact in its final judgment, after both parties submitted their own proposed findings of fact, and trial court adopted defendants' version nearly verbatim, incorporating two additional findings of fact of its own, because trial court's findings of fact and conclusions of law were insufficient to facilitate appellate review, judgment is vacated and case is remanded for sufficient findings of fact and conclusions of law**

CIVIL PROCEDURE: Findings & Conclusions. COMMERCIAL LAW: Corporations. This case arises out of contract dispute between Christenberry Trucking and Farm, Inc. (Christenberry Trucking) and F&M Marketing Services, Inc. (F&M) in 2005. In first appeal (35 TAM 20-8), this court concluded that F&M could pursue action for breach of contract against Christenberry Trucking. On remand, trial court entered written order on 2/13/12 awarding F&M \$375,524 plus post-judgment interest. At time trial court entered judgment, Christenberry Trucking had no assets to satisfy judgment. After learning this, F&M commenced action on 5/25/12 seeking to disregard corporate entity of Christenberry Trucking and hold its primary shareholder, Clayton Christenberry (Mr. Christenberry), personally liable for judgment against corporation. On 6/26/12, Christenberry Trucking and Mr. Christenberry filed motion to dismiss F&M's complaint to pierce corporate veil. Trial court denied motion by written order entered 9/11/12. On 10/5/12, Christenberry Trucking and Mr. Christenberry jointly filed their Answer to complaint. On 10/7/13, F&M moved to amend its original complaint to add additional defendants and claims. Additional defendants included Mr. Christenberry in his capacity as trustee and beneficiary of Clayton V. Christenberry Jr. and Jannie Christenberry Revocable Trust (Trust); Trust; and Jannie Christenberry, Mr. Christenberry's wife, in her individual capacity and her capacity as trustee and beneficiary of Trust (collectively with Christenberry Trucking and Mr. Christenberry, Christenberry defendants). In addition to its action to pierce corporate veil, F&M also brought action to set aside allegedly fraudulent conveyances and seeking *lien pendens* on Trust. F&M's motion to amend complaint was granted on 11/25/13. Christenberry defendants filed motion to dismiss amended complaint. They argued that F&M was foreign corporation doing business in Tennessee without proper registration with Tennessee Secretary of State pursuant to state law. Thus, they argued F&M was precluded from bringing suit in state. Trial court denied motion to dismiss on 11/20/13. Because Christenberry defendants had not yet responded to amended complaint, F&M

moved for default judgment on 2/6/14. On 2/24/14, Christenberry defendants filed answer to amended complaint, essentially denying that any transfer of Trust was fraudulent. On 3/5/14, Christenberry defendants filed motion to "bifurcate the trial against them in order to separately address [F&M's] causes of action pertaining to the Trust from the original action on piercing the corporate veil" against Christenberry Trucking and Mr. Christenberry individually. On 1/16/15, trial court granted motion to bifurcate trial, finding that "action for piercing the corporate veil against [Christenberry Trucking] and Mr. Christenberry should be bifurcated from the action against the Trust Defendants for fraudulent transfer." On 2/4/15, 2/5/15, and 2/6/15, trial court conducted trial on F&M's action to pierce corporate veil of Christenberry Trucking. At conclusion of trial, trial court orally ruled from bench, concluding that F&M had not carried its burden to prove that corporate veil should be pierced. Because second part of bifurcated action concerning Trust and alleged fraudulent transfer was contingent upon conclusion that corporate veil should be pierced, second part of trial was pretermitted. Accordingly, trial court dismissed entirety of F&M's claims against all of defendants. (1) After bench trial, trial court orally ruled in favor of appellees. Although trial court stated it would not deign findings of fact, command of TRCP 52.01 is clear that such findings are mandatory, rather than discretionary. Trial court's statement that it was "not required to produce a Finding of Fact" is categorically incorrect. Fortunately, at behest of counsel for F&M, trial court eventually permitted both parties to submit proposed version of findings of fact and conclusions of law. Trial court apparently reviewed both and ultimately issued its Final Judgment on 2/18/15, which included sections titled Finding of Facts and Conclusions of Law. Thus, trial court's order, on its face appears to comply with TRCP 52.01. (2) "Piercing the corporate veil" appears to have been sole basis for trial court's judgment in favor of appellees. There seems to have been some confusion in trial court as to appropriate text to be applied in determining issue of whether corporate veil should be pierced in this case. Trial court indicated its reliance on what it deemed three different "tests": test from *Continental Bankers Life Insurance Co. of South v. Bank of Alamo*, 578 SW2d 625 (Tenn. 1979); test from *Oceanics Schools Inc. v. Barbour*, 112 SW3d 135 (Tenn.App. 2003); and factors set forth in *FDIC v. Allen*, 584 F.Supp 386 (E.D.Tenn. 1984), test devised by federal courts in 1984 and often applied by Tennessee courts thereafter. Trial court explicitly stated that F&M "has failed to carry its burden of proof necessary to impose piercing of the corporate veil of [Christenberry Trucking] under any of the aforementioned tests." Trial court's and parties' confusion as to applicable test, however, was not warranted. Neither *Continental Bankers* nor *Barbour* provides appropriate standard by which court considers whether to pierce corporate veil. First, trial court relied upon *Continental Bankers*, utilizing three-prong "instrumentality rule." *Continental Bankers* court analyzed three factors to determine whether parent corporation exercised such dominion and control over its subsidiary to render subsidiary mean "tool, agency, or instrumentality of the parent." In present case, although trial court explicitly stated it was relying upon *Continental Bankers*, it made no findings of fact or conclusions of law with respect to any of three factors. In addition, trial court did not state why *Continental Bankers* test was applicable, where case-at-bar does not involve question of whether parent corporation should be liable for wrong committed by its subsidiary. Simply put, it is completely unclear how and why trial court relied on *Continental Bankers*, without findings of fact and conclusions of law relative to any of three factors. Next, trial court relied upon *Barbour*. Specifically, trial court provided that it relied upon "sham or dummy corporation test" in *Barbour*.

Barbour court did not promulgate “sham or dummy corporation” test in that case. Trial court isolated that phrase from surrounding language in *Barbour*, explaining that courts may pierce corporate veil “upon a showing that it is a sham or a dummy or where necessary to accomplish justice.” Even more importantly, *Barbour* court “review[ed] all of the evidence — in the context of the *Allen* factors.” Thus, in *Barbour*, *Allen* factors provided backdrop for courts to consider whether corporation is sham or dummy corporation. Indeed, Tennessee cases nearly uniformly consider *Allen* factors in determining this issue. Accordingly, this court turns to whether trial court made sufficient findings concerning *Allen* factors. Tennessee Supreme Court clearly outlined appropriate test to utilize — *Allen* factors — in considering challenge to corporate veil in *Rogers v. Louisville Land Co.*, 367 SW3d 196 (Tenn. 2012). Although trial court asserted during trial that it “spent the last three nights reviewing a number of cases in this field,” seminal Tennessee Supreme Court opinion on this issue does not appear to have been discussed or applied by trial court or parties at trial level. In *Rogers*, Supreme Court specifically stated that factors promulgated by *Allen* “are applicable” when determining whether corporate veil should be pierced. Generally, no one of 11 *Allen* factors is conclusive in determining whether to pierce corporate veil; rather courts will rely upon combination of factors in deciding issue. Accordingly, this court examines whether trial court made sufficient findings of fact and conclusions of law with respect to *Allen* factors. Here, 11 factors in *Allen* require fact-intensive inquiry for each individual case: necessity for sufficient findings of fact and conclusions of law cannot be overstated in case where party seeks to pierce corporate veil, as it “depends on the specific facts and circumstances of the case.” Although trial court included in its final order that, “a few of the *Allen* factors may have been met,” it is unclear which factual findings are attributed to that conclusion. It is also unclear which factors trial court deemed met. Indeed, rather than above statement, trial court’s written order and oral ruling contain no other mention of trial court’s application of *Allen* factors. While there is no bright-line test by which to assess sufficiency of trial court’s factual findings, general rule is that findings of fact must include as much of subsidiary facts as is necessary to disclose to reviewing court steps by which trial court reached its ultimate conclusion on each factual issue. Trial court’s order fails to meet this standard. This court is not able to discern, for example, which of *Allen* factors trial court concluded favored piercing corporate veil, and which trial court concluded did not. In addition, trial court’s order fails to disclose what facts led trial court to these conclusions. While trial court made some factual findings that could be relevant to some of *Allen* factors, it is still unclear what conclusions of law were to be drawn from findings. For example, trial court found that “Capital of [\$136,000] was paid into the corporation.” Trial court did not, however, render legal conclusion as to whether this constituted undercapitalization pursuant to *Allen* factors. This is but one example of inadequacy of trial court’s final order with respect to its findings and conclusions. Accordingly, it is impossible to decipher upon which factors trial court based its decision. Generally, appropriate remedy when trial court fails to make appropriate findings of fact and conclusions of law pursuant to TRCP 52.01 is to vacate trial court’s judgment and remand cause to trial court for written findings and conclusions of law. But this court has indicated that we may “soldier on” with our review, despite trial court’s failure to comply with TRCP 52.01 in certain limited circumstances. Here, issues of piercing corporate veil is fact-intensive inquiry that is not easily resolved, including interpretation of many corporate and personal documents. Thus, disputes in this case do not involve only clear legal issues. Trial court’s deci-

sion in this case is also not “readily ascertainable.” Nothing in trial court’s written order or oral rulings indicates reasoning underlying its decision not to pierce corporate veil or which test on which it ultimately relied. Trial court’s order includes no balancing of factors required by *Allen*, and indeed, does not even include conclusions of law relative to factors in *Allen*. Furthermore, it is unclear what facts trial court actually relied upon in making its determination. Trial court’s failure to render specific findings concerning factors, and even more importantly, trial court’s failure to render legal conclusions as to any of factors, warrant vacatur of final judgment. Under these circumstances, appropriate remedy is to vacate judgment and remand to trial court for entry of order compliant with TRCP 52.01(3). Although this court vacates trial court’s order for its noncompliance with TRCP 52.01, we must address ancillary concern raised by F&M in its appellate brief concerning counsel-prepared findings of fact and conclusions of law. Trial court’s oral ruling did not include any findings of fact, and each party was permitted to submit their own proposed findings. Although trial court eventually considered both parties’ submission and reiterated set of findings, findings included in trial court’s final order are nearly identical to those submitted by Christenberry Trucking and Mr. Christenberry. As set forth in *Smith v. UHS of Lakeside Inc.*, 439 SW3d 303 (Tenn. 2014), court’s decision must be, and must appear to be, result of exercise of trial court’s own judgment. Here, trial court refused to make findings of fact on record even after counsel requested such findings. Hence, parties were required to draft proposed orders with no indication from trial court as to how it found disputed facts or which facts were relevant to trial court’s ultimate decision. Manner in which trial court entered its final judgment in this case comes perilously close to violating *Smith*. On remand, in addition to entering order compliant with TRCP 52.01, we also advise trial court to be mindful of Tennessee Supreme Court’s recent decision opining on trial court’s obligation to ensure that its orders afford this court appropriate insight into trial court’s reasoning, as well as result from trial court’s independent judgment. (*F&M Marketing Services Inc. v. Christenberry Trucking & Farm Inc.*, 41 TAM 5-9, 10/19/15, ES, Stafford, 12 pages.)

▼ **When original plaintiff filed suit for nonpayment of note, plaintiff obtained default judgment on 3/15/01, after repeated unsuccessful attempts to obtain payment, original plaintiff assigned judgment to plaintiff, plaintiff filed motion on 8/5/10 to revive and renew judgment, defendant appeared at 12/13/10 hearing, plaintiff did not appear, trial court entered order denying plaintiff’s motion and “released and dismissed” judgment on 12/30/10, and plaintiff filed motion on 3/10/11 to set aside 12/30/10 order under TRCP 60.02 on ground that she was unexpectedly caught in severe weather while traveling to 12/13/10 hearing from her home in Georgia, trial court did not abuse discretion in granting plaintiff’s motion to set aside 12/30/10 judgment under TRCP 60.02(1) for excusable neglect when plaintiff had valid judgment, judgment was still valid at time of hearing, her failure to appear was not willful, she had no control over weather, and she had no notice that potential consequence of her failure to appear at hearing would be release and dismissal of her underlying judgment**

CIVIL PROCEDURE: Post-Judgment Relief. Dinkla, original plaintiff, filed suit for nonpayment of \$200,000 promissory note. Dinkla obtained default judgment against defendant on 3/15/01. After repeated unsuccessful attempts to obtain payment from defendant, Dinkla assigned judgment to Muffley. On 8/5/10, Muffley, acting *pro se*, filed Motion to Revive and Renew Judgment. In

his response, defendant alleged that he had not been properly served with motion, motion did not comply with procedural rules, and judgment had already been satisfied. At 12/13/10 hearing on Muffley's motion, defendant appeared with his attorney, but Muffley did not. On 12/30/10, trial court entered order denying Muffley's motion with prejudice. In addition, trial court "released and dismissed" 2001 judgment. On 3/10/11, Muffley, now represented by counsel, filed motion to set aside 12/30/10 order under TRCP 60.02(1) and (5). As grounds for motion, Muffley submitted that she was unexpectedly caught in severe weather while traveling to 12/13/10 hearing from her home in Georgia. Muffley also moved for extension of 2001 judgment under TRCP 69.04. After hearing oral argument and reviewing parties' written briefs, trial court granted Muffley's TRCP 60.02 motion and reinstated 2001 judgment. Trial court also ordered evidentiary hearing on Muffley's motion to extend judgment. Ultimately, trial court granted TRCP 69.04 motion and extended 2001 judgment for additional 10 years. (1) Under TRCP 60.02(1), court may set aside final judgment for reason of "mistake, inadvertence, surprise or excusable neglect." Muffley argues that her failure to appear at hearing constituted excusable neglect because she was caught in unanticipated bad weather while traveling to court from her home in Georgia. Muffley had valid judgment. Statute of limitation on judgment did not expire until 3/15/11. On 8/5/10, she timely filed motion to extend judgment under TRCP 69.04. At time of hearing, judgment was still valid. Her failure to appear was not willful. She had no control over weather. Moreover, Muffley had no notice that potential consequences of her failure to appear would be "release[] and dismiss[al] of her underlying judgment. Defendant did not request such relief in his response to motion to extend judgment. He simply asked for court to strike motion until such time as plaintiff complied with procedural rules. Trial court did not abuse discretion in granting Muffley's motion to set aside 12/30/10 judgment. Review of record reveals no willful act by plaintiff and no undue prejudice to defendant. This is not case of "impermissible indulgence towards *pro se* litigant to the other party's detriment." (2) Because Muffley was appropriately granted relief under TRCP 60.02(1), it is not necessary to consider whether relief was also appropriate under higher bar of TRCP 60.02(5). (*Muffley v. George*, 41 TAM 5-10, 10/28/15, MS, McBrayer, 5 pages.)

GOVERNMENT: Annexation. In 8/11, Town of Huntsville (Town) initiated annexation proceedings involving certain properties located within Town's approved urban growth boundary. One such affected property, nominated Parcel 10, is owned by plaintiff. Plaintiff's parcel consists of approximately 1,800 acres of raw, unimproved land and contains only dirt logging roads. Property is contiguous to Town's boundary and surrounds Town's water reservoir. On 8/24/11, Town's Board of Mayor and Aldermen met in regular session and adopted Resolution 11-08-01, approving plan to annex subject property, along with Resolution 11-08-04, approving plan of services that would be provided to affected property. Plaintiff's complaint for declaratory action, in which he sought temporary restraining order preventing second reading and adoption of annexation ordinance, was denied by trial court. On 9/28/11, Town adopted Ordinance 11-08-01 annexing property, as well as Resolution 11-08-04, approving proposed plan of services. Plaintiff challenged annexation ordinance, and trial court determined that, pursuant to TCA 6-58-111, plaintiff failed to prove that annexation ordinance was unreasonable for overall well-being of communities involved or health, safety, and welfare of citizens and property owners of municipality and territory would not be materially retarded in absence of such annexation. Trial court, therefore, dismissed plaintiff's com-

plaint. (1) Plaintiff argued that its property, consisting of unimproved land, did not need and would not benefit from provision of any services by Town. In addition to fire and police protection services, Town, pursuant to its plan of services, would install main sewer line to border of plaintiff's property at estimated cost of \$5,000. Any future residents would then pay reduced rate for sewer service. Town also committed to provide garbage collection services, maintain any future streets, provide street lighting, provide inspection services, and develop zoning plan. Plaintiff's purported lack of desire to avail itself of available services provided by Town is not dispositive when Town has committed to providing valuable services needed. (2) Plaintiff did not meet its burden of proving that annexation ordinance was unreasonable for overall well-being of community involved. Town has committed to providing numerous services for large parcel of property when revenue amounts to mere \$875 per year. Regarding its purpose for annexation, Town represented that annexation of property in question was necessary to protect water reservoir and "[get] ahead of development" that might impact water supply. Evidence at trial demonstrated that such protection of water supply was necessary for health and welfare of citizens of Town and other communities served by water reservoir. This is valid and reasonable basis for Town's annexation of subject property. (3) Plaintiff failed to prove that health, safety, and welfare of citizens and property owners of municipality and territory would not be materially retarded in absence of this annexation. Annexation's purpose was to protect Town's water supply, which would clearly benefit health, safety, and welfare of Town's citizens. Any future development of plaintiff's property would be benefitted by services provided by Town following annexation. Therefore, annexation was mutually advantageous to Town and to plaintiff, materially benefitting health, safety, and welfare of citizens and property owners of Town and affected territory. (4) Town argued that plaintiff's complaint for declaratory action and this appeal should be dismissed due to plaintiff's failure to file quo warranto proceeding within 30 days of annexation ordinance's passage. This court finds no basis to hold that quo warranto action filed days before final passage of ordinance is untimely as premature. Present action was filed prior to ordinance's operative date, in accordance with TCA 6-51-103, and is therefore timely. (*Oneida Farms Development Inc. v. Town of Huntsville*, 41 TAM 5-11, 11/16/15, ES, Frierson, 11 pages.)

GOVERNMENT: Billboard Regulation. CIVIL PROCEDURE: Equitable Estoppel — Unclean Hands. In 9/05, Thomas filed applications with Tennessee Department of Transportation (TDOT) for billboard permits for both sides of proposed billboard, i.e., "back-to-back" billboard, on property he owned on Jackson Avenue in Memphis. TDOT approved permit applications, and permits were issued in 10/05. In 7/06, CBS Outdoor (CBS) bought back-to-back billboard from Thomas, and prior to making purchase, CBS confirmed that billboard was properly permitted by TDOT. In 2/10, Clear Channel, owner of billboard to west of billboard owned by CBS, notified TDOT that CBS's billboard was actually less than 1,000 feet from Clear Channel's billboard. TDOT subsequently gave CBS notice of revocation of its permits. CBS requested contested case hearing before administrative law judge (ALJ). ALJ granted TDOT's motion for summary judgment after concluding that TDOT had shown that billboard owned by CBS was in violation of applicable spacing laws and that TDOT properly voided CBS's permits. CBS appealed to TDOT Commissioner, who entered final order adopting ALJ's findings and affirming his decision. (1) ALJ's conclusion, as adopted by Commissioner, was supported by

substantial and material evidence. TDOT regulations contemplate that Commissioner can void advertising permit for any violation of requirements for permit under state or federal law or agency rules and regulations. (2) Trial court did not err in failing to find that equitable estoppel prevented TDOT from revoking CBS's billboard permits. In Tennessee, doctrine of estoppel generally does not apply to acts of public officials or public agencies, and estoppel should be applied against public agencies only in very exceptional circumstances. In present case, CBS spends large portion of its brief arguing that TDOT should be estopped from enforcing its regulations because of conduct of one of its employees, Reid. Reid's specific testimony was that he would consider sign to be 1,000 feet if it was within "reasonable tolerance of the correct measurements." There is no evidence that Reid or any inspector exercised this type of discretion in present case. In fact, evidence shows that post-construction inspection typically consisted of taking pictures to establish that billboard was built in proper place. Unless there was question as to location of billboard, measurements would not be taken. CBS had equal access to means of finding out whether billboard met spacing requirement before it purchased billboard in present case. (3) Trial court did not err in failing to apply doctrine of unclean hands to prevent TDOT from revoking CBS's permits. There is no evidence of conduct by Reid rising to level required to invoke doctrine of unclean hands. Doctrine of unclean hands "provides the court with a basis to decline to grant relief to parties who have willfully engaged in unconscionable, inequitable, immoral, or illegal acts with regard to the subject matter of their claims." CBS could have verified distance between billboards before purchasing Jackson Avenue billboard. (*CBS Outdoor Inc. v. Tennessee Department of Transportation*, 41 TAM 5-12, 11/6/15, MS, Bennett, 15 pages.)

▼ **When petitioner pled guilty to two counts of attempted rape of child and two counts of incest and was sentenced to 20 years with parole eligibility after serving 30% of his sentence, apparently because of his good behavior, parole board considered inmate for release on parole after he had served only 20% of his sentence, Board denied inmate parole based solely on its finding that "[t]he release from custody at this time would depreciate seriousness of crime of which offender stands convicted or promote disrespect of the law," and deferred review of its parole application for five years, inmate filed petition for common law writ of certiorari, and trial court affirmed parole board's decision, parole board acted arbitrarily in deferring further review of inmate's parole application beyond time when he would have otherwise been parole eligible — at 30% of his 20-year sentence; because inmate has already served more than 30% of his 20-year sentence, he should immediately be granted new parole hearing**

CRIMINAL SENTENCING: Parole. In 2009, petitioner pled guilty to two counts of attempted rape of child and two counts of incest. He was sentenced to 20 years with parole eligibility after serving 30% of his sentence for two convictions for attempted rape of child. His sentences for two convictions for incest have expired. Victim of petitioner's crimes was his adopted sister. Parole hearing for petitioner was held on 3/26/13 before hearing officer appointed by Board of Parole (Board). Eleven individuals, including victim, appeared in support of petitioner's release at hearing and were allowed to testify on his behalf. Hearing officer also reviewed letters from petitioner's friends and family supporting his release and results of psychiatric evaluation that

concluded that petitioner "does not pose likelihood of committing sexual assaults upon his release from confinement." No opposing testimony was presented. At conclusion of hearing, hearing officer stated that he would recommend to Board that petitioner be denied parole due to seriousness of his offense and that further review of his parole application should be deferred for five years. On 4/3/13, Board formally notified petitioner that it had adopted recommendations of its hearing officer and denied his application for parole. In support of its decision, Board stated in its formal notice that "[t]he release from custody at this time would depreciate seriousness of crime of which offender stands convicted or promote disrespect of the law." Board also informed petitioner that he would not be considered for parole again until 3/18. After exhausting his remedies before full Board, petitioner filed petition for common law writ of certiorari on 8/16/13. Among other things, petitioner argued that Board's decision to deny him parole based solely on seriousness of his crime was arbitrary and capricious because there was no evidence in record to establish that his particular case was more serious than any other case involving same offense. Pursuant to issuance of writ of certiorari, petitioner's certified parole hearing record was filed in trial court. Arguments on petition for certiorari were heard by trial court on 6/5/14. On 7/17/14, trial court entered final order affirming Board's decision. Trial court concluded that petitioner failed to show that Board's decision-making process was arbitrary or illegal because "seriousness of the offense" is valid ground for denying parole under TCA 40-35-503(b)(2) and because record reflects that Board's officer considered testimony presented by petitioner's witnesses at his parole hearing. Petitioner contends that Board acted illegally and arbitrarily in denying him parole based solely on seriousness of offense when all of evidence presented at his parole hearing supported his release and Board gave no other reason for its decision. He points out that, in enacting statutory scheme that governs sentencing in Tennessee, legislature determined that individuals convicted of offenses for which he was convicted are eligible for parole after serving percentage of their sentence. Accordingly, he argues that Board should be required to provide some support or explanation to indicate that it considered his specific conduct and not just nature of statutory offenses for which he was convicted. Board counters that TCA 40-35-503(b)(2) expressly states that it "shall" deny parole where it finds that "[t]he release from custody at the time would depreciate the seriousness of the crime of which the defendant stands convicted or promote disrespect for the law." In addition, Board points out that courts have held repeatedly that Board's consideration of seriousness of inmate's offense in making parole decision does not implicate any constitutional right. Thus, Board emphasizes that release on parole for privilege and not right and argues that seriousness of inmate's offense is proper basis for denying parole even if it is only basis for denial. Past cases that have upheld denial of parole based on seriousness of offense have concluded that Board considered facts and circumstances specific to individual inmate and not just nature of offense of which inmate was convicted. While it cannot be discerned from this record nature of offense of which inmate was convicted, it is not necessary that we address that issue in this case. Petitioner was sentenced to 20 years in prison with release eligibility after serving 30% of his sentence on 4/3/09. Accordingly, his original release eligibility date was 4/3/15. Apparently because of his good behavior, Board granted petitioner early parole hearing in 3/13 to determine whether he should be released after serving only 20% of his sentence. Following 3/13 hearing, Board denied petitioner parole and deferred further

parole consideration until 3/18. By 3/18, petitioner will have served approximately 45% of his 20-year sentence. Board's decision to grant petitioner early parole hearing and then defer his next parole hearing beyond time that he should have otherwise received parole hearing was arbitrary. Whole concept of parole is based on theory that people can change over time and that even convicted felon may be able to live in accordance with law after serving percentage of his or her sentence. Thus, Board's determination that petitioner would not be suitable candidate for parole after serving 20% of his sentence is not conclusive evidence that he would not be suitable candidate for parole after serving 30% of his sentence. Under terms of his sentence, petitioner's release eligibility date was 4/3/15. Board was required to conduct hearing within reasonable time prior to that date to determine his fitness for parole. Board cannot deprive petitioner of parole hearing that he otherwise would have been eligible to receive by determining that he is not ready to be released two years prior to that time. Thus, Board should have considered his fitness for release within reasonable time prior to his original eligibility date on 4/3/15. Accordingly, because time when petitioner should have received parole hearing has already passed, he should be granted new hearing immediately on remand. (*Brennan v. Board of Parole*, 41 TAM 5-13, 10/21/15, MS, Goldin, 6 pages.)

Court of Criminal Appeals

EVIDENCE: Expert Testimony — Relevancy — Other Bad Acts — Tangible Evidence — Tape Recordings. CRIMINAL PROCEDURE: Trial Conduct. Defendant was convicted of two counts of first degree premeditated murder and one count of possession of firearm by convicted felon and was sentenced to two life sentences for murder convictions and to consecutive two-year term for firearm possession. (1) Trial judge did not err in denying defendant's request to present expert testimony (of Drs. Walker and Street) regarding defendant's mental illness. Trial court determined that even though defendant had, for number of years, been treated for and hospitalized at least two times for specific diagnosed mental illnesses, defects, and conditions, and that even though evidence demonstrates that defendant was, based upon expert's opinion, suffering, at time of offenses, from significant and serious mental illness, expert opinion testimony should be excluded as to issue of insanity and as to issue of required culpable mental state for offenses. Trial court allowed defendant to offer lay testimony as to his mental condition, his culpable mental state, and his insanity at time of offenses. Psychiatric testimony must demonstrate that defendant's inability to form requisite culpable mental state was product of mental disease or defect, not just particular emotional state or mental condition — it is showing of lack of capacity to form requisite culpable mental intent that is central to evaluating admissibility of expert psychiatric testimony on issue. (2) Trial judge did not err in admitting recording of jail telephone call between defendant and his father. Recording was played for jury both during state's case-in-chief and cross-examination of defendant's father. Prosecutor argued that audiotape was relevant to show defendant was questioning why "people in his family are telling law enforcement what happened," while defendant "kept his mouth shut" and that conversation showed that defendant "intended to get away with this crime." Defense counsel contended that taped conversation was inadmissible because it showed defendant "commenting about the fact that he has chosen not to give any

statements" and that he was "relying upon his right to remain silent." Defendant made issue of his mental state before and during crimes. Hence, defendant's statements to his father during conversation were relevant to state's theory of case. Although defendant argued that "bell" could not be "unrung" after he, himself, had brought up in conversation that he was not wearing bulletproof vest at time of slayings, as he believed some had said, immediately after jury heard recorded conversation, detective, continuing his testimony, said there was no proof that defendant was wearing bulletproof vest on day of homicides. (3) Although trial judge erred in admitting evidence regarding defendant's prior arrests, error was harmless. Trial proceeded upon defense counsel's admitting that defendant had killed victims, and, even independent of that, evidence was overwhelming that he had done so. Thus, error in admitting this evidence was harmless. (4) Defendant argued that placing him in stun-belt without hearing violated his right to due process to full use of his faculties during trial. There was substantial evidence of defendant's misbehavior during trial. Psychologist testified that defendant was "very unstable," that he was "very volatile," and that he had "very short fuse." Defendant made disruptive statements during testimony of expert, defendant's daughter, and defendant's father. In addition, as defense counsel was making argument to court regarding statements taken from defendant's parents, defendant made "[i]ndiscernible comment," and counsel advised him, "Be quiet or you're gonna get shocked." Based upon defendant's conduct while in jail, as well as his continuing disobedience during trial, trial court did not abuse discretion in ordering that defendant wear stun-belt during trial. (5) Trial judge did not err by admitting testimony regarding ammunition found by roadside when cartridges were circumstantial proof of defendant's guilt. Testimony showed that defendant drove along Hooper Gap Road, as he went from his parents' home, where extended capacity magazine with 31 live 9 mm shells was found, to home of his uncle. Investigator said that ammunition found on roadside was same caliber and from same manufacturer, as that from extended magazine at home of defendant's parents. Metal recoil spring guide rod found in defendant's vehicle fit 9 mm pistol, which was caliber weapon used to kill victims. Moreover, in view of defense admission that defendant shot victims, any error in admitting this evidence was harmless. (6) Trial judge did not abuse discretion in denying defendant's request to play two recorded statements of defendant's father's for jury. Recording, which contained joint interviews of defendant's father and mother, both of whom testified at trial, as well as his brother and sister-in-law, neither of whom testified, was approximately 1 hour and 40 minutes long and was of poor quality. In recording, those present conversed amongst themselves regarding defendant and charges against him. Various speakers did not identify themselves during lengthy conversation. This court is unaware of any circumstances whereby, in questioning witness regarding previous precise statement, lengthy recording including non-witnesses may be played for jurors simply so they can hear single statement of one of speakers. Proper way at trial to compare two statements of defendant's father about being asked to get rid of pistol would have been to ask to play for witness relevant portion of second statement, not entire 1-hour and 40-minute recording with multiple speakers. (*State v. Lawson*, 41 TAM 5-14, 10/16/15, Knoxville, Wedemeyer, 24 pages.)

CRIMINAL LAW: Aggravated Rape. EVIDENCE: Other Offenses — Cross-Examination. APPEAL & ERROR: Waiver. Defendant was indicted on charges of aggravated rape and aggravated robbery. Jury convicted defendant of aggravated

rape but was unable to reach verdict on aggravated robbery charge. As result, mistrial was declared with respect to aggravated robbery charge, and it was ultimately dismissed. Defendant argued that trial court erred “in ruling that if consent [was] raised as a defense,” then evidence of other two rapes committed by defendant “would be relevant to rebut the issue of consent.” Substance of defendant’s proposed consent defense is not apparent from record given victim’s testimony that entire sexual encounter was violent and non-consensual and defendant’s repeated denials to police officer of ever having met victim. Hence, it is impossible for this court to make determination of whether defense of consent would have raised material issue because defendant failed to make offer of proof regarding issue of consent. Likewise, this court cannot evaluate whether probative value of evidence of other rapes was outweighed by danger of unfair prejudice. Accordingly, defendant has waived this issue by failing to make proper offer of proof. Nevertheless, with respect to defendant’s argument that trial court’s ruling prevented him from presenting defense of consent and effectively cross-examining state’s witnesses, trial court did not prohibit defendant from doing either. In fact, trial court specifically told defense counsel that this was not case. Rather, defense counsel made strategic decision to forgo pursuing defense of consent and cross-examining witnesses on that particular subject in order to avoid “opening the door” to more damaging evidence. Such strategic decision does not violate defendant’s constitutional rights to defense or to cross-examine state’s witnesses. (*State v. Richardson*, 41 TAM 5-15, 10/16/15, Jackson, Thomas, 9 pages.)

CRIMINAL LAW: Aggravated Robbery. CRIMINAL PROCEDURE: Exculpatory Evidence. (1) Evidence was sufficient to convict defendant of aggravated robbery. Victim testified that he was manager of auto care center in 2011. On 4/27/11, defendant came into store and told victim that he was waiting on his girlfriend to bring in her car for oil change. Defendant sat in chair in store lobby. After sole remaining customer left store and as victim was speaking on phone, defendant grabbed phone and placed gun against victim’s abdomen. Victim testified that defendant walked him to cash register and said, “Put the money — open the register and put the money on the counter.” Victim testified that he was scared and that he complied. Defendant “scooped ... up” money, i.e., \$380, and then told victim to open safe. Again, victim complied, and when defendant saw safe was empty, he left, leaving behind black “beanie” cap. Victim locked doors and called police. Victim testified that defendant “very much” put him in fear. Victim subsequently identified defendant as robber. (2) Trial court did not err by declining to instruct jury regarding loss or destruction of evidence. At time defendant was arrested, search of his vehicle uncovered white hardhat, black beanie, and reflective vest. Evidence showed scant amount of genetic material on vest or hardhat was sufficient to exclude defendant as contributor. Thus, expert testimony showed that only beanie cap contained genetic material too degraded to analyze. Several factors undercut defendant’s claim to due process remedy for state’s not testing cap sooner. First, relationship of cap to perpetrator of robbery was dubious — although cap was “left behind” after perpetrator left store, no one testified that perpetrator wore cap. Second, DNA testing performed by TBI did not result in finding that defendant’s DNA was found on cap — due to degraded nature of material, result was, in effect, neutral. Third, even affirmative determination that defendant’s genetic material was not on cap barely advances defendant’s case — such determination would only deny state additional inference of fact, which was denied anyway. Finally, defendant did not cite

authority that imposes duty on state to have ever performed DNA analysis. Cap itself was neither lost nor destroyed, and state was obliged to allow him “to inspect and copy or photograph ... tangible objects” if item was within state’s possession. In addition to inspecting object, defendant could have applied to trial court for leave to conduct independent analysis. Even if state had duty to preserve any genetic material that existed on its collected items of evidence, significance of destroyed evidence was slight, palling in comparison to “other evidence used at trial to support the conviction.” (*State v. Johnson*, 41 TAM 5-16, 10/14/15, Nashville, Witt, 7 pages.)

▼ **In case in which defendant was convicted of five counts of aggravated burglary and six counts of theft, trial judge erred in denying defendant’s motion to suppress his confession to police when defendant made statement as part of cooperation-immunity agreement, in which prosecutor promised not to prosecute defendant fully in exchange for his truthful information, but first agreement turned out to be unenforceable because it contained illegal sentence, and defendant never accepted state’s second offer; cooperation-immunity agreements, like plea agreements, are enforceable as contracts; defendant’s convictions are reversed, and case is remanded to trial court for further proceedings**

CRIMINAL PROCEDURE: Confession — Immunity Agreement. Defendant was convicted of five counts of aggravated burglary and six counts of theft and was sentenced to effective term of eight years. Trial judge erred in denying defendant’s motion to suppress his confession to police. Defendant gave his confession as part of cooperation-immunity agreement, in which prosecutor promised not to prosecute defendant fully in exchange for his truthful information. Cooperation-immunity agreements, like plea agreements, are enforceable as contracts. Terms of agreement offered to defendant were reduced to writing and specified that state would charge defendant with no more than six felonies and that he would receive sentencing concurrent with his previous nine-year sentence. Based on agreement, defendant confessed to 28 burglaries. But this agreement turned out to be unenforceable because it contained illegal sentence. At that point, state decided to offer to allow defendant to plead guilty to misdemeanors so that he could receive concurrent sentencing. State conveyed offer to defense counsel, but nothing indicates that defense counsel conveyed offer to defendant. Moreover, nothing indicates that defendant ever accepted offer. As such, trial court erred in holding that defendant breached second agreement. Because state’s evidence against defendant consisted primarily of his confession, defendant’s convictions must be reversed, with case remanded to trial court for further proceedings. (*State v. Lane*, 41 TAM 5-17, 12/7/15, Knoxville, Ogle, 9 pages.)

CRIMINAL LAW: Theft. CRIMINAL PROCEDURE: Exculpatory Evidence. Defendant was convicted of theft between \$1,000 and \$10,000 and was sentenced as career offender to 12 years. (1) Shelby County Criminal Court had jurisdiction to hear defendant’s case. Defendant argued that because offense occurred in V.A. Hospital parking lot, federal government had exclusive territorial jurisdiction of offense. Defendant did not present any proof to support his claim that parking lot of V.A. Hospital was federal property such that federal government had exclusive jurisdiction of any offense committed there. Moreover, although initial taking of victim’s car occurred in parking lot of V.A. Hospital, that offense was consummated when defendant exercised control over car beyond point at which victim had

given him permission to do so, such as when he pulled out of parking lot and drove to Office Max and then to his house with intent to deprive victim of vehicle. (2) Defendant argued that trial court erred by permitting state to impeach him with his criminal convictions that were more than 10 years old. Trial court initially ruled that state would be permitted to impeach defendant with six of his prior convictions. Defendant acknowledged prior convictions, but he attempted to minimize their impact by noting that he had pled guilty to each offense. When defendant added during direct examination that he pled guilty to receive lesser sentence even though he was not guilty, he opened door to further impeachment. As such, trial court did not abuse discretion in allowing state to admit defendant's prior convictions as impeachment evidence. Moreover, given overwhelming evidence of defendant's guilt, any error that might have occurred as result of trial court's ruling was harmless. (3) Defendant argued that trial court should have dismissed indictment or, at very least, provided jury instruction based upon state's loss or destruction of video surveillance from V.A. Hospital and Office Max. Defendant failed to demonstrate what, if any, exculpatory evidence would have existed in video surveillance. Moreover, defendant admitted that he got into victim's car in parking lot of V.A. Hospital and that he drove it to Office Max, where he made telephone call to victim. Under circumstances, video surveillance footage from two locations was not "constitutionally material evidence" and, as such, state had no duty to preserve it. (*State v. Shegog*, 41 TAM 5-18, 10/13/15, Jackson, Witt, 8 pages.)

CRIMINAL LAW: Trespass — Vandalism — Theft. (1) Evidence was sufficient to convict defendant of criminal trespass (as lesser included offense of aggravated burglary). Defendant did not have Johnson's consent to enter her rental house. Defendant was not on lease, and he only stayed at house few nights each week. Even though Johnson gave defendant key to house during their relationship, Johnson testified that she changed locks when relationship ended, 10 days prior to incident in question. Defendant knew that his key no longer worked because he confronted Johnson about it at her job. She did not give him new key but told defendant that she would meet him at house when she got off work. Therefore, defendant knew he did not have Johnson's consent to enter home before that time. Defendant admitted entering house after this confrontation. Photograph was entered into evidence showing damage to front door that indicated forced entry. Although evidence that defendant caused damage to front door was circumstantial, it was within province of jury to determine weight of such evidence and inferences to be drawn from it. (2) Evidence was sufficient to convict defendant of vandalism over \$1,000. Defendant admitted that he piled Johnson's clothing on living room floor and poured bleach on them with intention of "messing them up" so that Johnson could no longer use them. It was reasonable for jury to infer that defendant was aware that his conduct of pouring bleach onto clothes was reasonably certain to also cause damage to surrounding carpet. Representative from rental company testified that cost of replacing bleach-damaged carpet was \$631 and that cost of repairing front door of house was \$305. Defendant admitted that he poured bleach on Johnson's clothes, on which he testified that he spent up to \$1,000. Even if value of clothing depreciates after purchase, cost of replacing bleach-damaged clothes, when added to other damages, would certainly bring total value of damage caused by defendant over \$1,000 threshold. Additionally, even though defendant purchased clothing, he did so as gift to Johnson, making her owner of that property. (3) Evidence was sufficient to convict defendant of theft of \$500 or less in connection with theft

of 32-inch television from Johnson's bedroom. Johnson testified that she purchased television with money she received from her tax refund several months before entering into relationship with defendant. Even though Johnson did not have receipt for television, state was not required to prove that victim had legal title to property in question. Jury was free to accredit Johnson's testimony over defendant's testimony that television was his because he gave Johnson money to buy it. Even if defendant's version were true, jury could rationally conclude that television was gift, in which case Johnson would still be rightful owner. (*State v. Smith*, 41 TAM 5-19, 10/16/15, Nashville, Easter, 8 pages.)

CRIMINAL LAW: Drug Offenses. CRIMINAL SENTENCING: Reasonableness. Defendant was convicted of promotion of methamphetamine manufacture and sentenced as Range III career offender to 12 years, to be served at 60%. (1) Evidence was sufficient to convict defendant of promotion of methamphetamine manufacture. Deputies from specialized drug unit responded to anonymous call of someone "cooking" methamphetamine at defendant's residence. When deputies arrived to investigate, defendant exited wooden outbuilding and locked door behind him. Items indicative of manufacture of methamphetamine were located in burn pile near outbuilding. Two deputies testified in detail as to why certain items in pile were "red flags" that alerted them to potential methamphetamine manufacture. Subsequent search of defendant's property and vehicles revealed key tools and ingredients for manufacture of methamphetamine, using either "red P" or "one pot" method. Although defendant argued that these items had "normal uses," it is reasonable for juror to infer from fact that all of these items were located together inside blue Igloo cooler that items were used in manufacture of methamphetamine. Moreover, even though defendant insisted that he found blue Igloo cooler in middle of road, this argument was rejected by jury. (2) Defendant's 12-year sentence was not excessive. Defendant was career offender — he had 11 prior felony convictions. At sentencing hearing, state entered into evidence certified copies of 7 of defendant's 11 prior felony convictions, including one conviction for aggravated burglary and six convictions for motor vehicle habitual offender violations. Although none of defendant's prior convictions were violent or drug-related offenses, this fact does not render defendant's sentence unlawful. (*State v. Davenport*, 41 TAM 5-20, 10/12/15, Knoxville, McMullen, 9 pages.)

CRIMINAL SENTENCING: Motion to Correct — Legality — Consecutive Sentencing. On 4/7/95, defendant pled guilty to possession of cocaine with intent to sell and received sentence of eight years as Range I offender. Judgment form indicates that sentence is to be served concurrently with "[f]ederal [s]entence." On 7/28/14, defendant filed motion pursuant to TRCrP 36.1, arguing that his sentence was illegal because trial court ordered his state sentence to be served concurrently to his federal drug sentence in direct contravention of TRCrP 32(c) and TCA 40-20-111(b). Defendant argued that he was on bail for state charges when he committed federal offense. On 9/10/14, trial court summarily denied defendant's motion. State concedes that defendant presented colorable claim for relief from alleged illegal sentence in his state and federal convictions because defendant alleges that he committed felony offense while he was on bail for state drug offense. TRCrP 36.1, by its explicit terms, states that defendant may "at any time" seek correction of illegal sentence. In previous opinion concerning dismissal of defendant's previously filed petition for writ of habeas corpus, petition for post-conviction relief, and petition for writ of error coram nobis, panel of this

court pointed out that state sentence had “apparently expired.” But TRCrP 36.1 does not exempt its applicability to “expired” sentence. Case is remanded to trial court for further proceedings consistent with this opinion and in compliance with all provisions of TRCrP 36.1. (*State v. McCroby*, 41 TAM 5-21, 9/29/15, Knoxville, Woodall, 6 pages.)

CRIMINAL SENTENCING: Motion to Correct — Legality.

On 3/29/04, petitioner was convicted of two counts of sale of .5 gram or more of cocaine within 1,000 feet of school. Petitioner was sentenced as Range II multiple offender to 32 years and six months for each offense, to be served concurrently. On 6/4/14, petitioner filed “Motion/Memorandum to Correct illegal Sentence” pursuant to TRCrP 36.1. He alleged that his sentence was enhanced in violation of his right to jury trial, that state failed to provide notice to seek enhanced punishment, and that he should have been sentenced as Range I offender because he did not have requisite number of prior felony convictions to be sentenced as Range II multiple offender. Trial court did not err in summarily dismissing TRCrP 36.1 motion. (1) Petitioner’s challenge to his right to trial by jury, even if taken as true, would affect his convictions, not his sentences. Hence, he is not entitled to relief on this basis. (2) Gravamen of petitioner’s claim of sentence illegality is that state erroneously relied on prior conviction in Ohio that was dismissed to enhance his offender status. But alleged error in offender classification should be raised on direct appeal. Accordingly, petitioner’s claims, even if true, are not within purview of TRCrP 36.1. Moreover, petitioner’s assertions are not supported by record. In its motion to dismiss, state attached its timely filed notices of intent. Moreover, case which state relied upon to enhance punishment was not subject of acquittal or dismissal. Rather, petitioner pled guilty to aggravated drug trafficking. Here, petitioner was convicted of two counts of sale of .5 gram or more of cocaine within 1,000 feet of school, Class A felony. As Range II multiple offender, he was subject to sentence ranging between 25 and 40 years. Trial court imposed mid-range sentence of 32 years and six months for each conviction, to be served concurrently. Hence, petitioner received authorized sentences. Petitioner failed to state colorable claim for relief pursuant to TRCrP 36.1. (*State v. Lindsey*, 41 TAM 5-22, 9/29/15, Knoxville, McMullen, 4 pages.)

CRIMINAL SENTENCING: Motion to Correct. On 10/4/00, petitioner was convicted of first degree murder, felony murder, and especially aggravated robbery. Murder convictions were merged. By agreement of parties, especially aggravated robbery offense was amended to aggravated robbery. Petitioner was sentenced to life imprisonment and 12 years, to be served concurrently. On appeal, this court reversed first degree murder conviction based on harmful error in jury instructions relative to that count. This court affirmed felony murder and aggravated robbery convictions well as sentences. Tennessee Supreme Court denied application for permission to appeal on 3/22/04. Petitioner subsequently filed untimely petition for post-conviction relief, and this court affirmed post-conviction court’s summary dismissal. Petitioner thereafter repeatedly sought habeas corpus relief without success. On 1/15/15, petitioner filed *pro se* “Motion to Set Aside Illegal Sentence Pursuant to Rule 36.1 TRCP.” Petitioner asserted that he was entitled to relief because trial court committed plain error in failing to charge jury on circumstantial evidence and in failing to provide jury with written instructions. Trial court did not err in summarily dismissing motion to correct illegal sentence. Petitioner waived his claim that trial court did not follow applicable sentencing statutes for

first degree murder because he failed to include issue in his TRCrP 36.1 motion. Waiver aside, considering all of petitioner’s assertions as true and viewing them in light most favorable to him, he has not presented colorable claim for relief. Petitioner failed to state any claim regarding illegality of his sentences. Rather, he alleges that trial court committed plain error in its jury instructions and in its sentencing procedure, claims which should have been addressed on direct appeal or in timely-filed petition for post-conviction relief. Moreover, this court cannot consider issue under its discretionary “plain error” review where record does not clearly establish what occurred in trial court. This court is not able to review allegations of erroneous jury instructions or sentencing procedure absent corresponding transcripts. Here, petitioner failed to establish all five factors required for plain error. At time of petitioner’s offenses, first degree felony murder was punishable by mandatory minimum of life imprisonment. For aggravated robbery conviction, Class B felony, petitioner was sentenced as Range I standard offender to 12 years, maximum sentence in range. Hence, petitioner received authorized sentences. (*Winters v. State*, 41 TAM 5-23, 9/29/15, Knoxville, McMullen, 4 pages.)

▼ Holding in *Ferguson* does not apply to cases where evidence is lost or destroyed prior to adoption of Post-Conviction DNA Analysis Act

CRIMINAL PROCEDURE: Post-Conviction DNA Analysis Act — Exculpatory Evidence.

In 1998, petitioner was convicted of rape of child. On 7/13/14, petitioner commenced this action requesting post-conviction relief in form of DNA analysis pursuant to TCA 40-30-303. In his petition, petitioner alleged that at time of his original trial in 1998, DNA testing was in its relative infancy and that because DNA technology has “improved substantially [it] would now allow for the same swabs to be adequately tested.” Petitioner averred that this would “show that the material collected from the cotton pad used to swab the victim’s vulva did not belong to or come from the Petitioner.” Post-conviction court concluded that petitioner failed to establish second and third requirements of TCA 40-30-304. Post-conviction court found that petitioner had “filed no evidence with the Court that show[ed] that the evidence that [was] to be tested still exist[ed] in such a state as to allow for DNA testing.” Post-conviction court noted that state had “responded with allegations that the evidence in question no longer exist[ed].” Post-conviction court noted that state had “responded with allegations that the evidence in question no longer exist[ed].” Post-conviction court further found that record reflected that DNA testing had been attempted prior to petitioner’s trial, but sample was too small for analysis. Post-conviction court stated that petitioner failed to provide any proof that additional testing “would overcome this problem.” (1) Petitioner argues that post-conviction court erred in concluding that he had failed to prove that evidence was still in existence and in condition sufficient to allow for testing. Petitioner asserts that state’s response alleging that requested evidence was no longer in existence is insufficient to prove that evidence is in fact no longer available for testing. Further, petitioner argues that “a *pro se* petitioner should not be required ... to present proof establishing that the physical evidence is in such a condition that DNA testing can still be conducted” in order to survive summary dismissal. Rather, petitioner submits that better practice is for post-conviction court to appoint counsel “so that counsel can provide the post-conviction court with affidavits from experts, which address the testability of the physical evidence.” In support of his contention that state did not provide

adequate proof that requested evidence is no longer in existence, petitioner relies upon *Griffin v. State*, 29 TAM 34-30 (Tenn.Cr.App. 2004), *reversed on other grounds by Griffin v. State*, 182 SW3d 795 (Tenn. 2006). In that case, panel of this court examined whether state's "blanket" response that "[n]o DNA evidence exists which could be subject to testing or analysis at this time" provided a substantial basis for the post-conviction court to conclude that the Petitioner has failed to meet criterion (2) of TCA 40-30-304. This court noted that state's response "offered no explanation regarding evidence which might have existed previously or regarding efforts to locate evidence still existing." This court went on to say that "[i]f the state is remiss in providing an explanation or if its explanation is not sufficiently detailed, the [post-conviction] court has an obligation to make reasonable factual inquiries before dismissing the petition." But post-conviction courts are not required to "conduct lengthy or protracted evidentiary hearings on the matter." *Griffin* is distinguishable from instant case because here, unlike in *Griffin*, state's response specifically outlined steps it had taken to locate testable evidence from petitioner's case. In *Griffin*, trial court merely held that cursory assertion that evidence no longer existed, unsupported by explanation which is "sufficiently detailed," could not support summary dismissal of petitioner's action. Petitioner asserts that state's response is "further weakened" by its failure to attach affidavits from people it contacted when attempting to locate evidence. But panel of this court has previously affirmed post-conviction court's summary dismissal of petition where state outlined specific steps it had taken in attempt to locate evidence, even though no affidavits from custodians of evidence were provided. Because in this case state provided detailed response outlining its unsuccessful attempts to locate requested evidence, post-conviction court had sufficient basis from which to conclude that petitioner failed to prove evidence was still in existence. In addition, petitioner provided no authority in support of his argument that *pro se* petitioner should not be required to present proof that evidence is still in testable condition in order to survive summary dismissal. TCA 40-30-307 makes clear that appointment of counsel is discretionary. Moreover, even with assistance of counsel on appeal, petitioner has provided no proof that evidence he seeks to have analyzed is currently in testable condition. In sum, petitioner failed to satisfy TCA 40-30-304(2) — that evidence is still in existence and in condition sufficient to allow for DNA analysis. Failure to prove any one of requirements of TCA 40-30-304 is fatal to action. Hence, post-conviction court did not abuse discretion in summarily dismissing petition. (2) Petitioner asserts that, upon concluding that evidence is no longer in existence and in testable condition, his case should nonetheless be remanded for hearing pursuant to *State v. Ferguson*, 2 SW3d 912 (Tenn. 1999). In *Ferguson*, Tennessee Supreme Court addressed "consequences [that] flow from the State's loss or destruction of evidence alleged to have been exculpatory." Analysis in *Ferguson* was focused on state's pretrial obligation to preserve evidence that might prove exculpatory. Therefore, panels of this court have repeatedly refused to extend *Ferguson* holding to cases brought under Post-Conviction DNA Analysis Act (Act), where petitioner's conviction predated implementation of Act. Furthermore, other panels of this court have questioned whether rationale espoused in *Ferguson* would ever apply in post-conviction case. These cases reflect sound policy that it would be "an unreasonable burden on the State to forever preserve each article of evidence collected in every investigation on chance that it may later be called upon for further analysis." In this particular

case, petitioner was convicted in 1998, three years before adoption of Act and 16 years before filing of this action. Petitioner provided no authority or rationale that would persuade this court to change course from previous decisions and apply *Ferguson* to cases where evidence is lost or destroyed prior to adoption of Act. (*State v. Wilks*, 41 TAM 5-24, 9/30/15, Jackson, Thomas, 8 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner was convicted of especially aggravated kidnapping and reckless endangerment. He was sentenced as especially mitigated offender to 13.5 years. In this appeal of denial of petition for post-conviction relief, petitioner contends that counsel was ineffective in failing to communicate eight-year plea offer. Trial counsel testified that he communicated to petitioner state's offer of eight years at 30% and that he discussed offer with petitioner and petitioner's mother on several occasions. Although petitioner and his mother claimed trial counsel never communicated state's offer, post-conviction court explicitly credited trial counsel's testimony. (*Bigsbee v. State*, 41 TAM 5-25, 9/22/15, Nashville, Holloway, 8 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner was convicted of aggravated robbery. He received effective sentence of 30 years with 60% release eligibility as career offender. In this appeal of denial of petition for post-conviction relief, petitioner contends that he was denied effective assistance of counsel. (1) Petitioner contends trial counsel was ineffective in failing to challenge pretrial identification by Lawson. Lawson's identification was neither product of impermissibly suggestive procedure nor unreliable. Show-up occurred shortly after crime occurred, and petitioner was apprehended as part of ongoing on-scene investigation. Moreover, Lawson gave accurate description of perpetrator before show-up occurred, specifically noting that petitioner had changed his shirt and discarded his ball cap, and testified that she had "no doubt" that petitioner was man she saw fleeing Kroger parking lot with pocketbook. Because there is no reasonable probability that motion to suppress identification would have been successful, petitioner did not establish either deficient performance or prejudice. (2) Petitioner contends trial counsel was ineffective in failing to pursue motion to suppress petitioner's statements and confession. According to Detective Cole, petitioner initiated second interview in which he confessed to crime and made confession voluntarily, not in exchange for reduced charge. Petitioner failed to prove that trial counsel's decision not to pursue motion to suppress his statements was prejudicial because there is no reasonable probability that motion to suppress would have been granted. (3) Petitioner asserts he received ineffective counsel because trial counsel failed to adequately investigate case. Petitioner did not present any evidence of what additional preparation or investigation by trial counsel would have produced in petitioner's favor. Post-conviction court found trial counsel met with petitioner several times, adequately prepared defense, and ably presented that defense at trial. Evidence in record supports these findings. (*Boling v. State*, 41 TAM 5-26, 9/24/15, Knoxville, Easter, 13 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner was convicted of aggravated kidnapping and aggravated assault. He received effective sentence of life without parole. In this appeal of denial of petition for post-conviction relief, petitioner contends that he received ineffective assistance of counsel. (1) Petitioner contends trial counsel was ineffective in failing to call Jones as witness. Even if Jones had testified definitively at trial that outer security door did not have doublelock, remaining

evidence would have been more than sufficient for jury to have found that petitioner falsely imprisoned victim. Petitioner held victim captive for significant amount of time before he ever left residence, locking her inside. (2) Petitioner contends trial and appellate counsel were ineffective in failing to raise double jeopardy issue. There is no evidence that legislature intended to prohibit multiple punishments in circumstances such as those in this case. Given that elements of two indicted offenses were different, they were two separate crimes. Accordingly, convictions did not violate double jeopardy. (*Hubbard v. State*, 41 TAM 5-27, 9/25/15, Jackson, Ogle, 13 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner was convicted of two counts of felony murder and one count of especially aggravated robbery. He received consecutive life sentences and concurrent 12-year sentence. In this appeal of denial of petition for post-conviction relief, petitioner contends trial counsel was ineffective. (1) Petitioner contends trial counsel was ineffective in failing to interview Daniels. Post-conviction court rejected petitioner's assertion that "the proof establishing his presence at the scene of the murders is solely based on the testimony of co-defendants, accomplices and Daniels, who was also an accomplice." Post-conviction court found that testimony of Daniels and co-defendants was corroborated by petitioner's cell phone records as well as note he passed to Carino "relating to events occurring at scene of murders." (2) Petitioner contends trial counsel was ineffective in failing to properly challenge conflict of interest involving petitioner's and Hutson's counsel. Hutson's counsel was no longer representing Hutson at time of trial. At post-conviction hearing, petitioner did not present any proof to establish reasonable probability that independent motion raised by trial counsel would have resulted in different outcome (3) Petitioner contends trial counsel was ineffective in failing to challenge admission of coded note on direct appeal, even though issue was included in motion for new trial. Post-conviction court found that "[n]o proof was shown by the petitioner that the note was improperly admitted. No authority was cited by the petitioner that the ruling made by the trial court was improper. The petitioner has not shown that had [trial counsel] presented this issue to appellate court, he would have been successful." Trial counsel was not ineffective in this regard. (4) Petitioner asserts that trial counsel failed to properly establish grounds for his motion to withdraw as counsel, and further failed to seek appellate review after denial of motion to withdraw. At post-conviction hearing, trial counsel testified that his relationship with petitioner significantly improved after family members and other third parties stopped interfering with his representation. This court fails to see what more counsel should have done in arguing motion to trial court, or how this issue would have had merit on appeal. (5) Petitioner contends trial counsel was ineffective in failing to file pretrial motions concerning significant evidentiary and procedural issues. Petitioner has not demonstrated how he was prejudiced by counsel's pretrial motion practice. At evidentiary hearing, petitioner did not present any proof or argument to establish reasonable probability that filing of petitioner's requested pretrial motions would have resulted in different outcome. (6) Petitioner contends trial counsel should have presented mitigating factors or evidence to support concurrent sentencing; should have objected to trial court's findings that petitioner committed offenses while on probation; and should have informed court reason that state withdrew its notice to seek enhanced punishment. Petitioner failed to establish reasonable probability that, but for counsel's alleged errors, result of sentencing hearing would have been different. Petitioner did not

show that he was prejudiced by counsel's failure to object to trial court's finding that he committed offenses while on probation, given that this court upheld separate finding that petitioner was dangerous offender. Petitioner did not show that he would have received concurrent sentences if trial counsel informed court of basis of state's withdrawal of its notice of intent to seek enhanced punishment. (*Cofer v. State*, 41 TAM 5-28, 9/28/15, Knoxville, McMullen, 22 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner was convicted of second degree murder. He received sentence of 25 years. In this appeal of denial of petition for post-conviction relief, petitioner contends trial counsel was ineffective. Petitioner contends trial counsel was ineffective in failing to present his sister and mother as mitigation witnesses at sentencing hearing. Trial court found no statutory mitigating factors during sentencing hearing, but it considered mitigating evidence of petitioner's work history and involvement in GED and anger management classes in prison as "other factors." Post-conviction court found that counsel made tactical decision not to present mitigation witnesses in addition to mitigation evidence presented and that benefit of petitioner's mother's testimony was "unclear" given her knowledge of petitioner's criminal record. Further, petitioner has not shown that he was prejudiced by trial counsel's failure to present petitioner's mother and sister at sentencing hearing. Although testimony of his sister and mother could have been considered relevant to mitigating factor (13) (any other factor consistent with purposes of Chapter 35 of Title 40), trial court found that existing enhancement factors far outweighed any mitigating factors. Moreover, there is no evidence that result of sentencing hearing would have been different had witnesses been presented. (*Houston v. State*, 41 TAM 5-29, 9/28/15, Jackson, Montgomery, 8 pages.)

CRIMINAL PROCEDURE: Effective Counsel: Petitioner was convicted of aggravated burglary, especially aggravated kidnapping, second degree murder, and felony murder. He received effective sentence of life plus 22 years. In this appeal of denial of petition for post-conviction relief, petitioner contends trial counsel was ineffective. (1) Petitioner contends trial counsel was ineffective in that she did not convey or discuss settlement offer, did not discuss material in state's response to discovery, did not explain possible punishment or exposure he faced on his charges, did not discuss strategy of defense or possible witness testimony, did not prepare him to testify at trial, and was unprepared for trial. Counsel testified that she had copy of discovery, and she talked to petitioner about what state's proof might be at trial. She discussed who state's witnesses might be with petitioner, and she interviewed witnesses. Counsel recalled that petitioner's position throughout was that he acted in self-defense and that was their only defense at trial. Counsel said that she discussed petitioner's testifying with him even though she regretted not discussing "courtroom etiquette [with the petitioner] a little bit more," elaborating that she was "shocked at some of the language" petitioner used on stand. Post-conviction court accredited counsel's testimony at to these issues. (2) Petitioner contends trial counsel was ineffective in failing to attack his underlying aggravated burglary charge because "[h]ad the aggravated burglary been defeated on the elements, there would not have been a conviction for felony murder." Counsel explained that her legal strategy was that she thought she could get judgment of acquittal on felony murder charge because indictment indicated that underlying felony was burglary, not aggravated burglary, and she believed that state did not prove "just regular burglary." It cannot be concluded that

counsel rendered deficient performance because she made informed strategy in how to try to defeat most serious charge against petitioner, although in hindsight strategy was unsuccessful. (3) Petitioner contends counsel was ineffective on appeal because she “fumbled and stumbled through the essential preparation and transmittal phase of the appeal,” and failed to support issue of constructive amendment of indictment in appellate brief. Counsel testified that she filed for extension of time because she did not have entire record. She filed brief but asked this court “to allow [her] time to file a supplemental brief pursuant to the supplemental record being filed.” But she ultimately decided not to file supplemental brief because she “had covered all [her] issues basically in the initial brief that [she] needed to and having received the supplement[al] briefs there was no new issue that needed to be raised.” Petitioner cannot prove that he was prejudiced by any of counsel’s alleged deficiencies on appeal because this court nonetheless addressed all of his issues, including constructive amendment of indictment issue. (*Swett v. State*, 41 TAM 5-30, 9/28/15, Nashville, Glenn, 18 pages.)

CRIMINAL PROCEDURE: Effective Counsel — Guilty Plea. Petitioner pled guilty to sale of less than .5 gram of cocaine in drug-free zone. He received sentence of six years to be served at 100%. In this appeal of denial of petition for post-conviction relief, petitioner contends trial counsel was ineffective and that his guilty pleas were entered unknowingly and involuntarily. Petitioner contends that his guilty plea was not knowingly and voluntarily entered because he thought that he was only going to have to serve 30% of his sentence because counsel failed to inform him he was going to be serving 100% of his sentence. Petitioner did not prove that counsel’s representation of him was deficient. Counsel presented state’s two offers to petitioner and discussed with him consequences of his choosing each offer. She recalled that petitioner did not like either scenario but that he understood ramifications of each offer. Counsel negotiated sentence of six years to encompass multiple felony drug charges for which petitioner was facing mandatory consecutive sentences. Furthermore, petitioner did not prove his guilty plea was not knowingly and voluntarily entered. Transcript from hearing shows that trial court repeatedly informed petitioner that he would be serving his sentence day for day at 100%. Petitioner is familiar with criminal justice system because he has previously been incarcerated, and he acknowledged his understanding. Transcript reveals that trial court questioned petitioner about his understanding of plea agreement and that petitioner understood his sentence and ramifications of pleading guilty. (*Holder v. State*, 41 TAM 5-31, 9/28/15, Nashville, Wedemeyer, 10 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner was convicted of sexual battery and attempted sexual battery. He received effective one-year sentence. In this appeal of denial of petition for post-conviction relief, petitioner contends trial counsel was ineffective in failing to request mental health evaluation before trial. Counsel’s performance was not deficient in regard to ROCIC form because petitioner failed to prove by clear and convincing evidence counsel knew or should have known of its existence. But counsel’s performance was deficient in other respects. Petitioner advised counsel of his hallucinations while in jail, and counsel relied upon opinions of jail personnel that petitioner was “faking it.” Counsel’s reliance on mental health assessment by correctional officers did not negate counsel’s duty to investigate petitioner’s mental health further. Counsel, who was not trained mental health professional, was not entitled to rely on his own assessment of petitioner’s mental health in light

of counsel’s learning early during representation of petitioner’s hallucinations and obsessive-compulsive disorder (OCD). Counsel’s decision not to investigate further was deficient performance. Counsel’s defense theory centered on petitioner’s compulsive behaviors to show that petitioner was not taking photographs for sexual gratification, but rather as result of compulsion he could not control. During opening statement, counsel discussed OCD in detail. Counsel did not raise any other defenses. Evidence preponderated against post-conviction court’s determination that counsel’s failure to investigate petitioner’s mental health was not deficient. Relative to question of prejudice, petitioner did not present any expert testimony at post-conviction hearing regarding his mental health. As result, petitioner failed to establish that he was prejudiced by counsel’s failure to request mental health evaluation. Alternatively, petitioner argues that he qualified for narrow exception in which ineffective assistance can be proven without showing prejudice. Petitioner admitted under oath that his mental health issues were not cause of his unlawful behavior. Petitioner did not show that counsel’s deficiency was so fundamental that prejudice must be presumed. Therefore, petitioner is not entitled to relief. (*Herrera v. State*, 41 TAM 5-32, 9/30/15, Jackson, Montgomery, 12 pages.)

CRIMINAL PROCEDURE: Guilty Plea. Petitioner pled guilty in three separate cases. He received effective sentence of 31 years. In this appeal of denial of petition for post-conviction relief, petitioner contends that his guilty plea was entered involuntarily and unknowingly and that he was denied effective assistance of counsel. Petitioner did not present sufficient testimony at hearing to show that he would have insisted upon proceeding to trial or that he did not understand that some of his convictions would be served consecutively. Moreover, post-conviction court found petitioner’s testimony at both plea hearing and post-conviction hearing belied his claim, noting that “transcript of plea hearing clearly indicates that the consequences of the plea were explained in detail to the petitioner.” Additionally, although he claimed he was not apprised of contents and effects of plea agreement, petitioner agreed to enter plea after extensive questioning from trial court with regard to his understanding of agreement and his satisfaction with counsel’s representation. Finally, petitioner conceded at post-conviction hearing that trial counsel had discussed facts of case with him. Therefore, petitioner failed to show that his plea was entered involuntarily and unknowingly. (*Jones v. State*, 41 TAM 5-33, 9/24/15, Knoxville, Easter, 8 pages.)


CRIMINAL PROCEDURE: Post-Conviction Relief — Statute of Limitation. On 11/21/00, petitioner pled guilty to rape, Class B felony. He received eight-year sentence of intensive probation. But judgment form did not indicate that petitioner was also subject to lifetime community supervision as required by statute. Almost seven years later, upon motion by state, trial court entered amended judgment containing lifetime community supervision requirement. On 2/21/11, petitioner filed motion to withdraw guilty plea, claiming that his constitutional due process rights were violated because he was not informed that lifetime community supervision was consequence of his plea and because he was not notified of entry of amended judgment. Post-conviction court concluded that it did not have jurisdiction over petitioner’s motion to withdraw guilty plea because it was untimely. But court treated motion as petition for post-conviction relief and took matter under advisement pending Tennessee Supreme Court’s decision in *Bush v. State*, 428 SW3d 1 (Tenn. 2014), on issue of whether holding in *Ward v. State*, 315 SW3d

461 (Tenn. 2010), was retroactively applicable for purposes of post-conviction relief. After *Bush* was decided, post-conviction court dismissed petitioner's converted petition for post-conviction relief. Post-conviction court concluded that due process did not necessitate tolling of post-conviction statute of limitation because petitioner failed to diligently pursue his post-conviction claim after learning that he was required to submit to lifetime community supervision. Specifically, post-conviction court found that petitioner's "testimony dating his discovery of the 13 July 2007 amendment of the judgment to the end of 2007 or the beginning of 2008, establishes that he did have a reasonable opportunity to challenge the amendment or the voluntary or intelligent nature of this guilty pleas before he did so in February 2011." Petitioner contends that post-conviction court erred in dismissing his converted petition for post-conviction relief and ask this court to remand for additional hearing on issue of due process tolling of statute of limitation. Although record does not contain transcript of proceedings before post-conviction court, post-conviction court's 7/7/14 order contains specific findings that petitioner admitted that he learned of amended judgment and lifetime supervision requirement in 2007 or 2008, several years before he initiated relief proceedings in 2011. Given lack of evidence in record, evidence did not preponderate against factual findings of post-conviction court. Petitioner did not meet his burden of proving by clear and convincing evidence that statute of limitation should be tolled on due process grounds. (*Payne v. State*, 41 TAM 5-34, 9/23/15, Knoxville, Easter, 5 pages.)

CRIMINAL PROCEDURE: Post-Conviction Relief — Statute of Limitation. Petitioner pled guilty to aggravated robbery and received effective sentence of eight years. Judgment was

entered on 1/24/11. Petitioner did not pursue any relief on matter until 3/28/14, when he filed *pro se* petition for post-conviction relief. In petition, petitioner stated, "This is my very first appeal and with me being heavily medicated my understanding level was very low, now that I am off any type of meds I can properly bring my case." He also stated that he "was heavily medicated at the time for mental health problems" and that he had "a low IQ." Post-conviction court did not by summarily dismissing petition as untimely. Post-conviction court argues that petitioner's medical records from Tennessee Department of Correction show "that he was psychotic during the one-year statute of limitations." But he does not state specifically when petitioner's mental issues began or what mental issues were; he alleged only that he was heavily medicated and had low IQ. Petitioner made "unsupported, conclusory, [and] general allegations of mental illness," which was insufficient to make prima facie showing of incompetence. (*Hall v. State*, 41 TAM 5-35, 9/25/15, Jackson, Ogle, 4 pages.)

CRIMINAL PROCEDURE: Post-Conviction Relief — Statute of Limitation. CRIMINAL SENTENCING: Life Sentence. Petitioner was convicted of premeditated first degree murder, first degree felony murder, especially aggravated kidnapping, and aggravated robbery. He received effective sentence of life imprisonment plus 15 years. This court affirmed petitioner's convictions on direct appeal. On 7/31/00, Tennessee Supreme Court declined to grant permission to appeal. On 9/12/14, petitioner filed petition for post-conviction relief, arguing that U.S. Supreme Court's decision in *Miller v. Alabama*, 132 SCT 2455 (2012), holding that "mandatory life without parole for those under the age of [18] at the time of their crimes violates the




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Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” established new constitutional right that was not recognized as existing at time of his trial. Post-conviction court did not err in summarily dismissing petition as untimely. Decision in *Miller* was filed on 6/15/12. Petitioner did not file his petition for post-conviction relief until 9/12/14, more than two years after ruling. Furthermore, holding in *Miller* would not apply to petitioner because he was sentenced to life imprisonment and, therefore, eligible for release after serving 51 years. (*Adams v. State*, 41 TAM 5-36, 9/28/15, Jackson, Thomas, 3 pages.)

CRIMINAL PROCEDURE: Habeas Corpus — Indictment — Due Process. APPEAL & ERROR: Timeliness. CONSTITUTIONAL LAW: Retroactivity. In 2008, petitioner was convicted of especially aggravated kidnapping, attempted aggravated robbery, and aggravated burglary. He received effective sentence of 20 years. In this appeal, petitioner appeals denial of his petition for habeas corpus relief. (1) Petitioner’s notice of appeal was filed with Johnson Criminal Court Clerk on 2/11/15, 36 days after filing of order denying relief. Appeal as of right is initiated by filing notice of appeal within 30 days of entry of judgment. In case of *pro se* appellant who is incarcerated, TRAP 20(g) provides that “filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing.” In his *pro se* notice of appeal, incarcerated petitioner certified that his “notice of appeal was put in the prison mail box on January 31, 2015.” Thus, by rule, petitioner’s notice of appeal was timely filed. (2) Petitioner argued that indictments were constructively amended by trial court and that his conviction for especially aggravated kidnapping is improper because it violates due process principles under *State v. White*, 362 SW3d 559 (Tenn. 2012). Petitioner attached to his petition copy of four-count indictment and copy of jury instructions to support his argument that trial court’s instructions operated as constructive amendment to indictments by modifying elements of offenses, thereby rendering indictments void. Even if true, such allegations with regard to error in jury instructions would render convictions merely voidable, not void. In addition, petitioner’s reliance on *White* is misplaced. *White*, decided in 2012, is not retroactive, except to cases that were already in appellate pipeline. Petitioner’s direct appeal was affirmed in 2010 and was, therefore, no longer in appellate pipeline by time *White* was decided. Because petitioner failed to show that his convictions were void or that his sentence has expired, denial of his petition for habeas corpus relief was appropriate. (*Majors v. State*, 41 TAM 5-37, 9/25/15, Knoxville, Easter, 4 pages.)

APPEAL & ERROR: Coram Nobis. CRIMINAL PROCEDURE: Statute of Limitation — Effective Counsel. Petitioner and co-defendant were convicted in 1991 of first degree murder and conspiracy to commit first degree murder for shooting death of petitioner’s father. Both received sentence of life in prison. This court affirmed on appeal, and Tennessee Supreme Court denied permission to appeal. Co-defendant testified at trial and was subject to cross-examination by petitioner’s trial counsel. He admitted that petitioner had discussed killing her father with him but claimed that he refused to participate in murder. Post-conviction court later granted relief to co-defendant, and he subsequently entered best interest guilty plea to second degree murder on 8/13/01 in exchange for 20-year sentence. Since then, petitioner has made multiple attempts to collaterally attack her convictions based upon co-defendant’s plea, wherein she claims that he recanted his trial testimony and accepted responsibility for murder

of her father. Present appeal is based upon petitioner’s second petition for writ of error coram nobis filed *pro se* on 6/9/14. This time, petitioner attached affidavit from co-defendant, dated 3/19/14, recanting his trial testimony and accepting full responsibility for murder of petitioner’s father. Coram nobis court appointed counsel for petitioner as well as district attorney *pro tempore* for state. Coram nobis court summarily dismissed petition as time-barred. Coram nobis court found that petitioner’s claim was not eligible for due process tolling of statute of limitation because petitioner had “meaningful opportunity to litigate this very issue in other collateral attacks” and found that petitioner was at fault for failing to present co-defendant’s recantation “or other similar evidence in one of her earlier claims for relief.” (1) Petitioner filed petition for writ of error coram nobis well beyond one-year statute of limitation period for her 1991 conviction. Therefore, this court must determine whether her asserted ground for relief — co-defendant’s recantation of his trial testimony — actually arose after limitations period and whether strict application of statute of limitation would effectively deny petitioner reasonable opportunity to present her claim. (2) Co-defendant entered his guilty plea in 2001, and petitioner claims that she first learned of co-defendant’s guilty plea in late 2003. Petitioner filed her first petition for *coram nobis* relief in 2010. Ignorance as to existence of claim does not create “later-arising” claim for due process purposes; therefore, petitioner’s claim actually arose in 2001 when co-defendant entered his plea. This court previously held that “[t]he opportunity to assert her claim was within her control after she learned of her codefendant’s guilty plea in late 2003 or early 2004. But “[n]othing in the record explain[ed] why the Petitioner waited [several] years to attempt to present her coram nobis claim.” Even under due process, petitioner must bring claim within reasonable time of learning of later-arising ground for relief. Fact that petitioner unsuccessfully attempted to obtain relief through post-conviction proceedings does not further toll statute of limitation for coram nobis claim. Hence, petitioner is not entitled to further tolling of statute of limitation. (3) Petitioner claims that 2014 affidavit from co-defendant recanting his trial testimony is newly discovered evidence separate and distinct from his 2001 guilty plea. But petitioner has “merely re-package[d] th[e] same claim in a new form” by including affidavit. Despite fact that petitioner’s first petition for coram nobis relief should have been time-barred, she was granted full evidentiary hearing. Petitioner did not seek to obtain affidavit from co-defendant at that time. Petitioner also did not subpoena co-defendant to testify, despite being afforded opportunity to do so. Petitioner was under duty to diligently pursue her claims. Moreover, petitioner’s claim that she was prevented from presenting this evidence at earlier hearing because of ineffective assistance of her prior coram nobis counsel is unpersuasive. There is no constitutional or statutory right to effective assistance of counsel in collateral proceedings such as petitions for writ of error coram nobis or petitions for post-conviction relief. Attorney is petitioner’s agent when acting, or failing to act, in furtherance of litigation, and petitioner must bear risk of attorney error in state collateral proceedings. Hence, petitioner is not excused from her duty to diligently pursue her claims. Waiting over 10 years to obtain affidavit from allegedly recanting witness, after having been granted full evidentiary hearing on previous petition asserting same ground for relief, exceeds reasonable opportunity to present claim in meaningful time and in meaningful manner. Petitioner is not entitled to additional evidentiary hearing to relitigate claim that she was previously afforded meaningful opportunity to present. (*Barnett v. State*, 41 TAM 5-38, 9/23/15, Knoxville, Easter, 6 pages.)

Sixth Circuit Court of Appeals

▼ **When plaintiff hired defendant attorney to represent plaintiff and other parties in suit, during punitive damages phase of trial, defendant did not object on hearsay ground to admission of article, which stated that, in 1998, plaintiff's gross sales were about \$47 million, jury found plaintiff and its co-defendant liable for \$5 million in punitive damages, plaintiff decided to hire new attorneys to handle post-trial matter, new law firms revised proposed judgment affirming trial court's punitive damage award between 7/10 and 9/10, trial court affirmed punitive damages award on 10/1/10, and on 9/29/11, plaintiff filed legal malpractice suit, district court properly ruled that suit was time-barred; plaintiff suffered actual injury when it retained new counsel in 5/10, plaintiff knew or should have known of facts that gave rise to injury when new counsel knew or should have known of alleged wrongful conduct, and hence, plaintiff's malpractice claim accrued no later than 7/10 and is time-barred**

TORTS: Legal Malpractice. CIVIL PROCEDURE: Statute of Limitation. COMMERCIAL LAW: Agency. In 11/04, Americare Systems Inc. (Americare) hired Pinckney, of law firm Howell & Fisher, PLLC, to represent company and other parties in suit in Bedford County, Tenn. Plaintiffs in that suit (Bedford Plaintiffs) sued Americare for negligence that allegedly caused death of relative. During first phase of trial, jury found in favor of Bedford Plaintiffs and awarded compensatory damages. Jury also found that Americare and its co-defendant should be held liable for punitive damages. During phase of trial to determine amount of punitive damages, Bedford Plaintiffs offered into evidence highlighted article from *St. Louis Business Journal*, which stated that in 1998 Americare's gross sales were about \$47 million (hearsay article). Although he recognized article as inadmissible hearsay, not subject to any exception, Pinckney did not object to its admission. On 4/30/10, jury found Americare and its co-defendant liable for \$5 million in punitive damages. Immediately after trial, Americare's Chair, Montgomery, and Pinckney began discussing possible grounds for appeal. According to Americare, Pinckney told Montgomery that he "didn't really represent Americare, but he represented the nurses." Montgomery recognized that was "problem," so he met with Americare's corporate counsel. Because of adverse judgment and punitive damages award, Americare decided to hire new attorneys to handle post-trial matters. Americare retained law firms Miller & Martin, PLLP, and Moore & Lee, PLLC. Between 7/10 and 9/10, firms for both parties reviewed and revised Bedford plaintiffs' proposed judgment affirming trial court's punitive damages award and court's findings of fact. Firms also reviewed trial transcripts and researched various issues, including due process concerns related to punitive damages award. On 10/1/10, trial judge affirmed jury's punitive damages award. Trial judge's findings directly addressed hearsay article, noting that "[t]o the great surprise of this trial judge, there was no hearsay objection to the introduction of this evidence." On 1/17/11, Americare sent letter to Pinckney notifying him of company's intent to pursue legal malpractice claim against him and his firm. It also appealed trial court's punitive damages ruling. On 9/29/11, Americare filed this legal malpractice action against Pinckney and Howell & Fisher in federal district court. District court stayed action pending outcome of appeal against Bedford Plaintiffs. Tennessee Court of Appeals

affirmed trial court's judgment for Bedford Plaintiffs, but reduced punitive damages award from \$5 million to \$2,985,000. On 6/11/14, stay in this malpractice suit was lifted. On 4/2/15, district court granted summary judgment in favor of Pinckney and Howell & Fisher, holding that Americare's legal malpractice claim is barred by one-year statute of limitation. In Tennessee, legal malpractice claims must be commenced within one year after cause of action accrues. Cause of action accrues when plaintiff knows or in exercise of reasonable care and diligence should know that injury has been sustained as result of wrongful or tortious conduct by defendant. Plaintiff must suffer legally cognizable damage — actual injury — as result of defendant's wrongful or negligent conduct, and must have known or in exercise of reasonable diligence should have known that this injury was caused by defendant's wrongful or negligent conduct. (1) For purposes of discovery rule, actual injury occurs when there is loss of legal right, remedy or interest, or imposition of liability. But plaintiff may also suffer actual injury if he or she suffers "some actual inconvenience" — such as incurring expense, as result of defendant's negligent or wrongful act. In legal malpractice action, incurring legal fees and expenses may constitute actual injury, even though no adverse judgment or order has been entered. Plaintiff may not delay filing suit until all injurious effects or consequences of alleged wrong are actually known to plaintiff. Inconvenience, time, and expense that Americare incurred by retaining new counsel constituted "actual injury" under discovery rule. But for \$5 million punitive damages award, it would not have hired new counsel. Americare incurred fees when it retained counsel to contest punitive damages award and prepare for appeal. Decision on 10/1/10 that affirmed jury's award of punitive damages was "additional damage," but it was "not necessary for [Americare] to have suffered all the injurious effects or consequences of the alleged negligence in order for the statute to begin running." Americare cites *Cherry v. Williams*, 36 SW3d 78 (Tenn.App. 2000), for proposition that "entry of an adverse judgment [is] the starter pistol for the running of the statute of limitations on litigation malpractice." Hence, according to Americare, "only point at which [it] can be said to have sustained an injury is once the trial court entered judgment on October 1, 2010." But *Cherry* merely recognizes that entry of judgment is "most easily identifiable time" that court could use to determine when actual injury has occurred not only time. By no means should it be read as holding that actual injury cannot occur until adverse judgment has been entered. Court's entry of judgment might always be considered actual injury, but that does not foreclose possibility that injury sufficient to warrant accrual of statute of limitation occurred before entry of that judgment. Americare also asserts that if claim had been filed before entry of judgment, court would have dismissed it as not being ripe for review. Americare argues that jury's punitive damages award was merely speculative at that point, and was not final until affirmed by trial court. Americare's argument seems to be that it had not suffered any real harm until jury's punitive damages award had been affirmed. But negligent conduct was attorney's malpractice, and harm suffered was fees that Americare incurred by retaining new counsel. Therefore, whether punitive damages award had been affirmed or not, Americare had ripe legal malpractice claim well before jury's award was affirmed when it had suffered damages by incurring expenses of retaining new counsel as result of alleged malpractice. Despite having suffered injury, in form of inconvenience, time, and expense of retaining new counsel, statute of limitation could not begin to accrue until Americare had suffered injury and was also aware of Pinckney's tortious or negligent conduct. (2) Under Tennessee law, plaintiff must have actual or constructive knowledge

that his or her injury was sustained as result of wrongful or tortious conduct by defendant attorney. Not only must plaintiff know that he has suffered injury, but he must also know of defendant's wrongful or tortious conduct that gave rise to injury. Plaintiff can have either actual or constructive knowledge of wrongful or tortious conduct. Actual knowledge of conduct could occur where attorney admits committing malpractice or where plaintiff has been informed by another attorney that malpractice has occurred. Plaintiff has constructive knowledge of conduct when he or she reasonably should have become aware of facts sufficient to put reasonable person on notice that injury has been sustained as result of defendant's negligent or wrongful conduct. New attorneys that Americare hired knew or should have known of Pinckney's alleged negligent conduct. That knowledge, whether actual or constructive, is imputed to Americare. District court analogized facts of this case to *Cardiac Anesthesia Services PLLC v. Jones*, 385 SW3d 530 (Tenn.App. 2012). In both cases, plaintiffs had retained new, independent counsel. Both cases also involve filings that required plaintiffs to take some affirmative action. In *Cardiac Anesthesia Services*, plaintiffs defended against motion for summary judgment, and, here, Americare drafted revised proposed judgment following jury's verdict and punitive damages award. Billing records show that between 7/10 and 9/10, firms for both parties reviewed and communicated about Bedford Plaintiffs' proposed judgment affirming jury's punitive damages award. That proposed judgment, revised by Americare's newly-retained counsel, specifically referred to hearsay article that was basis for punitive damages award. Further, billing records show that Americare's new counsel reviewed trial transcript and researched punitive damages issues. Crux of Americare's malpractice case against Pinckney is that any reasonably prudent attorney would have identified article as hearsay and objected to its admission at trial. Assuming that newly retained counsel are reasonably prudent, attorneys necessarily would have identified article as hearsay when they reviewed trial records and proposed judgment, and prepared to contest punitive damages award. Newly retained counsel either knew or should have known that Pinckney's failure to object to hearsay article was negligent conduct. Their knowledge is imputed to their client. Hence, Americare, through its new attorneys, had actual or constructive knowledge of facts giving rise to injury, on or before, 7/10 — time it revised Bedford Plaintiffs' proposed judgment that specifically referenced hearsay article. Americare claims that it would be bad policy to require appellate counsel to "squeal" on trial counsel by requiring that they notify client of trial counsel's malpractice. This court does not set Tennessee policy. We hold only that, on these facts, appellate counsel either knew or should have known of Pinckney's alleged negligent or wrongful conduct, and Tennessee law imputes this to Americare. This court recognizes Americare's point that under Tennessee law, question as to "whether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a question of fact." But this is not always case. Given relationship between article, punitive damages award, and Americare's injury, Americare reasonably should have become aware of facts sufficient to put reasonable person on notice that Pinckney's failure to object to article caused injury, in 7/10, well before 10/1/10. Americare suffered actual injury when it retained new counsel in 5/10. Company knew or should have known of facts that gave rise to injury — Pinckney's negligent representation at trial — when new counsel knew or should have known of alleged wrongful conduct. Accordingly, Americare's malpractice claim accrued no later than 7/10, and is, therefore, time-barred. (*Americare Systems Inc. v. Pinckney*, 41 TAM 5-39, 1/6/16, Keith, 11 pages, N/Pub.)

▼ **When wife was injured in accident involving car that her husband was driving, wife filed suit against husband's estate for damages, and insurance company, through which husband had automobile insurance policy, brought action for declaratory judgment seeking to declare that policy exclusion for family member precluded coverage for wife, district court properly granted insurer's motion for judgment on pleadings; wife argues that policy is structurally ambiguous because of distance between coverage provision and exclusion, but there is no binding precedent supporting argument that exclusion located many pages away from coverage provision it limits renders policy ambiguous; Tennessee courts have repeatedly held that family member exclusions are enforceable**

INSURANCE: Automobile Insurance — Waiver of Policy Requirements — Estoppel to Deny Coverage. CIVIL PROCEDURE: Laches. On 12/13/09, Timothy Ryan died in car accident involving vehicle he was driving. His passengers, his wife Margaret Ryan and their grandchildren, were injured in accident. At time of accident, Timothy Ryan's insurance policy through Depositors Insurance Company (Depositors) was in effect. In letter to Andrew Ryan — personal representative for two children injured in accident — dated 10/21/10, Depositors advised him that there was "\$5000 in available medical payments coverage under this policy that is available regardless of fault," and that statute of limitation for his bodily injury claims would expire 12/13/10. Margaret Ryan was copied on this letter, but letter references only her grandchildren's claims, not her own. On 12/1/10, Margaret Ryan and Andrew Ryan, individually and as father and personal representative of grandchildren, filed action against Estate of Timothy Ryan (Estate) in state court, seeking damages for physical and emotional pain and suffering. Depositors provided legal representation to Estate in state court action but alleged that one of Policy's exclusions (Exclusion) precludes coverage for Margaret Ryan's injuries. At end of Policy is Exclusion for "bodily injury" to you or any "family member." Timothy Ryan and Margaret Ryan are both listed on "DECLARATIONS" page as "named insured." In letter to Margaret Ryan dated 3/28/13, Depositors informed her that "even if you are successful in your claims against [the Estate], this insurance policy will provide no coverage or pay any judgment you might obtain against the estate." On 5/22/14, Depositors amended its claim under 28 USC 2201 and FRCP 15(a)(1)(B) and 57 seeking declaration that Policy does not provide coverage for Margaret Ryan's injuries. Margaret Ryan and Estate filed answers, raising affirmative defenses of laches and waiver and estoppel and asserting that relevant exclusion is contrary to public policy and that Policy is contract of adhesion. Depositors moved for judgment on pleadings. Margaret Ryan opposed motion and Estate adopted her brief in opposition. District court granted Depositors' motion. It concluded that Exclusion is not ambiguous and that it is standard for insurance companies to provide coverage in one section and narrow it through exclusion, as Depositors did here. Regarding affirmative defenses, district court noted that Ryans did not cite authority for their argument that Depositors' three-year delay was unreasonable. In addition, district court indicated that Ryans alleged prejudice only to Margaret Ryan, not Estate, so laches defense did not apply. Regarding waiver/estoppel defense, district court concluded that to succeed, Depositors would have had to make misrepresentation to Estate not to Margaret Ryan, but also that express terms of Policy precluded application of doctrine. Finally, district court concluded that Policy's terms were not "oppressive or unconscionable," nor "beyond the reasonable expectations of an ordinary person," so contract of adhesion

defense also failed. (1) Appellants argue that district court erred because it analyzed affirmative defenses under heightened pleading standard. District court asserted that “a defendant’s pleadings must contain sufficient facts to state a [defense] that is plausible on its face.” Nonetheless, district court did not limit its analysis to statements contained in appellants’ answers but rather analyzed merits of arguments presented in briefs and concluded they lacked merit. It seems this circuit has not addressed precise issue of whether *Twombly/Iqbal* heightened pleading standard applies to affirmative defenses. But because district court did not actually apply that standard to appellants’ affirmative defenses, it is unnecessary to resolve this issue. (2) Appellants contend Policy is ambiguous because of its structure. Exclusion is substantively unambiguous. It is plainly labelled as exclusion, explicitly references which coverage provision it limits, and does not wholly eliminate coverage previously granted. Moreover, Tennessee courts have routinely upheld similar provisions as unambiguous. Heart of appellants’ argument is that Policy is structurally ambiguous because of distance between coverage provision and Exclusion. Yet, appellants point to no binding precedent supporting that exclusion located many pages away from coverage provision it limits renders policy ambiguous. To contrary, although not specifying distance between coverage provision and exclusion, Tennessee case law indicates that it is not uncommon for exclusion to be separate from coverage provision to which it relates. When reading Policy as whole and taking care not to construct ambiguities, separation between coverage and Exclusion provisions does not create ambiguity. Exclusion’s number, PP0326, and other endorsement numbers are referenced in “DECLARATIONS” page at beginning of Policy. While appellants insist that based on “Quick Reference Guide,” “reasonable consumer” would believe first 15 pages comprised entire Policy, reasonable consumer would heed warnings to “READ YOUR POLICY CAREFULLY” and not ignore pages following main policy provisions, particularly one labelled “LIABILITY COVERAGE EXCLUSION ENDORSEMENT,” that references provision within main policy. Because it is common for insurance policy to grant coverage, then exclude it later in policy, appellants’ arguments that “Declarations page” and “Insuring Agreement” appear to grant coverage to Margaret Ryan fail, because any coverage these provisions purported to grant was excluded by Exclusion. Because there is no ambiguity, based on Exclusion’s ordinary meaning, Margaret Ryan is not covered under Policy. Exclusion applies to “you” or any “family member.” Margaret Ryan falls under definition of “you” because she is “named insured,” as well as definition of “family member” because she is related to another named insured, Timothy Ryan, by marriage and they lived together. Thus, Exclusion precludes coverage for Margaret Ryan’s injuries. (3) Without argument or citation to case law or record, appellants maintain that Depositors’ three-year delay “clearly shows a lack of diligence.” Regarding prejudice prong of laches analysis, they argue that 2010 letter to Margaret Ryan “effectively induc[ed] or at least encourag[ed] the litigation,” that both Margaret Ryan and Estate suffered prejudice because of expenses incurred in state court litigation, and that Estate was prejudiced because it will face judgment if Margaret Ryan is successful in that suit. Equitable defense of laches rests on principle that “equity will not intervene on behalf of one who has delayed unreasonably in pursuing his rights.” To succeed on laches defense, one must establish inexcusable, negligent, or unreasonable delay on party asserting claim. Despite appellants’ declaration that Depositors’ three-year delay “clearly shows a lack of diligence,” there is no bright-line for how long delay will be tolerated. Depositors provides no justification for its delay. But it is not nec-

essary to contemplate whether delay was “inexcusable, negligent, or unreasonable” because Estate suffered no prejudice. In district court, Margaret Ryan responded to Depositors’ motion for judgment on pleadings, and Estate filed motion adopting her response. Response does not allege any prejudice to Estate, just to Margaret Ryan, and Estate makes only conclusory allegations of prejudice in its answer. Therefore, any arguments as to prejudice suffered by Estate are forfeited. Because underlying declaratory judgment action concerns Depositors’ legal obligations regarding Estate, not with Margaret Ryan, proper inquiry is whether Estate, not Margaret Ryan, suffered prejudiced. Thus, appellants’ laches defense fails. (4) Appellants declare that Depositors did not tell Margaret Ryan about Exclusion until 2013, yet it copied her to 2010 letter to her son, which did not mention that coverage was excluded for Margaret Ryan. Letter, they assert, created promissory estoppel, inducing Margaret Ryan to act to her detriment. Although parties use terms interchangeable, Tennessee courts have recognized distinction between estoppel and waiver. Waiver is intentional or voluntary relinquishment of known right. But, in Tennessee, this definition has been held to apply only “to a waiver of the right to enforce a provision in a contract.” Doctrine applies defensively as excuse for nonperformance of contractual duties, but not offensively to establish forfeiture of opposing party’s contractual rights. Here, appellants are not using waiver as excuse for nonperformance, but rather to establish that Depositors forfeited its rights to enforce Exclusion. Thus, under Tennessee law, doctrine of waiver is not applicable in this case. To succeed on defense of equitable estoppel, appellants must prove with respect to Depositors conduct which amounts to false representation or concealment of material facts, or, at least, which is calculated to convey impression that facts are otherwise than, and inconsistent with, those which party subsequently attempts to assert; intention, or at least expectation that such conduct shall be acted upon by other party; and knowledge, actual or constructive of real facts. With respect to themselves, they must establish lack of knowledge and of means of knowledge of truth as to facts in question; reliance upon conduct of party estopped; and action based thereon of such character as to change their position prejudicially. Tennessee law does not favor doctrine of equitable estoppel. While either negligent silence or silence when one has duty to speak may support claim for equitable estoppel, there will be no estoppel when facts are known to both parties, or both have same means of ascertaining truth. Relevant inquiry is whether misrepresentations were communicated to Estate, not to Margaret Ryan. Neither response to Depositors’ motion for judgment on pleadings, nor appellants’ brief on appeal alleged any affirmative misrepresentation was made to Estate. Estate alleges only that it was not notified until 2013 that coverage was unavailable for Margaret Ryan. Although estoppel defense may be predicated upon opposing party’s silence, Estate had access to Policy. Despite appellants’ assertion that to understand policy, one would have to read it “in the painstaking level of detail and comprehension beyond that of ordinary consumer,” provisions at issue, despite being separated by scores of pages, are simple. Because Estate had “the same means of ascertaining the truth” as Depositors, estoppel defense cannot stand. (5) Insurance policy is contract of adhesion drafted by insurer. But such contract is not per se invalid. Enforceability of contract of adhesion is contingent upon whether its terms are beyond reasonable expectations of ordinary person, or oppressive or unconscionable. Tennessee courts have repeatedly found family member exclusions enforceable. Appellants’ argument appears to be that due to alleged structural ambiguity in Policy, it is beyond reasonable expectations of ordinary consumer. But there is no such ambiguity. Further,

nearly identical provisions have consistently been upheld in Tennessee. Hence, Policy is enforceable. (*Depositors Insurance Co. v. Estate of Ryan*, 41 TAM 5-40, 1/6/16, Gibbons, 15 pages, N/Pub.)

Court of Workers' Comp Claims

▼ **When employee fell from ladder and principal contractor presented letter allegedly written by employee it claims serves as liability waiver, even if letter were dated and authenticated, it does not bar employee from recovering benefits from principal contractor because TCA 50-6-114(a) expressly prohibits relieving employer from its obligation under Workers' Compensation Law through contract or agreement**

WORKERS' COMPENSATION: Causation — Temporary Disability — Weekly Wage — Principal Contractor — Settlement. Employee injured her left foot when she slipped and fell from ladder while preparing wall for painting. Accident occurred on 7/31/14 at constructive site for Crescent Cool Springs apartments in Franklin. Record contains "Summit Contractors Group, Inc. Accident/Injury/Incident Report Form" completed by Summit's project manager. X-rays revealed comminuted calcaneal fracture accompanied by joint depression. Dr. Deer of Vanderbilt Bone and Joint Clinic (Vanderbilt) operated on employee's foot on 8/15/14. Employee recovered from surgery and began physical therapy in 11/14. On 11/10/14, Deer wrote in treatment notes: "I will keep her off work until we see her back in 4 weeks and get an idea of how she is doing at that point. Even then, if she returns after that, we will need [] ground level work only on a lifted basis." Employee worked for Zelaya at time of accident. Employee claims that Zelaya paid her in cash. After employee suffered her injury, Vanderbilt attempted to collect payment from Zelaya's workers' compensation insurance carrier. Carrier refused payment because Zelaya's policy did not cover his employees for injuries incurred while working in Tennessee. Summit prepared letter summarizing its work relationship with employee. Letter stated that employee does not work for Summit. Letter further states, "The company we have [employee] working for on file is Roney Drywall, which is a subcontractor to Tabares (sub-sub to Summit)." Letter also indicated that employee had signed letter "stating that she holds Summit harmless for the accident." On 2/27/15, employee filed two Petitions for Benefit Determination (PBDs) seeking workers' compensation benefits for 7/31/14 workplace accident. In one petition, she named Zelaya as employer. In other, she named Summit as employer. Parties were unsuccessful at mediation, and mediator filed Dispute Certification Notice on 4/10/15. Employee filed Request for Expedited Hearing on 5/19/15 that identified only Summit as employer. She filed amended request on 5/20/15 that identified Zelaya, Summit, and Summit's insurance carrier, North River Insurance Company (North River), as defendants. (1) Facts related to employee's accident are essentially undisputed. Nature of her injury is likewise undisputed. Dr. Deer's medical records indicate that employee suffered left-calcaneal fracture and joint depression. Hence, for purposes of Record Review, employee has established that she will likely prevail at hearing on merits. (2) Medical records reveal that employee's injury required surgery and rehabilitation. Her employer must pay cost she incurred in treating her injury and costs of any additional, future medical care. (3) Employee may also recover temporary disability benefits. Dr. Deer took employee off work from 7/31/14 through 1/8/15. Period of temporary disability may be longer but there are no medical

records specifically mentioning her inability to work past 1/8/15. Employee claimed that she earned \$9 per hour while working on Summit jobsite and worked 55 to 60 hours per week. Case file does not contain wage statement, and Summit has not provided any information disputing wages and hours employee claimed she earned and worked. Hence, employee's earned average weekly wage is \$540 per week, resulting in compensation rate of \$360 per week. Time between 8/1/14 and 1/8/15 encompasses 28 weeks and two days. Employee is entitled to recover temporary total disability benefits of \$10,183 for this entire period. (4) Employee seeks recovery for medical and temporary disability benefits from Summit as principal contractor due to her immediate employer's failure to provide workers' compensation insurance. Employee worked directly for Zelaya when she suffered injury at Crescent Site. Employee's affidavit states that she worked for Zelaya, and file contains no other sworn statements refuting her affidavit. Only evidence tending to discredit her affidavit comes from Summit Accident Report that identified "Roney Drywall, LLC" as employee's direct employer. Employee's affidavit is compelling on this issue. Evidence further shows that Summit served as principal contractor at Crescent Site. Evidence also shows that Zelaya did not have valid workers' compensation insurance as Vanderbilt attempted to collect payment for medical bills from her immediate employer's insurance carrier but carrier refused to pay and informed Vanderbilt that employee's immediate employer did not have valid insurance policy. Employee has instituted action for recovery against both her immediate employer, Zelaya, and Summit and thereby satisfied procedure requirements of TCA 50-6-113(c). Evidence is sufficient to satisfy employee's burden of proving Summit's liability in context of this Record Review. Summit has presented this court letter allegedly written by employee. Summit claims that letter serves as liability waiver and prevents employee from holding it liable for 7/31/14 workplace accident. But letter does not mention Summit, is not dated, and had not been properly authenticated. Moreover, even if letter were dated and authenticated, it does not bar employee from recovering benefits from Summit because TCA 50-6-114(a) expressly prohibits relieving employer from its obligations under Tennessee Workers' Compensation Law through contract or agreement. Hence, letter does not serve as valid waiver of liability against Summit. (*Sanabria v. Zelaya*, 41 TAM 5-41, 6/18/15, Baker, 10 pages.)

CLE Calendar

Webinars

- **Tennessee Family Law Cases that Could Impact Your Practice**, 90-minute webinar presented by Brent Lankford on Tuesday, **February 23**, at 2 p.m. (Central), 3 p.m. (Eastern).
- **Judgment Collection in Tennessee — Locating Assets and Collection Methods that Work**, 60-minute audio conference presented by Griffin Dunham on Wednesday, **February 24**, at 2 p.m. (Central), 3 p.m. (Eastern).
- **Handling Uninsured and Underinsured Motorist Claims in Tennessee**, 60-minute webinar presented by Dan Coughlin on Thursday, **February 25**, at 10 a.m. (Central), 11 a.m. (Eastern).
- **Using Mental Health Records in Custody Cases: The Culbertson Case**, 60-minute webinar presented by Amy Amundsen on Thursday, **February 25**, at 2 p.m. (Central), 3 p.m. (Eastern).

● **Update on Living Wills, Advance Directives, and Powers of Attorney for Health Care in Tennessee**, 60-minute webinar presented by Terry Cox on Wednesday, **March 9**, at 2 p.m. (Central), 3 p.m. (Eastern).

● **Proving Defamation from Social Media Abuse: Strategies for Helping Clients Respond**, 60-minute webinar presented by Marcus Chatterton on Wednesday, **March 16**, at 10 a.m. (Central), 11 a.m. (Eastern).

● **Handling Social Media, Email, and Other ESI in Tennessee**, 60-minute webinar presented by Russell Taber on Wednesday, **March 16**, at 2 p.m. (Central), 3 p.m. (Eastern).

Live Events

Medical Malpractice Conference for Tennessee Attorneys, to be held in Nashville on **Friday, May 13** at the **Nashville School of Law**. *Earn up to 7.5 hours of CLE, including 1 DUAL hour.

FACULTY: **Brandon Bass**, Law Offices of John Day PC, Brentwood; **Judge Tom Brothers**, Davidson County Circuit Court; **Philip N. Elbert**, Neal & Harwell, PLC, Nashville; **Ben Harrison, Jr.**, Cornelius & Collins, LLP, Nashville; **Marty Phillips**, Rainey, Kizer, Reviere & Bell, PLC, Jackson; **Chris Tardio**, Gideon, Cooper & Essary PLC, Nashville; and **Mathew Zenner**, McCune, Zenner & Happell, Brentwood.

HIGHLIGHTS: Recent developments in pre-suit notice and certificate of good faith requirements; new summary judgment procedure; how to “turn the tables” on a plaintiff’s expert; defenses that may be raised to defeat a plaintiff’s healthcare liability claim; trial tips and tactics from both a plaintiff’s and defense perspective; deposition strategies to help you win at trial; using technology to excel as an advocate; review of recent healthcare liability appellate court decisions; a panel discussion of “hot topics” in healthcare liability actions; and ethical issues that arise when dealing with evidence and experts.

For more information or to register for this event, visit www.mleesmith.com/tn-medical-malpractice-2016.

Tennessee Business Law Conference, to be held in Nashville on **Friday, May 20** at the **Nashville School of Law**. *Earn up to 7.5 hours of CLE, including 1 DUAL hour.

FACULTY: **A. Neal Graham**, Harris Shelton Hanover Walsh PLLC, Memphis; **L. Kevin Levine**, L. Kevin Levine, PLLC, Nashville; **Ralph Levy, Jr.**, Dickinson Wright PLLC, Nashville; **Chancellor Ellen Hobbs Lyle**, Davidson County Chancery Court/Tennessee Business Court Pilot Project; **David B. Parsons**, Nashville attorney; **Richard R. Spore, III**, Bass, Berry & Sims, PLC, Memphis; and **Bryan K. Williams**, Gullett Sanford Robinson & Martin PLLC, Nashville.

HIGHLIGHTS: Survey of business law issues that have arisen in the Tennessee Business Court Pilot Project; creative practices for handling business disputes to avoid litigation; mistakes to avoid in drafting LLC operating agreements; what every attorney needs to know when litigating a business dispute in Tennessee; what federal tax issues arise when operating a limited liability company; key issues in drafting an acquisition agreement; top 10 negotiation strategies for obtaining a settlement in a business dispute; and ethics for attorneys in business disputes — including adequacy of fees and charges.

For more information or to register for this event, visit www.mleesmith.com/tn-business-law-2016.

TAM Top 10

Following is a listing of the 10 most important cases from the past month.

1. *Bray v. Khuri*, 40 TAM 52-5 (CA WS 12/3/15) (in healthcare liability action, plaintiff failed to substantially comply with TCA 29-26-121(a)(2)(E) when plaintiff left blank portion of authorization form describing type and amount of information to be used and therefore failed to provide defendant with proper authorization to use decedent’s medical records to mount defense)
2. *In re Andrea R.*, 40 TAM 52-19 (CA MS 11/30/15) (father’s payments fall under equitable considerations rule, thereby permitting father to receive credit on child support obligation for voluntary payments, when father deposited money into mother’s bank account when she asked for it, father did not exercise any control over money after he gave it to mother, and as result of father’s payments, mother was able to provide for couple’s child)
3. *Yocum v. Yocum*, 41 TAM 2-6 (CA ES 12/15/15) (there is no bailment duty in Tennessee between spouses in divorce action with regard to spouse’s personal property)
4. *State v. Hutchison*, 41 TAM 3-1 (SC 1/14/16) (autopsy report prepared by medical examiner was not testimonial, and its admission at trial through testimony of another physician did not violate defendant’s rights under Confrontation Clause; responding officer’s initial entry into home was justified by exigent circumstances, and subsequent entry into home by other officers constituted mere continuation of initial officer’s lawful entry into home)
5. *Johnson v. UHS of Lakeside LLC*, 41 TAM 3-12 (CA WS 12/23/15) (when plaintiff argued that statute of limitation in healthcare liability action had been tolled because decedent had been “adjudicated incompetent” within meaning of TCA 28-1-106, trial court properly dismissed case upon finding that statute required judicial adjudication of incompetency in order to toll statute of limitation)
6. *Service Employees International Union Local 205 v. Metropolitan Nashville Board of Public Education*, 41 TAM 3-16 (CA MS 12/21/15) (when director of schools notified union that represents school district’s service workers that, in accordance with 2011 amendment to law governing employees of boards of education, he was rescinding board’s labor negotiations policy, and union sought declaratory judgment that policy was still in effect, trial court erred in holding that director did not have authority to rescind policy)
7. *Wade v. Tennessee Department of Finance & Administration*, 41 TAM 3-17 (CA MS 11/3/15) (in case in which appellant, TennCare enrollee, had been receiving 24/7 care from private duty nurse in his grandparents’ home in Martin, TennCare determined that appellant could receive adequate care for less cost in special respiratory care unit in St. Francis Hospital in Memphis, appellant, through his grandparents as his co-conservators, filed administrative appeal, and administrative law judge (ALJ) agreed with TennCare, decision of ALJ was neither arbitrary nor capricious when appellant failed to prove that private duty nurse was medically necessary 24/7 or that ventilator unit was not adequate to meet appellant’s needs)
8. *State v. Childress*, 41 TAM 3-21 (CCA 11/25/15) (because defendant unequivocally invoked his right to counsel after his initial *Miranda* waiver — after being confronted with allegations that he forced his half-sister to perform oral sex on him, defendant’s statement to detective that “I will talk to you, but I want to run it by an attorney first” clearly communicated defendant’s desire to consult with counsel — detective was constitutionally obligated to cease all questioning of defendant immediately)
9. *Dolman v. Donovan*, 41 TAM 4-2 (CA WS 12/23/15) (trial court properly dismissed healthcare liability action based on plaintiffs’ failure to comply with pre-suit notice requirement of TCA 29-26-121 when eight healthcare providers — Methodist Healthcare Germantown, Methodist LeBonheur Hospital, Dr. Ellis, Mid-South Pulmonary Specialists, Memphis Vascular Center, Memphis Radiological, P.C., Dr. Shelton, and Dr. Donovan — were given pre-suit notice, but HIPAA forms submitted by plaintiffs only authorized Methodist LeBonheur Healthcare and its affiliates to release medical records)
10. *Moore v. Gaut*, 41 TAM 4-5 (CA ES 12/30/15) (in cases where dog caused injury on owner’s property, TCA 44-8-413 codifies common law requirement that claimant “establish that the dog’s owner knew or should have known of dog’s dangerous propensities”)

41 TAM 5-40:

<http://www.mleesmith.com/tenn/tam/cases/41/41-TAM-5-40.pdf>

41 TAM 5-41:

<http://www.mleesmith.com/tenn/tam/cases/41/41-TAM-5-41.pdf>