



# *Administrative Office of the Courts*

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Director

## **MEMORANDUM**

**(4/22/16)**

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 19<sup>th</sup> edition of the book was published in 2015. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created and/or substantially revised instructions, are attached to the memorandum which appears on the AOC's website. If the committee changed a comment and/or footnote but did not change the text of an instruction, the instruction will be listed below but it will not be posted on the AOC's website.

### **4.01 – Criminal attempt (other than attempted first degree murder with serious bodily injury)**

- a) Add the following as new Comment 4:

Criminal attempt is a lesser-included offense of any charged offense in every case in which: (1) the charged offense has a requisite intent element; and (2) the proof has fairly raised the completed offense. *State v. Thorpe*, 463 S.W.3d 851, 863 (Tenn. 2015). There are several situations in which Tennessee courts have held that the omission of an attempt instruction did not constitute reversible error when the proof showed the offense was either completed or did not occur at all. *See, e.g., State v. Marcum*, 109 S.W.3d 300, 304 (Tenn. 2003); *State v. Biggs*, 218 S.W.3d 643, 658 (Tenn. Crim. App. 2006). However, in those cases, the Defendant was challenging the omission of the attempt instruction, rather than the inclusion of the instruction. *See Marcum*, 109 S.W.3d at 301. Because "it is no defense to prosecution for criminal attempt that the offense attempted was actually committed," Tenn. Code Ann. § 39-12-101(c), proof, even uncontroverted proof, that a defendant completed a crime, in and of itself, does not shield a defendant from a conviction for criminal attempt of the crime allegedly completed even though the State did not adduce proof in a prosecution for criminal attempt that the defendant failed to complete the target crime. Proof sufficient to support a defendant's conviction of a completed offense is, logically and legally, sufficient to support that defendant's conviction of criminal attempt to commit that offense. *State v. Thorpe*, 463 S.W.3d 851, 861-63 (Tenn. 2015).

#### **4.01(a) – Criminal attempt, To Wit: First Degree Murder where the victim suffers serious bodily injury**

- a) Add the following as new Comment 4:

Criminal attempt is a lesser-included offense of any charged offense in every case in which: (1) the charged offense has a requisite intent element; and (2) the proof has fairly raised the completed offense. *State v. Thorpe*, 463 S.W.3d 851, 863 (Tenn. 2015). There are several situations in which Tennessee courts have held that the omission of an attempt instruction did not constitute reversible error when the proof showed the offense was either completed or did not occur at all. *See, e.g., State v. Marcum*, 109 S.W.3d 300, 304 (Tenn. 2003); *State v. Biggs*, 218 S.W.3d 643, 658 (Tenn. Crim. App. 2006). However, in those cases, the Defendant was challenging the omission of the attempt instruction, rather than the inclusion of the instruction. *See Marcum*, 109 S.W.3d at 301. Because “it is no defense to prosecution for criminal attempt that the offense attempted was actually committed,” Tenn. Code Ann. § 39-12-101(c), proof, even uncontroverted proof, that a defendant completed a crime, in and of itself, does not shield a defendant from a conviction for criminal attempt of the crime allegedly completed even though the State did not adduce proof in a prosecution for criminal attempt that the defendant failed to complete the target crime. Proof sufficient to support a defendant's conviction of a completed offense is, logically and legally, sufficient to support that defendant's conviction of criminal attempt to commit that offense. *State v. Thorpe*, 463 S.W.3d 851, 861-63 (Tenn. 2015).

#### **6.02(a) – Aggravated Assault (For offenses committed on or after 7/1/13)**

- a) Add the word “or” between “neck” and “by” in the definition for “strangulation” paragraph which begins “[Only for offenses committed on or after 7/1/15: “Strangulation” so that it reads as follows:

“Strangulation” means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, ...

#### **8.01 – Kidnapping**

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:  
**[only include if another offense against the person<sup>fn</sup> was committed during the alleged kidnapping as to that same victim<sup>fn</sup> is charged in the indictment and is submitted to the jury:**
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:  
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. *State v. Alston*, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes according. The text of the footnote should read as follows:  
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in *State v. White*, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. *State v. Teats*, 468 S.W. 3d 495 (Tenn. 2015) and *State v. Williams*, 468 S.W. 3d 510 (Tenn. 2015).

### 8.02 – Aggravated Kidnapping

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:  
**[only include if another offense against the person<sup>fn</sup> was committed during the alleged aggravated kidnapping as to that same victim<sup>fn</sup> is charged in the indictment and is submitted to the jury:**
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:  
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes according. The text of the footnote should read as follows:  
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

### 8.03 – Especially aggravated kidnapping

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:  
**[only include if another offense against the person<sup>fn</sup> was committed during the alleged especially aggravated kidnapping as to that same victim<sup>fn</sup> is charged in the indictment and is submitted to the jury:**
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:  
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes according. The text of the footnote should read as follows:  
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

### 8.05 – False imprisonment

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:

**[only include if another offense against the person<sup>fn</sup> was committed during the alleged false imprisonment as to that same victim<sup>fn</sup> is charged in the indictment and is submitted to the jury:**

- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:  
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes according. The text of the footnote should read as follows:  
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

#### **10.22 – Soliciting minors to engage in [certain conduct]**

- a) In element 1, change the word “is” to “was” so that it reads, “that the defendant was eighteen (18) years of age or older.”.
- b) Element 2 should be amended to read as follows:  
*That the defendant, by means of [[oral] [written] [electronic] communication], [electronic mail] [internet services] directly or through another intentionally [[commanded] [requested] [hired] [persuaded] [invited] [attempted to induce<sup>fn</sup>] [a person whom the defendant knew or should have known was less than eighteen (18) years of age]] [solicited<sup>fn</sup> a law enforcement officer posing as a minor whom the person making the solicitation reasonably believed to be less than eighteen (18) years of age] to engage in certain conduct;*
- c) Add a new footnote after “attempted to induce” and renumber the remaining footnotes accordingly. The text of the new footnote should read as follows:  
The trial judge may wish to charge criminal attempt if the language in this bracket is used. See T.P.I. – Crim. 4.01, Criminal Attempt.
- d) Add another new footnote after “solicited” in the revised element 2 above and renumber the remaining footnotes accordingly. The text of the new footnote should read as follows:  
The trial judge may wish to charge solicitation if the language in this bracket is used. See T.P.I.- Crim. 4.02, Solicitation.
- e) Before the definition of “intentionally”, add the following definition in brackets:  
[“Law enforcement officer” means an officer, employee or agent of government who has a duty imposed by law to:  
(A) Maintain public order;  
Or  
(B) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses;

And

(C) Investigate the commission or suspected commission of offenses.]<sup>fn</sup>

- f) Add a new footnote to the end of the “law enforcement officer” definition and renumber any remaining footnotes accordingly. The text of the footnote should be as follows:  
T.C.A. §39-11-106(a)(21).
- g) Delete the three defenses in brackets before the definition of “intentionally” and replace it with the following after the “intentionally” definition:  
[It is no defense that *[the solicitation was unsuccessful] [the conduct solicited was not engaged in] [the law enforcement officer could not engage in the solicited offense] [the minor solicited was unaware of the criminal nature of the conduct solicited]*].<sup>fn</sup>
- h) Add a new footnote to the end of the above defense and renumber any remaining footnotes accordingly. The text of the footnote should be as follows:  
T.C.A. §39-13-528(b)
- i) Change the text of Comment One to read as follows:  
A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor. T.C.A. §39-13-528(c).
- j) Add a new comment to the comment section as new number four. The text of the new comment should be as follows:  
A defendant is subject to prosecution in this state for this offense for any conduct that originates in this state, or for any conduct that originates by a person located outside this state, where the person solicited the conduct of a minor located in this state, or solicited a law enforcement officer posing as a minor located within this state. T.C.A. §39-13-528(d).

### **13.01 – Arson**

- a) Remove the last sentence from the definition of “Knowingly”.
- b) Amend the definition of “Intentionally” to read as follows:  

“Intentionally” [or “with intent”] means that a person acts intentionally with respect to the nature of the conduct when it is the person’s conscious objective or desire to engage in the conduct.
- c) Add the following to footnote two after the current language:  

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.
- d) Add the following to footnote four after the current language:  

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9,

2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

### **13.02 – Aggravated Arson**

- a) Remove the last sentence from the definition of “Knowingly”.
- b) Amend the definition of “Intentionally” to read as follows:

“Intentionally” [or “with intent”] means that a person acts intentionally with respect to the nature of the conduct when it is the person’s conscious objective or desire to engage in the conduct.

- c) Add the following to footnote two after the current language:

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

- d) Add the following to footnote four after the current language:

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

### **31.01 – Controlled substances: Manufacture, deliver or sale**

- a) Add the following sentence to the end of Comment One:  
Even though the minimum sentence must be served at 100%, which precludes full probation, a defendant eligible for and granted diversion would not have to serve that minimum sentence, as “judicial diversion does not constitute a sentence, but rather a decision to defer sentencing.” *State v. Dycus*, 456 S.W. 3d 918, at 928 (Tenn. 2015).

### **31.04 – Controlled substances: Possession with intent to sell or deliver**

- a) Add the following sentence to the end of Comment One:  
Even though the minimum sentence must be served at 100%, which precludes full probation, a defendant eligible for and granted diversion would not have to serve that minimum sentence, as “judicial diversion does not constitute a sentence, but rather a decision to defer sentencing.” *State v. Dycus*, 456 S.W. 3d 918, at 928 (Tenn. 2015).

### **31.10 – [Keeping] [Maintaining] a [Location] for Drug Use**

- a) Insert the language in attachment one to this memorandum as new instruction 31.10.

**39.05(a)- Criminal Gang Offense- Supplemental Instruction (Criminal Gang Initiation)- PLEASE NOTE THAT THESE GANG ENHANCEMENT PROVISIONS IN Tenn. Code Ann. §40-35-121 HAVE BEEN DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS IN *State v. Devonte Bonds*, No. E2014-00495-CCA-R3-CD, 2016 WL 1403286 (Tenn. Crim. App. Apr. 7, 2016).**

- a) Insert the language in attachment two to this memorandum as new instruction 39.05(a).

**39.05(b)- Criminal Gang Offense- Supplemental Instruction (Criminal Gang Initiation)- PLEASE NOTE THAT THESE GANG ENHANCEMENT PROVISIONS IN Tenn. Code Ann. §40-35-121 HAVE BEEN DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS IN *State v. Devonte Bonds*, No. E2014-00495-CCA-R3-CD, 2016 WL 1403286 (Tenn. Crim. App. Apr. 7, 2016).**

- a) Insert the language in attachment three to this memorandum as new instruction 39.05(b).

**42.05 – Identity**

- a) Remove the word “and” from the end of factor number three.
- b) At the end of factor number four, change the period to a semicolon and add the word “and” so that it reads as follows:  
... such identifications; and
- c) Add the following to the list of factors as the next numbered paragraph:  
(5) Any other factors fairly raised by the evidence.
- d) Add a footnote to the above new factor and renumber remaining footnotes accordingly. The new footnote should read as follows:

The committee added factor five to cover any additional proof not covered by the first four factors, such as expert witness identification testimony. *See State v. Christopher M. Epps*, No. M2014-01955-CCA-R3-CD, 2015 WL 5968339 (Tenn. Crim. App. Oct. 14, 2015) *perm. app. denied* (Tenn. Feb. 19, 2016).

**42.13 – Alibi**

- a) Replace the language in footnotes two and three with the following:

*State v. Leath*, 461 S.W.3d 73, 105-06 (Tenn. Crim. App. 2013), citing *Christian v. State*, 555 S.W.2d 863 (Tenn. 1977).

**42.13(a) – Alternative instruction: Alibi**

- a) Delete the entire instruction but keep the number 42.13(a) as [Reserved].

#### 42.23 – Duty to preserve evidence

- a) At the end of footnote one, add the following:

See Comment One.

- b) Add the following language as new Comment One, keeping the citation underneath the quote centered and in parentheses:

The loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial. *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *State v. Ferguson*, 2 S.W.3d 912, 915-16 (1999)). The court rejected a "bad faith" analysis in favor of "a balancing approach in which bad faith is but one of the factors to be considered in determining whether the lost or destroyed evidence will deprive a defendant of a fundamentally fair trial." *Merriman*, 410 S.W.3d at 785. Fundamental fairness, as an element of due process, requires a review of the entire record to evaluate the effect of the State's failure to preserve evidence. The trial court must first "determine whether the State had a duty to preserve the evidence," which is "limited to constitutionally material evidence." To be "constitutionally material," the evidence "must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." "If the trial court determines that the State had a duty to preserve the evidence, the court must determine if the State failed in its duty." *Id.* at 784-85. If the trial court concludes that the State lost or destroyed evidence that it had a duty to preserve, the trial court must then consider three factors to determine the appropriate remedy for the State's failure:

- (1) the degree of negligence involved;
- (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
- (3) the sufficiency of the other evidence used at trial to support the conviction.

*Id.* "If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction [such as TPI - Crim. 42.23]." *Id.* at 785-86.

(Taken from *State v. Theodore Lebron Johnson*, No. M2014-02046-CCA-R3-CD, 2015 WL 5968257 (Tenn. Crim. App. Oct. 14, 2015) *perm. app. denied* (Tenn. Feb. 18, 2016)

#### 42.25(a) – Election of Offenses

- a) Insert the language in attachment four to this memorandum as new instruction 42.25(a).

## T.P.I. – Crim. 31.10

### ***[KEEPING] [MAINTAINING] A [LOCATION] FOR DRUG USE***

Any person who commits the offense of *[keeping] [maintaining] a [location]* for drug use is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:<sup>1</sup>

- (1) that the defendant *[kept] [maintained] a [store] [shop] [warehouse] [dwelling] [building] [vehicle] [boat] [aircraft] [structure] [place]*;  

and
- (2) that the defendant knew at the time of *[keeping] [maintaining]* that it was *[resorted to by persons unlawfully using controlled substances for the purpose of using these substances] [used for [keeping] [selling] controlled substances]*.<sup>2</sup>

“Controlled substance” means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 — 39-17-416. [ \_\_\_\_\_ ] is a *[drug] [substance] [immediate precursor]* in Schedules I through VII of §§ 39-17-403 — 39-17-416.<sup>3</sup>

"Knew" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.<sup>4</sup>

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.<sup>5</sup>

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.<sup>6</sup>

### COMMENTS

1. This offense is a Class D felony. T.C.A. § 53-11-401(b)(1).
2. Fines for this offense differ with different schedules of controlled substances:  
For a violation involving a Schedule I or II controlled substance, \$100,000.  
For a violation involving a Schedule III or IV controlled substance, \$50,000.  
For a violation involving a Schedule V or VI controlled substance, \$5,000.  
For a violation involving a Schedule VII controlled substance, \$1,000.  
T.C.A. § 53-11-401(b)(2). [See how this looks in Comment 2 of 31.11].

### FOOTNOTES

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1. T.C.A. § 53-11-401(a)(5).
  2. If the use of more than one controlled substance is alleged in the indictment or raised in the proof, the trial judge should make the State elect upon which controlled substance it is relying, to ensure a unanimous verdict, and insert the name of that controlled substance into element two.
  3. T.C.A. § 39-17-402(4).
  4. T.C.A. § 39-11-106(a)(20).
  5. T.C.A. § 39-11-301(a)(2).
  6. T.C.A. § 39-11-106(a)(18).

PLEASE NOTE THAT THESE GANG ENHANCEMENT PROVISIONS IN Tenn. Code Ann. §40-35-121 HAVE BEEN DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS IN *State v. Devonte Bonds*, No. E2014-00495-CCA-R3-CD, 2016 WL 1403286 (Tenn. Crim. App. Apr. 7, 2016).

**T.P.I. CRIM. 39.05(a)**

**CRIMINAL GANG OFFENSE**

**SUPPLEMENTAL INSTRUCTION (CRIMINAL GANG MEMBER)**

Members of the jury, you have found the defendant, [ \_\_\_\_\_ ], guilty of the offense of [ \_\_\_\_\_ ]. It is now your duty to determine certain facts which may affect the sentence the defendant will receive for this offense.<sup>1</sup> In making these determinations, you will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters. Each verdict you reach must be unanimous.

You will first determine if the defendant, at the time of committing that offense, committed a "criminal gang offense."

"Criminal gang offense" means:

**[only for offenses committed prior to 7/1/13:** an offense during the perpetration of which the defendant knowingly *[caused]* *[threatened to cause]* death or bodily injury to another person or persons *[[and specifically includes [rape of a child] [aggravated rape] [rape]*

or

an offense which *[resulted]* *[was intended to result]* in the defendant's receiving income, benefit, property, money or anything of value from *[the commission of an aggravated burglary]* *[the illegal [sale] [delivery] [manufacture] of a [controlled substance] [controlled substance analogue] [firearm]]*;

or

**[only for offenses committed on or after 7/1/13: the *[commission of]* *[attempted commission of]* *[facilitation of]* *[solicitation of]* *[conspiracy to commit]* any *[here name an offense listed in TCA § 40-35-121(a)(3)(B)]*.<sup>2</sup>**

“Knowingly” and “Reasonable Doubt” have been previously defined for you.

You are to take with you the court's previous instructions along with this supplemental instruction, the indictment and all exhibits entered into evidence and complete the verdict form or forms as directed below. Your verdict must be unanimous as to all findings on the verdict forms.

### VERDICT FORM “A”

Was the offense of [ \_\_\_\_\_ ] a “criminal gang offense”?

Count

Yes

No

Count

Yes

No

Count

Yes

No

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FOREPERSON

If your verdict is "No," you will go no further and you will report your verdict. However, if your verdict is "Yes," you will proceed to determine whether or not the defendant was a "criminal gang member."

A "criminal gang member" is a person who is a member of a criminal gang, who meets two (2) or more of the following criteria:

- (A) Admits to criminal gang involvement;
- (B) Is identified as a criminal gang member by a parent or guardian;
- (C) Is identified as a criminal gang member by a documented reliable informant;
- (D) Resides in or frequents a particular criminal gang's area, adopts their style or dress, their use of hand signs or their tattoos and associates with known criminal gang members;
- (E) Is identified as a criminal gang member by an informant of previously untested reliability and the identification is corroborated by independent information;
- (F) Has been arrested more than once in the company of identified criminal gang members for offenses that are consistent with usual criminal gang activity; or
- (G) Is identified as a criminal gang member by physical evidence such as photographs or other documentation.<sup>3</sup>

A “criminal gang” is a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has:

- (A) As one (1) of its activities the commission of criminal acts; and
- (B) Two (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity.<sup>4</sup>

“Pattern of criminal gang activity” means prior convictions for the commission or attempted commission of, facilitation of, solicitation of, or conspiracy to commit:

- (i) two (2) or more criminal gang offenses that are classified as felonies; or
- (ii) three (3) or more criminal gang offenses that are classified as misdemeanors; or
- (iii) one (1) or more criminal gang offenses that are classified as felonies and two (2) or more criminal gang offenses that are classified as misdemeanors; and
- (iv) the criminal gang offenses are committed on “separate occasions;” and
- (v) the criminal gang offenses are committed within a five-year period.<sup>5</sup>

“Prior conviction” means a criminal gang offense for which a criminal gang member was convicted prior to the commission of the instant criminal gang offense by the defendant. “Prior conviction” includes convictions under the laws of any other state, government or country that, if committed in this state, would have constituted a criminal gang offense. *[[ \_\_\_\_\_ ] is a criminal gang offense.]*<sup>6</sup> Convictions for multiple criminal gang offenses committed as part of a single course of conduct within twenty-four (24) hours are not committed on “separate occasions.”<sup>7</sup> [However, acts that

constitute criminal gang offenses committed prior to 7/1/13 during the perpetration of which the defendant knowingly caused, or threatened to cause, death or bodily injury to another person or persons, specifically including rape of a child, aggravated rape or rape; or resulted, or was intended to result, in the defendant's receiving income, benefit, property, money or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery, or manufacture of a controlled substance, controlled substance analogue, or firearm, shall not be construed to be a single course of conduct.]<sup>8</sup>

### VERDICT FORM "B"

Was the defendant a "criminal gang member" at the time of committing the underlying "criminal gang offense"? In order to find the defendant guilty of being a "criminal gang member," you must unanimously find that, at the time of the "criminal gang offense" at least two (2) of the criteria listed below were true beyond a reasonable doubt. Please indicate each of your findings by marking with an "X" either "Yes" or "No."

That the defendant, at the time of the offense:

- (A) had admitted to criminal gang involvements; Yes \_\_\_\_ No \_\_\_\_
- (B) had been identified as a criminal gang member by a parent or guardian;  
Yes \_\_\_\_ No \_\_\_\_
- (C) had been identified as a criminal gang member by a documented reliable informant; Yes \_\_\_\_ No \_\_\_\_
- (D) resided in or frequented a particular criminal gang's area, adopted their style or dress, their use of hand signs or their tattoos, and associated with known criminal gang members; Yes \_\_\_\_ No \_\_\_\_

- (E) had been identified as a criminal gang member by an informant of previously untested reliability and such identification has been corroborated by independent information; Yes \_\_\_\_ No \_\_\_\_
- (F) Had been arrested more than once in the company of identified criminal gang members for offenses which are consistent with usual criminal gang activity; Yes \_\_\_\_ No \_\_\_\_
- (G) had been identified as a criminal gang member by physical evidence such as photographs or other documentation. Yes \_\_\_\_ No \_\_\_\_

Does the jury find the defendant was a "criminal gang member" by unanimously finding that, at the time of the "criminal gang offense," at least two (2) of the above criteria were true beyond a reasonable doubt?

Yes \_\_\_\_\_

No \_\_\_\_\_

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FOREPERSON

[THE TRIAL JUDGE SHOULD ONLY GIVE THE FOLLOWING INSTRUCTION IF IT IS ALLEGED IN THE INDICTMENT THAT THE DEFENDANT WAS ALSO A LEADER OR ORGANIZER OF THE CRIMINAL GANG AT THE TIME THE OFFENSE WAS COMMITTED]:

If your verdict is "No," you will go no further and you will report your verdict. However, if your verdict is "Yes," you will proceed to determine whether or not the defendant was also a leader or organizer of the criminal gang at the time the offense was committed. Your verdict must be unanimous.

**VERDICT FORM "C"**

Was the defendant a leader or organizer of the "criminal gang" at the time the "criminal gang offense" was committed?

Yes \_\_\_\_\_

No \_\_\_\_\_

\_\_\_\_\_  
Foreperson

**COMMENTS**

1. A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished one (1) classification higher than the classification of the offense committed. T.C.A. § 45-35-121(b). If the criminal gang offense subject to enhancement one classification higher is a Class A felony, the presumptive sentence for the offense shall be the maximum sentence within the range from which the defendant is to be sentenced. T.C.A. § 45-35-121(d). A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished two (2) classifications higher than the classification established by the specific statute creating the offense committed if the criminal gang member was also a leader or organizer of the criminal gang at the time the offense was committed. T.C.A. § 45-35-121(e). If the offense is a Class A or B felony, the defendant shall be sentenced as a Class A felon and the presumptive sentence for the offense shall be the maximum sentence within the range from which the defendant is to be sentenced. T.C.A. § 45-35-121(f).

2. If the defendant is charged with a criminal gang offense and the district attorney general intends to seek enhancement of the punishment, the indictment, in a separate count, shall specify, charge and give notice of the subsection under which enhancement is alleged applicable and of the required prior convictions constituting the gang's pattern of criminal gang activity. T.C.A. § 45-35-121(g).

3. Voir Dire - Judges may be concerned about the issue of "gang activity" as an issue for inquiry in voir dire and the opening statements of the attorneys before the jury which will first try the underlying felony. In United States v. Jobson, 102 F. 3d 214 (6<sup>th</sup> Cir., Kennedy 1996), the District Court was reversed for failure to treat "gang membership" as being limited to Rule 404 (b) admissibility. The relevance of "gang activity" under TN. R. Evid. 401 and TN. R. Evid 403 [balancing of the probative value of the evidence against potential prejudice to defendant] should be considered before the admission of the evidence of "gang activity" in trying the underlying crime. If admissible, the trial judge should instruct the jury as to the limited use of Rule 404(b) evidence.

4. Hearsay evidence - Members of the committee expressed concern that the legislature in creating this enhancement provision of the law dealing with "criminal gang offenses" invited hearsay evidence and therefore may constitute constitutional confrontation violations. On occasion hearsay is legislatively allowed such as under the provisions of T.C.A. 40-35-209 (b) [Sentencing Hearing] in that during a sentencing hearing hearsay evidence is addressed by allowing "reliable hearsay".... "if the opposing party is accorded a fair opportunity to be heard." Also, in T.C.A. 39-13-204 (c)

[Sentencing for First Degree Murder] hearsay may be entertained by the jury “provided the defendant is accorded a fair opportunity to rebut any hearsay statement so admitted.” However, the legislature did not address hearsay under this legislation found in T.C.A. 40-35-121 “ Criminal Gang Offenses - Enhanced Punishment - Procedure.”

## FOOTNOTES

- 
1. T.C.A. § 40-35-121.
  2. T.C.A. § 40-35-121(a)(3).
  3. T.C.A. § 40-35-121(a)(2).
  4. T.C.A. § 40-35-121(a)(1).
  5. T.C.A. § 40-35-121(a)(4)(A).
  6. “In the event that a conviction from a jurisdiction other than Tennessee is not specifically named the same as a criminal gang offense, the elements of the offense in the other jurisdiction shall be used by the Tennessee court to determine if the offense is a criminal gang offense.” T.C.A. § 40-35-121 (a)(4)(B)(ii).
  7. T.C.A. § 40-35-121(a)(4)(B).
  8. T.C.A. § 40-35-121(a)(4)(B)(iii) and (a)(3)(A).

PLEASE NOTE THAT THESE GANG ENHANCEMENT PROVISIONS IN Tenn. Code Ann. §40-35-121 HAVE BEEN DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS IN *State v. Devonte Bonds*, No. E2014-00495-CCA-R3-CD, 2016 WL 1403286 (Tenn. Crim. App. Apr. 7, 2016).

T.P.I. CRIM. 39.05(b)  
CRIMINAL GANG OFFENSE

SUPPLEMENTAL INSTRUCTION (CRIMINAL GANG INITIATION)

Members of the jury, you have found the defendant, [ \_\_\_\_\_ ], guilty of the offense of [ \_\_\_\_\_ ]. It is now your duty to determine certain facts which may affect the sentence the defendant will receive for this offense.<sup>1</sup> In making these determinations, you will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters. Each verdict you reach must be unanimous.

You will first determine if the defendant, at the time of committing that offense, committed a "criminal gang offense."

"Criminal gang offense" means:

**[only for offenses committed prior to 7/1/13: an offense during the**  
perpetration of which the defendant knowingly *[caused]* *[threatened to cause]*  
death or bodily injury to another person or persons *[[and specifically includes*  
*[rape of a child]* *[aggravated rape]* *[rape]*

or

an offense which [resulted] [was intended to result] in the defendant's receiving income, benefit, property, money or anything of value from [the commission of an aggravated burglary] [the illegal [sale] [delivery] [manufacture] of a [controlled substance] [controlled substance analogue] [firearm]];

or

[only for offenses committed on or after 7/1/13: the [commission of] [attempted commission of] [facilitation of] [solicitation of] [conspiracy to commit] any [here name an offense listed in TCA § 40-35-121(a)(3)(B)].<sup>2</sup>

"Knowingly" and "Reasonable Doubt" have been previously defined for you.

You are to take with you the court's previous instructions along with this supplemental instruction, the indictment and all exhibits entered into evidence and complete the verdict form or forms as directed below. Your verdict must be unanimous as to all findings on the verdict forms.

### VERDICT FORM "A"

Was the offense of [ \_\_\_\_\_ ] a "criminal gang offense"?

Count

Yes \_\_\_

No \_\_\_

Count

Yes \_\_\_

No \_\_\_

Count

Yes    \_\_\_

No     \_\_\_

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FOREPERSON

If your verdict is “No,” you will go no further and you will report your verdict. However, if your verdict is “Yes,” you will proceed to determine whether or not the defendant committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a “criminal gang.”

A “criminal gang” is a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has:

- (A) As one (1) of its activities the commission of criminal acts; and
- (B) Two (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity.<sup>3</sup>

“Pattern of criminal gang activity” means prior convictions for the commission or attempted commission of, facilitation of, solicitation of, or conspiracy to commit:

- (i) two (2) or more criminal gang offenses that are classified as felonies; or
- (ii) three (3) or more criminal gang offenses that are classified as misdemeanors; or
- (iii) one (1) or more criminal gang offenses that are classified as felonies and two (2) or more criminal gang offenses that are classified as misdemeanors;

and

- (iv) the criminal gang offenses are committed on “separate occasions;”

and

(v) the criminal gang offenses are committed within a five-year period.<sup>4</sup>

“Prior conviction” means a criminal gang offense for which a criminal gang member was convicted prior to the commission of the instant criminal gang offense by the defendant. “Prior conviction” includes convictions under the laws of any other state, government or country that, if committed in this state, would have constituted a criminal gang offense. *[[ \_\_\_\_\_ ] is a criminal gang offense.]*<sup>5</sup> Convictions for multiple criminal gang offenses committed as part of a single course of conduct within twenty-four (24) hours are not committed on “separate occasions.”<sup>6</sup> [However, acts that constitute criminal gang offenses committed prior to 7/1/13 during the perpetration of which the defendant knowingly caused, or threatened to cause, death or bodily injury to another person or persons, specifically including rape of a child, aggravated rape or rape; or resulted, or was intended to result, in the defendant's receiving income, benefit, property, money or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery, or manufacture of a controlled substance, controlled substance analogue, or firearm, shall not be construed to be a single course of conduct.]<sup>7</sup>

#### **VERDICT FORM “B”**

Do you unanimously find that the defendant committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a “criminal gang”?

Yes

No

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FOREPERSON

**COMMENTS**

1. A criminal gang offense committed by a defendant who committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a criminal gang shall be punished one (1) classification higher than the classification of the offense committed. T.C.A. § 45-35-121(c). If the criminal gang offense subject to enhancement one classification higher is a Class A felony, the presumptive sentence for the offense shall be the maximum sentence within the range from which the defendant is to be sentenced. T.C.A. § 45-35-121(d).

2. If the defendant is charged with a criminal gang offense and the district attorney general intends to seek enhancement of the punishment, the indictment, in a separate count, shall specify, charge and give notice of the subsection under which enhancement is alleged applicable and of the required prior convictions constituting the gang's pattern of criminal gang activity. T.C.A. § 45-35-121(g).

3. Voir Dire - Judges may be concerned about the issue of "gang activity" as an issue for inquiry in voir dire and the opening statements of the attorneys before the jury which will first try the underlying felony. In United States v. Jobson, 102 F. 3d 214 (6<sup>th</sup> Cir., Kennedy 1996), the District Court was reversed for failure to treat "gang membership" as being limited to Rule 404 (b) admissibility. The relevance of "gang activity" under TN. R. Evid. 401 and TN. R. Evid 403 [balancing of the probative value of the evidence against potential prejudice to defendant] should be considered before the admission of the evidence of "gang activity" in trying the underlying crime. If admissible, the trial judge should instruct the jury as to the limited use of Rule 404(b) evidence.

4. Hearsay evidence - Members of the committee expressed concern that the legislature in creating this enhancement provision of the law dealing with "criminal gang offenses" invited hearsay evidence and therefore may constitute constitutional confrontation violations. On occasion hearsay is legislatively allowed such as under the provisions of T.C.A. 40-35-209 (b) [Sentencing Hearing] in that during a sentencing hearing hearsay evidence is addressed by allowing "reliable hearsay".... "if the opposing party is accorded a fair opportunity to be heard." Also, in T.C.A. 39-13-204 (c) [Sentencing for First Degree Murder] hearsay may be entertained by the jury "provided the defendant is accorded a fair opportunity to rebut any hearsay statement so

admitted.” However, the legislature did not address hearsay under this legislation found in T.C.A. 40-35-121 “ Criminal Gang Offenses - Enhanced Punishment - Procedure.”

## FOOTNOTES

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1. T.C.A. § 40-35-121.
  2. T.C.A. § 40-35-121(a)(3).
  3. T.C.A. § 40-35-121(a)(1).
  4. T.C.A. § 40-35-121(a)(4)(A).
  5. “In the event that a conviction from a jurisdiction other than Tennessee is not specifically named the same as a criminal gang offense, the elements of the offense in the other jurisdiction shall be used by the Tennessee court to determine if the offense is a criminal gang offense.” T.C.A. § 40-35-121 (a)(4)(B)(ii).
  6. T.C.A. § 40-35-121(a)(4)(B).
  7. T.C.A. § 40-35-121(a)(4)(B)(iii) and (a)(3)(A).

**T.P.I. – CRIM. 42.25(a)**

**ELECTION OF OFFENSES**

**(ONLY USE IN GENERIC EVIDENCE CASES)<sup>1</sup>**

The state has offered proof in its case in chief of more than one act allegedly committed *[by the defendant] [by one for whom the state alleges the defendant is criminally responsible]* which the state alleges constitutes an element of the offense of \_\_\_\_\_ as charged in Count \_\_\_\_\_ of the indictment. To ensure a unanimous verdict, the State must prove beyond a reasonable doubt the commission of all of the acts described by the alleged victim *[in that particular count]* as occurring within the time period charged in *[that count of]* the indictment.

Before you can 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 in *[that count of]* the indictment.<sup>2</sup>

**COMMENTS**

1. The evidence in *State v. Jimmy Dale Qualls*, No. W2013-01440–SC-R11-CD, 2016 WL 362224 (Tenn. Jan. 28, 2016) was termed “generic” in that it was non-specific as to time, specific details, dates or distinguishing characteristics as to individual incidents of sexual battery. In *Qualls*, “the victims described with clarity the type of sexual battery perpetrated on them but failed to identify specifically when each alleged act occurred. Instead, the victims here described a pattern of abuse that occurred over an extended period of time. One of the victims testified that the act of sexual battery occurred once a week. Both victims testified that the abuse occurred regularly and happened at least once during the time periods charged in each count of the indictment.” *Qualls*, p. 13.

**FOOTNOTES**

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1. See Comment One.

2. This instruction was developed from the language in *State v. Jimmy Dale Qualls*, No. W2013-01440–SC-R11-CD, 2016 WL 362224, at p. 20 (Tenn. Jan. 28, 2016).