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M E M O R A N D U M

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This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 22nd edition of the book was published in 2018. The Administrative Office of the Courts' website includes Word "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.

4.03 – Criminal conspiracy

a) Add the following language as new Comment 3:

> Tennessee Code Annotated, section 39-12-106(c), provides, "A person may be convicted of conspiracy and the offense which was the object of the conspiracy." The Advisory Comments provide further clarification, "Under subsection (c), the conspiracy is not merged with the completed offense and, therefore, the offender may be convicted of both the conspiracy and the object offense." In *State v. Watson*, this court noted the trial court's error in merging a conviction for conspiracy to commit first degree murder and first degree premeditated murder. 227 S.W.3d 622, 628 (Tenn. Crim. App. 2006).
>
> State v. Jenelle Leigh Potter, E2015-02261-CCA-R3-CD, 2019 WL 453730, (Tenn. Crim. App. Knoxville, February 5, 2019).

6.08 – Domestic assault (for offenses committed prior to 4/10/08)

a) Delete this instruction.

6.08(a) – Domestic assault (for offenses committed on or after 4/10/08)

a) Renumber this instruction as 6.08.

b) Add a footnote to the title of the newly numbered instruction and renumber subsequent footnotes accordingly. The footnote should read as follows:

> To obtain the pattern instruction for this offense committed prior to 4/10/08, *see* T.P.I. 6.08 (22nd ed. 2018), or an earlier edition.

6.08(b) – Domestic assault (causing bodily injury to the victim): Supplemental instruction number one

a) Renumber this instruction as 6.08(a).

7.05(a) – Second degree murder (knowing killing of another)

a) Bracket the paragraph that begins "The distinction between…"

b) Move footnote 7 to outside the closing bracket.

c) Outside the new closing bracket after footnote 7 , add the following in new brackets:

> [Delete if not charging Voluntary manslaughter. See footnote 7].

d) After the existing wording of Footnote 7, add the following:

> State v. Mason, W2017-01863-CCA-R3-CD, 2019 WL 350756, (Tenn. Crim. App. Jan. 28, 2019).

7.06- Voluntary manslaughter

a) Add the following as new Comment 2 and renumber existing Comments 2 and 3 as Comment 3 and 4, respectively:

> In *State v. Torvarius Mason,* No. W2017-01863-CCA-R3-CD, 2019 WL 350756 (Tenn. Crim. App., Jackson, January 28, 2019), the Court affirmed the trial judge for not charging voluntary manslaughter as a lesser-included offense, because there was no evidence to show that the defendant killed the victim while "in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." The defendant was looking for the person who shot his brother a short time earlier that night, but there was absolutely no proof in the record that the victim was involved in the shooting, so the victim presented no "adequate provocation." The unarmed victim did nothing to provoke the defendant before the defendant shot him five times, killing him. Defendant was not entitled to a jury instruction on voluntary manslaughter. The Court of Criminal Appeals has held that the elements which distinguish voluntary manslaughter from murder are those of "adequate provocation" and the "state of passion." It has long been held under Tennessee law, and at common law, that a murder will only be reduced to voluntary manslaughter when the provocation was caused by the victim.. The Tennessee Supreme Court first addressed this issue in *State v. Tilson*, 503 S.W.2d 921 (Tenn. 1974), in which the defendant had been involved in a barroom brawl with several men prior to leaving the bar. 503 S.W.2d at 921-22. The defendant returned a short time later with a pistol and shot the victim who had taken no active part in the fight but had been "on the side" of the one provoking the fight. *Id.* at 923-24. It was held that the defendant's actions did not constitute voluntary manslaughter because he killed an unarmed man who was simply "on the side" of the person who provoked an earlier fight with the defendant, and did nothing to provoke him.

b) After the existing wording of Footnote 2, add the following:

See Comment 2.

c) After the existing wording of Footnote 3, add the following:

See Comment 2.

10.16 – Violation of sex offender registration act (for offenses committed on or after August 1, 2005)

a) Change the wording in parenthesis in the title to: (for offenses committed on or after July 1, 2008)

b) Add a new footnote to the title and renumber subsequent footnotes accordingly. The new footnote should read as follows:

To obtain the pattern instruction for this offense committed prior to 7/1/08, *see* T.P.I. 10.16 (22nd ed. 2018), or an earlier edition.

c) Remove references to "only for offenses committed prior to…" for dates previous to 7/1/08 and remove associated brackets as necessary**. See the attached amended Word version of this instruction for clarification.**

d) Rearrange the definition paragraphs in the following order after new Part W, element 3:

["Board"
["Conviction"
["Designated law enforcement agency"
["Employed or practices a vocation"
["Homeless"
["Institution of higher education"
["Law enforcement agency of any institution of higher education"
["Local law enforcement agency"
["Minor"
["Month"
["Parent"
["Primary residence"
["Register"
["Report"
["Resident"
["Secondary residence"
["SOR"
["Student"
["TBI"
["TBI registration form"
["Within forty-eight (48) hours"
"Knowingly"
The requirement of "knowingly"
"Intentionally"

e) Renumber the corresponding footnotes of each definition according to the new placement.

10.17(a) – Violation of sex offender residential or work restrictions (for offenses committed on or after 8/1/05 but prior to 8/17/09)

a) Delete this instruction.

10.17(b) – Violation of sex offender residential or work restrictions (for offenses committed on or after August 17, 2009)

a) Renumber this instruction as 10.17.
b) Add a footnote to the title of the instruction and renumber subsequent footnotes accordingly. The footnote should read as follows:

> To obtain the pattern instruction for this offense committed prior to 8/17/2009, *see* T.P.I. 10.17(a) (22nd ed. 2018), or an earlier edition.

10.24 – Continuous sexual abuse of a child

a) In comment one, at the beginning of the third sentence, add the phrase "For offenses committed on or after 7/1/18," so that the sentence reads as follows:

> For offenses committed on or after 7/1/18, a defendant convicted of this offense "shall be punished by imprisonment and shall be sentenced from within the full range of punishment for the offense of which the defendant was convicted, regardless of the range for which the defendant would otherwise qualify."

12.04- Cruelty to Animals

a) Rearrange the definition paragraphs in the following order:

> "Animal"
> ["Bodily injury"
> ["Owner"
> "Torture"
> "Intentionally"
> "Knowingly"

b) Renumber the corresponding footnotes of each definition according to the new placement.

12.04(a) – Aggravated cruelty to animals

a) Rearrange the existing definition paragraphs in the following order:

> "Aggravated cruelty"
> "Companion animal"
> "Livestock"
> "Torture"
> "Intentionally"

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Add the following new definition after the definition of "Companion animal":

"Depraved" means morally corrupt; perverted.

d) Add a new footnote to the above new definition. The footnote should read as follows:

State v. Curll, No. M2017-00090-CCA-R3-CD, 2018 WL 3146336 (Tenn. Crim. App., June 26, 2018).

e) Add the following new definition after the definition of "Livestock":

"Sadistic" means a delight in cruelty; excessive cruelty.

f) Add a new footnote to the above new definition. The footnote should read as follows:

State v. Curll, No. M2017-00090-CCA-R3-CD, 2018 WL 3146336 (Tenn. Crim. App., June 26, 2018).

34.03- Sexual exploitation of a minor (for offenses committed on or after 7/1/05)

a) Rearrange the definition paragraphs in the following order:

"Community"
["Lascivious"
"Material"
"Minor"
"Patently offensive"
"Sexual activity"
[A "simulated sexual activity"
"Knowingly"
The requirement of "knowingly"
"Intentionally"

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Change the definition of "lascivious" to read as follows:

["Lascivious" means tending to incite lust; lewd; indecent.]

d) Change the wording of existing footnote 13 to read as follows:

State v. Hall, ___ S.W.3d ____, 2019 WL 117580 (Tenn. 2019). See Comment 3.

e) Add a new comment 3 to the instruction. The text of the comment should read as follows:

In deciding whether or not materials are "lascivious," the Supreme Court in *State v Whited*, 506 S.W.3d 416, 438 (Tenn. 2016), held that

> the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all "multi-factor analysis" such as the *Dost* factors. See *Grzybowicz*, 747 F.3d at 1306. Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making such a determination.

34.04- Aggravated sexual exploitation of a minor

a) Rearrange the definition paragraphs in the following order:

"Community"
["Consideration"
["Cunnilingus"
["Distribute"
["Fellatio"
["Lascivious
"Material"
"Minor"
["Obscene"
["Patently offensive"
["Promote"
"Prurient interest"
"Sexual activity"
"Sexual conduct"
[A "simulated sexual activity"
["Sodomy"
"Knowingly"
The requirement of "knowingly"
"Intentionally"

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Change the definition of "lascivious" to read as follows:

["Lascivious" means tending to incite lust; lewd; indecent.]

d) Change the wording of existing footnote 23 to read as follows:

State v. Hall, ___ S.W.3d ____, 2019 WL 117580 (Tenn. 2019). See Comment 3.

e) Add a new comment 3 to the instruction. The text of the comment should read as follows:

In deciding whether or not materials are "lascivious," the Supreme Court in *State v Whited*, 506 S.W.3d 416, 438 (Tenn. 2016), held that

> the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all "multi-factor analysis" such as the *Dost* factors. See *Grzybowicz*, 747 F.3d at 1306. Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making such a determination.

34.05 – Especially aggravated sexual exploitation of a minor

a) Rearrange the definition paragraphs in the following order:

["Community"
["Cunnilingus"

[“Fellatio”
[“Lascivious”
“Material”
“Minor”
[“Patently offensive”
[“Promote”
“Sexual activity”
[A “simulated sexual activity”
[“Sodomy”
“Knowingly
The requirement of “knowingly”
“Intentionally”

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Change the definition of “lascivious” to read as follows:

[“Lascivious” means tending to incite lust; lewd; indecent.]

d) Change the wording of existing footnote 17 to read as follows:

State v. Hall, ___ S.W.3d ____, 2019 WL 117580 (Tenn. 2019). See Comment 5.

e) Add a new Comment 5 to the instruction. The text of the comment should read as follows:

In deciding whether or not materials are “lascivious”, the Supreme Court in *State v. Whited*, 506 S.W.3d 416, 438 (Tenn. 2016), held that

> the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all "multi-factor analysis" such as the *Dost* factors. See *Grzybowicz*, 747 F.3d at 1306. Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making such a determination.

34.09 – Exploitation of a minor [by electronic means]

a) Rearrange the definition paragraphs in the following order:

[“Community”
[“Lascivious”
[“Law enforcement officer”
[“Material”
“Minor”
“Patently offensive”
“Sexual activity”
[A “simulated sexual activity”
“Intentionally”

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Change the definition of “lascivious” to read as follows:

[“Lascivious” means tending to incite lust; lewd; indecent.]

d) Change the wording of existing footnote 9 to read as follows:

> State v. Hall, ___ S.W.3d ____, 2019 WL 117580 (Tenn. 2019). See Comment 3.

e) Add a new Comment 3 to the instruction. The text of the comment should read as follows:

> In deciding whether or not materials are "lascivious", the Supreme Court in *State v. Whited*, 506 S.W.3d 416, 438 (Tenn. 2016), held that
>
> > the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all "multi-factor analysis" such as the *Dost* factors. See *Grzybowicz*, 747 F.3d at 1306. Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making such a determination.

38.09- Underage driving while impaired – Under 21 [For offenses committed prior to 7/1/16]

a) Renumber this instruction as 38.09(b).

b) Revise the phrase "intoxicant of drug" to "intoxicant or drug" in the second sentence from the end of the instruction so that the sentence reads as follows:

> The law merely requires that the person be under the influence of an intoxicant or drug.

38.09(a) – Underage driving while impaired (for offenses committed on or after 9/19/16)

a) Add attachment one to this memo as new instruction 38.09(a), Underage driving while impaired (for offenses committed on or after 9/19/16).

40.17 – Defense: Effective consent

a) In paragraph two, add the following in italics and brackets after *[vehicular assault]:*

> *[aggravated vehicular assault]*

b) In paragraph two, add a new footnote after *[reckless endangerment]* and renumber subsequent footnotes accordingly.

c) The text of the footnote should read as follows:

> For offenses not listed, see Comment 3.

d) Add a new Comment 3. The text of Comment 3 should read as follows:

> As the statutory defense of effective consent only applies to those offenses listed in brackets, if the trial judge wishes to instruct the jury that consent is not a defense to a particular offense, the judge may wish to consult *State v. Matthew Reynolds*, No. M2017-00169-CCA-R3-CD, 2018 WL 6253829 (Tenn. Crim. App., Nov. 28, 2018), (for membership of BDSM) *citing State v. Mickens*, 123 S.W.3d 355, 392 (Tenn. Crim. App. 2003) (for membership of gang).

42.23 – Duty to preserve evidence

a) Add the following as new Comment 2 to the instruction:

> In *State v. Terry Craighead and Sinead St. Omer*, No. M2017-01085-CCA-R3-CD, 2018 WL 5994974 (Tenn. Crim. App., Nashville, November 15, 2018), app. denied (Tenn. Mar. 28, 2019), the two defendants were charged with two counts of felony murder, aggravated child abuse, and aggravated child neglect, when their child, on a feeding tube, starved to death. The trial court imposed the sanction of dismissing the indictment in accordance with the mandates of *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), because the police on the crime scene failed to collect and preserve the feeding tube and pump that was used to feed their infant daughter, and also the information stored in the feeding pump. The trial judge's decision was reversed on appeal, the Court holding that the officers had no duty to collect evidence from the defendants' room, because it was not in the State's control, and therefore there was no duty under *Ferguson* to preserve such evidence. There is a difference between failing to collect evidence on private property not in the State's control, and not preserving evidence already collected and therefore already in the State's control. The Court stated as follows:
>
> > In concluding that the State's failure to collect evidence from a crime scene does not rise to the level of a *Ferguson* violation, this court has recognized that "the State is not required to investigate cases in any particular way: Due process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process. Moreover, [i]t is not the duty of this Court to pass judgment regarding the investigative techniques used by law enforcement unless they violate specific statutory or constitutional mandates."*[State v.]Brock*, 327 S.W.3d [645, 698-99 (Tenn. Crim. App. 2008]. .... We conclude that this court's opinion in *Brock* that an officer's failure to collect evidence from a crime scene owned, operated, or maintained by a private citizen does not violate *Ferguson* controls. *See Brock*, 327 S.W.3d at 698-99. .... The Defendants have not shown that the investigative techniques used by law enforcement violated "'specific statutory or constitutional mandates.'" *Brock*, 327 S.W.3d at 699 ... . We hold that the police officers had no duty to collect evidence from the Defendants' room and, therefore, no duty under *Ferguson* to preserve such evidence. Accordingly, the trial court erred in dismissing the Defendants' charges.

43.14 – No outside communication during deliberation

a) Change the second sentence of the instruction to read as follows:

> You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website, including, but not limited to, Facebook, LinkedIn, YouTube, Snapchat, Instagram, Google, Twitter, or any other social media, to communicate to anyone any information about this case or to conduct any research about this case until you have returned your verdict and the trial has concluded.