The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am one of twelve Judges on the Tennessee Court of Criminal Appeals. I serve in the Middle Section, although I sit in all three Grand Divisions of the state.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1989

BPR # 013780

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee, BPR # 013780

October 1989

Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

September 1, 2014 – Current: Court of Criminal Appeals Judge – I am currently serving as an Appellate Court Judge for the Tennessee Court of Criminal Appeals. Elected by statewide retenitin vote in August 2016.

January 1998 – August 2014: Circuit Court Judge – 21st Judicial District, which includes Hickman, Lewis, Perry, and Williamson Counties. As a Circuit Judge, I handled both criminal and civil matters at all times and sat in both Circuit Court and Chancery Court. I was first

appointed to this position by Governor Don Sundquist in January of 1998. I won with 61% of the vote in a contested primary election in May of 1998 and I was unopposed in the general election in August of the same year. I was unopposed and re-elected to another full, eight-year term in August of 2006, and then again in August of 2014.

August 2016 – May 2018: Nashville School of Law – Instructor

August 2012 – 2014: Lipscomb University – Adjunct Professor

January 1994 – January 1998: Rogers & Easter, Attorneys at Law. General private practice of law involving criminal defense, bankruptcy, collection, personal injury, family law, and business organization matters.

September 1989 – January 1994: Assistant District Attorney, 21st Judicial District. As an Assistant District Attorney, I prosecuted thousands of criminal matters in Hickman, Lewis, Perry, and Williamson Counties.

August 1986 – September 1989: Victim Witness Coordinator, 21st Judicial District

March 1983 – Summer 1986: AT&T Information Systems / Sales Representative

April 1984 – November 1984: Victor Ashe For U.S. Senate

June 1982 – January 1983: The Alexander Committee

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

No

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Tennessee Court of Criminal Appeals Judge

In September of 2014, after being vetted by the governor's judicial counsel, Governor Bill Haslam appointed me to the Court of Criminal Appeals for the Middle Section. I was retained by a statewide election in 2016. Since being appointed I have written well over 500 opinions and participated as a panel member in approximately 1,100 additional opinions. These opinions have addressed all manner of criminal offenses appealed to the CCA from all the trial courts in Tennessee's 95 counties.

I have also have had the occasion to fill in as a special judge on the Court of Appeals during my seven years on the intermediate court.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

District Attorney's Office, 21st Judicial District

My experience began while I was still in law school. In 1986, I was hired by District Attorney General Joseph D. Baugh of the 21st Judicial District to implement a new legislatively-enacted position called Victim Witness Coordinator. *See* T.C.A. § 8-7-206. It was while serving in this position that I began to observe the negative impact the criminal justice process could have on innocent citizens. It also allowed me the gratifying participation in the ultimate passage of the Victims' Bill of Rights by the 96th General Assembly in 1990.

During my senior year of law school, I was allowed the honor to begin prosecuting matters under the supervision of General Baugh pursuant to former Rule 17 of the Tennessee Rules of the Supreme Court, now Supreme Court Rule 7, § 10.03. It was a tremendous opportunity, allowing me to have the experience of actually trying several jury trials before law school graduation.

Upon obtaining my law license, I was appointed Assistant District Attorney in the same judicial

district. I prosecuted all manner of criminal cases, from underage drinking to capital murder. The prosecution process in the office was horizontal: if you obtained a case in general sessions court, you were the prosecutor through the trial court. You had to know your cases, and cases were not presented for grand jury review unless you, as the prosecutor, were satisfied with the defendant's guilt beyond a reasonable doubt. For five years, I had the opportunity to handle thousands of general sessions and circuit court matters and hundreds of jury trials. For several years, I served on Williamson County's Child Protective Investigative Team (CPIT), investigating and prosecuting numerous child abuse cases. I also had the pleasure of being appointed special prosecutor in other jurisdictions when the local DA's office had a conflict.

Prosecuting cases in all four counties in the 21st Judicial District introduced me to the different dynamics of rural legal communities, including local law enforcement, local attorneys, citizens, and government, as contrasted with the dynamic of more suburban communities. It is an insight that continues to serve me well in our Tennessee judicial system.

Private Practice

In January of 1994, I left the District Attorney's Office and entered private practice with David G. Rogers, forming Rogers & Easter, Attorneys at Law, in Brentwood. Mr. Rogers was (and remains) a Chapter 7 Bankruptcy Trustee, and thus approximately 40% of our practice was bankruptcy related. The remainder of my practice was 20% criminal, 10% personal injury, 10% collection, 10% family law, and 10% business organization.

It was my pleasure during this time to represent many members of law enforcement, including issues involving employment matters that required appearances before local legislative bodies, commissions, and boards. I also appeared on behalf of TDOC inmates and family before the TN Board of Paroles.

Circuit Court Judge, Division IV, 21st Judicial District.

Beginning in 1998 as a Circuit Court Judge for the 21st Judicial District, I was charged with presiding over both criminal and civil matters at all times. I would estimate that approximately 60% of the cases I handled were criminal matters including misdemeanors, felonies, and juvenile appeals. I also handled numerous post-conviction relief petitions, and other post-adjudication motions or writs such as violations of probation, habeas corpus petitions, and writs of error coram nobis. Other criminal judicial responsibilities included issuing search warrants, judicial subpoenas, conducting child support and other family law criminal contempt hearings, as well as administrative duties involving the grand jury, petit juries, and bail bonding companies. Additionally, having a state prison in the district (Turney Center), provided me with the adjudicatory opportunity to preside over matters involving administrative appeals and other violations of prison regulations and criminal statutes. I also handled family law matters, all civil matters, probate matters involving wills, estate disputes, guardianships, and conservatorships. I served in this capacity until I was appointed to the Court of Criminal Appeals in 2014.

I also had the privilege of presiding over the 21st Recovery Court from 2000-2014. I was involved in the pursuit of the initial implementation grant, formation of policies and procedures, program design, and staffing the Recovery Court after receiving a grant from the United States

Department of Justice. I also served in the role of Recovery Court Judge, witnessing the saving of lives of addicted criminal defendants and the saving of hundreds of thousands of taxpayer dollars. I also served on the 21st Recovery Court 501(c)(3) board of directors from 2002 until 2016, the funding arm of the recovery court program. The recovery court ambition was the most rewarding experience of my judgeship.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Boles v. Nat'l Dev. Co., Inc., 175 S.W.3d 226 (Tenn. Ct. App. 2005)

In March of 2004, I became deeply involved in a class action lawsuit in Hickman County representing over 3,800 class members. I worked with Mr. Rogers and Hickman County attorney Douglas T. Bates III on this case which was still pending when I became Circuit Judge in 1998. Ultimately, after successfully piercing the corporate veil, a judgment was successfully obtained against the defendants, which was appealed to the Tennessee Court of Appeals. The trial judgment was affirmed and collection attempts have thus far proven unfruitful. The experience was a learning experience for me at multiple levels in civil litigation.

State v. Bonestel, 871 S.W.2d 163 (Tenn. Crim. App. 1993)

As a prosecutor, I argued against the grant of judicial diversion at a sentencing hearing. The trial judge agreed and the defendant appealed. The Court of Criminal Appeals upheld the sentencing, concluding that the denial of judicial diversion is similar in purpose to pretrial diversion and the trial judge's denial is presumed correct, similar to the constraints that are placed on prosecutors in denial of pretrial diversion. The case established the "Bonestel factors" cited in guiding the adjudication of judicial diversion. According to Westlaw, the case has been cited in nearly 550 opinions.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

CRIMINAL

State v. Reynolds, No. E2013-02309-CCA-R9-CD, 2014 WL 5840567 (Tenn. Crim. App. Nov. 12, 2014), *perm. app. granted.*

This case was an interlocutory appeal from the criminal court of Knox County. It involved the death of two passengers and injury to a third, in a single-vehicle accident, due to the defendant's driving while intoxicated. The defendant was indicted for 2 counts of vehicular homicide due to intoxication and one count of vehicular assault, among other driving offenses. The

investigating officer determined that the defendant was the driver. Additionally, he smelled the odor of alcohol on the defendant. The officer testified that based on this information and two confirmed fatalities, he determined that a blood draw was mandatory. While the defendant was at the hospital being treated for her injuries, a blood sample was taken for law enforcement purposes. After 2 separate hearings, the trial court granted the defendant's motion to suppress the result of the blood test, finding that the defendant did not give actual consent for the blood draw because of her traumatic injuries, her limited interaction with the officer, the effects of medication received during her care, and a hearing impairment. In the State's appeal, I agreed with the trial court regarding the defendant's actual consent. However, in my opinion, I found that the implied consent law in effect at the time of the accident allowed for the defendant's blood draw because the officer had probable cause to believe that the defendant was driving under the influence. Furthermore, although not recognized in Tennessee at the time, in my view, I suggested that the facts and posture of this case, in particular, seem to fit squarely within the limited good faith exception to the application of the exclusionary rule set forth in *Davis v. United States*, 564 U.S. 229 (2011), *Illinois v. Krull*, 480 U.S. 340, 349-50(1987), and *United States v. Leon*, 468 U.S. 897 (1984), even if the Tennessee implied consent law was later determined to be unconstitutional.

This case is significant because in the appeal to the Tennessee Supreme Court, Justice Clark, writing for the majority, found that a warrantless blood draw in violation of the Fourth Amendment and Tennessee Constitution's prohibition against unreasonable search and seizure, in some circumstances, can come within the good faith exception to the exclusionary rule; and for the first time in Tennessee, a good faith exception to the state exclusionary rule applied to evidence obtained in violation of Constitution. *State v. Reynolds*, 504 S.W.3d. 283 (Tenn. 2016).

State v. Bonds, 502 S.W.3d 118 (Tenn. Crim. App. 2016).

After being convicted of attempted second degree murder and aggravated assault, three defendants' sentences were enhanced based on the jury's finding that the defendants' underlying offenses constituted criminal gang offenses. As a matter of first impression in an opinion I delivered for the Court of Criminal Appeals, I found the Tennessee Criminal Gang enhancement statute violated due process because it did not require a nexus between the underlying crime and the defendant's membership in a gang. I concluded the statute, as written, was unconstitutional. The State of Tennessee did not attempt to appeal.

This case is significant because it is highly unusual for an intermediate court to determine a statute unconstitutional and neither party appeal the finding to the Supreme Court. The general assembly, in its next session, amended the statute to make it constitutionally compliant.

State v. Caudle, Circuit Court for Williamson County, No. II-CR094394.

This case involved an open plea by the defendant to reckless endangerment with a deadly weapon and theft of merchandise. The defendant had been engaging in shoplifting at JC Penney at the Cool Springs Mall. When confronted by a female security officer, the defendant began fighting the officer while dragging her to an awaiting vehicle. The defendant then instructed the driver to gun it while the security officer was being held partly outside the vehicle. The security

officer was dragged some 500 feet by the vehicle resulting in a broken arm, as well as knee, finger, and shoulder injuries. At the April 20, 2010, sentencing hearing, I sentenced the defendant to three years as a Range II multiple offender and denied alternative sentencing. The sentence was appealed to the Court of Criminal Appeals, who had conflicting opinions as to whether the absence of a transcript of a guilty plea submission hearing precluded appellate review on the merits. The Supreme Court took review of the case.

The case is significant because the Tennessee Supreme Court explicitly held an abuse of discretion standard, accompanied by a presumption of reasonableness, applied to within-range sentences that reflect a decision based upon the purposes and principles of sentencing, including the questions related to probation or any other alternative sentence. *See State v. Caudle*, 388 S.W.3d 273 (Tenn. 2012).

State v. Burdick, Circuit Court for Williamson County, No. II-CR053486.

In this case, the defendant was indicted in a 14-count indictment for four separate home invasion style rapes in Williamson County. The defendant also had rape convictions in Davidson County and pending rape charges in Wilson County. The defendant became known as the Wooded Rapist. The counts were severed, and I presided over the two separate Williamson County jury trials.

The first jury trial was a multi-day matter that began on May 20, 2010. The case involved an aggravated rape and especially aggravated kidnapping that had occurred in 1999. It was some nine years later before the defendant was identified and arrested. His apprehension came after he was found in the same neighborhood of the offense on a night similar to the night years earlier. The case also involved DNA evidence. After hearing the disturbing proof, the jury convicted the defendant of both offenses, and I sentenced the defendant to 25 years, as a violent offender, to run consecutively to a previously pronounced Davidson County sentence of 32 years.

The convictions and sentences were both upheld on appeal to the Court of Criminal Appeals and permission to appeal to the Supreme Court was denied. *State v. Burdick*, No. M2011-01299-CCA-R3-CD, 2012 WL 2151489 (Tenn. Crim. App. June 13, 2012), *perm. app. denied* (Tenn. Sept. 18, 2012).

The second jury trial commenced on November 20, 2011. The defendant had been indicted for rape, aggravated kidnapping, and aggravated burglary. These offenses were committed in 2004 in the same neighborhood in Williamson County where the defendant was located four years later. The proof demonstrated that the home invasion, kidnapping, and rape occurred very similarly to the proof in the previous trial. DNA proof was also presented. After hearing all the proof, the jury convicted the defendant of all three offenses, and I sentenced the defendant to 30 years as a violent offender, to run consecutively to the Davidson County sentence and the 25-year Williamson County sentence imposed at the first trial.

The convictions and sentences were upheld on appeal to the Court of Criminal Appeals and permission to appeal to the Supreme Court was denied. *State v. Burdick*, No. M2012-01071-CCA-R3-CD, 2013 WL 2642313 (Tenn. Crim. App. June 11, 2013), *perm. app. denied* (Tenn. Nov. 13, 2013).

These cases are significant because of the delayed apprehension of the defendant as well as the investigative techniques used by law enforcement, including DNA. It was also significant because of the great number of offenses throughout middle Tennessee alleged to have been committed by the defendant. Because it took so long to solve these crimes, it left several Middle Tennessee communities terrorized for several years.

CIVIL

Baugh v. Novak, Chancery Court for Williamson County, No. 32631

This chancery matter was a case wherein the sellers of corporate interest filed suit against buyers seeking enforcement of an indemnity agreement regarding the corporation's obligations to creditors that the parties had executed in connection with the sale. The buyers filed a counterclaim for fraudulent inducement. After receiving very commercially complex evidence presented at a two-day bench trial in July of 2009, I entered a judgment for the sellers in the amount of $201,715.50. The buyers appealed to the Court of Appeals which, on its own motion, invalidated the stock purchase agreements and related indemnity agreements as a violation of public policy, an issue never raised at trial or on appeal.

This case is significant because the Tennessee Supreme Court held that it would have been better practice for the Court of Appeals to have allowed the parties to address this issue before the filing of its opinion. The supreme court found, particularly in cases involving the enforceability of contracts on public policy grounds, that fairness dictates providing the parties notice that the court intends to consider the issue and a reasonable opportunity to address the issue before the court decides it. I believe such an opportunity would have saved the parties' time and expense because it would have allowed the trial court to review the issue before appeal. The Supreme Court found no violation of public policy and reinstated the judgment rendered by the Circuit Court. *See Baugh v. Novak*, 340 S.W.3d 372 (Tenn. 2011).

Benefit Consultants, Inc., et al v. American Bankers Insurance Co. of Florida, et al, Chancery Court for Williamson County, No. 28611

This was an extremely complicated commercial litigation matter that I presided over as Chancellor, from 2000 to 2005. It culminated in a five-week jury trial that rendered a total judgment of over $92 million among the multiple parties. This case is significant because of the massive number of parties, claims, attorneys, and states as well as the logistics involved. It included, among other issues, claims of breach of contract, claims of breach of fiduciary duty, Tennessee Consumer Protection Act violations, punitive damages, attorney's fees, and pre-judgment interest. It is also significant in that the parties did not appeal the judgment but settled all claims after the trial.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

While in private practice, I was appointed as a guardian ad litem in cases involving minors who

were beneficiaries of life insurance proceeds from their father's estate. Additionally, I was appointed as a guardian ad litem in a few elder conservatorship matters during the same period of private practice. I currently serve as coexecutor with one of my brothers in the administration of my father's estate in the State of Virginia.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

During my 14 years of being involved with Recovery Courts, I have attended numerous state and national conferences addressing issues that may arise from treatment courts. The most recent conferences include:

November 2019: National Judicial College, Reno NV

- Justice Involved Individuals with Substance Use Disorders: Cultivating Law & Medicine Partnerships

September 2019: National Center for State Courts, Denver CO

- Problem-Solving Courts Summit: Back to the Basics

In 2019, Governor Bill Lee appointed me to serve on the Sentencing Subcommittee of his Criminal Justice Investment Task Force. The members of the Task Force, among other things, were asked to create recommendations for long-term goals of reviewing the sentencing code. This fascinating work resulted in part of the 23 recommendations included in a December 2019 report to the Governor, which became part of his criminal justice reform package.

Other national conferences I have attended include:

June 2018: National Judicial College, Reno, NV

- Leadership For Judges

March 2015: National Judicial College, San Diego, CA

- Essential Skills for Appellate Judges

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

December 10, 1997, Division IV Circuit Court Judge, 21st Judicial District. My name was submitted to the Governor as a nominee and I was appointed by the Governor in January 1998.

April 10, 2014, Court of Criminal Appeals. My name was submitted to the Governor as a nominee to fill the vacancy after the retirement of Judge Jerry Smith. I was appointed by the Governor, to begin on September 1, 2014.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Lipscomb University, 1978-1982. BA in Political Science and Communication. While at the University, I served as an editor of the campus paper, president of Tau Phi Fraternity, president of the Interclub Council, and was elected to Who's Who Among American Colleges and Universities.

Nashville School of Law, 1985-1989. Doctor of Jurisprudence. While at NSL, I received the American Jurisprudence Awards in Commercial Transactions and Legal Ethics.

PERSONAL INFORMATION

15. State your age and date of birth.

61 – DOB: [redacted]960

16. How long have you lived continuously in the State of Tennessee?

Since June 1970, over 51 years.

17. How long have you lived continuously in the county where you are now living?

36 years.

18. State the county in which you are registered to vote.

Williamson

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

During my 23 years as a Tennessee judge, I understand some 13 complaints with the Tennessee Board of Judicial Conduct have been filed against me. All were dismissed.

I never had a complaint filed against me with the Board of Professional Responsibility while a practicing attorney.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question

does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Docket #83C-105 6th Circuit for Davidson County, TN. Auto accident case that was settled and dismissed on March 18, 1983.

During the 16 years as a Circuit Court Judge and 7 years as an appellate Judge, I have been named as a party in a few civil suits in both State and Federal Courts. All these matters were ultimately dismissed with no judgment ever being entered against me.

Docket #2014-62. General Sessions Court for Williamson County. Case filed by disgruntled criminal litigant which was dismissed by the General Sessions Court. The case was appealed to the Circuit Court of Williamson County. This case was dismissed as well.

Docket #091101, Circuit Court for Williamson County. Petition for Writ of Mandamus by disgruntled divorce litigant. Dismissed by the Circuit Court and later appeal dismissed by the Tennessee Court of Appeals, on June 15, 2016, docket No. M2016-00165-COA-R3-CV.

Docket #17-471, Chancery Court for Maury County. Divorce. Final Decree May 30, 2018.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Brentwood YMCA, Board of Directors (2013-2019)

21st Recovery Court Inc., Board Member (2000-2016)

Leadership Brentwood (class of 2000)

Paul Harris Fellow, Brentwood Rotary (1994-2000)

Brentwood Baptist Church (member)

Tennessee Judicial Conference Foundation (2019-Current)

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

College Fraturnity.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Sept. 2021 – Present: Integrated Criminal Justice Committee

- Tennessee Supreme Court Designee

1998 – Present: Member, Tennessee Judicial Conference

- President (2018-2019)
- Vice President (2012-2013)
- Secretary (2009-2010)
- Executive Committee (several terms)
- Legislative Committee
- Retirement and Compensation Committee
- Chairman, Recovery Court Committee
- Bench Bar Committee

1998 – 2014: Member, Tennessee Trial Judge Association

- Treasurer (2014)

2012 – 2014: Member, Board of Judicial Conduct

- Vice Chairman

2009 – Present: Fellow, Tennessee Bar Association

1989 – Present: Member, Williamson County Bar Association

- 2009 Recipient of Liberty Bell Award, the highest honor given to a member of the Williamson County Bar

1996 – 2015: John Marshall American Inns of Court

- President (1999-2002)
- Master of the Bench (1999-present)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Fellow – Tennessee Bar Association

Liberty Bell Award – Williamson County Bar Association

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Nashville School of Law

- Instructor in legal research and writing. August 2016- May 2018

Belmont Law

- Symposium 2017, Judicial Panel

Lipscomb University

- Judicial Processing and Policy Making
- Problem Solving Courts
- Life Long Learning Program

Tennessee Judicial Conference

- Docketing Motion Days-A Type of Case Management Approach, Tennessee Judicial Conference, Memphis, TN

Memphis Bar Association

- Appellate Court Practice- Bench Bar Conference, 2017

Tennessee Court Talk (podcast)

- The Appellate Court Process in Tennessee

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Jan. 1996 – General Sessions Judge, Div. II, Williamson County (withdrew petition)

Jan. 1998 – Circuit Court Judge, 21st Judicial District, Div. IV – appointed by Governor

Aug. 1998 – Circuit Court Judge, 21st Judicial District, Div. IV – Elected (contested)

Aug. 2006 – Circuit Court Judge, 21st Judicial District, Div. IV – Elected (uncontested)

Aug. 2014 – Circuit Court Judge, 21st Judicial District, Div. IV – Elected (uncontested)

Sept. 2014 – Court of Criminal Appeals, Middle Section – appointed by Governor

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

State v. Bonds, 502 S.W.3d 118 (Tenn. Crim. App. 2016). (100%)

Abu-Ali Abdur'Rahman v. State, No. M2019-01708-CCA-R3-PD, 2020 WL 7029133 (Tenn. Crim. App. Nov. 30, 2020), *no perm. app. filed.* (100% of the majority opinion)

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

Early in my career, I encountered Theodore Roosevelt's 1910 "Citizenship in a Republic" speech describing the Man in the Arena. The passage greatly impacted me. I determined not to be just a critic, pointing out how the strong stumble or how the doer of good deeds could have done them better. Instead, I wanted to take part in the arena, striving valiantly, erring, coming up short time and again, but striving nonetheless to do the deeds. Later, I wanted to be the example to my daughters of that person who spends themselves in worthy causes, daring greatly for high achievement. I feel I have done this throughout my legal career. It is why I now seek a place on the Supreme Court of Tennessee. There is little more an individual can dare to achieve than to be a member of the State's highest Court, a most worthy cause.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

As a trial judge, I appointed counsel to hundreds of indigent criminal defendants, ensuring legal representation. I have striven to never allow myself to be influenced by bias or by stereotyping parties in litigation. Further, I took criminal appointments while in private practice. I represented many criminal clients at reduced fees. I also represented clients from AGAPE, Inc. of Nashville with adoptions on a sliding scale or no fee at all. Additionally, I provided pro bono legal services for several non-profit entities while in private practice.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

As the Court of last resort, the Tennessee Supreme Court hears cases, both civil and criminal, from across the State. The five justices represent each of the three Grand Divisions. The Court sits in Knoxville, Nashville, and Jackson. Most cases are reviewed pursuant to Tennessee Rule of Appellate Procedure 11. A few matters, such as capital murder cases, must be reviewed by the Court. The Court also serves many administrative functions for the state judiciary and bar.

Matters before the Supreme Court deserve speedy, yet deliberate, resolution. I believe my selection would certainly be impactful in this regard because of my attention to quick opinion filing while on the Court of Criminal Appeals. I have written and filed over 525 opinions while on this court, all within an average of 62 days of docketing. Particularly notable, of the 525 cases I have written, the Supreme Court has only reversed three. Additionally, the Supreme Court has adopted my dissenting opinion on at least two occasions.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

As a member of the Board of Directors for the Brentwood YMCA, which had played a large role my daughters' rearing, I enjoyed giving back to the community and helping direct countless programs, including the well-recognized wellness opportunities, Restore Ministries, After Breast Cancer, Hope for Health, YCAP, and Full Circle. I also helped organize and implement the first half marathon for the City of Brentwood in November 2013 (Harvest Half).

I also was a Board Member for the nonprofit 21st Recovery Court, Inc. (www.21dc.ord) from its beginning in 2000 until 2016. Much of the funding for recovery courts must come from the community that hosts them as they are not a line item in any state or local budget.

I organized presentations of the SCALES Project (Supreme Court Advancing Legal Education for Students) in the 21st Judicial District. In 2004, it was held in the historic courtroom in Franklin, Williamson County, and in 2009 in Centerville, Hickman County. I have participated in similar presentations while a member of the Court of Criminal Appeals, hearing oral arguments at many Tennessee law schools, colleges and universities.

I am an alumnus of Leadership Brentwood and have stayed active in community events sponsored by that organization, as well as Leadership Franklin, by making presentations to the classes each year on government day.

I have participated in the High School Mock Trial Competition sponsored by the Young Lawyers Division of the Tennessee Bar Association for many years. I assisted in organizing the inaugural event in Williamson County in 1987. I have participated as a scorer, courtroom bailiff, timekeeper, coach (Brentwood High School), or Judge nearly every year since.

In 2019, I completed an application and received approval to be a mentor in the Men of Valor program.

I plan to stay active in these services and other community organizations.

39. Describe life experiences, personal involvements, or talents that you have that you feel will

be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Since the age of 12, I have maintained some type of employment. From mowing lawns and throwing the Tennessean/Nashville Banner to the last 23 years on the bench, I have rarely been without some level of income. I was raised by parents who grew up during the Depression and instilled a strong work ethic and a sense of personal responsibility in me. While at times in my youth their method of parenting seemed unfair on this issue, it is a very real reason why I am the only attorney on my side of the family.

As I pointed out in question 25, I was a party to a lawsuit at a very young age. This event introduced me to the legal system early and not just in a law school setting. It put me in a position to have the knot in my stomach that many litigants experience. I was scared and distraught over my future. I could never have imagined during that stressful period in my life that the experience would one day give me insight that would be beneficial to me as a prosecutor, advocate for a client, and judge. It has allowed me the very real opportunity to see the legal system from all sides and, in the end, render me a better attorney, judge and, I hope, person.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. Shortly after I became a judge, I was presented with a case wherein an arrestee spat on a police officer. The defendant announced to the arresting officer that he was HIV positive immediately before spitting on her. The State charged the defendant with a violation of T.C.A. § 39-13-109, criminal exposure of another to HIV, a class C felony. The statute requires evidence that the defendant transfers potentially infectious body fluids to another in any manner that presents a significant risk of HIV transmission. The jury convicted the defendant. I believed the defendant intended to transmit the disease. However, it was my view that under the statute as written, the state had failed to show a significant risk of HIV transmission. Thus, I set aside the verdict. Fortunately, the police officer never contracted the virus but she suffered months of stress and preventative medical procedures.

Another example is when I presided over matters involving the termination of parental rights. There have been times that I believed the facts demonstrated that for the possibility of positive life achievement for a child to occur, terminating a parent's parental rights would be in that child's best interest. However, the law requires an initial showing of a statutory ground for termination, by clear and convincing evidence. Thus, in following the law, I have denied the termination of parental rights petition although it would appear to me that doing so would be in the child's best interest in the long run.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Craig Fry, President, Christ Led Communities (CLC), [redacted] Brentwood, TN 37024; [redacted] (o)
B. Connie Martin, Director 21st District Recovery Court, [redacted] Franklin, TN 37064-2880; [redacted]
C. Judge John Everett Williams, Presiding Judge, Tennessee Court of Criminal Appeals, [redacted] Huntingdon, TN 38344; [redacted]
D. Phillip R. Newman, Puryear, Newman & Morton, PLLC (Attorneys At Law) [redacted] Franklin, TN 37064; [redacted] (o)
E. Mark V. Ezell, Commissioner of Tourism, State of Tennessee, [redacted] Nashville, TN; 37243 [redacted] (o)

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Supreme Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: 18 Nov., 2021.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Timothy L. Easter
Type or Print Name

Timothy Easter
Signature

18 Nov., 2021
Date

013780
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

502 S.W.3d 118
Court of Criminal Appeals of Tennessee,
AT KNOXVILLE.

STATE of Tennessee
v.
Devonte BONDS, Thomas Bishop,
Jason Sullivan, and Brianna Robinson

August 19, 2015 Session
|
Filed April 7, 2016
|
Application for Permission to
Appeal Denied by Supreme
Court August 18, 2016

Synopsis

Background: Four defendants were tried jointly and convicted in the Criminal Court, Knox County, Bobby R. McGee, J., of attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony, and three of the defendants received enhanced sentences based on jury's finding that their underlying offenses constituted criminal gang offenses. Defendants appealed.

Holdings: The Court of Criminal Appeals, Timothy L. Easter, J., held that:

[1] pretrial identification procedures were not impermissibly suggestive;

[2] nurse was qualified to give expert testimony;

[3] detective's expert testimony regarding gang identification was relevant;

[4] sufficient evidence supported underlying convictions;

[5] as matter of first impression, gang enhancement phase of trial was subject to Confrontation Clause protections;

[6] new trial on gang offenses was warranted based on court's treatment of gang enhancement phase as sentencing hearing; and

[7] as matter of first impression, portions of gang enhancement statute that did not require nexus between underlying offenses and gang membership violated due process.

Convictions affirmed; gang enhancements vacated; remanded for new sentencing hearing.

West Headnotes (59)

[1] Witnesses Recalling Witnesses

Trial court did not abuse its discretion in attempted murder prosecution by permitting State to continue its direct examination of victim after it had tendered the witness for cross-examination but before cross-examination began, where there was no indication that defendants were prejudiced from the court's decision aside from the

inherent prejudice that exists in any incriminating testimony.

[2] **Criminal Law** Re-examination

A trial court's decision to permit the State to recall a witness is reviewed for an abuse of discretion.

[3] **Criminal Law** Admissibility of evidence

Trial court did not err in attempted murder prosecution by permitting State to introduce pretrial identifications of defendants during suppression hearing through police investigator's testimony, even if that testimony was based on hearsay, since the Rules of Evidence generally did not apply in hearings to determine the admissibility of evidence. Tenn. R. Evid. 104(a).

1 Cases that cite this headnote

[4] **Criminal Law** Identity

Police investigator's testimony regarding pretrial identifications of defendants by witnesses was admissible in attempted murder prosecution under exception to hearsay rule for prior statements of identification by a witness, since all of the witnesses who made the identifications testified at trial and were subject to cross-examination. Tenn. R. Evid. 803(1.1).

[5] **Criminal Law** Nature or stage of proceeding

The constitutional right to confrontation is a trial right and does not apply in suppression hearings. U.S. Const. Amend. 6.

[6] **Criminal Law** Identity of Accused

To avoid exclusion from trial, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification; nonetheless, an identification that is conducted in an impermissibly suggestive manner will not be excluded if the witness's identification was otherwise reliable under the circumstances.

1 Cases that cite this headnote

[7] **Criminal Law** Identity of Accused

Courts use a multi-factor inquiry to determine the reliability of an identification procedure, which includes the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention at the time of the crime, the accuracy of the witness's prior description, the level of certainty demonstrated at the confrontation, and the time

elapsed between the crime and the confrontation.

1 Cases that cite this headnote

[8] **Criminal Law** Manner of exhibition; suggestiveness

Criminal Law Number and character of pictures

Pretrial identifications made by witnesses in attempted murder prosecution were not the result of inherently or impermissibly suggestive procedures; police investigator composed each of the six-photograph lineups by inserting each defendant's photograph among five other photographs of individuals with similar appearances, and while investigator could have used a "double blind" method such that both the interviewer and witnesses did not know which photograph was that of the suspect, such a method was not required by law, and fact that witnesses did not make same identifications in every lineup supported inference that lineups were not composed in a suggestive manner.

[9] **Criminal Law** Identity of Accused

The *Biggers* test for reliability of pretrial identification procedures is only triggered if the identification procedures were conducted in an impermissibly suggestive manner.

2 Cases that cite this headnote

[10] **Criminal Law** Discretion

Criminal Law Determination of question of competency

Questions regarding the qualifications, admissibility, relevancy, and competency of expert testimony are matters left within the broad discretion of the trial court.

[11] **Criminal Law** Admissibility

On appellate review, a trial court's ruling regarding the admissibility of expert testimony shall not be overturned absent a finding that the trial court abused its discretion in admitting or excluding the testimony.

[12] **Criminal Law** Discretion of Lower Court

An appellate court should find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.

[13] **Criminal Law** Matters involving scientific or other special knowledge in general

Evidence constitutes "scientific, technical, or other specialized

knowledge" triggering expert testimony requirements if it concerns a matter that the average juror would not know, as a matter of course. Tenn. R. Evid. 702.

[14] Criminal Law Knowledge, Experience, and Skill

The determining factor as to whether a witness is qualified to give expert testimony is whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue. Tenn. R. Evid. 702.

[15] Criminal Law Necessity and sufficiency

Trial court should consider the following non-exclusive factors when determining the reliability of expert testimony: (1) whether the scientific evidence has been tested and the accompanying methodology with which it was tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether the potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert conducted the research in the field independent of litigation. Tenn. R. Evid. 703.

[16] Criminal Law Necessity and sufficiency

The application of the *McDaniel* factors used to determine the reliability of expert testimony, a gatekeeping function of the trial court, operates to ensure introduction of testimony that characterizes the practice of an expert in the relevant field; however, the factors are only relevant to the extent they are reasonable measures of testing the reliability of the proposed expert testimony.

[17] Criminal Law Bodily and mental condition

Registered nurse was qualified to give expert testimony in attempted murder prosecution regarding "life-threatening" nature of victim's injuries; although, under statutory definition of the scope of the practice of professional nursing, nurse may not have been permitted to render a medical diagnosis or develop a medical plan of care, she was nevertheless qualified to render an expert opinion as to "cause and effect" and "nursing management of illness, injury or infirmity including identification of patient problems." Tenn. Code Ann. § 63-7-103.

[18] Criminal Law Practices or modus operandi of offenders

Police detective's expert testimony regarding gang identification was sufficiently relevant to be admissible

in attempted murder prosecution arising from beating of gang member; much of the testimony was offered to connect the defendants' legal names with their gang monikers and for confirmation of their gang affiliation, which was something other witnesses were generally unable to accomplish, testimony about gang's history and culture was used to explain symbols or abbreviations relevant to identifying defendants, and testimony regarding gang's hierarchy and their customs regarding initiation and expulsion, which generally occurred through beatings, were relevant to intent and motive. Tenn. R. Evid. 401, 402.

[19] **Criminal Law** Practices or modus operandi of offenders

Probative value of police detective's expert testimony regarding gang identification outweighed any danger of unfair prejudice to defendants in attempted murder prosecution arising from beating of gang member; detective's testimony was largely didactic and not inflammatory in nature, it did not involve extraneous evidence of violence or bad acts by the defendants or their gang in general, and as the victim was himself a gang member, jury would not have been tempted to place undue emphasis on defendants' gang affiliation for conduct against a nonmember. Tenn. R. Evid. 403.

1 Cases that cite this headnote

[20] **Criminal Law** Points and authorities

Defendants waived on appeal their argument that trial court violated their constitutional rights in attempted murder prosecution by admitting incriminating statements of co-defendants in violation of *Bruton*; defendant's appellate brief, the relevant portion of which was adopted by the other defendants, failed to specifically identify which evidence he deemed improper, and only made a general complaint about "numerous written and audio recorded statements of co-defendants." Tenn. R. Ct.Crim.App. 10(b).

4 Cases that cite this headnote

[21] **Homicide** Intent or mens rea

Intent to kill, which can seldom be proven by direct evidence, may be deduced or inferred by the trier of fact in a second degree murder prosecution from the character of the assault, the nature of the act and from all the circumstances of the case in evidence. Tenn. Code Ann. § 39-12-101.

3 Cases that cite this headnote

[22] **Homicide** Second degree murder

Evidence was sufficient to support finding that defendants intended to kill victim, a fellow gang member who was severely beaten in his apartment, as required to support defendants' second degree murder convictions; based on severity of victim's life-threatening physical injuries, jury could have inferred that defendants intended to beat victim to death as punishment for failing to meet his gang-imposed responsibilities, and police detective explained that a gang-motivated "beat out" of an expelled gang member could be intended to cause either permanent physical impairment or death in order to promote the gang's status. Tenn. Code Ann. § 39-12-101.

[23] **Assault and Battery** Parties to Offenses

Homicide Parties to offense

Weapons Parties to crime; aiding and abetting

Evidence was sufficient to hold four defendants criminally responsible for attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony arising from beating of fellow gang member, despite individual defendants' arguments that they did not possess a firearm or actually cause the victim's injuries; evidence indicated that the defendants went to the victim's home with the shared purpose of confronting, intimidating, and beating him, and given that victim testified that one defendant possessed a handgun in his pocket during the encounter, the handle of which was hanging out, jury could have inferred that all of the other defendants were aware of the gun and intended to benefit from it. Tenn. Code Ann. §§ 39-11-402, 39-12-101(a)(2), 39-13-102(a)(1)(A)(i), 39-17-1324(a).

[24] **Assault and Battery** Great, extreme, or severe injury or harm in general

Presentment sufficiently alleged the offense of aggravated assault, despite defendant's argument that it did not include allegations of simple assault or include the allegation that the assault involved the use or display of a deadly weapon; language of the presentment contained all of the statutory elements of aggravated assault, and the State did not rely on the use of a deadly weapon to make the assault aggravated, but rather relied on the serious bodily injury sustained by the victim. Tenn. Code Ann. § 39-13-102(a)(1).

[25] **Criminal Law** Testimony of interested persons

The testimony of a victim, by itself, is sufficient to support a conviction.

1 Cases that cite this headnote

[26] **Criminal Law** Identity and characteristics of persons or things

Homicide Eyewitness identification

Homicide Miscellaneous particular circumstances

Evidence was sufficient to show that defendant was one of the four individuals who attacked victim in his apartment, as required to support defendant's convictions for attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony; although victim acknowledged that another individual in lineup looked like defendant, victim did not make an incorrect identification and instead asked police investigator for additional photographs, victim confidently identified defendant as one of his attackers on the next occasion, and defendant displayed consciousness of guilt by encouraging efforts to discourage victim from appearing in court. Tenn. Code Ann. §§ 39-12-101(a)(2), 39-13-102(a)(1)(A)(i), 39-17-1324(a).

1 Cases that cite this headnote

[27] **Double Jeopardy** Homicide

Dual convictions for attempted second degree murder and aggravated assault do not violate the Double Jeopardy Clause. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[28] **Sentencing and Punishment** Indictments and charging instruments

There was no evidence that defendants' criminal gang enhancement charges were not included in presentment to grand jury, and thus trial court properly refused to dismiss the presentment; prosecutor indicated that entire presentment was presented to grand jury at one time, but that the gang enhancement offenses were titled separately and contained on physically separate pages so that the relevant pages could easily be made available to the jury, which was not aware of the gang enhancement offenses during the guilt phase of trial, during deliberations. Tenn. Code Ann. § 40-35-121(g).

[29] **Criminal Law** Review De Novo

Questions of law presented by a trial court's ruling on a motion to dismiss an allegedly defective indictment or presentment are reviewed de novo with no presumption of correctness.

1 Cases that cite this headnote

[30] **Criminal Law** Arraignment

Even if defendant convicted of attempted murder, aggravated assault, and illegal possession of a firearm was not given notice of gang enhancement offenses at his arraignment, he was not entitled to relief on that ground; defendant eventually learned of the gang enhancement offenses before trial and did not present any evidence of prejudice from the late notice.

2 Cases that cite this headnote

[31] **Criminal Law** Out-of-court statements and hearsay in general

The Confrontation Clause precludes the admission of testimonial statements of witnesses absent from trial. U.S. Const. Amend. 6.

[32] **Jury** Sentencing Matters

Sentencing and Punishment Factors enhancing sentence

Facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime which must be proven beyond a reasonable doubt to a jury, regardless of whether those facts increase the statutory maximum or mandatory minimum of the sentencing range. U.S. Const. Amend. 6.

[33] **Criminal Law** Nature or stage of proceeding

Gang enhancement phase of prosecution arising from severe beating of gang member was an extension of the actual guilt phase of trial on the underlying criminal offenses, not merely a sentencing hearing, and thus presentation of proof during the gang enhancement phase was subject to the protections of the Confrontation Clause; although the legislature labeled the statute governing criminal gang offenses as "enhanced punishment," the factual requirements of the statute were elements of the underlying gang offenses because the statute increased the prescribed range of penalties applicable to a defendant by automatically increasing the underlying offense's sentencing classification by at least one range, raising both the maximum and minimum ends of the range. U.S. Const. Amend. 6; Tenn. Code Ann. § 40-35-121.

4 Cases that cite this headnote

[34] **Criminal Law** Nature or stage of proceeding

Criminal Law Reception of evidence

Sentencing and Punishment Reception of Evidence

New trial on defendants' criminal gang offenses was warranted based on trial court's treatment of gang enhancement phase of trial as a sentencing hearing, rather than an extension of the guilt phase to which Confrontation Clause protections applied; trial court should have permitted defendants to make specific objections to evidence during gang enhancement phase, rather than noting a general standing objection, trial court should have examined each potential piece of hearsay independently to determine whether it was testimonial, trial court should have permitted defendants to cross-examine expert about circumstances under which evidence in gang file was obtained, and State bore the burden of proving that the challenged evidence did not violate the Confrontation Clause. U.S. Const. Amend. 6; Tenn. Code Ann. § 40-35-121.

3 Cases that cite this headnote

[35] Constitutional Law Resolution of non-constitutional questions before constitutional questions

Generally, the Court of Criminal Appeals will not address the constitutional validity of a statute when it can dispose of the case on other grounds.

[36] Constitutional Law Certainty and definiteness in general

Due process requires that a statute provide fair warning and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have understood to be proscribed; to avoid constitutional infirmity, a criminal statute must be sufficiently precise to put an individual on notice of prohibited activities. U.S. Const. Amend. 14.

[37] Constitutional Law Matters Considered in Sentencing

Sentencing and Punishment Validity

Statute providing for enhanced punishment for certain "criminal gang offenses" was sufficiently precise to provide fair warning of the conduct covered by the statute, as required by due process; although statute's definition of "criminal gang offense" did not define "criminal offense," "bodily injury," or "death," given that "criminal offense" and "bodily injury" were defined in other criminal statutes and "death" was capable of ready understanding by a person of ordinary intelligence, a person of common intelligence would have no trouble understanding that the statute applied when a criminal gang member injured or killed someone, or threatened to do so, while committing a crime.

U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. §§ 39-11-102, 39-11-106(2), 39-11-106(20), 40-35-121.

1 Cases that cite this headnote

[38] Constitutional Law Notice and Hearing

The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[39] Constitutional Law Substantive Due Process in General

In contrast to procedural due process, "substantive due process" bars oppressive government action regardless of the fairness of the procedures used to implement the action. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[40] Constitutional Law Reasonableness, rationality, and relationship to object

Unless a fundamental right is involved, the test for determining whether a statute comports with substantive due process is whether the legislation bears a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[41] Criminal Law Review De Novo

Issues of constitutional interpretation are questions of law which the Court of Criminal Appeals reviews de novo without any presumption of correctness given to the legal conclusions of the courts below.

[42] Constitutional Law Presumptions and Construction as to Constitutionality

When reviewing the constitutionality of a statute, courts begin with the presumption that an act of the legislature is constitutional and must indulge every presumption and resolve every doubt in favor of constitutionality.

[43] Constitutional Law Reasonableness, rationality, and relationship to object

Under rational basis review of the constitutionality of a statute challenged on due process grounds, specific evidence is not necessary to show the relationship between the statute and its purposes. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[44] **Constitutional Law** Matters Considered in Sentencing

Sentencing and Punishment Validity

Provision of statute governing "criminal gang offenses" that mandated enhanced punishment for certain offenses lacked a reasonable relationship to achieving the legislative purpose of deterring criminal gang activity and, thus, violated substantive due process principles; provision was completely devoid of language requiring that the underlying offense be somehow gang-related before the sentencing enhancement applied, and without a nexus requirement, the provision directly advanced only the objective of harsher treatment of criminal offenders who happened to be members of a criminal gang. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. § 40-35-121(b).

8 Cases that cite this headnote

[45] **Constitutional Law** Matters Considered in Sentencing

Sentencing and Punishment Validity

Provision of statute governing "criminal gang offenses" that mandated enhanced punishment for certain offenses violated substantive due process principles because it imposed mandatory criminal punishment based on the criminal conduct of others; without a nexus requirement that the underlying offense be gang-related, the provision was untethered to any personal criminal intent or conduct by the defendant, as there was no Tennessee law prohibiting membership or affiliation with a criminal gang as defined by the statute, and fact that provision purportedly imposed a sentence enhancement rather than an independent criminal offense was irrelevant because it imposed mandatory punishment wholly aside from any consideration of discretionary sentence enhancement factors. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. § 40-35-121(b).

1 Cases that cite this headnote

[46] **Constitutional Law** Invalidity as applied

In contrast to a facial challenge, which involves the constitutionality of the statute as written, an as applied challenge to the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations.

[47] **Constitutional Law** Facial invalidity

A statute is unconstitutional on its face when no set of circumstances exists under which the statute, as written, would be valid.

2 Cases that cite this headnote

[48] **Statutes** Effect of Partial Invalidity; Severability

Under the "elision doctrine," a court may, under appropriate circumstances and in keeping with the expressed intent of a legislative body, elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective.

[49] **Statutes** Effect of Partial Invalidity; Severability

The doctrine of elision is not favored.

[50] **Statutes** Effect of Partial Invalidity; Severability

Tennessee law permits severance of unconstitutional statutory provisions only when it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted.

[51] **Statutes** Effect of Partial Invalidity; Severability

In determining whether an unconstitutional statutory provision should be severed, the proper inquiry is whether the legislature would choose, on the one hand, having no statute at all and, on the other, passing the statute without the unconstitutional provision.

[52] **Statutes** Effect of Partial Invalidity; Severability

Statutes Effect of severability clause

Legislative endorsement of elision does not automatically make it applicable to every situation; however, when a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted, then elision of the unconstitutional portion is appropriate. Tenn. Code Ann. § 1-3-110.

[53] **Statutes** Criminal justice

Provisions of statute governing "criminal gang offenses," which violated substantive due process principles by mandating enhanced punishment for certain gang offenses without requiring a nexus between the underlying criminal offense and gang membership, were severable from the rest of the statute; the unconstitutional provisions were not interwoven with a separate provision that mandated enhanced punishment

for criminal gang offenses related to gang initiation requirements, which did contain the requisite nexus language. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. § 40-35-121.

12 Cases that cite this headnote

[54] Sentencing and Punishment Other particular grounds for enhancement

Statute providing for enhanced punishment of "criminal gang offenses" did not violate the Eighth Amendment's prohibition of cruel and unusual punishment; statute's imposition of heightened punishment for gang-related offenses by increasing the sentencing range of the offense did not offend the proportionality requirements of the Eighth Amendment. U.S. Const. Amend. 8; Tenn. Code Ann. § 40-35-121.

[55] Sentencing and Punishment Sufficiency

Evidence was sufficient to support finding that defendants were a members of a criminal gang and committed a "criminal gang offense," as required to support mandatory sentence enhancements; evidence established that defendants perpetrated the underlying criminal offenses of attempted murder, aggravated assault, and illegal possession of a firearm in connection with severe beating of victim, a former gang member who identified defendants as members of the gang, evidence indicated that defendants wore gang colors and were involved in gang-related crimes, and evidence of other gang members' convictions established that at least two members of the gang had committed at least two different felonies within a five-year period. Tenn. Code Ann. § 40-35-121.

10 Cases that cite this headnote

[56] Sentencing and Punishment Miscellaneous particular offenses

Defendant convicted of attempted second degree murder, aggravated assault, and illegal possession of a firearm failed to demonstrate that trial court improperly sentenced him as a multiple offender based on his prior federal convictions for drug-related crimes; although trial court did not expressly consider whether the federal convictions had Tennessee analogues, defendant failed to suggest or show that court violated the multiple offender statute by utilizing those convictions to establish his offender classification. Tenn. Code Ann. § 40-35-106(b)(5).

[57] Criminal Law Judgment, sentence, and punishment

When a defendant challenges the length or manner of service of a within-range sentence, the Court of Criminal Appeals reviews the trial court's sentencing decision under an abuse of discretion standard with a presumption of reasonableness; this presumption applies to within-range sentencing decisions that reflect a proper application of the purposes and principles of the Sentencing Act.

[58] Criminal Law Sentencing

A trial court abuses its discretion in sentencing when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining; this deferential standard does not permit an appellate court to substitute its judgment for that of the trial court.

[59] Sentencing and Punishment Punishment

Trial court did not abuse its discretion in sentencing defendant to within-range sentences of 35 years' imprisonment for attempted second degree murder, 18 years' imprisonment for aggravated assault, and 5 years' imprisonment for illegal possession of a firearm; trial court clearly identified each enhancing factor on which it relied, including defendant's previous criminal history, the life-threatening nature of the victim's injuries, the failure of previous attempts at alternative sentencing, defendant's possession of a firearm, and defendant's multiple convictions for offenses resulting in serious bodily injury, and there was no indication that court placed undue emphasis on an improper factor. Tenn. Code Ann. §§ 40-35-102, 40-35-103, 40-35-114(1), 40-35-114(6), 40-35-114(8), 40-35-114(9), 40-35-114(11).

West Codenotes

Prior Version Held Unconstitutional

Tenn. Code Ann. §§ 40-35-121(b), 40-35-121(e)

***126 Appeal from the Criminal Court for Knox County, Nos. 100194A–D, Bobby R. McGee, Judge**

Attorneys and Law Firms

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Timothy L. Easter, J., delivered the opinion of the Court, in which James Curwood Witt, Jr., and Camille R. McMullen, JJ., joined.

*127 OPINION

Timothy L. Easter, J.

Defendants Devonte Bonds, Thomas Bishop, Jason Sullivan, and Brianna Robinson were tried jointly and convicted of attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony. The jury found that the underlying offenses committed by Defendants Bonds, Bishop, and Sullivan constituted criminal gang offenses, and they received enhanced punishment under Tennessee Code Annotated section 40–35–121. All of the defendants raise multiple procedural and evidentiary issues with regard to the guilt phase of the trial on the underlying offenses. Defendants Bonds, Bishop, and Sullivan also raise several issues regarding their criminal gang enhancements. Defendants Bishop and Sullivan each raise an issue with regard to their sentencing. After an exhaustive review of the record, we ascertain no error in the guilt phase of the trial on the underlying offenses. Accordingly, the trial court's judgment as to Defendant Robinson is affirmed. However, because the subsection of the criminal gang enhancement statute employed by the State violates the Due Process Clause of the Fourteenth Amendment and is facially unconstitutional, we reverse the judgments of the trial court as to Defendants Bonds, Bishop, and Sullivan, vacate the criminal gang enhancements, and remand for modification of the judgments and a new sentencing hearing on the underlying offenses of attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony.

This is a direct appeal by the four defendants who were convicted by a Knox County jury of various serious crimes of violence involving firearms and gang enhancement that resulted from a "beating out" of a fellow gang member. Because of the nature of the charges, the defendants were tried jointly in a trifurcated proceeding.

I. Procedural History and Factual Summary

All of the defendants were indicted for attempted first degree murder, aggravated assault, possession of a firearm during the commission of a dangerous felony, and employing a firearm during the commission of a dangerous felony. A jury convicted them of attempted second degree murder, aggravated assault, and possession of a firearm during the

commission of a dangerous felony; they were acquitted of employing a firearm during the commission of a dangerous felony. Defendants Bishop and Sullivan were each found to have committed the underlying firearm offense while having previously been convicted of dangerous felonies. Defendants Bonds, Bishop, and Sullivan were found to have committed criminal gang offenses and received enhanced punishment pursuant to Tennessee Code Annotated section 40–35–121. The following facts were adduced during the guilt phase on the underlying offenses. [1]

On May 30, 2012, Jonathan Dyer was living with his girlfriend, Carnisha Dibrell, in Arbor Place Apartments on Townview Drive. Katherine White lived upstairs from the couple in the same apartment complex. That morning, Ms. White asked Mr. Dyer to take out his trash because she could smell it at her apartment, and she ***128** gave him a trash bag to do so. Mr. Dyer removed the trash and cleaned off his porch. Afterward, around 11:00 a.m., he went inside to brush his teeth and to prepare for a job interview. He also woke up Ms. Dibrell so that she could get ready to go to work.

Ms. White was sitting on the stairs outside of her apartment and smoking a cigarette when she saw a group of people approach and knock on Mr. Dyer and Ms. Dibrell's front door. Mr. Dyer and Ms. Dibrell heard the knock on the door, and Mr. Dyer shut the bedroom door before going to answer the front door. When Mr. Dyer opened the door, the defendants immediately entered the apartment. Ms. White saw Mr. Dyer let the group inside the apartment.

Mr. Dyer and the defendants were members of a street gang known as the Five Deuce Hoover Crips. Mr. Dyer knew the defendants, primarily, by their gang monikers: Defendant Bonds was known as "Lil Doozie"; Defendant Bishop was known as "Hoova T"; Defendant Sullivan was known as "Crank Deuce"; and Defendant Robinson was known as "Yella Deuce." Mr. Dyer's gang moniker was "J Hoover." Mr. Dyer knew Defendant Bonds the best of all the defendants because they grew up together, and Defendant Bonds's legal name was the only one of which Mr. Dyer was aware at that time. Mr. Dyer had only met Defendant Sullivan recently.

After entering the apartment, Defendants Bishop and Sullivan told Mr. Dyer that he needed "to put some money on [his] big homey, L.G.'s, books." Mr. Dyer refused this demand on the basis that fellow gang member L.G. was not his big homey; Mr. Dyer's big homey was another individual. [2] Mr. Dyer explained that a "big homey" is a gang member who "calls the shots." A gang member under the authority of a "big homey" is called a "little homey," and a little homey must get the big homey's permission "to do something."

Defendant Bishop then accused Mr. Dyer of abandoning Defendant Robinson during a previous incident when someone fired a gun at her. Defendant Bishop indicated that Mr. Dyer's conduct was unacceptable because he had "left the home girl on stuck," meaning that Mr. Dyer "didn't defend her." Mr. Dyer maintained to the group that such an event had never happened and told them that Defendant Robinson was lying. Defendant Robinson "swore up and down that it did happen" and insisted, "Yeah,

it did. You left me on stuck." Defendant Bishop reprimanded Mr. Dyer, chiding "these are the most precious things to us. You're supposed to hold it down, cuz. That's bogus." In making mention of "the most precious things," Defendant Bishop was talking about all female Crips. Mr. Dyer explained that, as a gang member, he was expected to "step up" and defend a fellow gang member if being threatened. Thus, if Defendant Robinson had been attacked, he would have had an obligation to protect her.

While in the bedroom during the confrontation, Ms. Dibrell heard a familiar ***129** male voice say, "These are the most precious B's in the world.... You ain't supposed to leave them like that. [They] are supposed to be protected." She then heard Mr. Dyer deny the accusations by responding, "No, that ain't what happened. That ain't what happened."

According to Mr. Dyer, failing to provide money for an incarcerated inmate and failing to protect a fellow female gang member could be potential grounds for a gang member to be expelled from the gang. The group surrounded Mr. Dyer against the wall leading into the kitchen of his apartment, and all of them "ganged" him, which meant that Mr. Dyer was "getting hands and feet put to" him. Mr. Dyer explained that receiving a gang beating or a fight is both the manner of initiation into the gang and expulsion from the gang. These rituals are known as "ganged in" and "ganged out." Mr. Dyer was ganged in to the gang when he was seventeen years old. During his initiation, Mr. Dyer was only ganged with fists, not feet, and he fought back against the gang members who were "jumping" him. There were no weapons during the initiation. Mr. Dyer did not need medical attention after he was ganged in. For this particular gang, the beating or fight is supposed to last for two minutes. However, on this occasion, Mr. Dyer did not remember having "too much of a chance to fight back." Mr. Dyer acknowledged that the beating he received was him being "ganged out" of the Five Deuce Hoover Crips and that he is no longer a member of the gang. Mr. Dyer testified that a gang member is also expected to fight back when he is ganged out. He was unaware of any gang member sustaining injuries as serious as he did while being ganged out.

Mr. Dyer remembered that Defendant Sullivan had a pistol "inside his front pocket," which Mr. Dyer described as a "little .22." Mr. Dyer could see the handle "hanging out," and he recognized the gun as belonging to Defendant Robinson. However, Mr. Dyer did not see Defendant Sullivan remove the weapon from his pocket, and as far as he knew, he had not been "pistol-whipped" with the gun.

From the bedroom, Ms. Dibrell heard a man "screaming" at Mr. Dyer, followed by loud yelling. The voice was so loud that Ms. Dibrell was "scared ... a little bit." After "no longer than five seconds" of "scuffling" and "commotion," Ms. Dibrell went into the living room and saw Mr. Dyer on the floor. At that point, he was no longer being beaten. When Ms. Dibrell entered the room, four individuals were looking at her, and she began to "fear for [her] life."

The attackers walked out of the apartment, but Defendant Bonds turned around and pushed his way back into the apartment as Ms. Dibrell tried to shut the front door. He retrieved a bottle of

Sprite from the kitchen and left. Ms. Dibrell did not observe any of the attackers carrying a weapon of any type.

Out of the group, Ms. Dibrell recognized Defendant Bonds because she knew him well. She had seen Defendant Bishop at their apartment on previous occasions, but only knew him by his moniker. Ms. Dibrell gathered that the familiar voice she had heard in the bedroom was that of Defendant Bishop because she knew it was not Defendant Bonds's voice and because she did not know the other male in the group. The first person who walked out of the front door did not appear to be someone Ms. Dibrell knew, but she did not see that person's face.

Mr. Dyer was face down on the floor and would not respond to her. There was "so much blood on his face." His toothbrush was on the floor in the living room. Afraid that the attackers might still be ***130** outside, Ms. Dibrell said a prayer before she went outside and began screaming. She ran upstairs to get help from Ms. White and the other neighbors. Ms. Dibrell was "so scared" about Mr. Dyer's condition because he was unconscious and could not be roused.

Ms. White was still outside when Ms. Dibrell came out of the apartment screaming. Ms. White estimated that less than a minute had elapsed since the group entered the apartment. However, Ms. White did not notice the group leave. Ms. White went down to the apartment, looked inside through the front door, and saw Mr. Dyer on the floor.

After alerting Ms. White, Ms. Dibrell returned to her apartment and observed Mr. Dyer begin "shaking." She then called 911 from her apartment. Paramedic David Blanton responded to the emergency call. After entering the apartment, he observed Mr. Dyer unconscious on the floor and bleeding from his head. Mr. Dyer would not respond to attempts to revive him. Paramedic Blanton and his partner immobilized Mr. Dyer and carried him on a stretcher to their ambulance. They took him to the emergency room for trauma patients in critical condition.

The beating rendered Mr. Dyer unconscious and caused him to have body seizures. He remained in a medically-induced coma for nine weeks. A tracheotomy tube was inserted into Mr. Dyer's throat because he could not breathe without mechanical assistance. He needed rehabilitation to learn how to talk and walk again and to learn how to control his excretory functions. Mr. Dyer said that he was not in his "right state of mind" immediately after awaking from the coma. He began "hitting people" after he regained consciousness. Ms. Dibrell admitted that there were moments when Mr. Dyer's memory was "spotty" after he regained consciousness. At times, he did not recognize her. Mr. Dyer eventually normalized, but there are still some things that he does not remember. Mr. Dyer agreed that there are gaps in his memory about what happened to him after he awoke from the coma. At the time of trial, Mr. Dyer was twenty-one years old.

Michael Washam of the Knoxville Police Department was an investigator in the Violent Crime Unit. When he arrived at Mr. Dyer's apartment, Mr. Dyer had already been taken to the hospital. Inside the apartment, Investigator

Washam observed puddles of blood near and inside of the kitchen area.

Investigator Washam interviewed Ms. White about the incident and spoke to the apartment manager. Based on his conversations, Investigator Washam began looking for four black males and a black female. Ms. White testified that the men entered first, followed by the woman. The woman wore her hair in a ponytail. One of the other men had a short "fade" haircut. They did not appear to be carrying anything. Investigator Washam quickly identified Defendants Bonds and Robinson as potential suspects; Defendant Bishop became a suspect not long after the first two were identified as suspects.

On July 20, 2012, Investigator Washam went to the hospital and showed Ms. Dibrell a six photograph lineup. She identified Defendant Bishop. He showed her another six photograph lineup, and she identified Defendant Bonds. At the time she made those identifications, she had not discussed the incident with Mr. Dyer.

During this hospital visit, Mr. Dyer was "up and moving around ... [but] he did not know who he was nor who [Investigator Washam] was and could not even name his girlfriend's name...." Because of Mr. ***131** Dyer's mental state, Investigator Washam did not ask Mr. Dyer to identify his attackers.

On August 20, 2012, Investigator Washam returned to the hospital and presented Mr. Dyer with several six photograph lineups. Investigator Washam instructed Ms. Dibrell to leave the room while he asked Mr. Dyer about the lineups. Mr. Dyer identified Defendants Bonds, Robinson, and Bishop, respectively. Mr. Dyer did not make an identification in two additional lineups, neither of which contained a photograph of any of the defendants. He told Investigator Washam that Crank Deuce participated in the beating and that one of the men in the two lineups looked like Crank Deuce. However, because Mr. Dyer had only met Crank Deuce once or twice a few weeks before the beating occurred, Mr. Dyer said that he was "not a hundred percent sure" that Crank Deuce was in the lineups. Mr. Dyer asked Investigator Washam to bring additional lineups for him to review. Separately, Ms. Dibrell also identified Defendant Robinson in a lineup.

On August 25, 2012, after Mr. Dyer had been released from the hospital, Investigator Washam showed Mr. Dyer a different lineup. This time, Mr. Dyer affirmatively identified Defendant Sullivan as Crank Deuce.

On October 22, 2012, Investigator Washam showed Ms. White a six photograph lineup, and she identified Defendant Robinson. He showed her another lineup, and she identified Defendant Bishop. She could not identify anyone else in the group.

Detective Thomas Walker of the Knox County Sheriff's Office testified that Five Deuce Hoover Crips is a gang that operates in Knox County. The Hoover Groovers was the original gang name during the 1960s in California. The gang members commonly refer to the gang as "Groovin' " or "Groovers." Detective Walker confirmed that, in gang culture, a member known as "a big homey" is one who recruits members to the gang. The recruits are mentored

or trained on gang life by the "big homey." The more recruits a "big homey" has, the more status he has within the gang. Aside from death, "beat outs" are a common way for gangs to expel or release members who want to leave. It is a "very violent" experience that "will result in some kind of major trauma" to the ex-member. Permanent injury serves as an enduring reminder of what happens if someone offends or forsakes the gang.

The Sheriff's Office keeps a log of all ingoing and outgoing mail to inmates in their custody. On December 14, 2012, at 4:50 a.m., a letter written by Defendant Sullivan was mailed to a Knoxville address. Defendant Sullivan signed the letter identifying himself as "Crank Deuce 52." Previously, on January 22, 2010, Defendant Sullivan sent another letter to the same individual. The bottom of the letter displays the word "groovin" and the letters "MxHxL." The acronym stands for "much Hoover love." It is signed by "Crank Deuce." Defendant Bishop signed a letter as Hoova T, "Hoova" being short for Hoover.

Defendant Sullivan has a tattoo on his arm. It depicts four playing cards fanned out, each bearing the numeral two with one of the suits in a standard deck of playing cards; such a hand is known as a four of a kind. The tattoo reads "Deuce is Wild." The gang members also commonly refer to themselves as "The Deuces." Defendant Bishop has the phrase "Criminal Minded" on his forearms as well as a five on one forearm and a two on the other. Defendant Bonds has a tattoo on his neck that says "Five Two." The numbers allude to their gang's name which contains those numbers. Defendant Bonds also has a ***132** tattoo of a star, which in gang culture identifies that a gang member is with a particular "nation." Defendant Robinson has "Yella Girl," tattooed on her neck.

Lieutenant Stephen Patrick of the Knox County Sheriff's Office testified that he was the keeper of records for the jail. He explained that Knox County contracts with a private company to record and store all inmate telephone calls. Every inmate receives a twelve-digit pin number, which is required for the inmate to place a phone call. The phone pin number is associated with the inmate's identification number. The State played portions of numerous recorded phone calls made by the defendants while incarcerated. [3]

On August 20, 2012, at 9:13 a.m., Defendant Bonds made a phone call to an unidentified recipient, during which he said:

> ["Tone"] keep telling everybody I'm locked up for attempted murder like he want[s] me to be locked up for attempted murder. I said to myself like, "Dude, you just don't know. Lil' Jonathan done woke up."....
> If he were to press charges it would be aggravated assault and battery. Ain't no attempted murder.... Only thing is it would be extremely aggravated assault.

On February 28, 2013, at 6:40 p.m., Defendant Bonds made a phone call to an unidentified recipient, during which the following conversation transpired:

> Defendant Bonds: Listen. Listen. I need you all to make sure cuz is not coming.
>
> [Redacted]

Defendant Bonds: You got to make sure everything is everything, man. 'Cause if not, dude, I'm gone. I'm gone. I'm just gonna be gone for six years, but that's still a long time, man.

....

Defendant Bonds: .... If he show[s] up, I'm gone for six years.

Other: (Inaudible)

Defendant Bonds: You hear me?

Other: Yeah. [Redacted] said he wasn't.

Defendant Bonds: .... I need to know. I can't say too much over the phone, you hear me?

Other: I know, okay. So you need to talk to your daddy.

Defendant Bonds: I'm telling—Look. Listen.

Other: I[ ] know what you're sayin', okay?

Defendant Bonds: All right, I'm just making sure. Because if everything go good, I will be walking. I will be walking out [of] this jail on April 23rd.

Other: Right.

Defendant Bonds: Yeah, got to get this politicking the right way. Got to get this stuff right, ASAP. 'Cause if everything go good, I'm walking out that courtroom. My lawyer said, if cuz don't show up to court, I'm walking out that courtroom [on] April 23rd. I'm walking out of this jail [on] April 23rd....

....

Defendant Bonds: Yeah, my lawyer says, [if] Jonathan don't show up to court, I'm walking out of this court, I'm walking out of this jail [on] April 23rd.

Other: Oh, okay.

....

Defendant Bonds: Hey, you coming to court, right?

***133** Other:.... I'm gonna try. Yeah, I'm gonna tell my manager to approve it.

Defendant Bonds: He need to approve it 'cause I need you there. 'Cause when I walk into the courtroom, I need you to nod your head yeah if he there, you know what I'm saying? You hear me?

Other: Uh huh.

Defendant Bonds: 'Cause you coming in from the outside, and you can see, you get what I'm saying?

Other: Uh huh.

Defendant Bonds: All right. And if he not there, you know, nod your head no 'cause I can't talk to you. But don't make it obvious. I'm gonna look at you.

On February 28, 2013, at 6:53 p.m., Defendant Bonds made a phone call to an unidentified recipient, during which the following conversation transpired:

Defendant Bonds: I been calling your phone. Is my daddy there?

Other: No, he left....

Defendant Bonds: Ahh, damn. I just missed him.

....

Defendant Bonds: .... I need him to make sure cuz don't show up.

....

Defendant Bonds: .... If cuz don't show, man, it's good. But if he show, I'm gone for six for aggravated assault and then they gonna charge me six for another gun, which is at a hundred. I'm gonna end up doing at least eight, nine years....

On March 4, 2013, at 9:45 a.m., Defendant Bonds made a phone call to his father, known to Mr. Dyer as "Big Doozie," during which the following conversation transpired:

Defendant Bonds: .... I was telling you to let you know and make sure cuz doesn't show up to court. 'Cause if [he] do, I'm gone for twenty years, man....

....

Defendant Bonds: .... See, n[* * * * *] is gonna talk. See, he's gonna talk....

Other: .... You dude ain't coming to court, know what I mean?

Defendant Bonds: Dude ain't coming to court, and I'm good, man. I go to trial next month on April 23rd.

Other: Well, he ain't showed up when he's supposed to.

On January 5, 2013, at 7:46 p.m., Defendant Bishop made a phone call to an unidentified recipient, during which the following conversation transpired:

Defendant Bishop: Hey, you get your letter from the homey?

Other: Yeah, I been trying to look for that n[* * * * *], man. I couldn't even find that little n[* * * * *].

Defendant Bishop: You got that letter though?

Other: Yeah.

....

Other: .... I've been trying to get in to little dude.... I mean, he was on Facebook. He was on Facebook so I was his friend on —I got into his friend on Facebook, and he's telling somebody he trying to heal or some s* * * you know what I'm saying? He's trying to recover or something.

Defendant Bishop: All right, all right. Well, you got him on the issue?

Other: I ain't want to do it on Facebook, man.

Defendant Bishop: All right.... So, you on it then?

Other: I'm on it....

***134** ....

Other: Yeah, I'm trying to see where he is, see where he located at or not, so I can go just go to his crib.

Defendant Bishop: Yeah, that's what's up.

On March 23, 2013, at 3:34 p.m., Defendant Bishop made a phone call to the same phone number, during which the following conversation transpired:

Defendant Bishop: Hey, hey, what's up, man? Yeah, you still be acting on that little situation?

Other: Yeah. Lil Cuz, J Hoover.

....

Defendant Bishop: What's up with them, homey?

Other: I don't know. Motherf[* * * * *], said he wouldn't [be] coming though. Said he wouldn't [be] coming[, that is] what's up. And I talked to K Groove, and K Groove said he wasn't coming too though.

In a phone call on January 23, 2013, at 1:27 p.m. to the same number, Defendant Sullivan was addressed as Crank Deuce, and the following conversation occurred:

Defendant Sullivan: .... You know what you were talking about the last time when he called you, right?

Other: Ahhh.

Defendant Sullivan: Just stay up on that and see what Lil Buddy talking about on the LC. You feel me?

Other: I've been hitting him up and s* * * you know what I'm saying? I've been hitting him up. I've been telling him I f[* * *] with. I have been telling him I f[* * *] with some more Groovers and s* * *

Defendant Sullivan: Yeah, that's what's up....

Other: He wanted me to come over. I had to get my car fixed. He wanted me to come over and chill with him. So me and G are going to go over there and kick it with him and s* * * and holler at that n[* * * * *] about that s* * *

Defendant Sullivan: That's what's up. I see you. That's what's up because everything [is] lookin' goochy poochy.... We've got to make sure Lil Buddy don't come and don't do s* * * like—he like—like word is. But then, you know Lil Buddy.

On February 20, 2013, at 7:29 p.m., Defendant Sullivan made another phone call to the same phone number, during which the following conversation transpired:

Defendant Sullivan: .... Hey, but you know that business that we—that cuz we've been hitting that groove on, right?

Other: Yeah, yeah, yeah.

Defendant Sullivan: Need to take care of, you know what I'm saying?

Other: Yeah, but you all hanging out. What you feelin'?

Defendant Sullivan: It's like, you know what I'm saying, it will be a no go if everything on that end don't show, you dig?

In a phone call on September 18, 2012, at 9:26 a.m., Defendant Sullivan identified himself as "Crank." During the conversation, he instructed the other participant, "It ain't Crank Deuce no more—it's Deuce Man. They call me Deuce Man." Defendant Sullivan also declared his intention to "back[ ] all the way out [of] the gang ... completely," going so far as to say that he would no longer wear the gang's colors of orange and blue.

On February 23, 2013, at 4:22 p.m., Defendant Robinson made a phone call to Mr. Dyer's "big homey," who goes by the moniker ***135** "Bucc-it[4]," during which the following conversation transpired:

Defendant Robinson: Yeah. You know I go to court in April?

Other: I know, and I'm on top of that too.

Defendant Robinson: Yeah.

Other: I can't find that n[*]gga.

Defendant Robinson: Who?

Other: I can't find him.

Defendant Robinson: Who? Oh yeah, yeah, yeah.

Other: Dude.

Defendant Robinson: Yeah. Ahh, he ain't coming.

Other: Oh, all right.

Defendant Robinson: Yeah, everything is good on that....

After the conclusion of the State's case-in-chief, none of the defendants presented any proof. The jury convicted all of the defendants of attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony. The defendants were acquitted of employing a firearm during the commission of a dangerous felony.

During the second phase of the trial, the jury found that Defendants Bishop and Sullivan had prior drug-related felony convictions, which would enhance their sentences for the underlying offense of possession of a firearm during the commission of a dangerous felony. Those enhancements are not challenged on appeal.

During the third phase of the trial, the jury found that the underlying offenses committed by Defendants Bonds, Bishop, and Sullivan were criminal gang offenses pursuant to Tennessee Code Annotated section 40–35–121 and subject to enhanced punishment. For clarity, the relevant facts of this proceeding will be set forth below as each legal issue is analyzed.

At the sentencing hearing, the trial court enhanced Defendants Bonds, Bishop, and Sullivan to one classification higher for their

convictions of attempted second degree murder and aggravated assault pursuant to subsection (b) of T.C.A. § 40–35–121. Defendant Bonds received an effective sentence of twenty-three years as a standard offender. Defendant Bishop received an effective sentence of thirty-seven years as a multiple offender. Defendant Sullivan received an effective sentence of forty years as a multiple offender. Defendant Robinson received an effective sentence of eleven years as a standard offender.

After the trial court denied their respective motions for new trial, the defendants filed timely notices of appeal.

II. Analysis

On appeal, the defendants raise the following issues with regard to the guilt phase of the trial: (1) the trial court erred by allowing continued direct examination of the victim after the State announced that its examination of the witness was concluded; (2) the trial court erred by not suppressing the pre-trial identifications of the defendants made to Investigator Washam; (3) the trial court erred in admitting expert testimony from an emergency room nurse about the victim's injuries; (4) the trial court erred in admitting testimony from Detective Walker as a gang expert; (5) the trial court erred in admitting out-of-court statements made by each of ***136** the codefendants in their joint trial; and (6) the evidence is insufficient to support their convictions.

Defendants Bonds, Bishop, and Sullivan raise the following issues with regard to their criminal gang enhancements: (1) the trial court erred by failing to dismiss the charges due to defects in the presentment to the grand jury; (2) the statute violates the Confrontation Clause of the Sixth Amendment; (3) the statute violates the Due Process Clause of the Fourteenth Amendment; (4) the statute imposes cruel and unusual punishment in violation of the Eighth Amendment; (5) the trial court erred by admitting hearsay testimony from Detective Walker as a gang expert; (6) the trial court erred by denying the defendants an opportunity for closing argument; and (7) the evidence is insufficient to support their gang enhancements.

Individually, Defendant Bishop argues that the trial court erred in sentencing him as a multiple offender, and Defendant Sullivan argues that the trial court abused its discretion by imposing an excessive sentence. [5]

A. Guilt Phase

1. Continued Direct Examination of Victim

[1] The defendants argue that the trial court erred in permitting the State to continue its direct examination of the victim after tendering the witness for cross-examination. The State concluded its direct examination of the victim at the end of the first day of the presentation of proof during the trial. The prosecutor announced that the State had no further questions for the witness and passed the witness to the defense. Cross-examination was to commence on the beginning of the second day of the trial. However, the following morning, the State requested permission from the trial court to ask the victim additional questions. Over the defendants' objections, the

trial court granted this request, and the State proceeded to elicit testimony from the victim about the presence of a firearm during the crime. The victim did not testify about a firearm during the first day.

[2] A trial court's decision to permit the State to recall a witness is reviewed for an abuse of discretion. *See State v. McAlister,* 751 S.W.2d 436, 438 (Tenn.Crim.App. 1987). The defendants did not identify any prejudice from the trial court's decision aside from the inherent prejudice that exists in any incriminating testimony. There was no reason for the trial court to deny the State an opportunity to continue its direct examination. The defendants are not entitled to relief on this issue.

2. Pre–Trial Identification

The defendants argue that the trial court erred during the suppression hearing by permitting Investigator Washam to testify about the pre-trial identifications without testimony from the identifying witnesses. The defendants also argue that the trial court erred by not suppressing the identifications because they were conducted in an impermissibly suggestive manner and were unreliable.

At the suppression hearing, Investigator Washam's testimony was consistent with his subsequent trial testimony. Investigator Washam showed various six-photograph lineups to three different witnesses: Ms. Dibrell, Mr. Dyer, and Ms. White. On July 20, 2012, Investigator Washam showed Ms. Dibrell two lineups, and she identified Defendant Bishop and Defendant ***137** Bonds. On August 20, 2012, Investigator Washam presented Ms. Dibrell with a new lineup, and she identified Defendant Robinson. On the same day, Investigator Washam presented the lineups of Defendants Bonds, Robinson, and Bishop to Mr. Dyer. Mr. Dyer identified each of them, respectively. Investigator Washam also showed Mr. Dyer a lineup containing a photograph of Blake Kirk, who was a "running buddy" of Defendant Bonds, because Investigator Washam thought it possible that Mr. Kirk had also been involved in the crime. However, Mr. Dyer did not identify Mr. Kirk as one of his attackers. Similarly, Mr. Dyer also did not identify Antonio Williams, who was Defendant Bonds's cousin and a fellow gang member, as one of his attackers. On August 25, 2012, Investigator Washam showed Mr. Dyer a new lineup, which included a photograph of Defendant Sullivan. Mr. Dyer identified Defendant Sullivan. On October 22, 2012, Investigator Washam showed Ms. White the photo lineups of each defendant. Ms. White identified Defendants Robinson and Bishop, but she was unable to identify Defendants Bonds and Sullivan.

According to Investigator Washam, he usually prefaces showing a lineup to a witness by telling the witness:

> I'm going to show you a photo lineup of six people. The person may or may not be in there. Please don't pay attention to ... facial hair or regular hair—that can change overnight—and just look at their features. If you

> recognize someone, I need you to tell me.

Investigator Washam denied giving instructions or making suggestions to any of the witnesses in this case about which photographs he wanted them to select.

To create the lineups in this case, Investigator Washam placed a driver's license of each defendant among five other driver's license photographs of individuals who possessed similar physical features and characteristics of the defendant, such as gender, hair style, facial hair style, and skin color. The photographs in the lineup of Defendant Bishop shown to Ms. Dibrell and Mr. Dyer were in black and white, rather than color, because that made the skin color of all six individuals more similar.[6] In the lineup of Defendant Bonds, Investigator Washam utilized colored photos because black and white "faded out several of the pictures." Investigator Washam ensured that, even in color, the skin complexion of every individual was "very similar." After completing the lineups of Defendants Bishop and Bonds, Investigator Washam asked another investigator, who was not involved with this case, to confirm that neither of the lineups suggested a particular photograph. The lineup of Defendant Robinson was also in black and white to ensure that her relatively lighter skin complexion did not stand out. Most but not all of the women in the lineup of Defendant Robinson were wearing earrings like she was in her photograph.

The trial court admitted into evidence all of the lineups that were presented to each witness, whether an identification was made or not, as well as a recording of the August 20th identifications made by Ms. Dibrell and Mr. Dyer.[7] Investigator Washam was the only witness who testified. After hearing the proof and the arguments of counsel, the trial court denied the motion to suppress.

***138** **[3]** **[4]** The defendants argue that the trial court erred by admitting into evidence the pre-trial identifications of the defendants. First, they contend that the trial court erred in permitting the State to introduce the identifications of Mr. Dyer, Ms. Dibrell, and Ms. White through the testimony of Investigator Washam at the suppression hearing because his testimony was based on hearsay and the identifying witnesses were not available for cross-examination. However, the Tennessee Rules of Evidence generally do not apply in hearings to determine the admissibility of evidence. Tenn. R. Evid. 104(a). Accordingly, Investigator Washam's hearsay testimony as to the identifications made by Mr. Dyer, Ms. Dibrell, and Ms. White was permissible at the suppression hearing. This same testimony by Investigator Washam was also permissible at trial because an exception to the hearsay rule exists for "[a] statement of identification of a person made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." Tenn. R. Evid. 803(1.1). "[W]itnesses other than the declarant may testify about the identifying declaration" so long as the declarant will be available for cross-examination at the suppression hearing or at trial. Tenn. R. Evid. 808(1.1), Advisory Comm'n Comments. All of the witnesses who made the identifications

testified at trial. Therefore, because the rules of evidence did not apply at the suppression hearing and because a hearsay exception applied at trial, no hearsay violation occurred at either proceeding.

[5] The Supreme Court of the United States has held that "the Confrontation Clause precludes the admission of '[t]estimonial statements of witnesses absent from trial.' " *State v. Dotson,* 450 S.W.3d 1, 63 (Tenn. 2014) (quoting *Crawford v. Washington,* 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). However, this Court has previously stated that "[t]he right to confrontation is a trial right and does not apply in suppression hearings." *Norris E. Ray v. State,* No. W2010–01675–CCA–R3–PC, 2011 WL 5996037, at *16 (citing *State v. Bush,* 942 S.W.2d 489, 511 (Tenn. 1997)) (referring to suppression hearing on a photographic array used in pre-trial identification), *perm app. denied* (Tenn. Apr. 12, 2012). Therefore, the defendants were not constitutionally entitled to confront the witnesses about their identifications at the suppression hearing. Furthermore, because those witnesses were available for cross-examination at trial, neither their trial testimony nor that of Investigator Washam violated the Confrontation Clause.

[6] **[7]** The defendants also argue that the identification procedures used by Investigator Washam were improper. To avoid exclusion from trial, "an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification." *State v. Cribbs,* 967 S.W.2d 773, 794 (Tenn. 1998) (citing *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). Nonetheless, an identification that is conducted in an impermissibly suggestive manner will not be excluded if the witness's identification was otherwise reliable under the circumstances. *State v. Philpott,* 882 S.W.2d 394, 400 (Tenn.Crim.App. 1994). Courts use a multi-factor inquiry to determine reliability, which includes "the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention at the time of the crime; the accuracy of the witness's prior description; the level of certainty demonstrated at the confrontation; [and] the time elapsed between the crime and the confrontation." *Id.* (citing *Neil v. Biggers,* 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)) ***139** (internal numbering omitted).

[8] The trial court found that the identifications made by Mr. Dyer, Ms. Dibrell, and Ms. White were not conducted in an impermissibly suggestive manner. The record supports the findings of the trial court. Investigator Washam testified that he composed each of the six-photograph lineups by inserting the driver's license photograph of each defendant among five other driver's license photographs of individuals with similar appearances to that of the defendant. These similarities include gender, hair style, facial hair style, skin complexion, and jewelry. When the skin complexion of the individuals was too different, Investigator Washam used black and white images to eliminate the disparity. In this case, he had another detective evaluate several of the lineups for suggestiveness.

Upon our review of the lineups, we agree with the trial court that none of them are

inherently or impermissibly suggestive. We also acknowledge the defendants' argument that Investigator Washam could have chosen to use what is known as the "double blind" method of conducting the lineup identifications, wherein neither the interviewer nor the interviewee knows which photograph within the lineup is that of the suspect. However, defendants have not identified any legal authority, and we are aware of none, requiring law enforcement officers to use any particular identification procedure, even if there exists a method or procedure which offers greater protection against the risk of misidentification than the one chosen by the investigating officer. The law simply prohibits use of any means of obtaining an identification that is unfairly suggestible. Investigator Washam denied suggesting to any of the witnesses in this case which photographs they should select. In fact, with respect to two suspects thought by Detective Washam to be involved, Mr. Dyer did not make identifications. Similarly, Ms. Dibrell and Ms. White were unable to identify all four of the defendants. The fact that each of the three witnesses did not make identifications in every lineup bolsters Detective Washam's testimony that he was not personally making suggestions to the witnesses and that the lineups themselves were not composed in such a manner as to suggest which photograph was the suspect.

[9] Lastly, the defendants contend that the trial court did not and could not have properly applied the *Biggers* factors without testimony from the witnesses. However, the trial court was not required to conduct a *Biggers* analysis. The *Biggers* test for reliability is only triggered if the identification procedures were conducted in an impermissibly suggestive manner. *State v. Michael Love,* No. W2012–00404–CCA–MR3–CD, 2013 WL 1042852, at *12 (Tenn.Crim.App. Mar. 13, 2013) (citing *State v. Butler,* 795 S.W.2d 680, 686 (Tenn.Crim.App. 1990)), *perm. app. denied* (Tenn. Apr. 1, 2014). Unlike some identification procedures, such as "one-on-one station house showups," *State v. Thomas,* 780 S.W.2d 379, 381 (Tenn.Crim.App. 1989), use of a six-photograph lineup, is not considered to be inherently suggestive, although such a lineup can be impermissibly suggestive where the photographs included within it are "grossly dissimilar." *See Michael Love,* 2013 WL 1042852, at *12 (citing *State v. Edwards,* 868 S.W.2d 682, 694 (Tenn.Crim.App. 1993)). Because neither the six-photograph lineups utilized in this case nor the circumstances under which they were presented to the witnesses were impermissibly suggestive, the trial court was not required to determine whether the identifications were nonetheless reliable under the circumstances. The ***140** defendants are not entitled to relief on this basis.

3. Nursing Expert

The defendants argue that the trial court erred in allowing an emergency room nurse to testify about the nature of Mr. Dyer's injuries because this subject exceeded the scope of her expertise —emergency nursing care.

Rebecca Greene was a registered nurse working in the emergency room at University of Tennessee Medical Center on May 30, 2012. She testified that when Mr. Dyer arrived in the emergency room, he was

nonresponsive. He was classified as a full trauma alert, requiring immediate intervention, and he received the lowest possible score on the Glasgow Coma Scale based on the extent of his nonresponsiveness.

Mr. Dyer was not breathing well, so he was intubated with an endotracheal tube and a ventilator to supply oxygen to his body and to avoid "brain death." There was an abrasion with bruising and swelling on the right side of his head. There was an abrasion on the back side of his left shoulder and some swelling on the left side of his jaw. Nurse Greene testified that bruising results from blunt force trauma.

Mr. Dyer was placed in the intensive care unit ("ICU") and diagnosed with an intraparenchymal hemorrhage, which is "a bleed inside the tissues of the brain," and also diagnosed with a subdural hematoma, which is "a bleed outside of the brain," between the brain and the skull. Nurse Greene testified that both of these injuries are usually caused by blunt force trauma. Nurse Greene said that the head injury "could be" caused by "a carpet burn or something like that" or "could ... have also been caused by being beaten with a weapon." She also said that the injuries could have been caused by blows from fists.

Over objections by all defendants, Nurse Greene testified that it was her opinion that Mr. Dyer's injuries were life-threatening because Mr. Dyer's body was unable to breathe effectively enough to sustain oxygen flow to the brain. She also testified that the bleeding in Mr. Dyer's brain could have caused brain damage from the accompanying swelling.

[10] **[11]** **[12]** Questions regarding the qualifications, admissibility, relevancy, and competency of expert testimony are matters left within the broad discretion of the trial court. *See* *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263–64 (Tenn. 1997); *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). On appellate review, the trial court's ruling shall not be overturned absent a finding that the trial court abused its discretion in admitting or excluding the expert testimony. *Ballard*, 855 S.W.2d at 562. "[A]n appellate court should find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

[13] Rule 702 of the Tennessee Rules of Evidence addresses the admissibility of opinion testimony of expert witnesses. It states in pertinent part:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

[14] Additionally, Tennessee Rule of Evidence 703 requires the expert's opinion to be

supported by trustworthy facts or data ***141** "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." *State v. Stevens,* 78 S.W.3d 817, 834 (Tenn. 2002). Evidence constitutes " 'scientific, technical, or other specialized knowledge,' if it concerns a matter that 'the average juror would not know, as a matter of course.' " *State v. Murphy,* 953 S.W.2d 200, 203 (Tenn. 1997) (quoting *State v. Bolin,* 922 S.W.2d 870, 874 (Tenn. 1996)). Additionally, an expert witness's testimony must be relevant to the issues at trial. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

[15] **[16]** In *McDaniel,* the supreme court adopted a non-exclusive list of factors that a trial court should consider when determining the reliability of expert testimony. 955 S.W.2d at 265. Those include: (1) whether the scientific evidence has been tested and the accompanying methodology with which it was tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether the potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert conducted the research in the field independent of litigation. *Id.* The application of the factors, a "gatekeeping function" of the trial court, operates to ensure introduction of testimony that " 'characterizes the practice of an expert in the relevant field.' " *Brown v. Crown Equip. Corp.,* 181 S.W.3d 268, 273 (Tenn. 2005) (quoting *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). However, the *McDaniel* factors are only relevant to the extent they are reasonable measures of testing the reliability of the proposed expert testimony. *Id.* at 277.

[17] Nurse Greene was a registered nurse with an associate's degree in nursing. She had three years of nursing experience, all of those in an emergency room. Once tendered by the State, none of the defendants objected to her expertise, and the trial court deemed her to be an expert in the field of nursing care. As state above, Nurse Greene testified about Mr. Dyer's injuries, their possible causes, and the medical procedures that were used to treat those injuries. When asked if these injuries could have "caused his death" had he not received medical care, the defendants objected and argued that Nurse Greene was not competent to testify on this matter. The trial court overruled the objection, finding that "she does have specialized experience and training that enable her to render opinion testimony regarding the seriousness of injuries...." The trial court questioned "how much experience has she had determining or connecting seriousness of injury to death," and Nurse Greene confirmed that she has had "occasion to see a number of people injured" and "occasion to see people die" in the emergency room. Nurse Greene then testified that Mr. Dyer's injuries were "life-threatening" because his lack of responsiveness was causing

"inability to breathe appropriately to sustain oxygen to the brain."

To support the argument that Nurse Greene testified beyond her expertise, Defendant Bonds cites Tennessee Code Annotated section 63–7–103(b) which provides:

> Notwithstanding the provisions of subsection (a), the practice of professional nursing does not include acts of medical ***142** diagnosis or the development of a medical plan of care and therapeutics for a patient, except to the extent such acts may be authorized by §§ 63–1–132, 63–7–123 and 63–7–207.

However, subsection (a) of that statute provides in relevant part:

> (a)(1) "Practice of professional nursing" means the performance for compensation of any act requiring substantial specialized judgment and skill based on knowledge of the natural, behavioral and nursing sciences and the humanities as the basis for application of the nursing process in wellness and illness care; and
>
> (2) "Professional nursing" includes:
>
> (A) Responsible supervision of a patient requiring skill and observation of symptoms and reactions and accurate recording of the facts;
>
> (B) Promotion, restoration and maintenance of health or prevention of illness of others;
>
> (C) Counseling, managing, supervising and teaching of others;
>
> (D) Administration of medications and treatments as prescribed by a licensed physician, dentist, podiatrist, or nurse authorized to prescribe pursuant to § 63–7–123, or selected, ordered, or administered by an advanced practice nurse specializing as a certified registered nurse anesthetist (CRNA)....;
>
> (E) Application of such nursing procedures as involve understanding of cause and effect; and
>
> (F) Nursing management of illness, injury or infirmity including identification of patient problems.

Therefore, under the statutory definition of the scope of the practice of professional nursing, it seems that while Nurse Greene would not be permitted to render a medical diagnosis or to develop a medical plan of care, she was qualified to render an expert opinion as to "cause and effect" and "nursing management of illness, injury or infirmity including identification of patient problems." We find her testimony about the "life-threatening" nature of Mr. Dyer's injuries to be squarely within her field of expertise.

Defendant Bishop cites *State v. Jerome Johnson,* No. W2012–01754–CCA–R3–CD, 2013 WL 5488522 (Tenn.Crim.App. Sept. 30, 2013), *perm. app. denied* (Tenn. Feb. 11, 2014).

In that case, the defendant challenged the sufficiency of the evidence for his conviction of aggravated assault. *Id.* at *5. This Court observed that there was "no expert medical testimony ... presented at trial to assist in determining whether the victim's injuries involved a substantial risk of death," despite testimony from the treating nurse that "the victim's collapsed lung, rib injuries, and asthma had 'the potential to be life-threatening." However, the court also explained that the nurse "was never qualified as an expert at trial." Contrary to Defendant Bishop's assertion, we do not read *Jerome Johnson* as providing any support for the proposition that a nurse cannot be competent to offer expert testimony on the life-threatening nature of injuries. In that case, the court merely acknowledged that such testimony could not be considered evidence of substantial risk of death where the trial court was not asked to perform its gatekeeping function by evaluating whether the nurse was qualified to offer expert testimony. That was not the case here.

We have no problem resting with the uncontroverted fact that Mr. Dyer's injuries, requiring a nine-week medically-induced coma, constitute serious bodily injury. The defendants are not entitled to relief on this basis.

***143** 4. Gang Expert

The defendants argue that the trial court erred in allowing Detective Walker to provide expert testimony in the field of gang identification because his entire testimony was irrelevant, cumulative, and unduly prejudicial. The State argues that his testimony was relevant and that the trial court did not abuse its discretion in admitting the evidence.

Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Evidence must be relevant to be admissible. Tenn. R. Evid. 402. Where the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice, waste of time, or needless presentation of cumulative evidence, it may be inadmissible. Tenn. R. Evid. 403. A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Banks,* 271 S.W.3d 90, 116 (Tenn. 2008). A trial court has abused its discretion if it "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party." *Id.* (citation omitted).

Detective Walker testified that he had six years of experience in the gang unit of the Knox County Sheriff's Office. "Since 1999, [he has] received over five hundred and twenty-nine hours of gang instruction to investigate gang crimes, identify different gang members and different gangs." As a state instructor, he has taught about 344 classes since 2006. On numerous occasions, he testified as a gang expert in both state and federal courts. He has an associate's degree in criminal justice from Roane State and a bachelor's degree from Columbia Southern in criminal justice administration. He wrote and developed ten

courses that were "post-certified" by the State of Tennessee to be taught to police officers and for official training credit. The trial court accepted Detective Walker as an expert in gang information and identification over the objection of the defendants.

[18] The record demonstrates the relevance of Detective Walker's testimony. Much of his testimony was offered for identification purposes to connect the defendants' legal names with their gang monikers and for confirmation of their affiliation in the gang, which was something that the witnesses were largely unable to accomplish. The background about the gang's history and culture provided by Detective Walker was not merely gratuitous but was used to explain symbols or abbreviations relevant to identifying the defendants. Most importantly, however, his testimony about gang hierarchy and their customs with regard to initiation and expulsion, which occurs through violence generally in the form of beatings, was particularly relevant on the issues of intent and motive. Mr. Dyer's testimony about how the gang handled their affairs was piecemeal and confusing at times. Detective Walker's testimony clarified much of Mr. Dyer's testimony.

[19] Although this evidence was undoubtedly prejudicial to the defendants, any unfair prejudice would have been minor. Detective Walker's testimony was largely didactic and not inflammatory in nature. It did not involve extraneous evidence of violence or bad acts by the defendants or the gang in general. It was not presented in such a manner as to emphasize the unsavory characteristics of criminal street gangs that contribute to common social stigma. Moreover, as the victim himself was also a gang member, ***144** this was not a situation where the jury would have been tempted to place undue emphasis on the defendants' gang affiliation for conduct against a nonmember. After a thorough review of the record on this issue, we cannot say that the trial court abused its discretion by admitting this evidence. The defendants are not entitled to relief on this issue.

5. Statements of Codefendants

[20] The defendants argue that the trial court violated their constitutional rights by admitting incriminating statements in violation of *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which prohibits the use of incriminating statements made by a non-testifying co-defendant against another defendant. The State argues that the defendants have waived this issue, and we agree. Defendant Bonds's appellate brief[8] fails to specifically identify which evidence he deems improper, making only a general complaint about "numerous written and audio recorded statements of co-defendants." "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. R. Ct.Crim.App. 10(b); *State v. Thomas,* 158 S.W.3d 361, 393 (Tenn. 2005). We refuse to speculate about which pieces of evidence the defendants may find objectionable. The defendants are not entitled to relief on this basis.

6. Sufficiency of Evidence—The Guilt Phase

The defendants argue that the evidence is insufficient to support their convictions for attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R.App. P. 13(e); *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The jury's verdict replaces the presumption of innocence with one of guilt; therefore, the burden is shifted onto the defendant to show that the evidence introduced at trial was insufficient to support such a verdict. *State v. Reid,* 91 S.W.3d 247, 277 (Tenn. 2002). The prosecution is entitled to the "strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *State v. Goodwin,* 143 S.W.3d 771, 775 (Tenn. 2004) (quoting *State v. Smith,* 24 S.W.3d 274, 279 (Tenn. 2000)). It is not the role of this Court to reweigh or reevaluate the evidence, nor to substitute our own inferences for those drawn from the evidence by the trier of fact. *Reid,* 91 S.W.3d at 277. Questions concerning the "credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." *State v. Wagner,* 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *State v. Campbell,* 245 S.W.3d 331, 335 (Tenn. 2008)). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." ***145** *Reid,* 91 S.W.3d at 277 (quoting *State v. Bland,* 958 S.W.2d 651, 659 (Tenn. 1997)). This standard of review applies whether the conviction is based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Dorantes,* 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Hanson,* 279 S.W.3d 265, 275 (Tenn. 2009).

Second degree murder is the "knowing killing of another." T.C.A. § 39–13–210(a)(1). Relevant to this case, one who "[a]cts with intent to cause" the knowing killing of another and "believes the conduct will cause" the killing of another "without further conduct on the person's part" has attempted to commit second degree murder. *See* T.C.A. § 39–12–101(a)(2). Also relevant to this case, aggravated assault is intentionally or knowingly causing serious bodily injury to another. T.C.A. § 39–13–102(a)(1)(A)(i). Lastly, "[i]t is an offense to possess a firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony." T.C.A. § 39–17–1324(a). Attempted second degree murder is a dangerous felony. T.C.A. § 39–17–1324(i)(1)(B).

The evidence presented in this case establishes that the victim and all of the defendants were members of the street gang known as the Five Deuce Hoover Crips. On May 30, 2012, the defendants showed up at the victim's apartment where he lived with his girlfriend. Once the victim opened the door, the defendants immediately entered the apartment and an

argument ensued during which the victim was accused of shirking two obligations incumbent upon him as a fellow gang member. After a relatively brief exchange of shouting between the victim and several of the defendants, all of the defendants surrounded and attacked the victim, hitting him with their fists and kicking him with their feet.

The beating rendered the victim unconscious, and he remained in a medically-induced coma for approximately nine weeks. The victim sustained significant internal cranial bleeding, and without medical assistance, the victim could have died because his body was unable to breathe on its own. Fortunately, the victim was stabilized at the hospital, but when he regained consciousness, he was aggressive and did not recognize the people around him. The victim needed physical therapy to regain control of his excretory functions and to relearn how to walk and talk. The victim still has some memory trouble.

[21] **[22]** The defendants argue that the evidence does not support an inference that they intended to kill the victim rather than simply injure him. We disagree. "Intent, which can seldom be proven by direct evidence, may be deduced or inferred by the trier of fact from the character of the assault, the nature of the act and from all the circumstances of the case in evidence." *State v. Inlow,* 52 S.W.3d 101, 105 (Tenn.Crim.App. 2000) (citing *State v. Holland,* 860 S.W.2d 53, 59 (Tenn.Crim.App. 1993)). Based on the severity of the victim's life-threatening physical injuries, a rational jury could have inferred that the defendants intended to beat the victim to death as punishment for failing to meet his gang-imposed responsibilities. This conclusion is further supported by the expert testimony of Detective Walker, who explained that a gang-motivated "beat out" of an expelled gang member can be intended to cause either permanent physical impairment or death, both of which promote the gang's status within the community by increasing their threat level and instilling fear. "Whether the appellant[s] 'knowingly' attempted to kill [the] victim is a question of fact for the jury," *id.* at 104–05, and we will not disturb that finding, even if we would have decided otherwise.

***146** **[23]** Defendant Bishop argues that there is no proof that he "actually caused any injuries" to the victim or possessed a firearm. Defendant Robinson also argues that there is no evidence that she possessed a firearm. However, the victim specifically testified that he witnessed all of the defendants hit him, including Defendant Bishop. Nonetheless, the evidence is sufficient to hold all of the defendants criminally responsible for all crimes that occurred, which was correctly included in the trial court's jury charge. Under Tennessee Code Annotated section 39–11–402, a defendant is criminally responsible for an offense committed by the conduct of another person if, "with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the [defendant] solicits, directs, aids, or attempts to aid another person to commit the offense." Clearly, the defendants went to the victim's home with the shared purpose of confronting, intimidating, and beating him. As for possession of the firearm, the victim testified that Defendant Sullivan possessed a handgun in his pocket during the encounter,

the handle of which was hanging out for all to see. The jury could have inferred that all of the other defendants, including Defendants Bishop and Robinson, were aware that Defendant Sullivan possessed the handgun and intended to benefit from his possession of the weapon with the possibility that it might be needed. *See State v. William Patrick Peebles,* No. M2011–01312–CCA–R3–CD, 2013 WL 2459881, at *6 (Tenn.Crim.App. June 6, 2013) (rejecting sufficiency of the evidence argument based on claim that the appellant "did not personally possess a firearm" where the appellant was criminally responsible for co-defendant's use of a firearm), *perm. app. denied* (Tenn. Nov. 13, 2013).

[24] Defendant Bishop also argues that the presentment "failed to allege a statutory crime" because it did not include allegations of simple assault or include the allegation that the assault "involved the use or display of a deadly weapon." This argument is misguided. The language of the presentment contains all of the statutory elements of the offense of aggravated assault. Moreover, the State did not rely on the use of a deadly weapon to make the assault aggravated, rather it relied on the serious bodily injury sustained by the victim.

[25] **[26]** Defendant Sullivan argues that there is insufficient evidence that he was one of the attackers. We disagree. Although the victim acknowledged that an individual in one of Investigator Washam's lineups looked like the man he knew as Crank Deuce, the victim did not make an incorrect identification. Instead, he asked Investigator Washam for additional photographs, and on the next occasion, the victim confidently identified Defendant Sullivan as Crank Deuce and as one of his attackers. The victim was quite certain that Defendant Sullivan was part of the group because the victim noticed that Defendant Sullivan possessed a handgun. Although neither of the other witnesses identified Defendant Sullivan, "the testimony of a victim, by itself, is sufficient to support a conviction." *Id.* (citing *State v. Williams,* 623 S.W.2d 118, 120 (Tenn.Crim.App. 1981)). Additionally, we note that during the phone calls made by Defendant Sullivan on January 23 and February 20, he displayed consciousness of guilt about the crime when he encouraged efforts to discourage the victim from appearing in court.

[27] Defendant Bonds argues that trial court should have merged the convictions for attempted second degree murder and aggravated assault and that, because it did ***147** not, those convictions violate the principles of Double Jeopardy. However, this Court has previously determined that dual convictions for these offenses do not violate the Double Jeopardy Clause. *State v. Dannaer Beard,* No. W2013–00502–CCA–MR3–CD, 2014 WL 5465860, at *4 (Tenn.Crim.App. Oct. 28, 2014), *perm. app. denied* (Tenn. Mar. 12, 2015). The defendants are not entitled to relief on this basis.

Because the evidence was sufficient to sustain each of the defendants' convictions, and there was no error in the guilt phase of the trial on the underlying offenses, those convictions are affirmed.

B. Gang Enhancement Phase

Defendants Bonds, Bishop, and Sullivan raise several issues regarding their convictions under Tennessee Code Annotated section 40–35–121(b), which provides:

> 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 established by the specific statute creating the offense committed.

As applicable to this case, the statute defines "criminal gang offense" as:

> (A) A criminal offense committed prior to July 1, 2013 that:
>
> (i) During the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person or persons ...; or
>
> (ii) Results, 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[.]

T.C.A. § 40–35–121(a)(3)(A). The statute defines a "criminal gang member" as "a person who is a member of a criminal gang," as established by satisfaction of two 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[.]

T.C.A. § 40–35–121(a)(2). The statute defines a "criminal gang" as "a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has ... [a]s one (1) of its activities the commission of criminal acts; and [t]wo (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity[.]" T.C.A. § 40–35–121(a)(1)(A)–(B). The statute defines "pattern of criminal gang activity" as "prior

convictions for the commission or attempted commission of" the following:

> ***148** (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[.]

T.C.A. § 40–35–121(a)(4)(A). The statute utilizes the same definition for the underlying criminal gang offense and the predicate offenses required to establish a pattern of criminal gang activity. *See* T.C.A. § 40–35–121(i).

To prove that the Five Deuce Hoover Crips satisfied the statutory definition of a criminal gang, the State presented proof regarding the criminal histories of seven individuals. First, Joy McCroskey, the Knox County Criminal Court Clerk, testified and provided certified copies of convictions for those individuals. All of the convictions were felonies committed between September 8, 2005, and January 25, 2011. The convictions were entered between July 11, 2006, and May 2, 2011.

Then, Detective Walker testified that each one of those individuals (and several others) was or had been a member of the Five Deuce Hoover Crips. Some of Detective Walker's responses suggested that he had no personal knowledge of the facts of the underlying cases for any of those individuals. His testimony was based on a gang file compiled and maintained by the Knox County Sheriff's Office. The information in the files on each gang member is obtained through personal interviews with arrestees, mail searches and prison records of inmates, cell phone searches, and information from informants. According to Detective Walker, all information is "verif[ied] to make sure that it is true and accurate." Detective Walker testified about the information in the gang file upon which the Sheriff's Office relied in determining that each of the seven individuals were members of the Five Deuce Hoover Crips. Additionally, Detective Walker testified that Defendants Bonds, Bishop, and Sullivan were also members of the Five Deuce Hoover Crips.

Detective Walker also testified about the origin of the Five Deuce Hoover Crips as a violent criminal gang and explained that their activities include "drug dealing mostly, robberies, agg[ravated] assaults, attempted murder, stuff like that." The contents of the gang file relied upon by Detective Walker were admitted into evidence.

1. Defective Presentment

[28] Defendants Bonds, Bishop, and Sullivan argue that the trial court erred in refusing to dismiss this case because the criminal enhancement charges were not included in the presentment to the grand jury. Counsel for Defendant Bonds told the trial court that he had only received counts one through eight at the arraignment and did not learn of the gang

enhancement charges until shortly before the hearing date.

Tennessee Code Annotated section 40–35–121(g) provides:

> If the defendant is charged with a criminal gang offense and the district attorney general intends to seek enhancement of the punishment under subsection (b), (c) or (e), 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 ***149** constituting the gang's pattern of criminal gang activity.

[29] Questions of law presented by a trial court's ruling on a motion to dismiss an allegedly defective indictment or presentment are reviewed de novo with no presumption of correctness. *See* *State v. Sherman,* 266 S.W.3d 395, 403 (Tenn. 2008).

In this case, the defendants were charged collectively by presentment. The true bill is dated August 28, 2012, and was signed by the grand jury foreperson and all of the grand jury members. The second through fifth pages of the presentment contain eight counts, constituting the underlying offenses in this case. The fifth page contains a signature block that was signed by the district attorney. The following page is topped with the case caption. The case numbers are handwritten on the upper right corner. A list of witnesses and their addresses are set forth below. The seventh page is titled "Criminal Gang Offense Enhancement." The seventh through eleventh pages contain counts nine through eleven, which are the gang enhancement charges against Defendants Bonds, Bishop, and Sullivan. The eleventh page contains a signature block that was signed by the district attorney.

At the pre-trial hearing on the motion to dismiss the presentment, the prosecutor informed the trial court that the entire presentment, pages one through eleven, was presented to the grand jury at one time. The true bill signed by the grand jury encompassed all counts, including the gang enhancement offenses. According to the prosecutor, the reason that the gang enhancement offenses were titled separately and contained on additional pages was for physical severability of the pages in the presentment. Expecting that the presentment would be made available to the jury during their deliberations on the guilt phase of the trial and that the jury would not be aware of the gang enhancement offenses during that phase of the proceeding, the State structured the presentment in such a way that the pages containing the gang enhancement offenses could be easily separated. The prosecutor explained that, at the time of the presentment, the district attorney's office did not have a pre-constructed "macro" for the gang enhancement offenses in its word processing software, so those counts had to be created from scratch, which was why the format of those charges was

different than the charges for the underlying offenses.

Relying on the contents of the case file and the representations of the prosecutor, the trial court denied the motion. We find no error in the trial court's ruling. "Unless a defect in an indictment appears on the face of the indictment, the initial burden of proof is on the defendant to establish the grounds of the motion to dismiss." W. Mark Ward, Tennessee Criminal Trial Practice § 14:5 (2014–2015 ed.) (citing *Shadden v. State,* 488 S.W.2d 54, 60 (Tenn.Crim.App. 1972), *overruled on other grounds by State v. Jones,* 598 S.W.2d 209 (Tenn. 1980)). Here, there was absolutely no evidence to support the defendants' claim that the gang enhancement offenses were not included in the presentment before the grand jury.

[30] At the hearing, the trial court did not make a specific ruling on Defendant Bonds's claim that he was not given notice of the gang enhancement offenses at his arraignment, although it did note that an entire copy of the presentment was included in the court file. However, even if this claim were true, it would not entitle Defendant Bonds to relief. He eventually learned of the gang enhancement before trial and did not present any evidence of prejudice from the late notice. *See* ***150** *State v. Joshua Tyrell Cross,* No. E2014–00963–CCA–R3–CD, 2015 WL 477296, at *13 (Tenn.Crim.App. Feb. 4, 2015) (concluding that lack of formal arraignment did not warrant reversal where the trial court informed the defendant of the charges at the guilty plea hearing), *no perm. app. filed*. Defendant is not entitled to relief on this basis.

2. Confrontation Clause

The defendants argue that the testimony of Detective Walker during the enhancement phase violated the Confrontation Clause because it was based on testimonial hearsay. The State argues that the Confrontation Clause does not extend to sentencing proceedings. Defendant Sullivan concedes that the gang enhancement is a sentencing enhancement, but nonetheless argues that the Confrontation Clause's prohibition on testimonial hearsay should have been applied by the trial court.

[31] As previously stated, "the Confrontation Clause precludes the admission of '[t]estimonial statements of witnesses absent from trial.' " *Dotson,* 450 S.W.3d at 63 (quoting *Crawford,* 541 U.S. at 59, 124 S.Ct. 1354). This Court has repeatedly recognized that the Confrontation Clause is not applicable to sentencing hearings. *See, e.g., State v. Thomas William Whited,* No. E2013–02523–CCA–R3–CD, 2015 WL 2097843, at *10 (Tenn.Crim.App. May 4, 2015), *perm. app. granted* (Tenn. Sept. 22, 2015); *State v. Arealie Boyd,* No. W2009–00762–CCA–R3–CD, 2010 WL 1240720, at *7–8 (Tenn.Crim.App. Mar. 30, 2010) (citing *State v. William Edwin Harris,* No. M2008–01685–CCA–R3–CD, 2009 WL 1871919, at *6 (Tenn.Crim.App. June 30, 2009), *perm. app. denied* (Tenn. Nov. 30, 2009)), *no perm. app. filed*; *see also State v. Stephenson,* 195 S.W.3d 574, 590 (Tenn. 2006) (observing that "the federal appellate courts continue to hold that the Sixth Amendment right of confrontation does not apply at sentencing, even after *Crawford*"), *abrogated on other grounds by State v. Watkins,* 362 S.W.3d 530 (Tenn. 2012).

[32] For purposes of the Sixth Amendment's right to a jury trial, the Supreme Court has determined that, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 2162, 186 L.Ed.2d 314 (2013). Thus, " 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" which must be proven beyond a reasonable doubt to a jury, regardless of whether those facts increase the statutory maximum or mandatory minimum of the sentencing range. *Id.* at 2160 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

[33] Despite simply being dubbed by the General Assembly as "enhanced punishment," the factual requirements of Section 40–35–121 are elements of the underlying criminal gang offenses because the statute increases the prescribed range of penalties applicable to a defendant by automatically increasing the underlying offense's sentencing classification by at least one range, raising both the maximum and minimum ends of the range. *See People v. Sengpadychith,* 26 Cal.4th 316, 26 Cal.4th 1154A, 109 Cal.Rptr.2d 851, 27 P.3d 739 (Cal. 2001) (holding that *Apprendi* applies to certain felonies subject to gang enhancement). We think it necessarily follows that the protections of the Confrontation Clause of the Sixth Amendment also apply to the presentation of any proof within the constitutional scope of a jury trial. Accordingly, the "gang enhancement" ***151** portion of the proceeding in this case was an extension of the actual guilt phase of the trial on the underlying criminal offenses; it was not a merely a sentencing hearing.

In this case, Defendants Bonds, Bishop, and Sullivan raised numerous hearsay and Confrontation Clause objections to the testimony of the gang expert. The trial court noted the defendants' "standing objection" to the testimony of the gang expert and the introduction of the contents of the gang file on the various members of the Five Deuce Hoover Crips. At one point, during Defendant Bishop's cross-examination of the gang expert about his specific, personal knowledge of particular information in the gang file, the trial court sustained relevance objections from the State. After cross-examination was concluded, Defendant Sullivan moved for a judgment of acquittal. The State objected, arguing that they were merely involved in "sentencing hearing." The trial court agreed, noting, "This is an enhancement provision. It's not a separate freestanding crime." The trial court then proceeded with a jury-out hearing on Defendant Sullivan's motion, which was adopted by the other two defendants. After hearing arguments from counsel, the trial court made the following ruling, in part:

> This is rather unchartered territory. Your objections to the results of investigation that gave rise to the certification of your clients as gang members, certainly I can see a legitimate argument

> about the hearsay, but it would appear that what this legislation intends is for evidence of this sort to be compiled by the police and introduced in effect as a business record exception. They collect information and create a file. At this point, this court is going to accept the proposition that our law, especially the business record exception, is going to be ... that that evidence is admissible in these cases.

Counsel for Defendant Sullivan posed the question of whether the gang enhancement statute was actually a "status offense," to which the trial court responded:

> No, this is an enhancing factor. It's not a separate offense. It doesn't have separate elements that have to be proved. There are necessary findings but this is not a separate freestanding crime.... This is simply circumstances permitting the enhancement of an offense and they have to be found true by a jury ... before the Court can enhance the sentence based on these findings. It has to be submitted to a jury and that's what we're doing now.

Because this is a unique case of first impression, and there is no previous appellate court guidance on the substantive or procedural aspects of this statute, we have much sympathy for the trial court and the attorneys involved in this proceeding. However, the trial court and the State miscomprehended the nature of the third phase of the trial. It was not a sentencing hearing. All constitutional and procedural criminal protections were applicable, including the Confrontation Clause and the Rules of Evidence.

[34] Even assuming, without deciding, that the gang file was properly admitted through one of the hearsay exceptions,[9] ***152** such satisfaction alone does not mean that there was not a violation of the Confrontation Clause. *State v. McCoy,* 459 S.W.3d 1, 12 (Tenn. 2014). The trial court should have permitted the defendants to make specific objections to any of the material within the gang file or the expert testimony, rather than noting only a general standing objection to the evidence, and the trial court should have examined each potential piece of hearsay independently to determine whether it was testimonial or non-testimonial for purposes of the Confrontation Clause. The trial court also should have permitted the defendants to cross-examine the gang expert about the circumstances under which all of the evidence in the gang file was obtained and by whom the evidence was obtained, rather than relying only on the gang expert's general description of how the gang file was compiled and maintained by the Sheriff's

Office. Conducting a Confrontation Clause analysis of whether a statement is testimonial hinges on factual information about the circumstances under which a hearsay statement was made. We find this record too incomplete to reach a conclusion on the resolution of the Confrontation Clause issue raised by the defendants. Once challenged, the State bears the burden of proving that its proffered evidence is constitutionally permissible. *See State v. Huddleston,* 924 S.W.2d 666, 675 (Tenn. 1996). It failed to carry this burden.

To briefly summarize, we hold that the requirements of Section 40–35–121 are additional elements of the underlying criminal gang offenses and the portion of the trial during which proof of gang membership and activity is introduced is not merely a sentencing hearing but rather is an extension of the guilt phase of the trial to which constitutional, statutory, and procedural rules fully apply. Because the trial court treated the proceeding as a sentencing hearing, without considering the protection afforded by the Confrontation Clause, and because the State failed to prove by a preponderance of the evidence that the gang expert's testimony and the contents of the gang file did not violate the Confrontation Clause, we reverse the defendants' gang enhancement convictions and remand this case for a new trial on the gang enhancement.

3. Due Process

[35] The defendants argue that Tennessee Code Annotated section 40–35–121 violates the principles of due process because it is both unconstitutionally vague and lacks language restricting its scope to underlying gang-related offenses. Generally, this Court will not address the constitutional validity of a statute when we can dispose of the case on other grounds. *See Waters v. Farr,* 291 S.W.3d 873, 882 (Tenn. 2009) ("It is well-settled in Tennessee that 'courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties.' " ***153** (quoting *State v. Taylor,* 70 S.W.3d 717, 720 (Tenn. 2002))). In this case, however, our conclusion that the case must be remanded for a new trial on the gang enhancements does not fully adjudicate the rights of the parties. If the defendants prevail on their facial constitutional challenges, they would not be subject to the gang enhancement at all—a very different disposition than a remand for retrial. For this reason, we will address the constitutional due process challenges to Section 40–35–121.

The defendants argue that Tennessee Code Annotated section 40–35–121(a)(3)(A)(i) is unconstitutionally vague on its face because it does not specify "what is and is not a gang[-]related offense." The State maintains that the statute is not vague because it clearly defines the conduct that is prohibited.

[36] A "vague statute is vulnerable to a constitutional challenge because it (1) fails to provide fair notice that certain activities are unlawful; and (2) fails to establish reasonably clear guidelines for law enforcement officials and courts, which, in turn, invites arbitrary and discriminatory enforcement." *State v. Pickett,* 211 S.W.3d 696, 702 (Tenn. 2007). In regards to the former, "[d]ue process

requires that a statute provide 'fair warning' and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have understood to be proscribed." *State v. Burkhart,* 58 S.W.3d 694, 697 (Tenn. 2001) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). To avoid constitutional infirmity, a criminal statute must be "sufficiently precise to put an individual on notice of prohibited activities." *Id.* (quoting *State v. Wilkins,* 655 S.W.2d 914, 915 (Tenn. 1983)).

[37] As stated above, Section 40–35–121(b) provides that "[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 established by the specific statute creating the offense committed." Pertinent to this case, the statute defines "criminal gang offense" as "[a] criminal offense committed prior to July 1, 2013 that ... [d]uring the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person or persons...." T.C.A. § 40–35–121(a)(3)(A)(i).

Although Section 40–35–121 does not contain definitions of the terms "criminal offense" or "death" or "bodily injury," those terms are either defined elsewhere within the Code or capable of ready understanding. Tennessee Code Annotated section 39–11–102(a) provides that "[c]onduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute." Thus, we know that a "criminal offense" is an offense defined as such "by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute." *Id.* We further know that "the general principles" regarding offense definition "apply to offenses defined in all volumes of the Tennessee Code Annotated unless the law provides otherwise." T.C.A. § 39–11–102, Sentencing Comm'n Commts. "[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" or "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." T.C.A. § 39–11–106(20). " 'Bodily injury' includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily ***154** member, organ, or mental faculty[.]" T.C.A. § 39–11–106(2). Although the term "death" is not defined in our criminal statutory scheme, that term is capable of ready understanding by a person of ordinary intelligence.

Accordingly, we conclude that the statute is sufficiently precise to provide fair warning of the conduct covered by the statute. Simply put, the statute applies when a criminal gang member injures or kills someone, or threatens to do so, while committing a crime. A person of common intelligence would have no trouble understanding this plain meaning. Because the defendants have not alleged vagueness in any other language in the statute, we have not considered whether any other aspect of the statute is vague.

The defendants also argue that Tennessee Code Annotated section 40–35–121(b) is unconstitutional as a violation of substantive due process. Specifically, they contend that the statute lacks a nexus between gang membership and criminal conduct. As explained in Defendant Sullivan's appellate brief:

> Enhancement applies regardless of a defendant's knowledge or control of, or consent to, the other alleged gang members' criminal acts. Conversely, enhancement does not require that the [S]tate show that the offenses committed by others w[ere] committed for the benefit of, at the direction of, or in association with any criminal street gang. The statute does not even require that crimes committed by the other alleged gang members be gang[-]related, just that the crimes be committed by alleged gang members. Assuming that a defendant is a gang member, the statute would punish a defendant not for his own acts, but because of unrelated criminal acts of persons with whom he may have been or is associated, or over whom he has no control whatsoever. This amounts to enhanced sentencing based on association, and nothing else.

The State did not address this issue in its appellate brief, but it addressed the issue at oral argument. After hearing oral argument, this Court ordered supplemental briefing on this specific issue in which the State argued that the criminal gang statute was constitutional as applied to the defendants in this case.

For support, the defendants rely on *State v. O.C.*, 748 So.2d 945 (Fla. 1999). In that case, a juvenile was convicted of aggravated battery for participating in the beating of another youth after exiting a school bus. After being convicted, the defendant was then found to be a member of a criminal street gang, which caused the underlying conviction to be enhanced by one felony classification. The relevant criminal gang statute provided:

> (2) "Criminal Street Gang Member" is a person who is a member of a criminal street gang ... and who meets two or more of the following criteria:
>
> (a) Admits to criminal street gang membership.
>
> (b) Is identified as a criminal street gang member by a parent or guardian.
>
> (c) Is identified as a criminal street gang member by a documented reliable informant.
>
> (d) Resides in or frequents a particular criminal street gang's area and adopts their style of dress, their use of hand signs, or their

tattoos, and associates with known criminal street gang members.

(e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.

***155** (f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.

(g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.

(h) Has been stopped in the company of known criminal street gang members four or more times.

Id. at 947 n.1(citing Fla. Stat. § 874.03(2)(a)–(h) (Supp.1996)). The statute defined a "criminal street gang" as:

> A formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity.

Id. at 948(citing Fla. Stat. § 874.03(1)). The statute defined a "pattern of criminal street gang activity" as:

> The commission or attempted commission of, or solicitation or conspiracy to commit, two or more felony or three or more misdemeanor offenses, or one felony and two misdemeanor offenses, or the comparable number of delinquent acts or violations of law which would be felonies or misdemeanors if committed by an adult, in separate occasions within a 3–year period.

Id. at 948 n.2(citing Fla. Stat. § 874.03(3)).

The Supreme Court of Florida held that the gang statute was "unconstitutional as a violation of substantive due process." *Id.* at 950. The court explained:

> [S]ection 874.07 punishes mere association by providing for an enhancement of the degree of a crime based on membership in a

> criminal gang, even where the membership had no connection with the crime for which the defendant had been found guilty.... [B]ecause the statute punishes gang membership without requiring any nexus between the criminal activity and gang membership, it lacks a rational relationship to the legislative goal of reducing gang violence or activity and thus fails to have a 'reasonable and substantial relation' to a permissible legislative objective.

Id.

The State asserts that *O.C.* is distinguishable from this case because the facts in this case clearly establish that the underlying crimes were gang-related—the victim was "beat out" of the gang for allegedly failing in his obligations to the gang.

[38] **[39]** **[40]** The Fourteenth Amendment to the Constitution of the United States guarantees that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Law of the Land Clause in Article I, section 8 of the Tennessee Constitution "has consistently been interpreted as conferring identical due process protections as its federal counterparts." *Mansell v. Bridgestone Firestone North American Tire, LLC,* 417 S.W.3d 393, 407 (Tenn. 2013) (citing *Burford v. State,* 845 S.W.2d 204, 207 (Tenn. 1992)). Our supreme court has acknowledged that the concept of due process entails both procedural and substantive components. *Id.* (citing *Lynch v. City of Jellico,* 205 S.W.3d 384, 391 (Tenn. 2006)). "The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner." *Id.* (quoting *Lynch,* 205 S.W.3d at 391). "In contrast to procedural ***156** due process, substantive due process bars oppressive government action regardless of the fairness of the procedures used to implement the action." *Id.* at 409 (citing *Lynch,* 205 S.W.3d at 391–92). "Unless a fundamental right is involved, the test for determining whether a statute comports with substantive due process is whether the legislation bears 'a reasonable relation to a proper legislative purpose' and is 'neither arbitrary nor discriminatory.' " *Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn. 1994) (quoting *Nebbia v. New York,* 291 U.S. 502, 537, 54 S.Ct. 505, 78 L.Ed. 940 (1934)).

[41] **[42]** "Issues of constitutional interpretation are questions of law which we review de novo without any presumption of correctness given to the legal conclusions of the courts below." *Waters,* 291 S.W.3d at 882 (citing *Colonial Pipeline Co. v. Morgan,* 263 S.W.3d 827, 836 (Tenn. 2008)). When reviewing the constitutionality of a statute, we begin "with the presumption that an act of the General Assembly is constitutional" and "must indulge every presumption and resolve every doubt in favor of constitutionality." *Riggs v. Burson,* 941 S.W.2d 44, 51 (Tenn. 1997).

Our research reveals that this case is the first appellate decision construing our gang enhancement statute in any way. Given the lack of guidance, we proceed with caution.

The *O.C.* court struck down the statute before it for failing rational basis review. Our courts have previously applied this type of judicial scrutiny to state statutes under a substantive due process analysis, as have courts in other jurisdictions. *See generally* Wayne R. LaFave, 1 Subst. Crim. L. § 3.3 (2d ed.) (distinguishing this type of due process analysis from the due process analysis applied to laws allegedly burdening fundamental rights). Given the deference to legislative decision-making afforded by this level of scrutiny, most of those cases have concluded that the statute in question is reasonably related to a legitimate government purpose. *See, e.g., Riggs v. Burson,* 941 S.W.2d 44, 52 (Tenn. 1997) (upholding helicopter-related land use restrictions near a national park); *State v. Smith,* 48 S.W.3d 159, 169–70 (Tenn.Crim.App. 2000) (upholding application of Drug Free School Zone Act to conduct occurring outside of normal school hours); *Martin v. Beer Board,* 908 S.W.2d 941, 955 (Tenn.Ct.App.1995) (upholding local restrictions on the sale of alcohol on Sundays). However, on at least one occasion, our supreme court has found government action to fall short of this basic requirement. *See Doe v. Norris,* 751 S.W.2d 834, 840 (Tenn. 1988) (holding that "the commingling of status offenders with delinquent children in secure penal facilities operated for delinquent children was not rationally related to a legitimate government purpose" and therefore was a "practice [that] violate[d] the principles of substantive due process").

[43] **[44]** Our supreme court has recognized that "the Legislature has the authority to enact laws for the public safety, comfort and welfare." *Riggs,* 941 S.W.2d at 51. Because criminal laws fall squarely within this domain, *see State v. Wyrick,* 62 S.W.3d 751, 792 (Tenn.Crim.App. 2001) (citing *Motlow v. State,* 125 Tenn. 547, 145 S.W. 177, 183 (1912)), we have no trouble concluding (and the defendants do not contest) that proscribing harmful street gang activity is a proper legislative purpose. The material inquiry in this case is whether Section 40–35–121(b) is reasonably related to that legislative purpose. Under a means-end review, "specific evidence is not necessary to show the relationship between the statute and its purposes." *Riggs,* 941 S.W.2d at 52 (citing *Newton,* 878 S.W.2d at 110). The court in *O.C.* held ***157** that the gang statute in that case was not reasonably related to a legitimate legislative purpose because it lacked a nexus between the underlying criminal activity and gang affiliation. We note that the statute struck down in that case was strikingly similar to Section 40–35–121(b). Like the statute in *O.C.,* Section 40–35–121(b) does not contain a nexus requirement. After careful consideration, we have concluded that such an omission is constitutionally fatal. It simply cannot be maintained that a statute ostensibly intended to deter gang-related criminal conduct through enhanced sentencing is reasonably related to that purpose where the statute in question is completely devoid of language requiring that the underlying offense be somehow gang-related before the

sentencing enhancement is applied. Without a nexus requirement, Section 40–35–121(b) directly advances only the objective of harsher treatment of criminal offenders who also happen to be members of a criminal gang. Because Section 40–35–121(b) fails to even obtusely target gang-related criminal activity, it lacks a reasonable relationship to achieving the legitimate legislative purpose of deterring criminal gang activity and therefore violates the principles of substantive due process.

Additionally, we also agree with the defendants' guilt by association argument based on *Scales v. United States,* 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). In that case, the Supreme Court of the United States provided an insightful discussion of the limitations imposed on governmental police power by the constitutional protections of due process. The Court declared:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause....

Id. at 224–25, 81 S.Ct. 1469. Examining a federal law that criminalized knowing membership in "any organization which advocates the overthrow of the Government of the United States by force or violence," *id.* at 205, 81 S.Ct. 1469, the Court concluded that the requirements of the Due Process Clause "were satisfied when the statute is found to reach only 'active' members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action," *id.* at 228, 81 S.Ct. 1469. In reaching its decision, the Court observed:

> It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that 'act' alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for

> instance by a commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it ***158** by any act or course of conduct whatever.

Id. at 227–28, 81 S.Ct. 1469.

[45] We believe that Section 40–35–121(b) runs afoul of the bounds of due process delineated in *Scales* because it imposes mandatory criminal punishment based on the criminal conduct of others. Without a nexus requirement that the underlying offense be gang-related, Section 40–35–121(b) is untethered to any personal criminal intent or conduct by the defendant. There is no Tennessee law prohibiting membership or affiliation with a criminal gang as defined in Section 40–35–121. Thus, a defendant's affiliation with such a group is statutorily permissible and innocuous until it is joined with otherwise criminal conduct. However, Section 40–35–121(b) imposes mandatory punishment on an eligible defendant by imputing to him responsibility for the criminal activity of the gang as a collective without requiring the defendant's knowledge of and intent to promote such activity. We simply cannot believe that the concept of personal guilt articulated in *Scales* tolerates such an attenuated basis for criminal punishment. Indeed, a literal reading of the statute reveals that the scope of its potential application is startling, also posing an increased risk of arbitrary application. [10]

We note that Section 40–35–121(b) purportedly imposes a sentence enhancement rather than an independent criminal offense as in *Scales*. However, we believe that distinction to be inconsequential. Section 40–35–121(b) imposes mandatory criminal punishment wholly aside from any consideration of the nature of the underlying offense, of the previous criminal history of the offender, or of how gang affiliation increases the future threat to society posed by the offender. *Cf.* *Dawson v. Delaware,* 503 U.S. 159, 166–67, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (holding that the First Amendment prohibited introduction of the fact of a convicted defendant's mere membership in the Aryan Brotherhood without additional evidence that the gang affiliation was relevant to help prove an aggravating circumstance at the sentencing hearing). Instead, the statute enhances punishment solely on the mere fact of one's affiliation with a gang which makes it easily distinguishable from other discretionary sentencing enhancement factors that are relevant for reaching a personalized sentencing decision.

Many states have statutes specifically targeting gang-related crimes, and many state courts have upheld their gang enhancement statutes against constitutional challenges. *See, e.g.,* *Rodriguez v. State,* 284 Ga. 803, 671

S.E.2d 497 (2009); *People v. Gardeley,* 14 Cal.4th 605, 59 Cal.Rptr.2d 356, 927 P.2d 713 (1996). ***159** However, Section 40–35–121(b), like the statute in *O.C.,* is uniquely distinguishable from other statutes that have survived constitutional challenges because it lacks a textual basis conditioning enhanced punishment on gang-related criminal conduct by the defendant. *Cf. Rodriguez,* 671 S.E.2d at 503 (holding that Georgia's gang statute did not violate due process or the First Amendment because the statute required participation in the commission of a criminal act and did not punishment gang membership alone); *State v. Williams,* 148 Ohio App.3d 473, 773 N.E.2d 1107, 1112 (2002) (holding that Ohio's gang statute did not "impermissibly establish guilt by association alone" because it "requires that the active member with guilty knowledge has specific intent or purpose to further the group's criminal conduct before they may be prosecuted"); *Klein v. State,* 698 N.E.2d 296 (Ind. 1998) (upholding gang statute where "[m]embership in a gang, by itself, does not provide the basis for prosecution for criminal gang activity"); *Gardeley,* 59 Cal.Rptr.2d 356, 927 P.2d at 725 (observing that California's "STEP Act does not criminalize mere gang membership; rather it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory conditions of a 'criminal street gang,' but also with the 'specific intent to promote, further or assist in any criminal conduct by gang members' ").[11] Nearly all gang enhancement statutes in this country contain specific language limiting the reach of those statutes only to offenses that possess a nexus to a defendant's gang affiliation, and therefore, a defendant's own criminal conduct. *See, e.g.,* Cal.Penal Code § 186.22(b)(1) (enhancing a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members"); D.C.Code § 22–951(b)(1) (making it a crime to "knowingly and willfully participate in any felony or violent misdemeanor committed for the benefit of, at the direction of, or in association with any other member or participant of that criminal street gang"); Ga.Code Ann. § 16–15–4(b) (enhancing punishment for enumerated offenses committed "with the intent to obtain or earn membership or maintain or increase ... status or position in a criminal street gang"); Idaho Code Ann. § 18–8503 (enhancing punishment for enumerated offenses "committed for the benefit or at the direction of, or in association with, any criminal street gang member"); Ind.Code Ann. § 35–50–2–15(b) (enhancing punishment for a felony committed by a gang member "at the direction of or in affiliation with a criminal gang[, or] with the intent to benefit, promote, or further the interests of a criminal gang, or for the purposes of increasing the person's own standing or position with a criminal gang"); La.Rev.Stat. Ann. § 15:1403(B) (enhancing punishment for a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the intent to promote, further, or assist in the affairs of a criminal gang"); Mich. Comp. Laws Ann. § 750.411u (enhancing punishment when a person "who is an associate or a member ***160**

of a gang commits a felony or attempts to commit a felony and the person's association or membership in the gang provides the motive, means, or opportunity to commit the felony, the person is guilty of a felony"); *see also* Fla. Stat. Ann. § 874.04; Iowa Code Ann. § 723A.2; Minn.Stat. Ann. § 609.229; Miss.Code Ann. § 97–44–19; Mo. Ann. Stat. § 578.425; Nev.Rev.Stat. Ann. § 193.168; Tex. Penal Code Ann. § 71.02; Utah Code Ann. § 76–3–203.1; Va.Code Ann. § 18.2–46.2.

As a matter of clarification, we emphasize that the defendants have not alleged that Section 40–35–121(b) violates a fundamental right to expressive association with a criminal street gang, but we are aware that there are arguably additional First Amendment implications.[12] Because the defendants have not approached their due process challenge from this angle, we make no decision on whether First Amendment protection exists for such an association. Tenn. R.App. P. 13(b) ("Review generally will extend only to those issues presented for review.").

[46] **[47]** We turn now to the State's argument that Section 40–35–121(b) was constitutionally applied to the defendants in this case because the evidence established that the underlying offenses were gang-related. We disagree. "In contrast to a facial challenge, which involves the constitutionality of the statute as written, an as applied challenge to the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations." *State v. Crank,* 468 S.W.3d 15, 24 n.5 (Tenn. 2015) ***161** (quoting *City of Memphis v. Hargett,* 414 S.W.3d 88, 107 (Tenn. 2013)) (internal quotations omitted). A statute is unconstitutional on its face when "no set of circumstances exists under which the statute, as written, would be valid." *Waters,* 291 S.W.3d at 882. In this case, as it would be in any other case, Section 40–35–121(b) unconstitutionally imposes criminal punishment for the defendants' mere affiliation with the Five Deuce Hoover Crips. Because the statute's text lacks a nexus requirement, the defendants' sentences were not enhanced because they committed gang-related crimes; instead, the defendants' sentences were enhanced because other individuals with whom they have a connection have previously engaged in criminal activity and have a history of criminal convictions.

Although we sympathize with the State's argument because it is amply apparent that the underlying offenses in this case were gang-related, we refuse to read a nexus requirement into the statute to eliminate its constitutional shortcomings. We respect the General Assembly's efforts to combat the scourge of criminal gang activity in our state, but it is not within our authority to rewrite this statute.

[48] **[49]** **[50]** **[51]** We must now look to the question of severability of Section 40–35–121(b). *New York v. United States,* 505 U.S. 144, 186, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). "Severability is of course a matter of state law." *Leavitt v. Jane L.,* 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996). "Under the doctrine of elision, a court may, under appropriate circumstances and in keeping with the expressed intent of

a legislative body, elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." *Lowe's Companies, Inc. v. Cardwell,* 813 S.W.2d 428, 430 (Tenn. 1991). "The doctrine of elision is not favored," *Gibson Cty. Special Sch. Dist. v. Palmer,* 691 S.W.2d 544, 551 (Tenn. 1985) (citing *Smith v. City of Pigeon Forge,* 600 S.W.2d 231 (1980))," and "Tennessee law permits severance only when 'it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted,' " *Memphis Planned Parenthood, Inc. v. Sundquist,* 175 F.3d 456, 466 (6th Cir. 1999) (citing *State v. Harmon,* 882 S.W.2d 352, 355 (Tenn. 1994)). "In determining whether a provision should be severed, the proper inquiry is whether the legislature "would choose, on the one hand, having no [Code section 40–35–121] at all and, on the other, passing [Code section 40–35–121] without" subsection (b). *Memphis Planned Parenthood, Inc.,* 175 F.3d at 466.

[52] "The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute in force if some other portion of the statute has been declared unconstitutional." *Gibson Cty. Special Sch. Dist.,* 691 S.W.2d at 551 (citing *Catlett v. State,* 207 Tenn. 1, 336 S.W.2d 8 (1960)). Although Section 40–35–121 does not contain a specific severability clause, the Code does include a general severability provision:

> It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be exscinded if the code would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the ***162** remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part in any one (1) or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.

T.C.A. § 1–3–110. "This legislative endorsement of elision 'does not automatically make it applicable to every situation; however, when a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted, then elision of the unconstitutional portion is appropriate.' " *State v. Crank,* 468

S.W.3d 15, 29 (Tenn. 2015) (quoting *In re Swanson,* 2 S.W.3d 180, 189 (Tenn. 1999)).

[53] Under the same analysis of section (b) above, Section 40–35–121(e) also fails for lack of a nexus.[13] When read in conjunction with subsections (b) and (e), subsections (a)(1), (2), (3) and (4) violate the constitutional principles of due process. However, subsection (c) contains the necessary nexus language ("... *for the purpose of and with the intent to* ...") (emphasis added) and thus meets the constitutional requirement of due process.[14] Furthermore, when read in conjunction with subsection (c), subsection (a) and all its subparts meet due process requirements.

As near as one body can reason the collective minds of another body, we believe the legislature would choose the survival of subsection(c) and the remaining provisions of Section 40–35–121 as opposed to the death of the entire statute. The statutory scheme allows Section 40–35–121(c) to operate independently from subsections (b) and (e). Because the latter provisions are not interwoven with the statutory mechanics of subsection (c), this statute is unlike previous statutes that have been wholly invalidated where the unconstitutional portion affects the substantive nature or scope of the remaining provisions. *See, e.g., State v. Tester,* 879 S.W.2d 823, (Tenn. 1994) (refusing to apply the doctrine of elision where resulting statutory scheme would apply statewide rather than to only three counties); *Frost v. City of Chattanooga,* 488 S.W.2d 370 (Tenn. 1972) ("To elide the [unconstitutional] provisions ... defining the category of affected municipalities would result in an incomplete statute. Either all municipalities would be included or this Court would be faced with the problem of establishing a class of municipalities that accords with state law."). So, likewise, subsection (a) would survive when applied in conjunction with subsection (c) and the remaining provisions. Therefore, we conclude that Section 40–35–121(b) and Section 40–35–121(e) may be permissively elided, and the remainder of Section 40–35–121 remains effective.

***163** 4. Cruel and Unusual Punishment

[54] Defendants Bonds, Bishop, and Sullivan also argue that Section 40–35–121 violates that Eighth Amendment's prohibition of cruel and unusual punishment because it offends the contemporary standards of decency and because it results in a sentence that is grossly disproportionate to the crime. We note that other states have rejected Eighth Amendment challenges to sentences imposed under gang enhancement statutes, *see, e.g., Armstrong v. State,* 22 N.E.3d 629, 639 (Ind.Ct.App. 2014) (noting that the defendant "does not point to any authority holding that a sentence based upon a criminal gang enhancement statute is unconstitutional under the Eighth Amendment"), and we likewise have no trouble concluding that Section 40–35–121's imposition of heightened punishment for gang-related offenses by increasing the sentencing range of the offense does not offend the proportionality requirements of the Eighth Amendment. The defendants are not entitled to relief on this basis.

6. Closing Argument

Defendants Bonds, Bishop, and Sullivan argue that the trial court erred in denying them the opportunity to make closing arguments to the jury before it decided the gang enhancement charges. Because we have already concluded above that this phase of the trial was not merely a sentencing hearing, we agree that the State and the defendants should have been permitted to make closing arguments to the jury. *See* Tenn. R.Crim. P. 29.1.

7. Sufficiency of Evidence for the Third Phase —Gang Offense Enhancement

[55] Lastly, Defendants Bonds, Bishop, and Sullivan argue that their convictions under Section 40–35–121(b) were not supported by sufficient evidence. We disagree.

The State relied on the evidence presented during the first phase of the trial to prove that the underlying offenses were criminal gang offenses as defined by Section 40–35–121(a)(3)(A)(i). As recounted above, the evidence clearly established that the defendants perpetrated the underlying criminal offenses of attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony while knowingly causing bodily injury to another person. They beat the victim to within an inch of his life. This conduct satisfied the statutory definition of a criminal gang offense.

The State also introduced ample evidence that Defendants Bonds, Bishop, and Sullivan were each members of a criminal gang known as the Five Deuce Hoover Crips. During the first phase of the trial, the victim, a former member of the gang, identified each of the defendants as gang members, satisfying Section 40–35–121(a)(2)(C). Detective Walker testified that Defendant Bonds was arrested as a juvenile for participating in a "gang beat in" of a gang initiate and had also been recently arrested for reckless endangerment during which he had been witnessed shouting "Fifty-two Hoover" before shots were fired from a car. Both of these facts would satisfy Section 40–35–121(a)(2)(F). Defendant Bonds also has "Fifty–Two Hoover" tattooed on his right arm and "Five Two" on his neck with a star, which would satisfy Section 40–35–121(a)(2)(D). Detective Walker testified that Defendant Bishop had been confirmed as a gang member by the Sheriff's Office because "he did graffiti inside of [the] jail, wearing gang colors, known gang association of known gang members, felony criminal history, arrested on a violent crime, confirmed ***164** through an outside gang unit, and another weapons arrest." Graffiti is physical evidence identifying him as a gang member which satisfies Section 40–35–121(a)(2)(G). Wearing gang colors satisfies Section 40–35–121(a)(2)(D). Detective Walker testified that Defendant Sullivan was confirmed by the Sheriff's Office as a gang member because "he had points for graffiti, known gang association with known gang members, felony criminal history, outside jurisdictional information from a confirmed source, arrested on a violent crime, gang-specific brands or tattoos, and named as a gang member in correspondence."

Based on the victim's testimony and the testimony of Detective Walker, a criminal gang

expert familiar with the Five Deuce Hoover Crips, it was plainly apparent that the Five Deuce Hoover Crips boasts membership of three or more people as required by Section 40–35–121(a)(1); there were four members on trial, the victim was a member at the time of the offenses, and numerous other individuals were determined by the Sheriff's Office to be members based on the contents of the gang file, which we will not regurgitate here. Detective Walker testified that the activities of the Five Deuce Hoover Crips has included committing crimes such as "drug dealing mostly, robberies, agg[ravated] assaults, attempted murder, stuff like that," which satisfies the requirement of Section 40–35–121(a)(1)(A).

To prove that two or more of the members of the Five Deuce Hoover Crips have engaged in a "pattern of criminal gang activity" as required by Section 40–35–121(a)(1)(B), the State introduced certified judgments of convictions for other gang members, for felonies such as possession of a controlled substance with intent to sell, attempted possession of a controlled substance with intent to sell, aggravated assault, facilitation to commit aggravated robbery, aggravated burglary, and attempted aggravated burglary. The requirements of the statute were satisfied because there were judgments for three drug-related felony convictions[15] which occurred on different occasions within a period of five years and which were committed by at least two individuals as required by the statute.[16] Section 40–35–121(a)(3)(A)(ii) ***165** defines an eligible criminal gang offense as any crime that "results, or was intended to result, in the defendant's receiving income, benefit, property, money or anything of value ... from the illegal sale ... of a controlled substance...."

Therefore, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that the defendants were members of a criminal gang, as defined by statute, and that they committed a criminal gang offense, as defined by statute. They are not entitled to relief on this issue.

C. Sentencing

Defendant Bishop argues that the trial court erred by finding that his criminal history made him a multiple offender subject to Range II sentencing. Defendant Sullivan argues that the trial court abused its discretion by ordering him to serve an excessive sentence. Each of these arguments has been rendered moot by the foregoing conclusions, but we will address them anyway to facilitate additional appellate review.

1. Offender Classification

Tennessee Code Annotated section 40–35–106 classifies a defendant as a multiple offender if he has a "minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes." For purposes of this section, generally, each conviction must not have occurred during the same twenty-four-hour period.

At the sentencing hearing on July 25, 2013, the State introduced the presentence investigation

reports into evidence. The State also asked the trial court to take notice of the certified judgments for three federal convictions of drug-related crimes committed by Defendant Bishop, which were introduced during the second phase of the trial on the felon in possession of a firearm charge. After hearing argument from counsel, the trial court determined that Defendant Bishop was a Range II, multiple offender and sentenced him to thirty-two years for the attempted murder, to fifteen years for the aggravated assault, and to five years for the possession of a firearm. The first two sentences were run concurrently, but the third sentence was run consecutively to the attempted murder sentence by operation of statute.

The State entered a single certified judgment from the District Court of the United States for the Eastern District of Tennessee. That judgment showed that Defendant Bishop pled guilty to three offenses: possession with intent to distribute five grams or more of cocaine base, carrying a firearm during and in relation to a drug trafficking crime, and possession within intent to distribute cocaine base. The same offense date of May 26, 2001, is listed for the first two convictions, and the offense date of January 19, 2001, is listed for the third conviction. Aside from the firearm conviction, the two separate drug convictions are sufficient to make Defendant Bishop a multiple offender because they occurred on different days.

[56] In his appellate brief, Defendant Bishop makes a passing assertion that the trial court "neglected to determine both whether the convictions ... were 'within the conviction class, a higher class, or within the next two (2) lower felony ***166** classes.' " Section 40–35–106(b)(5) states that "[i]n the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given." Although the trial court did not expressly consider whether the federal convictions had Tennessee analogues, Defendant Bishop has not suggested or shown that there was any violation of the statute by utilizing those convictions to establish his offender classification. Defendant Bishop bears the burden of showing that his sentence is improper. *State v. Cooper,* 321 S.W.3d 501, 505 (Tenn. 2010). Accordingly, he is not entitled to relief.

2. Excessiveness

[57] **[58]** When a defendant challenges the length or manner of service of a within-range sentence, this Court reviews the trial court's sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *State v. Caudle,* 388 S.W.3d 273, 278–79 (Tenn. 2012); *State v. Bise,* 380 S.W.3d 682, 708 (Tenn. 2012). This presumption applies to "within-range sentencing decisions that reflect a proper application of the purposes and principles of the Sentencing Act." *Bise,* 380 S.W.3d at 707. A trial court abuses its discretion in sentencing when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shuck,* 953 S.W.2d 662, 669 (Tenn. 1997) (citing *Ballard v. Herzke,* 924 S.W.2d 652, 661 (Tenn. 1996)).

This deferential standard does not permit an appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Our supreme court has "continued to emphasize the need for trial courts to 'place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.' " *State v. King*, 432 S.W.3d 316, 322 (Tenn. 2014) (quoting *Bise*, 380 S.W.3d at 705–06 n.41). Additionally, the sentence imposed "should be no greater than that deserved for the offense committed" and also "should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. § 40–35–103(2), (4).

[59] Based on his criminal history, the trial court found Defendant Sullivan to be a multiple offender. He received a thirty-five-year sentence for the attempted murder, eighteen years for the aggravated assault, and five years for the possession of a firearm. The first two sentences were run concurrently, and the last sentence and the first sentence were run consecutively.

During its consideration, the trial court identified five enhancing factors. Because Defendant Sullivan had numerous misdemeanor convictions and one additional felony conviction, the trial court found that he had a previous criminal history in addition to that necessary to establish the sentencing range. *See* T.C.A. § 40–35–114(1). The trial court also found that the injuries inflicted upon the victim were particularly great given their life-threatening severity and crippling impact on the victim's life. *See* T.C.A. § 40–35–114(6). The trial court found that previous attempts at alternative sentencing involving release into the community had failed because Defendant Sullivan's criminal record included multiple probation violations and a history of misconduct even while in custody. *See* T.C.A. § 40–35–114(8). The trial court noted that Defendant Sullivan possessed a firearm during the commission of the charged offense. *See* T.C.A. § 40–35–114(9). And ***167** lastly, the trial court found that the charged offense resulted in serious bodily injury and Defendant Sullivan already had been previously convicted of a felony that resulted in serious bodily injury. *See* T.C.A. § 40–35–114(11).

After reviewing the record, we determine that the trial court did not abuse its discretion in sentencing Defendant Sullivan. The trial court clearly identified each enhancing factor upon which it relied and explained why each was applicable. Defendant Sullivan complains that the trial court did not explain how much weight it was placing on each factor, but nothing in the record suggests that the trial court placed undue emphasis on an improper factor. We are satisfied that Defendant Sullivan's sentences comport with the purposes and principles of our sentencing scheme and are not excessive. *See* T.C.A. §§ 40–35–102, –103. He is not entitled to relief on this basis.

III. Conclusion

Because there was no error during the guilt phase of the trial on the defendants' underlying convictions for attempted second degree murder, aggravated assault, and possession of a firearm during the commission of a dangerous felony, those convictions are affirmed. Accordingly, the trial court's judgments as to Defendant Robinson are affirmed. However, because Tennessee Code Annotated section 40–35–121(b) violates the Due Process Clause of the Fourteenth Amendment for lack of a nexus requirement between the underlying offenses and the gang affiliation of Defendants Bonds, Bishop, and Sullivan, their criminal gang enhancements are vacated, their judgments are reversed, and the case is remanded to the trial court for modification of the judgments and a new sentencing hearing based solely on the underlying offenses.

All Citations

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Footnotes

1 Relevant facts from the pre-trial proceedings and the other guilt phases for the enhancements will be provided during the analysis section of this opinion.

2 Gang expert Detective Thomas Walker later testified that Lamar Griffin was affiliated with the Five Deuce Hoover Crips. According to Detective Walker, his street name is “L.G.,” and he was incarcerated on May 30, 2012, which was a Wednesday. That day was Mr. Griffin's designated day of the week to use money from his account to place an order for amenities from the jail's commissary. People on the outside can deposit money into an inmate's account. An order for the commissary would have to be placed by around noon on the same day. It is processed overnight, and the goods are delivered the next day. If there are insufficient funds in the account, the order is not filled.

3 For the sake of brevity, we have only summarized the most probative of these phone calls for purposes this opinion.

4 This is the spelling used by Mr. Dyer. Detective Walker testified that members of the Crips do not spell any words using the letter combination of “ck” because those letters are an abbreviation for an offensive phrase—“Crip Killer”—used by their rivals, the Bloods.

5 We have synthesized this list of issues based on the appellate briefs of all defendants.

6 However, the lineup of Defendant Bishop shown to Ms. White was in color, rather than in black and white. This discrepancy was not addressed during the suppression hearing.

7 Investigator Washam did not make recordings of all of the interviews.

8 Defendant Bonds was the only defendant to brief this issue. The other defendants simply adopted his argument.

9 As noted above, the trial court indicated that it was admitting the gang file under the business records hearsay exception. However, we note that the trial court did not explain how the gang file satisfied the requirements of Tennessee Rule of Evidence 803(6). We also note that the State and the trial court, at times, seemed to be under the impression that the gang file might be admissible in its entirety under Tennessee Rule of Evidence 703, although the trial court did not make a ruling to that effect. Because the Confrontation Clause implications of the admission of hearsay "basis evidence" from gang experts is currently before the Supreme Court of California, *see* *People v. Sanchez,* 167 Cal.Rptr.3d 9, 22–24 (Cal.Ct.App. 2014), *review granted,* 171 Cal.Rptr.3d 453, 324 P.3d 273 (Cal. May 14, 2014), we encourage the trial court to carefully consider an argument on the admissibility of this evidence on this basis, in the event that this case is ultimately remanded for a new determination on the gang enhancement. We also express our concern that the nature of the gang expert's testimony may have been improper "parroting" of the hearsay contents of the gang file to the jury rather than true expert opinion independently formed on the basis of that information. *See, e.g.,* *United States v. Mejia,* 545 F.3d 179, 197–99 (2d Cir. 2008) (examining basis of gang expert testimony under Federal Rule of Evidence 703 and the Confrontation Clause).

10 As written on May 30, 2012, a defendant who happened to be a member of a college Greek organization with at least a three person membership, *see* T.C.A. § 40–35–121(a)(1), and he or she wears the organization's colors and letters or appears in club photos, *see* T.C.A. § 40–35–121(a)(2)(D)(G), could be subject to a gang enhanced sentence if convicted of a minor criminal offense, wholly unrelated to the organization. If the organization happens to engage in activities which are criminal acts, *see* T.C.A. § 40–35–121(a)(1)(A) (e.g., underage drinking or hazing), and unbeknown to the defendant, at least two other members of the organization have been convicted of a combination of offenses designated as a pattern of criminal gang activity, with no nexus to the organization (e.g., threatening a simple assault), *see* T.C.A. § 40–35–121(a)(1)(B), (a)(3)(A)(i), & (a)(4)(ii), Section 40–35–121(b) can come into play. Officers in such organizations need to be particularly alert. *See* T.C.A. § 40–35–121(e). The 2013 amendment did little to change this scenario. It clarified and expanded what is considered a criminal gang offense, enumerating some twenty-seven specific crimes. Interestingly, several misdemeanors remain on the list. *See* T.C.A. § 40–35–121(a)(3)(B).

11 *See also* *State v. Ochoa,* 189 Ariz. 454, 943 P.2d 814 (Ariz.Ct.App. 1997); *State v. Baldenegro,* 188 Ariz. 10, 932 P.2d 275 (Ariz.Ct.App. 1996); *Helton v. State,* 624

N.E.2d 499, 508–09 (Ind.Ct.App. 1993); *State v. Woodbridge,* 153 Ohio App.3d 121, 791 N.E.2d 1035 (2003); *State v. Rushton,* 151 Ohio App.3d 654, 785 N.E.2d 492 (2003); *State v. Bennett,* 150 Ohio App.3d 450, 782 N.E.2d 101 (2002); *State v. Stallings,* 150 Ohio App.3d 5, 778 N.E.2d 1110 (2002).

12 The defendants did not raise a First Amendment argument to the court below and have not properly raised one in this Court either. Although some of their filings make offhand suggestions that the statute is overbroad, this argument was never developed, and the defendants have not otherwise argued that Section 40–35–121(b) infringes their right to expressive association under the First Amendment. *See* Tenn. Ct.Crim.App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). However, we take this opportunity to note that the scope of associational rights for gang members under the First Amendment is far from clear. *See, e.g.,* Beth Bjerregaard, *The Constitutionality of Anti–Gang Legislation,* 21 Campbell L.Rev. 31, 36–37 (1998) (identifying disagreement among commentators and case law). *Compare* *Scales,* 367 U.S. at 229, 81 S.Ct. 1469 (commenting that "[i]f there were a ... blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired") *with* *Roberts v. United States Jaycees,* 468 U.S. 609, 620, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (acknowledging a constitutionally protected freedom of association for "intimate human relationships" as "a fundamental element of personal liberty" and also "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion") *and* *City of Chicago v. Morales,* 527 U.S. 41, 53, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion) (commenting that the "impact" of the anti-gang loitering statute before it "on the social contact between gang members and others does not impair the First Amendment 'right of association' that [previous] cases have recognized" (citing *Dallas v. Stanglin,* 490 U.S. 19, 23–25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989))) *and* *Rumsfeld v. F.A.I.R.*, 547 U.S. 47, 68, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a 'right of expressive association' " (citing *Boy Scouts of America v. Dale,* 530 U.S. 640, 644, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000)). At least one case has expressly held that the First Amendment generally does not afford associational protection to gang members. *People ex rel. Gallo v. Acuna,* 14 Cal.4th 1090, 60 Cal.Rptr.2d 277, 929 P.2d 596, 608–09 (1997) (holding that a civil injunction forbidding gang members from publicly appearing with other gang members in a particular neighborhood did not implicate any associational protections of the First Amendment).

13 "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. § 40–35–121(e).

14 "A criminal gang offense committed by a defendant who was not a criminal gang member at the time of the offense but who committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a criminal gang as defined in subdivision (a)(1) shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed." T.C.A. § 40–35–121(c).

15 Bekweri William Bost was convicted of possession of cocaine not over .5 grams with intent to sell, which was committed on September 24, 2005. James H. Coney was convicted of attempted possession of cocaine with intent to sell, which was committed on June 27, 2006. Adrian Dezekiel Thomas was convicted of possession of cocaine over .5 grams with intent to sell, which was committed on February 1, 2008.

16 Although the statute's definition of a pattern of criminal gang activity only requires a minimum of two different eligible felonies committed by two different gang members to satisfy its criteria, the State entered into evidence more convictions than required. We note that the judgments for at least some of the non-drug-related offenses may not have constituted legally sufficient proof under the statute. For crimes committed prior to July 1, 2013, Section 40–35–121(a)(3)(A)(i) defines a criminal gang offense as any criminal offense "[d]uring the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person." It appears to us that a mere judgment form would be inadequate proof that its underlying felony was perpetrated in a manner that entailed the causing or threatening of death or bodily injury, unless the elements of the crime necessarily encompassed such conduct. For example, as currently written, one could commit aggravated assault with a reckless mens rea, but that degree of mental awareness would not support Section 40–35–121(a)(3)(A)(i)'s requirement that the crime be committed knowingly. It's also quite simple to conceive of a hypothetical where one could commit aggravated burglary, i.e., the entering of a habitation with the intent to commit a felony, without ever threatening or causing death or bodily injury and without ever intending to receive anything of value from the trespass. Such a problem would not arise however, for crimes committed after July 1, 2013, because Section 40–35–121(a)(3)(B) simply enumerates the eligible criminal offenses without any qualifying language that would require proof of the facts of the underlying crime.

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THE COURT OF CRIMINAL APPEALS
RELATING TO PUBLICATION
OF OPINIONS AND CITATION
OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT NASHVILLE.

Abu-Ali ABDUR'RAHMAN
v.
STATE of Tennessee

No. M2019-01708-CCA-R3-PD
|
June 9, 2020 Session
|
FILED 11/30/2020

Appeal from the Criminal Court for Davidson County, No. 87-W-417, Monte Watkins, Judge

Attorneys and Law Firms

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Timothy L. Easter, J., delivered the opinion of the court, in which Robert L. Holloway, Jr., J., joined. Thomas T. Woodall, J., filed a separate opinion concurring in part and dissenting in part.

OPINION

Timothy L. Easter, J.

***1** This is a State appeal, filed by the State Attorney General and Reporter, from an Agreed Order ("AO") entered between Petitioner, Abu-Ali Abdur'Rahman, and the District Attorney General for Davidson County. The AO amended Petitioner's capital sentence to life imprisonment. Petitioner filed a motion to reopen his post-conviction proceedings based upon the ruling of the United States Supreme Court in *Foster v. Chatman*, 578 U.S. ——, 136 S. Ct. 1737, 195 L.Ed.2d 1 (2016). The post-conviction court granted the motion and set the matter for a hearing. At the hearing, the parties presented to the court an AO stating that Petitioner's sentence would be amended in exchange for his waiving and dismissing all post-conviction claims. The post-conviction court accepted the AO and subsequently entered an amended judgment of conviction. The State appealed, arguing that the post-conviction court lacked jurisdiction to accept the AO and amend Petitioner's sentence. Petitioner responds that this Court lacks jurisdiction to hear this appeal because the State consented to the AO in the post-conviction court, thereby foreclosing any right to appeal. We have thoroughly considered the briefs and arguments of both parties as well as the amici curiae. We conclude that the State has a right to appeal to challenge the jurisdiction of the post-conviction court. We also conclude that the post-conviction court lacked jurisdiction to accept the AO and to amend Petitioner's final judgment of conviction because it did not comply with the statutory requirements for granting relief under the Post-Conviction Procedure Act. Therefore, we vacate both the AO and the amended judgment of conviction and remand this case to the post-conviction court for further proceedings consistent with this opinion.

Factual Background and Procedural History

Well over 33 years ago, Petitioner, Abu-Ali Abdur'Rahman (formerly known as James Lee Jones, Jr.), was convicted of first-degree premeditated murder, assault with intent to commit first-degree murder, and armed robbery for the stabbing attacks of Patrick Daniels and Norma Norman. Petitioner was sentenced to death for the murder conviction and consecutive life sentences for the two other convictions. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), *cert. denied, Jones v. Tennessee*, 498 U.S. 908, 111 S.Ct. 280, 112 L.Ed.2d 234 (1990). As relevant to this appeal, Petitioner raised a claim on direct appeal that the prosecutor's use of peremptory strikes against African-American jurors violated his constitutional rights under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Jones*, 789 S.W.2d at 548-49. The Tennessee Supreme Court found that "[t]here was no pattern of strikes against black jurors" and that "[t]here was no indication of any discriminatory purpose in the strikes" given the prosecutor's "neutral reasons for the exercise of its challenges." *Id.* at 549. The Tennessee Supreme Court affirmed Petitioner's convictions and sentences. *Id.* at 553.

Petitioner subsequently filed a petition for post-conviction relief, the denial of which was affirmed by this Court on appeal. *See James Lee Jones, Jr. v. State*, No. 01C01-9402-CR-00079,

1995 WL 75427, at *1 (Tenn. Crim. App. Feb. 23, 1995), *perm. app. denied* (Tenn. Aug. 28, 1995), *cert. denied, Jones v. Tennessee*, 516 U.S. 1122, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996). Petitioner also unsuccessfully sought federal habeas corpus relief, primarily raising claims of ineffective assistance of counsel and the prosecutor's withholding of certain evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000); *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011); *Abdur'Rahman v. Carpenter*, 805 F.3d 710 (6th Cir. 2015).

On June 24, 2016, Petitioner filed a motion to reopen post-conviction proceedings in the Davidson County Criminal Court. *See* T.C.A. § 40-30-117. Petitioner asserted three claims based on recent United States Supreme Court cases. First, and as relevant to this appeal, Petitioner asserted that *Foster v. Chatman*, 578 U.S. ——, 136 S. Ct. 1737, 195 L.Ed.2d 1 (2016), established a new rule of constitutional law regarding a prosecutor's use of peremptory strikes against potential jurors that are "motivated in substantial part by discriminatory intent" and that this rule was retroactively applicable. Like the defendant in *Foster*, Petitioner obtained the prosecutor's jury selection notes after his trial and direct appeal, which Petitioner alleged contradicted the prosecutor's race-neutral reasons for the strikes given at trial. The other claims raised in Petitioner's motion were that capital punishment should be declared unconstitutional because it is inconsistent with the reasoning of the majority opinion in *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), and with Justice Breyer's dissent in *Glossip v. Gross*, 576 U.S. 863, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). On September 23, 2016, Petitioner filed a petition for writ of habeas corpus as a supplement to his motion to reopen, asserting that capital punishment should be deemed unconstitutional based on the historical record of its application in Tennessee since 1977 showing that it "operates in an arbitrary and capricious manner" and that it is not consistent with the "evolving standards of decency." The State did not file a response to either of Petitioner's pleadings.

***2** On October 5, 2016, the post-conviction court entered an order entitled "Order Granting 'Motion to Reopen Post-Conviction Petition' in Part and Denying in Part." The post-conviction court denied Petitioner's motion with respect to his claims based on *Obergefell* and *Glossip*, concluding that they did not establish new rules of constitutional law that would entitle Petitioner to relief.[1] The post-conviction court also denied Petitioner's petition for writ of habeas corpus. However, the post-conviction court stated that it would "hold an evidentiary hearing in order to make a determination as to issue one, whether Petitioner is entitled to relief under *Foster v. Chatman*." The post-conviction court stated that the hearing would focus on whether *Foster* created a new rule of law regarding peremptory strikes of potential jurors that were "motivated in substantial part by discriminatory intent" or whether the new rule was actually announced in *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). If *Snyder* controlled, the

post-conviction court would determine whether Petitioner waived his claim because he failed to raise it for eight years.

On August 28, 2019,[2] Petitioner filed a "Pre-Hearing Memorandum" detailing his claim that "*Foster* formulated a change in the evidentiary and procedural rules for adjudicating a jury race discrimination claim" from that originally established in *Batson*. After describing the development of United States Supreme Court's jurisprudence from *Batson* through the recent decision in *Flowers v. Mississippi*, —— U.S. ——, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019), Petitioner argued that "*Foster* stands in an important position in the Court's development of the law in this area" because it allowed a defendant to raise a jury discrimination claim that had been previously adjudicated on direct appeal and to support the claim with "newly discovered evidence from outside the trial record – specifically in this case, the prosecutor's notes taken during jury selection[.]" Additionally, Petitioner asserted that *Foster* retroactively applied to post-conviction proceedings the standard established in *Snyder*, a direct appeal, that a defendant must show that the prosecutor's strike of a juror was "motivated in substantial part by discriminatory intent." *See* *Foster*, 136 S. Ct. at 1754 (citing *Snyder*, 552 U.S. at 485, 128 S.Ct. 1203). The memorandum then detailed Petitioner's factual allegations regarding the peremptory strikes of specific African-American jurors by the prosecutor in his case.

***3** An evidentiary hearing was held on August 28, 2019, consisting of arguments by counsel for both parties. Petitioner's counsel submitted multiple exhibits, including the prosecutor's jury selection notes, transcripts of voir dire from Petitioner's trial, and an affidavit from one of the stricken jurors. The exhibits also contained a letter written by Davidson County District Attorney General, Glenn R. Funk, to the Tennessee District Attorney Generals Conference regarding comments made by the prosecutor as a panel member at a continuing legal education seminar in 2015 suggesting the use of racial stereotypes in jury selection. Petitioner's counsel presented the factual and legal arguments underpinning Petitioner's claim that he was entitled to relief under *Foster*. Petitioner's counsel also argued that this claim should be considered in conjunction with Petitioner's claims of prosecutorial misconduct that were raised in his federal habeas corpus proceedings.[3] The District Attorney General stated that the "hearing [was] not about an innocent man" but that "[o]vert racial bias has no place in the justice system" and "the pursuit of justice is incompatible with deception." The District Attorney General stated that upon his review of Petitioner's case and his discussions with the surviving victim and both victims' families, he was prepared to enter an agreement in which Petitioner's death sentence would be vacated in exchange for Petitioner "withdrawing his application for a new trial[,] waiving any other claims for relief[,]" and "not fil[ing] any other petitions." The parties then presented the post-conviction court with the AO, which they signed in open court. The post-conviction court took the matter under advisement, stating that it would "review the order, as well as the

pleadings and exhibits in this case, and make a determination as to whether the [c]ourt will accept this."

On the next day, August 29, 2019, the post-conviction court signed the AO entitled "Agreed Order Allowing Amended Judgment", which stated in pertinent part as follows:

> It appears from the signatures appearing below of the Petitioner and his counsel, and of the attorney for the State, that the parties stipulate, and therefore the Court finds, as follows:
>
> ....
>
> G. The State and the Petitioner have agreed to settle this case according to the terms set forth below, subject to Court approval. The State represents that this settlement will serve the ends of justice.
>
> H. By signing below, Petitioner represents to the Court that he understands the terms of this settlement which involve the waiver of any claims he may have in this case, subject to the terms of this Order, and that he believes this settlement is in his best interest.
>
> ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. The Court's judgment for Count 1 convicting Petitioner of First Degree Murder and sentencing him to death is hereby amended, such that Petitioner's sentence for Count 1 is and shall be Life in Prison, and not Death.
>
> 2. All other provisions of the Court's judgments for Counts 1, 2 and 3 shall remain in full force and effect.
>
> 3. All of Petitioner's claims in this case are deemed waived by Petitioner and are therefore DISMISSED, subject to the terms of this Agreed Order.

The following day, the post-conviction court announced its ruling in open court, stating:

> The [c]ourt reviewed the pleadings, including the facts of the case, the jury selection process, the exhibits and the relevant statutory and case law regarding this matter. During my consideration of the agreed order, an issue arose as to whether parties could agree to set aside a jury verdict such as the one presented to this court. The [c]ourt believes that the issue has been resolved or is resolved by [Tennessee Code Annotated section] 40-30-103, as well as cases such as [*Joseph Matthew*] *Maka v. State*, [No. W2003-01209-CCA-R3-PC, 2004 WL 2290493, at *2 (Tenn. Crim. App. Oct. 11, 2004), *no perm. app. filed*] and *Foster v. Chatman*, as well as *Batson v. Kentucky*.
>
> The [c]ourt concludes that the prosecuting office has the authority to remedy a legal injustice under circumstances such as these before us. After careful consideration, the [c]ourt believes the parties reached an equitable and just resolution and, therefore, approves the agreed order.

The post-conviction court subsequently entered an amended judgment of conviction for Count

1, reflecting a life sentence for the first degree murder conviction. Under the section of the form for special conditions, the post-conviction court wrote:

> ***4** Judgment amended pursuant to agreed order signed by the court on 8/28/19 which was entered in consideration of potential unconstitutional conviction and sentence pursuant to the provisions of [T.C.A. §] 40-30-101 et seq and [T.C.A. §] 40-30-117 (post-conviction statutes). In consideration of this modification of judgment, [Petitioner] waives all appeals and claims related to this matter.

On September 20, 2019, the State, acting through the Office of the Attorney General and Reporter (hereinafter, "State Attorney General"), filed a notice of appeal pursuant to Tennessee Rule of Appellate Procedure 3(c).

Analysis

On appeal, the State Attorney General argues that the post-conviction court lacked jurisdiction to accept the AO and to amend Petitioner's judgment of conviction because the court failed to follow the statutory requirements of the Post-Conviction Procedure Act. In particular, the State relies upon this Court's recent opinion in *Harold Wayne Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *11-12 (Tenn. Crim. App. Oct. 10, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020), in which this Court held that the post-conviction court lacked jurisdiction to accept a proposed settlement agreement in the absence of a finding that the petitioner was entitled to post-conviction relief. Petitioner, as the appellee, responds that this Court lacks jurisdiction to hear this appeal because the State, represented by the District Attorney General, consented to the entry of the AO in the post-conviction court. With regard to the merits of the State's claim, Petitioner argues that because the post-conviction court had the jurisdiction to adjudicate his motion to reopen, it also had the jurisdiction to accept the parties' settlement agreement and that this Court's decision in *Harold Wayne Nichols* is inapplicable to the case at bar.

This Court is required to "consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." Tenn. R. App. P. 13(b). Subject matter jurisdiction is "the power of a court to adjudicate the particular category or type of case brought before it." *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015). "Subject matter jurisdiction involves the nature of the cause of action and the relief sought, and can only be conferred on a court by legislative or constitutional act." *State v. Cawood*, 134 S.W.3d 159, 163 (Tenn. 2004) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)). Subject matter jurisdiction "cannot be waived, because it is the basis for the court's authority to act."

Meighan v. U.S. Sprint Commc'ns Co., 924 S.W.2d 632, 639 (Tenn. 1996). " 'It is fundamental that jurisdiction, neither original nor appellate, can be conferred by consent and neither waiver nor estoppel could be more effective than the consent of parties.' " *State v. Smith*, 278 S.W.3d 325, 329 (Tenn. Crim. App. 2008) (quoting *James v. Kennedy*, 174 Tenn. 591, 129 S.W.2d 215, 216 (Tenn. 1939)). Whether a court has subject matter jurisdiction is a question of law, and our review is de novo with no presumption of correctness. *Cawood*, 134 S.W.3d at 163 (internal quotation omitted).

Because this Court's jurisdiction to hear an appeal is a prerequisite to appellate review, we will first address the question of whether the State Attorney General can pursue an appeal of the AO on behalf of the State when the District Attorney General, also representing the State, consented to the entry of the AO in the post-conviction court. This involves issues related to the State's right to appeal and the proper allocation of authority between the District Attorney General and the State Attorney General. Because we ultimately conclude that this Court has jurisdiction to hear this appeal, the second question we will address is whether the post-conviction court had jurisdiction to enter the AO. This involves issues related to the post-conviction court's jurisdiction to adjudicate Petitioner's motion to reopen as well as its jurisdiction to amend Petitioner's sentence upon agreement of the parties that his post-conviction claims would be waived. We note that due to the procedural posture of this case, the merits of Petitioner's *Foster* claim are not before this Court, and we express no opinion thereon.

I. Appellate Court's Jurisdiction

A. State's Right to Appeal

***5** Generally, the State does not have the right to appeal in a criminal case " 'unless the right is expressly conferred by a constitutional provision or by statute.' " *State v. Menke*, 590 S.W.3d 455, 460 (Tenn. 2019) (quoting *State v. Meeks*, 262 S.W.3d 710, 718 (Tenn. 2008)); *see* Tenn. R. Crim. P. 37(b) (stating that "the state may appeal any order or judgment in a criminal proceeding when the law provides for such appeal"). " 'When a statute affords [the State] the right to an appeal in a criminal proceeding, the statute will be strictly construed to apply only to the circumstances defined in the statute.' " *Menke*, 590 S.W.3d at 460 (quoting *Meeks*, 262 S.W.3d at 718).

Tennessee Rule of Appellate Procedure 3(c) provides as follows:

> Availability of Appeal as of Right by the State in Criminal Actions. In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or

> complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, or post-conviction proceeding, from an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure, and from a final order on a request for expunction.

According to the Advisory Commission Comments, "This subdivision specifies situations, within constitutional limits, in which it seems desirable to recognize the state's right of appeal." Tenn. R. App. P. 3(c), Adv. Comm'n. Cmts.

This case was initiated when Petitioner filed a motion to reopen post-conviction proceedings, which was granted by the post-conviction court on October 5, 2016.[4] Once the post-conviction court granted the motion to reopen, "the procedure, relief and appellate provisions" of the Post-Conviction Procedure Act applied. T.C.A. § 40-30-117(b). This includes the provision that the post-conviction court's final order is appealable "in the manner prescribed by the Tennessee Rules of Appellate Procedure." T.C.A. § 40-30-116. The AO, which disposed of Petitioner's pending post-conviction claims by stating that they were waived and dismissed, was a final judgment in a post-conviction proceeding from which the State has a right to appeal under Rule 3(c). Moreover, from the language of the AO, it does not appear that the State explicitly waived the right to appeal.[5]

Additionally, the Tennessee Supreme Court has recently held that a defendant has an appeal as of right from the entry of an amended order or judgment under Rule 3(b) by applying Tennessee Rule of Criminal Procedure 36. *State v. Allen*, 593 S.W.3d 145, 153 (Tenn. 2020). Rule 36 grants a trial court the authority to correct clerical errors in judgments and orders at any time and provides that "[u]pon filing of the corrected judgment or order, ... the defendant or the [S]tate may initiate an appeal as of right pursuant to Rule 3[.]" Tenn. R. Crim. P. 36. In *Allen*, the supreme court concluded that because the trial court "was not purporting to simply correct a clerical mistake or supply omitted or overlooked information" when it amended an order that had become final over five years previously, it "exceeded the authority Rule 36 provides." *Allen*, 593 S.W.3d at 154. Similarly, when the post-conviction court in this case entered the amended judgment, which amended Petitioner's sentence for first degree murder from death to life imprisonment, it did not purport to merely correct a clerical mistake or omission. Because, as we discuss further below, the post-conviction lacked any other basis to amend Petitioner's final judgment, the State has an appeal as of right under Rule 3(c) from the entry of the amended judgment

because the post-conviction court exceeded the authority granted by Rule 36. [6]

***6** Petitioner relies heavily on case law stating that consent decrees in civil cases are "not appealable by the parties entering into the agreement." *City of New Johnsonville v. Handley*, No. M2003-00549-COA-R3-CV, 2005 WL 1981810, at *10 (Tenn. Ct. App. Aug. 16, 2005) (citing *City of Shelbyville v. State ex rel. Bedford Cnty.*, 220 Tenn. 197, 415 S.W.2d 139, 144 (Tenn. 1967); *Bacardi v. Tenn. Bd. of Registration in Podiatry*, 124 S.W.3d 553, 562 (Tenn. Ct. App. 2003)), *perm. app. denied* (Tenn. Feb. 6, 2006). "However, a party may appeal from a consent order upon a claim of lack of actual consent, fraud in its procurement, mistake, or *lack of the court's jurisdiction to enter the judgment.*" *Leroy Jackson, Jr. v. Purdy Bros. Trucking Co., Inc.*, No. E2011-00119-COA-R3-CV, 2011 WL 4824198, at *3 (Tenn. Ct. App. Oct. 12, 2011) (citing *Swift & Co. v. United States*, 276 U.S. 311, 323-24, 48 S.Ct. 311, 72 L.Ed. 587 (1928)), *perm. app. denied* (Tenn. Mar. 8, 2012) (emphasis added). Even in criminal cases, "a defendant who pleads guilty may appeal the issue of whether or not the trial court had subject matter jurisdiction because jurisdictional defects are not waived by the plea." *State v. Yoreck*, 133 S.W.3d 606, 612 (Tenn. 2004); *see also* *State v. Carter*, 988 S.W.2d 145, 148 (Tenn. 1999) (holding that "a no contest plea or plea of guilty does not waive a challenge to the court's jurisdiction"); Tenn. R. App. P. 3(b)(2) (allowing a defendant to appeal as of right from a guilty plea to raise issues "not waived as a matter of law by the plea").

Thus, we believe that, when a statute or rule specifically provides for an appeal as of right from a trial court's order, an appellate court has jurisdiction to hear the case and to determine whether any specific errors complained of were waived as a matter of law by a party's consent to the judgment in the court below. *See* *Pacific R.R. Co. v. Ketchum*, 101 U.S. 289, 290, 25 L.Ed. 932 (1880). Generally speaking, a party's consent or failure to object to a trial court's order may waive most evidentiary and procedural issues under Tennessee Rule of Appellate Procedure 36(a). [7] However, that rule does not place a restriction on this Court's jurisdiction to hear an appeal in the first place. *See* Tenn. R. App. P. 36(b) (stating the plain error doctrine, which authorizes discretionary review of otherwise waived claims); Tenn. R. App. P. 13(b) (stating that an appellate court must consider subject matter jurisdiction and may consider other issues "(1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process"). Moreover, this Court has held that the State's failure to object to a trial court's lack of jurisdiction did not bar it from raising the issue on appeal "because such jurisdiction could not be conferred upon the criminal court by consent, estoppel, or waiver." *Smith*, 278 S.W.3d at 329; *see also* *John Thedford Day v. Vici Martha Day Gatewood*, No. 02A01-9805-CV-00141, 1999 WL 269928, at *1 (Tenn. Ct. App. Apr. 30, 1999) ("The issue of subject matter jurisdiction is not waivable and thus may be raised at any time, regardless of whether any objection to the assertion of jurisdiction was made at the trial court level."). Thus, subject matter jurisdiction remains a viable issue on

appeal even if the parties consented to the judgment in the court below.

Alternatively, even if we were to determine that the State does not have an appeal as of right under Rule 3(c), this Court has the authority to treat the State's notice of appeal as a petition for a writ of certiorari. *See* *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002), *superseded on other grounds by statute*, *as recognized in* *State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017); *see also* *State v. L.W.*, 350 S.W.3d 911, 916 (Tenn. 2011) (holding that "the failure to follow the procedural requirements of [T.C.A. §] 27-8-106 for petitions for writ of certiorari in civil cases did not deprive the Court of Criminal Appeals of jurisdiction to hear these appeals"). The common law writ of certiorari has been codified at Tennessee Code Annotated section 27-8-101, which provides:

> ***7** The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

The common law writ of certiorari is an "extraordinary judicial remedy," *State v. Lane*, 254 S.W.3d 349, 355 (Tenn. 2008), and may not be used "to inquire into the correctness of a judgment issued by a court with jurisdiction." *Adler*, 92 S.W.3d at 401 (citing *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978)). Instead, the writ of certiorari is available "to correct '(1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal's authority; and (5) plain and palpable abuses of discretion.' " *Lane*, 254 S.W.3d at 355 (citation omitted). Because the State Attorney General's claim on appeal is that the post-conviction court, by accepting the AO and amending Petitioner's sentence, "exceeded the jurisdiction conferred" by the Post-Conviction Procedure Act, the writ of certiorari would be appropriate if there were "no other plain, speedy or adequate remedy" under the Rules of Appellate Procedure. T.C.A. § 27-8-101.

B. Authority of the State Attorney General and District Attorney General

Petitioner argues that the District Attorney General had the discretion to consent to the entry of the AO and that, by appealing therefrom, the State Attorney General invaded the constitutional and statutory powers of the District Attorney General. Both the State Attorney General and the District Attorney General are constitutional officers established by Article 6, section 5 of the Tennessee Constitution, and the Legislature has codified

the respective duties and responsibilities of each office. The District Attorney General "[s]hall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto," T.C.A. § 8-7-103(1), while the State Attorney General shall "attend to all business of the state, both civil and criminal in the court of appeals, the court of criminal appeals[,] and the supreme court," T.C.A. § 8-6-109(b)(2). The same division of authority applies in post-conviction proceedings. Under the Post-Conviction Procedure Act, "[t]he district attorney general shall represent the state" in responding to the petition and asserting "the affirmative defenses the district attorney general deems appropriate." T.C.A. § 40-30-108(a), (d). Additionally, the district attorney general "has the option to assert" certain defenses by filing a motion to dismiss. T.C.A. § 40-30-108(c). During proceedings in the post-conviction court, the State Attorney General shall "lend whatever assistance may be necessary to the district attorney general in the trial and disposition of the cases," T.C.A. § 40-30-114(b)(1). However, "[i]n the event an appeal is taken[,]" the State Attorney General "shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals." T.C.A. § 40-30-114(b)(2). As this Court has previously explained:

> ***8** Considering ... these sections of the Code together, we conclude that the legislature has given the District Attorney General the power to prosecute criminal cases at the trial level, and that the State Attorney General has been given the full right, power and exclusive authority to prosecute criminal cases and/or pursue other remedies that may be attendant to such cases in the appellate courts.

State v. Simmons, 610 S.W.2d 141, 142 (Tenn. Crim. App. 1980) (holding that the district attorney general did not have standing to object to the State Attorney General's motion to dismiss an appeal). Thus, in pursuing an appeal of the post-conviction court's order, the State Attorney General was acting within his exclusive sphere to exercise the State's right to appeal.

Petitioner relies upon the Tennessee Supreme Court's opinion in *State v. Watkins*, 804 S.W.2d 884 (Tenn. 1991), for the proposition that the State Attorney General is bound by the agreements made in the trial court by the District Attorney General. In *Watkins*, the court said:

> We have carefully considered the state's argument that in representing the prosecution on appeal, the Office of the Attorney General is more than a mere extension of the local District Attorney's office and should not be bound on appeal by the action of

> the prosecutor in the trial court. The Attorney General undoubtedly has a role to play in ensuring that errors in the trial court prejudicial to the state are corrected on appeal. But there is a difference between seeking to correct errors in the trial court not deliberately of the state's making, and second-guessing the judgment of the local prosecutor in settling a case. Where such a settlement is not illegal and does not result in manifest injustice (and, certainly, the sentence in this case fits neither category), the state should be held on appeal to the same waiver rule as the defendant. Such a rule is particularly important in this context, because it ensures adequate notice and, therefore, fundamental fairness to a defendant engaged in the delicate process of making the determination whether to plead guilty or to go to trial.

Id. at 886-87. However, *Watkins* is distinguishable from the present case because the issue being discussed was an erroneous sentencing range, which the Tennessee Supreme Court has repeatedly said is a "non-jurisdictional" element of a defendant's sentence and may be the subject of plea negotiations between the defendant and the State. *See, e.g., Davis v. State*, 313 S.W.3d 751, 759-60 (Tenn. 2010).

In this Court's experience, it is not uncommon for the State Attorney General to take a different position on appeal from the one held by the District Attorney General in the trial court, even when such position is contrary to an agreement between the District Attorney General and the defendant. *See, e.g., Harold Wayne Nichols*, 2019 WL 5079357, at *11 (noting the State's changed position on appeal with regard to the post-conviction court's ability to accept a settlement agreement), *perm. app. denied* (Tenn. Jan. 15, 2020); *State v. A.B. Price*, No. W2017-00677-CCA-R3-CD, 2018 WL 3934213, at *5 (Tenn. Crim. App. Aug. 14, 2018) (noting the State's changed position on appeal with regard to whether the constitutionality of a statute was justiciable), *rev'd*, 579 S.W.3d 332 (Tenn. 2019); *State v. Alex Hardin Huffstutter*, No. M2013-02788-CCA-R3-CD, 2014 WL 4261143, at *1 (Tenn. Crim. App. Aug. 28, 2014) (noting the State's changed position on appeal with regard to whether the defendant's certified question of law was dispositive), *no perm. app. filed*; *State v. Shannon A. Holladay*, No. E2004-02858-CCA-R3-CD, 2006 WL 304685, at *5 (Tenn. Crim. App. Feb. 8, 2006) (Wade, P.J., concurring) (noting the State's changed position on appeal with regard to whether the defendant had an expectation of privacy), *no perm. app. filed*; *State v. James Anthony Hill*, No. M2003-00516-CCA-R3-CD, 2004 WL 431481, at *4 (Tenn. Crim. App. Mar. 9, 2004) (noting the State's changed position on appeal with regard to whether an offense was a lesser-included offense), *perm. app. denied*

(Tenn. Sept. 7, 2004). Generally speaking, "[t]he same rules that apply to defendants likewise apply to the State" with regard to the waiver of issues raised for the first time on appeal, even when "[t]he Attorney General's Office on appeal apparently disagrees with the assistant district attorney general's concession in the trial court[.]" *State v. Jarus Smith*, No. M2014-01130-CCA-R3-CD, 2015 WL 4656553, at *7 (Tenn. Crim. App. Aug. 6, 2015), *perm. app. denied* (Tenn. Dec. 10, 2015); *see also* *Watkins*, 804 S.W.2d at 886 (noting that, "proverbially speaking, what is applicable to the goose ought to be applied to the gander" with regard to waiver); *State v. Adkisson*, 899 S.W.2d 626, 635-36 (Tenn. Crim. App. 1994) ("It is elementary that a party may not take one position regarding an issue in the trial court, change his strategy or position in mid-stream, and advocate a different ground or reason in this Court."). However, as stated above, in this case the State Attorney General is challenging the post-conviction court's *jurisdiction* to enter the AO and the amended judgment, which is not waived by the District Attorney General's agreement thereto. *See generally State v. Boyd*, 51 S.W.3d 206 (Tenn. Crim. App. 2000). As this Court has previously observed:

> ***9** We agree that it may appear unfair to a defendant for the State to take one position at the trial court level, and after a defendant has relied on that position, take a different position on appeal. In most cases we could refuse to accept the State's position on appeal on the ground that we will not address issues not raised at the trial court level. However, as stated previously, neither we nor the trial court can ignore court rules in order to assume jurisdiction where there is none.

Id. at 211 (internal citations omitted).

To be clear, the resolution of the question of the authority of Attorney General to take a different position on appeal will always lie when that resolution, as is here, involves questions of the trial court's jurisdiction. It is neither a question of position change by the State as a party on appeal, nor a question of allocation of authority between a District Attorney General and the State Attorney General. It is simply a question of jurisdiction which this Court can never ignore.

Based on the foregoing, we conclude that the State had a right to appeal, that the State Attorney General had the authority to bring the appeal, and that the jurisdictional issue raised on appeal was not waived by the agreement of the parties in the court below. Thus, this appeal is properly before this Court, and we will proceed to consider the merits of the State's claim that the post-conviction court lacked jurisdiction to enter the AO and amend Petitioner's sentence.

II. Post-Conviction Court's Jurisdiction

A. Motion to Reopen Post-Conviction Proceedings

In *Case v. Nebraska*, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus ligation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act, whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103; *see also Sills v. State*, 884 S.W.2d 139, 142 (Tenn. Crim. App. 1994) ("The Post-Conviction Procedure Act was created to address and remedy constitutional wrongdoing in the convicting or sentencing process which is significant enough to render the conviction or sentence void or voidable."). However, "there is no constitutional duty to provide post-conviction relief procedures." *Serrano v. State*, 133 S.W.3d 599, 604 (Tenn. 2004) (citing *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). Thus, "the availability and scope of post-conviction relief lies within the discretion of the General Assembly because post-conviction relief is entirely a creature of statute." *Bush v. State*, 428 S.W.3d 1, 15-16 (Tenn. 2014) (citing *Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005)).

Under its current iteration, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." T.C.A. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed[,]" a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." *Id.*; *see Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997). A motion to reopen post-conviction proceedings is only cognizable if it asserts one of the following grounds for relief:

> ***10** (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim

> is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid[.]

T.C.A. § 40-30-117(a)(1)-(3). Additionally, the motion must assert facts underlying the claim which, "if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." *Id.* at (a)(4). Taking the petitioner's factual allegations as true, the post-conviction court shall deny the motion if it fails to meet the requirements listed in subsection (a). T.C.A. § 40-30-117(b). If the post-conviction court grants the motion to reopen, "the procedure, relief and appellate provisions" of the Post-Conviction Procedure Act apply. *Id.*

The State does not contest the fact that the Davidson County Criminal Court, as the original court of conviction, had subject matter jurisdiction over Petitioner's post-conviction proceedings. *See* T.C.A. § 40-30-104(a) (stating that the petition must be filed with "the clerk of the court in which the conviction occurred"). Instead, the State argues that the post-conviction court lacked jurisdiction in this case because it did not properly grant Petitioner's motion to reopen post-conviction proceedings in the first place. The State contends that, despite the fact that the post-conviction court's October 5, 2016 order was entitled "Order Granting 'Motion to Reopen Post-Conviction Petition' in Part[,]" the post-conviction court did not actually reopen post-conviction proceedings because it "made none of the findings required for reopening a post-conviction petition." Specifically, the State asserts that the post-conviction court never made a finding that *Foster* established a new rule of constitutional law or that it was retroactively applicable. The State argues that, because the motion to reopen was never granted, the post-conviction court lacked jurisdiction to accept and enter the AO because there was "no case or controversy pending before it to be settled or otherwise adjudicated." Alternatively, the State argues that the October 5, 2016 order "should be vacated because the post-conviction court had no legally cognizable basis for reopening" the post-conviction proceedings based upon the merits of Petitioner's claim. Specifically, the State argues that "*Foster* did not create a new rule of law" and that Petitioner cannot "establish by clear and convincing evidence that there was a constitutional violation that entitles him to relief."

As an initial matter, we disagree with the State's characterization of the post-conviction court's October 5, 2016 order. However, even if the State is correct that the post-conviction court did not actually grant the motion to reopen with respect to the *Foster* claim, it clearly did not deny the claim as it did with the *Obergefell* and *Glossip* claims. Thus, at the very least, the motion to reopen itself remained pending for adjudication at the time of the August 28, 2019 hearing.

***11** Secondly, we note that the State did not seek to appeal the post-conviction court's October 5, 2016 order. While the motion to

reopen statute provides a means by which a petitioner may seek a permissive appeal from the post-conviction court's denial of a motion to reopen, *see* T.C.A. § 40-30-117(c), it does not provide a means by which the State may appeal the post-conviction court's grant of the motion. Additionally, the State did not seek either an interlocutory appeal under Tennessee Rule of Appellate Procedure 9 or an extraordinary appeal under Tennessee Rule of Appellate Procedure 10.

Indeed, an order granting a motion to reopen is, by its very nature, an interlocutory order, triggering application of "the procedure, relief and appellate provisions" of the Post-Conviction Procedure Act. *See* T.C.A. § 40-30-117(b). The motion to reopen statute does not require the post-conviction court to specifically state its findings of fact and conclusions of law in its order granting the motion. *Cf.* T.C.A. § 40-30-109(a) (stating that the court is merely required to enter an order setting an evidentiary hearing if it does not summarily dismiss the petition); T.C.A. § 40-30-111(b) (requiring the court to enter an order stating "the findings of fact and conclusions of law with regard to each ground" "[u]pon the *final* disposition of [the] petition") (emphasis added). Instead, to grant a motion to reopen, the statute merely requires the post-conviction court to determine if the petitioner's "factual allegations, if true, meet the requirements of subsection (a)." T.C.A. § 40-30-117(b). The State does not contend that Petitioner's motion to reopen failed to comply with the pleading requirements of subsection (a); it simply disagrees with Petitioner's claim on the merits. However, "[i]n order to determine if a court has jurisdiction, we consider whether or not it had the power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong." *Cawood*, 134 S.W.3d at 163 (internal quotation omitted). Regardless of whether the post-conviction court's decision was right or wrong, it had subject matter jurisdiction to grant the motion to reopen and to set the matter for an evidentiary hearing where Petitioner would "have the burden of proving the allegations of fact by clear and convincing evidence." T.C.A. § 40-30-110(f).

B. AO and Amended Judgment

The problem in this case arises from the fact that, although the post-conviction court had jurisdiction over Petitioner's reopening of the post-conviction proceedings, it did not have jurisdiction to amend Petitioner's death sentence to life imprisonment under the terms of the AO. "There obviously is an important distinction between the right to *seek* relief in a post-conviction proceeding and the right to *have* relief in a post-conviction proceeding." *Shazel v. State*, 966 S.W.2d 414, 415-16 (Tenn. 1998) (emphasis in original). "[I]n order for a Court to have the jurisdiction to enter a decree in a particular case it must not only have the general jurisdiction over the subject matter involved and over the parties, it must also have the power to grant the particular relief decreed." *Brown v. Brown*, 198 Tenn. 600, 281 S.W.2d 492, 503 (Tenn. 1955). Rather than granting Petitioner post-conviction relief upon a finding of a constitutional violation, the AO in this case specifically stated that Petitioner's post-conviction claims were waived and dismissed.

Thus, the post-conviction court did not have jurisdiction to amend Petitioner's sentence because his original judgment of conviction remained final. *See Delwin O'Neal v. State*, No. M2009-00507-CCA-R3-PC, 2010 WL 1644244, at *3 (Tenn. Crim. App. Apr. 23, 2010) (affirming trial court's finding that it lacked jurisdiction over a post-conviction petitioner's request for a reduction of sentence after constitutional claims were abandoned), *perm. app. denied* (Tenn. Sept. 3, 2010).

***12** "As a general rule, a trial court's judgment becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed." *Boyd*, 51 S.W.3d at 210 (citing *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)). "[O]nce the judgment becomes final in the trial court, the court shall have no jurisdiction or authority to change the sentence in any manner[,]" except under certain limited circumstances. T.C.A. § 40-35-319(b); *see State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991). "[J]urisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties." *Moore*, 814 S.W.2d at 383 (citing *State v. Hamlin*, 655 S.W.2d 200 (Tenn. Crim. App. 1983)). "[A]ny attempt by the trial court to amend the judgment, even with the agreement of the [d]efendant and the State, is void." *Boyd*, 51 S.W.3d at 210 (citing *Pendergrass*, 937 S.W.2d at 837; *Moore*, 814 S.W.2d at 383); *see also Lonnie Graves v. State*, No. 03C01-9301-CR-00001, 1993 WL 498422, at *2 (Tenn. Crim. App. Dec. 1, 1993). "To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution." *Harold Wayne Nichols*, 2019 WL 5079357, at *12 (citing *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000); *State v. Dalton*, 109 Tenn. 544, 72 S.W. 456, 457 (Tenn. 1903)).

The Post-Conviction Procedure Act provides a means for seeking relief from an otherwise final judgment "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103; *see Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999) (noting the availability of post-conviction proceedings "to collaterally attack a conviction and sentence which have become final"). With regard to the disposition of a post-conviction petition, the statute provides as follows:

> If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, including a finding that trial counsel was ineffective on direct appeal, the court shall vacate and set aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

T.C.A. § 40-30-111(a). The language of this statute is significant in two respects. First, it limits the available relief that a post-conviction court may grant to either vacating the original judgment or ordering a delayed appeal. *See* T.C.A. § 40-30-113 (describing the procedures for granting a delayed appeal). Vacating a judgment allows the case to "be returned to the particular stage needed to remedy the constitutional wrong found to have occurred," whether that be the pre-trial stage or the pre-sentencing stage. *Sills*, 884 S.W.2d at 142-43. Significantly, the post-conviction statute "does not authorize a trial judge to reduce a sentence[.]" *State v. Carter*, 669 S.W.2d 707, 708 (Tenn. Crim. App. 1984). Second, the post-conviction court's authority to grant relief "is contingent upon the court's finding that the judgment is void or voidable due to an infringement of the petitioner's constitutional rights." *Harold Wayne Nichols*, 2019 WL 5079357, at *11; *see Wilson v. State*, 724 S.W.2d 766, 768 (Tenn. Crim. App. 1986) (holding that trial court's grant of a delayed appeal was inappropriate where there was no finding of a constitutional violation on the face of the order). "In the absence of a finding of constitutional violation sufficient to grant post-conviction relief, the post-conviction court is without jurisdiction to modify a final judgment." *Harold Wayne Nichols*, 2019 WL 5079357, at *12. Thus, taking these provisions of the statute together, it is clear that "[o]nly upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an agreement to settle the case without a new trial or sentencing hearing." *Id.*, at *11 (citing *Boyd*, 51 S.W.3d at 211-12).

***13** Petitioner asserts that much of this Court's opinion in *Harold Wayne Nichols* regarding a post-conviction court's jurisdiction to accept a settlement agreement was dicta and, therefore, is not controlling. The term "obiter dictum" refers to a statement made by the court that is not necessary for a determination of the issue and, although it may be persuasive, it generally is not binding as precedent within the rule of stare decisis. *See Staten v. State*, 191 Tenn. 157, 232 S.W.2d 18, 19 (Tenn. 1950). The Tennessee Supreme Court has held that "inferior courts are not free to disregard, on the basis that the statement is obiter dictum, the pronouncement of a superior court when it speaks directly on the matter before it[.]" *Holder v. Tenn. Judicial Selection Comm'n*, 937 S.W.2d 877, 882 (Tenn. 1996). In *Harold Wayne Nichols*, the petitioner was specifically challenging the post-conviction court's conclusion that it could not accept the proposed settlement agreement "where there is no claim for post-conviction relief before this [c]ourt which should survive this [c]ourt's statutorily required preliminary order." 2019 WL 5079357, at *11. Thus, dicta or not, the question of the post-conviction court's authority to accept a proposed settlement agreement without following the statutory requirements of the Post-Conviction Procedure Act was squarely before this Court.

Alternatively, Petitioner argues that *Harold Wayne Nichols*, which was decided less than two months after the entry of the AO in this case, represents a change in the law and cannot be applied to retroactively invalidate

the AO. Petitioner asserts on appeal that this Court's unpublished opinion in *Joseph Matthew Maka*, 2004 WL 2290493, which was relied upon by the post-conviction court, was "the only appellate authority on point" regarding the validity of settlement agreements in post-conviction cases at the time the AO was entered. However, *Joseph Matthew Maka* simply stands for the proposition that the trial court loses jurisdiction to amend or vacate an agreed order granting post-conviction relief once it becomes final. *Id.* at *2 (citing *State v. Peele*, 58 S.W.3d 701, 705-06 (Tenn. 2001)); *see also Anthony E. Perry v. State*, No. W2006-02236-CCA-R3-PC, 2008 WL 2483524, at *4 (Tenn. Crim. App. June 19, 2008) (relying on *Joseph Matthew Maka* in holding that the post-conviction court lost jurisdiction to vacate its order denying relief after it became final), *perm. app. denied* (Tenn. Oct. 27, 2008). Although the *Joseph Matthew Maka* court vacated the post-conviction court's subsequent order denying relief and reinstated the earlier agreed order, 2004 WL 2290493, at *3, the court did not specifically address the propriety of the agreed order itself. Moreover, we would note that, unlike this case, the agreed order in *Joseph Matthew Maka* did not state that the defendant was waiving all claims or that the post-conviction court was amending an otherwise final judgment. Instead, it stated that the post-conviction petition was "granted as to each issue and claim for relief raised therein," and that it appeared that the defendant's conviction for second degree murder was vacated and he stood to be retried for first degree murder. *Id.*, at *1-2. Thus, *Joseph Matthew Maka* does not support the proposition that the post-conviction court had the jurisdiction to enter the AO in this case, which amended Petitioner's final judgment of conviction in the absence of any finding of a constitutional violation.

Moreover, Petitioner's argument overlooks this Court's published opinion in *Boyd*, which was cited in *Harold Wayne Nichols*. In *Boyd*, the defendant filed a petition for post-conviction relief alleging ineffective assistance of counsel after the direct appeal of his guilty plea was dismissed for failure to properly preserve his certified questions of law. 51 S.W.3d at 208. The prosecutor agreed that the defendant was entitled to post-conviction relief, and the post-conviction court entered an agreed order granting the defendant a delayed appeal pursuant to Tennessee Code Annotated section 40-30-213(a) (now renumbered as 40-30-113(a)). *Id.* However, on appeal, the State Attorney General argued "that the trial court did not have jurisdiction to amend the final judgment" to include the certified questions of law. *Id.* at 209. This Court agreed, concluding that the post-conviction court "did not have the jurisdiction to amend the judgment when it granted the delayed appeal" despite the agreement of the parties. *Id.* at 210. This Court concluded, however, that defendants in such a situation were not "left without a remedy" in that the post-conviction court, upon a finding of ineffective assistance of counsel according to the appropriate standard, could "vacate the judgment of conviction and allow the defendant to withdraw the guilty plea" pursuant to Tennessee Code Annotated section 40-30-211(a) (now renumbered as 40-30-111(a)). *Id.* at 211. Thereupon, the

parties are "placed back in the position they occupied prior to the guilty plea" where they could "re-enter into such a plea agreement[.]" *Id.* at 212. The trial court could then "conduct another plea hearing and enter a new judgment of conviction, explicitly reserving the certified questions of law." *Id.* Thus, *Boyd* stands for the proposition that the post-conviction court cannot accept an agreement of the parties to bypass the statutory requirements of the Post-Conviction Procedure Act to amend a final judgment of conviction.

***14** Because the AO in this case stated that Petitioner's claims were waived and dismissed, the post-conviction court never made a finding of a constitutional violation as required to grant relief under the Post-Conviction Procedure Act. Indeed, the amended judgment states that it was entered "in consideration of *potential* unconstitutional conviction and sentence" (emphasis added). Without finding that Petitioner's conviction or sentence were constitutionally infirm, the post-conviction court did not have the authority to vacate Petitioner's original judgment under Tennessee Code Annotated section 40-30-111(a). Thus, because Petitioner's original judgment was never vacated, it remained final, and the post-conviction court had no jurisdiction to amend it, despite the agreement of the parties. *See Boyd*, 51 S.W.3d at 210 (citing *Pendergrass*, 937 S.W.2d at 837; *Moore*, 814 S.W.2d at 383). We conclude that the proper remedy in this case is to vacate both the amended judgment and the AO, thereby placing the parties back into the positions they occupied at the time of the evidentiary hearing on August 28, 2019. *See State v. Santos Macarena*, No. M2005-01905-CCA-R3-CO, 2006 WL 1816326, at *3 (Tenn. Crim. App. June 27, 2006), *no perm. app. filed.*

Conclusion

Based on the foregoing, we vacate the AO and the amended judgment. We hereby remand this case to the post-conviction court for proceedings consistent with this opinion.

Thomas T. Woodall, J., filed a separate opinion concurring in part and dissenting in part.

Thomas T. Woodall, J., concurring in part and dissenting in part.

I respectfully dissent from the majority's opinion insofar as it holds that the post-conviction trial court *must* first determine that a petitioner is entitled to post-conviction relief before a District Attorney General is allowed to negotiate a settlement of criminal convictions and/or sentences which are the subject of a post-conviction proceeding. The majority opinion prohibits the 31 District Attorneys General in Tennessee from evaluating a petition for post-conviction relief, determining that it has some merit, and concluding that it is appropriate to concede a petitioner is entitled to post-conviction relief. In so doing, the majority opinion prevents the State's statutorily designated attorney from negotiating the most favorable settlement of the challenged underlying charges *before* a post-conviction trial court grants full post-conviction relief. If a District Attorney General must wait until the post-conviction trial court rules that post-conviction relief must be granted, the District

Attorney General, as in the case *sub judice*, might very well have a difficult task to locate witnesses and/or physical evidence to present in a new trial. Consequently the State would be required to negotiate from a position of weakness as a result of mandating that the court first grant post-conviction relief prior to the State negotiating a new settlement of the challenged offenses. As a result, the majority opinion undermines the authority of each District Attorney General in this state.

I do concur in the majority opinion's conclusion that this case should be remanded. However, I feel it should be remanded solely for entry of proper stipulations, orders, and judgments to reflect what I believe is the crystal clear intent of the State, Petitioner, and the post-conviction court in the proceedings leading to this appeal. Generally, but without being a mandated and binding procedure, I envision that appropriate procedures could generally follow this outline:

(1) The State, represented by the duly-elected District Attorney General of the 20th Judicial District, in his opinion and within his constitutional and statutory authority, concludes in a stipulation that Petitioner is entitled to post-conviction relief from his convictions and resulting sentences;

(2) The post-conviction court approves the State's stipulation and grants Petitioner's request for post-conviction relief and sets aside Petitioner's convictions and sentences;

(3) The State and Petitioner immediately announce a settlement of the renewed pending charges. Pursuant to settlement, Petitioner pleads guilty as charged to all pending charges, and receives sentences of life imprisonment for each conviction. The post-conviction court, then sitting as a trial court presiding over disposition of pending charges, would accept the settlement. Immediately thereafter, an agreed order granting post-conviction relief based upon the State's stipulation could be entered, followed by entry of judgments of convictions and sentences pursuant to the court accepted negotiated plea agreements. This would procedurally "cross each t" and "dot each i."

***15** I agree with the majority's holding that the post-conviction court properly granted Petitioner's motion to reopen his first post-conviction petition. Pursuant to Tennessee Code Annotated section 40-30-117(b), once a motion to reopen has been granted, "the procedure, relief, and appellate provisions of [Tennessee Code Annotated sections 40-30-101 through 40-30-122] *shall* apply." Tenn. Code Ann. § 40-30-117(b) (emphasis added). Included within the procedures and relief set forth above are those found in Tennessee Code Annotated section 40-30-108. Subsection (a) thereof requires the District Attorney General to represent the State in the post-conviction proceeding at the trial court level and to file "an answer or other responsive pleading" to the post-conviction proceeding. Subsection (c) thereof permits the District Attorney General, by way of a motion to summarily dismiss the post-conviction petition, to assert certain defenses to the petition. Importantly, subsection (d) states that the District Attorney General *shall* respond to each allegation in the petition. Not surprisingly, the General Assembly did not prohibit the District Attorney General

from responding that one or more allegations of entitlement to post-conviction relief is (are) admitted. In other words, the General Assembly implicitly approved each District Attorney General's authority and responsibility to seek, acknowledge, and enforce truth and justice in post-conviction proceedings.

With all due respect to my esteemed colleagues who wrote and joined the opinion in *Harold Wayne Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019) *perm. app. denied* (Tenn. Jan. 15, 2020) and the majority opinion in the case *sub judice*, I conclude that those opinions erroneously conclude that a trial court's acceptance of the State's admission that the petitioner is entitled to post-conviction relief removes the jurisdiction of the post-conviction court unless the post-conviction court conclusively and independently of the State finds grounds to grant relief. Logically, this would require a full evidentiary hearing without regard to stipulations of evidence submitted by the parties. It also, in my opinion, effectively amends the statutory procedures pertaining to post-conviction relief, which allow, as set forth above, the State to include in its response to a post-conviction petition that the petitioner is entitled to post-conviction relief on one or more grounds.

I do not dispute at all the right of a post-conviction court to decline to accept a proposed settlement between the State and the petitioner to grant post-conviction relief. However, to conclude that when a post-conviction trial court does, after due consideration, accept the State's concession and grants post-conviction relief, that the post-conviction court loses its jurisdiction to make such a determination is a dangerous precedent.

For these reasons, I dissent in part. I concur in part to the extent the matter should be remanded to the post-conviction court, but solely for the purposes of giving the State, Peititoner, and the post-conviction court the opportunity to proceed to the same effective result as before, but following appropriate procedural steps.

All Citations

Slip Copy, 2020 WL 7029133

Footnotes

1 The Petitioner did not file an application for permission to appeal the denial of these claims pursuant to Tennessee Code Annotated section 40-30-117(c) or an appeal as of right under Tennessee Rule of Appellate Procedure 3(b) from the denial of his habeas corpus petition.

2 Pending before this Court is Petitioner's motion, pursuant to Tennessee Rule of Appellate Procedure 14, to consider the declaration of Petitioner's counsel regarding his various meetings with the District Attorney General to negotiate a settlement of this case over the course of this three-year delay. Rule 14(a) empowers an appellate

court to consider certain facts that "occur[ ] after judgment," are "capable of ready demonstration[,]" and "affect[ ] the positions of the parties or the subject matter of the action[.]" In deferring consideration of Petitioner's motion and the State's response, a panel of this Court noted:

> Although the facts contained in counsel's declaration are not later-arising and were known to the appellee and to the District Attorney General at the time of the negotiated settlement, the parties could not have anticipated the need to include details of the settlement negotiations in the record at the time of the entry of the parties' agreed order. The circumstances presented in this case are unique, and the motion before the court does not squarely fall within the guidelines of Tennessee Rule of Appellate Procedure 14.

Order Reserving Judgment on Motion to Consider Post-Judgment Facts, March 5, 2020. Given the unique circumstances of this case, this Court will consider the declaration of Petitioner's counsel only insofar as it provides helpful information regarding the procedural history of this case.

3 Petitioner's attorney relied on the dissenting opinion by Judge Cole in *Abdur'Rahman v. Colson*, 649 F.3d at 478-483. However, the majority opinion in that case rejected Petitioner's claim that the prosecutor violated *Brady* by failing to disclose certain pieces of evidence or that any prejudice arising therefrom was sufficient to entitle Petitioner to relief. *See id.* at 475, 478.

4 As discussed in further detail below, we reject the State's argument that the post-conviction court's October 5, 2016 order did not actually grant the motion to reopen.

5 Even if such a waiver is possible, this Court has noted that the State Attorney General "would be a necessary party to such an agreement." *State v. Burrow*, 769 S.W.2d 510, 512 n.3 (Tenn. Crim. App. 1989).

6 The trial court entered its amended judgment six days after the State filed its notice of appeal. To the extent that the State's notice of appeal was premature, it would be deemed timely filed upon the entry of the amended judgment. *See* Tenn. R. App. P. 4(d).

7 "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a).