

CRIMINAL LAW UPDATE

APPELLATE OPINIONS

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I. Pretrial Issues

A. Confessions and Statements

State v. Dailey, 273 S.W.3d 94 (Tenn. 2009) (1-2-09) (Davidson County) [5-0, Clark]--Dailey, charged with first degree murder, filed a motion to suppress the two statements he made, claiming that he had initially been subjected to custodial interrogation without the benefit of Miranda warnings. The trial court denied the suppression motion. Dailey pled guilty to second degree murder, reserving a certified question of law as to the propriety of the suppression ruling. The Court of Criminal Appeals initially found that the certified question was not dispositive. In *Dailey I*, the Supreme Court reversed, held that the certified question was dispositive, and remanded for consideration of the suppression issue. On remand, the Court of Criminal Appeals affirmed the trial court's finding that Dailey had not been subjected to custodial interrogation until after he was given his Miranda warnings and had voluntarily waived his rights. The Supreme Court reversed that finding, vacated Dailey's conviction, and dismissed his murder charge.

Murder Investigation: In April 2004, the female victim's severely decomposed body had been found in an abandoned vehicle at Tommy's Wrecker Service with a piece of rope wrapped around her neck. Officers interviewed several employees of the wrecker service and took fingerprints; they found no physical evidence linking any suspect to the murder.

Focus on Dailey: Officers had a gut feeling that they needed to speak further with Dailey. They asked someone at the wrecker service to find out if Dailey would be willing to come to the police station and give a second set of prints. Officers wanted another chance to talk with him. Dailey drove himself to the station and met Detective Roland in the lobby. The detective asked if they could talk before retaking the print. Detective Roland led Dailey to an interview room and then left to deal with some paperwork. Detective Roland returned with Detective Postiglione. The detectives closed the door behind them.

Interview 1: The interview began with casual conversation. Dailey said that he initially forgot to mention that he sometimes closed the shop. The detectives asked whether he worked weekends. They also asked if he remembered questioning whether the police would be able to solve this murder. Dailey said that he had just been curious. Detective Roland then said that the officers had basically concluded the investigation, and that it might get tough for Dailey.

The detectives told Dailey, falsely, that his prints had been found where they should not be. Dailey asked where, but the detectives would not say. They then informed Dailey that they were not questioning him to see if he was involved but only to ask why the victim was now dead. They then informed Dailey that, based on what they now knew, they had no choice but to charge him with first degree murder and that, perhaps if they knew the circumstances surrounding the killing, they could argue for a reduced charge. Dailey said he was not sure exactly what happened. He had picked up the victim for sex. They went to the wrecker service; the victim wanted more money and threatened Dailey. Dailey got angry and threw the victim to the floor. He vaguely remembered putting his hands on her throat; the next thing he knew, the victim was dead. He tried to cover up what he had done by putting the piece of rope around her neck and moving her body to one of the cars on the lot.

The detectives then said that Dailey had to be charged and, at that point, read Dailey his rights. Dailey asked if that meant he would be staying at the jail that night. Dailey then signed the waiver of his rights.

Interview 2: Once Dailey signed the waiver, the questioning immediately resumed. No break was taken, and no one left the room. Dailey was not told that his first statement might not be admissible. The detectives made some general references to that first statement. Dailey added some more details and gave a complete statement.

Custodial Interrogation: Dailey was clearly subjected to interrogation both times. The issue was whether Dailey was in custody prior to giving the second statement. The trial court held that he was not. The Court of Criminal Appeals agreed, noting that Dailey's apparent understanding that he could not go home at the end of the first statement suggested that, up to that point, Dailey felt free to leave. The Supreme Court disagreed.

Tennessee's test for "custody" is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself deprived of freedom of movement to a degree associated with a formal arrest. The Supreme Court explained that the determination of "custody" is a fact-intensive inquiry. Here, the Court concluded that a reasonable person would have considered himself deprived of freedom of movement to a degree associated with formal arrest, at least by the time that the detectives informed Dailey that they would have to charge him with first degree murder. As to Dailey's inquiry about not being able to go home, the Court found it irrelevant since the inquiry is objective--based on what a reasonable person would think, not on what the defendant may actually have been thinking at the time.

Impact of Unwarned Statement on Second Statement: When a defendant has given an unwarned statement but is later given proper Miranda warnings and waives his rights, the analysis as to the propriety of the second statement under the Fifth Amendment is governed by *Missouri v. Seibert*, 542 U.S. 600 (2004); the test is stricter under Tennessee's Constitution, Art. I, § 9, and is governed by *State v. Smith*, 834 S.W.2d 915 (Tenn. 1992). Under both tests, the Court found that Dailey's second statement was inadmissible. Both tests require consideration of multiple factors, but the key factors in the Court's view were:

*The detectives obtained a fairly detailed confession in the first round of questioning

*The questioning in round one was pointed and quite accusatory

*There was no break between the two rounds--same people involved; same room; virtually no passage of time

*The detectives treated the two rounds of questioning as two portions of the same whole--the second being merely the "official" portion

*No informing Dailey, after giving Miranda warnings, that they were starting with a clean slate--the Court concluded that a reasonable person in Dailey's position would have considered the second statement a foregone conclusion.

B. Confidential Informant/Right to Disclosure

State v. Brandon Keith Ostein & Teresa Gale Foxx, ___S.W.3d___ (Tenn. 2009) (8-20-09) (Davidson County) [5-0, Clark]--On November 5, 2005, the trial court issued a search warrant for the apartment leased to defendant Foxx. The warrant was supported by the detective's affidavit noting that, within the past 72 hours, a reliable confidential informant (CI) had seen defendant Ostein at the apartment cooking powder cocaine and making crack cocaine; the CI had previously seen defendant Ostein and others at the apartment in possession of cocaine, other drugs, and large amounts of money. The search warrant was executed 5 days later. One hour prior to the execution, the CI again saw defendant Ostein cooking cocaine in the apartment. The CI was not present during the search.

When officers knocked on the apartment door and announced they were there with a warrant, they heard running, yelling, and a toilet flushing upstairs. As officers entered the apartment, five people ran out the front door. Defendants Foxx and Ostein were among those five. Officers saw a pot of boiling water on the stove with digital scales next to it. Officers found defendant Haley upstairs lying on a bed across from the bathroom, where they found a large amount of cocaine and a broken beaker in the water of the toilet.

All of the arrestees were given Miranda rights. Defendant Foxx told officers that she let defendants Ostein and Haley cook and sell crack from her apartment; in return, they helped pay some of her bills, including rent. Defendants Foxx and Ostein were both charged with possession of over 300 grams of cocaine with intent to sell or deliver and possession of drug paraphernalia. Both defendants filed motions to compel the identity of the CI. The trial court granted their motions but also granted the State an interlocutory appeal. But the Court of Criminal Appeals and the Supreme Court found that the trial court had abused its discretion in compelling the State to identify the CI.

The Informer's Privilege: Both the United States and Tennessee Supreme Courts have long recognized the necessity for law enforcement, at times, to rely on individuals working undercover to provide information. In reality, the privilege belongs to the government not to reveal the identity of its informants unless the informant's identity is either: (1) relevant and helpful to the accused's defense; or (2) essential to a fair determination of the prosecution.

A defendant seeking disclosure must prove, by a preponderance of the evidence, circumstances entitling him to disclosure. Those circumstances would include situations in which the informant participated in the crime; witnessed the crime; or had knowledge favorable to the defendant. Here, neither defendant met that burden. This CI's information was used only to obtain the search warrant. Defendant Foxx's prosecution will be based on: (1) fact that she was the lessee of the apartment; (2) her statements admitting that she allowed the apartment to be used for drug preparation and sale; (3) her presence at the time of the arrest; and (4) the large amount of cocaine found on the premises that she controlled. The CI has no relevance in these areas. As to defendant Ostein, the CI could only have information that would harm rather than

assist his defense. The CI twice saw defendant Ostein preparing cocaine. But defendant Ostein is not being prosecuted for what the CI saw, but for the offenses he was committing at the time the warrant was executed.

Because neither defendant could establish that the CI had sufficient information to require disclosure, both defendants were also unable to demonstrate that disclosure was necessary to present a complete defense under the due process provisions of either the state or federal constitutions. While there could be situations in which a CI's identity might be so crucial as to implicate constitutional protections, neither defendant made that showing here.

C. Indictments/Statute of Limitations

State v. Neddie Mack Lawson, ___S.W.3d___(Tenn. 2009) (8-24-09) (Claiborne County) [5-0, Wade]--Lawson was stopped for driving under the influence on June 20, 2005. Within one year of the offense, he was indicted for DUI, 2nd offense (misdemeanor; one-year statute of limitations). The State later learned that he had three prior DUI convictions. He was indicted for DUI, 4th offense (E felony; two-year statute of limitations) on August 8, 2006, in a superseding indictment.

Prior to trial, Lawson requested (and the trial court granted) a motion to expunge all the records pertaining to the first indictment after the State had filed a nolle prosequi on that indictment.

At the sentencing phase of the bifurcated trial, the judge excluded one of the prior DUI convictions. Lawson was thus convicted of DUI, 3rd offense (misdemeanor; one-year statute of limitations). Lawson moved to dismiss his conviction, claiming that the prosecution was begun beyond the one-year statute of limitations for misdemeanor offenses. When the State argued that the second indictment was filed while the prior timely indictment was still pending, which had tolled the statute of limitations, Lawson argued that, in light of the expunction order, the State could not prove its claim. The trial court rejected Lawson's claim, as did the Tennessee Supreme Court.

Superseding Indictments/Judicial Notice: The law in Tennessee has long recognized that a second or superseding indictment filed beyond the statute of limitations is proper so long as the first indictment was timely and the superseding indictment neither broadens nor substantially amends the prior indictment. Since Tenn. Code Ann. § 55-10-403(a)(1)(A)(iii) specifically provides that the consideration of prior offenses for multiple-offense DUI is a sentencing consideration only, not a separate offense, this superseding indictment did not broaden the prior indictment; the additional prior offenses were merely sentencing considerations. Accordingly, the second indictment was a proper superseding indictment.

When the trial court denied Lawson's motion to dismiss on the statute of limitation issue after the verdict, it took judicial notice of the fact that the prior timely indictment had been pending at the time the superseding indictment was issued. This notice was proper, because at that time, the existence of the first indictment was not subject to reasonable dispute and was

capable of accurate and ready determination by resort to the record of the proceedings. The burden then fell to Lawson to show why the judicially noticed fact of the prior indictment was improper; he could not do so.

Finally, the Court noted that the expunction order should never have been entered under these circumstances. In *State v. Doe*, 860 S.W.2d 38 (Tenn. 1993), the Court had observed that the purpose of expunction was to prevent a citizen from bearing the stigma of having been charged with a criminal offense where he was **acquitted of the charge or prosecution was abandoned**. Since prosecution under the first indictment had not been abandoned but simply superseded by the second indictment, the expunction order should not have been entered and was of no effect.

D. Search and Seizure

1. Terry Stops

Arizona v. Johnson, ___ U.S. ___, 129 S.Ct. 781 (2009) (1-26-09) [9-0, Ginsburg]--One female officer and two male detectives, all members of Arizona's Gang Task Force, were patrolling near a neighborhood associated with the Crips gang when they pulled a car over for a civil license plate infraction (warranting a written citation). Johnson was the passenger in the back seat of the car. As the officer approached the vehicle, she noticed that Johnson was watching them intently. While one of the detectives checked on the license for the driver, the officer questioned Johnson. She noticed that Johnson was wearing clothing consistent with Crips membership, including a blue bandana. She also noticed that Johnson had a police scanner with him, used to monitor police activity.

The officer decided that she wanted to question Johnson away from the front-seat passenger, so she asked him to step out of the car. Based on her observations, she feared that Johnson might be armed; she conducted a pat-down search and felt the butt of a gun near Johnson's waist. Johnson began to struggle. The officer put him in handcuffs.

Johnson was charged with unlawful possession of a weapon. He filed a motion to suppress in the trial court claiming that the officer lacked reasonable suspicion for the pat-down. The Arizona trial court denied the suppression motion, and Johnson was convicted as charged. A divided Arizona Court of Appeals reversed the conviction. The Arizona Supreme Court denied review, but the United States Supreme Court granted review and reversed.

The Court analyzed prior opinions discussing *Terry* stops and concluded that this officer's pat-down was reasonable under the circumstances. The initial stop was lawful since the officers had witnessed a civil traffic infraction. In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court had determined that, following a valid stop, officers may request that passengers, as well as the driver, exit the vehicle. In *Brendlin v. California*, 551 U.S. 249 (2007), the Court had determined that passengers, as well as the driver are seized from the moment of a traffic stop until given permission to leave. Here, since Johnson was already seized at the time of the proper stop, it was appropriate that the officer ask him to exit the car. The officer was not constitutionally required to give Johnson the opportunity to leave without first ensuring that she was not permitting a dangerous person to get behind her. So long as the officer reasonably suspected that Johnson

was armed and dangerous, the frisk was proper, even though the officer had no reason to believe that Johnson was then involved in or had been involved in a criminal offense.

State v. Day, 263 S.W.3d 891 (Tenn. 2008) (9-22-08) (Sumner County) [4-1, Clark; D-Koch]--A police officer on routine patrol saw a driver coming toward him flashing her lights, waving her arms wildly, and pointing at the SUV in front of her. The officer made a U-turn, turned on his blue lights, and pulled over the SUV. The woman who had summoned his help also pulled over behind the officer. The officer briefly questioned the woman, then approached Day, the driver of the SUV. The officer immediately smelled alcohol when he spoke to Day. After Day failed several field sobriety tests, the officer arrested him. Tests revealed that Day had a blood-alcohol level of .25%.

Day filed a motion to suppress his blood test, claiming that the initial stop was not justified by reasonable suspicion that he had committed or was committing a criminal offense. The trial court denied the suppression motion, essentially finding that the officer was justified in stopping Day as part of the officer's community-caretaking function. Day then pled guilty to DUI, third offense, but reserved a certified question of law as to whether the officer had reasonable suspicion of a criminal offense at the time of the stop. The Court of Criminal Appeals held that the officer lacked such suspicion, reversed Day's conviction, and dismissed the indictment. The Supreme Court affirmed that judgment.

The Court refused to address the community-caretaker function, holding that it was not part of the question reserved for appeal (*See* § IV(A)(1)--certified question). Since the driver who signaled the officer's attention was completely unknown to the officer, he had no idea as to her credibility or what she knew about Day and his activities. The Court agreed that the signaling driver's actions would have been sufficient to support stopping her to question her about Day, which may have led to adequate suspicion for stopping Day, but since the record failed to show what she had told the officer and since the officer himself had not witnessed any improper conduct on behalf of Day, the record was simply inadequate to show reasonable suspicion of criminal conduct at the time of the stop.

Dissent [Koch]--Given the signaling driver's proximity to Day, the officer could reasonably have concluded that she had witnessed the commission of a crime or that she was signaling the officer because Day needed assistance. Either way, it was reasonable for the officer to stop Day under the circumstances.

2. Search Incident to Arrest

State v. Marcus Richards, 286 S.W.3d 873 (Tenn. 2009) (7-10-09) (Williamson County) [4-1, Lee; D-Koch]--Officers received a call from a reliable informant that a drug deal was going on behind a known drug house. The caller described three people involved in the deal: Trent Covington; Marcus Head; and an unnamed woman who had previously appeared in drug court. Officers approached from a neighboring yard. They saw four people seated around a picnic table. As soon as one of the defendants, Head, saw the officers, he swept his arm across the table, scattering a white powdered substance in plain view across the table and in the yard. Head also

dropped a corner baggie to the ground. All four people looked as if they had been caught in the act. Officers asked Head what he had in his hand--a rolled-up dollar bill with a white powdered substance on it. Officers did an initial pat-down and found no contraband or weapons. Once a field test showed that the substance scattered on the table and ground was cocaine, officers performed a second search, this time looking for drugs. Officers found a bag of cocaine and a bag of marijuana in their search of Richards.

Richards was charged with simple possession of both cocaine and marijuana. He moved to suppress. The trial court denied his motion. Richards pled guilty but reserved a certified question of law as to the propriety of the search that turned up the drugs. The Court of Criminal Appeals held that the evidence should have been suppressed, and the Supreme Court agreed; the indictment was dismissed.

State's Position: The State argued that this situation was very similar to *Maryland v. Pringle*, 540 U.S. 366 (2003), in which officers, after obtaining consent to search a car, found drugs and a large sum of money in the back seat. When neither the driver nor either of the passengers claimed possession, officers arrested all three. In affirming the arrest of Pringle, a passenger, the Court held that it was reasonable to infer that any or all three in the car had knowledge of, and exercised control over, the drugs. Similarly, here, the State argued that, as soon as the officers saw the cocaine in plain view, equally accessible to all four around the picnic table, it was reasonable to infer that all four possessed the cocaine; thus, Richards could properly be arrested for possession at that point and then searched incident to that arrest.

Majority: The Supreme Court rejected the State's position for two reasons. First, the Court held that the officers lacked probable cause to believe that Richards was in possession of the cocaine at the time of the search. In *United States v. DiRe*, 332 U.S. 581 (1948), the Court had held that, where an informant singles out a guilty person, any inference that everyone on the scene of the crime is guilty must then disappear. Since the original caller here had made no mention of Richards in the call and officers had not actually seen Richards engage in any incriminating activity, they lacked probable cause as to his possession of the cocaine scattered on the table.

Second, the Court held that this search could not be justified as incident to a lawful arrest because the Court found that the only basis for the arrest was the contraband found on Richards pursuant to the second search.

Dissent [Koch]: Justice Koch pointed out that the probable cause to justify Richards' arrest was not based on the caller's tip; that tip had been about a drug transaction that had been completed by the time the officers came on the scene. Rather, the probable cause was based on ongoing drug use, and the officers' seeing cocaine in plain view and equally accessible to all four persons seated around the table.

Similarly, the basis for arrest was not the fruit of the second search. A search incident to arrest may actually precede the arrest, so long as there is independent probable cause to justify the search and the arrest and search are so close in time as to be part of the same transaction, which took place in this incident with Richards.

3. Probable Cause and Exigent Circumstances

State v. Meeks, 262 S.W.3d 710 (Tenn. 2008) (9-2-08) (Coffee County) [5-0, Koch]--Manchester officers received a call from a guest in room 109 of the Park Motel. The caller reported a strange odor coming from room 110 and said that she and her mother both had burning eyes and headaches because of the fumes; she asked what a methamphetamine lab smelled like. The responding officer went in room 109 and found the odor instantly recognizable and unmistakable as methamphetamine. Officers knocked on the door to room 110, got no response, but heard a voice inside and the sound of breaking glass. The officers got a key from the hotel manager, but the chain was locked. When they kicked in the door, they found defendant Snyder in the bathroom near a hotplate with its heating element glowing. Defendant Meeks was lying unconscious on one of the beds. Officers put on protective gear to go back into the room. They called for a hazardous materials team to deal with the scene and cleared all others from the hotel. Both defendants required hospitalization.

Based on what they had seen upon entering the room, the officers obtained a search warrant for the room. Execution of the warrant revealed methamphetamine on the dresser, meth lab pieces, equipment, and ingredients, as well as disposable plastic gloves. Both defendants were indicted for manufacturing methamphetamine and other drug-related charges. They filed motions to suppress the evidence, arguing that there were no exigent circumstances justifying the warrantless entry into the hotel room. The trial court granted the suppression motion, but the Court of Criminal Appeals reversed that order, and the Supreme Court upheld the reversal.

Exigent Circumstances: Both defendants conceded that the officers had probable cause to enter the room based on their recognition of the smell signifying the manufacture of methamphetamine, but they argued that the State failed to prove that there was a sufficient exigency to enter the room without a warrant. The defendants pointed out that officers did not clear the hotel until after the initial entry, thus suggesting the absence of exigent circumstances.

The Court explained that exigency is evaluated based on the totality of the circumstances known to the officers at the time of entry. Officers must have an objectively reasonable basis for concluding that there was an immediate need to act to protect themselves or others from serious harm. Here, there was a clear exigency. Meth labs are extremely volatile and highly combustible. Plus, exposure to the toxic fumes can cause serious inhalation injuries, even to those not necessarily in the same room with the lab equipment. Officers knew from the smell that there was an active meth lab, and they knew that the fumes were already affecting the occupants in the next room. Thus, there was an immediate need to act to protect both the officers and the other people in the hotel. The fact that the officers waited to clear the hotel until after initial entry into room 110 did not undermine the reasonableness of their decision to enter the room without waiting to get a warrant.

II. Trial Issues/Expert Testimony

State v. Scott, 275 S.W.3d 395 (Tenn. 2009) (1-23-09) (Davidson County) [5-0, Koch]--Scott was charged with three counts of sexual battery by an authority figure and two counts of rape of his step-daughter, who was between 13 and 18 at the time of the offenses. Scott advised that he would rely on a defense of sleep parasomnia. He presented the report of Dr. Brevard Haynes,

who specializes in sleep disorders, in which Dr. Haynes opined that “sexual behavior in sleep parasomnia is the explanation for [Mr. Scott’s] touching of his step-daughter.”

Because the doctor’s report was based, in large part, on Scott’s own uncorroborated, self-serving statements, the State moved to exclude the expert testimony as unreliable. The trial court conducted a hearing and excluded the testimony but granted Scott’s request for an interlocutory appeal by permission. The Court of Criminal Appeals denied interlocutory review; the Supreme Court granted Scott’s application and reversed the trial court’s order.

Trial Court’s Gatekeeper Role: Trial courts should assess all proffered expert testimony under the rubric of Rules 702 and 703, Tenn. R. Evid. In making the determination, trial courts walk a fine line. While they are to ensure that the testimony is based upon proof that is sufficiently trustworthy as to be admissible, trial courts may not overstep their bounds to usurp the jury’s role as fact-finder.

The determination of whether expert testimony should be admitted essentially involves inquiry into three areas: (1) qualifications of the proffered expert; (2) reliability of the expert’s field of discipline--includes an examination of studies, articles, and data that compose that field; and (3) reliability of underlying facts or data upon which the expert’s opinion is based.

There are some areas of expert testimony that, as a matter of law, have already been established for purposes of admissibility. Some types of evidence have been deemed either reliable or unreliable by statute; others have been deemed either reliable or unreliable by prior controlling legal decisions. Where a controlling legal decision has found evidence either admissible or inadmissible, a trial court need not undertake a more probing admissibility analysis in the absence of some solid basis for reconsideration. Since this area of testimony has not been conclusively addressed by statute or case law, the Court examined the three areas.

Expert’s Qualifications: Dr. Haynes was thoroughly cross-examined and clearly qualified. He is board certified in sleep medicine and has focused his practice on sleep medicine for two decades.

Reliability of Field or Discipline: The State did not object to the reliability of the field of sleep science or even to the reliability of underlying studies related to sleep sex behavior as a form of sleep parasomnia. The State’s concession was proper because diagnosis of sexual behavior as sleep parasomnia has been generally accepted within the field of sleep science.

Reliability of Underlying Facts/Data: This was the basis of the State’s strong objection. Dr. Haynes conducted a sleep assessment of Scott and observed no unusual behavior; the bulk of his opinion was based on Scott’s own self-serving, uncorroborated statements. The Court nevertheless found that this prong was satisfied. Dr. Haynes’s diagnosis was based on the same type of data on which other experts in the field would rely. While the State’s claims will provide excellent fodder for cross-examination, they are not an adequate basis for exclusion.

Substantial Assistance: The State also argued that Dr. Haynes’s testimony would not substantially assist the trier of fact because it is common knowledge that persons, while asleep, do not act intentionally. The Court found that the doctor’s testimony was not as narrow as the

State's argument suggested. A description and explanation of a form of sleep parasomnia where sexual behaviors occur extends beyond the common understanding of jurors.

State v. Bradley Ferrell, 277 S.W.3d 372 (Tenn. 2009) (1-29-09) (Van Buren County) [5-0, Wade]--Ferrell was housed with two cellmates in the Van Buren County Jail. One cellmate, James McCormick, planned to escape from the jail by calling the female jailer to their cell to deal with the third cellmate's oxygen machine. McCormick shared his plan with Ferrell. On September 2, 2000, McCormick called for the jailer. When she went to get tubing for the oxygen machine, McCormick stepped out of the cell; Ferrell followed. McCormick told the jailer not to make trouble. He and Ferrell left the jail and went to Ferrell's house, where someone drove them to McCormick's truck. They then went to McCormick's sister's house, where they were found and returned to the jail.

At a pretrial hearing, the defense asked the trial court to allow the testimony of Dr. Steven Adams, an assistant professor of family medicine at the University of Tennessee, Chattanooga. Adams had either directly treated Ferrell or supervised other physicians treating him for a number of years.

Dr. Adams' proffered testimony: Ferrell had suffered a brain injury in 1997, leaving him comatose for several days and also requiring a ventilator for life support, which caused fixed deficits in Ferrell's cognition, short- and long-term memory, and his awareness of his surroundings. These deficits had remained static. In his opinion, Ferrell suffered from organic brain syndrome and was not competent to commit a crime intentionally if the offense required planning ahead of time.

Ferrell likely could not even remember his departure from the jail. While the doctor admitted on cross-examination that Ferrell would probably have been aware that he was in jail and may have known that he was walking out of the cell when he did, it was his opinion that Ferrell would not have understood the consequences of his actions.

Trial court's ruling: The trial judge excluded the proffered testimony for two reasons. First, he read *State v. Leroy Hall* as requiring that a psychiatrist testify to this type of evidence. Also, the judge held that this mental-state defense was not relevant to escape since escape was a non-specific intent crime.

At trial, McCormick testified that, at the time of the escape, Ferrell was on medication. McCormick was not sure if Ferrell even really knew what he was doing. Ferrell was convicted of misdemeanor escape and sentenced to 11 months, 29 days, suspended after service of 60 days.

The Court of Criminal Appeals affirmed the trial court holding that, even if the exclusion were error, it was harmless. The Supreme Court reversed and remanded the case for a new trial.

Mental State Defense Evidence: In *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997), the Court had explained that, while Tennessee does not recognize a defense of diminished capacity, expert testimony negating a mental state is admissible because negating any element of a criminal

offense is a recognized defense in Tennessee. In *Hall*, the Court had not intended to distinguish between specific and general intent crimes, nor had the Court limited the mental expert testimony solely to psychiatrists; it simply happened to be psychiatric testimony that had been proffered in *Hall*.

Because the trial court had misapprehended the application of *Hall*, it had applied an incorrect standard and thus abused its discretion. Dr. Adams should have been allowed to testify. His proffered testimony was both relevant and admissible pursuant to Rules 702 and 703 of the Rules of Evidence, which set out the requirements for expert testimony. Nor could the exclusion of this evidence be considered harmless. The exclusion of the expert testimony divested Ferrell of any real opportunity to present his only meaningful defense. Because this error more probably than not affected the result, Ferrell must be granted a new trial.

III. Sentencing Issues/Sixth Amendment Jury-Trial Right/Consecutive Sentencing

Oregon v. Ice, _U.S._, 129 S.Ct. 711 (2009) (1-14-09) [5-4, Ginsburg-Stevens-Kennedy-Breyer-Alito; D: Scalia-Roberts-Souter-Thomas]--Ice was convicted of six offenses committed during two occasions when he broke into an apartment and sexually assaulted the eleven-year-old victim. Under Oregon's sentencing scheme (like Tennessee's), multiple sentences, except for mandatory consecutive sentencing situations, are to run concurrently unless the trial judge finds specific statutorily-required facts to support consecutive sentencing. Ice's judge ordered the majority of his sentences to be served consecutively for a total effective sentence of 340 months. Had all the sentences been served concurrently, he would have served 90 months.

On appeal, Ice argued that the Sixth Amendment mandated that a jury find the facts necessary to support consecutive sentencing. The Oregon Court of Appeals affirmed the judgment. The Oregon Supreme Court reversed, agreeing with Ice's Sixth Amendment claim. The United States Supreme Court granted cert. and reversed.

Scope of Sixth Amendment's Jury Guarantee: In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court established the principle that any fact—other than the fact of a prior conviction—that increased the maximum punishment to which a defendant may be sentenced must be admitted by the defendant or proved beyond a reasonable doubt to a jury. Ice argued that, since he could not get consecutive sentences without the finding of additional facts, the *Apprendi* rule would require a jury to find the facts supporting consecutive sentencing. The Court rejected the argument, citing the purpose of the *Apprendi* rule and considering the nature and historical development of consecutive sentencing.

The “animating principle” of the *Apprendi* rule is preservation of the jury's historic role as a bulwark between the State and the accused in a criminal trial. The *Apprendi* line of cases established that the jury, not the judge, must determine any fact that the law makes essential to the defendant's punishment. State legislatures may not circumvent the jury's role by reclassifying facts that function as elements of a criminal offense into mere sentencing considerations. But all of the prior *Apprendi* line of cases dealt with sentencing for a discrete offense. The determination of how multiple sentences are to be served is a different matter.

Historically, consecutive/concurrent sentencing considerations rested exclusively with trial judges. Judge determination of consecutive/concurrent sentencing was, in fact, the practice both in England immediately prior to American independence and in the early American states. Thus, the finding of facts necessary for consecutive sentencing would not have been understood by the framers of the Sixth Amendment as being within the jury's domain. The Sixth Amendment jury right does not attach to every contemporary state-law entitlement to predicate factual findings.

The Court further noted that preventing and dealing with crime was much more the business of states than of the federal government. Specification for service of multiple sentences has long been considered the prerogative of state legislatures. The Court refused to burden the nation's trial courts with mandated procedures absent a genuine affront to the *Apprendi* principle, which was not present here.

Dissent: The *Apprendi* principle leaves no room for a formalistic distinction between facts bearing on the number of years a defendant will serve for a single conviction and facts bearing on how many years a defendant will serve in total for a number of convictions. The decision to impose consecutive sentencing clearly increases the defendant's maximum punishment; thus, having a judge, rather than the jury, find facts supporting consecutive sentencing runs afoul of a defendant's Sixth Amendment jury-trial right.

IV. Post-Trial Issues

A. Appeals

1. Certified Question of Law

State v. Day, 263 S.W.3d 891 (Tenn. 2008) (9-22-08) (Sumner County) [4-1, Clark; D-Koch]-- See complete factual summary in I(D)(1). The State argued in the Supreme Court that the question of whether there was reasonable suspicion of a crime at the time of the stop was, in fact, not dispositive of the case because the trial court had upheld the stop on different grounds--as reasonable under the community-caretaking function of law enforcement. Rather than reviewing the issue as one addressing the dispositive nature of this certified question, the Court instead chose to penalize the State for not including the community-caretaker function within the scope of the certified question.

The Court referred to the requirements for reserving a certified question on appeal and noted that Rule 37(b)(2)(A)(ii), Tenn.R.Crim.P., specifically requires that the question certified be clearly identified so as to mold the scope and limits of the legal issue reserved. The Court recognized that the burden is on the criminal defendant to certify a question properly but urged the State to ensure that all the requirements of Rule 37 are met also because, as here, if the question certified is too narrow, the limited scope could work to the State's detriment. The Court alluded to the possibility of a different outcome here had the question been broad enough to include consideration of the community-caretaker function.

2. Interlocutory Appeals v. Appeals of Right

State v. Meeks, 262 S.W.3d 710 (Tenn. 2008) (9-2-08) (Coffee County) [5-0, Koch]--See complete factual summary in I(D)(3). When the trial court granted the defendants' suppression motion, the State was granted an interlocutory appeal by permission by the trial court. After consulting with our office, the prosecutor went back to the trial court and asked for an order dismissing the charges against the defendants since the State could no longer go forward with the prosecution. The trial court entered dismissal orders, and the State pursued an appeal as of right.

Unlike many other jurisdictions, Tennessee has no statute or rule dealing specifically with suppression orders. The Supreme Court finally set out a definitive ruling as to when the State should seek interlocutory review, as opposed to when the State should seek an appeal as of right. Tenn. R. App. P. 3(c) grants the State an appeal as of right from an order "the substantive effect of which results in dismissing an indictment, information, or complaint." Past appellate decisions had allowed Rule 3 appeals so long as there was something in the record to show that the prosecution could not proceed in light of the suppression ruling. The Court held that those decisions were inaccurate because they overlooked the requirement that the order "result" in the dismissal of the prosecution. The Court's bright-line rule then is: the State can pursue a Rule 3 appeal as of right only when there is an order dismissing the indictment, presentment, information, or complaint.

In all other suppression circumstances, the State may still pursue either an interlocutory appeal by permission under Tenn. R. App. P. 9 or an extraordinary appeal pursuant to Tenn. R. App. P. 10, but such appeals are discretionary and disfavored.

3. Notice of Appeal

State v. Byington, 284 S.W.3d 220 (Tenn. 2009) (5-5-09) (Sullivan County) [5-0, Lee]--Byington had been granted a delayed appeal. He filed a delayed motion for new trial, which was heard and denied by the trial court. Byington then filed his notice of appeal. The Court of Criminal Appeals dismissed the appeal because there was no written order denying the motion for new trial. In the absence of such an order, the Court of Criminal Appeals held that it had no appellate jurisdiction over the case. The Supreme Court disagreed, vacated the order of the intermediate appellate court, and remanded the case for consideration of Byington's issues.

Basis of Appellate Jurisdiction: Tenn. R. App. 4(c) specifies that the "order" denying a motion for new trial in a criminal case triggers the running of the 30 days in which a defendant must file his notice of appeal. In the original appellate record before the Court of Criminal Appeals, the transcript reflected that the new-trial motion had been denied, but the record contained no order on the motion. In this situation, the Supreme Court held that the Court of Criminal Appeals should have required that the record be supplemented. The Court had previously extolled the dual virtues of supplementation: (1) avoiding technicality; and (2) expediting just resolution of the case on its merits.

In granting Byington's appeal, the Supreme Court ordered that the record be supplemented with an order denying the new-trial motion; if such an order did not exist, the trial

judge was to prepare an order. Instead, the record was supplemented with the minute entry showing that the motion for a new trial had been denied.

Minute Entries as Orders: The Court of Criminal Appeals had been split as to whether a minute entry qualified as an order. The Supreme Court noted that minute entries serve a vital role in the court system; in fact, they are the most reliable evidence of what went on in a trial court proceeding. Accordingly, a minute entry is sufficient under Tenn. R. App. P. 4 to constitute a written order and to provide appellate jurisdiction.

The State argued that this minute entry was insufficient because it was not signed by the trial court. The Supreme Court rejected this argument as well. Since Tenn. Code Ann. § 16-1-106 requires a trial court to sign each day's minutes, the Court will presume that the trial court complied with its duty absent evidence in the record to the contrary. Here, although the one page showing denial of the new-trial motion was unsigned, the Court had no reason to believe that the complete minutes were not signed.

Conclusion: Having held that a minute entry showing that a motion for new trial has been denied suffices to establish appellate jurisdiction, the Court then strongly encouraged trial courts to make a practice of entering separate written orders. Though not required, the Court found that this would be the far superior practice.

B. Post-Conviction Petitions

Dellinger v. State, 279 S.W.3d 282 (Tenn. 2009) (1-22-09; petitions for rehearing denied, 2-23-09) (Blount County) [5-0, Holder]--Tight circumstantial evidence showed at trial that Dellinger and his co-defendant Sutton murdered their friend, Tommy Griffin, late on a Friday night; his body was not discovered until the next Monday afternoon. Dellinger's defense at trial included a challenge to the State's theory as to time of death. The defense presented the testimony of a physician, though not a pathologist, who testified that the victim did not die until the Sunday before his body was discovered on Monday. The jury rejected the defense theory. Dellinger was convicted of first degree murder and sentenced to death. Both the conviction and sentence were affirmed on direct appeal.

In his post-conviction petition, Dellinger particularly pressed two claims: (1) that he was actually innocent of the murder; and (2) ineffective assistance of counsel at trial. In support of his actual-innocence claim, Dellinger called two experts: a board-certified entomologist, who based his opinion as to time of death on the apparent lack of evidence of insects and insect eggs on the body; and a forensic pathologist. Both experts placed the victim's time of death as Saturday afternoon or later, consistent with the defense expert at trial and directly contrary to the State's theory as to time of death. The State called Dr. William Bass in rebuttal.

The post-conviction court denied relief. The Court of Criminal Appeals affirmed, and the Tennessee Supreme Court granted permission to appeal primarily to address a question of first impression--is a claim of actual innocence cognizable in a post-conviction petition?

Actual Innocence: The Court first noted that the United States Supreme Court has not decided

whether “actual innocence” raises a federal constitutional claim. The Court then declined to address the issue of whether a claim of actual innocence establishes a violation of the Tennessee Constitution. Instead, the Court held that the post-conviction statute specifically allows for such claims.

The Court pointed to Tenn. Code Ann. § 40-30-102, which provides an exemption from the statute of limitations for claims based on new scientific evidence establishing actual innocence, and to Tenn. Code Ann. § 40-30-117(a)(2), which allows a motion to reopen post-conviction proceedings based on new scientific evidence establishing actual innocence. The Court found that these provisions would allow an untimely petition to raise an actual-innocence claim, or would allow a petitioner who has already completed an initial round of post-conviction proceedings to reopen a petition with a claim of actual innocence. Since actual-innocence claims could be brought in these two contexts, the Court saw no rational basis for disallowing actual-innocence claims in initial petitions.

The flaw in the Court’s reasoning is that the two statutory provisions it relied on do not, in fact, specifically provide for freestanding actual-innocence claims. Those sections merely provide a gateway for a petitioner who would otherwise be barred from filing a petition to litigate his cognizable post-conviction claims. The State pointed out, in a petition to rehear, that, in order to allow a freestanding claim of actual innocence, the Court must first find that the conviction of an innocent person violates the state or federal constitutions. The Court denied the petition, so its ruling stands.

Having established that Tennessee’s statute allows freestanding claims of actual innocence, the Court then held that Dellinger failed to meet his burden of proving his claim. Even if Dellinger’s proffered expert testimony constituted new scientific evidence (the Court assumed without deciding), Dellinger fell short of the mark. The post-conviction court heard the battle of the experts and chose to accredit the State’s expert; appellate courts do not reassess credibility determinations. Also, other proof from trial lent further credence to the State’s, rather than to the defense’s theory of time of death.

Burden of Proof on Ineffective Assistance Claims: Dellinger also claimed that Tennessee’s post-conviction requirement that a petitioner prove his factual allegations by clear and convincing evidence somehow ran afoul of the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court rejected the claim, holding that proper application of Tenn. Code Ann. § 40-30-110(f) is entirely consistent with *Strickland*. If a petitioner proves the underlying facts of his ineffectiveness claim by clear and convincing evidence, then the court analyzes the claim under the *Strickland* standard.

Dellinger’s post-conviction court had included in its findings of fact a statement that the burden was on Dellinger to prove both prongs of the *Strickland* test by clear and convincing evidence. While perhaps that language was imprecise, the Court found no reversible error. But, to avoid any misunderstanding in future post-conviction litigation, the Court amended Tenn. S.Ct. R. 28 § 8(D)(1) to read: “Petitioner shall be required to present petitioner’s case and to establish the factual grounds alleged by clear and convincing evidence.”

C. State Habeas Corpus

Carter v. Bell, 279 S.W.3d 560 (Tenn. 2009) (2-27-09) (Davidson County) [4-1; Koch; D-Wade]-Carter entered a fully-negotiated plea in Maury County in which he agreed to a sentence outside of his offender range but still within the range for Class C felonies. Within one year of the judgment, he filed a petition for writ of habeas corpus in the county of incarceration (Davidson). Carter's only claim was that his sentence was illegal. The habeas court summarily dismissed the petition; since Carter had agreed to the sentence outside the range, the judgment was not void.

On appeal Carter argued, for the first time, that the habeas court should have transferred his habeas case to the Maury County Circuit Court to be treated as a post-conviction petition so that he could argue that his guilty plea was not knowingly and voluntarily entered. The Court of Criminal Appeals rejected that claim, as did the Tennessee Supreme Court.

Civil Transfer Statute: In 2000, the legislature enacted Tenn. Code Ann. § 16-1-116--applicable to "original civil actions"--which allows a court that lacks jurisdiction over a civil pleading to transfer the case to a court possessing such jurisdiction if it is in the "interest of justice" to transfer the case. Once the case is transferred under the statute, the pleading is treated as if it had been initially filed in the correct court on the date of the original filing.

Because Carter was past the time to file a post-conviction petition by the time his habeas appeal was complete, he strenuously argued that the habeas court should have invoked this statute and transferred the case to Maury County for consideration as a post-conviction petition. The transfer statute was inapplicable to the habeas petition because transfer is only available if the court of the original filing lacks jurisdiction. Here, the Davidson County court had jurisdiction over the habeas petition.

The Court then viewed another option. Assuming that the Davidson County court could have treated Carter's filing as a post-conviction petition, since Davidson County was not the convicting court, it was without jurisdiction, so the transfer statute could potentially apply. But, the Court found the statute not to apply, concluding that post-conviction petitions are not "original civil actions" within the meaning of the transfer statute. Post-conviction proceedings are best described as proceedings arising out of a criminal case.

Finally, the Court determined that it need not fashion its own remedy under Tenn. R. App. P. 36(a). Even after the summary dismissal of his habeas petition, Carter still had three months in which to file a post-conviction petition in the convicting court; he failed to do so. Since Carter was not without fault in failing to avoid this situation, the Court refused to create a remedy for him.

Dissent [Wade]: Considering both the broad, general civil-transfer statute and the Court's traditional encouragement of resolving colorable claims on the merits rather than on procedural technicalities, Justice Wade would have reversed the Court of Criminal Appeals and remanded the case with instructions to transfer to the convicting court for post-conviction proceedings.

V. Capital Opinions

A. Sixth Circuit Opinions

Owens v. Guida, 549 F.3d 399 (6th Cir. 2008) (12-9-08; reh'g denied, 2-25-09) [Boggs-Siler; D-Merritt], cert denied 10-5-09 (*Owens v. Steele*)--Owens is serving a death sentence for paying Sidney Porterfield \$17,000 to murder her husband. The Sixth Circuit affirmed the district court's dismissal of her habeas petition on three grounds: (1) ineffective assistance of counsel in the penalty phase for failing to investigate her background adequately and failing to overcome the State's hearsay objection to one of her penalty-phase witnesses; (2) *Brady* claim--State failed to turn over letters between victim and his paramour; and (3) trial court error in refusing to allow proof, in mitigation, that Owens had wanted to enter a guilty plea and accept a life sentence. Judge Merritt would have granted habeas relief as to all three claims.

Note: The State can move to set an execution date for Owens following either the denial of a petition to rehear or the expiration of time in which to file a rehearing petition.

West v. Bell, 550 F.3d 542 (6th Cir. 2008) (12-18-08; reh'g denied, 5-20-09) [Boggs, Norris; C/D-Moore]--West and his seventeen-year-old companion raped and murdered a classmate of the younger defendant and also stabbed her mother to death. West's convictions and death sentences had been upheld on direct appeal, and state post-conviction relief had been denied. The Sixth Circuit affirmed the district court's denial of federal habeas relief on the following claims: (1) ineffective assistance of counsel at penalty phase; (2) exclusion of two pieces of evidence--testimony of an acquaintance who knew both the younger co-defendant and the victim; and a taped conversation between the younger co-defendant and a cellmate; and (3) several claims of prosecutorial misconduct in closing argument.

Zagorski v. Bell, No. 06-5532, 2009 WL 996307 (6th Cir. 2009) (4-15-09) [Cook-Cole-Griffin]--The Sixth Circuit affirmed the district court's denial of federal habeas relief finding that Zagorski had procedurally defaulted his *Brady* claims and his attack on the trial court's instruction on malice. As to Zagorski's remaining two claims--(1) that the trial court erred in admitting his statement; and (2) that he received ineffective assistance of counsel at the penalty phase when trial counsel, pursuant to Zagorski's request, offered no mitigating evidence--the court found that the Tennessee Supreme Court's resolution of these issues had been neither contrary to nor an unreasonable application of clearly established federal law.

Irick v. Bell, 565 F.3d 315 (6th Cir. 2009) (5-12-09; reh'g and reh'g en banc denied, 7-27-09) [Batchelder-Siler; C/D-Gilman]--Irick is on death row for raping and murdering the 7-year-old victim whom he was babysitting at the time. The Sixth Circuit affirmed the district court's dismissal of Irick's habeas petition on two claims: (1) *Brady* claim involving a statement made by the victim's mother as to his possible intoxication at the time of the offense; and (2) prosecutorial misconduct during rebuttal closing argument at the penalty phase. Judge Gilman concurred with rejection of the *Brady* claim but would have granted habeas relief as to the prosecutorial misconduct claim.

Note: Irick's cert. petition is due this month.

Harbison v. Little, 571 F.3d 531 (6th Cir. 2009) (7-2-09) [Siler-Cook; D-Clay]--The district court found that Tennessee's three-drug lethal-injection protocol violated the Eighth Amendment because the State knowingly disregarded the protocol's substantial risk of inflicting unnecessary pain. After the district court's order, the Supreme Court issued its opinion in *Baze v. Rees*, 128 S.Ct. 1520 (2008), which upheld Kentucky's lethal-injection protocol. The plurality opinion in *Baze* further held that, for future challenges, any protocol that was substantially similar to Kentucky's would not violate the Eighth Amendment.

Here, the Sixth Circuit concluded that Tennessee's protocol was substantially similar to Kentucky's, vacated the district court's decision, and remanded to the district court for vacation of the injunction barring the State from executing Harbison. Judge Clay dissented and would have remanded the case to the district court to conduct a hearing for determining whether Tennessee's protocol was substantially similar to Kentucky's.

Note: The Sixth Circuit's mandate has been stayed pending resolution of Harbison's cert petition.

B. Direct Appeals

State v. Banks, 271 S.W.3d 90 (Tenn. 2008) (11-7-08) (Shelby County) [5-0, Koch], cert. denied ___U.S.___, 129 S.Ct. 1677 (2009) (3-30-09)--Banks had been befriended by two men formerly from Iraq who had settled in Memphis. One of the men, Hussain Atilebawi, had been very generous to Banks. Mr. Atilebawi had hired Banks to perform odd jobs and had sold him used cars on very favorable terms. Mr. Atilebawi, among other vocations, sold used cars from his home. Banks decided that Mr. Atilebawi had wronged him both in an incident involving a former girlfriend and financially. Banks arranged for another man to help him take revenge on Mr. Atilebawi.

On the night Banks chose to exact his revenge, Kadhem Al-Maily happened to be visiting Mr. Atilebawi. Banks entered the home upon being invited in and was surprised to see both men there. He asked to use the phone (to call his compatriot), which he took outside to make the call. When Mr. Atilebawi came to check on him, Banks shot him four times. Banks' compatriot then arrived on the scene. They re-entered the home, ordered Mr. Al-Maily to the back bedroom and told him to lie face down in the floor as they ransacked the house. They stole several items, loaded them up into one of the two cars that they also stole. Banks then went back into the house and shot Mr. Al-Maily execution-style in the back of the head. Though Mr. Atilebawi survived his wounds; Mr. Al-Maily did not. Banks was convicted of the murder of the second victim; the attempted murder of the first victim; and of especially aggravated robbery. The Supreme Court affirmed all convictions and sentences in this direct appeal.

Among the numerous guilt-phase issues, the Court upheld the admission of Mr. Atilebawi's statement to police as an excited utterance. The Court found no confrontation violation because Mr. Atilebawi testified at trial. As to the penalty phase, the Court reversed the finding of the intermediate appellate court that there had been insufficient evidence of the aggravator that the murder was committed, in part, to avoid arrest or prosecution. Here, viewing the evidence in the light most favorable to the State, there was proof beyond a reasonable doubt

that Banks killed the second victim in order to eliminate him as a witness. Banks had every reason to believe that the first victim was dead or dying, and once he shot the second victim point-blank in the head, he remained in the area, even driving one of the stolen vehicles. Clearly, Banks thought that he had eliminated all witnesses to his crimes.

State v. Kiser, 284 S.W.3d 227 (Tenn. 2009) (5-13-09) (Hamilton County) [5-0, Clark]--Kiser was in the process of trying to set fire to a local fruit stand when Deputy Sheriff Kenneth Bond, Jr., came to investigate. Kiser hid behind his truck and shot the officer multiple times. Kiser was sentenced to death on the basis of a single aggravating factor, Tenn. Code Ann. § 39-13-204(i)(9)--that the murder was committed against a law enforcement officer engaged in performance of official duties, and the defendant knew or reasonably should have known that fact. Kiser chose not to present any mitigating evidence in the penalty phase of trial. The Supreme Court affirmed Kiser's conviction and death sentence.

The primary issue before the Court was Kiser's claim that the trial court erred in failing to order a *sua sponte* competency evaluation for him in light of his desire to waive mitigation. The Supreme Court rejected Kiser's claim. When defense counsel informed the court that Kiser desired to waive mitigating evidence, the court engaged in a colloquy with Kiser to be sure that he understood his rights and the impact of his waiver. The trial court also had counsel instruct Kiser as to what mitigating proof they would have offered; Kiser remained firm in his desire to waive mitigation. While the defense had proffered two expert reports under seal prior to trial for potential use in the penalty phase, counsel never requested a competency evaluation for Kiser, and, in fact, affirmatively represented that Kiser was competent. Under these circumstances, the trial court had no reason *sua sponte* to order a competency evaluation.

C. Post-Conviction Appeals

Andre Bland v. State, 2009 WL 910197 (Tenn. Crim. App. 2009) (4-3-09; Rule 11 denied, 8-17-09) (Shelby County) [Williams-Ogle-McLin]--The Court of Criminal Appeals affirmed the trial court's denial of Bland's post-conviction petition in which he had claimed that counsel was ineffective at the guilt and penalty phases as well as on appeal. Interesting note: the trial court initially appointed private counsel to represent Bland; the post-conviction defender [PCD] appealed, and the Court of Criminal Appeals ordered that the trial court appoint the PCD. Ultimately, the trial court removed the PCD because they failed to appear on scheduled court dates. The post-conviction proceedings and appeal were then handled by private counsel.

Perry Cribbs v. State, 2009 WL 1905454 (Tenn. Crim. App. 2009) (7-1-09) (Shelby County) [Ogle-Thomas; D-Woodall]--The Court of Criminal Appeals affirmed the denial of post-conviction relief as to guilt-phase issues but reversed as to the penalty phase and remanded for a new sentencing hearing. The Court found that counsel was deficient in not investigating petitioner's mental-health issues more thoroughly and in not presenting any mitigation proof dealing with his mental issues. Judge Woodall dissented, concluding that petitioner failed to demonstrate prejudice.

Note: The State filed a Rule 11 application on August 31, 2009, attacking the finding of both deficient performance and prejudice.