

CRIMINAL LAW AND PROCEDURE

I. Introduction

The eight major sources of Tennessee criminal law and procedure are the Tennessee Constitution, Tennessee Code Annotated, Supreme Court Rules, Court of Criminal Appeals Rules, Rules of Evidence, Rules of Appellate Procedure, Rules of Criminal Procedure, and case law.

II. Tennessee Constitution

The Tennessee Constitution is, of course, the supreme source of legal authority for Tennessee's entire criminal justice system. Some state constitutions are interpreted entirely in lockstep with the federal constitution's analogous provisions. However, a state supreme court may interpret its own constitution's provisions as providing greater rights to its citizens than those granted by the U.S. Constitution. The Tennessee Supreme Court has historically interpreted the Tennessee Constitution as providing greater rights than the U.S. Constitution, but the distinctions between the state and federal constitutions have dwindled in recent years. Whether the same or different from federal law, the Tennessee Constitution includes provisions affecting indictment, the right to a jury trial, search and seizure, due process and double jeopardy, the rights to confrontation and against self-incrimination, ex post facto laws, and bail. The state constitution also sets forth certain victims' rights.

A. Indictment

1. Article I, section 14 of the Tennessee Constitution guarantees that every person be charged by presentment, indictment, or impeachment. Impeachment is the extremely rare circumstance in which the legislature—rather than the grand jury—brings criminal charges against a government official. The criminal defendant's right to be charged by a grand jury through either indictment or presentment is available for all offenses that are punishable by imprisonment or carry a fine of \$50 or more. A presentment may be returned by the grand jury itself after a hearing, whereas an indictment may issue from the grand jury after initiation by the state prosecutor and a preliminary hearing to determine probable cause. An indictment must contain in its caption or body the name of the state, county, and court, and must conclude with the words "against the peace and dignity of the State."

2. The grand jury is comprised of 23 persons who meet in secret. Although the defendant has the right to a grand jury proceeding before he is prosecuted in circuit court, the defendant cannot be present at the grand jury hearing, and he does not even have to be notified that he is the target of a grand jury investigation.

If the grand jury returns an indictment, the case may proceed in circuit court. For cases in which the defendant does not have a right to be charged by indictment or presentment, the case can only proceed in general sessions court after a criminal warrant or summons has been sworn out against the defendant.

B. Right to a Jury Trial: Article I, section 6 grants a defendant the right of trial by jury, and in Tennessee, a 12-person jury is the default rule. This is different than the rule in federal court, which allows a jury of 6. For both felony and misdemeanor convictions in Tennessee, the jury's verdict must be unanimous. Although there is a general right to a jury from the county where the crime was committed, this right may be waived if undue excitement would prevent a fair trial. In such cases, the judge may summon distant jurors to the county where the crime was committed, or the defendant may seek a change in venue.

C. Search and Seizure

1. The Tennessee provision paralleling the Fourth Amendment is Article I, section 7, which prohibits unreasonable searches and seizures and requires that search warrants be particularly described and supported by evidence. This is similar to the U.S. Constitution in that information contained in the warrant must be sufficient to establish that there is probable cause to believe that the individual in question has committed a crime or that items related to criminal activity will be found at a particular place.

2. Tennessee Code Annotated § 40-6-101 *et seq.* and Tennessee Rule of Criminal Procedure 41 contain additional warrant requirements.

3. The state interpretation of Article I, section 7 diverges in some ways from the federal interpretation of the Fourth Amendment. The following subsections briefly touch on those differences and also on those areas where Tennessee law has recently changed to match federal law, in whole or in part.

D. Warrant Requirements: Credibility of Informants

1. Until recently, the U.S. Supreme Court and Tennessee Supreme Court disagreed on how to evaluate the reliability of a warrant or affidavit that contains information provided by a confidential (criminal) informant or an anonymous tipster. The traditional two-step analysis from *Aguilar-Spinelli* required a magistrate to review

- a) the informant's basis of knowledge, and
- b) the informant's veracity or credibility.

2. The U.S. Supreme Court abandoned the *Aguilar-Spinelli* rule in 1983, adopting a more flexible standard in *Gates*. The “totality of the circumstances” analysis adopted in *Gates* simply requires the magistrate to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

3. In 1989, the Tennessee Supreme Court rejected the *Gates* standard and opted to maintain the *Aguilar-Spinelli* test based on its interpretation of the state constitution. However, in 2017, the Tennessee Supreme Court overruled its 1989 decision and decided that Tennessee’s Article I, section 7 should be interpreted “in a manner that is entirely consistent” with the federal Fourth Amendment. Based on this interpretation of the federal and state constitutions, the court adopted the *Gates* totality of the circumstances test for evaluating warrants and affidavits in Tennessee.

E. Community Caretaking Exception to the Warrant Requirement

1. The Tennessee Supreme Court has recently overruled another one of its own cases so as to make Tennessee law entirely consistent with federal law. The community caretaking doctrine, which has existed in federal law since 1973, is a concept that describes police officers’ interactions with citizens to conduct public safety functions. The doctrine has taken various forms in different states, and in 2013, Tennessee opted to define the community caretaking doctrine as “a concept separate and distinct from the investigation of possible criminal activity.” The effect of this decision was that police officers could not rely on their community caretaking function as an exception to the constitutional requirement that all searches and seizures be conducted pursuant to valid warrants.

2. In 2016, however, the Tennessee Supreme Court overruled its 2013 decision and harmonized Tennessee law with federal jurisprudence interpreting the community caretaking doctrine as an exception to the warrant requirement. To establish the community caretaking exception, the State must now show that:

- a) the officer possessed specific and articulable facts, which, viewed objectively and in the totality of the circumstances, reasonably warranted a conclusion that a community caretaking action was needed; and
- b) the officer’s behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need.

3. If these two prongs of the community caretaking exception are met, then an officer who searches or seizes a person without a warrant will not run afoul of the state or federal constitution.

F. What Constitutes a Seizure in Tennessee

1. The Tennessee Supreme Court held in 2017 that “[a] seizure of the person occurs, for purposes of the Fourth Amendment and article I, section 7, when, ‘taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” This totality-of-the-circumstances test is an objective one, requiring the courts to analyze the situation from the viewpoint of a reasonable person while ignoring the subjective viewpoints of the police officers and persons involved.

2. Where Tennessee and federal law differ in this regard is the understanding of when a person has been seized without being physically restrained. The U.S. Supreme Court has held that “where no physical restraint is involved, an officer’s show of authority, such as yelling, “Stop,” does **not** constitute a seizure if the suspect fails to yield to the show of authority.” In Tennessee, however, there is a broader view: a person is seized as soon as an officer makes a show of authority toward that person, even if a physical restraint is not involved. For example, a person in a vehicle is seized when an officer activates his patrol car’s blue lights and the circumstances indicate that a reasonable person would not have felt free to ignore the lights and drive away. The circumstances for determining whether a seizure has occurred include “the time, place and purpose of the [police–citizen] encounter; the words used by the officer; the officer’s tone of voice and general demeanor; the officer’s statements to others who were present during the encounter; the threatening presence of several officers; the display of a weapon by an officer; and the physical touching of the person of the citizen.”

G. Good-faith Exceptions to the Exclusionary Rule

1. Another area where the U.S. and Tennessee Supreme Courts differ is in their treatment of the exclusionary rule. The exclusionary rule was created to deter police misconduct by excluding illegally seized evidence from use at trial. In the past, the Tennessee Supreme Court had almost universally applied the exclusionary rule for both constitutionally deficient and procedurally-defective warrants, making exceptions only if the independent source or attenuation principle applied. However, the court has recently adopted two aspects of the federal good faith exception, declining to apply the exclusionary rule for evidence obtained:

- a) by good-faith execution of constitutionally adequate warrants that were procedurally or statutorily deficient as a result of an inadvertent, clerical, or technical error; or
- b) in objectively reasonable good-faith reliance on “binding appellate precedent” that “specifically authorizes a particular police practice,” when that precedent is later overturned.

2. Recently, the Tennessee Supreme Court maintained the exclusionary rule and refused to allow the admission of evidence that had been obtained by police pursuant to a warrant that suffered from a jurisdictional defect: the magistrate did not have the geographical authority to issue a warrant in the county where the search occurred. The Court also recently struck down—on separation of powers grounds—a legislative Exclusionary Rule Reform Act that would have blanketly adopted all federal good faith exceptions. The Court has not yet considered a case that squarely presents the federal good faith exception in *Leon*, which would create an exception to the exclusionary rule for **constitutionally** defective warrants that were executed in good faith by police officers.

3. To date, therefore, the exceptions to the exclusionary rule that have been adopted by the Tennessee Supreme Court are limited to procedural or statutory defects (as opposed to constitutional or jurisdictional defects) in an affidavit or warrant, changes in binding appellate precedent, and inadvertent, technical, or clerical errors that occur in the execution of an affidavit or warrant.

H. Due Process, Self-Incrimination, and Confrontation Clauses

1. Article I, section 9 states the equivalent of the federal Sixth Amendment, plus the Fifth Amendment right against self-incrimination: “[I]n all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.” The Tennessee Supreme Court has held that Article I, section 9 provides a right to counsel “during police-initiated custodial interrogation,” and that a suspect’s invocation of this right must be analyzed under the same standards as federal law and the Fifth Amendment. However, the Tennessee Supreme Court has also held that Article I, section 9 may apply more broadly than the Fifth Amendment in some circumstances.

2. One such circumstance is the right against self-incrimination. Under federal law, a confession that is obtained without administering *Miranda* warnings is

inadmissible, but a subsequent confession that does include *Miranda* warnings will cure the defect and allow the second confession to be admitted at trial. In 1992, the Tennessee Supreme Court disagreed with this U.S. Supreme Court precedent and held that—as a matter of Tennessee constitutional law—the “extraction of an illegal, unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession, even if preceded by proper *Miranda* warnings, is tainted by the initial illegality.” This presumption can be overcome by the State only if it establishes that the tainted confession is “so attenuated as to justify admission of the subsequent confession.” In determining whether the initial confession is sufficiently attenuated, the reviewing court must consider all the circumstances to see if the actions of the police officers prevented the suspect “from subsequently:

- a) making a free and informed choice to waive the State constitutional right not to provide evidence against one’s self, and
- b) voluntarily confessing his involvement in the crime.” The Tennessee Supreme Court has reaffirmed this distinction between state and federal law as recently as 2013.

3. Article I, section 9 also discusses the defendant’s right “to meet the witnesses face to face.”

a) The Tennessee Supreme Court has held that despite the different terminology between the state and federal constitutions, Confrontation Clause issues should be addressed in the exact same manner in Tennessee as they are under federal law:

- (1) whether the evidence sought to be admitted is testimonial or non-testimonial,
- (2) whether the proposed witness is available or unavailable, and
- (3) whether the party opposing the admission of the evidence has had an opportunity to cross-examine the witness.

b) Under this right of confrontation, ex parte videotaped testimony is inadmissible. However, Tennessee has several statutes allowing for the admission of testimonial video-recorded statements (usually for children), and the Tennessee Supreme Court has held that this practice does not violate the Confrontation Clause if the witness is made available for cross-examination at trial.

c) Also, limitations on witness examination contained in the state’s rape shield law do not violate the right of confrontation.

I. Double Jeopardy

1. Article I, section 10 of the Tennessee Constitution states that no person shall for the same offense be twice put in jeopardy of life or limb. In 2012, the Tennessee Supreme Court stated: “[W]e have not found, nor have we been provided with, any textual reason or historical basis for interpreting the Double Jeopardy Clause of the Tennessee Constitution differently from the Double Jeopardy Clause of the United States Constitution.” For this reason, the court overruled its own case from 1996 that had set out a state-specific, four-factor test for determining whether multiple convictions constitute the same offenses for purposes of double jeopardy. The 2012 case thus abandoned the distinction between state and federal law in this area, adopted the federal *Blockburger* same-elements test, and brought Tennessee in line with U.S. Supreme Court precedent.

2. Under *Blockburger*, multiple convictions or multiple punishments are allowed if they have been expressly intended by the legislature. When the legislative intent is unclear, the first step of the *Blockburger* test is to determine whether the convictions arise from the same act or transaction. If the convictions do not arise from the same act or transaction, then the inquiry ends, and no double jeopardy violation would occur from multiple convictions. If the convictions do arise from the same act or transaction, then the second step of the *Blockburger* test is to analyze the statutory elements of each offense. If the offenses have the same elements, or if one offense is a lesser-included offense of the other, then the court must conclude that multiple convictions would violate double jeopardy. If, however, each offense includes an element that the other offense does not include, then no double jeopardy violation would occur from multiple convictions.

J. Ex Post Facto Laws

1. Article I, section 11 explains that punishment is limited to the laws established prior to the offense; this is the ex post facto provision that applies to criminal defendants in Tennessee.

2. In 2016, the Tennessee Supreme Court overturned state precedent and aligned Tennessee with the four federal categories of prohibited ex post facto laws:

- a) Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action;
- b) Every law that aggravates a crime, or makes it greater than it was, when committed;
- c) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and

d) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3. The broader, state-specific fifth category—that every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage—has now been eliminated.

K. Bail

1. Under Article I, sections 15 and 16, defendants in Tennessee have a constitutional right to reasonable bail except for capital offenses.

2. Article I, section 16 provides that neither excessive bail nor excessive fines shall be imposed, nor shall cruel and unusual punishment be inflicted. This is a mirror of the Eighth Amendment to the U.S. Constitution.

3. Tennessee also has statutory guidelines regarding bail, which is intended both to ensure the appearance of a person in court and to protect the public from a person charged with a violent or dangerous offense.

L. Victims' Rights

1. Article I, section 35 provides certain rights for victims of crimes. Crime victims have the right:

- a) to confer with the prosecution;
- b) to be present at all proceedings where the defendant has the right to be present;
- c) to be heard, when relevant, at all critical stages of the criminal justice process;
- d) to be informed of all proceedings, and of the release, transfer, or escape of the accused or convicted person; and
- e) to receive restitution from the offender.

2. There is also a statutory "Victims' Bill of Rights" in the Tennessee Code Annotated. Tenn. Code Ann. § 40-38-101.

Comment [LP1]: Citation

III. Tennessee Code Annotated

A. Tennessee's statutory compilation, the Tennessee Code Annotated ("TCA"), provides instruction on criminal procedure and substantive criminal law.

1. All criminal offenses are set forth in Tenn. Code Ann. Title 39.

2. Tennessee’s criminal procedure statutes are found in Tenn. Code Ann. Title 40 and are supplemented by the Tennessee Rules of Criminal Procedure.

3. Resources¹:

- a) The *Tennessee Criminal Justice Handbook*², which is published by the Tennessee Administrative Office of the Courts (“AOC”) to provide assistance to attorneys who practice criminal law, includes most criminal offenses.
- b) Mark Ward’s *Tennessee Criminal Trial Practice* handbook published by West is another good resource.
- c) The Tennessee Pattern Jury Instructions for criminal cases, which can be found online, are a good starting point for determining what the prosecution will have to prove in order for a defendant to be found guilty.
- d) *Tennessee Jurisprudence* provides an introduction to criminal law topics but may not always be up to date.

4. Note that the creation of the TCA abolished all common law crimes and defenses; however, earlier cases analyzing the common law may be helpful in analyzing the applicable statute that derived from the common law.

B. Statutory Criminal Offenses

1. Chapters 11 through 17 of Title 39 include the substantive criminal law provisions in Tennessee:

- a) Chapter 11 deals with general issues of criminal law such as statutory construction, burdens of proof, mental culpability, and criminal responsibility, including accomplice liability.
- b) Chapter 12 covers organized crime and inchoate offenses such as conspiracy, attempt, and solicitation.
- c) Chapter 13 defines “Offenses Against Person,” including assault, homicide, kidnapping, robbery, and some sex offenses.
- d) Chapter 14 covers “Offenses Against Property,” including theft, forgery, and other illicit means of acquiring goods or money—and also animal cruelty, burglary, and arson.
- e) Chapters 15 and 16 cover “Offenses Against the Family” and “Offenses Against Administration of Government,” respectively.
- f) Chapter 17 sets forth the “Offenses Against Public Health, Safety and Welfare,” which include crimes relating to drugs, weapons, obscenity, and the sexual exploitation of children.

¹[This list is not exhaustive and does not serve as an endorsement for any commercially available product.](#)

²The handbook can be found by clicking this link: [Handbook](#).

2. Vehicular offenses—including reckless driving, DUI, and open container violations—are in Tenn. Code Ann. sections 55-10-101 through -804.
3. Title 37 of the TCA deals with the prosecution and punishment of juvenile offenders.
4. Peculiarities of Tennessee’s criminal homicide statutes deserve brief mention:
 - a) First degree murder can be predicated on a culpable mental state (which requires premeditation and intent but not deliberation), a specified felony (such as arson, rape, robbery, burglary, or kidnapping), or an unlawful throwing, placing or discharging of a destructive device or bomb. As of January 1, 2019, the list of predicate felony murder offenses has been expanded to include more crimes of abuse and neglect.
 - b) Second degree murder punishes knowing killings as well as deaths resulting from drug distribution and deaths resulting from the cumulative effects of repeated abuse.
 - c) Other homicides include voluntary manslaughter, negligent homicide, vehicular homicide, aggravated vehicular homicide, reckless homicide, and the related crime of assisted suicide.
 - d) Finally, a fetus is considered a human for the purpose of criminal homicide statutes although an exception is made for certain medical procedures.

IV. Culpable Mental States

- A. Most Tennessee crimes follow the Model Penal Code’s example and require one of four mental states: intentionally, knowingly, recklessly, or negligently.
- B. Although strict liability crimes also exist under Tennessee law, there is a statutory presumption that a culpable mental state is required for each offense unless the statute creating the offense clearly intends to punish the offense without requiring a mental state. In other words, for an offense to be a strict liability crime, the statute must clearly indicate that it is a strict liability crime.
- C. When a statutory offense is silent as to the culpable mental state, then the mental state of intentionally, knowingly, or recklessly is sufficient to establish culpability.

V. Defenses and Justifications

A. Tennessee law includes statutory defenses and justifications. The general defenses delineated in Tenn. Code Ann. 39-11-501 *et seq.* are:

1. insanity,
2. ignorance of mistake or fact,
3. intoxication,
4. duress, and
5. subjective entrapment.

B. Neither voluntary nor involuntary intoxication is a defense to prosecution, but evidence of voluntary or involuntary intoxication can be used by the defendant to negate the culpable mental state required to establish an offense.

C. Tennessee's justification defenses are set forth in Tenn. Code Ann. § 39-11-602 *et seq.* and include:

1. necessity,
2. public duty,
3. self-defense,
4. defense of others, and
5. defense of property.

D. Tenn. Code Ann. § 39-11-611(b)–(e) is Tennessee's stand-your-ground law.

E. Certain crimes have special defenses.

Comment [LP2]: Citations?

1. For example, defendants charged with assault, aggravated assault, or reckless endangerment may also plead a consent defense.
2. There is a statutory claim-of-right defense against charges of theft of goods or services and joyriding.
3. A defendant may assert the affirmative defense of renunciation against inchoate offenses by showing that they successfully prevented the commission of the attempted, solicited, or conspired offense under circumstances manifesting a complete and voluntary renunciation of the criminal purpose.
4. Some affirmative defenses and the defenses of insanity and alibi must be asserted before trial.
5. For any defense to be submitted to the jury, the defendant must provide enough evidence to fairly raise the defense's existence.

F. Statutes of limitations may also be raised as a defense to prosecution. The statutes of limitations for each type of offense in Tennessee are:

1. First degree murder—no limitations
2. Class A felony—15 years
3. Class B felony—8 years
4. Class C felony—4 years
5. Class D felony—4 years
6. Class E felony—2 years
7. Class A misdemeanor—12 months

VI. Sentencing

Comment [LP3]: Citations

A. Misdemeanors:

1. There are 3 grades of misdemeanor offenses in Tennessee: A, B, and C.
2. The maximum sentence for an A misdemeanor is 11 months and 29 days, a B misdemeanor is 6 months, and a C misdemeanor is 30 days.
3. Because misdemeanor sentences are not subject to sentence ranges or enhancement, the maximum sentence for any single misdemeanor offense is 11/29.
4. But if a person is convicted of more than one misdemeanor offense, the sentences may be ordered to run consecutively.
5. All criminal offenses are considered misdemeanors unless otherwise specified; for sentencing purposes, a misdemeanor defaults to Class A unless the statute provides differently.

B. Felonies:

1. There are 5 grades of felony offenses: A, B, C, D, and E.
2. The full range of punishment for an A felony is 15-60 years, a B felony is 8-30 years, a C felony is 3-15 years, a D felony is 2-12 years, and an E felony is 1-6 years.
3. For sentencing purposes, a felony defaults to Class E unless the statute provides differently.

4. For each class of felony offense, Tennessee's Sentencing Act sets forth various ranges of punishment: Range I, Range II, or Range III, with each range increasing the possible length of a sentence.

5. For example, the full range of punishment for an A felony is 15-60 years, so a Range I Class A felony is punishable between 15 and 25 years; a Range II Class A felony is punishable between 25 and 40 years, and a Range III Class A felony is punishable between 40 and 60 years.

6. Once the class of felony offense has been established, the defendant's sentence range (I, II, or III) must be determined by calculating the number of prior offenses on his criminal record.

a) There are four main types of offenders for sentencing purposes: Standard Offender, Multiple Offender, Persistent Offender, and Career Offender.

(1) A Standard Offender cannot have more than 1 prior felony conviction on his record; these offenders will be sentenced within the applicable Range I.

(2) A Multiple Offender is someone who has 2-4 prior felony convictions; these offenders will be sentenced within the applicable Range II.

(3) A Persistent Offender is someone who has at least 5 prior felony convictions; these offenders will be sentenced within the applicable Range III.

(4) A Career Offender is someone who has at least 6 prior felony convictions; these offenders must be sentenced to the maximum possible sentence in the applicable Range III.

b) Note that a defendant's prior felony convictions may be calculated in alternative manners depending on the type of prior offense; certain felonies count as prior offenses for calculating sentence range only if they are within 2 grades of the current felony offense.

(1) So, for example, a prior B felony robbery would enhance an A felony aggravated rape, but an E felony burglary of a motor vehicle would not; in the prior Class E burglary scenario, the defendant is a Range I offender for purposes of sentencing on the current Class A aggravated rape.

(2) Also, certain prior offenses like second degree murder will enhance the defendant's sentence range automatically, regardless of the number of prior felonies on his criminal record.

(3) Be sure to consult the statutes for each offense and offender classification when calculating sentence range.

c) To determine the exact length of a defendant's sentence within the applicable range (unless the defendant is a Career Offender, which requires that defendant

Comment [LP4]: What scenario?

be sentenced to the maximum length within the applicable Range III), the sentencing court will consider statutory enhancement and mitigating factors.

(1) The court uses the statutory purposes and principles of sentencing for reference and is not obligated to arrive at a specific sentence, but the judge must sentence a defendant within the correct range.

(2) Certain enhancement factors—such as finding the defendant to be a “dangerous offender”—require the court to make specific factual findings on the record before enhancing a sentence on that basis.

(3) If the defendant has been convicted of more than one offense, the court will also consider statutory factors for determining whether the multiple sentences should be served consecutively or concurrently.

(4) Although consecutive/concurrent sentencing typically falls within the court’s discretion, note that some offenses—such as a felony committed while the defendant is on parole for a prior felony, or a felony committed after the defendant has escaped from prison—carry mandatory consecutive sentencing.

7. While sentence lengths are finite, the manner of service of a sentence may vary. Sentences may be served:

- a) entirely on probation,
- b) partly in incarceration and partly on probation (which is called a split-confinement sentence), or
- c) entirely in incarceration.

8. Probation

Comment [LP5]: citations

a) Probation is available for most sentences, although some types of offenses—like murder, aggravated robbery, and aggravated kidnapping—are not eligible for probation.

b) If a sentence is greater than 10 years, it cannot be served on probation, but sentences may be tacked. For example, it is not an illegal sentence if a person receives 8 years on probation for one sentence and 4 years on probation for another sentence, to be served consecutively, for a total sentence of 12 years to be served on probation.

c) Community corrections is a more serious form of probation with additional requirements that may be available for certain types of offenders with certain types of sentences (generally, non-violent offenders with non-violent offenses). These sentences can be of any length and allow the defendant to serve his time while released into the community. Defendants who violate the terms of release while in the Community Corrections program are subject to re-sentencing, which may lead to an increase in their original sentence.

9. Release Eligibility Date. Another point to consider when evaluating a sentence to be served in incarceration is the defendant's release eligibility date ("RED").

- a) Standard Offenders reach their RED after serving 30% of their sentence.
- b) Multiple Offenders reach their RED after serving 35% of their sentence.
- c) Persistent Offenders reach their RED after serving 45% of their sentence.
- d) Career Offenders reach their RED after serving 60% of their sentence.
- e) Once a defendant reaches his RED, he is eligible (although not guaranteed) to receive parole. Some defendants may earn "good time" sentence credits while in prison, which allows them to reach their RED sooner.
- f) Note that some offenses—such as first and second degree murder, especially aggravated and aggravated kidnapping, rape, and aggravated child abuse—do not carry any release eligibility, which means the defendant must serve 100% of the sentence imposed. The only way to serve less than 100% of the sentence on one of these non-RED offenses is to earn sentence credits while in prison, but these credits can only reduce the sentence by a maximum of 15%, so in no circumstances can the defendant serve less than 85% of his sentence before release.

10. Specific Sentences for certain crimes:

Comment [LP6]: citations

- a) For sex offenses, the defendant is required to register on Tennessee's Sex Offender Registry in addition to whatever sentence is imposed. Sex offenses also typically require a period of community supervision following the sentence, and often the defendant must be supervised for the rest of his life. A few, limited offenses, such as statutory rape, provide the opportunity to be removed from the registry after a specified period of time.
- b) The death penalty is available only for a conviction of first degree murder. First degree murder is punishable by a sentence of life, life without parole, or death.
 - (1) A life sentence with the possibility of parole exists because "life" has been calculated to mean 60 years' incarceration with the chance of paroling at some point based on any applicable sentence credits (which means that the defendant who is serving a life sentence may be eligible for parole no sooner than serving 85% of the 60-year sentence).
 - (2) The prosecutor must provide pre-trial notice if the State will be seeking a punishment of death or life without parole.
 - (3) When the State seeks death or life without parole, the jury must decide the case in a bifurcated proceeding: one to determine guilt and one to determine

punishment. Appointed lawyers must have extensive training before taking a first degree murder case with a bifurcated proceeding.

VII. After Conviction

A. Expungement of criminal records in Tennessee is not automatic, but it may be available in some circumstances. The legislature frequently amends the expungement requirements, so attorneys should always refer to Tenn. Code Ann. § 40-32-101 for the list of eligible offenses and offenders before advising a client on the possibility of expungement.

1. A person may be eligible for expungement if they were arrested and released without being charged, their charges were dismissed, a “no true bill” was returned by a grand jury, they were acquitted by a jury, or their case resulted in a *nolle prosequi*.

2. For misdemeanors and some felonies, a “qualified defendant” or “eligible petitioner” may be entitled to expungement after a period of pretrial diversion or judicial diversion.

3. Under limited circumstances, a person may be eligible for an expungement at no cost, but in most instances, the person will be required to pay all requisite fines and fees set by statute and the local court clerk before expungement will be permitted.

4. The AOC’s website provides forms and resources for seeking an expungement.

B. Tennessee’s Post-Conviction Procedure Act (“PCPA”), located in Tenn. Code Ann. § 40-30-101 *et seq.*, provides an avenue for relief from a conviction or sentence that is void or voidable because of the abridgement of any right guaranteed by the Tennessee Constitution or the U.S. Constitution.

1. State post-conviction proceedings must be brought within one year of the final action of the highest state court appealed to or, if no appeal was taken, within one year of the judgment becoming final.

2. The PCPA does, however, provide certain exceptions for tolling the one-year statute of limitations on post-conviction proceedings. The most common claim raised on post-conviction is the ineffective assistance of counsel.

3. The PCPA is supplemented by Tennessee Supreme Court Rule 28: The Tennessee Rules of Post-Conviction Procedure.

C. Statutory habeas corpus relief is available to convicted defendants and is codified at Tenn. Code Ann. 29-21-101 *et seq.* Unlike federal habeas, Tennessee’s statutory

habeas is very narrow and provides relief in extremely limited circumstances, such as when a person is being forced to continue serving an expired sentence or when the judgment of conviction is void on its face.

D. Finally, a convicted defendant may seek post-conviction relief under the extraordinary procedure of a writ of error coram nobis, which is codified at Tenn. Code Ann. § 40-26-105.

1. Coram nobis relief is limited to errors outside the record and matters that were not or could not have been litigated in an earlier proceeding. Essentially this means that coram nobis relief will be granted (i.e., a new trial will be ordered) only if the defendant presents “newly discovered evidence” and a court determines that if this evidence had been available at the time of the original trial it would have resulted in a different outcome.

2. Note that the coram nobis statute may be invoked only by defendants who were convicted after a trial; the Tennessee Supreme Court ruled in 2016 that coram nobis relief is not available to defendants whose original conviction was the result of a guilty plea.

Comment [LP7]: citation

VIII. Procedural, Evidentiary, and Court Rules

A. The Tennessee Rules of Criminal Procedure, Rules of Evidence, and Rules of Appellate Procedure are separate from the TCA but work in conjunction with it. These rules and the local rules of practice in the state’s trial and appellate courts can be found on the AOC’s website.

B. Rules of Criminal Procedure 3, 3.5, 4, 5, and 5.1 address the preliminary proceedings in criminal court, including arrest warrants, initial appearances to set bail, and preliminary hearings to determine probable cause.

C. Rules of Criminal Procedure 6 through 9 address criminal indictments and joinder of offenses and defendants.

1. Under Rule 8, there is both mandatory and permissive joinder of criminal offenses in the same indictment.

2. The joinder of defendants is always permissive; two or more defendants may be charged in the same indictment if:

- a) each defendant is charged with being accountable for each offense;
- b) each defendant is charged with conspiracy; or
- c) there is a common scheme or plan so connected in time, place, and occasion that it would be difficult to separate proof of the offenses.

D. Rule of Criminal Procedure 12 lists the motions that may or must be raised before trial. Motions that must be raised before trial are a motion alleging a defect in the institution of the prosecution; a motion alleging a defect in the indictment, presentment, or information; a motion to suppress evidence; a Rule 16 request for discovery; and a Rule 14 motion to sever or consolidate offenses or defendants.

E. Severance of defendants or offenses is governed by Rule of Criminal Procedure 14. Note that a severance motion **must** be filed before trial or the severance issue will be waived.

F. Part VI of the Rules of Criminal Procedure, which includes Rules 23 through 31, governs proceedings at trial. Rule 29 provides the grounds and process for seeking a judgment of acquittal during and after trial. A motion for judgment of acquittal (for insufficient evidence) can be made orally at the close of the State's proof, can be renewed orally before the case goes to the jury (only if the motion was made orally at the close of the State's proof), and can be made in writing within 30 days of the date the defendant's sentence is ordered by the court.

G. Part VII of the Rules of Criminal Procedure, which includes Rules 32 through 36.1, addresses judgments, sentencing, and motions for new trials.

1. A motion for new trial is governed by Rule 33 and must be filed within 30 days of the date the defendant's sentence is ordered by the court.

2. A motion for new trial may also be combined with a motion for judgment of acquittal (see paragraph F, above).

3. The grounds for a motion for new trial are virtually limitless, but in practice the most common grounds are:

- a) sufficiency and weight of the evidence,
- b) newly discovered evidence,
- c) recanted testimony,
- d) errors in jury instructions, and
- e) evidentiary errors committed at trial.

4. The only two issues that do not have to be raised in a motion for new trial in order to be preserved for appeal are the sufficiency of the evidence and general sentencing errors. All other issues that the defendant may seek to raise on direct appeal, if not included in the motion for new trial, will be deemed waived and subject only to plain error review by the appellate court.

H. Rule 36.1 is important because it provides a prerequisite procedural step to appealing an illegal sentence. An illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute. Before the

defendant or the State can appeal from an illegal sentence, they must file a Rule 36.1 motion asking the trial court to correct the sentence. If the trial court denies the Rule 36.1 motion, then either party is entitled to appeal the sentencing decision under Rule of Appellate Procedure 3. The Court of Criminal Appeals routinely dismisses appeals by defendants who have sought to collaterally attack an illegal sentence on direct appeal without first filing a Rule 36.1 motion in the trial court.

Comment [LP8]: citations

I. Rule of Criminal Procedure 37 sets forth the procedures for advising defendants of their appellate rights, the procedures for pursuing or waiving an appeal, and the duties of counsel on appeal.

1. An attorney who is appointed to represent an indigent defendant in the trial court is required to continue representing that defendant through the appellate process unless the trial or appellate court permits the attorney to withdraw.
2. Rule 37 and the duties of appointed counsel at trial and on appeal are supplemented by Tennessee Supreme Court Rules 13 and 14.
3. Rule of Appellate Procedure 18 also includes specific rules governing appeals filed by indigent defendants.
4. Rules 9 and 10 govern interlocutory appeals that may be granted in the court's discretion.

J. Criminal defendants have a plenary right to appeal to the Court of Criminal Appeals, and these appeals as of right are governed by Rule of Appellate Procedure 3.

1. A notice of appeal must be filed with the appellate court clerk within 30 days after entry of the judgment or order appealed from.
2. Rules of Appellate Procedure 24, 25, and 26 set forth the process for requesting and filing the trial court record after giving notice of the appeal.
3. Rules 27 through 30 provide guidelines for formatting and filing appellate briefs and other documents.
4. E-filing is now available in the appellate courts, and any document that is permitted to be filed through the electronic system must comply with the formatting requirements in Tennessee Supreme Court Rule 46.
 - a) If counsel for an indigent defendant wants to use the e-filing system, counsel must register with the appellate court clerk.
 - b) Notices of appeal that are filed electronically must include the order of appointment so that indigency can be established and the \$550 filing fee can be waived.

K. As for the substance of an appeal, defense counsel may raise any issues identified in the motion for new trial, as well as the legal sufficiency of the evidence and any issues related to sentencing.

1. Typically the burden is on the defendant to prove that:
 - a) something that occurred or did not occur at trial was an error, and
 - b) the error was not harmless to the defendant.

2. The first sentence of Rule of Appellate Procedure 36(b) sets forth the harmless error analysis that appellate courts will use to review most types of errors raised on appeal.
 - a) Under Rule 36(b), “A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.”
 - b) However, some constitutional errors—such as the complete deprivation of the right to counsel—require automatic reversal of the defendant’s conviction, while other constitutional errors—such as the omission of jury instructions on a lesser included offense—put the burden on the State to prove that the error was harmless beyond a reasonable doubt.
 - c) The case of *State v. Rodriguez*, 254 S.W.3d 361 (Tenn. 2008), includes a thorough and helpful discussion of the different types of errors that may be reviewed on appeal.

L. If the defendant receives an adverse ruling from the Court of Criminal Appeals, Rule of Appellate Procedure 11 provides the process for seeking discretionary review of the intermediate appellate court’s decision by filing an application for permission to appeal to the Tennessee Supreme Court.

1. A Rule 11 application must be filed within 60 days of the date that the Court of Criminal Appeals’ decision is filed.

2. The state supreme court is not an error-correction court, and review will be granted only if the case involves one or more of the criteria in Rule 11:
 - a) the need to secure uniformity of decision,
 - b) the need to secure settlement of important questions of law,
 - c) the need to secure settlement of questions of public interest, or
 - d) the need for the exercise of the Supreme Court’s supervisory authority.

3. For more guidance on the appellate process, attorneys should refer to *Appellate Advocacy: A Handbook on Appellate Practice in Tennessee*, which is published by the Nashville Bar Association and is available online.

IX. Tennessee's Judicial Districts and Court Systems

Comment [LP9]: duplicates content in the TN Constitution Outline?

A. There are 31 judicial districts in Tennessee, and most of them include multiple counties served by a unified circuit court system. Only some of the districts have courts that are dedicated entirely to criminal cases; many districts have circuit court judges that will hear both criminal and civil cases and may or may not have a lot of criminal experience when they take the bench.

B. Each county has general sessions courts that handle preliminary hearings on misdemeanors and felonies. If a preliminary examination is held and the proof is sufficient to establish that an offense has been committed and there is probable cause to believe that the defendant committed it, the judge must bind over the defendant to the grand jury. The finding must not be based on inadmissible hearsay, except documentary proof of ownership and written reports of expert witnesses. Rules excluding evidence acquired by unlawful means are applicable in these proceedings.

C. The criminal jurisdiction of a general sessions court is limited to preliminary hearings in felony cases and misdemeanor trials in which a defendant waives the right to a grand jury investigation and a trial by jury in a circuit or criminal court. Absent waiver by the defendant, criminal misdemeanor and felony trials must be heard by a jury in circuit or criminal court. Criminal cases are tried in circuit court unless the case is in a district that has a separate criminal court. Circuit and criminal courts also have jurisdiction over appeals from general sessions courts.

D. Traffic offenses are typically handled by municipal courts, and most juvenile cases (whether criminal or civil) are handled by juvenile courts. A juvenile offender may be transferred from juvenile court to circuit or criminal court for certain offenses like murder, rape, robbery, and burglary. Before the juvenile can be transferred to circuit or criminal court, a transfer hearing must occur. A juvenile must be at least 14 years old before transfer can occur, and transferred juveniles are not eligible for the death penalty.

E. In some jurisdictions, specialty courts like drug court and veterans' court exist for both misdemeanors and felonies. These courts and programs offer special services and have probationary requirements that cater to persons that fall into the category that is being served.

F. More information about Tennessee's trial courts is available on the AOC's website.