

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 5 FALL 2018 ISSUE 2

INVESTED WITH A STRANGE AUTHORITY: A GUIDE TO THE INSANITY DEFENSE AND RELATED ISSUES IN TENNESSEE

By Jason R. Smith¹

“Old scarred marble floors in a cold white corridor. A room where the mad sat at their work. To Suttree they seemed like figures from a dream, something from the past He’d never been among the certified and he was surprised to find them invested with a strange authority, like folk who’d had to do with death some way and had come back, something about

¹ Jason R. Smith is a law clerk to Judge D. Kelly Thomas, Jr., of the Tennessee Court of Criminal Appeals. He has also taught Legal Communications as an adjunct professor at LMU Duncan School of Law. Prior to clerking for Judge Thomas, he was a research attorney at Butler, Vines & Babb, PLLC in Knoxville, TN. He graduated from the University of Tennessee College of Law, summa cum laude and Order of the Coif, in 2009. Mr. Smith would like to thank Symposium Director Keri Rule and Professor William Gill for inviting him to speak on this topic at the March 23, 2018 LMU Law Review Symposium, Justice for All: Ethical Approaches to Mental Health and Criminal Justice. The views and opinions expressed in this article are Mr. Smith’s own and in no way should be construed as reflecting the views or opinions of Judge Thomas or the Tennessee Court of Criminal Appeals.

them of survivors in a realm that all must reckon with soon or late.”²

I. INTRODUCTION

The insanity defense has long been viewed as one of the most controversial areas of substantive criminal law.³ The public perception of the insanity defense is that it “is a commonly used device that allows criminals who deserve to be punished to escape any sort of retribution.”⁴ In truth, the insanity defense “is a device that is rarely used and even more rarely successful” with “most defendants who are able to successfully raise it . . . spending an immense . . . amount of time under state-supervised hospitalization, treatment, and institutionalization.”⁵

The insanity defense plays a major role in Tennessee criminal law despite its infrequent use because “[m]ental disease or defect does not otherwise constitute a defense” outside the statutorily provided definition of insanity.⁶ Therefore, criminal law practitioners in Tennessee must contend with the insanity defense as it is now codified regardless of the controversies surrounding it. Or, as the Tennessee Supreme Court stated in 1827, “[w]hatever differences of opinion there may be as to the construction and operations of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration of intellect which is requisite to free a man from punishment for crime by

² CORMAC MCCARTHY, *SUTTREE* 431 (Vintage International 1992) (1979) (describing the patients at the now closed Lakeshore Mental Health Institute in Knoxville, Tennessee).

³ See James F. Hooper, M.D., *The Insanity Defense: History and Problems* 25 St. Louis U. Pub. L. Rev. 409 (2006).

⁴ Louis Kachulis, Note, *Insane in the Mens Rea: Why Insanity Defense Reform is Long Overdue* 26 S. Cal. Interdisc. L. J. 357, 362 (2017) (noting that the insanity defense “is raised in less than 1 percent of all criminal cases, and is thought to be successful in no more than 30 percent of those cases”).

⁵ *Id.*

⁶ TENN. CODE ANN. § 39-11-501(a) (2018).

the law of the land.”⁷

Consequently, Part I of this article will examine the current state of the insanity defense in Tennessee and the most common issues that arise when it is litigated. Part II of this article will provide a general overview of the present version of the insanity defense, looking at its background, the procedural prerequisites for raising it, and its elements. Part III will examine the burden of proof for the insanity defense. Part IV will discuss the scope of expert testimony with respect to the insanity defense. Part V will examine what happens after the insanity defense has been litigated at trial, looking at the appellate standard of review and the procedure upon a verdict of not guilty by reason of insanity. Part VI will briefly examine some issues related to the insanity defense such as “diminished capacity,” sentencing, and post-conviction claims.

II. THE INSANITY DEFENSE IN TENNESSEE

A. BACKGROUND

Insanity is a legal term of art and not a medical diagnosis.⁸ In Tennessee, the insanity defense is codified at Tennessee Code Annotated section 39-11-501 which states in full:

(a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant’s acts. Mental disease or defect does not otherwise constitute a defense. The

⁷ *Cornwell v. State*, 8 Tenn. (Mart. & Yer.) 147, 156 (1827).

⁸ See 41 AM. JUR. PROOF OF FACTS 2D 615 *Insanity Defense* § 1 (Apr. 2018 Update) (noting that insanity “is a legal and not a medical question”); *Insanity*, BLACK’S LAW DICTIONARY (10th ed. 2014) (noting that insanity “is a legal, not a medical, standard”). The term “insanity” is “used in different criminal law settings” and “frequently encountered in legal situations quite outside the criminal law.” WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 7.1(a) (3d ed.). With the exception of some limited discussion in Part VI, this article will focus on the insanity defense. All other uses of the term “insanity” are beyond the scope of this article.

defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(b) As used in this section, “mental disease or defect” does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.

Subsection (a) is the operative part of the statute. Subsection (b) is designed to deny the insanity defense “to psychopaths, i.e., those repeat offenders without other medically discernible symptoms.”⁹ Subsection (c) addresses the scope of expert witness testimony with respect to the insanity defense.

The original version of section 39-11-501 was modeled on the standard found in the American Law Institute’s Model Penal Code that had previously been adopted by the Tennessee Supreme Court.¹⁰ However, section 39-11-501 was significantly amended in 1995 and has not been amended since.¹¹ The current version of section 39-11-501 was “patterned after and virtually identical to the federal Insanity Defense Reform Act of 1984.”¹² The Insanity Defense Reform Act of 1984, which was designed to “tighten the traditional insanity rule,” was enacted in response “to a large public outcry” following the acquittal by reason of insanity of John Hinckley, Jr. for the attempted assassination of President Ronald Regan.¹³ Likewise, “[t]he 1995 amendment [of section

⁹ TENN. CODE ANN. § 39-11-501 (2018), Sentencing Comm’n cmts.

¹⁰ See TENN. CODE ANN. § 39-11-501 (1989), Sentencing Comm’n cmts.; *Graham v. State*, 547 S.W.2d 531, 543-44 (Tenn. 1977) (adopting the Model Penal Code standard).

¹¹ TENN. CODE ANN. § 39-11-501 (1995); *State v. Holder*, 15 S.W.3d 905, 910 (Tenn. Crim. App. 1999) (acknowledging the amendment and comparing the previous and current versions of section 39-11-501).

¹² *Holder*, 15 S.W.3d at 911.

¹³ *Kachulis*, *supra* note 4, at 360.

39-11-501] was an obvious expression of legislative intent to restrict the defense of insanity.”¹⁴ As such, any caselaw involving a pre-July 1, 1995 offense should be considered highly suspect even though such caselaw still appears in treatises and annotations to section 39-11-501.

B. PROCEDURAL PREREQUISITES

Pursuant to Tennessee Rule of Criminal Procedure 12.2, a defendant who intends to assert the insanity defense at trial must “notify the district attorney general in writing and file a copy of the notice with the [trial court] clerk.”¹⁵ The State is not required to make “a triggering request.”¹⁶ Instead, “[t]he burden is upon the defendant to give notice of any defense based upon [a] mental condition.”¹⁷ The notice must “be given within the time provided for the filing of pretrial motions or at such later time as the court may direct.”¹⁸ Rule 12.2 gives the trial court the discretion to “allow the defendant to file the notice late, grant additional trial preparation time, or make other appropriate orders” when “cause [has been] shown.”¹⁹ Failure to comply with the written notice requirement bars the defendant from raising the insanity defense at trial.²⁰

Rule 12.2 also requires that written notice be provided to the district attorney general and a copy filed with the trial court clerk if the defendant “intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt.”²¹ This is because “lack of notice about the defendant’s mental state may seriously disadvantage the

¹⁴ Holder, 15 S.W.3d at 910-11.

¹⁵ Tenn. R. Crim. P. 12.2(a)(1) (2018).

¹⁶ Tenn. R. Crim. P. 12.2 (2018), Advisory Comm’n cmt.

¹⁷ *Id.*

¹⁸ Tenn. R. Crim. P. 12.2(a)(2). It should be noted that Rule 12.2 requires that this notice be provided sooner than Tennessee Code Annotated section 39-11-204(c)(1) which states that written notice of an affirmative defense shall be provided “no later than ten . . . days before trial.”

¹⁹ *Id.*

²⁰ Tenn. R. Crim. P. 12.2(a)(3) (2018).

²¹ Tenn. R. Crim. P. 12.2(b)(1) (2018).

district attorney general in preparing possible rebuttal proof.”²² This notice must also be given “within the time provided for the filing of pretrial motions or at such later time as the court may direct.”²³ The trial court “may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant’s mental condition” if the defendant fails to comply with the notice requirement.²⁴

In addition to the notice requirements, the trial court “may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order” upon motion of the district attorney general.²⁵ Statements of the defendant made “in the course of any examination conducted under” Rule 12.2(c), as well as testimony about those statements, are not “admissible against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony.”²⁶ The trial court may exclude the testimony of the defendant’s expert witness if the defendant “does not submit to an examination ordered under Rule 12.2(c).”²⁷ Given the harshness of its penalties, Rule 12.2 should be closely examined and followed if there is a possibility that the defendant’s mental condition will be an issue at trial.

C. ELEMENTS OF THE INSANITY DEFENSE

The elements of the insanity defense found in the current version of section 39-11-501 are as follows: “at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant’s acts.”²⁸ Put another way, the elements of the

²² Tenn. R. Crim. P. 12.2 (2018), Advisory Comm’n cmt.

²³ Tenn. R. Crim. P. 12.2(b)(2) (2018).

²⁴ Tenn. R. Crim. P. 12.2(d) (2018).

²⁵ Tenn. R. Crim. P. 12.2(c)(1) (2018).

²⁶ Tenn. R. Crim. P. 12.2(c)(2) (2018).

²⁷ Tenn. R. Crim. P. 12.2(d) (2018).

²⁸ TENN. CODE ANN. § 39-11-501(a) (2018). This is in sharp contrast with the original version of section 39-11-501 which “allowed the defense, ‘if, at the time of such conduct, as a result of mental disease

insanity defense are that the defendant, at the time of the offense, (1) suffered from a severe mental disease or defect, and as a result (2) was unable to appreciate either (a) the nature or (b) the wrongfulness of their acts.

The first element is that, at the time of the offense, the defendant suffered from a severe mental disease or defect. The 1995 amendment to section 39-11-501 added the requirement that the mental disease or defect be “severe.”²⁹ What constitutes a severe mental disease or defect is not defined by the statute. However, examples from caselaw include schizophrenia,³⁰ delusional disorder,³¹ bipolar disorder with psychotic episodes,³² schizoaffective disorder,³³ brief psychotic disorder,³⁴ moderate mental retardation,³⁵ and major depression.³⁶ In most cases, this element will not be disputed at trial.³⁷

Instead, the outcome of an insanity defense case will usually turn on whether the defendant has established the second element of the defense, that the defendant was unable to appreciate either the nature or the wrongfulness of their acts. Whether the defendant “understood the nature of his actions or

or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person’s conduct or to conform that conduct to the requirements of law.” Holder, 15 S.W.3d at 910 (quoting TENN. CODE ANN. § 39-11-501 (1991)).

²⁹ TENN. CODE ANN. § 39-11-501(a) (1995); Holder, 15 S.W.3d at 910 (recognizing the change in the statutory language).

³⁰ State v. Flake, 114 S.W.3d 487 (Tenn. 2003); Holder, 15 S.W.3d at 905.

³¹ State v. Hank Wise, No. M2012-02520-CCA-R3-CD, 2014 WL 992102 (Tenn. Crim. App. Mar. 13, 2014).

³² State v. Kennedy, 152 S.W.3d 16 (Tenn. Crim. App. 2004).

³³ State v. Colvett, 481 S.W.3d 172 (Tenn. Crim. App. 2014); State v. John Stephen Steele, No. E2006-00039-CCA-R3-CD, 2007 WL 2681784 (Tenn. Crim. App. Sept. 13, 2007).

³⁴ State v. Michael Halliburton, No. W2015-02157-CCA-R3-CD, 2016 WL 7102747 (Tenn. Crim. App. Dec. 6, 2016), *perm. app. denied* (Tenn. Apr. 13, 2017).

³⁵ State v. Ann Marie Thornton Kelly, No. M2001-01054-CCA-R3-CD, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002).

³⁶ State v. Daryl Keith Holton, No. M2000-00766-CCA-R3-DD, 2002 WL 1574995 (Tenn. Crim. App. July 17, 2002), *aff’d*, State v. Holton, 126 S.W.3d 845 (Tenn. 2004).

³⁷ See, e.g., Colvett, 481 S.W.3d at 197; Kennedy, 152 S.W.3d at 22; Holder, 15 S.W.3d at 912.

... the wrongfulness of his actions” are “two separate prongs,” and “a defendant need only prove one prong to be successful in his defense.”³⁸ The inability of the defendant to appreciate the nature of their acts is illustrated by the “oft-cited example” of a defendant who strangles their spouse but believes that they are “squeezing lemons.”³⁹ As for the term “wrongfulness,” it is not defined in the statute.

The Tennessee Pattern Jury Instructions characterize “wrongfulness” as the defendant’s inability “to understand what [they were] doing was wrong.”⁴⁰ The Tennessee Court of Criminal Appeals has held that this instruction is “a complete and correct charge of the current law concerning an insanity defense.”⁴¹ The Tennessee Court of Criminal Appeals has also interpreted the term “wrongfulness” as including both legal and moral wrongfulness.⁴² Having examined the background and the elements of the current version of the insanity defense, the next sections will address several common issues that arise with it.

III. THE BURDEN OF PROOF

The most significant change in the 1995 amendment to section 39-11-501 was to alter the burden of proof for the insanity defense.⁴³ Prior to the 1995 amendment, section 39-11-501 “provided that insanity was simply a ‘defense.’”⁴⁴ Also under the original version of section 39-11-501, “if the evidence adduced raised a reasonable doubt as to the defendant’s sanity, the burden of proof then fell upon the [S]tate to establish sanity

³⁸ State v. Richard Anthony Arriola, No. M2007-00428-CCA-R3-CD, 2009 WL 2733746, at *7 (Tenn. Crim. App. Aug. 26, 2009).

³⁹ LAFAVE, *supra* note 8, at § 7.1(b); *see also* T.P.I.-Crim. 40.16 (2018) (characterizing this prong as a defendant’s inability to understand what they were doing).

⁴⁰ T.P.I.-Crim. 40.16 (2018).

⁴¹ Wise, 2014 WL 992102, at *16 (internal quotation marks omitted) (quoting State v. Brian Val Kelley, No. M2001-00461-CCA-R3-CD, 2002 WL 927610, at *25-26 (Tenn. Crim. App. May 7, 2002)).

⁴² State v. Robert E. Odle, No. M2014-00349-CCA-R3-CD, 2014 WL 6607013, at *4 (Tenn. Crim. App. Nov. 21, 2014).

⁴³ Holder, 15 S.W.3d at 910.

⁴⁴ *Id.*

beyond a reasonable doubt.”⁴⁵ To that end, the State could present “any ‘evidence which [was] consistent with sanity and inconsistent with insanity.’”⁴⁶

In contrast, the current version of section 39-11-501 provides that insanity “is an affirmative defense to prosecution” and that “[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence.”⁴⁷ Section 39-11-501 now “places the burden of establishing [the] affirmative defense [of insanity] squarely on the defendant.”⁴⁸ While the State “is required to prove all essential elements of a crime beyond a reasonable doubt, sanity is not an element of a crime.”⁴⁹ As such, the Tennessee Supreme Court has “explicitly reject[ed] the notion that the State must rebut defense proof of insanity with substantial evidence.”⁵⁰

“In determining whether a defendant is insane, [the trier of fact] is entitled to consider all the evidence offered, including the facts surrounding the crime, the testimony of lay witnesses, and expert testimony.”⁵¹ The trier of fact “may not arbitrarily ignore evidence,” but it is “not bound to accept the testimony of experts [when] the evidence is contested.”⁵² In light of this, the State will likely attempt to counter the defendant’s proof of insanity “by contrary expert testimony, lay witnesses, or vigorous cross-examination designed to undermine the credibility of the defense experts” even though that the State is not required to rebut the defendant’s proof with substantial evidence.⁵³

The current version of section 39-11-501 makes the defendant’s burden of proving insanity exceptionally heavy. This difficulty is illustrated in the caselaw on the insanity

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ TENN. CODE ANN. § 39-11-501(a) (2018). Evidence is clear and convincing when “there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992).

⁴⁸ *State v. Flake*, 88 S.W.3d 540, 554 (Tenn. 2002).

⁴⁹ *Holder*, 15 S.W.3d at 911.

⁵⁰ *Flake*, 88 S.W.3d at 554.

⁵¹ *Id.* at 556.

⁵² *Id.*

⁵³ *Id.* at 554.

defense since the 1995 amendment took effect. For example, the Tennessee Court of Criminal Appeals affirmed a trial court's rejection of the insanity defense in *State v. Holder* despite two expert witnesses having testified that the defendant was unable to appreciate the wrongfulness of his conduct.⁵⁴ Instead, the trial court "relied primarily upon the actions and words of the defendant before, at[,] and after the commission of the offense."⁵⁵

Likewise, the Tennessee Supreme Court affirmed a jury's rejection of the insanity defense in *State v. Flake* in spite of the fact that four expert witnesses testified that the defendant was unable to appreciate the wrongfulness of his conduct and a fifth expert witness testified that the defendant felt morally justified in his conduct.⁵⁶ Instead, the court noted that "the facts surrounding the offense suggest[ed] [that] the defendant realized his conduct was wrongful."⁵⁷ The court relied on the fact that the defendant shot only the victim, that he fled after the shooting, that he "appeared to realize he had committed a crime" at the time of his arrest, and that he exhibited "no bizarre behavior" at the time of his arrest.⁵⁸

By contrast, the sole example of a Tennessee appellate court applying the current version of section 39-11-501 of a defendant having satisfied the burden of proof is *State v. Kennedy*.⁵⁹ In *Kennedy*, the jury convicted the defendant of

⁵⁴ 15 S.W.3d at 909, 911-12.

⁵⁵ *Id.* at 912.

⁵⁶ 88 S.W.3d at 544-48, 556-57.

⁵⁷ *Id.* at 556.

⁵⁸ *Id.*

⁵⁹ 152 S.W.3d at 16. In *State v. Flake*, the Tennessee Court of Criminal Appeals originally held that the defendant had established insanity by clear and convincing evidence at trial and modified the jury's guilty verdict to not guilty by reason of insanity, but that opinion was reversed by the Tennessee Supreme Court and the jury's verdict was reinstated. *Flake*, 88 S.W.3d at 542; *see also State v. Christopher Flake*, No. W2001-00568-CCA-R3-CD, 2002 WL 1298773 (Tenn. Crim. App. June 12, 2002), *rev'd*, 88 S.W.3d 540 (Tenn. 2002). The Tennessee Court of Criminal Appeals made similar holdings in two other cases prior to the Tennessee Supreme Court's decision in *Flake*. *State v. Luis Anthony Ramon*, No. W2001-00389-CCA-R3-CD, 2002 WL 1841608 (Tenn. Crim. App. Aug. 9, 2002), *perm. app. granted* (Tenn. Dec. 23,

vehicular homicide and three other offenses, but the trial court granted the defendant's motion for judgment of acquittal on the grounds that she had established insanity by clear and convincing evidence.⁶⁰ The State appealed and the Tennessee Court of Criminal Appeals affirmed the trial court's decision.⁶¹ In making its decision, the trial court relied on the fact that three experts testified that the defendant suffered from bipolar disorder with psychotic episodes and that she could not appreciate the nature or wrongfulness of her actions, that there was nothing in the defendant's conduct leading up to the offense to counter that opinion, that the defendant's statement after the offense "clearly evidence[d] continuing delusion," and that there was no evidence that the defendant was malingering.⁶²

It is highly unlikely that an appellate court would overturn a trier of fact's rejection of the insanity defense in an instance when the defense and the State have presented conflicting expert testimony. As illustrated by the cases discussed above, it is still very unlikely that an appellate court would reverse a guilty verdict even when the experts agree in favor of insanity so long as there is evidence in the record countering the Defendant's claim of insanity. The *Kennedy* opinion provides the only caselaw for defense counsel to favorably compare to a defendant's case while attempting to distinguish the plethora of unfavorable decisions issued since

2002); *State v. Claude W. Cheeks*, No. E2001-00198-CCA-R3-CD, 2002 WL 1609743 (Tenn. Crim. App. July 22, 2002), *perm. app. granted* (Tenn. Dec. 23, 2002). Then Judge Joseph M. Tipton filed dissenting opinions in both cases arguing that the defendants' convictions should have been affirmed on appeal. *Cheeks*, 2002 WL 1609743, at *9-11; *Ramon*, 2002 WL 1841608, at *7-8. The Tennessee Supreme Court granted permission to appeal in both cases and remanded the cases to the Tennessee Court of Criminal Appeals for reconsideration in light of the supreme court's *Flake* opinion; the defendants' convictions were affirmed upon remand. *State v. Luis Anthony Ramon*, No. W2002-03084-CCA-RM-CD, slip op. at 1 (Tenn. Crim. App. Oct. 29, 2003); *State v. Claude W. Cheeks*, No. E2002-03083-CCA-RM-CD, 2003 WL 22362766, at *1 (Tenn. Crim. App. Oct. 17, 2003).

⁶⁰ 152 S.W.3d at 17.

⁶¹ *Id.*

⁶² *Id.* at 22.

the 1995 amendment of section 39-11-501.

IV. THE SCOPE OF EXPERT TESTIMONY

Another issue that commonly arises with the insanity defense is the scope of expert testimony. Subsection (c) of section 39-11-501 was added in the 1995 amendment and provides as follows: “No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.”⁶³ Subsection (c) is unusual as it is an aberration from Tennessee Rule of Evidence 704 which provides that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” In fact, “[i]n Tennessee the only ultimate issue about which an expert explicitly cannot offer an opinion is whether the defendant was or was not sane at the time of commission of the criminal offense.”⁶⁴

The unusual nature of subsection (c) has caused considerable confusion about the scope of expert testimony as it relates to the insanity defense. This is best illustrated by *State v. Hank Wise*.⁶⁵ In that case, the defense’s expert witness testified that the defendant “was unable to appreciate the wrongfulness of his conduct at the time of the offense due to his [suffering from] delusional disorder.”⁶⁶ The State’s expert witness “declined to give an opinion as to whether the [d]efendant could appreciate the wrongfulness of his conduct because he felt that was an issue to be decided by the trier of fact.”⁶⁷ Neither expert was correct in their interpretation of what was permissible under subsection (c). The defense’s expert “exceeded the scope of permissible testimony” while the State’s

⁶³ TENN. CODE ANN. § 39-11-501(c) (1995).

⁶⁴ *State v. Shuck*, 953 S.W.2d 662, 663 n.3 (Tenn. 1997); *see also* Tenn. R. Evid. 704 (2018), 1996 Advisory Comm’n cmt. (noting that “[o]ne ultimate issue is outside the scope of expert testimony” and citing section 39-11-501(c)).

⁶⁵ 2014 WL 992102, at *15-16.

⁶⁶ *Id.* at *15.

⁶⁷ *Id.*

expert “unnecessarily” narrowed the scope of his testimony.⁶⁸

Subsection (c) is construed “narrowly because of the interests at stake” and its unusual nature.⁶⁹ An expert witness “may testify that the defendant suffered from a severe mental disease or defect.”⁷⁰ An expert witness “may also state whether the defendant could have appreciated the nature or wrongfulness of his conduct at the time of the offense.”⁷¹ However, the expert cannot state “that the severe mental disease or defect operated to prevent the defendant from appreciating the nature or wrongfulness of his conduct.”⁷² Put another way, an expert witness’s testimony cannot connect the two elements of the insanity defense. To illustrate, an expert witness may testify about everything except for what has been stricken through in the following statement: The Defendant, at the time of the offense, (1) suffered from a severe mental disease or defect, (2) was unable to appreciate either (a) the nature or (b) the wrongfulness of their acts.

V. POST-TRIAL PROCEDURES

In most cases the trier of fact will reject the insanity defense and convict the defendant at the conclusion of trial. On appeal, the standard of review is very deferential to the trier of fact’s verdict. A “verdict rejecting the insanity defense [will be reversed] only if, considering the evidence in the light most favorable to the prosecution, no reasonable trier of fact could have failed to find that the defendant’s insanity at the time of the offense was established by clear and convincing evidence.”⁷³ This standard is similar “to the familiar sufficiency standard which appellate courts apply” when reviewing the

⁶⁸ *Id.* at *16.

⁶⁹ *State v. Perry*, 13 S.W.3d 724, 742 (Tenn. Crim. App. 1999).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Flake*, 88 S.W.3d at 554. This is also the standard of review that applies on the rare occasion when the State appeals a trial court’s granting of a motion for judgment of acquittal on the grounds that the defendant established insanity by clear and convincing evidence. *Kennedy*, 152 S.W.3d at 22 n.1.

sufficiency of the convicting evidence.⁷⁴ “Where the proof is contested, appellate courts should rarely reverse a jury’s rejection of the insanity defense under this deferential standard of review.”⁷⁵ This deferential standard of review is likely part of the reason why the State often seeks to put on rebuttal proof even though it has no burden to do so.

On the other hand, should the defendant be found not guilty by reason of insanity, the trial court will order the defendant “to be diagnosed and evaluated” by “the community mental health agency or licensed private practitioner designated . . . to serve the court.”⁷⁶ Based upon that evaluation, the trial court can either: (1) release the defendant; (2) release the defendant subject to mandatory outpatient treatment; or (3) have the defendant involuntarily committed.⁷⁷ However, if the charge was first degree murder “or a Class A felony offense under title 39, chapter 13,” then the trial court must either commit the defendant or release the defendant subject to mandatory outpatient treatment.⁷⁸

If the defendant is involuntarily committed, due process entitles the defendant to release “when he has recovered his sanity or is no longer dangerous.”⁷⁹ Tennessee Code Annotated section 33-6-602 provides for release to mandatory outpatient treatment if the defendant “is likely to participate in outpatient treatment with a legal obligation to do so” but “not likely to participate . . . unless legally obligated to do so.”⁸⁰ Tennessee Code Annotated section 33-7-706 provides for release to

⁷⁴ Flake, 88 S.W.3d at 554. However, a challenge to the trier of fact’s rejection of the insanity defense on appeal is not technically a challenge to the sufficiency of the evidence as the two appellate standards of review are “similar but not identical.” Odle, 2014 WL 6607013, at *4 n.2.

⁷⁵ Flake, 88 S.W.3d at 556.

⁷⁶ TENN. CODE ANN. § 33-7-303(a)(1) (2018).

⁷⁷ TENN. CODE ANN. § 33-7-303(b) (2018).

⁷⁸ TENN. CODE ANN. § 33-7-303(g) (2018). Title 39, chapter 13 contains “offenses against person.”

⁷⁹ Jones v. United States, 463 U.S. 354, 368 (1983).

⁸⁰ TENN. CODE ANN. § 33-6-602(1) (2018). See State v. Kenneth Ryan Mallady, No. M2010-02142-CCA-R3-CD, 2012 WL 76901 (Tenn. Crim. App. Jan. 10, 2012), for a more detailed discussion of release to mandatory outpatient treatment under section 33-6-602.

voluntary outpatient treatment if the defendant “is likely to participate in outpatient treatment without being legally obligated to do so.”⁸¹ It should be noted that Tennessee Code Annotated section 33-7-303 was amended in 2017 to provide that if the charged offense was first degree murder or a Class A felony from title 39, chapter 13, then a committed defendant can only be released to mandatory outpatient treatment.⁸²

VI. RELATED ISSUES

A. “DIMINISHED CAPACITY”

“Diminished capacity” is often mistakenly referred to as a defense and raised in conjunction with the insanity defense.⁸³ However, “diminished capacity” is “merely a rule of evidence.”⁸⁴ “While the law presumes sanity it does not presume mens rea.”⁸⁵ To that end, “evidence which tends to prove or disprove the required mental state is relevant and generally admissible under Tennessee law.”⁸⁶ The term “diminished capacity” refers to a defendant’s presentation of expert testimony “aimed at negating the requisite culpable mental state.”⁸⁷ Expert testimony admissible under the rule of “diminished capacity” is not limited to just psychiatric testimony, but includes any other form of expert testimony

⁸¹ TENN. CODE ANN. § 33-6-706(2)(C) (2018). See *State v. David Clor*, No. E2015-01069-CCA-R3-CD, 2016 WL 4054948 (Tenn. Crim. App. July 27, 2016), for a more detailed discussion of release to voluntary outpatient treatment under section 33-6-706.

⁸² TENN. CODE ANN. § 33-7-303(g) (2018). Subsection (g) also provides that the trial court is to review the defendant’s need for outpatient treatment after six months and annually thereafter if mandatory outpatient treatment is deemed to still be necessary.

⁸³ See, e.g., *Holton*, 126 S.W.3d at 858-60; *Holder*, 15 S.W.3d at 913; *Halliburton*, 2016 WL 7102747, at *12-14.

⁸⁴ *State v. Hall*, 958 S.W.2d 679, 689 (Tenn. 1997) (internal quotation marks omitted) (quoting *United States v. Pohlot*, 827 F.2d 889, 897 (3rd Cir. 1987)).

⁸⁵ *Id.* (quoting *State v. Phipps*, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994)).

⁸⁶ *Id.*

⁸⁷ *Id.* at 688.

“regarding a defendant’s capacity to form a requisite mental state.”⁸⁸

To be admissible under the “diminished capacity” rule, expert testimony “must demonstrate that the defendant’s inability to form the requisite culpable mental state was the product of a mental disease or defect, not just a particular emotional state or mental condition.”⁸⁹ When a defendant is attempting to disprove the culpable mental state with this type of expert testimony, section 39-11-501(c)’s prohibition on expert witnesses testifying about the ultimate issue in the case does not apply.⁹⁰ In fact, the opposite is true. The expert witness must testify about the ultimate issue of fact for their testimony to be admissible under the “diminished capacity” rule.

B. SENTENCING

Defendants will also typically argue in conjunction with the insanity defense that their sentence should be mitigated due to their suffering from a mental condition.⁹¹ The trial court can consider that the defendant “was suffering from a mental or physical condition that significantly reduced the defendant’s culpability for the offense” as a mitigating factor in deciding the length of the defendant’s sentence.⁹² However, the enhancement and mitigating factors are merely advisory.⁹³ Furthermore, trial courts are given wide discretion in sentencing matters and “a trial court’s misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 [Sentencing Reform] Act, as amended in 2005.”⁹⁴ Given this deferential standard of appellate review, it behooves any

⁸⁸ State v. Ferrell, 277 S.W.3d 372, 379 (Tenn. 2009).

⁸⁹ Hall, 958 S.W.2d at 690.

⁹⁰ State v. Lesergio Duran Wilson, No. M2014-01487-CCA-R9-CD, 2015 WL 5170970, at *11 (Tenn. Crim. App. Sept. 2, 2015).

⁹¹ See, e.g., Wise, 2014 WL 992102, at *13-14, 18-19; State v. Timothy Wade Davis, No. E2003-02162-CCA-R3-CD, 2004 WL 2378251, at *13-15 (Tenn. Crim. App. Oct. 25, 2004), *aff’d*, State v. Davis, 185 S.W.3d 338 (Tenn. 2006); Kelly, 2002 WL 31730874, at *22.

⁹² TENN. CODE ANN. § 40-35-113(8) (2018).

⁹³ TENN. CODE ANN. § 40-35-210(c) (2018).

⁹⁴ State v. Bise, 380 S.W.3d 682, 706 (Tenn. 2012).

defendant seeking application of this mitigating factor to make a strong showing and argument for it to the trial court during the sentencing hearing.

C. POST-CONVICTION

Failing to present an insanity defense or to investigate the petitioner's mental health history is a common claim of ineffective assistance of trial counsel raised in post-conviction proceedings.⁹⁵ But to successfully raise such a claim on post-conviction, the petitioner needs "to present the testimony of an expert at the evidentiary hearing to explain what, if any, mental health evidence trial counsel should have advanced at trial."⁹⁶ However, "the state is not required to provide expert assistance to indigent non-capital post-conviction petitioners."⁹⁷ This lack of funding for expert assistance will bar most post-conviction petitioners from successfully raising such a claim of ineffective assistance of trial counsel.⁹⁸

VII. CONCLUSION

The rationale behind the insanity defense "is that those

⁹⁵ See, e.g., *George Timmons v. State*, No. E2017-00335-CCA-R3-PC, 2018 WL 1391630 (Tenn. Crim. App. Mar. 20, 2018); *Phillip Alexander McWilliams v. State*, No. E2017-00275-CCA-R3-PC, 2017 WL 5046354 (Tenn. Crim. App. Nov. 2, 2017); *Tyler James Schaeffer v. State*, No. E2016-01614-CCA-R3-PC, 2017 WL 4477345 (Tenn. Crim. App. Oct. 6, 2017).

⁹⁶ *Demario Johnson v. State*, No. W2011-02123-CCA-R3-PC, 2013 WL 772795, at *8 (Tenn. Crim. App. Feb. 27, 2013) (citing *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)).

⁹⁷ *Davis v. State*, 912 S.W.2d 689, 696-97 (Tenn. 1995).

⁹⁸ A closely related issue, but outside the scope of this article, is that due process requires the tolling of the one-year statute of limitations for post-conviction actions when the petitioner's mental incompetence prevents the petitioner from complying with the statute. *Whitehead v. State*, 402 S.W.3d 615, 623-24 (Tenn. 2013). The competency standard is whether the petitioner "possesses 'the present capacity to appreciate [his or her] position and make a rational choice with respect to continuing or abandoning further litigation or . . . is suffering from a mental disease, disorder, or defect which may

who are mentally ill and cannot fully comprehend their actions should not, in justice, be held responsible for those actions.”⁹⁹ Moreover, from a policy standpoint “millions of mentally ill persons [clog] the [American] criminal justice system” as our courts “are not focused on treatment” of the chronically mentally ill.¹⁰⁰ To that end, the insanity defense “allows for rehabilitation of the mentally ill,” “removes those from society who are dangerous,” allows “them to be treated so that they are no longer dangerous,” and “prevents the mentally ill . . . from being forced into a prison system where they will not receive proper treatment.”¹⁰¹

In 2005, an attorney for a post-conviction petitioner asserted that since the 1995 amendment to section 39-11-501 no defendant had been acquitted by reason of insanity “in a contested jury trial.”¹⁰² It appears that this record has not improved in the subsequent 13 years as only one appellate decision since the 1995 amendment has concluded that the defendant established insanity by clear and convincing evidence. Given its infrequent use and the poor chance of success, it begs the question whether section 39-11-501 in its current form fulfills the rationale and public policy underlying the insanity defense. However, Tennessee attorneys will have to contend with the current version of the insanity defense as outlined in this article until the General Assembly sees fit to amend section 39-11-501 in an attempt to make it more responsive to that underlying rationale and public policy.

substantially affect the petitioner’s capacity.” Reid ex rel. Martiniano v. State, 396 S.W.3d 478, 512-13 (Tenn. 2013) (quoting Tenn. Sup. Ct. R. 28, § 11(B)(1)). However, to survive summary dismissal, the petitioner must make a prima facie showing of mental incompetence by submitting with the petition “affidavits, depositions, medical reports, or other credible evidence that contain specific factual allegations showing the petitioner’s incompetence.” *Id.* at 512.

⁹⁹ Kachulis, *supra* note 4, at 358.

¹⁰⁰ Hooper, *supra* note 3, at 413.

¹⁰¹ Kachulis, *supra* note 4, at 358-59.

¹⁰² Kelley v. State, No. M2004-01158-CCA-R3-PC, 2005 WL 2255854, at *12 (Tenn. Crim. App. Sept. 15, 2005).