The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: David Henry Veile

Office Address: 509 New Highway 96 West, Suite 201
(including county) Franklin, Williamson County, Tennessee 37064

Office Phone: 615-550-2800 Facsimile: 615-550-2807

Email Address: [redacted]

Home Address: [redacted]
(including county) Franklin, Williamson County, Tennessee 37064

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney and Member of Schell & Oglesby, LLC

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

2004; BPR No. 023941

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

Tennessee (BPR No. 023941; admitted October 21, 2004; license is currently active)

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

No.

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

Attorney (member) with Schell and Oglesby, LLC – April 2012 through present

Attorney (associate) with Lowery, Lowey & Cherry, PLLC – February 2008 through April 2012

Attorney (associate) with Rochelle, McCulloch & Aulds, PLLC – February 2005 through February 2008

Police Officer and Sergeant, Metropolitan Nashville Police Department – February 1998 through February 2005

American Cellular, Inc. (sales) – April 1996 through February 1998

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

Not applicable.

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

I am in private practice as a member of a firm consisting of six members and three associates based in Franklin, Tennessee. My practice currently consists of the following areas of law:

Criminal defense: 99%

General civil litigation (personal injury, business litigation, probate): 1%

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

I have enjoyed an extremely diverse practice, appearing before no fewer than one hundred (100) judges in at least twenty-eight (28) counties across this state regarding both criminal and civil matters. During my practice, I have represented many hundreds of clients in various general sessions, circuit, criminal, and chancery courts, as well as before the Court of Criminal Appeals, the Court of Appeals, and the Tennessee Supreme Court.

When I was first licensed, I was a sergeant with the Metropolitan Nashville Police Department, where I had served as a patrol officer and subsequently as Law Instructor at the Metropolitan Nashville Police Department Training Academy. As a police officer in a major metropolitan area, I lived and breathed criminal law. As Law Instructor, I provided legal instruction to new recruits and existing officers in the areas of constitutional law, statutory law, criminal procedure, and legal issues involving the use of force.

When I left the police department to enter private practice in 2005, my practice initially consisted primarily of civil litigation. I represented plaintiffs and defendants in a variety of civil matters, including construction litigation, personal injury, breach of contract, condemnation of real property by public authorities, land use/zoning appeals, civil rights lawsuits (on behalf of

plaintiffs and defendants), and probate matters. I have tried civil cases (jury and non-jury) in circuit and chancery courts, as well as numerous hearings and trials in general sessions courts.

I have represented clients on direct appeal (including brief and oral argument) in civil matters before the Court of Appeals and the Tennessee Supreme Court.

I have also represented clients before boards of zoning appeals and in disciplinary hearings/appeals before the Metropolitan Nashville Police Department Disciplinary Board, the Metropolitan Nashville Civil Service Commission, and the City of Lebanon.

As my legal career progressed, my practice shifted to criminal law. In the criminal arena, I initially prosecuted defendants during an internship with the 20th Judicial District Attorney's Office (while serving as a Metropolitan Nashville Police Officer), and later as a special prosecutor in the municipal courts of Mt. Juliet and Lebanon. Over the course of my practice as a criminal defense attorney, I have represented individuals accused of crimes ranging from a speeding ticket to first degree murder. I have argued countless motions regarding search and seizure and the admissibility of evidence and tried criminal cases (jury and non-jury) in circuit/criminal courts, as well as bench trials and countless other hearings in general sessions courts. I have represented numerous clients on direct appeal (including brief and oral argument) before the Court of Criminal Appeals involving conviction, sentencing, and post-conviction relief. I have likewise appeared before the Tennessee Supreme Court in a criminal appeal.

In addition to the areas listed above, my practice has previously included domestic relations law, where I represented clients in matters involving divorce, post-divorce disputes, child custody, paternity matters, grandparent visitation, orders of protection, and contempt proceedings in circuit, chancery, juvenile, and general sessions courts.

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

I represented a funeral home in an appeal from a local board of zoning appeals to chancery court and ultimately to the Court of Appeals, where as a matter of first impression, the appellate court affirmed my client's position that a crematory is a lawful expansion of a funeral home's business, and permitted the funeral home to build a crematory on site. *See BMC Enterprises, Inc., v. City of Mt. Juliet*, 273 S.W.3d 619 (Tenn.Ct.App., 2008) *perm. app. denied* (Tenn. Oct. 27, 2008).

I represented a client before the Tennessee Supreme Court in the appeal of the denial of parole, in which the Tennessee Supreme Court held (in a split decision with two separate dissenting opinions) that the statute providing that a court clerk could not accept a filing from an inmate with outstanding court costs did not deny equal protection or due process. *See Hughes v. Tennessee Board of Probation and Parole,* 514 S.W.3d 707 (Tenn. 2017).

I represented a client before the Tennessee Supreme Court in an appeal involving the failure of an officer to provide a copy of the search warrant to the defendant at the time of the search warrant's execution. The Court affirmed that the Exclusionary Rule Reform Act was unconstitutional and expanded the good faith exception to the exclusion of evidence to include innocent technical violations of Rule 41 of the Tennessee Rules of Criminal Procedure. *See*

State v. Daniel, 552 S.W.3d 832 (Tenn. 2018).

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

I served as special judge for the Municipal Court of Mt. Juliet, Tennessee, on various occasions from 2008 through 2012 when the appointed judge was unavailable.

From 2007 through 2012, I was appointed by the Lebanon City Council as an Administrative Hearings Officer for the City of Lebanon, with the responsibility to hear internal disciplinary matters and serve as an ethics investigator.

In 2019, I was listed by the Alternative Dispute Resolution Commission as a Rule 31 Mediator in both General Civil and Family law cases. Since being listed, I have mediated both civil and family law cases.

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

None.

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

During law school, I was employed full-time as a police officer with the Metropolitan Nashville Police Department. In this capacity, I was ultimately assigned to teach criminal and constitutional law to police recruits in the police academy (consisting of approximately 120 hours of instruction per academy session) and to all existing officers during mandatory annual training. I was certified as a Police Instructor by the Tennessee Peace Officer Standards and Training Commission in the specialized area of Criminal Law. Additionally, I conducted legal research for the members of the police department and assisted with drafting complicated search warrants and in preparing cases from the Police Department for presentation to the grand jury.

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

Governor as a nominee.

On September 21, 2011, I submitted an application to the Tennessee Judicial Nominating Commission for the vacant position of Circuit Court Judge, Division III, for the 21st Judicial District. The Judicial Nomination Commission considered my application on October 20, 2011, and I was honored to have my name submitted to the Governor as a nominee.

On August 24, 2014, I submitted an application to the Governor's Commission for Judicial Appointments for the vacant position of Circuit Court Judge, Division IV, for the 21st Judicial District. The Commission for Judicial Appointments considered my application on September 30, 2014, and I was again honored to have my name submitted to the Governor as a nominee.

EDUCATION

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

College:

University of Memphis – August, 1994 through December, 1995.

- Received the Cecil C. Humphreys Presidential Scholarship
- I left the University of Memphis due to a family emergency when my fiancée was critically injured in an automobile accident, and I relocated to Nashville to assist with her care and extended recovery.

Middle Tennessee State University – August 1996 through August 1998.

- Degree – Bachelor of Arts
- Major – Foreign Language (Spanish); Minor – Political Science
- Graduated cum laude

Law School:

Nashville School of Law – August 2000 through June 2004.

- Degree – Doctor of Jurisprudence
- Ranked third in graduating class
- Inducted into the Honorable Society of Cooper's Inn
- Awarded the Candace Ripp Memorial Scholarship
- Awarded the Joe P. Binkley, Sr., Scholarship
- Awarded the Tulley Award

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 44 Date of Birth: [redacted] 1976

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

44 years. (Tennessee has always been my home.)

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

14 years.

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

Williamson County.

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

Not applicable.

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

No.

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

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of

professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

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

No.

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

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

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

Tennessee Commission on Continuing Legal Education

- Commissioner, appointed by the Tennessee Supreme Court to serve from January 2019 through December 2021
- Secretary, January 2020 through December 2020

Tennessee Criminal Justice Investment Task Force

- Appointed by the Governor's Office to serve on the Violent Crime Task Force, June 2019 to Present

Governor's Criminal Justice Review Subcommittee
- Appointed by the Governor's Office, July 2020 to Present

Integrated Criminal Justice Steering Committee
- Member, 2018 to Present

21st Judicial District Recovery Court
- Vice President, 2019 to Present
- Board of Directors, 2017 to Present

Redemption City Church, Franklin, Tennessee
- Served on Children's Ministry Team
- Served on Finance Team
- Served on Location Team

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

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

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

No.

ACHIEVEMENTS

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

Tennessee Bar Association – Member, 2005 to Present.

Board of Governors
- Board Member representative from Young Lawyers Division, June 2011 to June 2013
- Elected to serve as Middle Tennessee Grand Division Governor, Position 2, from June 2014 to June 2017
- Elected to serve as District 6 Governor, June 2018 to Present
  - Responsible for governing the activities of, administering the business of, and acting for the Tennessee Bar Association in all matters, subject to the direction of the membership and the provisions of the Charter and Bylaws

Executive Committee
- Member, June 2014 to June 2017 and June 2019 to Present
  - Responsible for exercising the powers and duties of the Board of Governors when the Board is not in session

Operations Committee
- Chair, June 2019 to June 2020
  - Responsible for making recommendations to the Board of Governors on important operational details of the association, including election procedures, personnel, and administrative policy, and for overseeing the staff evaluation process

Membership Committee
- Chair, June 2020 to Present
  - Responsible for developing membership programs and for reviewing and making recommendations regarding member benefits

Criminal Justice Section
- Chair, June 2015 to June 2016
- Vice Chair, June 2014 to 2015
- Executive Committee, 2013 to Present
  - Responsible for supervising and directing the affairs and policies of the section, with the purpose of facilitating better working relationships and communications between judges, prosecuting attorneys, private counsel, and public defenders, and to enhance and increase the professional skill of section members

Mentoring Committee
- Co-Chair, June 2014 to June 2015
- Coordinator, Solo In a Box Program, June 2013 through 2014
  - Responsible for the development of a comprehensive, user-friendly guide to assist new lawyers with establishing and improving a law firm

Leadership Law Program – Graduate, Class of 2012

Young Lawyers Division
- President, June 2012 to June 2013
- President-Elect, June 2011 to June 2012
- Vice President, June 2010 to June 2011
- District 8 Representative, June 2006 to June 2010
- Executive Committee, June 2010 to June 2014
- Chair, Long Range Planning Committee, June 2010 to June 2011
- Chair, Wills for Heroes Committee, June 2009 to June 2011
  - Responsible for assisting with the coordination of 23 Wills for Heroes events across the state, during which 365 volunteer attorneys assisted 830 first responders and spouses with estate planning documents

Tennessee Bar Association Young Lawyers Division Fellows
- Inducted as Fellow, June 2014
- Liaison between the TBA YLD Fellows and the Young Lawyers Division, June 2014 to June 2015

Williamson County Bar Association
- President, July 2019 to July 2020
  - Responsible for the coordination of monthly "lunch and learn" CLE seminars
- Vice President, July 2018 to July 2019
- Treasurer, July 2017 to July 2018
- Secretary, July 2016 to July 2017
- Member, April 2012 to Present

American Bar Foundation – Inducted as Fellow, March 2013

American Bar Association
- Member, May 2010 to July 2015
- Graduate, 2013 national ABA TIPS Leadership Academy
- Coordinator, 2013 ABA TIPS class service project
- Vice Chair, Tort Trial Insurance Practice Government Law Committee, August 2013 to July 2015
- Vice Chair, Tort Trial Insurance Practice Law in Public Service Committee, August 2013 to July 2014
- Vice Chair, Tort Trial Insurance Practice Business Law Committee, August 2013 to July 2015
- Vice Chair, Tort Trial Insurance Practice Trial Techniques Committee, August 2013 to 2014

John Marshall American Inn of Court – Barrister, August 2012 to Present

Tennessee Association of Criminal Defense Lawyers
- Member, 2008 to Present
- Board of Directors, August 2015 to August 2018

15th Judicial District Bar Association – Member, February 2005 to April 2012

National Association of Criminal Defense Lawyers – Member, 2019 to Present

National College for DUI Defense – Member, 2015 to Present

Legal Aid Society of Middle Tennessee and the Cumberlands
- 2016 Williamson County Campaign Chair

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

Rated as AV® Preeminent™ in Criminal Law, General Practice, and Business Law by fellow attorneys and judges through Martindale-Hubbell®, which is the highest possible rating for legal

ability and ethical standards

Recognized by Super Lawyers® as follows:

- Mid-South Super Lawyers, 2017, 2018, 2019, and 2020
- Mid-South Rising Stars, 2014, 2015, 2016

Received the 2009-2010 President's Distinguished Service Award from the Tennessee Bar Association Young Lawyers Division, June 4, 2010

Received the President's Special Recognition Award from the Tennessee Bar Association Young Lawyers Division, June 17, 2011

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

None

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

CLE Seminars

Fighting the Blood – Tennessee Association of Criminal Defense Lawyers, December 18, 2019.

- Presented overview of issues related to admissibility of blood alcohol toxicology evidence

Top Ten Things to Know to Avoid PCR – Tennessee Association of Criminal Defense Lawyers, December 14, 2018.

- Presented an overview of post-conviction relief and effective representation of criminal defendants

Oral Argument Preparation in Action Panel – Tennessee Bar Association, April 19, 2018.

- Served as a panelist in a panel discussion regarding preparation for making an appellate oral argument

Branding Your Practice – Tennessee Bar Association, February 8, 2018.

- Presented an overview to solo/small firm attorneys on developing a brand

Ethical Issues in Criminal Defense – Tennessee Bar Association, December 8, 2017.

- Presented an overview of potential ethical issues involved in criminal defense

Best Practices in a Preliminary Hearing – Tennessee Association of Criminal Defense Lawyers, November 17, 2017.

- Presented an overview of best practices in conducting an effective preliminary hearing

Appellate Advocacy Panel – Tennessee Bar Association, September 6, 2017.

- Served as a panelist in a panel discussion regarding practicein front of the Tennessee Supreme Court immediately following my argument before the Tennessee Supreme Court

TBA Solo in a Box Toolkit – Williamson County Bar Association, December 2, 2016.

- Presented an overview of the TBA Solo in a Box Toolkit member benefit

Ethical Issues in Private Criminal Defense – Tennessee Board of Professional Responsibility, November 4, 2016.

- Presented an overview of potential ethical issues involved in private criminal representation

Sentencing in DUI and Vehicular Homicide Cases – Tennessee Association of Criminal Defense Lawyers, October 14, 2016.

- Presented an overview of issues involved in sentencing related to DUI and vehicular homicide convictions

TBA Solo in a Box Toolkit – Tennessee Bar Association, June 29, 2016.

- Presented an overview of the TBA Solo in a Box Toolkit member benefit

WCBA 2016 Legislative Update – Williamson County Bar Association, June 3, 2016.

- Presented an update regarding recent criminal law legislation

TACDL 2016 Legislative Update – Tennessee Association of Criminal Defense Lawyers, May 17, 2016.

- Presented an update regarding recent criminal law legislation

Best Practices from a Defense Attorney Perspective – Tennessee Association of Criminal Defense Lawyers, April 22, 2016.

- Presented an overview of best practices in the courtroom to provide effective representation

Name that Tune/Artist/Legal Area – John Marshall American Inn of Court, February 9, 2016.

- Presented an update regarding recent criminal law cases and legislation

Judges Panel: Learn What to Do and What Not to Do – Tennessee Bar Association, December 11, 2015.

- Served as moderator for panel of general sessions, trial, and appellate judges discussing what to do (and not do) in the courtroom

TACDL 2015 Legislative Update – Tennessee Association of Criminal Defense Lawyers, June 12, 2015.

- Presented an update regarding recent criminal law legislation

Start Your Solo Gig: How to Step Out on Your Own – Tennessee Lawyers' Association for Women, June 18, 2015.

- Appeared on a panel for discussion related to starting a law practice

TBA Solo in a Box Toolkit – Tennessee Bar Association, November 10, 2015.

- Presented an overview of the TBA Solo in a Box Toolkit member benefit

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

On December 6, 2011, I filed a petition as candidate for Circuit Court Judge, Division III, for the 21st Judicial District, while I and two other nominees for appointment to that judgeship were pending before the Governor for possible appointment. I withdrew my petition on December 14, 2011, when another nominee was appointed to that judgeship by the Governor.

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

No.

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

See attached briefs, which are 99% my own personal effort. Note that unreported cases originally attached in the appendices have not been included.

ESSAYS/PERSONAL STATEMENTS

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

I truly enjoy the puzzle of constitutional, statutory, and procedural issues involved in the administration of criminal justice. I enjoy legal research, writing, and the challenge of applying existing law to a specific scenario. My entire adult life has been focused on criminal law, initially as a police officer, sergeant, and law instructor in a major metropolitan area, and subsequently as a criminal defense attorney. I have lived and breathed criminal law for decades. I love considering the facts of a case, identifying the issues, and deducing how the law applies to those facts. I want to use my experience and abilities to ensure that criminal justice is administered in accordance with the law. I look forward to being an advocate not for the prosecution or the defense, but for justice under the law.

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

I firmly believe that all persons should enjoy equal justice under the law, regardless of their station or economic status. During my career, I have had the privilege to serve our communities in numerous capacities, including assisting with fund raisers for the Legal Aid Society, public service projects, live legal clinics, online legal clinics, answering legal questions through the Tennessee Alliance for Legal Services TN Free Legal Answers program, providing *pro bono* representation to indigent clients in civil and criminal matters, serving as a member of the

IOLTA Grant Review Committee, and serving as chair of the Wills for Heroes Committee.

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

The Court of Criminal Appeals hears trial court appeals in felony and misdemeanor cases, as well as post-conviction appeals. The Court is comprised of twelve judges, with four judges from each grand division. The Middle Grand Division is comprised of 41 counties and sits in Nashville. All twelve members of this Court sit in panels of three in Jackson, Nashville, and Knoxville.

Our criminal justice system is based on balance. It is vital that a judge view each issue impartially and without preference to either the prosecution or the defense. With my background in both law enforcement and criminal defense, I have developed the ability to view any particular issue from multiple, often opposite, perspectives. I have experienced first-hand the impact of this Court's applications of the law, both from the comfort of a courtroom and as an officer on the street. I believe this unique perspective would benefit the Court.

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

I have had the privilege of serving on the boards of directors for several non-profit organizations, including Habitat for Humanity of Wilson County and Hearthside, Inc., a religious non-profit assisted living facility.

In 2017, I was elected to serve on the Board of Directors of the 21st Judicial District Recovery Court, and it has been my distinct honor to help manage this organization that addresses addictions (that often motivate criminal behavior) by providing our participants with the resources, support, and accountability they need to change their lives.

Much of my extra-curricular activities have been geared toward improving our legal communities. I have been active in the leadership of the Tennessee Bar Association continuously since 2006. and have dedicated innumerable hours to improving our legal communities.

A judge should lead by example. Should I be appointed judge, I intend to continue to serve my community to the extend permitted by the Code of Judicial Conduct.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I was fortunate to be raised in a home where both parents were public servants who taught me

to improve the lives of those in my community.

My initial plans to attend law school as a traditional student ended abruptly when my fiancée was critically injured in an automobile accident. As a result, I postponed my law school application and joined the Metropolitan Nashville Police Department. My experiences as a patrol officer, law instructor, and sergeant gave me a tremendous respect for the law and its enforcement. I have seen first-hand that the violation of the law can cause immeasurable suffering. I have also seen that there is no criminal prosecution worthy of violating the rights afforded all citizens, and that the government must be held to constitutional standards when it prosecutes any of its citizens.

After several years as an officer, I was able to fulfill my dream of attending law school by attending the Nashville School of Law. In addition to the normal academic rigors of law school, I learned valuable lessons in time management. As if attending classes while working full time was not enough, I worked extra hours to pay for law school, and halfway through my second year, I was blessed with the birth of twin daughters. Despite these wonderful challenges, I persevered and graduated ranked third in my class.

My diverse background will allow me to rule without predisposition to favor any litigant based on their status as prosecutor, defender, victim, or defendant.

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

Yes. The governmental checks and balances established through the three co-equal branches of government dictate that as a judge, I must uphold the law established by the legislature even if I disagree with the substance of the law. Personal feelings, disagreement, or prejudices cannot be allowed to sway a judge from applying the law as enacted by the legislature.

As a criminal defense attorney who was formerly a police officer, I have had numerous occasions wherein I have forced myself to set aside personal feelings in order to fulfill my duties to my client.

As a specific example, I recall sitting as a special judge for the Municipal Court of Mt. Juliet. A gentleman who possessed a commercial driver license (CDL) was charged with speeding while off work in his personal vehicle. Under federal law, he was ineligible to attend traffic school in lieu of a conviction because he had a CDL. I personally did not agree with the substance of this law as applied to this case, as it prevented this gentleman from benefiting from a program designed to improve driver skills simply because he had a CDL. However, the law on the matter was clear, and I did my duty as a judge based upon the law without regard to my personal opinion.

REFERENCES

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

A. Jeff Long, Commissioner of the Department of Safety and Homeland Security

[redacted], Nashville, Tennessee 37243

[redacted]

[redacted]

B. David L. Raybin, Attorney, Raybin & Weissman, P.C.

[redacted], Nashville, Tennessee 37219

[redacted]

[redacted]

C. Robert E. Lee Davies, Senior Judge, State of Tennessee

[redacted], Franklin, Tennessee 37064

[redacted]

[redacted]

D. Deborah Faulkner, Chief of Police, Franklin Police Department

[redacted], Franklin, Tennessee 37064

[redacted]

[redacted]

E. Dr. Jedediah Coppenger, Lead Pastor, Redemption City Church

[redacted], Franklin, Tennessee 37069

[redacted]

[redacted]

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: October 5, 2020.

Dated: October 5, 2020.

_____

Signature

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

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

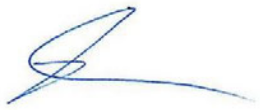
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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

WAIVER OF CONFIDENTIALITY

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

David Veile
Type or Print Name



Signature

October 5, 2020
Date

023941
BPR #

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

Writing Example 1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

REGINALD DION HUGHES,	)	
	)	
Appellant,	)	**Supreme Court Case No.**
	)	**M2015-00722-SC-R11-CV**
vs.	)	
	)	
TENNESSEE BOARD OF	)	**Court of Appeals Case No.**
PROBATION AND PAROLE	)	**M2015-00722-COA-R3-CV**
	)	
Appellee.	)	

ON APPEAL BY PERMISSION
FROM THE JUDGMENT OF THE COURT OF APPEALS

REPLY BRIEF OF APPELLANT/PETITIONER REGINALD DION HUGHES

David H. Veile, #23941
Schell & Davies, LLC
509 New Highway 96 West
Suite 201
Franklin, Tennessee 37064

Attorney for Appellant/Petitioner

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONS:

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

1. **Whether T.C.A. §41-21-812(a) is constitutional as applied to the dismissal of Mr. Hughes' petition and appeal**

STATEMENT OF THE CASE

This is an appeal of the dismissal of a writ of certiorari filed *pro se* by an indigent inmate due to the allegations of prior unpaid court costs. In 1987, Mr. Hughes was convicted of two (2) counts of second degree murder and was sentenced to thirty (30) years for each count, to be served consecutively. (Vol. I, pp. 36-37). On August 18, 2011, Mr. Hughes attended a parole hearing to determine whether he would be released on parole. (Admin. Rec., p. 21).

After receiving notice that he had been denied parole, Mr. Hughes filed the Petition for Common Law Writ of Certiorari (hereinafter, the "Petition") in the Lauderdale County Chancery Court seeking judicial review of the denial of parole. (Vol. I, p. 3). The Lauderdale County Chancery Court accepted the Petition for filing without objection. (Vol. I, p. 3).

More than one year after the Petition was filed, the Tennessee Board of Probation and Parole filed a motion to transfer the matter to the Davidson County Chancery Court, asserting that the Lauderdale County Chancery Court did not have subject matter jurisdiction, and that only the Davidson County Chancery Court had subject matter jurisdiction to hear this matter. (Vol. I, pp. 66-68). On May 1, 2013, the Lauderdale County Chancery Court entered an order transferring the matter to the Chancery Court of Davidson County. (Vol. I, pp. 104-5).

On January 20, 2015, the State filed a motion to dismiss the Petition based on the allegation that Mr. Hughes had unpaid costs from prior lawsuits. (Vol. II,

pp. 173-177). On March 16, 2015, the Davidson County Chancery Court entered an order dismissing the petition due to the alleged unpaid costs. (Vol. II, pp. 192-193). On April 13, 2015, Mr. Hughes filed a timely notice of appeal. (Vol. II, pp. 193-194).

By order entered July 1, 2015, the Court of Appeals dismissed the appeal, citing that Tenn. Code Ann. § 41-21-812(a) was applicable to the appellate court, and that the appeal must be dismissed based on the Appellant's failure to pay court costs previously assessed against him.

On July 15, 2015, Mr. Hughes filed a petition for rehearing in the Court of Appeals pursuant to Tenn.R.App.P. 39. By order entered July 17, 2015, the Court of Appeals denied the petition to rehear. On September 14, 2015, Mr. Hughes was a *pro se* litigant incarcerated in a correctional facility and delivered to an appropriate individual at the correctional facility an application for permission to appeal pursuant to Tenn.R.App.P. 11. As such, the application was timely filed pursuant to Tenn.R.App.P. 20(g).

On February 2, 2016, this Court granted Mr. Hughes' application for permission to appeal and appointed undersigned counsel for representation on a pro bono basis.

STATEMENT OF THE FACTS

Mr. Hughes relies on the facts presented in his initial brief in this Court.

ARGUMENT

I. THE RIGHT OF ACCESS TO THE COURTS IS A FUNDAMENTAL CONSTITUTIONAL RIGHT UNDER THE UNITED STATES AND TENNESSEE CONSTITUTIONS

In its responsive brief, the State makes no effort to defend the constitutionality of the application of Tenn. Code Ann. § 41-21-812(a) to the Appellant in this case utilizing a strict scrutiny analysis; rather, the State relies on its assertion that there is no fundamental right of access to the court under either the federal or state constitutions, and therefore any review of the statute as applied is subject to rational basis review. As such, the State seemingly concedes that this statute would not pass muster under a strict scrutiny analysis.

The State correctly asserts that there is no fundamental right to parole; however, the State then makes the leap to the conclusion that because there is no fundamental right to parole, there is no fundamental right for an individual to petition or otherwise access the courts pursuant to the process provided by statute to seek the redress of a grievance stemming from the illegal denial of parole. It is this leap that cannot stand.

A. The right of access to courts under the United States Constitution is fundamental under Equal Protection, Due Process, and the First Amendment Right to Petition for Redress of Grievances

The law is settled that a person has the fundamental right under the federal constitution to petition the government for a redress of grievances. Though the Appellee argues against the right of access to courts under the Equal Protection clause and the Due Process clause of the United States Constitution, it makes no

such argument regarding the right protected by the First Amendment to petition the government for a redress of grievances. "This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011)(internal citations omitted). "The First Amendment provides, in relevant part, that Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances. We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights and have explained that the right is implied the very idea of a government, republican in form." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524-25, 122 S. Ct. 2390, 2395-96, 153 L. Ed. 2d 499 (2002)(internal citations omitted).

"Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely the kind of trial a man gets, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee."

Boddie v. Connecticut, 401 U.S. 371, 388-89, 91 S. Ct. 780, 792, 28 L. Ed. 2d 113 (1971) (Brennan, J., concurring)(internal citations omitted).

The Sixth Circuit Court of Appeals clearly delineated two types of prisoner claims: cases involving constitutional and other civil rights related to their incarceration, in which states are required to provide affirmative assistance in the preparation of legal papers, and all other types of civil actions, in which states "may not erect barriers that impede the right of access of incarcerated persons." *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992)(internal citations omitted). The Appellee suggests that this decision was somehow superseded by the later holding in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). Br. Appellee at 12. However, these cases are not incongruous. *Lewis* involved claims of inadequate access to legal libraries and inadequate legal assistance to illiterate and non-English speaking inmates. *Id.* at 347. As such, the claims in *Lewis* clearly involve the demand for "affirmative assistance" that a state must provide to incarcerated litigants under the first type of prisoner claims (involving constitutional and other civil rights related to incarceration) set forth in *John L.* Clearly, *Lewis* did not involve the imposition by a state of a complete barrier to impede the right of an inmate's access to petition the court simply because the inmate is indigent and has unpaid costs from a prior case. The law is clear that the level of legal assistance that must be provided to an inmate depends on the particular claim being sought. It is equally clear that a state may not erect a barrier that completely impedes an inmate's right to petition the court for the

redress of a legitimate grievance. And to the extent that the Appellee suggests that *John. L.* has been abrogated, Petitioner would note that the holding has been repeatedly cited as authority after the decision in *Lewis*. See *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 864 (6th Cir. 2012); *J.P. v. Taft*, 439 F. Supp. 2d 793, 796 (S.D. Ohio 2006);

B. **The right of access to courts specifically granted under the Tennessee Constitution is a fundamental right**

Though Mr. Hughes is entitled to relief pursuant to the United States Constitution, this Court need not reach the federal argument. The application of Tenn. Code Ann. § 41-21-812 to dismiss Mr. Hughes' Petition functions as a direct violation of Article I, section 17 of the Tennessee Constitution, which provides as follows:

> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay....

"We, therefore, hold that a prisoner has a constitutional right to institute and prosecute a civil action seeking redress for injury or damage to his person or property, or for the vindication of any other legal right; however, this is a qualified and restricted right. *Whisnant v. Byrd*, 525 S.W.2d 152, 153 (Tenn. 1975)(emphasis added). The Court ultimately held in *Whisnant* that a prisoner had a right to hold civil litigation in abeyance while in custody, and this holding was overruled by *Logan v. Winstead*, 23 S.W.3d 297 (Tenn. 2000); however, in *Logan*,

this Court specifically reaffirmed a prisoner's constitutional right to initiate and prosecute a civil action, holding that "... although incarcerated plaintiffs have a constitutional right to initiate and prosecute a civil action, they do not retain an absolute right to have civil litigation held in abeyance until they are released from custody, nor do they retain an absolute right to be present at each stage of the proceedings. *Logan* at 302 (emphasis added).

Notably, in *Ali v. Moore*, 984 S.W.2d 224 (Tenn. Ct. App. 1998) *perm.app.denied* (Dec. 21, 1998), a *pro se* inmate plaintiff filed a defamation lawsuit against a news station. After the case was non-suited, the trial court entered an order enjoining the plaintiff from filing future *pro se* actions in that judicial district, but appointed a local attorney to represent the plaintiff "for any potential meritorious claims that may arise in the future." *Id.* at 230. Even with the appointment of an attorney to represent the plaintiff for meritorious claims, the Court of Appeals struck down the trial court's order, holding that "[n]otwithstanding the laudable objective of the trial court's order, we find that such an order violates the open courts provision of the Tennessee Constitution [Tenn. Const. Art. I, § 17]." *Id.* The court in *Ali* was not concerned with what type of claim might be brought. Despite the added protection of an appointed attorney on hand to assist with meritorious claims, the court struck down the unconstitutional blanket barrier against filing *pro se* claims without regard to the status of the underlying claim as a violation of a fundamental right.

Similarly, in *Whitaker v. Whitaker*, 957 S.W.2d 834 (Tenn. Ct. App. 1997) *perm.app.denied* (Oct. 6, 1997), the Court of Appeals struck down an order preventing a party from filing a petition to modify custody. "The provisions of the final decree appear to prevent Husband from seeking relief and thus violate the open court provision of the Tennessee Constitution set out in Article I, Section 17... [t]he decree shall further be modified to eliminate the requirement that Husband shall be entitled to visitation only upon petition made by the guardian ad litem and to provide that Husband may petition the court as provided by law to establish visitation rights. *Id.*, at 838-39.

In discussing the open courts provision of the Tennessee Constitution, this Court has discussed the type of injuries for which a man shall have remedy by due course: "The constitutional guaranty providing for open courts and insuring a remedy for injuries does not guaranty a remedy for every species of injury, but applies only to such injuries as constitute violations of established law of which the courts can properly take cognizance. *Barnes v. Kyle*, 202 Tenn. 529, 535-36, 306 S.W.2d 1, 4 (1957)(internal citations omitted).

In its brief, the State cites a superb law review article penned by former Justice and current Dean William Koch in an attempt to artificially limit the application of the Tennessee open courts provision: "[o]nly constitutionally recognized injuries can trigger the constitutionally protected jural right of access to a legal remedy." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee*

Constitution, 27 U. Mem. L. Rev. 333, 419-20 (1997). However, the State fails to continue with that learned author's explanation of "constitutionally recognized injuries," to wit:

> Thus, a proper understanding of the meaning of "injury" is central to a proper understanding of Tenn. Const. art I, § 17. The term "injury" as it appears in Tenn. Const. art I, § 17 does not include every species of injury. It includes only those injuries amounting to invasions of legal rights or violations of established law of which the courts can take cognizance...
>
> Thus, Tenn. Const. art I, § 17 provides constitutional protection for judicial redress of such wrongs as are recognized by the law of the land...
>
> Thus, for the purposes of Tenn. Const. art I, § 8 and Tenn. Const. art I, § 17, the "law of the land" includes the state constitution, the United States Constitution, all valid state statutes and regulations, and all valid federal statutes and regulations.

Id., at 420-423. A further reading of the article reveals its particular application to the case at bar:

> Tenn.Const. art I, § 17 has been used most frequently to establish a constitutional right to institute and prosecute civil actions. The Tennessee Supreme Court relied on Tenn. Const. art I, § 17 in holding that prisoners have a right to file civil actions... The Tennessee Court of Criminal Appeals relied on the open courts clause when it held that trial courts could not direct their clerks to refuse to file a prisoner's successive post-conviction petitioners.

Id., at 427(citing *Whisnant v Byrd*, 525 S.W.2d 152, 153 (Tenn. 1975) and *Potter v. State*, App. No. 82-175-III, slip op. at 4 (Tenn. Crim. App. Mar. 28, 1983)).

There is no requirement that the underlying lawsuit involve the allegation of the violation of a fundamental right in order to invoke the fundamental right to

access the courts under Tenn. Const. art. I, § 17. Here, Mr. Hughes has averred that the Tennessee Board of Probation and Parole acted illegally in denying him parole, and Tenn. Code Ann. § 27-9-102 specifically provides the right to file a petition for writ of certiorari seeking judicial review of the illegal decision of the Tennessee Board of Probation and Parole.[1] As such, the law of the land provides for this action, and the application of Tenn. Code Ann. § 41-21-812(a) to dismiss the lawsuit is in direct violation of Mr. Hughes' right to access the court.

C. The application of Tenn. Code Ann. § 41-21-812(a) to the Appellant does not satisfy rational basis review

In its defense of the application of Tenn. Code Ann. § 41-21-812(a) to Mr. Hughes, the state cites various statistics regarding the cost of inmate litigation, but gives no information regarding the cost of inmate litigation in Tennessee. Br. Appellee at 15. The state then selectively cites a Tennessee appellate case as purported authority that the statute at issue was enacted to counter abuses that arise when inmates file lawsuits "in forma pauperis...[by] reduc[ing] the number of... lawsuits an inmate can file at taxpayer expense." Br. Appellee at 15, citing *Sweatt v. Tenn.Dept.of Corr.*, 99 S.W.3d 112, 114 (Tenn.Ct.App. 2002). However, the state omitted critical text in its citation. The "unabridged" citation from *Sweatt* is as follows:

---

1 Appellee asserts that Mr. Hughes has no right to a writ of certiorari because the grant of the writ is discretionary with the trial court. Br. Appellee at 13. However, the right to file the petition is granted in Tenn. Code Ann. § 27-9-101 et seq. Notably, prior to dismissing the case, the trial court granted the writ and ordered the Board of Probation and Parole to forward the underlying record to the court for review. Vol. I, pp. 136-138.

> Tenn. Code Ann. § 41–21–801, et seq., was enacted to counter some of the abuses that arise when inmates exercise their rights to file lawsuits in forma pauperis. Among other things, the legislation was designed to reduce the number ***of frivolous or malicious lawsuits*** an inmate can file at taxpayer expense, and to identify and resolve ***baseless claims*** at an early stage.

Sweatt, at 114 (Tenn. Ct. App. 2002)(emphasis added). The suspicious omission from the state's citation of the words "frivolous," "malicious," and "baseless" are of great importance.

Contrary to the State's assertion that the rational basis is to curb all indigent inmate litigation, the actual basis for the statute is "to bar inmates who have *malicious* or *frivolous* claims from filing any further lawsuits until they have paid the costs that have accrued from those prior claims." *Williams v. Bell, et al.*, 37 S.W.3d 477, 479 (Tenn.Ct.App.2000) *perm.app.denied* (Jan. 8, 2001)(emphasis added). While there certainly could be a rational basis to enact and apply a law designed to prevent frivolous, malicious, or baseless claims, the broad effect of the statute as applied to this Appellant has no rational basis toward this stated goal, because the statute as applied destroys an indigent inmate's ability to bring any lawsuit, regardless of its merits, and regardless of the inmate's prior history as a proper or improper litigant. Here, there is no indication in the record that Mr. Hughes has ever filed a frivolous, malicious, or baseless claim. Unlike 28 U.S.C. § 1915(g), which precludes an inmate from bringing a claim *in forma pauperis* if the prisoner has on three or more prior occasions brought an action that was

dismissed on the grounds that it was frivolous, malicious, or failed to state a claim, the Tennessee statute as applied makes no mention of prior frivolous claims.

While the Appellee points to other states' attempts to regulate *in forma pauperis* inmate filings in an effort to show a rational basis for the Tennessee statute, the argument fails. It is important to note that none of the other states have the specific right to maintain a lawsuit set forth in Tenn. Const. art I, § 17.

The Appellee cites Mich.Comp.Laws § 600.2963(8), "[a] prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid," to support the rational basis for Tenn. Code Ann. § 41-21-812(a). However, the Appellee fails to cite the preceding provision (7) in the same statute, which provides that "...this section shall not prohibit a prisoner from commencing a civil action or filing an appeal in a civil action if the prisoner has no assets and no means by which to pay the initial partial filing fee..." Mich.Comp.Laws § 600.2963(7). When read together, it seems that Michigan's statute recognizes that there is no rational basis for the complete preclusion of the ability to bring a lawsuit simply because an inmate is destitute.

Next, Appellee cites Louisiana's prisoner litigation reform act; however, as cited by the Appellee, Louisiana's act provides for the inmate's filings to be stayed for a maximum of three years. Br. Appellee at 18. This is easily distinguished from the application of the Tennessee statute to the Appellant. Here, the

Appellant was not given the time or ability to address the alleged prior unpaid fees; rather, the trial court and the Court of Appeals summarily dismissed his case.

D. The holding in *Clifton v. Carpenter* is applicable to Mr. Hughes

The Appellee attempts to draw a marked distinction between the holding in *Clifton v. Carpenter*, 775 F.3d 760 (6th Cir. 2014) and the case at bar, simply because the inmate in *Clifton* had been released on parole for a very short period prior to his re-incarceration and his hearing before the Board of Probation and Parole. This is a distinction without consequence, as both inmates sought to avail themselves of the exact same statutory right to seek review of the decision of the Board of Probation and Parole through the same mechanism, and both were denied access to court due to their indigency. The State's argument is in essence a repeat of its initial position that the right to access court is only fundamental if the underlying claim is the deprivation of a fundamental right, and yet the state reiterates that there is no fundamental right to parole. For the reasons set forth in the Appellant's initial Brief, the holding in *Clifton* should control.

II. BASED UPON A PLAIN REVIEW OF THE RECORD, TENN. CODE ANN. § 41-21-812(A) WAS INAPPLICABLE TO THE APPELLANT'S CASE

Tenn. Code Ann. § 41-21-802 provides that "[t]his part applies only to a claim brought by an inmate in general sessions or a trial level court of record in which an affidavit of inability to pay costs is filed with the claim by the inmate." Tenn. Code Ann. § 41-21-812(a) provides "...on notice of assessment of any fees,

taxes, costs and expenses *under this part...*" (emphasis added). Taken in conjunction, the bar to filing a claim for outstanding court costs under Tenn. Code Ann. § 41-21-812(a) is only applicable when the outstanding court costs were assessed in prior matters filed *in forma pauperis*.

The Appellant's petition for writ of certiorari seeking judicial review of the actions of the Tennessee Board of Probation and Parole was dismissed by the trial court, and his appeal dismissed by the Court of Appeals, based solely on the affidavit of Sandra Burnham, Clerk and Master of the Lauderdale County Chancery Court. Though this affidavit was missing from the original appellate record, the trial court ordered that the appellate record be supplemented with this affidavit. The affidavit averred that the Appellant "filed the following cases in forma pauperis and owes court costs therein: *Reginald Dion Hughes v. Jeraldine Y. Hughes*, No. 9546, court costs due $49.50; *Reginald D. Hughes v. Tenn. Bd. Of Probation & Parole*, No. 13009, court costs due $209.35.

After undersigned counsel was appointed to represent Mr. Hughes in this appeal, undersigned counsel was able to do something that Mr. Hughes was physically unable to do. Counsel for Mr. Hughes proceeded to the office of the Clerk and Master to review the files referenced by the affidavit and upon which the dismissal was based.

The entire file for the first case listed in the affidavit, *Reginald Dion Hughes v. Jeraldine Y. Hughes*, No. 9546, appears in the Supplemental Record. Contrary to the affidavit submitted by the Clerk and Master, nowhere in the file

was there an affidavit of inability to pay costs or any other request to proceed in forma pauperis. (Supp. Vol. I, pp. 7-16). As such, Tenn. Code Ann. § 41-21-812(a) cannot be triggered by the outstanding costs associated with that case.

Tenn. Code Ann. § 41-21-808(a) provides that "[j]udgment may be rendered for costs at the conclusion of the suit, action, claim or appeal as in other proceedings. If the judgment against the inmate includes the payment of costs, the inmate shall be required to pay the full amount of costs ordered." The final Order of Dismissal in the second case listed in the affidavit, *Reginald D. Hughes v. Tenn. Bd. Of Probation & Parole*, No. 13009, appears in the Supplemental Record. Contrary to the requirements of Tenn. Code Ann. § 41-21-808(a), the final Order of Dismissal does not assess costs against the Appellant. While the Clerk and Master might conceivably presume that such a dismissal would automatically result in the assessment of costs against the Appellant, it is clear that Tenn. Code Ann. § 41-21-808(a) makes the assessment of costs discretionary ("[j]udgment *may* be rendered... *if* the judgement against the inmate includes the payment of costs...")(emphasis added). As such, the supporting documentation obtained from the Clerk and Master contradicts the entire affidavit upon which the trial court relied when it dismissed the lawsuit.

CONCLUSION

For these reasons, Mr. Hughes respectfully requests that this Court vacate the Order of Dismissal entered by the trial court and remand so that Mr. Hughes may proceed with his case on the merits.

Respectfully submitted,

DAVID H. VEILE, #23941
SCHELL & DAVIES, LLC
509 New Highway 96 West
Suite 201
Franklin, Tennessee 37064
(615)550-2800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been sent, via First Class U.S. Mail, postage prepaid, to:

Pamela S. Lorch
Michael Polovich
Criminal Appeals Division
P.O. Box 20207
Nashville, Tennessee 37202

This 6th day of May, 2016.

DAVID H. VEILE

Writing Example 2

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
Appellant,	)	
	)	**Supreme Court Case No.**
vs.	)	**No. M2015-01073-SC-R9-CD**
	)	
ANGELA FAYE DANIEL,	)	
	)	***Williamson County Criminal***
Appellee.	)	

ON APPLICATION FOR PERMISSION TO APPEAL FROM
THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

BRIEF OF APPELLEE, ANGELA FAYE DANIEL

David H. Veile, B.P.R. No. 23941
Schell & Oglesby, LLC
509 Highway 96 West, Suite 201
Franklin, Tennessee 37064
615-550-2800
dveile@franklin.legal
Attorney for Appellee, Angela Faye Daniel

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes/Constitutions

Rules

Other

DESIGNATION OF THE RECORD

The Technical Record in this matter is 69 pages in length and is contained in a single volume marked "I" by the Clerk of this Court. References to the Technical Record will be by the abbreviation "Vol. I." The suppression hearing in this matter was held in Williamson County on May 1, 2015. The transcript of that hearing is 66 pages in length and is contained in a single volume marked "II" by the Clerk of this Court. References to the transcript of the suppression hearing will be by the abbreviation "Vol. II."

All references to the record will be by the abbreviation listed above and then by page number.

DESIGNATION OF THE PARTIES

The defendant/appellee will be referred to by her name as Ms. Daniel, the "Defendant," or "Appellee." The appellant will be referred to as "Appellant," "State of Tennessee," or "the State."

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

Whether the police officer's complete failure to provide to Ms. Daniel at the time of execution any copy of the search warrant or receipt for property taken as specifically required by Tenn.R.Crim.P. 41 and the language of the search warrant itself, despite having the ability to do so, constitutes a "clerical omission" under the Exclusionary Rule Reform Act.

II.

Whether the Exclusionary Rule Reform Act violates the Separation of Powers Clause in Article II of the Tennessee Constitution, rendering it unconstitutional.

III.

Whether the good faith exception adopted in *State v. Lemaricus Devall Davidson.* No. E2013-00394-SC-DDT-DD, 2016 WL 7339116 (Tenn. Dec. 19, 2016) should be expanded to include technical violations in the service of the search warrant when the search in question is otherwise constitutional.

STATEMENT OF THE CASE

On June 6, 2014, Officer Megan Valentin initiated a traffic stop of Ms. Daniel's vehicle. She ultimately arrested Ms. Daniel for DUI and obtained a search warrant for a blood sample. Vol. I., pp. 2-11. On January 12, 2015, the Williamson County Grand Jury indicted Ms. Daniel for driving under the influence and driving under the influence (.08% or greater). Vol. I, p. 12.

On March 27, 2015, Ms. Daniel filed a Motion to Suppress Evidence and Memorandum of Law in Support. Vol. I, pp. 16-44. In the motion, Ms. Daniel argued that the search warrant was not supported by probable cause. Vol. I, pp. 19-21. Additionally, Ms. Daniel argued that the illegal execution of the search warrant required the suppression of the blood evidence obtained pursuant to the search warrant. Vol. I, pp. 21-26. Specifically, Ms. Daniel argued that the failure of the officer to provide a copy to Ms. Daniel of the search warrant or a receipt for property taken at the time the search warrant was executed as required by Tenn.R.Crim.P. 41(e)(4), and the mandate of the search warrant itself that "a copy of this Warrant is to be left with the person searched," should result in the suppression of any evidence obtained pursuant to the search warrant in accordance with the clear provisions of Tenn.R.Crim.P. 41(g)(6). Vol. I, pp. 6-7. Finally, Ms. Daniel argued in her motion that the Exclusionary Rule Reform Act found at Tenn.Code.Ann. § 40-6-108 (hereinafter, "ERRA") failed to render the evidence admissible for two reasons, to wit: (1) ERRA applies only to an "unintentional clerical error or clerical omission," and the failure to deliver a copy of the search warrant was not an unintentional clerical error or clerical omission, and (2) to the extent that ERRA would otherwise apply to this case, ERRA is an unconstitutional encroachment on the power of the judiciary to formulate rules of procedure and evidence, and is a violation of the separation of powers required by our state constitution. Vol. I, pp. 23-26.

The State filed a response to the Motion to Suppress in which it waived reliance on ERRA: "The Defendant preemptively attacks the State's reliance on the Exclusionary Rule Reform Act, however, as explained above, the State need not rely on said Act." Vol. I, p. 49.

On May 1, 2015, a hearing was held before the Honorable Deanna Johnson. See Vol. II. The trial court made a specific finding of fact that the officer had the opportunity to deliver a copy of the search warrant to the defendant at the time of execution, but that the officer did not provide a copy of the search warrant to Ms. Daniel when it was executed. Vol. I, p. 52; Vol. II, p. 60.

The trial court did not make a specific finding that the failure to provide a copy of the search warrant was "unintentional." *Id.* Likewise, while the trial court specifically found that the police failed to provide Ms. Daniel with a copy of the search warrant itself, the trial court did not make any finding regarding the state's complete failure to ever provide Ms. Daniel with a receipt for property taken. *Id.*

Finally, the trial court found that the failure to provide a copy of the search warrant to Ms. Daniel was not a "clerical error" as defined by Tenn. Code Ann. § 40-6-108. Vol. I, p. 52; Vol. II, p. 63. The trial court did not make a ruling as to the constitutionality of ERRA, or whether the search warrant was supported by probable cause.

The trial court found that Ms. Daniel had proved by a preponderance of the evidence that Ms. Daniel had a reasonable expectation of privacy in her body and blood, the identity of the evidence to be suppressed, and the existence of a constitutional or statutory defect in the execution of the search warrant, and subsequently orally granted Mr. Daniel's motion to suppress at the conclusion of the hearing on May 1, 2015, citing Tenn.R.Crim.P. 41(g)(6). Vol. II., pp. 52-63. The State immediately announced to the trial court that it intended to file a Rule 9

application. Vol. II, p. 64. The trial court filed its order granting the motion to suppress on May 12, 2015. Vol. I, pp. 51-54.

On May 19, 2015, the State filed a Rule 9 application in the trial court. Vol. I, pp. 56-60. On June 1, 2015, the trial court entered an order granting the State's Rule 9 application. Vol. I, 63-65. On June 11, 2015, the State filed its Rule 9 application in the Court of Criminal Appeals. On July 17, 2015, the Court of Criminal Appeals entered an order granting the State's Rule 9 application.

On March 29, 2016, the Court of Criminal Appeals filed its unanimous opinion in which it affirmed the trial court's suppression of the blood evidence. *See State v. Angela Faye Daniel*, No. M2015-01073-CCA-R9-CD (Tenn. Crim.App., March 29, 2016). The Court of Criminal Appeals affirmed the trial court's factual determination that the officer failed to provide the Defendant with a copy of the search warrant at the time of the search. *Id.*, at *4. Additionally, the Court of Criminal Appeals held that the definition of "good faith mistake or technical violation" was carefully worded to include those errors and omissions that were "clerical," and that there was no indication that the legislature intended for the Exclusionary Rule Reform Act to permit the admission of evidence when the State completely failed to deliver a copy of a search warrant to a defendant. *Id.*at *7.

On May 31, 2016, the State filed an application for permission to appeal the decision of the Court of Criminal Appeals to this Court pursuant to Tennessee Rule of Appellate Procedure 11.

On January 18, 2017, this Court granted the State's application for permission to appeal. In addition to the issue regarding the whether the definition of "good faith error or technical mistake" includes the delivery of the search warrant to the defendant, this Court

directed the parties to address whether the good faith exception adopted in S*tate v. Lemaricus Duvall Davidson*, No. E2013-00394-SC-DDT-DD, 2016 WL 7339116 (Tenn. Dec. 19, 2016) should be expanded to include technical violations in the service of the search warrant when the search in question is otherwise constitutional, and whether the Exclusionary Rule Reform Act, Tenn. Code Ann. § 40-6-108, violates the Separation of Powers Clause in Article II of the Constitution and is therefore unconstitutional.

STATEMENT OF THE FACTS

Officer Megan Valentin

Officer Valentin testified that on June 6, 2014, she made a traffic stop of Ms. Daniel and ultimately placed her under arrest. (Vol. II, p. 8). Officer Valentin then obtained a search warrant from the magistrate of Williamson County to obtain a sample of Ms. Daniel's blood. (Vol. II, p. 8). Notably, one of the last mandates contained in the search warrant itself was for a copy of the search warrant to be given to Ms. Daniel. "A copy of this Warrant is to be left with the person searched…" (Vol. I, p. 2).

Initially, Officer Valentin testified that she "always" gives a copy of the search warrant to the defendant when it is served, and that "…I know every time I've executed one that I've given a copy." (Vol. II, p. 9). Officer Valentin was then presented with a transcript of her prior sworn testimony that she gave on November 18 and 19, 2014, in the preliminary hearing regarding this case, which included the following prior inconsistent sworn statement:

Q. Sitting here today can you say with certainty whether or not you gave her a copy of the search warrant?

A. No, I can't.

Q. So is it possible that you did not give her a copy of the search warrant?

A. It's possible.

Q. Why would you have not given her a copy of the search warrant?

A. I have no idea.

Q. But you certainly had the ability to make a copy and you could have given it to her?

A. Correct.

Q. But if she were to take the stand and swear I didn't get a copy of the search warrant, you would have no reason to disagree?

A. Correct.

(Vol. II, pp. 12-13).[1]

After being confronted with her earlier inconsistent statement, Officer Valentin admitted that she has no knowledge as to whether or not she actually gave a copy of the search warrant to Ms. Daniel. (Vol. II, p. 15). Officer Valentin testified that it is her typical practice to serve a copy of the search warrant upon the person from whom she is seizing blood, but that she could not remember one way or another in this specific case whether she did. (Vol. II, pp. 15-16).

Officer Valentin testified that she had the ability to give a copy of the search warrant to Ms. Daniel when it was executed and could have given her a copy of the warrant. (Vol. II, p. 10). Officer Valentin testified that if she did not give Ms. Daniel a copy of the search warrant, it would not have been done on purpose and would have been a mistake. (Vol. II, p. 27). Officer Valentin testified that she did give Ms. Daniel a copy of the pink implied consent form on the night of the arrest. (Vol. II, p. 29).

Officer Valentin initially testified that while she did not know an exact number, she has obtained more than twenty (20) DUI search warrants; however, when confronted with her prior inconsistent sworn testimony from the preliminary hearing in this matter and questioned if she had served more than twenty (20) such search warrants, she revised her testimony and stated that she did not know an exact number. (Vol. II, pp. 15, 28-29). She then testified that she had served some DUI search warrants since the preliminary hearing in this matter. (Vol. II, p. 29).

[1] The relevant portion of Officer Valentin's previous sworn testimony during the preliminary hearing is located at Vol. I, pp. 35 -37.

Officer Valentin did not give any testimony or other evidence regarding whether or not she ever provided a receipt for the property taken from Ms. Daniel, or whether or not she has ever provided a receipt for blood taken as a result of the execution of a search warrant.

Angela Faye Daniel

Ms. Daniel testified that she recalled being arrested on June 6, 2014, and being taken to the hospital to have blood drawn. (Vol. II, pp. 30-31). Ms. Daniel testified that she did receive the pink copy of the implied consent form, but that she did not receive a copy of a search warrant or anything else that said search warrant on it. (Vol. II, p. 31).

ARGUMENT

I. THE COMPLETE FAILURE OF THE OFFICER TO DELIVER ANY COPY OF THE SEARCH WARRANT OR RECEIPT FOR PROPERTY TAKEN TO MS. DANIEL AT THE TIME OF THE EXECUTION OF THE SEARCH WARRANT IN CLEAR VIOLATION OF THE MANDATES PROVIDED IN TENN.R.CRIM.P. 41 AND THE SEARCH WARRANT ITSELF, DESPITE HAVING THE OPPORTUNITY TO DO SO, IS NOT A "CLERICAL ERROR OR CLERICAL OMISSION" AND IS THEREFORE NOT A "GOOD FAITH MISTAKE OR TECHNICAL VIOLATION" AS DEFINED WITHIN THE EXCLUSIONARY RULE REFORM ACT.

Standard of Review

Generally, the standard of review of evidentiary rulings by a trial court is one of abuse of discretion. *State v. Rimmer*, 250 S.W.3d 12, 23 (Tenn.2008) (internal citation omitted). The party prevailing at the suppression hearing is afforded the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Keith*, 978 S.W.2d 861, 864 (Tenn.1998). A trial court's findings of fact in a suppression hearing are entitled to substantial deference and will be upheld unless the evidence preponderates otherwise. *See State v. Odom*, 928 S.W.2d 18, 23 (Tenn.1996)("Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence."). A trial court's application of law to the facts, however, is conducted under a *de novo* standard of review. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn.2001). As such, the trial court's factual determination that the state failed to provide Ms. Daniel with a copy of the search warrant at the time of its execution should be given substantial deference and should be upheld by this Court, while the

application of the law to the state's failure to follow the clear mandates of Tenn.R.Crim.P. 41 is reviewed *de novo*.

(A) The Suppression of Blood Evidence Pursuant to Tenn.R.Crim.P. 41(g)(6) Was Appropriate

The Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution protect citizens, including Ms. Daniel, from unreasonable searches and seizures. As stated by this Court about the rules governing the execution of search warrants:

> "Its intent no doubt was to secure the citizen against **carelessness** and **abuse** in the issuance and execution of search warrants…'There is no writ more calculated to be abused in its use than the search warrant, for with it any home may be entered and the inmates disturbed, humiliated, and degraded. To prevent such a possibility from false informants made to officers inspired by overzeal, or acting from expediency, or obeying the command uttered by a mob impulse, the provisions of the Constitution and statutes found force and command observance.'"

Talley v. State, 208 Tenn. 275, 345 S.W.2d 867, 869 (Tenn.1961), citing *Hampton v. State*, 148 Tenn. 155, 161, 252 S.W. 1007, 1008 (Tenn.1923)(emphasis added).

When an accused seeks to suppress evidence obtained under the guise of a search warrant, the accused has the burden to prove by a preponderance of the evidence: (1) the existence of a legitimate expectation of privacy in the place or property from which the items sought to be suppressed were seized; (2) the identity of the items sought to be suppressed; and (3) the existence of a constitutional or statutory defect in the search warrant or the search conducted pursuant to the warrant. *State v. Henning*, 975 S.W.2d 290, 298 (Tenn.1998) (internal citations omitted).

In this case, the trial court found that Ms. Daniel had a legitimate expectation of privacy in her body and her blood, and the identity of the items sought to be suppressed. Vol. II, p. 58.

Neither of these findings were contested by the State at the trial court, nor were they raised in the State's motion for permission to appeal in the trial court, their applications for permission to appeal filed with the Court of Criminal Appeals or with this Court, or in the Appellant's brief. As such, any issues related to these findings are waived, and this Court should limit review to the trial court's determination of the existence of a constitutional or statutory defect in the execution of the search warrant. *See Culbertson v. Culbertson*, 455 S.W.3d 107, 127 (Tenn.App.2014)(internal citations omitted).

Tenn.R.Crim.P. 41(e)(4) provides as follows:

> Leaving Copy of Warrant and Receipt. The officer executing the warrant ***shall***:
>
> (A) Give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property; or
>
> (B) ***Shall*** leave the ***copy and receipt*** at a place from which the property was taken.

(emphasis added).

Tenn.R.Crim.P. 41(g)(6) provides as follows:

> (g) Motion for Return or Suppression of Property. A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to Rule 12(b) to suppress any evidence obtained in the unlawful search or seizure. If property was unlawfully seized, the aggrieved person may move for the return of the property. The motion ***shall*** be granted--except as to the return of contraband--if the evidence in support of the motion shows that:
>
> (6) the serving officer--where possible--did not leave a copy of the warrant with the person or persons on whom the search warrant was served.

(emphasis added). Tennessee appellate courts have previously held that the word "shall" in the context of Rule 41 is mandatory, and that the violation of these provisions leads to suppression of the illegally seized evidence. *See State v. Brewer*, 989 S.W.2d 349, 355 (Tenn.Crim.App.1997), citing *Johnson v. State*, 208 Tenn. 620, 348 S.W.2d 295 (Tenn.1961);

Talley, supra; *State v. Steele*, 894 S.W.2d 318 (Tenn.Crim.App.1994). Likewise, the provisions of Rule 41 regarding the delivery of a copy of a search warrant to the person on whom the warrant is served are mandatory. *Id.*

Here, the trial court specifically found that although she had the ability to do so, the officer failed to deliver any copy of the search warrant to Ms. Daniel when it was served by piercing her vein and taking her blood. As such, the clear mandates of Rule 41(g)(6) require the suppression of the blood evidence, and the trial court's order suppressing this evidence should be affirmed.

(B) The Exclusionary Rule Reform Act Is Inapplicable Because The Complete Failure To Provide a Copy of the Search Warrant and Receipt Was Not an "Unintentional Clerical Error or Clerical Omission"

The Appellant argues that the failure of the officer to provide a copy of the search warrant to Ms. Daniel was a "good faith mistake or technical violation," and the evidence should therefore be admissible despite the officer's illegal actions pursuant to the Exclusionary Rule Reform Act ("ERRA"), found at Tenn. Code Ann § 40-6-108.

ERRA purports to forbid trial courts from excluding illegally obtained evidence provided that the evidence is otherwise admissible and constitutionally obtained, and provided that the illegally obtained evidence "was the result of a good faith mistake or technical violation." Tenn. Code Ann. § 40-6-108(a). The statute specifically defines "good faith mistake or technical violation" as "[a]n ***unintentional clerical*** error or ***clerical*** omission made by a law enforcement officer, court official or issuing magistrate in the form, preparation, issuance, filing and handling of copies, or return and inventory of a search warrant." Tenn. Code Ann. § 40-6-108(c)(1) (emphasis added). The Appellant takes the position that the officer's failure to provide Ms.

Daniel with a copy of the search warrant was an "unintentional clerical omission." This is not the case.

The basic rule of statutory construction is to ascertain the legislative purpose and intent. *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338, 341 (Tenn.Ct.App.1991) (internal citations omitted). When the language is ambiguous and does not yield a clear interpretation, courts may consult the legislative history for additional guidance. *Storey v. Bradford Furniture Co.*, 910 S.W.2d 857, 859 (Tenn.1995)(internal citations omitted).

ERRA does not define the term "clerical error" or "clerical omission." However, the legislative intent behind ERRA is clearly demonstrated by comparing the initial draft of the proposed legislative bill identified as Tennessee General Assembly, 107th G.A. House Bill 401, located at Vol. I, pp. 40-41, with the first amendment (Amendment No. 1 to SB0559) and second amendment (Amendment No. 2 to HB0401) that were adopted prior to passage of the bill, located at Vol. I, pp. 42-44. Notably, the original version defined "good faith mistake or technical violation" as "[a]n unintentional error made by a law enforcement officer, court official or issuing magistrate in the form, preparation, issuance, service, execution, filing and handling of copies, or return and inventory of a search warrant." Vol. I, p. 41. There was originally no requirement that the error or omission be "clerical" in the initial bill. Amendment 1 to the original bill, which was adopted on May 4, 2011, changed the definition of "good faith mistake or technical violation" to specify an "unintentional ***clerical*** error or omission made by a law enforcement officer." Vol. I, p. 43 (emphasis added). As additional indication of legislative intent, Amendment 2, which was also adopted on May 4, 2011, further limited the definition to "unintentional clerical error or ***clerical*** omission…" Vol. I, p. 44 (emphasis added). The bill then passed both houses as amended.

In construing legislative enactments, courts must presume that every word in a statute has meaning and purpose, and each word should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *Lawrence County Educ. Ass'n v. Lawrence County Bd. Of Educ.*, 244 S.W. 3d 302, 309 (Tenn.2007) (internal citations omitted). The addition of the limiting term "clerical" in two separate places within the definition of a good faith mistake clearly indicates the legislative intent to limit the application of ERRA to ***clerical*** errors and ***clerical*** omissions, rather than general errors or omissions.

Simply stated, there is no indication of legislative intent to permit the admission of evidence obtained when the state has completely failed to deliver any copy of the search warrant to the defendant at the time it was served.

It is important to note the history immediately preceding ERRA and the discussion of the bill before the Senate Judiciary Committee. On August 18, 2010, prior to the enactment of ERRA, the Court of Criminal Appeals released the decision in *State v. Hayes*, 337 S.W. 3d 235 (Tenn.Crim.App.2011). In that case, the defendant had been convicted of serious drug charges involving cocaine and marijuana and had been sentenced to serve twenty-nine (29) years in prison. *Hayes* at 240. On appeal, the defendant argued that the evidence obtained through the execution of a search warrant must be suppressed because the judge issuing the search warrant wrote "p.m." instead of "a.m." on the copy of the search warrant delivered to the defendant. *Id.* at 252. The Court of Criminal Appeals ultimately determined that because the defendant's copy reflected "p.m." instead of "a.m.," the warrant did not comply with the requirements of Rule 41, which resulted in the suppression of the evidence and reversal of the convictions. *Id.* at 256, 267. The state sought permission to appeal to this Court, which was denied on February 17, 2011. Notably, House Bill 0401 (which ultimately became ERRA) was filed for introduction in

the House on February 8, 2011, and the companion Senate Bill 0559 was filed for introduction in the Senate on February 9, 2011, while the state's application for permission to appeal was still pending.

Any doubt that this legislation was a direct reaction to the result of the "a.m."/"p.m." discrepancy in *Hayes* is removed by the fact that former Assistant District Attorney John Zimmerman appeared before the Senate Judiciary Committee on April 27, 2011, to testify before the Senate Judiciary Committee regarding the proposed ERRA bill and its purposes and effects.[2] Notably, Mr. Zimmerman was the assistant district attorney of record in the *Hayes* case at the trial court level. *Hayes* at 240.

In his testimony, Mr. Zimmerman referenced the situation when "a.m." is written "p.m." and testified that the proposed bill would affect two issues that affect admissibility of evidence obtained in technical violation of Tenn.R.Crim.P. 41(g). *See* Senate Judiciary Committee Recording at 07:00. First, Mr. Zimmerman addressed the provision in Tenn.R.Crim.P. (g)(5) when a judge, magistrate, or clerk did not make an original and two copies of the warrant, or did not endorse on the warrant the date and time of issuance or the name of the officer to which the warrant is issued. *See* Senate Judiciary Committee Recording at 07:24. Mr. Zimmerman specifically referred to "these errors" and specified that they are not caused by the police officer, but by the judge, the magistrate, or the clerk. *See* Senate Judiciary Committee Recording at 09:30. Mr. Zimmerman further testified that a "technical violation" by an officer would be when a search warrant is received by one officer but is served by another officer. *See* Senate Judiciary Committee Recording at 09:45. When asked by the Chair of the Senate Judiciary Committee to explain what was meant by an "omission" in the context of the proposed bill, Mr. Zimmerman

[2] A copy of the video recording of the referenced Senate Judiciary Committee hearing on April 27, 2011, is included in the Appendix to this Brief and cited as "Senate Judiciary Committee Recording."

testified that a clerical omission would occur when a judge failed to write the year on one of the copies of the search warrant." *See* Senate Judiciary Committee Recording at 13:33. There was absolutely no indication of any legislative intent to include the complete failure to deliver a copy of the search warrant or receipt to the defendant within the definition of "clerical omission."

The State has cited no authority that the officer's failure to provide a copy of the search warrant to Ms. Daniel at the time the search warrant was executed qualifies as a "clerical omission." To the contrary, a "clerical omission" has repeatedly been found where a word or phrase has been inadvertently left out of a document, as opposed to the complete failure to furnish the imperfect document. In *Eller v. Richardson*, 89 Tenn. 575, 15 S.W. 650, 651(Tenn.1891), this Court found that the failure of a justice of the peace to include in the caption of a deposition the county where the deposition occurred was a "clerical omission." Notably, the deposition had been filed and admitted as evidence. *Id.* In *Warder v. Millard*, 76 Tenn. 581 (1881), this Court found a "clerical omission" where a document contained a blank space following the word "five" and preceding "thirty-four," indicating a clerical omission of an additional number in the writing.

The legislature intended the relief provided by ERRA to be limited to those instances involving ***clerical*** errors and ***clerical*** omissions. The legislature could easily have included "delivery to the defendant" in its definition of unintentional clerical errors or omissions, but it chose not to. "Every word used is presumed to have meaning and purpose, and should be given full effect if so doing does not violate the obvious intention of the Legislature." *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). "Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the

same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject." *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn.2000).

Here, there was no clerical error or clerical omission. There was no accidental "a.m." inserted or "p.m." omitted. There was no printer malfunction that provided the defendant with substantially all of the search warrant, though not providing her with an "exact copy." There was no error caused by a neutral magistrate or judge. To the contrary, there was a complete failure by Officer Valentin to provide Ms. Daniel with any copy of the search warrant or a receipt for the property seized, as clearly required by Rule and the mandate contained in the search warrant itself. As of the date of the filing of this brief, the State has failed to deliver any receipt to Ms. Daniel.

The State requests that this Court expand the phrase "filing and handling of copies" to specifically include the delivery of the search warrant and receipt to the defendant, thereby relieving police from the requirement to follow simple, clear instructions of law. This is simply unwarranted. The Appellee avers that the statutory language in ERRA does not apply to the requisite delivery of a copy of the search warrant to the defendant. However, to the extent that any ambiguity exists regarding the definition of "filing and handling of copies," "in criminal cases, all ambiguities will be resolved in favor of the defendant." *State v. Denton*, 149 S.W. 3d 1, 17 (Tenn.2004), *citing State v. Rogers,* 992 S.W.2d 393, 400 (Tenn.1999). As such, any ambiguity in the definition of "filing and handling of copies" should not be used to expand the definition to benefit the State when its agent acts contrary to the law. Rather, ERRA should be strictly construed against the State and in favor of the defendant. The State's failure to cite any authority to justify its proposed expansive interpretation of "filing and handling of copies" is both telling and troubling, and the Appellee respectfully urges this Court to strictly construe the

terms of ERRA to avoid the wholesale abandonment of any requirement that an officer provide any copy of a search warrant to the person whose expectation of privacy is being invaded.

Tenn.R.Crim.P. 41(g)(6) requires that any evidence gathered under the guise of the illegally executed search warrant must be suppressed, and the judgment of the Court of Criminal Appeals upholding the trial court's order should be affirmed.

II. THE EXCLUSIONARY RULE REFORM ACT VIOLATES THE SEPARATION OF POWERS CLAUSE IN ARTICLE II OF THE TENNESSEE CONSTITUTION, RENDERING IT UNCONSTITUTIONAL.

Article II, § 2 of the Constitution of Tennessee specifically limits the power of each independent branch to interfere with any of the powers granted to the other branches: "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

This "separation of powers" doctrine is a fundamental principle of American constitutional government. *Town of South Carthage v. Barnett*, 840 S.W.2d 895, 897 (Tenn.1992)(internal citation omitted). The separation of powers requires that "...any exercise of that power (to enact rules) by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts. Only the Supreme Court has the inherent power to promulgate rules governing practice and procedure of the courts of this state." *State v. Mallard*, 40 S.W.3d 473, 480-81 (Tenn. 2001). "The authority of this [Tennessee Supreme] Court to make rules governing the practice of law is traditional, inherent and statutory. Such power is indispensable to the orderly administration of justice." *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn.1976).

The Supreme Court's inherent power "...exists by virtue of the establishment of a Court and not by largess of the legislature." *Haynes v. McKenzie Mem'l Hosp.*, 667 S.W.2d 497, 498 (Tenn.Ct App.1984)(perm.app.denied).

"Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary to engage in the complete performance of the judicial function, this power cannot be constitutionally exercised by any other branch of government." *Mallard* at 481.

> "The separation of powers doctrine, properly understood, imposes on the judicial branch not merely a negative duty not to interfere with the executive or legislative branches, but a positive responsibility to perform its own job efficiently. That positive aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial prerogatives."

Mallard at 482.

To summarize the Supreme Court's relative position regarding legislative interference with procedural rulemaking, "**the court is supreme in fact as well as in name.**" *Barger* at 341 (emphasis added).

As cited in the Appellant's brief, this Court has addressed the separation of powers in two cases involving legislative enactments that affected the admissibility of evidence that would otherwise be excluded pursuant to the Tennessee Rules of Evidence. However, the discussion and reasoning in both decisions strongly support the Appellee's position that because of the mandatory provisions of ERRA to override clearly established rules promulgated by the Tennessee Supreme Court, this legislation crosses the threshold into the realm reserved for the judiciary.

In *Mallard, supra*, this Court addressed the conflict between Tenn. Code Ann. § 39-17-424 and Tennessee Rule of Evidence 404(b). Tenn. Code Ann. § 39-17-424 provides a framework for the determination of a whether or not an object is illegal drug paraphernalia. Tenn. Code Ann.§ 39-17-424(2) requires the fact finder to consider prior drug-related convictions of a person in control of an object when determining whether the object was drug paraphernalia. This conflicts with the general provisions of Tenn.R.Evid. 404(b), which generally prohibits evidence of other crimes to prove action in conformity with a character trait. This Court ultimately determined that courts should give effect to the statute "in the interest of inter-branch comity. Because the legislature did not intend for the factors in section 39-17-424 to be absolute or preemptive, and because the legislature did not intend to remove the discretion of the trial judge to determine the logical or legal relevance of such evidence, the statute supplements the Rules of Evidence and should be permitted to operate to the fullest extent allowed by the Rules." *Id.* at 485. This is in stark contrast to the conflict here between the ERRA and Tenn.R.Crim.P. 41. The legislature clearly intended to preempt a court's ability to exclude evidence despite the requirements mandated by Tenn.R.Crim.P. 41(g). Likewise, ERRA attempts to remove all discretion from a court by mandating that evidence seized contrary to law but in good faith "shall not be suppressed as a result of any violation of this part or any violation of Tennessee Rules of Criminal Procedure Rule 41…" Unlike *Mallard*, the legislative intent in ERRA is not to "help supplement and guide the judicial process;" rather, it is to preclude this Court's ability to promulgate rules designed to protect the citizenry from law enforcement carelessness.

More recently, in *State v. McCoy*, 459 S.W.3d 1 (Tenn.2014), this Court considered a statute which permitted the admission into evidence of a forensic interview of a child victim in

the prosecution of child abuse, contrary to the general prohibition against hearsay evidence contained in Tenn.R.Evid. 802. This Court ultimately determined that the statute did not offend the separation of powers because Tennessee Rule of Evidence 802 itself "recognizes that sources of law outside of the Tennessee Rules of Evidence may develop such an exception" to the general rule excluding hearsay, in that the Rule provides that "hearsay is not admissible except as provided by these rules *or otherwise by law*." *Id.* at 10 (emphasis in original).

In *McCoy*, this Court also determined that the statute in question involving the hearsay exception "does not purport to overturn any evidentiary rule or any specific interpretation this Court has provided for such a rule." *Id.* Likewise, this Court found that the statute's key language used *permissive* instead of *mandatory* terms, providing that the video recordings "may be considered" at trial, and that the statute in question required the trial judge to make a determination of the reliability of the video-recorded statement. "While the statute mandates consideration of certain factors in making this determination, it also includes a catch-all provision, allowing the trial judge to take into account '[a]ny other factor deemed appropriate by the court.' For all of these reasons, section 24–7–123 does not constitute an impermissible overreach by the legislature into the judiciary's powers." *Id.* (internal citations omitted).

Notably, *McCoy* distinguished its holding from a case cited by that defendant in support of his separation of powers argument because the statute cited by the defendant ***required*** the admission of evidence, "clearly usurping the role of the court in promulgating rules of evidence…" as opposed to the statute at issue in *McCoy*, which merely permitted the court to consider admitting the hearsay evidence. *Id.*, (citing *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 806(1987)).

The discussion in *McCoy* supports the Appellee's position that ERRA is an improper encroachment by the legislature into the judiciary. Unlike Tennessee Rule of Evidence 802, Rule 41 of the Tennessee Rules of Criminal Procedure does not include a provision to admit illegal evidence "except as provided otherwise by law." To the contrary, the Rule specifically prohibits the admission of evidence obtained in violation of the Rule, going so far as to command that a motion to suppress "***shall*** be granted" if the evidence in support of the motion reveals that the search was not in compliance with the Rule. Tenn.R.Crim.P. 41(g)(6) (emphasis added).

Unlike the statute at issue in *McCoy*, which did not purport to overturn any specific rule or interpretation of any rule by the Supreme Court, ERRA purports to completely overturn Tenn.R.Crim.P. 41(g)(6) regarding suppression of evidence obtained in violation of the Rule, along with the numerous cases which have affirmed the suppression of evidence obtained in violation of the Rule.

Unlike the statute in *McCoy*, ERRA is not permissive but mandatory, prohibiting a court from suppressing illegally obtained evidence while stripping the court of any discretion as to the proper remedy for the state's violation. This complete prohibition of judicial discretion is much more in line with the case from Arizona distinguished in *McCoy*, and clearly usurps the role of the Supreme Court in promulgating rules of criminal procedure.

As a result, the enactment of the Exclusionary Rule Reform Act by the Tennessee legislature has caused the legislature to invade the exclusive power of the judicial branch of government. This Court is exclusively empowered to promulgate procedural rules. ERRA is an unconstitutional interference with the powers of this Court and should be held to be unconstitutional and of no effect. "The legislature can have no constitutional authority to enact

rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power." *Mallard*, at 483.

III. THE LIMITED GOOD FAITH EXCEPTION ADOPTED IN *STATE V. LEMARICUS DEVALL DAVIDSON*, NO. E2013-00394-SC-DDT-DD, 2016 WL 7339116 (TENN. DEC. 19, 2016) PERMITTING ADMISSION OF EVIDENCE RESULTING FROM A GOOD-FAITH FAILURE TO COMPLY WITH THE AFFIDAVIT REQUIREMENT SHOULD NOT BE EXPANDED TO INCLUDE TECHNICAL VIOLATIONS IN THE SERVICE OF THE SEARCH WARRANT RESULTING FROM THE CARELESSNESS AND INATTENTION OF LAW ENFORCEMENT OFFICERS.

In its order granting the State's application for permission to appeal, this Court instructed the parties to address whether or not the limited good faith exception adopted in *State v. Lemaricus Devall Davidson*, No. E2013-00394-SC-DDT-DD, 2016 WL 7339116 (Tenn. Dec. 19, 2016), permitting the admission of evidence obtained following a good faith failure to comply with the statutory search warrant affidavit requirements, should be expanded to include technical violations in the service of a search warrant.

As a former police officer, a former police sergeant, a former certified police academy law instructor, and a former Department Advocate[3], undersigned counsel responds most emphatically that this Court should NOT permit evidence obtained by police to be admitted when the officers have illegally and carelessly failed to execute a search warrant according to clear constitutional ***and*** statutory guidelines, regardless of any good faith claim.

[3] Undersigned counsel had the privilege of serving as a police officer and sergeant with the Metropolitan Nashville Police Department from 1998 until 2005. In addition to normal patrol officer and supervisory duties, undersigned counsel was honored to provide instruction and guidance to new recruits and seasoned officers in the areas of criminal procedure, search and seizure, and constitutional law. Undersigned counsel was also honored to serve as Department Advocate, representing the Police Department during disciplinary hearings against officers as a *de facto* prosecutor for violations of department policy.

A. Tennessee Should Continue To Provide Greater Protections to Its Citizens Than Those Minimum Protections Required By the Federal Government

The State draws the overwhelming majority of its argument for expanding Tennessee's good faith exception from the federal exclusionary rule. Although Article I, § 7 of the Tennessee Constitution has generally been interpreted consistently with the protections afforded by the Fourth Amendment to the United States Constitution, this Court has also consistently recognized distinctions that provide greater protection to our citizens. As this Court has stated, "...ordinarily the two constitutions should be construed alike where possible. Where, however, as in the particular phase of search and seizure law under consideration, there has been a settled development of state constitutional law which does not contravene the federal, we are not inclined to overrule earlier decisions unless they are demonstrably erroneous." *State v. Lakin*, 588 S.W.2d 544, 549 (Tenn.1979).

It is important to note three striking differences in the exclusionary rule under federal law and the settled development of the exclusionary rule pursuant to Article I, § 7 that protects Tennessee citizens.

(1) Since its inception, the Tennessee exclusionary rule has required suppression of evidence obtained not only in violation of the Tennessee Constitution, but for "technical" violations of Tennessee statutes and rules

In *Hughes v. State*, 145 Tenn. 544, 238 S.W. 588 (1922), this Court announced that evidence obtained through a constitutional violation should not be used to punish the citizen whose rights were violated.

> The state, having through its executive representatives produced the evidence of a violation of the law by one of its citizens by means prohibited by the Constitution, cannot be permitted through its judicial tribunal to utilize the wrong thus

> committed against the citizen to punish the citizen for his wrong; for it was only by violating his constitutionally protected rights that his wrong has been discovered. It is no answer to say that it matters not how a citizen's sins have been found out. Security from unlawful search is the right guaranteed to the citizen, even for the discovery of the citizen's sins. This right we must protect, unless we may with impunity disregard our oath to support and enforce the Constitution. The experience of our forefathers with unlawful searches and seizures was deemed by the people who framed the Constitution sufficient to warrant the provision by which in instances even the guilty might escape detection and punishment. We are not to be understood as holding that all evidence obtained by unlawful means is inadmissible, but only where in cases such as we have here the evidence offered has been produced by violating the constitutional protection against unlawful searches and seizures.

Hughes at 594. Shortly thereafter, this Court explained that the exclusionary rule demanded the exclusion of evidence based not only on constitutional violations by the police, but also on violations by the police of state statutes. In *Hampton v. State*, 148 Tenn. 155, 252 S.W. 1007 (1923), the officers failed to comply with the statutory requirements of a search warrant, and this Court made specific note of the requirement that searches must comply with constitutional ***and statutory*** requirements in order for the resulting evidence to be admissible:

> To protect not one man's home, but all men's homes, from unlawful intrusion by public officers it was ordained in article 1, § 7, of the Constitution:
>
> > "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not be granted."
>
> The Legislature directing procedure under this constitutional provision enacted the statutes embodied in Shannon's Code as follows:
>
> > "7297. No search warrant can be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and place to be searched.
> > 7298. The magistrate shall, before issuing the warrant, examine on oath the complainant and any witness he may produce, and take

> their affidavits in writing, and cause them to be subscribed by the persons making them.
> 7299. The affidavit shall set forth the facts tending to establish the grounds of the application, or probable cause for believing they exist.
> 7300. If the magistrate is satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him, to any lawful officer, commanding him forthwith to search the person or place named for the property specified, and to bring it before him."
>
> Thus do our laws prescribe the procedure through which officers may search suspected persons and places, and seize things. There is no writ more calculated to be abused in its use than the search warrant, for with it any home may be entered and the inmates disturbed, humiliated, and degraded. To prevent such a possibility from false informants made to officers inspired by overzeal, or acting from expediency, or obeying the command uttered by a mob impulse, the provisions of the Constitution ***and statutes*** found force and command observance.
>
> The officers acting in this case did so ***in good faith***, but, through ***carelessness*** of the justice of the peace, ***or by oversight***, the evidence presented by the affidavit omits some of the essential requirements of the statute, and the warrant omits most of them.
>
> ***It is uniformly held that the search warrant must conform to both the constitutional and statutory requirements***.
>
> The requirements of the Constitution ***and the statutes we have quoted*** are not difficult. It would be easy to comply with them, and compliance would result in protecting the innocent from unlawful search, and authorize the use of evidence obtained through lawful search against the guilty.

Hampton at 1008 (internal citations omitted)(emphasis added). This Court specifically noted that the officers acted in good faith, but due to carelessness or oversight, the search warrant did not comply with the statutory requirements, and the evidence was suppressed.

Since *Hampton*, compliance with both constitutional and statutory requirements in the execution of search warrants has consistently been required for the resulting evidence to be admissible in Tennessee criminal prosecutions.

Importantly, federal courts have consistently limited the suppression of evidence pursuant to the exclusionary rule to instances of constitutional violations and not violations of federal statute or procedural rule. "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was ***unconstitutional under the Fourth Amendment***." *United States v. Leon*, 468 U.S. 897, 919, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677 (1984)(internal citation omitted)(emphasis added).

Notably, Tennessee developed its exclusionary rule formula under our state constitution, statutes, and rules beginning in 1922, long before the federal government saw fit to extend any protection from the admission of illegally obtained evidence to state prosecutions through *Mapp v. Ohio*, 367 U.S. 643, 644, 81 S. Ct. 1684, 1685, 6 L. Ed. 2d 1081 (1961).

(2) Tenn.R.Crim.P. 41(g) specifically requires the suppression of evidence following certain "technical" illegal actions by police, whereas the corresponding federal rule does not

The consistent application of the exclusionary rule in Tennessee courts based on "technical" violations of the Tennessee statutes and Tennessee Rules of Criminal Procedure regarding search warrants is in contrast to the federal application of the exclusionary rule. It should be noted that unlike Tenn.R.Crim.P. 41(g), Federal Rule of Criminal Procedure 41 does not contain any provision that provides for the suppression of evidence obtained in violation of that Federal Rule. In fact, while Fed.R.Crim.P. 41(g) provides that a person aggrieved by an illegal search may move for the property's return, it specifically provides that when a court grants the motion and returns property to the person, the court "may impose reasonable

conditions to protect access to the property and its use in later proceedings." This clearly contemplates that the requirements of Fed.R.Crim.P. 41 are intended to be ministerial, and property seized in violation of these ministerial rules may later be used as evidence.

This is in contrast to the clear legislative intent and long-standing jurisprudential history of Tenn.R.Crim.P. 41 and its predecessors, which specifically require the exclusion of evidence obtained in violation of the specific requirements of that rule. By the very language of the rule, as repeatedly enforced by the courts of this State, the specific requirements are not "ministerial" under Tennessee law, but are prerequisites to the admission of evidence obtained through a legal search warrant.

(3)The federal exclusionary rule focuses on deterring intentional abuse, while the Tennessee exclusionary rule seeks to deter both intentional malfeasance and carelessness

While federal jurisprudence generally focuses on intentional malfeasance of officers, this Court has appropriately and repeatedly affirmed the exclusion of evidence based on the ***careless*** disregard of the clear provisions of Tenn.R.Crim.P. 41. In affirming the application of the predecessor statute upon which Tenn.R.Crim.P. 41 was based, this Court specified that the exclusion of evidence was necessary to protect citizens from both carelessness and abuse by the police, to wit: "[t]his statute was within the constitutional power of the Legislature, and it seems a reasonable and valid legislative declaration designed to supplement the provisions of our Constitution and of our statutes protecting citizens against unreasonable searches and seizures. Its intent no doubt was to secure the citizen against ***carelessness and abuse*** in the issuance and execution of search warrants. *Talley, at* 278 (emphasis added).

The requirement for officers to use due care when invading fundamental constitutional rights is certainly nothing new. With current technology, through which officers can utilize a pre-drafted form and obtain a search warrant in mere minutes, it is not too much to ask that officers are required to do so with reasonable care and precision. In fact, technological advancement has been cited by this Court as further justification to hold officers to the letter of the law. "The use of printed forms has made the procurement of a search warrant the merest formality, considering the fundamental constitutional right which the search invades. Certainly, this Court can do no less than to require that the few blank spaces be filled in, ***and the other details of the formality be carried out with care and precision***." *Everett v. State*, 182 Tenn. 22, 28, 184 S.W.2d 43, 45 (1944)(emphasis added). With the advancement in technology since *Everett* was decided during the height of World War II, to the point of now having mobile computers in patrol cars, surely this Court's pronouncement in *Everett* is more appropriate than ever before.

"Words could not be plainer, and [the procedural safeguards against abuse] are mandatory." *State v. Coffee*, 54 S.W.3d 231, 234 (Tenn. 2001)(citing *Talley* at 869).

B. The Exclusionary Rule Should Continue to Deter Tennessee Police Officers From Acting Carelessly Or Abusively

The pronouncements in *Hughes*, *Hampton*, *Everett*, *Talley*, and the host of other decisions upholding the enforcement of Tennessee's exclusionary rule provide an excellent academic discussion of the absolutely essential need to demand that officers are held to a high standard of care when they wield the sword of the state to invade a citizen's constitutional rights. As a former law enforcement professional, undersigned counsel will be the first to aver that 99%

of police officers are good and noble persons who risk their lives on a daily basis to protect the citizens from the wolves who would do us harm. And yet from a practical perspective, there is no question that police misconduct, which includes intentional abuse *and* unintentional "good faith" carelessness, must be deterred and cannot be rewarded.

In *Talley*, this Court affirmed that there is no writ more subject to being abused than the search warrant because with it, "any home may be entered and the inmates disturbed, humiliated, and degraded." *Talley* at 345. In cases like the one before this Court, the writ was exponentially more invasive, as it compelled invasion of Ms. Daniel's body and the removal of her life blood. Of practical importance are two specific references in *Talley*. First, the requirements of the rules and statutes pertaining to the execution of search warrants must be followed to protect citizens from "officers inspired by overzeal, or acting from expediency..." As a person who has been charged with enforcing the laws in a major metropolitan area, undersigned counsel has seen first hand how good, noble officers must constantly fight the urge to act with overzeal or expediency. The current exclusionary rule serves as an excellent deterrent in this regard. As the law currently stands, officers are trained that if they make a careless mistake, any evidence obtained cannot be used against the person whom they wish to prosecute. They are trained that if they search a vehicle illegally and find the body of a child that has been kidnapped and murdered, that evidence cannot be used against the defendant – not because of a "technicality," but because the officer broke the law. The degree to which the current exclusionary rule deters carelessness and encourages a conscientious officer to respect constitutional, statutory, and procedural safeguards cannot be overstated.

Expanding the good faith exception announced in *Davidson* to include "technical" violations in the execution of a search warrant will be an announcement that officers may act

carelessly without recourse, as evidence will be admissible despite their carelessness. Officers who might otherwise act with due care and resist the temptation to act overzealously or expediently will no longer have the threat of endangering the prosecutions they so zealously wish to pursue.

Finally, from a practical perspective, a procedural safeguard that does not have a corresponding appropriate enforcement mechanism provides no protection and fails to deter careless or abusive conduct. A glaring example of this occurs with regularity when undersigned counsel seeks to obtain a copy of an affidavit submitted by a police officer to obtain a search warrant. This Court has determined that the "exact copy" provision of Tenn.R.Crim.P. 41(c) at issue in this case does not include a copy of the affidavit submitted in support of the search warrant. *State v. Davis*, 185 S.W.3d 338 (Tenn.2006). As such, there has been no enforcement mechanism to ensure that the State files a copy of the affidavit with the clerk or otherwise provides a copy of the affidavit to the defense, even when an arrest based on the search warrant is pending in general sessions court. In *State v. Boyd*, No. W2003-02444-CCA-R9CD, 2004 WL 541128 (Tenn.Crim.App.Mar.17,2004)(no perm. app.), the Court of Criminal Appeals affirmed an order of the trial court which required the state to provide a copy of the search warrant affidavit to the defense prior to the preliminary hearing in general sessions court, finding that Tenn.R.Crim.P. 5.1 compelled the disclosure of the affidavit to the defense prior to the preliminary hearing because it was necessary for the defense to have access to the affidavit in order to appropriately challenge the legality of a search warrant during the preliminary hearing. However, because this right to the affidavit stems from Tenn.R.Crim.P. 5.1, which has no practical enforcement mechanism such as suppression of evidence, neither officers nor prosecutors are inclined to follow this rule. In fact, undersigned counsel has appeared in general

sessions court for preliminary hearings on numerous different cases in various jurisdictions and been refused a copy of the search warrant affidavit in an effort to defy the requirement of Tenn.R.Crim.P. 5.1 and retain an unfair advantage over the defendant. Most often, the affidavit has never been filed and is being held by the prosecuting officer. On one occasion, the affidavit had been filed, and the assistant district attorney removed the filed affidavit from the court file in an effort to prevent the defense from reviewing the affidavit prior to the preliminary hearing. While certainly not controlling authority, this is an example of the need for an enforcement mechanism to ensure that the rules designed to protect defendants from overzealous and expedient prosecution. Were the refusal to provide a copy of the search warrant affidavit pursuant to Tenn.R.Crim.P. 5.1 to result in suppression of the evidence, there is little doubt that officers and prosecuting attorneys would comply with the rule.

The State seeks to impose a requirement that before evidence can be suppressed, a defendant must make a showing of actual prejudice to the defendant or bad faith by the officer. Brief of Appellant, p. 19. This is ill advised, as the need for deterrence for "careless" mistakes is just as necessary as the deterrence for bad faith on the part of the officer. The officer's subjective intent behind his or her illegal act is not the issue. The issue is the officer's failure, either through ill will or carelessness, to follow the law. The State's suggestion that an officer's failure to follow the law was due to carelessness as opposed to bad faith does not change the fact that an officer has violated the law and obtained evidence, and the state seeks to use this illegally obtained evidence in its case in chief.

Unfortunately, police have an extremely difficult job. However, they must be required to exercise due care when enforcing the law, which includes the requirement that they, themselves, follow the law when they enforce the law. Expansion of the good faith exception to the

exclusionary rule encourages and rewards carelessness. As stated by President Theodore Roosevelt, "[n]o man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor." This must first apply to officers in the performance of their duties.

When officers act carelessly in the execution of search warrants, people can die. In 2000, officers with the Lebanon Police Department executed a search warrant at a private residence at 10:00 p.m. at night. Through carelessness, they served the search warrant at the wrong address. The elderly resident, John Adams, who was not involved in any criminal activity, reacted when his door was kicked in by numerous masked men, all clad in black. He grabbed his own weapon to defend himself and was subsequently shot and killed by the officers who had mistakenly and carelessly committed a "technical" error in the execution of the search warrant. Under the exclusionary rule in effect at the time, any evidence obtained would have been suppressed due to the technical violation. Yet the officers still acted carelessly, and a man died. Fortunately, that is a rare occurrence. The Defendant respectfully requests that Tennessee not be placed in a position to learn how many more similar tragedies may arise should the current deterrence for carelessness by police in the execution of a search warrant be removed through the further expansion of a good faith exception to the exclusionary rule.

CONCLUSION

The judgment of the Court of Criminal Appeals should be affirmed.

Respectfully submitted,

By: _____

David H. Veile, BPR#023941
SCHELL & OGLESBY, LLC
509 New Highway 96 West, Suite 201
Franklin, Tennessee 37064
(615)550-2800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been sent, via First Class U.S. Mail, postage prepaid, to:

Leslie Price
Senior Counsel
Criminal Appeals Division
P.O. Box 20207
Nashville, Tennessee 37202

This 16 day of March, 2017.

_____

David H. Veile