The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 41 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 questionnaire. 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 word processing 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 word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

County Attorney for Shelby County Government.

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

October 1998 – BPR No. 19366.

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 – 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).

Office of the Tennessee Attorney General:

August 1998 – December 2001 – Assistant Attorney General – Criminal Justice Division

- Handled Criminal Appeals before the Court of Criminal Appeals and Supreme Court; Federal Habeas Corpus Challenges before the Federal District and Appellate Courts; Advising District Attorneys General; Preparing Formal and Informal Attorney General Opinions.

December 2001 – May 2004 – Team Leader for Western Grand Division – Criminal Justice Division

- Same as above with the added responsibility of mentoring new

attorneys. Also, supervising the attorneys assigned to handle matters arising out of the Western Grand Division. Responsibilities included assigning cases, reviewing briefs, sitting as a judge on moot court panels and yearly evaluations.

May 2004 – November 2014 – Manager/Supervisor – Memphis Office

- Responsible for running the Memphis office and coordinating with Nashville concerning litigation in Shelby and the surrounding counties. I continue to handle heavy criminal appellate caseload; however, I now have a percentage of my practice relating to civil litigation.

July 2007 – Named Senior Counsel.

Shelby County Government:

December 2014 – Present – County Attorney for Shelby County

- Chief Counsel to Shelby County Government and legal advisor to the county mayor, the county commission, other elected county officials, as well as all departments, divisions, and offices of county government. Other responsibilities include providing oversight to the county's divorce referees and claims department; approving the form of county contracts; representing Shelby County in all lawsuits; drafting and reviewing all ordinances, resolutions, and state legislation applicable to Shelby County Government. Additionally, the County Attorney currently serves as the County's point person charged with resolving a Memorandum of Understanding with the Department of Justice to improve the Juvenile Justice system in Shelby County.

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.

As County Attorney, my law practice consists of representing the interest of Shelby County in a variety of areas. My office represents 40 plus elected officials and various County agencies and departments in both State and Federal Court in civil rights actions, tort claims, employment matters, tax issues, and various other matters. I am also called upon to provide both formal and informal opinions to County officials upon request.

In addition to these areas, I am currently charged with helping Shelby County navigate its way through a Memorandum of Agreement with the Department of Justice relating to the Juvenile Court of Memphis and Shelby County. Per the memorandum, the County is tasked with addressing the administration of juvenile justice for children facing delinquency charges before the Court and the conditions of confinement of children at the detention center now being operated by the Shelby County Sheriff's Office. In order to meet the terms of the memorandum, the County and must, implement policies and procedures to ensure that juvenile offenders' due process rights are secured, that they are provided with zealous and ethical advocates, and that those who remain in detention are protected from harm and provided with services needed to increase the chances of rehabilitation. In order to bring the County into substantial compliance under the Memorandum, I must provide advice to the Shelby County Sheriff's Department, the Shelby County Public Defender's Office, and the Juvenile Court for Memphis and Shelby County.

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.

County Attorney:

As County Attorney, I am charged with managing an office that consists of 22 attorneys and 10 support staff. The County Attorney is the Chief Legal Officer for Shelby County and is charged with representing all County employees (elected and

non-elected), offices, and departments in all litigation in both state and federal court. While not directly litigating each matter, as county attorney I am involved at some level in every case. In addition to managing and supervising all the County's litigation matters, I am personally involved as counsel of record in several matters. Aside from litigation, I am also charged with providing legal advice to the County's elected officials, offices, and departments. This advice ranges from daily matters to litigation strategy and comes in the form of oral communication to formal written opinions.

Experience in Nashville with the Attorney General's Office:

As a team leader in the Criminal Justice Division, I directly supervised three attorneys who handled cases primarily in the Court of Criminal Appeals. My supervisory responsibilities included assigning cases, monitoring case management, reviewing briefs and pleadings, sitting as a judge on moot court panels, supervising oral arguments, and responding to questions concerning appellate practice and criminal law. In addition to those under my direct supervision, myself and the two other team leaders were responsible for training new attorneys in appellate practice and procedure, emphasizing oral advocacy, brief writing, and legal research.

In addition to those duties, I also maintained a heavy caseload. Including my time in Nashville and now in Memphis, I have handled well over 800 cases in the Tennessee Court of Criminal Appeals and more than 25 cases in the Tennessee Supreme Court. I have also handled cases in the United States Court of Appeals for the Sixth Circuit and the Tennessee Court of Appeals. I have researched and briefed just about every criminal law issue imaginable. As a Team Leader in Nashville and now as Senior Counsel in the Memphis office, I am often called upon to handle the high profile and complex cases.

I handle habeas corpus cases in the state trial and U. S. district courts.

I provided legal advice to District Attorneys General and their assistants. While in Nashville, I was the main contact for prosecutors in western Tennessee who wanted an appeal perfected on behalf of the State of Tennessee or when they needed assistance prior to or during trial. I also provided legal assistance when the constitutionality of a statute is challenged.

I also wrote formal and informal opinions for legislators, District Attorneys General, Public Defenders, Judges, and Justices of the state supreme court. These opinions have addressed questions of constitutional law and statutory interpretation and have addressed a wide array of topics.

Experience in Memphis with the Attorney General's Office:

In taking on the position of Managing the Memphis office, my duties changed some. In addition to the day to day operations of the Memphis office, I was responsible for working with all the divisions of the Nashville office and assisting in their litigation in state trial and federal district courts in Memphis and West Tennessee. The degree of assistance ranged from acting as local or co-counsel to taking on the litigation as lead counsel.

As the supervising attorney for the Memphis office and Senior Counsel, I was routinely called upon to help other divisions with their high profile and complex litigation in West Tennessee. For example, I was asked by the Attorney General to serve as counsel in the federal lawsuit concerning the consolidation of the Memphis City and Shelby County schools systems.

In addition to the new duties required by this position, I also continued to maintain a heavy criminal appellate caseload and many, if not all, of the responsibilities I had while working in the Nashville office.

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

Trial Court Matters:

Shelby County Board of Education v. Memphis City School Board, et al.
February 2011 – August 2011
Federal District Court for the Western District of Tennessee at Memphis
Case was settled

I was one of three attorneys appointed by the Attorney General to defendant the constitutionality of a recently passed statute. The basis of the dispute centered on the City of Memphis's decision to surrender it charter to run a school system. By surrendering its charter, the City of Memphis relinquished its right to run a school system within the city and, in effect, placing the responsibility of educating all the children of Shelby County upon the Shelby County government and the Shelby County Board of education. As a result of the City's actions, the Shelby County School system would have increased from 40,000 students to over 140,000 students.

Prior to the City's surrender of its charter, the State legislature passed a bill that would require a two year waiting period before the consolidation of the school system. As part of the lawsuit, several of the named defendant's challenged the constitutionality of the recently passed legislation.

Once the District Court determined that the statute was constitutional and applicable to the matter, the parties were able to reach a settlement agreement.

Mike Dunavant, District Attorney General for the 25th Judicial District v. Fayette County General Sessions Court and Judge Mike Whittaker, in his official capacity only.
July 2007 – January 2008
Circuit Court for Fayette County
Case was settled in Mediation

I was appointed by the Attorney General to represent District Attorney General Mike Dunavant in his dispute with the General Sessions Court of Fayette County and Judge Mike Whittaker. The basis of the dispute was that Judge Whittaker issued several orders concerning the number of charges the State could file in one case and that released prisoners on their own recognizance without notifying the District Attorney and/or the victims. The main issue in the case boiled down to whether or not the Judge's orders infringed upon the statutory and constitutional duties and rights of the District Attorney General.

With the aid of mediation, the parties were able to determine the true nature for Judge Whittaker's complaints and actions and, thus, reach a resolution that was favorable and agreeable to all parties.

In The Matter of: Braxton Korvacea Moore
November 2006 – March 2007
Shelby County Circuit Court – Division IV

The named juvenile was found to have committed seven aggravated assaults, was declared delinquent, and placed in the custody of the Department of Children's Services (DCS). DCS placed the child in the Wilder Youth Facility so that he could receive the counseling and educational tools he needed.

Mother of the minor sued DCS, Wilder Youth Facility, Shelby County Juvenile Court, and the Juvenile Court Judge for Shelby County claiming that the parties had violated the child's rights. The mother wanted the entire juvenile court proceeding declared void and the child returned to her custody.

After being designated as lead counsel by the Attorney General's office, the Shelby County Attorney's Office and the Shelby County District Attorney's office, I argued that it was in the best interest of the child to remain at Wilder Youth Facility so that he could receive the treatment he needed. We also argued that should the mother prevail and the juvenile matter be voided then the juvenile would likely be transferred to criminal court and tried as an adult. Under that scenario, the juvenile was facing a sentence of over 90 years.

This matter was significant in that one of the main questions was whether the mother had a remedy in the Circuit Court due to the fact that she and the child, with the aid of counsel, had agreed to this "settlement" in juvenile court.

Criminal Courts of Shelby County v. Mark Luttrell, Jr., Sheriff of Shelby County
September 2005 – October 2006
Shelby County Criminal Court and the Tennessee Court of Criminal Appeals

I was appointed by the Attorney General to represent the judges of the Shelby County Criminal Court in their dispute with the Shelby County Sheriff concerning courtroom security. The basis of the dispute was that the Sheriff planned to replace the current full-time deputies who provided courtroom security with part-time deputies. The main issue in the case boiled down to who was in charge of courtroom security.

The Shelby County Attorney's office and I were able to reach a resolution that was agreeable to all parties without major litigation.

Appellate Court Matters:

***State v. Jackson,* 444 S.W.3d 554 (Tenn. 2014)**

The defendant was charged with the June 2005 first degree premeditated murder of her mother. The jury convicted her of second degree murder after a trial in which the evidence was entirely circumstantial. The Court of Criminal Appeals affirmed her conviction and sentence, although the judges on the Panel were not unanimous as to the rationale for the decision. The Supreme Court granted the defendant's application to appeal in order to resolve, among many, three main issues: 1) whether the prosecution had improperly commented on the defendant's right to remain silent; 2) whether the prosecution's failure to produce a witness's statement was harmless error; and 3) whether the defendant had created an attorney/client relationship with a family friend who happened to be an attorney. In reversing the defendant's conviction and granting her a new trial, the Court held that the lead prosecutor's remark during final closing argument at trial amounted to a constitutionally impermissible comment upon the defendant's exercise of her state and federal constitutional right to remain silent and not testify. The Court also held that the prosecution violated the defendant's constitutional right to due process by failing to turn over until after trial the third statement a key witness gave to law enforcement officers investigating the murder, and that the State had failed to establish that these constitutional errors were harmless beyond a reasonable doubt. Concerning the attorney/client issue, the Court determined that the defendant had failed to establish that relationship simply by talking to a family friend who happened to be an attorney.

***Johnson v. State,* 370 S.W.3d 694 (Tenn. Crim. App. 2011)**

After affirmance of his conviction for first-degree felony murder, the defendant petitioned for writ of error coram nobis claiming there was newly discovered evidence of a close relationship between a prosecution witness and gang prostitute undermined the evidence and strengthened his defense that the murder was

committed by someone else. On appeal, the Court determined that, while that relationship alone did not entitled the defendant to a new trial, when viewed in light of the entire record that testimony may have resulted in a different judgment had it been introduced at trial.

***State v. Johnson*, 366 S.W.3d 150 (Tenn. Crim. App. 2011)**

The defendant in this matter was convicted of aggravated robbery. On appeal, the question before the Court was whether the violence committed by the defendant, by way of displaying a knife to a store employee who was blocking the front door, was concomitant or contemporaneous with the taking of the bleach and children's clothes, as necessary to support a conviction for aggravated robbery. In comparing and distinguishing the facts of this case with prior precedent, the Court determined that the violence displayed by the defendant was contemporaneous with the taking, mainly in part to the fact that the defendant did not attempt to conceal the items, and, therefore, affirmed the conviction.

***Freshwater v. State*, 354 S.W.3d 746 (Tenn. Crim. App. 2011)**

The petitioner in this matter escaped from prison shortly after her conviction was affirmed. She remained at large for 32 years. Upon her capture and return to Tennessee, she filed a petition for writ of error coram nobis claiming that the State failed to provide evidence that was exculpatory in nature. This was the petitioner's third appeal from the denial of that petition. The main issue in this appeal was whether the State withheld from the petitioner's counsel the statement of Johnny Box that the petitioner's co-defendant told him that he had been the lone shooter of the victim, which, had it been revealed to her counsel, more probably than not, according to the petitioner, would have resulted in a different judgment. In granting the defendant a new trial, the Court of Criminal Appeals determined that that, had the jury known that State's witness Johnny Box had made a statement that Glenn Nash had confessed to being the sole shooter, "there is a reasonable probability" that this evidence may have resulted in a different judgment.

***State v. Garrett*, 331 S.W.3d 392 (Tenn. 2011)**

This case was taken by our Supreme Court to clarify the proper procedure to be used when a defendant request a severance of indictments pursuant to Tenn. R. Crim. P. 14. The Court found, as the State had conceded, that the trial court had failed to follow the Rules of Criminal Procedure in consolidating the matters for trial. In reaching this conclusion, the Court gave an in depth refresher on the procedures attorneys and judges must follow when determining whether indictments should be consolidated or severed for trial. Also of note, while not finding an ethical violation in the instant matter, the Court noted that attorneys have an ethical duty to ensure that the rules of court are followed.

***Ward v. State*, 315 S.W.3d 461 (Tenn. 2010)**

This case was taken by our Supreme Court to analyze for the first time whether Tennessee's Sexual Offender Registry Requirement and Lifetime Supervision Requirement were punitive in nature and, thus, a direct versus a collateral consequences of a guilty plea. The Court, siding with a majority of jurisdictions, concluded that the registration requirements imposed by the sex offender registration act were non-punitive and, therefore, a collateral consequence of a guilty plea. However, the Court also held that the mandatory sentence of lifetime supervision is a direct and punitive consequence of a guilty plea and, thus, trial courts have an affirmative duty to ensure that a defendant is informed and aware of the requirements prior to accepting a guilty plea.

***State v. Brown*, 311 S.W.3d 422 (Tenn. 2010)**

This case was taken by our Supreme Court to review, among other issues, whether the defendant was entitled to jury instructions on the offenses of second degree murder, reckless homicide and criminally negligent homicide as lesser-included offenses of felony murder. After reiterating the importance of charging a lesser-included offense and noting that such a practice benefits both the prosecution and the defense, the Court determined that the trial court erred in failing to instruct the jury as to the lesser-included offenses of felony murder and concluded that such error was harmful and warranted reversal.

***State v. Hatcher*, 310 S.W. 3d 788 (Tenn. 2010)**

Our Supreme Court took this matter to resolve, among other issues, the differing interpretations of Tennessee Rule of Criminal Procedure 33 relating to the filing and hearing of a motion for new trial. The Court interpreted the rule to direct trial courts not to hold any hearing on a motion for new trial until a reasonable time after the sentencing hearing has been held, sentence has been imposed, and the judgment order entered. If the defense files a timely motion for new trial, the trial court should allow ample opportunity to amend prior to holding a hearing. However, once a hearing on the motion for new trial has been heard and an order denying has been entered, motions to make additional amendments must be denied.

***State v. Swift*, 308 S.W.3d 827 (Tenn. 2010)**

Our Supreme Court granted the defendant's appeal to clarify whether the location of the use of violence or fear is relevant in distinguishing theft from robbery. Based on the statutory language, the Court held that the temporal proximity between the taking of property and the use of violence or fear is the sole relevant factor in distinguishing the two crimes.

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

The defendant in this matter was convicted of misdemeanor escape. At trial, the trial court denied the defendant's request to call an expert for the purpose of showing the he lacked the ability to form the required mental state for the offense. The Court of Criminal Appeals affirmed the conviction and held that the proffered testimony regarding "intent" was not relevant to the crime with which the defendant was charged and would not have benefitted him. Our Supreme Court reversed the lower courts and held that the lower courts had improperly limited its prior decisions by distinguishing between specific and general intent.

***Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008)**

In the appeal from the denial of a post-conviction petition, our Supreme Court determined that the trial court erred in striking as hearsay the testimony of witnesses presented at the hearing and in failing to assess their credibility and the potential effect of their testimony on the outcome of the petitioner's trial. Therefore, the Court remanded the matter to the trial court for a new hearing on the petition.

***Allen v. Carlton*, No. 05-5829 (6th Cir. May 24, 2007)**

Petitioner filed a petition for habeas corpus in the Federal District Court. After the District Court denied petitioner's claims, he appealed to the 6th Circuit which accepted the case on one issue concerning an erroneous jury instruction. In affirming the District Court's ruling, the appellate court recited Supreme Court precedent stating that a jury instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. After conducting a harmless error analysis, the 6th Circuit determined that the evidence supporting the defendant's felony murder conviction was overwhelming and affirmed the District Court's findings.

***State v. Maclin*, 183 S.W.3d 335 (Tenn. 2006)**

This was our Supreme Court's first case analyzing the recent U.S. Supreme Court case of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) regarding a defendant's 6th Amendment right to confront the witnesses against him.

***State v. Lawrence*, 154 S.W.3d 71 (Tenn. 2005)**

This case was taken by our Supreme Court to review, among other issues, whether the failure to bring a defendant before a magistrate for a judicial determination of probable cause within a constitutionally reasonable time necessitates the suppression of evidence. The Court determined that the trial court properly denied the suppression motion since the evidence was obtained prior to the detention exceeding forty-eight hours in duration.

***Freshwater v. State*, 160 S.W.3d 548 (Tenn. Crim. App. Sept. 1, 2004)**

The defendant in this matter escaped from prison shortly after her conviction was affirmed. She remained at large for 32 years. Upon her capture and return to Tennessee, she filed a petition for writ of error coram nobis claiming that the State failed to provide evidence that was exculpatory in nature. The trial court summarily dismissed the petition claiming it was barred by the one year statute of limitations. On appeal, the Court of Criminal Appeals reversed the trial court finding that due process allowed for the tolling of the statute and remanded the case for a determination of whether the defendant's newly discovered evidence may have resulted in different judgment and whether she was without fault in failing to discover and present the evidence at the appropriate time.

***State v. Butler*, 108 S.W.3d 845 (Tenn. 2003)**

The defendant was convicted of DUI when he was found in a Wal-Mart parking about 100 yards from his motorcycle carrying a sparkplug and a sparkplug wrench. Our Supreme Court took this case to determine whether the facts supported a finding that the defendant was in physical control of his motorcycle under Tenn. Code Ann. § 55-10-401(a). In finding the evidence sufficient to support the conviction, the Court adopted the reasonably capable of being rendered operable standard in cases where a defendant contests the element of physical control based upon alleged inoperability of the vehicle.

***State v. Cothran*, 115 S.W.3d 513 (Tenn. Crim. App. Feb. 14, 2003)**

Court ruled that defendants did not have standing to challenge the search of the car of a co-defendant. Court also reviewed *Terry* stops and plain view and inevitable discovery doctrines.

***State v. Jackson*, 60 S.W.3d 738 (Tenn. 2001)**

This was a case of first impression in which our Supreme Court determined that a defendant's history of being placed on juvenile probation allowed use of the enhancement factor that defendant had a history of unwillingness to comply with s sentence involving release in the community.

***State v. Dean*, 76 S.W.3d 352 (Tenn. Crim. App. Sept. 28, 2001)**

Court of Criminal Appeals determined that a confession given while illegally incarcerated was subject to suppression under the Fourth Amendment, but not under Tenn. R. Crim. P. 5(a). The Court also determined that because the defendant's bodily fluids were obtained pursuant to a valid search warrant it they were neither the fruit of, nor tainted by, the illegal detention.

***State v. Clever*, 70 S.W.3d 771 (Tenn. Crim. App. Sept. 14, 2001)**

Court of Criminal Appeals determined that the Tenn. Code Ann. § 55-10-403(a)(3) providing for enhanced punishment for driving under the influence for a defendant with prior driving under the influence conviction(s) was not void for vagueness and did not violate ex post facto prohibitions as to a defendant who had pled guilty to the prior driving under the influence conviction before the enactment of the statute.

***State v. Lipford*, 67 S.W.3d 79 (Tenn. Crim. App. July 27, 2001)**

Court of Criminal Appeals determined that the Tennessee Supreme Court has the authority by rule to prohibit a full-time municipal judge from representing a defendant or otherwise practicing law after 180 days from assuming judicial office.

***State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001).**

Our Supreme Court took this case to determine whether Tenn. Code Ann. § 39-17-424 requires admission into evidence of a defendant's prior convictions relating to controlled substances, even when Tenn. R. Evid. 404(b) would otherwise render such evidence admissible. The Court held that the legislature did not intend for section 39-17-424 to operate without regard to the Rules of Evidence and, thus, found that the trial court erred in admitting the evidence of the defendant's prior convictions.

***State v. Thompson*, 88 S.W.3d 611 (Tenn. Crim. App. 2000)**

Court of Criminal Appeals held that under Tennessee's statutory requirements, a nonresident whose Tennessee privilege to drive has been suspended is not extended the privilege to drive in Tennessee until the period of suspension has expired and the nonresident has complied with the reinstatement procedures even though he is in possession of a valid driver license issued by his state of residence.

***State v. Beauregard*, 32 S.W.3d 681 (Tenn. 2000)**

Supreme Court held that, under *State v. Denton*, 938 S.W.2d 373 (Tenn. 1996), the defendant's convictions for incest and rape did not violate double jeopardy principles under the United States Constitution or article I, section 10 of the Tennessee Constitution. The Court also concluded that the convictions did not violate due process under the United States Constitution or article I, section 8 of the Tennessee Constitution.

***State v. Lindsey*, 1999 WL 1095679 (Tenn. Crim. App. Oct. 28, 1999)**

Court of Criminal Appeals affirmed a defendant's murder conviction despite the fact that the State was not able to locate or produce the body of the victim.

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.

Not Applicable.

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

For the past 10 years, I have served on the Board of Directors for Christ Community Health Services. As a board, we have a fiduciary duty to two groups. First, we serve in a fiduciary capacity to the donors to ensure that the intent of their donations is fulfilled. Second, we also have a fiduciary duty to those we serve to ensure that they receive the best medical service possible and that it is delivered in a compassionate manner. In addition to having served as Vice Chair and Chairman of the Board, I also serve on the Board's Finance Committee.

I have also served as the Chairman for the Board of Trustee's for Christ United Methodist Church. The Board of Trustee's supervises and maintains all property belonging to the congregation so that the ministries of the church can be effective. The committee is entrusted to see to the proper keeping of the property, equipment, investments, and resources as a way to facilitate the ministry of the local church. The Board is also reports annually to the charge conference on the state of the church's property, equipment, investments, and resources. Therefore, we owe a fiduciary duty to the charge conference, the church membership, and the donors.

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

As a team leader and as Senior Counsel with the State Attorney General's Office, I was called on to mentor new lawyers. This included reviewing briefs, sitting on moot court panels, observing and critiquing oral arguments, and providing general guidance and advice to new lawyers.

For several years, I have been selected to serve as a judge for the University of Memphis, Cecil C. Humphreys School of Law moot court competitions. Also, when I was in Nashville I was selected to serve as a judge for the Middle Tennessee State University, Regional Trial Advocacy Competition. More recently, I was selected to review and grade briefs for the regional portion of the New York City Bar's National Moot Court Competition which was held in Memphis.

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 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.

July, 2007 – Applied for Criminal Court Judge for the 30th Judicial District. My name was not submitted to the Governor as a nominee.

May, 2008 – Applied for Judge of the Court of Criminal Appeals for the Western Grand Division. My name was not submitted to the Governor as a nominee.

September, 2011 – Applied for Judge of the Court of Criminal Appeals for the Western Grand Division. My name was 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:

Millsaps College – August, 1991 – May, 1995.
Degree – Bachelor of Business Administration
Major – Business Administration; Minor – Economics

University of Memphis – Summer, 1992.
(I attended the University of Memphis that summer to take one course.)

Law School:

Samford University – Cumberland School of Law – August, 1995 – May, 1998.
Degree – Juris Doctor

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 43 Date of Birth: August 30, 1972

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

Though I attended college in Jackson, Mississippi (Millsaps College) and law school in Birmingham, Alabama (Cumberland School of Law), the State of Tennessee has always been my legal residence.

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

12 Years – I returned to Shelby County from Davidson County in 2004.

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

Shelby 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 are now 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.

I had one complaint filed against me with the Board of Professional Responsibility. It was subsequently dismissed after my response.

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.

Christ United Methodist Church – Life-long member – Lay Leader, Present; Board of Trustees, 2010; Vice-Chairman of Board of Trustees, 2011; Chairman of Board of Trustees, 2012-2014; Congregational Elder, 2011 - Present

Christ Community Health Services – Board Member, 2005 to Present; Chairman of the Board, 2012-2015, Vice-Chairman, 2009-2011; Finance Committee, 2009 to Present.

American Inns of Court, Leo Bearman Chapter, Member, 2008/2009; 2009/2010; and 2015/2016.

NEXUS – A New Experience in Leadership - 2006

Nexus is comprised of a diverse group of Memphians consisting of all races, incomes and faiths who desire to make an impact in the Memphis and Shelby County area. NEXUS is sponsored by IMPACT Memphis and 2nd Presbyterian Church.

Impact Memphis – Member – 2004 to 2006.

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 Association of County Attorneys – 2014 to Present.

National Association of Extradition Officials – 2000 to 2015.

Tennessee Bar Association – 2004 to Present.

Memphis Bar Association – 2004 to Present.

Criminal Law Section – Chair - 2007 to 2010; Vice Chair – 2006; Secretary – 2005.

Helped restart the section including planning monthly lunch programs for

defense attorneys and prosecutors. We also provide CLE seminars and conducted a candidate forum for the 2006 elections (District Attorney, Criminal Court Judges, Juvenile Court Judge and General Sessions Court Judges).

House of Delegates – 2008, 2006.
The House of Delegates reviews policy and issues facing the Memphis Bar and makes recommendations concerning those matters to the Board of Directors.

Mentoring Program – Criminal and Appellate Issues – 2006 to Present.
Assist new lawyers from both the private bar and prosecutors in civil, criminal and appellate matters.

Served on Host Committee for June 2006 Tennessee Bar Association Annual Meeting in conjunction with Judicial Conference and TLAW.

S.C.A.L.E.S. Committee – 2006
Helped plan and organize for the Supreme Court's visit to Memphis as part of the Supreme Court's Advancing Legal Education program. As a committee, we were responsible for finding local high schools to participate and securing attorneys to meet with and discuss the cases with the students.

Chair of Juvenile Court Ad Hoc Committee – 2007
The committee's mission was to review the current make-up of juvenile court along with the recommendations made by the Shelby County Commission and determine how to increase the effectiveness of juvenile court.

Tennessee Lawyers Assistance Program – Appointed to the Regional Assistance and Monitoring Team – 2005 to Present.

TLAP provides consultation, assessment, referral, intervention, education, advocacy and peer support services for lawyers, judges, bar applicants, law students and their families.

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.

Tennessee Attorney General's Office:

After three years of service with the Criminal Justice Division of the Attorney General's Office, I was promoted to Team Leader for the Western Grand Division.

After another three years, I was promoted to Manager of the Memphis Office.

In 2007, I was named Senior Counsel.

On four occasions, I have been selected to present CLE training for the Tennessee Judicial Conference.

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

J. Ross Dyer and Garland Ergüden, *Tennessee's Application of Crawford v. Washington's Confrontation Clause Analysis* – Memphis Lawyer – The Magazine of the Memphis Bar Association – March/April, 2006.

Dyer, J.R. and Fulks, M.A., eds. *Tennessee's Manual on Extradition and Interstate Rendition* (2004).

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.

LAW SCHOOL:

Cecil C. Humphreys School of Law
University of Memphis
Course:

Guest Lecturer for Professor Barbara Kritchevsky's *Appellate Practice* Class – *Things All Appellate Lawyers Should Know* – Spring, 2011.

Guest Lecturer for Professor Barbara Kritchevsky's *Appellate Practice* Class – *Things All Appellate Lawyers Should Know* – Spring, 2010.

Guest Lecturer for Professor Barbara Kritchevsky's *Appellate Practice* Class – *Things All Appellate Lawyers Should Know* – Spring, 2009.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2013.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2011.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2008.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2007.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2006.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2005.

CLE SEMINARS:

Ethics and Professionalism in Legal Writing – Memphis Bar Association, December, 2013.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Ethics and Professionalism in Legal Writing – Tennessee Bar Association's Court Square Series in Jackson, Tennessee – September, 2011.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Appellate Practice Primer – Tennessee Bar Association's Court Square Series in Dyersburg, Tennessee – September, 2011.

- Presented overview of appellate practice and how the appellate process must be considered from the beginning of the trial.

Joinder, Consolidation, and Severance in Light of State v. Garrett – Tennessee Judicial Conference – June, 2011.

- Presented program covering the rules of joinder, consolidation, and severance and the Supreme Court's recent opinion on the topics.

Ethics and Professionalism in Legal Writing – Tennessee Bar Association's Court Square Series in Jackson, Tennessee – October, 2010.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Ethics and Professionalism in Legal Writing – Tennessee Bar Association's Court Square Series in Dyersburg, Tennessee – September, 2010.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Standards and Burdens of Proof – Tennessee Judicial Conference – June, 2010.

- Presented program covering several standards of review and burdens of proof that

Ethics and Legal Writing – Memphis Bar Association – December, 2009.

- Co-presenter of program discussing the interplay of the rules of ethics and professionalism and legal writing.

Appellate Advocacy – Tennessee Judicial Conference – April, 2009.

- Member of panel discussion concerning appeals. Topics ranged from standards of review, burdens of proof, making a record, to opinion writing.

Extradition and Detainers – Memphis Bar Association – December, 2007.

- Presented an overview of the procedures for properly extraditing prisoners. Also, reviewed the procedures for handling a prisoner's untried cases under the Interstate Compact on Detainers.

Collateral Attacks – Tennessee Judicial Conference – March, 2007.

- Served as the only non-judicial member on a panel discussion concerning the various post-judgment attacks and forms of collateral review. Was asked to serve on the panel to give the perspective of an appellate practitioner.

Case Law Update – Memphis Bar Association – December, 2006.

- Presented summary of recent Tennessee Supreme Court opinions and significant opinions of the United States Supreme Court and the Tennessee Court of Criminal Appeals.

Criminal Appeals – Memphis Bar Association – December, 2005.

- Member of panel discussion concerning criminal appellate practice. Topics ranged from preserving the record at trial, motions for new trial, compiling the record for appeal, issue selection and presentation, brief writing and oral argument.

Extradition and Detainers – Tennessee District Attorneys General Conference – March, 2004.

- Panel discussion reviewing the procedures for properly extraditing prisoners. Also, reviewed the procedures for handling a prisoner's untried cases under the Interstate Compact on Detainers.

Ramifications of State v. Burns – Tennessee District Attorneys General Conference – March, 2004.

- Member of panel discussion concerning the charging of lesser-included offenses.

OTHER COURSES:

Assessing Transcripts – Annual Tennessee Court Reporters Conference – June, 2004.

- Panel discussion for court reporters across the State. The discussion centered on problems we have found with transcripts on appeal and how to make sure that the transcripts are an accurate reflection of the trial.

Search and Seizure – Tennessee Highway Patrol Cadet School – December, 2002.

- Along with another member of the Criminal Justice Division of the Attorney General's Office, I taught a class to new cadets concerning the law on search and seizure. We also prepared a reference "book" for them on the topic.

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.

Not Applicable.

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

Not Applicable.

34. Attach to this questionnaire 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.

I have attached a copy of the brief I filed on behalf of the State of Tennessee in *State v. Noura Jackson.* With the exception of minor editing by the Solicitor General's office, the work is ninety-nine percent my own. I have also attached a copy of a memorandum opinion prepared by my office concerning an interpretation of a provision of the Shelby County Charter. This opinion was a collaborative effort between myself and one of my Deputy County Attorneys.

ESSAYS/PERSONAL STATEMENTS

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

Coming from three generations of lawyers and judges, you either wanted to go into law or you wanted nothing to do with it. Obviously, I choose the former and, thus, have wanted to be a lawyer and, one day a judge, since I can remember. I have

crafted and directed my career to reach this point and believe that the Court of Criminal Appeals is the next logical step in my career.

Furthermore, one of the many lessons passed down and taught in our family was the importance of giving back and service to your community. After graduating from law school, I took a job with the State Attorney General's office mainly because I saw this as a way to serve my home state. I have continued in this way of thinking by serving as the County Attorney for my home county. I cannot think of a better way to follow the lessons I was taught and fulfill a life-long dream than to give back to the citizens of Tennessee by serving as a judge.

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)***

When I started my career with the State Attorney General's Office, I was statutorily prohibited from participating in direct pro bono work. Therefore, I have committed myself to indirect forms of pro bono by giving of my time and service to the Memphis Bar Association and other legal groups to help improve the quality of the representation offered by both defense attorneys and prosecutors. As an officer in the Criminal Law Section of the Memphis Bar, I helped organize and host luncheon programs and CLEs. Also, I am part of the mentoring program of the Memphis Bar and regularly receive calls from and give advice to both prosecutors and defense attorneys concerning criminal law and appellate questions. As part of my job, I also field questions from and give advice to District Attorneys General. I have also worked with the moot court board at the Cecil C. Humphreys School of Law to help law students be better prepared to provide appellate services upon graduation.

Since joining the Shelby County Government, one of my main tasks has been to ensure that Shelby County provides for and protects the rights of those children who find themselves involved in the juvenile justice system.

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 petitions, and other post-judgment collateral attacks. The Western Grand Division is comprised of 21 counties and sits in Jackson. While this position is from the Western Grand Division, the 12 members of this Court still "ride the circuit" sitting monthly in panels of three in Jackson, Nashville, and Knoxville.

I intend to bring the judicial temperament and professionalism that the citizens of Tennessee deserve and which I have seen modeled by my grandfather and the judges before whom I have appeared. Having handled well over 800 different matters before the Court of Criminal Appeals, I have noticed that the number of appeals increases every year. Based on my experience in handling criminal appeals, I can and will be able to take on these growing numbers and produce a quality product in a timely fashion without much of a learning curve. My work ethic and commitment to fair treatment has been rewarded by my supervisors throughout my career. Furthermore, I believe that my experience as an appellate practitioner brings a new and different perspective to 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 served on the Board of Directors for Christ Community Health Services for 11 years and held the position of Chairman, Vice-Chairman, and Chair of the Development Committee. Christ Community is a non-denominational organization whose mission is to provide the highest quality healthcare, both medical and dental, to the poor, underprivileged, and medically unserved population of the community. Christ Community has an operating budget over $16 million and has over 160,000 patient visits a year. Our Board of Directors mirrors the diversity of those we serve.

I am also act in my church, Christ United Methodist Church, having served as the Chairman of the Trustees Committee and currently serving as the Lay Leader and a congregational elder. In addition to the church's global missions programs, Christ United Methodist Church supports numerous inner-city missions and ministries, including Service Over Self, an urban home repair ministry, Binghampton Development Corporation, a housing and economic development organization, Eikon Ministries, building urban leaders from within the community, and recently opening Cornerstone Preparatory School whose mission is to provide low-income children the quality education, skills and character necessary to succeed in college and to become life-changing leaders in their community.

I also serve on the Board of Directors of Christ Methodist Day School.

I believe that it is the responsibility of our elected and appointed officials to be involved in and give back to the community in which they live. Therefore, should I be appointed, I plan to continue my work with Christ Community Health Services and Christ United Methodist Church as well as seek other opportunities to serve within my community and throughout the State. I would also look for speaking engagements, especially in local schools and other youth programs. It is important that we continue to reach out to the children of our community and support them.

Furthermore, I believe it is important to remain involved in and supportive of the bar associations.

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)***

When I moved to Memphis to manage the State Attorney General's satellite office in Memphis, one of my missions was to increase the presence of the Attorney General's Office in Memphis and the surrounding counties. It is important for the people we serve to know that we do have a presence in west Tennessee, including Shelby County, and are not just a group of government lawyers sitting in Nashville and concerned only with matters in Middle Tennessee. Therefore, I made a concerted effort to get to know both the criminal and civil judges in Shelby County and the members of the bar, including prosecutors, defense attorneys, and other governmental attorneys. One way I accomplished this goal was by my involvement with the Memphis Bar Association. As a member of the Bar Association, I volunteered for and/or was appointed to numerous committees such as the SCALES committee, the planning committee for the Tennessee Bar, Judicial Conference and TLAW annual meeting, a member of the House of Delegates, Chairman of the Ad Hoc committee concerning Juvenile Court and an officer for the Criminal Law section of the Bar Association.

It is clear that these efforts did not go unnoticed. During my tenure with the Office, the Memphis office received more phone calls each month from citizens, elected officials, and members of the bar. I was routinely stopped by judges and other members who expressed great appreciation of the Attorney General's Office presence in Memphis. Today, I am asked on a regular basis who the Attorney General is going to place in the Memphis Office and how much my presence is missed.

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. As County Attorney and as an Assistant Attorney General I took an oath to defend the laws and constitutions of the State of Tennessee and the United States. As a judge, I will be asked to take a similar oath. I have, and intend to continue, to honor this oath.

Furthermore, as an attorney for the State, I, on occasion, disagreed with the decisions of our trial and appellate courts. However, as long as the decision was within the bounds of the law, my obligation was to defend the judgment regardless

of my personal feelings. A recent case provides another illustration. In *State v. Kevin Swift,* the defendant was convicted of aggravated robbery after pulling a box cutter on two store employees as he tried to exit the store with stolen merchandise. I argued that aggravated robbery was the correct charge because the defendant used violence to effectuate the completion of the theft. However, the Tennessee Supreme Court determined that the defendant's actions constituted the separate offenses of theft and assault and did not meet the statutory definition of aggravated robbery. Despite my disagreement with the Court's conclusion, I have since then had to advise district attorneys that certain factual scenarios do not support a charge of aggravated robbery based on the precedent established in *State v. Kevin Swift.*

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. Judge Hardy Mays, District Court Judge for the Western District in Memphis
B. Judge W. Mark Ward, Shelby County Criminal Court -
C. John L. Ryder, Attorney, Harris Shelton Hanover Walsh,
D. Mark H. Luttrell, Jr., Mayor of Shelby County,
E. Jackson W. Moore, Moore Management, LLC,

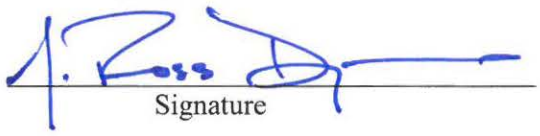
AFFIRMATION CONCERNING APPLICATION

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 [Court] of Criminal Appeals for the Western Grand Division 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 questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire 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: February 24, 2016.



Signature

When completed, return this questionnaire to Debbie Hayes, 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.

J. Ross Dyer
Type or Print Name

J. Ross Dyer
Signature

2/24/2016
Date

019366
BPR #

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

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	**SHELBY COUNTY**
v.	)	**NO.W2009-01709-SC-R11-CD**
	)	
NOURA JACKSON,	)	
	)	
Appellant.	)	

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

BRIEF OF THE STATE OF TENNESSEE

ROBERT E. COOPER, JR.
Attorney General & Reporter

WILLIAM E. YOUNG
Solicitor General

J. ROSS DYER
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Donnelly J. Hill Building
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B.P.R. No. 19366

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

Whether, during her rebuttal closing argument, the Assistant District Attorney improperly commented on the defendant's post-arrest silence;

II.

Whether, in denying the defendant's motion for new trial, the trial court correctly determined that Andrew Hammack's undisclosed third statement to police was neither exculpatory to the defendant nor material;

III.

Whether the trial court properly concluded that the relationship between the defendant and Genevieve Dix was personal rather than professional and, therefore, not protected by the attorney/client privilege;

IV.

Whether the trial court properly admitted the testimony of several witnesses concerning the defendant's drug use and life-style;

V.

Whether the trial court properly sentenced the defendant to a term of 20 years and nine months?

STATEMENT OF THE CASE

On September 27, 2005, the Shelby County Grand Jury returned an indictment charging the defendant with first degree premeditated murder. (TR1, 1-2.)[1] The case was tried by a jury on February 9-21, 2009, in the Criminal Court for Shelby County (Craft, J.) (XII - XXXVII.) The jury found the defendant guilty of the lesser-included offense of second-degree murder. (TR2, 224; XXVII, 4486.)

A sentencing hearing was held on March 27, 2009. (XLVIII.) At the conclusion of that hearing, the trial court sentenced the defendant to a term of 20 years and nine months. (TR2, 230; XLVIII, 108-123.)

The defendant filed a motion for new trial on April 24, 2009, and an amended motion on July 16, 2009. (TR2, 236-244, 245-260.) After a hearing, the trial court denied the defendant's motion. (TR2, 261; XLIX, 69-109.) Notice of appeal was filed on August 13, 2009. (TR2, 262.)

On December 10, 2012, the Court of Criminal Appeals issued an opinion affirming the defendant's conviction and sentence. *State v. Jackson,* No. W2009-01709-CCA-R3-CD, 2012 WL 6115084 (Tenn. Crim. App. Dec. 10, 2012). This Court granted the defendant's application for permission to appeal on April 9, 2013.

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[1] The record in this case consists of two volumes of technical record ("TR1-TR2"), nine volumes of exhibits ("III – XI"), one volume containing the jury charge ("XII"), and 37 volumes of transcript ("XIII – XLIX"). The appellant will be referred to as "Jackson" or the "defendant." The appellee will be referred to as the "State."

STATEMENT OF THE FACTS

In April 2005, Shelia Cocke was living across the street from Jennifer and Noura Jackson. One day during that time period, Ms. Cocke overheard an argument between Ms. Jackson, the victim, and Noura, the defendant. (XXVII, 2696-2697.) As the two were arguing, Ms. Cocke overheard the defendant yell, "Just give me the f'ing money. Just give me the f'ing money." (XXVII, 2697.) She also heard the defendant exclaim, "That's my money." (XXVII, 2699.) According to Ms. Cocke, the defendant had "rage in her voice." (XXVII, 2699.)

On May 21, 2005, Ms. Jackson was having a birthday party at her home for her step-brother, Eric Sherwood. (XXVII, 2716.) When the defendant arrived late for the party, Ms. Jackson accused her of being high and informed the defendant that she was going to start drug-testing her. (XXVII, 2717.)

Around that same date, the defendant had a conversation with a family friend, Regina Hunt. (XXX, 3459.) During that conversation, the defendant informed Ms. Hunt that her mother was trying to get a restraining order against Perry Brassfield, the defendant's ex-boyfriend. (XXX, 3459.) She also informed Ms. Hunt that her mother was drug-testing her. (XXX, 3460.) According to Ms. Hunt, the defendant was angry about both of these matters. (XXX, 3463.)

Over Memorial Day weekend, Ms. Jackson, Mr. Sherwood, and the defendant drove from Memphis to Perry, Florida, for a family reunion and to visit Ms. Jackson's sister, Cindy Eidson. (XXI, 1596-1599; XXVII, 2715.) During the drive, Ms. Jackson informed the defendant that her recent drug test had come back positive. (XXVII, 2722.) During their visit to Florida, Ms. Jackson and Ms. Eidson also had a

conversation with the defendant about the fact that Ms. Jackson was considering sending the defendant to boarding school because she was having trouble with home schooling and was partying too much. (XXI, 1600.)

While still in Florida, Ms. Jackson received a phone call from a neighbor in Memphis informing her that several of the defendant's friends were having a party at Ms. Jackson's home. (XXI, 1604, XXVII, 2726.) Initially, the defendant denied any knowledge of the party; however, the next day she admitted that she knew her friends were going to throw a party at their house while they were out of town. (XXI, 1604-1609.) After being confronted and admitting to knowing about the party, the defendant did not speak to Ms. Jackson the rest of the weekend. (XXI, 1611.)

As Ms. Jackson, Mr. Sherwood, and the defendant traveled back to Memphis, the defendant asked her mother about her job at the bank and how "bonds work." (XXVII, 2730.) At some point during their conversation, Ms. Jackson told the defendant not to worry about such things because she would be well cared for if anything ever happened to her. When the defendant inquired further, Ms. Jackson informed the defendant that she was the beneficiary on her life insurance policy and her 401(k) account. (XXVII, 2731.)

On June 4, 2005, the defendant and her friend, Alex Kline, went to Koale Madison's house to swim and lay out. (XXVII, 2894-2898.) Around 3:00 p.m., Mr. Madison and the defendant took Ms. Kline home and then drove to the defendant's house. (XXVII, 2898-2899.) When the defendant saw her mother's car in the driveway, she told Mr. Madison that she did not want to stop because her mother was home. (XXVII, 2899.) The two then drove around for a period of time before returning to the

defendant's house. (XXVII, 2901.) After the defendant changed clothes, they drove to Ike's to buy beer and then to Cater Kobeck's house to meet some other friends. (XXVII, 2901-2904; XXVIII, 2933; XXIX, 3032-3033, 3083-3085; XXX, 3194-3196, 3283.) Mr. Madison, Mr. McGoff, and Mr. Brassfield testified that they did not see any cuts, injuries, or bandages on the defendant either Friday or Saturday. (XXVII, 2898, 2908; XXIX, 3091.)

According to Kirby McDonald, while at Mr. Kobeck's house, a group of girls, which included the defendant, began to talk about their mothers. (XXVIII, 2947.) During this conversation, the defendant told her friends that "[m]y mom is a bitch and she needs to go to hell." (XXVIII, 2947.)

After hanging out at Mr. Kobeck's house for a few hours, the group decided to leave. (XXIV, 2161; XXVIII, 2944-2945) Some went to Perry Brassfield's house and others decided to go to the Italian Festival. (XXIV, 2161; XXVIII, 2944-2945.) The defendant was part of the group that ended up at Ms. Brassfield's house. (XXIV, 2163; XXVIII, 2944-2945; XXX, 3199, 3283.) According to the defendant's friends, the defendant was wearing a yellow tank top, a white skirt, and gold sandals that night. (XXIV, 2152-2154, 2160; XXVIII, 2940; XXIX, 3034.)

After partying at Mr. Brassfield's home for a while, Sophie Cooley, Richard Raines, and Brooke Thompson drove the defendant back to Mr. Kobeck's house to retrieve her car. (XXIV, 2168; XXIX, 3038, 3087; XXX, 3201) They dropped the defendant off at her car between 12:00 and 12:30 a.m.. (XXIV, 2168.)

Sometime after leaving Mr. Brassfield's house and before 1:00 a.m. on June 5, 2005, the defendant called Mr. Brassfield. (XXX, 3108-3109.) According to Mr.

Brassfield, the defendant called to see if there was any chance of their getting back together. (XXX, 3109.) She also informed Mr. Brassfield that she was sitting outside her house smoking. (XXX, 3109.) Around 1:00 a.m., the defendant sent Mr. Brassfield a text message and again inquired about the possibility of their getting back together. (XXX, 3210.) According to Cindy Eidson, one of the family members spoke to the victim around 12:00 a.m. on June 5, 2005. During that conversation, the victim stated that the defendant was outside smoking. (XXI, 1619.)

At 12:55 a.m., Clark Schifani missed a call from the defendant's residence. (XXX, 3287-88.) Five to ten minutes later, he received and missed a call from the defendant's cell phone. (XXX, 3288-3289.) Mr. Schifani testified that the victim had never called him. (XXX, 3289.) According to the defendant's cell phone records, no calls were made and no text messages were sent from her cell phone between 1:13 a.m. and 3:18 a.m. on June 5, 2005. (XX, 1387-1400.)

Between 3:00 and 4:00 a.m. on June 5th, Eric Whitaker received a call from the defendant stating that she was on her way to his house. (XXXV, 4083.) According to Mr. Whitaker, the defendant arrived at his house around 4:30 a.m. just as he was leaving to take a friend home. (XXXV, 4085.) When Mr. Whitaker asked the defendant if she wanted to ride with them, she declined and told him that she had to go meet some people. (XXXV, 4085.) The defendant spent a total of two or three minutes at Mr. Whitaker's house. (XXXV, 4086.)

Around 5:00 a.m., Andrew Hammack received a text message from the defendant that simply stated "answer." (XXXV, 4093.) When he spoke to the defendant, she informed him that she was on her way home from Mr. Whitaker's house and asked if

Mr. Hammack would meet her at her house and walk in with her. (XXXV, 4095, 4101.) Because Mr. Hammack had been out partying all night and feared getting a DUI, he declined the defendant's invitation. (XXXV, 4101.)

Shortly after this call was made, Mayo Cocke and his wife, Rachel Cocke, who lived across the street from the victim and the defendant, were woken by someone banging on their door and screaming. (XIV, 260, 309.) When they opened the front door, they found the defendant. (XIV, 261, 309.) According to the Cockes, the defendant stated, "My mom, my mom. Somebody's breaking into my house." (XIV, 260, 309.) At that point, Mr. Cocke retrieved his pistol from the closet and headed across the street to the victim's house while Mrs. Cocke called 911. (XIV, 260-262, 309.) As Mr. Cocke and the defendant reached the house, the defendant, despite her having claimed that someone was in the house, entered the home ahead of Mr. Cocke and went directly to the back of the house. (XIV, 262-263.) After determining that no one was in the house, Mr. Cocke began looking for the defendant. He found her in the sunroom on the phone with 911. (XIV, 264.) When Mr. Cocke asked the defendant where her mother was, the defendant calmly stated, "She's in her room." (XIV, 264.) Mr. Cocke entered the victim's room and found her lying naked on the floor and covered in blood. (XIV, 264.) After discovering the victim's body, Mr. Cocke returned to his house and retrieved his wife. (XIV, 266.) Mrs. Cocke noted that, despite the fact that the defendant had been screaming and acting hysterically, the defendant did not appear to have been crying. (XIV, 326-327.) According to Mrs. Cocke, the defendant's face was not red from crying, and she did not have any tears or makeup streaks. (XIV, 327.)

Officer Russell Tankersley and his partner, the first officers to make the scene, arrived at the victim's house at 5:15 a.m. on June 5th. (XIV, 336.) When they arrived, the defendant came running out of the house, stating that something was wrong with her mother. (XIV, 336.) As Officer Tankersley and his partner entered the house, they noticed what appeared to be blood on the hallway floor. When they entered the victim's room, they saw blood on the door and the bed. (XIV, 337.) They then discovered the victim's body on the floor. Upon seeing the victim, they immediately backed out of the house and secured the scene. (XIV, 337.) Officer Tankersly also noted that the defendant was wearing a long-sleeved sweat shirt. He found that odd due to the fact that it was very hot that morning. (XIV, 347.)

Of the numerous pieces of physical and photographic evidence retrieved from the crime scene, one thing of note to the crime scene officers was that all the doors and windows were closed and locked and there was no sign of forced entry. (XX, 1412.) The only broken glass was in the door leading from the kitchen to the closed garage. The officers also noticed that the broken pane was not in a place one would usually expect if someone had broken into or was trying to break into a home. Rather than being near the handle and the lock, the glass pane was in the middle of the door, closer to the butterfly lock which was not visible from outside the house. (XX, 1412-1413.) Sergeant Thomas Helldorfer also noticed that the bathtub and shower wall in the hallway bathroom were still wet. (XXXII, 3590-3591.) A search warrant executed on June 17, 2005, for the victim's car produced a Walgreens bag that contained 45 cents in change, a Q-tip swab, a paper towel with an unknown substance, three empty Skin Shield

packages, one NexCare bandage, one NexCare roll of tape, and the time-and-date-stamped receipt.

Shortly after 8:00 a.m., Officer Connie Justice drove the defendant to the police station to take her statement. (XXIV, 3956-3970.) In her initial statement, the defendant claimed that she called her mother from Mr. Brassfield's house around 12:10 a.m. and then stayed at his house for another 30 minutes before being driven back to Mr. Kobeck's house to retrieve her car. (XXIV, 3957-3958.) The defendant claimed that after picking up her car, she went to Taco Bell but realized that she did not have her wallet. (XXIV, 3958.) Upon making this discovery, the defendant called Mr. Brassfield and asked him to look for it. (XXIV, 3959.) When he could not find her wallet, the defendant returned to Mr. Kobeck's house, where she found her wallet. (XXIV, 3959.) She told Officer Justice that she then bought gas and made sure to note that she had a receipt to prove the stop and the purchase. (XXIV, 3959.) After buying gas, the defendant claimed that she drove to Eric Whitaker's house but, once there, decided not to stay and went home. (XXIV, 3959.) The defendant noted that she spoke with Mr. Whitaker for a minute before leaving his house. (XXIV, 3959.) The defendant then claimed that she spoke to Andrew Hammock on her drive home. (XXIV, 3959.) When Officer Justice inquired as to how the defendant cut her finger, she claimed that she cut it on a broken beer bottle on Friday night while attending Italian Fest. (XXIV, 3965.) After giving her statement, the defendant was returned to the scene.

After the defendant returned to the crime scene, she was approached by a family friend, Regina Hunt. (XXX, 3464.) The defendant told Ms. Hunt that she was uncomfortable and wanted to leave, so Ms. Hunt took the defendant to her restaurant

and fixed her a sandwich. (XXX, 3464-3465.) After eating, Ms. Hunt and the defendant returned to the crime scene. (XXX, 3465.)

Upon returning to the scene, the defendant had an encounter with another family friend, Genevieve Dix. (XXXI, 3365.) Immediately, Ms. Dix noticed that the defendant was wearing a sweatshirt and had it pulled down to her knuckles. (XXXI, 3365.) She also noticed that the defendant, whom she knew to be a smoker, smelled "fresh and sweet" and that she did not have on the heavy black eyeliner she normally wore. (XXXI, 3365-3366.)

Later, the defendant went with her friend, Caroline Giovannetti, to Caroline's house to shower and change clothes. (XXIX, 3116.) During the drive, Ms. Giovannetti asked the defendant where she had been the night before. (XXIX, 3117.) The defendant told Ms. Giovannetti that "I got dropped off at my car and I drove past my house at midnight and saw that all the lights were out. And so, I assumed my mom was asleep, so I just kept driving, and I went over to Eric Whitaker's. And then, came home around for or five and found my mom." (XXIX, 3118.) Shortly after that, Ms. Hunt showed up and invited all the kids, including the defendant, to her house. (XXIX, 3120.)

Once the defendant and her friends arrived at Ms. Hunt's house, the defendant started talking about having a party and/or going to a movie. (XXIV, 2177; XXX, 3470.) When Ms. Hunt and her friends asked about the cut on her hand, the defendant told them that she cut it on a beer bottle at Italian Fest. (XXIX, 3132; XXX, 3474.) Later, Ms. Hunt confronted the defendant with the fact that she had given her two different stories about where she was the night of the murder. (XXX, 3476.) Initially, the defendant told Ms. Hunt that she had snuck out that night. The defendant's second

version was that she had driven by the house but did not stop because the victim was asleep. (XXX, 3476.) When confronted about her different stories, the defendant got upset and said she wanted to go shopping or tanning. (XXX, 3478.)

The next day, Ms. Hunt drove the defendant to the hotel where her aunts, the victim's sisters, were staying. (XXX, 3480.) During the drive, Ms. Hunt again inquired about the cut on the defendant's hand. (XXX, 3480.) This time, the defendant told Ms. Hunt that she cut it trying to get the cat out of the garage. (XXX, 3480.) When Ms. Hunt confronted the defendant with her conflicting accounts concerning the cut, the defendant became defensive and said, "I want to kill myself. I just want to die." (XXX, 3481.)

After meeting with her family, the defendant's aunt, Grace France, took the defendant to buy some clothes. (XXI, 1691.) During their shopping trip, Ms. France noticed that, despite the summer heat, the defendant was only buying long-sleeved tops. (XXI, 1691.)

Later that day, Officer Justice contacted the defendant to clear up her timeline and resolve a conflict about which Taco Bell the defendant had visited the night before. (XXIV, 3985.) When confronted with the fact that she had told Officer Justice two different locations, the defendant "broke down and started crying, and then she goes, 'Well, I didn't want you to think that I was a bad person, but I didn't really go to Taco Bell, and instead, I just rode around and I smoked a bowl of weed.'" (XXIV, 3985.)

A few weeks after the victim's funeral, the defendant's family rented an apartment for the defendant and began paying her expenses. One day, while she was living at the apartment, the defendant went to visit the assistant property manager,

Rebecca Robertson. (XXXII, 3574.) Unknown to the defendant, Ms. Robertson had called the police about another tenant prior to the defendant's arrival in the office. (XXXII, 3574.) After the defendant arrived in the office, the police responded to Ms. Robertson's call. When they did, Ms. Robertson noticed that the defendant became very nervous and appeared uncomfortable. (XXXII, 3574.) She then asked Ms. Robertson, "Are they here for me?" (XXXII, 3574.)

After the defendant was arrested for her mother's murder, she contacted her aunt, Cindy Eidson. (XXI, 1640.) During their conversation, Ms. Eidson stated, "Noura just tell me where you were and who you were with when Jennifer was murdered." (XXI, 1640.) The defendant responded, "I don't know." (XXI, 1643.) Ms. Eidson insisted, and again the defendant stated, "I don't know." (XXI, 1643.) The defendant also had a conversation with her other aunt, Grace France. (XXI, 1703.) During that conversation, Ms. France again inquired about the cut on the defendant's hand. (XXI, 1704.) In response, the defendant told Ms. France that she burned her hand while cooking some macaroni and cheese. (XXI, 1704.)

According to Dr. Karen Chancellor, the Chief Medical Examiner for Shelby County and Memphis, Jennifer Jackson's body was received around 4:30 p.m. on June 5, 2005. (XXVI, 2497, 2502.) Dr. Chancellor's examination of the body revealed that Ms. Jackson suffered a total of 50 to 51 stab wounds to the front of her body, the back of her body, her arms, her hands, and her neck. (XXVI, 2506-2507.) She suffered seven stab wounds to the middle of her chest. Two of those wounds passed through the right ventricle of her heart and one through the left ventricle. (XXVI, 2521-2522.) The grouping of wounds to Ms. Jackson's abdomen involved damage to both her liver and

stomach. (XXVI, 2522.) She also suffered a stab wound to her right lung, which caused bleeding inside the body cavity. (XXVI, 2523.) According to Dr. Chancellor, the wounds to Ms. Jackson's neck were the result of both stab wounds and cutting wounds. (XXVI, 2529.) Dr. Chancellor concluded that Ms. Jackson's death was the result of multiple stab wounds. (XXVI, 2573.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE DID NOT IMPROPERLY COMMENT ON THE DEFENDANT'S POST-ARREST SILENCE.

The defendant contends that the trial court erred in denying her motion for a mistrial based on the State's rebuttal closing argument, which she argues was an improper comment on her post-arrest silence and violated her Fifth Amendment rights. (Def. Br., II, 41.) However, a review of the record and that applicable law does not support the defendant's allegation and does not furnish a basis for relief.

During the testimony of Cindy Eidson, the defendant's aunt, the following exchange took place between the prosecutor and Ms. Eidson:

State: Do you recall when the defendant was arrested?

Ms. Eidson: Yes.

State: Did you talk to her?

Ms. Eidson: Yes. She called me after she was arrested, at the — from the police station to tell me she had been arrested. And I said, Noura, tell me where you were and who you were with when Jennifer was murdered. And she said, I don't know.

. . .

State: You told your niece to tell you where you were. What was your motive in asking her that? Why were you asking her that?

Ms. Eidson: Because I was taking care of her. I would have gotten her lawyers to anything she needed if she had an alibi and could prove to me where she was and who she was with when my sister was murdered. And she said, I don't know. And I asked her again, where were you during all of this? Who were you with? And she said, I don't know. And then I never heard from her again.

(XXI, 1640, 1642-1643.)[2] After this exchange and prior to the defendant's cross-examination, the trial court instructed the jury that

> [n]o defendant charged with any crime has the burden of proving where they were or what they did. So you need to understand that Miss Jackson has the presumption of innocence, and she's not obligated to tell people where she was. You can take this conversation for what you take it for, but you cannot hold it against Miss Jackson to make her produce certain evidence to show her innocence. Does everybody understand that?

(XXI, 1643-1644.)

In light of this testimony, the prosecutor started her rebuttal closing argument by paraphrasing Ms. Eidson's testimony stating, "Just tell us where you were. That's all we're asking Noura." (XXXVII, 4438.) Before the prosecutor could say anything else, the defendant immediately objected, claiming that the prosecutor's statement was "inappropriate." In response, the prosecutor informed the trial court that "[o]ne of the witnesses testified to that, Your Honor, asking her where she was. Just tell us where you where and we'll do anything we can for you." (XXXVII, 4439-4440.) In response, the trial court informed the parties that

> I will give an instruction to the jury that she's commenting on testimony in the case and I will follow that up — I will also re-affirm, if you all wish me to, to the jury, that she does not have to testify today or any time during the trial in her own defense. That she's talking about the question that she was asked by the lay witness.

(XXXVII, 4440.) The trial court also noted that he would allow the prosecution to proceed "as long as you tie it to testimony in the trial." (XXXVII, 4441.) The prosecutor

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[2] During this exchange, the defendant objected, claiming that (1) the witness improperly testified that the defendant called her from the jail and (2) that the best evidence of that conversation would be the recording made by the jail of their conversation. (XXI, 1641-1642.) At no point did the defendant object to this testimony as a violation of the defendant's constitutional right to remain silent. (XXI, 1641-1642.)

responded to the trial court's direction, stating, "That's what I was attempting to do." (XXXVII, 4441.)

Following the bench conference, the trial court gave the jury a lengthy curative and limiting instruction during which he made it abundantly clear that the State carried the burden of proof, that the defendant was not required to testify in her own defense, that no inference could be drawn from the fact that she did not testify, and that the prosecutor was quoting a witness and commenting on the proof. (XXXVII, 4443-4445.) The court also instructed the jury that "[i]t's very important for all of you to understand that you cannot ever, ever, hold anything against Miss Jackson for not testifying in this trial" and that at no point from the time of the alleged murder did the defendant have to talk to anyone about anything. (XXXVII, 4444.) "She has an absolute right to remain silent and it's up to the State to prove her guilt beyond a reasonable doubt. It's not up to anyone to prove that they're innocent." (XXXVII, 4444-4445.) At that point, the trial court asked the jury if each one of them could follow his instruction. According to the record, every juror agreed that they would. (XXXVII, 4445.) The trial court then continued its limiting and curative instruction before allowing the State to continue. (XXXVII, 4445-4446.) When the prosecutor resumed her closing argument, she, as instructed by the trial court, reminded the jury that the defendant's aunt had asked the defendant to tell her where she had been at the time of the murder. (XXXVII, 4446.)

Courts have routinely held that "closing argument is a valuable privilege that should not be unduly restricted." *State v. Bane,* 57 S.W.3d 411, 425 (Tenn. 2001). The trial court has substantial discretion in controlling the course of arguments and will not be reversed unless there is an abuse of that discretion. *Id.* (citing *Terry v. State,* 46

S.W.3d 147, 156 (Tenn. 2001)). In addition, prosecutorial misconduct does not constitute reversible error absent a showing that it has affected the outcome of the trial to the prejudice of the defendant. *Id.* (citing *State v. Chalmers,* 28 S.W.3d 913, 917 (Tenn. 2000)). However, an attorney's comments during closing argument "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." *State v. Gann,* 251 S.W.3d 446, 459 (Tenn. Crim. App. 2007) (citing *State v. Sutton,* 562 S.W.2d 820, 823 (Tenn. 1978)). In order to be entitled to relief on appeal, the defendant must "show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment." *State v. Farmer,* 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996). Within closing argument, five general areas of prosecutorial misconduct are recognized:

> 1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
> 2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
> 3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> 4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
> 5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

While the Court of Criminal Appeals unanimously agreed that the defendant was not entitled to relief, the court was divided on how to reach that conclusion. The lead opinion, which the State believes is correct, opined that the record does not allow for a conclusion that the prosecutor's comment, while dramatic, was improper. *Slip op.* at 54. In reaching this conclusion, the author of the lead opinion concluded that "the State was

accurate in asserting that one of the defendant's aunts had testified that the defendant, although asked, had not revealed where she was at the time of her mother's murder, other than initially saying she had been with 'Chris.'" *Id.*

When addressing the prosecutor's intent in making the statement, the lead opinion noted that while the prosecutor's statement did make the same basic request as Ms. Eidson, the use of the terms "us" and "we" instead of "me" or "I" "could have been interpreted as if it were being asked of the defendant by those in the courtroom, which included the jury. On the other hand, the word 'we' could be interpreted to mean that Cindy Eidson was asking the question on behalf of the victim's family." *Id.* The lead opinion then concluded that

> [b]ecause of the immediate and to-be-expected objection from defense counsel, the record cannot reflect whether the State would have followed the objected-to statement by explaining this was the question asked by Cindy Eidson to the defendant. There is risk to the State in rephrasing witness testimony, especially when it focuses on the fact that the defendant elected not to testify. The upshot of all this is that we cannot conclude that the prosecutor's beginning to her rebuttal argument, though certainly dramatic, was improper.

Id. While the State agrees that the defendant's immediate objection precluded the trial court and the appellate courts from knowing exactly how that prosecutor would have followed up on her statement, the record gives us some insight into the issue.

After hearing the arguments of counsel and denying the defendant's motion for a mistrial, the trial court stated that it was going to allow the prosecutor to continue with her argument "as long as you tie it to testimony in the trial." (XXXVII, 4441.) The prosecutor responded to the court's instruction stating, "That's what I was attempting to do." (XXXVII, 4441.) The prosecutor then resumed her closing by stating, "As her aunt asked her, just tell us where you were Noura. We just have to know. We'll fight this for

you. We'll help you through this, we just have to know." (XXXVII, 446-447.) Based on the brief exchange between the court and the prosecutor and the resumption of the prosecutor's closing, the State submits that this Court can, as it appears the trial court did, infer that the prosecutor's original intent was to follow up her quote in a fashion similar to the argument she made after the objection.

Furthermore, the State submits that the most reasonable construction is that the prosecutor's argument was not a comment on the defendant's right to remain silent. Rather, the prosecutor simply recited for the jury a conversation between the defendant and her aunt, in which her aunt was not acting as a law-enforcement agent or trying to obtain a confession but was actually trying to understand so that she could help the defendant. Importantly, the defendant did not object to Ms. Eidson's testimony about that conversation on the ground that i violated the defendant's post-arrest right to remain silent.

This situation is not similar to the factual scenario in which a defendant refuses to speak with police, invokes her right to remain silent, and then the officer testifies at trial about her refusal to talk or the State argues to the jury that the defendant refused to talk to the police. The State's argument referred to a conversation between the defendant and a lay witness that did not encroach upon the defendant's constitutional rights. Furthermore, the defendant initiated this conversation when she called her aunt to inform her that she had been arrested, and the defendant did not remain silent, but twice answered her aunt's question.

Therefore, when viewed in context, the prosecutor's remarks were not intended as a comment on the defendant's assertion of her right to remain silent and did not

constitute such an impermissible comment. Rather, the prosecutor simply pointed out that the defendant, during a conversation with her aunt, claimed that she did not know where she was, what she was doing, or who she was with when her mother was murder. This is particularly important and relevant when viewed in light of the proof presented at trial and the prosecutor's entire argument, both of which showed that the defendant had routinely given very detailed, though contradictory, explanations for her whereabouts on the night of the murder.

Based on the foregoing, the defendant has failed to show that the State's closing argument was improper or that the trial court abused its discretion in allowing the State to continue. Nevertheless, should this Court conclude that the prosecutor's comment was improper, the State submits that both the lead and the concurring opinion correctly concluded that the prosecutor's argument did not affect the verdict. Thus, the defendant is not entitled to relief.

In determining whether the prosecutor's argument was so improper as to negatively affect the jury's verdict, this Court must consider: (1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper arguments; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case. *Judge v. State,* 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). While the defendant may be able to establish some of the *Judge* factors, the extensive curative measures taken by both the trial court and the prosecutor, the "relatively flawless trial,"

and the strength of the State's case precludes a finding that the prosecutor's closing statement affect the jury's verdict.

Both the lead and the concurring opinion opined that the prosecutor's comments were not, as argued by the prosecutor, a direct quote of Ms. Eidson's testimony. *Slip op.* at 54, 84. However, even the concurring opinion, which opined that the prosecutor's comment was improper, did not conclusively find that the defendant had established the factor but simply concluded that "this factor is, at the very least, problematic." *Slip op.* at 84.

The next factor to be considered is the curative measures taken by the trial court and the prosecution. As previously noted, the trial court gave an extensive curative and limiting instruction concerning the statement. (XXXVII, 4443-4446.) Included in the trial court comments were instructions to the jury that they could place no significance on the fact that the defendant has chosen not to testify; that the burden is on the State to prove the defendant guilty beyond a reasonable doubt and not the defendant to prove her innocence; that a defendant has an absolute right to remain silent and "you cannot ever, ever hold anything against Miss Jackson for not testifying;" and that the prosecutor was not asking the defendant a question or commenting on her right to remain silent, but was commenting on the proof. (XXXVII, 4443-4446.) The trial court even polled the jury to ensure that they understood his instruction and would follow his instruction. (XXXVII, 4445.) Each individual juror agreed that they would. (XXXVII, 4445.) Then, in addition to the curative measures taken by the trial court, the prosecutor, upon resuming her argument, made it clear to the jury that the defendant's aunt had asked the defendant those questions. (XXXVII, 4446.) Based on these

curative measures, the concurring opinion correctly concluded that, "[p]rimarily based upon the trial court's excellent work, this factor countenances rather strongly against a finding that the improper remark affected the jury's verdict." *Slip op.* at 84.

The third factor to be considered is the intent of the prosecutor in making the statement. As previously discussed, the record, due to the immediacy of the defendant's objection, does not permit a complete and full analysis of the factor. The State suggests, however, that the prosecutor's intent was not to comment on the defendant's constitutional right to remain silent, but to point out that the defendant, who prior to her arrest had given numerous contradictory versions of her whereabouts at the time of the murder, gave another contradictory story after her arrest when she told her aunt that she did not know where she was or who she was with at the time of the murder. Also, when discussing the opening of her rebuttal closing with the trial court, the prosecutor informed the court that her intent was follow up her statement by telling the jury that those questions had been asked of the defendant by her aunt. Then, upon resuming her closing, the prosecutor did just that. It can clearly be inferred from the record that the prosecutor was not commenting on the defendant's constitutional right to remain silent, but was simply pointing to yet another contradictory statement made by the defendant. Therefore, the factor weighs against a finding that the statement affected the jury's verdict.

Next, this Court must consider the cumulative effect of the statement and any additional errors. As found by the Court of Criminal Appeals, the defendant's trial was relatively free of errors. Specifically, the concurring opinion noted that, "[d]espite a

myriad of difficult evidentiary and other issues, the record before this court is of a relatively flawless trial." *Slip op.* at 84.

The final factor to be considered is the relative strength or weakness of the State's case as a whole. While the State's case is based primarily on circumstantial evidence, the proof establishing the defendant's guilt is overwhelming. First, the defendant had the motive to commit the murder. The defendant and the victim were constantly fighting about the defendant's partying life-style and drug use. The defendant was extremely upset with the victim because she was having the defendant drug tested, was considering sending the defendant to boarding school, and was even contemplating obtaining a restraining order against the defendant's ex-boyfriend. (XXI, 1600; XXVII, 2717, 2722; XXX, 3459-3463.) There was even evidence to suggest that the defendant wanted whatever money she was entitled to from her father's estate so that she could be on her own and out from under the victim's rules. (XXVII, 2697-2699.) Then, on the night of the murder, the defendant told her friends that her mother "is a bitch and she needs to go to hell." (XXVII, 2947.)

In addition to the defendant's motive, the record places that defendant in the house at the time of the murder. According to the defendant and the evidence presented at trial, the defendant was taken back to her car around 12:00 a.m. on June 5th. (XXIV, 2168; XXIV, 3957-3958.) In her statement to police and her conversation with Ms. Giovannetti, the defendant claimed that she drove by her house, saw that all the lights were out, assumed her mom was asleep, and then drove to Eric Whitaker's house. (XXIV, 3959; XXIX, 3118.) However, Perry Brassfield testified that the defendant called him around 1:00 and asked if they could get back together. During this conversation,

the defendant informed Mr. Brassfield that she was at home, her mother was asleep, and she was outside smoking a cigarette. (XXIX, 3109.) Also, Ms. Eidson testified that a family member spoke with the victim around 12:00 a.m. and that the victim told the family member that the defendant was home and outside smoking. (XXI, 1619.) Around 12:55 a.m., Clark Schifani received a call from the defendant's home phone. (XXX, 3287-3288.) Then, seconds later, he received a call from the defendant's cell phone. (XXX, 3288-3289.) According to Mr. Schifani, the defendant's mother never called him. (XXX, 3289.) According to the defendant's cell phone records, she made fourteen calls and/or texts messages between 12:10 a.m. and 1:08 a.m. (XX, 1386-1400; Exh. 262.) However, no phone calls were made or text messages sent between 1:13 a.m. and 3:18 a.m. (XX, 1400.)

Despite claiming that she never went home that night until she came home and found her mother, the defendant had changed clothes by the time her friends arrived on the murder scene. According to her friends, the defendant was wearing a yellow tank top, a white skirt and gold sandals on the night of June 4th. (XXIV, 2152-2154, 2160; XXVII, 2940; XXIX, 3034.) However, when her friends arrived on the scene early the next morning, the defendant was wearing a long-sleeved fleece sweatshirt, tennis shoes, and a short denim skirt. Also, other than the gold sandals, the clothing that the defendant was seen wearing when out with her friends was never found during the investigation.

Next, all of the defendant's friends testified that they did not notice any cuts on the defendant's hand that evening. (XXIV, 2159; XXVIII, 2898, 2908; XXIX, 3042, 3091; XXX, 3205; XLIV, 19.) However, they all noticed a cut on her hand after the

murder. (XXIV, 2178; XXIX, 3044, 3122; XXX, 3205-3206, 3274.) Then, when questioned about her injury, the defendant told numerous inconsistent stories and even became defensive when questioned about her contradictory stories. The defendant told her aunt, Grace France, that she burned her hand while cooking macaroni and cheese. (XXI, 1704.) In her statement to police, the defendant told Officer Justice that she cut her hand on a broken beer bottle on Friday night at Italian Fest. (XXIV, 3965.) The defendant told Perry Brassfield that she cut her hand on some glass while chasing her kitten around the house. (XXX, 3206.) Unable to remember which story she told which person, the defendant told Regina Hunt two different causes for the injury on her hand. First, she said that she cut it on a beer bottle on Friday night at Italian Fest. (XXXI, 3474.) Then she told Ms. Hunt that she cut her hand while trying to get the cat out of the garage. (XXXI, 3480.)

The contradictions between the defendant's version of events and the facts proven at trial did not end with her change in clothing or discussion about the cut on her hand. At 3:18 a.m., the defendant called Eric Whitaker and told him that she wanted to come over. (XXXV, 4038.) However, when the defendant arrived at Mr. Whitaker's house, he was leaving to take a friend home. When he asked the defendant if she wanted to ride with him, the defendant declined saying she needed to meet some people. (XXXV, 4085.) According to Mr. Whitaker, the entire episode lasted a total of two or three minutes. (XXXV, 4086.) While the defendant was sure to tell the police, her friends, and her family that she had been to Eric Whitaker's house, even producing a receipt for gas and cigarettes that she purchased that evening, the defendant failed to disclose to anyone that she had also stopped at Walgreens to buy supplies to care for the

cut on her hand and had made that purchase with cash. (XXXIII, 3723-3727; Exh. No. 363; XXXV, 4115-4136; Exh. No. 365.)

After establishing part of her story by being seen by Eric Whitaker and then buying gas and carrying for her wound, the defendant began calling and texting Andrew Hammack. After Mr. Hammack received a text from the defendant that said "answer," he finally did speak with the defendant. The defendant informed Mr. Hammack that she was on the way home from Mr. Whitakers. According to Mr. Hammack, the defendant also for the first time during their friendship asked him to meet her at her house and walk inside with him. (XXXV, 4093-4101.) Mr. Hammack declined the defendant's request.

When reviewing and cataloging the crime scene, officers noted two major issues. First, the officers noticed that the shower in the defendant's bathroom was still wet. (XXXII, 3590-3591.) They also noticed no signs of forced entry. All the doors and windows to the house were locked. The only broken glass was on a door in the kitchen that led to the closed garage. Furthermore, the glass pane that was broken was in the middle of the door and higher than the handle. The broken glass was actually closer to a butterfly lock which was not visible from the outside of the house and the existence of which could only have been known by someone familiar with the home. (XX, 1412-1413.)

The defendant's actions after the murder also aided in establishing her guilt. First, the night after the murder, the defendant stayed with Ms. Hunt and several friends. In addition to not being emotional, the defendant informed her friends that she wanted to go to a movie, go shopping, go tanning, or even have a party. It was also

during this time that the defendant continued to give contradictory statements about how she hurt her hand and where she was the night of the murder. The defendant would also become upset when anyone would question her about her conflicting stories. Then, about a month after the murder, the defendant was visiting with the assistant property manager of the apartment complex where she was living when the police arrived on the property concerning another tenant. When the defendant saw the police, she nervously and uncomfortably asked the property manager "are they here for me." Based on the defendant's claims and version of events, there was no reason for the police to be there for her. Yet, she was uncomfortable and nervous at the sight of them.

Based on the proof recited above, it is clear that the evidence, while circumstantial, overwhelmingly established the defendant's guilt. Thus, as unanimously found by the Court of Criminal Appeals, the prosecutor's statement during her closing, even if improper, had no effect on the jury's verdict. Thus, the defendant is not entitled to relief and the jury's verdict should be affirmed.

II. ANDREW HAMMACK'S THIRD STATEMENT DID NOT EXCULPATE THE DEFENDANT, NOR WAS ITS UNTIMELY PRODUCTION PREJUDICIAL TO THE DEFENDANT; THUS, THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR NEW TRIAL BASED ON HER CLAIM THAT THE SHE WAS DENIED A FAIR TRIAL DUE TO THE STATE'S FAILURE TO TIMELY PRODUCE THE STATEMENT.

The defendant contends that the trial court erred in denying her motion for new trial based on her claim that the State failed to timely produce the third pre-trial statement of Andrew Hammack. She argues that the absence of this statement prevented her from fully and effectively cross-examining Mr. Hammack and, therefore, denied her a fair trial. While the State agrees that the statement in question should have been disclosed, the record and the law support the conclusions reached by both the Court of Criminal Appeals and the trial court: (1) the State's failure to provide the defendant with the statement was unintentional; (2) the statement was not exculpatory; and (3) the timely production of the statement would not have affected the outcome of the trial. *Slip op.* at 63-72. Thus, the defendant is not entitled to relief on this claim.

On Sunday February 15, 2009, while preparing for his direct examination of Detective Miller, the Assistant District Attorney responsible for that direct examination of Det. Miller's supplement noticed a reference in Det. Miller's supplement to a third hand-written statement of Andrew Hammack. (XLIX, 76.) At the time, the State had only been provided with Mr. Hammack's first two statements and was unaware of the fact that he had made a third statement on June 13, 2005. (XLIX, 76.) Upon making this discovery, the ADA contacted his investigator and requested that a copy of the June 13th statement be obtained from the homicide office. On February 17th, the ADA was given a copy of said statement. According to the affidavit filed by the ADA after trial, his intent was to provide the statement to the defendant at the next opportunity, so he

placed a copy of the statement in "the flap of one of the trial notebooks." (XLIX, 77.) The ADA did not inform or provide his co-counsel with the statement at that time, despite the fact that she was responsible for the direct examination of Mr. Hammack. (XLIX, 77.) Based on the number of witnesses that were called between the time the ADA received the statement and Mr. Hammack's testimony on February 19th, the ADA forgot about the statement and did not realize his oversight until after the trial had concluded. (XLIX, 77.)

In *Brady,* the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In order to establish a due process violation under *Brady,* four prerequisites must be met:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not);
> 2. The State must have suppressed the information;
> 3. The information must have been favorable to the accused; and
> 4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995); *see also State v. Evans,* 838 S.W.2d 185 (Tenn. 1992).

The defendant has the burden of proving a constitutional violation by a preponderance of the evidence. *State v. Spurlock,* 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). Demonstrating a constitutional violation requires the defendant to show that without the omitted material he has been denied the right to a fair trial. *United States v. Agurs,* 427 U.S. 97, 108 (1976).

Assuming that the defendant demonstrates the first three elements of a *Brady* violation, he must still show the materiality of the omitted material. The United States Supreme Court has held that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) (citing *United States v. Bagley,* 473 U.S. 667, 682 (1985)). As stated by the United States Supreme Court:

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (citing *Bagley,* 473 U.S. at 678). In other words, the inquiry is whether we can be confident that the jury's verdict would have been the same if the State had disclosed the favorable evidence to the defendant. *Id.* at 453.

As found by the Court of Criminal Appeals and the trial court, the defendant has failed to establish the third prong of the *Brady* test — whether the information was favorable to the defendant. While Mr. Hammack's third statement may have added some details not included in his previous statements, no review of the statement would define it as exculpating for the defendant. A complete review of all three statements, while not painting Mr. Hammack in the best light, do not, in any way, exculpate the defendant or, as suggested by the defendant, inculpate Mr. Hammack in the murder.

As found by the Court of Criminal Appeals, Mr. Hammack's statements are "rambling, somewhat difficult to follow, and become more confusing when an attempt is made to try and compare them." Slip op. at 70. Moreover, even if this Court were to find that Mr. Hammack's admissions in his third statement that he was "rolling on XTC" and near the victim's residence that evening to be of "slight exculpatory value," the Court of Criminal Appeals correctly concluded that because of Mr. Hammack's admissions in his previous statements and at trial and the complete lack of evidence suggesting that he had a motive to kill the victim, the proof of his whereabouts would not have benefitted the defendant. *Id.* at 70-71.)

Furthermore, it is clear from the defendant's cross-examination of Mr. Hammack that the defendant had interviewed Mr. Hammack prior to trial and was aware of information that was not contained in either of his first two statements. For example, when questioning Mr. Hammack about his level of intoxication and his ability to recall the events of that evening, the defendant asked him if he remembered telling her investigator that he was "blotto" that evening. The defendant was also asked if he had left his phone anywhere or lost it; if he had been to a topless club that night; and if he knew Marcus Dalugich. (XXXV, 4105, 4112-4113.) None of these "facts" were mentioned in Mr. Hammack's first statement but were included in his third statement.

Based on the foregoing, it is clear that Mr. Hammack's third statement would have not have been beneficial to the defendant. Thus, the defendant has failed to establish the third prerequisite of *Brady* standard of review and is, therefore, not entitled to relief.

But even if this Court were to find that the suppressed statement was favorable to the defendant, the defendant has not and cannot show that the statement was material. While the Mr. Hammack's statement would have allowed the defendant to specifically cross-examine him about whether he was drunk or "rolling on XTC" that evening, the absence of that question, especially when reviewed in light of the entirety of the Mr. Hammack's testimony, would not have created a "reasonable probability" of a different result. The possibility of extra impeachment proof would not have "put the whole case in such a different light as to undermine confidence in the verdict." *See Kyles,* 514 U.S. at 435. Contrary to the defendant's claim, the testimony of Mr. Hammack was not the sole basis for her conviction.

While in order to place the defendant at the murder scene the State relied on Mr. Hammack's testimony that the defendant texted him the message "answer" and then called him and asked him to meet her at her house and walk inside with her, the phone records from both AT&T and T-Mobile confirm that calls were made and text messages were sent from the defendant's cell phone to Mr. Hammack. (VII, Exh. 262; X, Exh. 355.) Also, Sergeant Mark Miller testified that the last number called from the defendant's cell phone and from the home phone was Mr. Hammack's. (XXXII, 3631, 3637.) In addition to these facts placing the defendant at the scene, Mr. Brassfield testified that he spoke with the defendant sometime before 1:00 a.m. During that conversation, the defendant told him that she was at home and sitting outside smoking a cigarette. (XXX, 3109.) Also, a member of the victim's family last spoke with the victim around 12:00 a.m. that evening and was informed by the victim that defendant was outside smoking. (XXI, 1619.) Clark Schifani testified that he missed from the

defendant's home phone number at 12:55 a.m. and then missed a call from her cell phone moments later. (XXX, 3297-3289.) According to Mr. Schifani, the victim had never called him, leading to the inference that the defendant was the individual responsible for the missed called on his cell phone from her home phone number. Finally, when the defendant's friends showed up at the scene on June 5th, they noticed that she was no longer wearing the same clothes that she had been wearing the night before leading to the inference that the defendant had to go home at some point to change her clothes.

A review of the above-recited proof reveals that, Mr. Hammack's testimony, while helpful, was not the only evidence presented establishing a timeline of the defendant's movements that evening including her presence at house at the time of the murder. Mr. Hammack's testimony was neither the ultimate nail in the State's case nor the "smoking gun" that resulted in the defendant's conviction. Thus, the State submits, as found by the trial court, that while improper, the suppression of Mr. Hammack's third statement was not material, and had it been produced would not have put the case in such a different light as to undermine the confidence in the verdict. Accordingly, the State's failure to disclose Mr. Hammack's third statement did not violate the defendant's due process rights pursuant to *Brady* and did not deny her a fair trial. The defendant is not entitled to relief on this issue.

III. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF GENEVIEVE DIX AFTER DETERMINING THAT SHE WAS NOT ACTING AS THE DEFENDANT'S ATTORNEY AND, THUS, ANY CONVERSATION BETWEEN THE TWO WAS NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

The defendant contends that the lower courts erred in characterizing her communication with Ms. Dix as personal rather than professional. She argues that her conversation with Ms. Dix was protected by the attorney-client privilege and, therefore, that the trial court erred in allowing Ms. Dix's testimony. The Defendant also contends that if Ms. Dix's testimony was not covered by the attorney-client privilege, the trial court erred in allowing Ms. Dix to testify that she was an attorney. However, a review of the record, including the trial court's credibility determinations, reveals that Ms. Dix informed both the defendant and the officers on the scene that she was not acting as the defendant's attorney. Thus, any conversation between the two was personal in nature and not covered by the attorney-client privilege.

The attorney-client privilege has long been a part of the common law. The policy behind recognition of this oldest of privileges is that the administration of justice requires that communications between clients and their attorneys be free of concern that the communication would be publicly disclosed. *McMannus v. State,* 39 Tenn. 213, 215-16 (Tenn. 1858); *Boyd v. Comdata Network, Inc.,* 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002); *Bryan v. State,* 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992).

Tennessee's statutory privilege is rooted in the common law, and the codification embodies the common-law rule. *Johnson v. Patterson,* 81 Tenn. 626, 649 (1884); *McMannus,* 39 at 215-16). The statutory attorney-client privilege, which was first enacted in 1821, is found in Tenn. Code Ann. § 23-3-105 and provides as follows:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Not all communications between attorneys and clients are confidential. In order to be privileged under this statute, the communication between an attorney and client must meet two requirements; (a) it must involve the subject matter of the representation and (b) it must be made with the intent that the communication will be kept confidential. *State ex. rel. Flowers v. Tennessee Trucking Association Self Insurance Group Trust,* 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006); *Boyd,* 88 S.W.3d at 213. *See Hazlett v. Bryant,* 258, 241 S.W.2d 121, 124 (1951); *Jackson v. State,* 293 S.W. 539, 540 (1927).

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. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. *State v. Odom,* 928 S.W.2d 18, 23 (Tenn. 1996).

After arriving on the scene and discovering the victim's body, Sergeant Merritt informed the defendant that he needed either her consent or a warrant in order to enter and search the residence. At that point, he presented the defendant with a consent-to-search form. Upon the defendant's request, Sergeant Merritt found Ms. Dix and informed her that the defendant wanted to speak with her. (XXX, 3256.) When

Sergeant Merritt asked Ms. Dix who she was and why the defendant would want to speak with her, Ms. Dix informed him "I am an attorney. However, I am not here in that capacity. Jennifer is my best friend and I am here because of that." (XXX, 3256.)

Once Sergeant Merritt and Ms. Dix returned to the defendant, he informed Ms. Dix that "she [the defendant] wants to talk to you about this." (XXX, 3257.) In response and while in the presence of both Sergeant Merritt and the defendant, Ms. Dix stated "I don't represent her. I'm not a criminal attorney. What is that?" (XXX, 3257.) After being informed that the document was a consent-to-search form, Ms. Dix stated, "I've never seen one. I don't do criminal law." (XXX, 3257.) Then, Ms. Dix and the defendant stepped a few feet away from Sergeant Merritt.

At that point, Ms. Dix informed the defendant "I can't represent you. I'm not a criminal attorney. I've never seen one of these consent forms in my life." (XXX, 3257.) Despite Ms. Dix's warnings, the defendant inquired of her, "What does this mean?" (XXX, 3257.) Ms. Dix informed the defendant that it appeared to mean that the police wanted to search the house. (XXX, 3257.) When the defendant inquired if the police could search her car, Ms. Dix replied, "I've already told you, I don't represent you. I haven't got any idea what this form means. I don't know whether it extends to the grounds or the cars or whatever. I said, I don't know any of that." (XXX, 3258.) The defendant informed Ms. Dix that she was going to sign the form and the two returned to Sergeant Merritt. (XXX, 3258.)

After the defendant signed the form, Sergeant Merritt handed it to Ms. Dix to sign. (XXX, 3258.) In declining to sign the form, Ms. Dix again informed Sergeant

Merritt, in the defendant's presence, "I'm not her attorney. I don't represent her." (XXX, 3258.)

In denying the defendant's request to limit the testimony of Ms. Dix based on the attorney-client privilege, the trial court found "Noura Jackson's credibility is lacking in this instance" and Ms. Dix "was not giving her [the defendant] advice as an attorney." (XXX, 3271.) The trial court also determined that the defendant "was told by her [Ms. Dix] before she made these statements, I'm not acting as your lawyer." (XXX, 3272.) Therefore, any confidence the defendant had in Ms. Dix "would be confidences as a family friend, not as a lawyer." (XXX, 3272.)

Based on the testimony presented, it is clear that Ms. Dix was not acting as the defendant's attorney that morning. First, the record is void of any proof that the defendant told Sergeant Merritt or Ms. Dix that she was invoking her right to counsel. As a matter of fact, according to the proof, the defendant simply stated that she wanted to speak to Ms. Dix. She did not tell Sergeant Merritt that she wanted to speak to a lawyer or a family friend who happened to be a lawyer. The defendant simply stated that she wanted to speak to Ms. Dix. Second, Ms. Dix made it clear, on more than one occasion, to both Sergeant Merritt and the defendant that she was not acting as the defendant's attorney and was only present on the scene because of her friendship with the victim.

The defendant also contends that the Court of Criminal Appeals misapplied the holding in on *Grace v. Center Auto Safety,* 72 F.3d 1236 (6th Cir. 1996). While the Court in *Grace* held that when determining the existence of the an attorney-client relationship exists "the focus is on the client's subjective belief that he is consulting a

lawyer in the lawyer's professional capacity and his intent is to seek professional legal advice," the factual basis that led to that conclusion is substantially different that the proof presented in the instant matter. *Id.* at 1242. In *Grace*, the defendant's had been sanctioned for violating a protective order by disseminating a transcript to an attorney who the magistrate judge believed was not covered by the protective order. While the attorney in question never entered an order of appearance in the matter and supposedly never collected a fee from the defendants, the Court concluded that there was an attorney-client relationship and, thus, no violation of the protective order. Specifically, the Court reasoned:

> The Patel affidavit shows without contradiction that the Center was regularly seeking and obtaining professional legal advice on *Grace* from the Butler firm, and Mr. Ditlow's affidavit of January 26, 1994, shows that he and the Center were relying on the firm's assistance and counsel in the case. GM never refuted this showing that Ditlow and the Center had a subjective belief that they were consulting with the Butler firm in its professional capacity and intended to seek professional legal advice from the firm.
>
> . . .
>
> The Butler firm obviously did have a role in the lawsuit, and the role was sufficient to justify a belief by Ms. Patel that under the precise terms of the protective order she was free to forward the Timm deposition to the firm.

Grace, 72 F.3d at 1242-1243.

While *Grace* held that the attorney-client relationship is determined by the client's subjective belief that there was a relationship, it is clear from the court's opinion that a client's subjective belief has to have some factual basis. In *Grace,* that factual basis was the long-standing professional relationship between the attorney and the defendant.

Unlike in *Grace*, the defendant and Ms. Dix did not have a professional relationship. As a matter of fact, the record is void of any proof that Ms. Dix had an

attorney-client relationship with the defendant or the victim. Ms. Dix was not at the scene that morning because she was the attorney the victim, the family attorney for the victim's family, or the attorney for the defendant. Rather, according to the proof presented to the trial court, Ms. Dix was present that morning because she was a friend of the victim whose chosen profession just happened to be that of an attorney.

Based on the credibility determinations made by the trial court and the applicable law, it is clear that Ms. Dix was not acting as counsel for the defendant and that there was no attorney-client relationship between the two. Therefore, the conversation between Ms. Dix and the defendant is not protected by the attorney-client privilege, and the trial court properly allowed Ms. Dix to testify about her conversation with the defendant on the morning of June 6, 2005.

Next, the defendant claims that the trial court erred in allowing Ms. Dix to testify that she was an attorney. The defendant argues that Ms. Dix's profession was irrelevant and served only to bolster her credibility. It is not unusual for a witness to be asked about where they work or what they do for a living. As noted by both the Court of Criminal Appeals and the trial court, the jury is charged with assessing the credibility of a witness, and providing the jury with background information such as one's chosen profession, is just another tool available to the jury in making that determination. *Slip op.* at 31-32.

It should also be noted that when questioned about what she did for a living, Ms. Dix stated that she was an attorney whose practice focused on domestic relations and real estate. (XXXI, 3358-3359.) She also testified that the only reason she came to the scene that morning was because she was a friend of the victim. (XXXI, 3359.) At no

point did Ms. Dix say that she ever practiced criminal law or that she was there to provide legal advice for the defendant. Rather, her entire testimony centered on the fact that she had come to the crime scene because her friend had been murdered and to support the defendant.

As found by the courts below, Ms. Dix's profession was not irrelevant and her testimony was not prejudicial. Accordingly, the defendant was not denied a fair trial by the admission of this testimony. The ruling of the trial court should be affirmed.

IV. AFTER EXTENSIVELY INSTRUCTING THE JURY CONCERNING THE ITS LIMITED CONSIDERATION OF ANY TESTIMONY RELATING TO THE DEFENDANT'S USE OF DRUG AND ALCOHOL, THE TRIAL COURT PROPERLY ALLOWED SUCH TESTIMONY TO ESTABLISH THE VOLATILE RELATIONSHIP BETWEEN THE VICTIM AND THE DEFENDANT AND TO ESTABLISH THE DEFENDANT'S STATE OF MIND AS IT RELATED TO HER MOTIVATION IN COMMITTING THE CRIME.

The defendant contends that the trial court erred in allowing the testimony of several witnesses concerning the defendant's use and possession of drugs and alcohol. (Def. Br., 41-42.) She argues that the prejudicial effect of such testimony far outweighed the probative value and allowed the jury to convict her based on her propensity to engage in criminal activity. However, as found by the trial court and affirmed by the Court of Criminal Appeals, each of these witnesses personally observed the defendant use drugs and, in most cases, used drugs and alcohol with the defendant. The defendant's drug use and partying life-style was one of the main areas of conflict between the victim and the defendant. Thus, the defendant's drug use and life-style were relevant to that conflict and gave the jury insight into the defendant's state of mind and her motivation for committing the murder.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when otherwise inadmissible evidence is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or common scheme or plan. *State v. Tolliver,* 117 S.W.3d 216, 230 (Tenn. 2003); *State v. McCary,* 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Rule 404(b) states that a jury-out hearing regarding the admissibility of specific instances of conduct must be held "upon request." Tenn. R.

Evid. 404(b)(1). In order to determine the admissibility of a prior bad act, the trial court should consider the following three factors: (1) whether a material issue exists supporting admission of the prior act; (2) whether proof of the prior act is clear and convincing; and (3) whether the probative value of the evidence is not outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404(b)(2)-(4). If these three thresholds are met, the evidence may be admitted. This Court reviews a trial court's ruling on evidentiary matters under Rule 404(b) for abuse of discretion, provided the trial court has substantially complied with the procedural prerequisites of the rule. *State v. DuBose,* 953 S.W.2d 649, 652 (Tenn. 1997). If the trial court did not substantially comply with the procedure, its decision is not entitled to deference by the court, and "the determination of admissibility will be made by the reviewing court on the evidence presented at the jury out hearing." *Id.* at 653.

At trial, the prosecution's theory was that the defendant murdered her mother because she was "cracking down" on the defendant because of her life-style. According to the proof presented at trial, the victim had recently started having the defendant drug tested, was discussing sending the defendant to boarding school, and according to the defendant, was considering getting a restraining order against the defendant's ex-boyfriend, Perry Brassfield. The proof also revealed that the defendant had failed a drug test near the time of the murder. According to the prosecution's theory, these new restrictions and the recent failed drug test were the cause of great conflict between the two and the basis of the defendant's desire to be on her own and live under her own rules. In order to establish this conflict and the defendant's state of mind before and

after the murder, the State called several witnesses to testify about not only the defendant's drug use and life-style but also about the conflict between the two.

As required by Rule 404(b), the trial court conducted a proper hearing before each witness was allowed to testify about their personal knowledge of defendant's drug use and/or their knowledge about drug testing.[3] At the conclusion of each hearing, the trial court concluded that the witnesses could testify only to what they had personal knowledge of and/or personally heard from the defendant or overheard during a conversation between the defendant and the victim. The trial court also gave numerous limiting instructions to the jury concerning this testimony and the fact that the defendant's actions did not establish her guilt but was intended for the sole purpose of showing the defendant's state of mind at the time of the murder and to explain the relationship between the defendant and the victim.

In order to establish the defendant's life-style, Sophie Cooley was allowed to testify to the fact that she personally used marijuana, cocaine, and Lortab with the defendant. (XXIV, 2146-2147.) Eric Sherwood was allowed to testify to the fact that the defendant admitted to him that she smoke marijuana before and after the murder. (XXVII, 2714.) McKenzie Madison was allowed to testify about personally observing the defendant use cocaine and the fact that he personally used mushrooms, marijuana, and alcohol with the defendant. (XXVIII, 2887-2889.) Kirby McDonald was allowed to testify to the fact that she often smoked marijuana with the defendant. (XXVIII, 2937.)

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[3] The 404(b) hearings were conducted as follows: Cindy Eidson (XXI, 1530-1586); Sophie Cooley (XXIII-XXIV, 2038-2134); Eric Sherwood (XXVII, 2677-2694); McKenzie Koale Madison (XXVIII, 2894-2856); Cater Kobeck (XXVIII, 2862-2874); Kirby McDonald (XXVIII, 2877-2878); Joey McGoff (XXIX, 3049-3056); Perry Brassfield (XXIX, 3096-3109); Regina Hunt (XXXI, 3418-3448); and Alexandria Kline (XLIV, 29) (Though there was a hearing concerning under-age drinking, it was not transcribed).

Joey McGoff was allowed to testify to the fact that he personally observed the defendant use marijuana, cocaine, alcohol, and Lortab. (XXIX, 3077-3082.) Berry Brassfield, the defendant's ex-boyfriend, was allowed to testify to the fact that he and the defendant would use alcohol, marijuana, Lortab, Xanax, and cocaine together. (XXX, 3181-3189.) Regina Hunt was allowed to testify to the fact that she found pills and a prescription bottle in the defendant's purse. She then took the bottle to the pharmacist who informed her that it was hydrocodone. (XXXI, 3421-3423.) Furthermore, when she confronted the defendant, the defendant admitted that the drugs were hers. (XXXI, 3473.) Finally, Alexandria Kline was allowed to testify to the fact that she was at a party and personally observed the defendant consume alcohol on more than one occasion. (XLIV, 30-32.)

Concerning the fact that the victim was requiring the defendant to be drug-tested, Eric Sherwood testified that he was present not only when the victim told the defendant that she was going to test her, but he was also present when the victim told the defendant that she had failed her drug test. (XXVII, 2717, 2722.) Cindy Eidson was present when the victim and the defendant discussed the victim's concerns about the defendant's school performance and partying. (XXI, 1600-1602.)

It is clear from a review of the above-referenced testimony that each witness personally observed and, in most cases, actually engaged in the drug use with the defendant. As properly found by the Court of Criminal Appeals and the trial court, this testimony goes directly to the relationship between the victim and the defendant. The defendant's drug use and partying life-style were the main source of conflict between the defendant and the victim. The fact that the defendant wanted to continue this life-style

and the victim wanted to "crack down" on this lifestyle by having the defendant drug tested, sending her to boarding school, and keeping her away from her boyfriend goes directly to the defendant's state of mind. Thus, the testimony was highly relevant to the defendant's motive for committing the crime; therefore, the probative value was not "outweighed by the danger of unfair prejudice." Tenn. R. Evid. 404(b)(4).

Finally, the trial court gave numerous cautionary/limiting instructions throughout the trial as to how the jury could and could not use/interpret the testimony about the defendant's drug use and drug testing. Then, as part of his final jury instructions, the trial court gave the following instruction:

> Evidence of alleged alcohol or drug use. If from the proof you find that the defendant has engaged in alcohol or drug use, you shall not consider such evidence to prove her disposition to commit such a crime as that on trial. This evidence shall only be considered by you for the limited purpose of determining whether it provides motive. That it, such evidence shall be considered by you if it tends to show a motive of the defendant for the commission of the offense – excuse me. May be considered by you if it tends to show a motive of the defendant for the commission of the offense presently charged. Such evidence, if considered by you for any purpose, must not be considered for any purpose other than that specifically stated.

(XXXVI, 42381- 4282.)

It is clear from the trial court's instruction that the jury was only allowed to consider the testimony concerning the defendant's drug and alcohol use in order to determine whether the defendant, as suggested by the State, had a motive to kill her mother. Also, the jury was specifically precluded from considering the testimony for any other reason. Since we presume that a jury follows the instructions of the trial court, *see State v. Butler,* 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994), this Court must presume that the jury followed the trial court's instruction as well.

Each of the witnesses personally observed the defendant's drug use, usually by participating with her, and learned of her drug testing either from the defendant or while present when the defendant and the victim discussed the issue. In light of the trial court's numerous limiting instructions, the defendant has failed to show that the trial court abused his discretion in admitting the testimony. Therefore, the ruling of the trial court should be affirmed.

V. THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO A TERM OF TWENTY YEARS AND NINE MONTHS. (Defendant's Issue No. XII.)

The defendant contends that the "trial court erred in the procedure implemented in sentencing, by finding that Defendant had committed the uncharged crime of possession of marijuana, and in enhancing the Defendant's sentence in accordance with such finding." (Def. Br., 45.) Additionally, the defendant complains that the trial court erred in denying her objection concerning the timing of the filing of the pre-sentence report and in not requiring the individual who prepared the pre-sentence to testify. (Def. Br., 45-46.) However, as found by the Court of Criminal Appeals, the record and the applicable law do not support the defendant's claims. Accordingly, the ruling of the trial court and the defendant's sentence should be affirmed.

A. Notice of Enhancement Factors and Pre-Sentence Report

The defendant's initial complaint centers on the State's service of its notice of enhancement factors and the pre-sentence report. Concerning the State's notice of enhancement factors, both the Court of Criminal Appeals and the trial court correctly concluded that the applicable law does not require service 10 days prior to the

sentencing hearing since the State sought to have the defendant sentenced as a Range I standard offender. Thus, the defendant's argument is misplaced. As for the defendant's claim concerning the pre-sentence report, the defendant has waived this claim by failing to present it to the trial court at the time of the sentencing. Accordingly, the defendant is not entitled to relief on either of her claims.

Under Tenn. Code Ann. § 40-35-202(a), "[i]f the district attorney general believes that a defendant should be sentenced as a multiple, persistent or career offender, the district attorney general should file a statement thereof with the court and defense counsel not less than ten (10) days before trial." By its very terms, this statute only applies in situations in which the State seeks to have the trial court sentence a defendant in a greater range, not situations in which the State seeks to have the trial court enhance a defendant's sentence within a range. *State v. Garner,* No. W1999-01679-CCA-R3-CD, 2003 WL 1193253, at *5-6 (Tenn. Crim. App. March 14, 2003) (app. denied Oct. 6, 2003) (copy attached). Here, the defendant was sentenced as a Range I standard offender. In filing notice of enhancement factors, the State sought only to have the trial court increase the defendant's sentence within that range. Accordingly, the defendant's claim is without merit.

Next, the defendant argues that the pre-sentence report was not filed in accordance with Tenn. Code Ann. § 40-35-208. While the report was completed on March 11, 2009, well within the 10-day requirement, the record is void of any proof as to when the report filed. (Exh. AA, 7.) However, the defendant did not object to the timing of the filing of the report and, therefore, has waived her right to present this claim on appeal.

At the start of the sentencing hearing, the defendant registered two objections with the trial court: (1) the inclusion in the record of the "unsigned, unsworn [victim impact] statements" and (2) the fact that the notice of enhancement was not filed within 10 days of the sentencing hearing. (XLVIII, 7.) The defendant did not object to the filing or the service of the pre-sentence report. By failing to make a contemporaneous objection, the defendant has failed to preserve this claim and is not entitled to relief. *See* Tenn. R. App. P. 36(a) (stating appellate relief is generally not available when a party is "responsible for an error" or has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error"); *State v. Killebrew,* 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) (waiver applies when the defendant fails to make a contemporaneous objection).

B. Length of Sentence

In 2005, the legislature amended several provisions of the Sentencing Reform Act of 1989, which became effective June 7, 2005. However, although the defendant was sentenced after the effective date of the amended Act, the defendant's crime in this case occurred prior to June 7, 2005, and the defendant did not elect to be sentenced under the provisions of the amended Act by executing a waiver of her ex post facto protections. *See* 2005 Tenn. Pub. Acts, ch. 353, § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited are those that were in effect at the time the instant crime was committed.

The defendant was sentenced to twenty years and nine months for her second-degree murder conviction. A person convicted of second-degree murder, a Class A felony, is subject to a sentence of fifteen to twenty-five years in prison. The statutory

presumptive sentence is twenty years. Tenn. Code Ann. §§ 39-13-210(c), -40-35-112(a)(1).

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d); *State v. Imfeld,* 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus,* 986 S.W.2d 540, 543-44 (Tenn. 1999).

In making its sentencing determinations the trial court considered: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by the defendant in her own behalf. Tenn. Code Ann. §§ 40-35-103 and -210; *State v. Williams,* 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that her sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn. 1991).

In *State v. Gomez,* 239 S.W.3d 733 (Tenn. 2007), this Court concluded that other than a defendant's previous history of criminal convictions or other facts admitted to by the defendant, the application of enhancement factors which increases the defendant's sentence over the statutorily presumptive sentence deprives the defendant of his or her

Sixth Amendment right to have a jury determine whether those enhancement factors applied. *Gomez,* 239 S.W.3d at 739-40.

During the sentencing hearing, the trial court noted the above referenced law and the limitations it placed on what enhancement factors he could find and/or apply. (XLVIII, 108-109.) However, relying on several court opinions, the trial court found, based on the defendant's admission in the pre-sentence report, that the defendant did have a previous history of criminal behavior in addition to those necessary to establish the appropriate range. Tenn. Code. Ann. § 40-35-114(1). Specifically, the trial court noted that in the pre-sentence report the defendant admitted the use of marijuana at the age of 18. (XLVIII, 110.) Based on the defendant's admission, the trial court increased the defendant's sentence nine months over the statutory minimum. (XLVIII, 119.)

While this Court has yet to opine on the issue, several panels of the Court of Criminal Appeals, including the panel that reviewed the instant matter, have concluded "that an admission sufficient to support the enhancement of a defendant's sentence under *Blakely* must rest upon a defendant's unequivocal testimony, at trial or at the sentencing hearing, or a factual acknowledgment in the presentence report when the presentence report is introduced as an exhibit at the sentencing hearing without objection." *See State v. Oliver*, No. M2008-01824-CCA-R3-CD, 2010 WL 681377, at *13 (Tenn. Crim. App Feb. 26, 2010) (no app. filed); *State v. Anthony Riggs,* No. M2007-02322-RM-CD, 2008 WL 1968826, at *4 (Tenn. Crim. App. May 7, 2008) (no app. filed); *State v. Marquette Houston,* No. W2008-00885-CCA-R3-CD, 2009 WL 2357146, at *3 (Tenn. Crim. App. July 30, 2009) (no app. filed); *State v. Mohamed Medhet*

Karim, No. M2006-00619-CCA-R3-CD, 2007 WL 1435390, at *5 (Tenn. Crim. App. May 16, 2007) (app. denied Aug. 13, 2007) (copies attached).

Based on the defendant's admission to using illegal drugs in the pre-sentence report and the applicable law cited above, the trial court properly increased the defendant's sentence by nine months over the statutory minimum. The ruling of the trial court and the defendant's sentence should be affirmed.

CONCLUSION

For the reasons stated, the judgment of the Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing brief has been sent by first-class mail, postage prepaid, addressed as follows:

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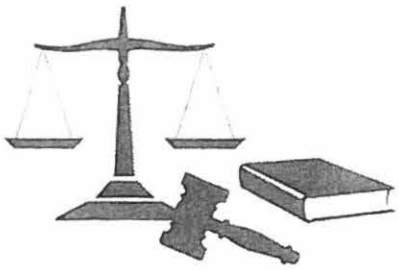

Shelby County Attorney's Office

Memorandum

To: Mayor Mark Luttrell

From: J. Ross Dyer, County Attorney JRD
Kim Koratsky, Chief Litigation Attorney KK

Date: November 3, 2015

Subject: Resolution to Hire Attorney for Commission

Question Presented: Whether the County Board of Commissioners may hire "special counsel" on a permanent basis in order to provide day-to-day legal counsel to the Commission.

Brief Answer: No. Based on the Shelby County Charter, the County Attorney and those attorneys subordinate to the County Attorney are the Chief Legal Counsel for ALL departments and offices of Shelby County Government and, as such, are the sole legal advisors for day-to-day legal advice and civil litigation absent some exceptions (e.g., County Attorney hires outside counsel, Trustee entitled to a delinquent tax property attorney per State statute).

DISCUSSION

Your question concerns an interpretation of the Charter. Section 3.08 of the Charter provides:

> There is hereby created the legal department of the Shelby County government...**The county attorney shall act as chief counsel to the Shelby County government, and he shall act as legal advisor** to the county mayor, **the county commission**, and to all departments, officers and officials of the Shelby County government and shall perform such other duties as may [be] required.

Shelby County Charter Section 3.08 (A) and (B). (Emphasis added).

This Charter provision, and related sections of the Code of Ordinances,[1] charges the County Attorney with representing the County in all civil litigation and providing advice and counsel to all departments of Shelby County Government.[2] The Code specifically describes this authority, setting forth that "[t]he county attorney is authorized to file all cases in civil actions of all kinds required in his opinion to protect the interest of the county. The decision as to these matters may be delegated to an assistant county attorney." Section 2-252 of the Shelby County Code of Ordinances.

Notwithstanding the above, the Charter allows the legislative body to employ special counsel. Specifically, Section 2.02 of the Charter reads in relevant part:

> **In exercising its legislative functions, the legislative branch may employ, subject to budgeting limitations, special** counsel . . . However, neither the legislative branch nor the chairman of the legislative branch shall exercise . . . or perform any functions . . . delegated or assigned by terms of this charter to other offices, branches or departments of county government.

Shelby County Charter Section 2.02 (Emphasis added).

When interpreting the law, rules of statutory construction require that words be construed in context, to harmonize the provisions to the extent possible.[3] The question you have posed requires us to analyze and reconcile the two sections of the Charter that address legal representation of the County Commission. The Charter provision allowing the Commission the ability to hire special counsel is limited to the Commission's exercise of legislative functions and is limited to specific, distinct questions or projects. "Special Counsel" is by definition an attorney employed "to assist in a particular case." Black's Law Dictionary 1397 (10th Ed. 2014). Moreover, this Charter provision contains explicit language further restricting the Commission from performing any functions assigned by the Charter to other offices. Thus, absent a change to the Charter, the Commission may not engage counsel that would take the place of the County Attorney. In contrast, the Charter provision setting forth the County Attorney's duty to serve as chief legal counsel to the County, including the County Commission, is broad and contains no language restricting this authority. Reading these provisions together, it is our opinion that the County Commission may only retain special counsel for specific, distinct matters related to the exercise of its legislative functions[4], and is limited in hiring special counsel absent consent of the County Attorney.

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[1] Chapter 2, Article IV, Section 2-251 of the Shelby County Code of Ordinances reads in pertinent part that "[t]he county attorney's office created by section 3.08(A)(1) and (A)(2) of the county Charter, shall consist of the county attorney, who shall be chief legal officer of the county, together with assistant county attorneys and such other employees as may from time to time be assigned to the county attorney's office."

[2] *See*, Tenn. Code Ann. § 5-6-112, which states, "[i]f there is no county attorney, [the county mayor has the power to] employ or retain counsel . . . to advise the county mayor and the members of the county legislative body as to their legal rights as such members, to prepare and draft resolutions for passage by the body, and to represent the county either as plaintiff or defendant in such suits as may be brought by or against the county."

[3] See 73 Am. Jur. 2d Statutes § 95.

[4] For example, should the Commission desire to hire special counsel to advise it on a specific legislative matter (e.g., reapportionment of Commission districts), the language in Charter Section 2.02 would authorize this.

A special counsel's legal representation is restricted because the Office of County Attorney is the sole department charged with the legal representation of the County. Section 3.08(A) of the Charter. The County Commission, as is true for any other client, may retain independent legal counsel when representation by the County Attorney's Office would pose a conflict of interest based on the ethical rules governing attorneys' conduct, but as chief legal counsel to the Commission, the County Attorney must first determine that a conflict exists and then may retain, or assist the County Commission with retaining, outside counsel. This interpretation is consistent with the long-standing past practice and previous opinions of the County Attorney's office (for example, see attached County Atty. Op. 99-004).

In looking at the specific resolution in question (attached), there are a number of additional flaws. First, the resolution is not specific to the assignment for the special counsel. Second, based on a combination of reading of the resolution and knowledge of the legislative intent (from both the sponsor and other commissioners), the objective of this resolution is to acquire ongoing legal advice for the County Commission. Finally, the resolution indicates "inherent conflict" without identifying same. Disagreement is not conflict as contemplated by Rule 1.7 of the Tennessee Rules of Professional Conduct.

In sum, any action by the County Commission to hire an attorney on a permanent or ongoing basis to provide general advice and counsel would contravene the existing Charter provisions and would, in essence, constitute the replacement of the County Attorney as the chief legal counsel for Shelby County Government. As noted above, the County Attorney's replacement as chief legal counsel for any of Shelby County's clients would require a Charter amendment.