The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Sarah K. Campbell

Office Address: 500 Dr. Martin L. King Jr. Blvd.
(including county) Nashville, TN 37202 (Davidson County)

Office Phone: (615) 532-6026 Facsimile: (615) 741-2009

Email Address: [redacted]@ag.[redacted]

Home Address: [redacted]
(including county) Nashville, TN 37215 (Davidson County)

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

INTRODUCTION

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

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

instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I currently serve as Associate Solicitor General and Special Assistant to the Attorney General in the Tennessee Attorney General's Office.

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

I was licensed in 2015. My BPR number is 034054.

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.

Virginia, Bar No. 78333. I was licensed in 2009 and resigned my licensure in 2018 because I was no longer practicing law in Virginia.

District of Columbia, Bar No. 996322. I was licensed in 2010 and resigned my licensure in 2018 because I was no longer practicing law in the District of Columbia.

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).

I voluntarily changed my membership in the District of Columbia Bar to inactive status for a couple of years after I moved to Tennessee before eventually resigning my membership. I have never been denied admission to the Bar of any State or suspended by the Bar of any State.

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).

August 2019 – Present: Associate Solicitor General and Special Assistant to the Attorney General, Tennessee Attorney General's Office, Nashville, TN

July 2015 – July 2019: Special Assistant to the Solicitor General and the Attorney General,

Tennessee Attorney General's Office, Nashville, TN

November 2012 – June 2015: Associate, Williams & Connolly LLP, Washington, DC

July 2011 – July 2012: Law Clerk, Associate Justice Samuel A. Alito, Jr., Supreme Court of the United States, Washington, DC

October 2010 – July 2011: Associate, Williams & Connolly LLP, Washington, DC

August 2009 – August 2010: Law Clerk, Judge William H. Pryor Jr., United States Court of Appeals for the Eleventh Circuit, Birmingham, AL

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.

I have been employed continuously since completion of my legal education.

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.

In my current role, I am primarily an appellate litigator. I brief and argue appeals in state and federal appellate courts, including the Tennessee Court of Appeals, the Tennessee Supreme Court, and the U.S. Court of Appeals for the Sixth Circuit. I also file petitions for certiorari, briefs in opposition, and amicus briefs in the U.S. Supreme Court. Less frequently, I litigate significant legal issues in federal district courts and state trial courts.

Roughly 70 percent of my current practice consists of defending the constitutionality or validity of state laws on appeal when those laws are challenged in civil actions.

Roughly 15 percent of my current practice consists of representing the State at the trial level in civil actions in which the State is challenging the constitutionality or validity of federal laws or executive actions.

Roughly 15 percent of my current practice consists of drafting and filing amicus briefs on behalf of the State in the federal courts of appeals and U.S. Supreme Court and reviewing multi-state amicus briefs authored by other States to determine whether it is in Tennessee's interest to join. These amicus briefs cover a wide range of legal issues in both civil and criminal cases but generally involve significant issues of federal constitutional or statutory law.

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.

My first position after completing law school was serving as a law clerk for Judge William H. Pryor Jr. on the U.S. Court of Appeals for the Eleventh Circuit. As a law clerk, I read the briefs filed by parties and amici, researched the legal issues presented, wrote bench memoranda, and prepared initial drafts of judicial opinions. I also served as a law clerk for Justice Samuel A. Alito, Jr. on the U.S. Supreme Court. My responsibilities in that position were similar but additionally included reviewing and making recommendations regarding petitions for writs of certiorari. In both clerkships, I worked on civil and criminal cases involving a wide range of challenging legal issues. Clerking was a formative professional experience. I had to immerse myself in unfamiliar areas of the law and quickly become an expert. I learned to distill complicated legal arguments, research thoroughly and carefully, and write cogently.

I worked as an associate at Williams & Connolly LLP, a law firm in Washington, DC, for approximately three-and-a-half years. My practice there focused on trial and appellate litigation and included high-stakes civil and criminal matters in federal and state courts across the country involving a variety of legal issues. At the trial level, I engaged in expert and fact discovery (including document collection and review and taking and defending depositions); prepared research memoranda; drafted discovery motions and dispositive motions; presented oral argument on motions; and prepared cases for trial. At the appellate level, I wrote research memoranda, drafted briefs, and helped prepare for oral argument. In addition to litigating in state and federal court, I also worked on a significant intellectual property matter in the International Trade Commission and represented clients in attorney disciplinary proceedings. I continued to hone my research and writing skills while in private practice. I also learned to manage a heavy workload and juggle multiple responsibilities.

For the past six years, I have worked in the Tennessee Attorney General's Office, first as Special Assistant to the Solicitor General and the Attorney General and then as Associate Solicitor General and Special Assistant to the Attorney General. During that time, I have served as counsel of record in nearly twenty appeals in state and federal court, including six in the Tennessee Supreme Court. I have handled both civil and criminal cases in the Tennessee Supreme Court, many involving important issues of statutory and constitutional interpretation. I have litigated significant appeals in the U.S. Court of Appeals for the Sixth Circuit involving the constitutionality of Tennessee's laws. I also frequently represent the State in cert-stage proceedings in the U.S. Supreme Court. I have filed approximately ten petitions for certiorari

or briefs in opposition, including several in capital cases.

I also file amicus briefs on behalf of the State. During my time in the Attorney General's Office, Tennessee has led two merits-stage multi-state amicus briefs in the U.S. Supreme Court and numerous multi-state amicus briefs in the U.S. Court of Appeals for the Sixth Circuit and other federal courts of appeals. I drafted or significantly contributed to each of those briefs. I also review amicus briefs drafted by other States and evaluate whether Tennessee should join. These amicus briefs concern important and cutting-edge legal issues in criminal and civil cases.

My practice in the Attorney General's Office at times includes trial-level litigation involving significant legal issues. For example, I represented state officials in a declaratory judgment action in chancery court concerning the interpretation of a state constitutional provision. I am currently representing Tennessee in a federal lawsuit challenging federal agency guidance under the Administrative Procedure Act. Tennessee is leading a coalition of twenty States in that action. I also assist with litigation strategy and dispositive motions in other trial-level litigation and monitor multi-state litigation to which Tennessee is a party. My work in the Attorney General's Office has offered opportunities to continue improving my legal writing, legal analysis, and oral advocacy skills.

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

The following cases are examples of significant matters I have litigated during my time in the Tennessee Attorney General's Office:

Tennessee Supreme Court

Holland v. State, 610 S.W.3d 450 (Tenn. 2020)

This appeal sought reversal of a Court of Criminal Appeals judgment granting a post-conviction petitioner a hearing on an issue that he had failed to raise either in this petition or on appeal. The Tennessee Supreme Court unanimously reversed the judgment and held that the Court of Criminal Appeals lacks authority under the Post-Conviction Act to raise an issue sua sponte that the petitioner has waived.

State v. Welch, 595 S.W.3d 616 (Tenn. 2020)

In this appeal from a burglary conviction, the defendant argued that Tennessee's burglary statute was unconstitutionally vague as applied to a shoplifter who entered a retail store after having previously been banned from the store for prior acts of shoplifting. The Tennessee Supreme Court held that the statute unambiguously applies in those circumstances and affirmed the conviction.

State v. Vance, 596 S.W.3d 229 (Tenn. 2019)

This was an appeal from a murder conviction. The defendant argued that the trial court erroneously admitted a detective's testimony under the curative admissibility doctrine. The

Tennessee Supreme Court held that the trial court had erred by admitting the detective's testimony. But the Court affirmed the defendant's conviction because he did not preserve his constitutional objection at trial and was not entitled to relief under the plain-error doctrine.

In re Bentley D., 537 S.W.3d 907 (Tenn. 2017)

This appeal arose from a termination of parental rights. The Court of Appeals initially dismissed the appeal because the appellant failed to personally sign the notice of appeal. The Tennessee Supreme Court held that the signature requirement of Tenn. Code Ann. § 36-1-124(d) does not require the appellant to personally sign the notice of appeal; the signature of the appellant's attorney is sufficient. The Court remanded to the Court of Appeals for further proceedings on the merits.

State v. Pruitt, 510 S.W.3d 398 (Tenn. 2016)

This appeal involved a constitutional challenge to the Exclusionary Rule Reform Act. The defendant argued that applying the Act to allow the introduction of otherwise inadmissible evidence violated the Tennessee Constitution's ex post facto clause. Overruling earlier precedents, the Tennessee Supreme Court held that Tennessee's ex post facto clause has the same definition and scope as its federal counterpart and that there was no ex post facto violation in this case. The Court affirmed the convictions.

U.S. Court of Appeals for the Sixth Circuit

Memphis Center for Reproductive Health v. Slatery, 14 F.4th 409 (6th Cir. 2021)

This appeal arose from a constitutional challenge to two Tennessee abortion laws. The first law prohibits doctors from performing abortions when they know the abortion is being because of the race, sex, or Down syndrome diagnosis of the unborn child. The second law prohibits abortions after certain gestational ages. The district court preliminarily enjoined the enforcement of both laws—the first on vagueness grounds and the second for violating a woman's right to abortion. A divided panel of the Sixth Circuit affirmed the injunction. The State's petition for rehearing en banc is pending.

Bristol Regional Women's Center, P.C. v. Slatery, 7 F.3d 478 (6th Cir. 2021) (en banc)

This appeal arose from a constitutional challenge to Tennessee's 48-hour waiting period for abortions. After a trial, the district court held the law unconstitutional and permanently enjoined its enforcement. A panel of the Sixth Circuit declined to stay the injunction pending appeal. The State filed a successful petition for initial hearing en banc. The en banc Court held that Tennessee's waiting period is constitutional and reversed the district court's judgment.

Memphis A. Philip Randolph Institute v. Hargett, 978 F.3d 378 (6th Cir. 2020)

This appeal involved a constitutional challenge to Tennessee's statutory process for verifying the signature on a mail-in absentee ballot. A divided panel of the Sixth Circuit held that the plaintiffs lacked standing to challenge the law.

Sutton v. Parker, 800 Fed. Appx. 397 (6th Cir. 2020)

This appeal involved an Eighth Amendment challenge to Tennessee's lethal-injection protocol. The Sixth Circuit affirmed the district court's judgment that the challenge was barred by the res judicata effect of the Tennessee Supreme Court's judgment rejecting a similar challenge.

Thomas v. Bright, 937 F.3d 721 (6th Cir. 2019)

This appeal arose from a First Amendment challenge to Tennessee's Billboard Act. The Sixth Circuit affirmed the district court's judgment that the Act violates the First Amendment because its distinction between on-premises and off-premises signs is content based and fails to satisfy strict scrutiny. This case generated significant nationwide interest given the prevalence of the on-premises/off-premises distinction. The federal government and several public-interest organizations and industry groups participated as amici. The State filed a petition for a writ of certiorari in the U.S. Supreme Court, but Tennessee's legislature amended the Act while that petition was pending. The Supreme Court granted certiorari in a different case raising the same issue and will decide that case this term.

George v. Hargett, 879 F.3d 711 (6th Cir. 2018)

This appeal involved a federal constitutional challenge to Tennessee's method for determining whether Amendment 1 was ratified by the voters in Tennessee's 2014 election. The district court held that Tennessee's method of counting votes violated plaintiffs' federal constitutional right to vote. The Sixth Circuit reversed. It concluded that Tennessee officials had properly interpreted Article XI, Section 3, of the Tennessee Constitution—the provision that governs constitutional amendments—and that the method did not unconstitutionally burden plaintiffs' federal voting rights.

Trial court

Hargett v. George, No. 44460 (Williamson Ch. Ct. Apr. 21, 2016)

Tennessee's Secretary of State and Coordinator of Elections filed a declaratory judgment action concerning the interpretation of Article XI, Section 3, of the Tennessee Constitution. The chancery court granted summary judgment in their favor.

Tennessee v. U.S. Department of Education, No. 3:21-cv-00308 (E.D. Tenn.) (pending)

In this case, a coalition of 20 States—led by Tennessee—is challenging guidance documents issued by the U.S. Department of Education and the Equal Employment Opportunity Commission concerning Title IX and Title VII, respectively. The action alleges that the guidance documents are procedurally and substantively unlawful under the Administrative Procedure Act.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or

arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not served as a mediator, arbitrator, or judicial officer.

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

While in law school, I served as a volunteer guardian ad litem for abused or neglected children who were in the legal custody of the Department of Social Services in Durham County, North Carolina.

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

N/A

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

I have not previously submitted an application.

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.

University of Tennessee (B.A. *summa cum laude*, 2004)

Major: College Scholars with emphases in political science, educational policy, and Spanish

Honors: Phi Beta Kappa, Torchbearer Award, Oldham Scholar (full-tuition merit scholarship),

Normandy Scholar (semester of interdisciplinary study of World War II)

Activities: President of the Student Government Association; Chairperson of the Undergraduate Academic Council; Founding Member of the Baker Scholars Program

Duke University Terry Sanford Institute for Public Policy (Master of Public Policy 2009)

Duke University School of Law (J.D., *magna cum laude*, 2009)

Honors: Order of the Coif; Advocacy Award; Commencement Speaker (selected by class); Mordecai Scholar (full-tuition merit scholarship)

Activities: Managing Editor of the *Duke Law Journal*; Moot Court Board (member of National Moot Court Competition regional championship team); Appellate Litigation Clinic (argued successful appeal before the U.S. Court of Appeals for the D.C. Circuit); Board Member of the Federalist Society and Christian Legal Society; Teaching Assistant for Professor Barack Richman's Contracts Course; Research Assistant for Professors Ernest Young and Doriane Coleman

PERSONAL INFORMATION

15. State your age and date of birth.

I am 39 years old. My date of birth is [redacted], 1982.

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

I have lived in Tennessee for a total of 26 years. I was born in LaFollette, Tennessee and lived there until 1990. My family then moved to Indiana for three years but relocated to Rogersville, Tennessee in 1993. I lived in Rogersville for eight years, until graduating from high school in 2000. I lived in Knoxville until 2005 while attending college and then relocated to North Carolina to attend law school, then to Birmingham, Alabama for a judicial clerkship, and then to Washington, D.C. to work at a law firm. I have lived in Nashville continuously since 2015.

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

I have lived in Davidson County for the past six years.

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

Davidson 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.

I have not served in the military.

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

No.

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

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

No formal complaints have been filed against me.

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.

- Member, Christ Presbyterian Church, Nashville, Tennessee (2015 to present)
- Member, Sequoia Swim and Tennis Club, Nashville, Tennessee (February 2021 to present)
- Board Member, Howard H. Baker Jr. Center for Public Policy, Knoxville, Tennessee (October 2012 to March 2018)

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.

In college, I was a member of Alpha Delta Pi sorority, which limits membership to women. I am no longer an active member of that organization and do not participate in its activities.

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.

- Member, TBA Leadership Law Alumni Association (2021 to present)
- Elected Member, American Law Institute (2018 to present)
- Member, Tennessee Bar Association (2016 to present)
- Federalist Society (2007 to present)
  - Member of the Executive Committee for the Federalism and Separation of Powers Practice Group (2019 to present)
- Barrister, Harry Phillips American Inn of Court (2017 to 2021)
  - Program Team Co-Captain (2019 to 2021)
- Member, Virginia Bar Association (2011 to 2016)

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.

- Selected as member of TBA Leadership Law Class of 2020
- Elected to membership in the American Law Institute in 2018

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

- *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 Law & Contemp. Probs. 107 (Spring 2010) (with Doriane Lambelet Coleman and Kenneth A. Dodge)
- Note, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071 (2009)

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.

- Tennessee's 48-Hour Abortion Waiting Period and Staggered Abortion Ban at the Sixth Circuit, Nashville Christian Legal Society (November 18, 2021)
- Tennessee Supreme Court Review, Nashville Federalist Society (November 16, 2021)
- Panelist, State Solicitors General Panel, Birmingham Federalist Society (October 22, 2021)
- Panelist, Supreme Court Preview, Kentucky Federalist Society Chapters Conference

(October 18, 2021)
- Tennessee Supreme Court Update, Nashville Bar Association (October 9, 2021)
- Title VII and IX – Tennessee Litigation, Higher Education Legal Summit (October 5, 2021)
- U.S. Supreme Court Review, Memphis Federalist Society (August 26, 2021)
- Tennessee Supreme Court Update, Nashville Bar Association (November 6, 2020)
- U.S. Supreme Court Review, Memphis Federalist Society (September 1, 2020)
- How Much Judicial Deference Is Too Much?, Harry Phillips American Inn of Court (March 17, 2020)
- State Sovereign Immunity: Past, Present, and Future, Tennessee Attorney General's Office (September 27, 2019)
- U.S. Supreme Court Review, Memphis Federalist Society (September 26, 2019)
- Tennessee Supreme Court Update, Nashville Bar Association (August 23, 2019)
- Reflections on Leaving Big Law for a State AG's Office, Federalist Society D.C. Young Lawyers Chapter (July 15, 2019)
- Tennessee Supreme Court Update, Nashville Bar Association (August 10, 2018)
- Tennessee Supreme Court Review, Nashville Federalist Society (August 9, 2018)
- Tennessee Supreme Court Update, Nashville Bar Association (December 15, 2017)
- U.S. Supreme Court Review, Presentation to Tennessee Supreme Court law clerks (December 7, 2017)
- U.S. Supreme Court Preview, Williamson County Federalist Society (October 12, 2017)
- U.S. Supreme Court Preview, Murfreesboro Federalist Society (September 28, 2017)
- Panelist, Former United States Supreme Court Law Clerks, Memphis/Mid-South Chapter of Federal Bar Association, Jackson Seminar (July 19, 2017)

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.

I served on the Governor's Council for Judicial Appointments, an appointed position, from July 2017 to November 2020.

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

No.

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

reflects your own personal effort.

The following writing samples are attached to my application:

1) A petition for rehearing en banc filed in the U.S. Court of Appeals for the Sixth Circuit in *Memphis Center for Reproductive Health v. Slatery*, No. 20-5969, on September 23, 2021. This petition reflects roughly 95 percent of my own personal effort. I drafted the entire petition. Two of my colleagues in the Attorney General's office reviewed the draft and made minor edits.
2) A merits brief filed in the Tennessee Supreme Court in *Marty Holland v. State of Tennessee*, No. W2018-01517-SC-R11-PC, on September 20, 2019. This brief reflects roughly 95 percent of my own personal effort. I drafted the entire brief. Two of my colleagues in the Attorney General's office reviewed the draft and made minor edits.
3) An application for permission to appeal filed in the Tennessee Supreme Court in *State of Tennessee v. Norman Eugene Clark*, No. E2016-01629-COA-R3-CV, on April 17, 2017. This example reflects roughly 95 percent of my own personal effort. I drafted the entire application. Two of my colleagues in the Attorney General's office reviewed the draft and made minor edits.

ESSAYS/PERSONAL STATEMENTS

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

The Tennessee Supreme Court is entrusted with deciding important legal issues that affect individuals and organizations across our State. That is a weighty responsibility, to say the least, and my decision to seek this position thus was not made lightly. I carefully considered whether I am qualified to decide the cases that come before the Court and whether I possess the temperament and work ethic needed to serve the State and its citizens well. I believe the legal analysis, research, and writing skills I have developed and refined as a judicial clerk and litigator lend themselves well to the day-to-day work of a Tennessee Supreme Court Justice, which frequently includes deciding difficult constitutional and statutory questions of first impression. And I believe that I can perform those responsibilities with humility and a proper understanding of the judiciary's limited role in our constitutional structure.

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)***

As a government attorney, my ability to participate in pro bono legal work is limited. I was also unable to participate in pro bono legal work while serving as a judicial law clerk. When I was in private practice, however, I had a robust pro bono practice that included representing a client facing parole revocation proceedings; representing tenants in a civil action brought against their landlord to remedy dangerous living conditions; and representing a juvenile facing adult

criminal charges. Through my involvement in the Harry Phillips American Inn of Court and the TBA Leadership Law program, I have participated in a number of CLE programs focused on equal-justice issues.

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)***

I seek a position on the Tennessee Supreme Court, a statewide court with five Justices. No more than two Justices can reside in the same Grand Division. The Court exercises jurisdiction over appeals from the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals. It occasionally assumes jurisdiction of appeals that are pending in, but not yet decided by, the Court of Appeals and Court of Criminal Appeals, and accepts certified questions from federal courts. The Court also reviews attorney disciplinary judgments and may review workers' compensation decisions. Most of the Court's appellate jurisdiction is discretionary. There are currently two Justices from the Western Division and one Justice each from the Middle and Eastern Divisions. If I were selected to serve on the Court, I would be the second Justice from the Middle Division.

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)***

Much of my current community involvement is at my church and my children's schools. I volunteer with the children's ministry at my church and am a room parent at my oldest child's elementary school and my younger two children's preschool. We participate in community service projects as a family, such as supporting local foster children and foster parents through our church and non-profit organizations. I regularly mentor younger attorneys and students who are interested in becoming attorneys, both through formal mentoring programs and informally at the request of friends and colleagues. I present CLE programs to bar associations and other professional groups and have taught civics lessons on Constitution Day.

If appointed to the Tennessee Supreme Court, I would continue my current community involvement to the extent permitted by the Code of Judicial Conduct. I would also seek out additional opportunities to promote civics education in Tennessee. All attorneys—especially judges—are uniquely equipped to teach the next generation about our system of government and the role of the judiciary. The Court's SCALES program, in which the Court holds oral arguments at schools across the State and interacts with students and teachers, is excellent in this regard. I have participated in the SCALES program as an arguing attorney and would very much enjoy being part of that effort if selected as a Justice.

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

I am seeking appointment to the Tennessee Supreme Court at an earlier stage of my career than most. But my professional experiences are also unique. I was fortunate to receive clerkships with two highly respected federal judges early in my career—clerkships that presented the opportunity to work on challenging, high-level legal issues and to see firsthand the discipline, intelligence, and care that excellent judging requires. My role in the Tennessee Attorney General's Office has presented opportunities to handle major litigation involving issues of broad importance to the State and its citizens—opportunities that many attorneys do not see until much later in their careers, if at all.

I do not take these opportunities for granted. I grew up in small-town rural East Tennessee with no attorneys in my family. My father was the first in his family to attend college, and my grandparents all made a living through physical labor—on farms, in factories, and on the railroad. From them and my parents, I learned to value hard work, humility, and honesty and to treat everyone with fairness and respect. Those are still my values. And they would carry over into my role as a judge if I am selected for that position. I would approach the job with discipline, humility, and honesty and strive to treat everyone in the judicial process—from litigants to attorneys to the judges whose opinions are being reviewed—with fairness and respect.

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. If appointed to serve as a judge, my role would be to apply the law as it is written, even if I disagree with the substance of the law or dislike the result of applying the law in a particular proceeding. That limited role is required by Tennessee's Constitution, which vests the legislature—not the courts—with authority to make the laws. When I clerked on the U.S. Court of Appeals for the Eleventh Circuit, my legal analysis had to consider and faithfully apply relevant binding precedents of both the Eleventh Circuit and the U.S. Supreme Court, even if I thought those precedents were wrongly decided.

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. Andrée S. Blumstein, Solicitor General, Office of the Tennessee Attorney General; [redacted], Nashville, TN 37202; [redacted]
B. Representative Michael G. Curcio, Member and Chair of the Criminal Justice Committee, Tennessee House of Representatives; [redacted] Nashville, TN 37243; [redacted]
C. Angie Gage, former Director of Women's Ministry at Christ Presbyterian Church in Nashville; [redacted], Greenville, SC 29605; [redacted]
D. The Honorable Douglas T. Jenkins, Chancellor for the Third Judicial District, [redacted] Rogersville, TN 37857; [redacted]; chancellor.doug.jenkins@tn.courts.gov
E. The Honorable William H. Pryor Jr., Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit; Hugo L. Black United States Courthouse, [redacted] Birmingham, AL 35203; [redacted]

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: November 18, 2021.

Sarah K. Campbell

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

Sarah K. Campbell
Type or Print Name

Sarah K. Campbell
Signature

November 18, 2021
Date

034054
BPR #

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

Virginia Bar (license number 78333)

District of Columbia Bar (license number 996322)

No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH; PLANNED PARENTHOOD OF TENNESSEE AND NORTH MISSISSIPPI; KNOXVILLE CENTER FOR REPRODUCTIVE HEALTH; FEMHEALTH USA, INC.; DR. KIMBERLY LOONEY; DR. NIKKI ZITE,
Plaintiffs-Appellees

v.

HERBERT H. SLATERY III; LISA PIERCEY, M.D.; RENE SAUNDERS, M.D.; W. REEVES JOHNSON, JR., M.D.; HONORABLE AMY P. WEIRICH; GLENN R. FUNK; CHARME P. ALLEN; TOM P. THOMPSON, JR.,
Defendants-Appellants

On Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:20-cv-00501)

PETITION FOR REHEARING EN BANC

HERBERT H. SLATERY III
Attorney General and Reporter
of the State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General
Counsel of Record

CLARK L. HILDABRAND
Assistant Solicitor General

P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

RULE 35(b)(1) STATEMENT

Tennessee law prohibits doctors from performing abortions when the unborn child has a fetal heartbeat or reaches certain gestational ages, Tenn. Code Ann. § 39-15-216(c)(1)-(12) ("Timing Provisions"), or when the doctor knows the abortion is being sought because of the unborn child's sex, race, or Down syndrome diagnosis, *id.* § 39-15-217(b)-(d) ("Antidiscrimination Provision"). A divided panel of this Court held that the Timing Provisions violate the right to pre-viability abortion and that the Antidiscrimination Provision is unconstitutionally vague.

The panel's vagueness holding warrants en banc review because it directly conflicts with precedents of the Supreme Court and this Court holding that close cases do not render a statute vague, *see United States v. Williams*, 553 U.S. 285, 304-06 (2008); *United States v. Paull*, 551 F.3d 516, 525-26 (6th Cir. 2009), and that scienter requirements alleviate vagueness concerns, *see Gonzales v. Carhart*, 550 U.S. 124, 149-50 (2007).

The panel's rational-basis analysis also warrants en banc review because it conflicts with this Court's recent precedents confirming that abortion laws are subject to traditional rational-basis review, *see Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 483 (6th Cir. 2021) (en banc); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 438-40 (6th Cir. 2020), as well as settled

precedent emphasizing the deferential nature of that standard, *see, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).

Finally, this case presents a question of exceptional importance: whether a medical-emergency provision with subjective and objective standards but no scienter element is unconstitutionally vague. In *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 204-06 (6th Cir. 1997), this Court held that it is. But *Voinovich*, which conflicts with *Karlin v. Foust*, 188 F.3d 446, 460-64 (7th Cir. 1999), should be reconsidered.

INTRODUCTION

Less than six months ago, the en banc Court upheld an Ohio law that prohibits a doctor from performing an abortion with "knowledge that the pregnant woman is seeking the abortion, in whole or in part, because" the unborn child has Down syndrome. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517 (6th Cir. 2021) (en banc) (quoting Ohio Rev. Code § 2919.10(B)). This Court had no trouble determining what conduct the Ohio law prohibits. *Id.* at 527, 529. And it concluded that the law does not violate the right to abortion because it furthers legitimate interests without preventing a large fraction of affected women from obtaining abortions. *Id.* at 527-29.

The panel in this case circumvented *Preterm-Cleveland* by holding Tennessee's materially similar Antidiscrimination Provision unconstitutionally

vague and casting doubt on the important government interests that underly it. To do so, it used "the abortion right" as a "bulldozer to flatten legal rules that stand in the way." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting). Voicing concerns about hypothetical close cases, it held unconstitutionally vague an unambiguous criminal statute with a scienter requirement. *But see Williams*, 553 U.S. at 305-06 (rejecting argument that the "mere fact that close cases can be envisioned renders a statute vague"); *Gonzales*, 550 U.S. at 149 (reiterating "that scienter requirements alleviate vagueness concerns"). And it deemed the State's interests in preventing discriminatory abortions illegitimate because it thought the law was bad policy. *But see EMW*, 978 F.3d at 438 (a federal court's belief that a law is not "sound policy" is irrelevant under rational-basis review).

Those errors are reason enough to grant en banc review. But this case also presents an opportunity to reexamine *Voinovich*'s holding that a medical-emergency exception with subjective and objective standards and no scienter requirement is unconstitutionally vague. 130 F.3d at 205. That holding misconstrues *Colautti v. Franklin*, 439 U.S. 379 (1979), conflicts with decisions of other circuits, and is long overdue for correction.

STATEMENT

Tennessee enacted the Timing Provisions and Antidiscrimination Provision in June 2020 as part of H.B. 2263. *See* 2020 Tenn. Pub. Acts, ch. 764. The Timing Provisions prohibit performing an abortion when the unborn child has a fetal heartbeat or is 8, 10, 15, 18, 20, 21, 22, 23, or 24 or more weeks. Tenn. Code Ann. § 39-15-216(c)(1)-(12).[1] The Antidiscrimination Provision prohibits performing an abortion "if the person knows that the woman is seeking the abortion because of the sex of the unborn child," *id.* § 39-15-217(b); "the race of the unborn child," *id.* § 39-15-217(c); or "a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome in the unborn child," *id.* § 39-15-217(d).

The legislature made extensive findings that these laws would further the State's interests in protecting unborn life, preventing fetal pain, eradicating discrimination, protecting the integrity of the medical profession, and promoting human dignity. Tenn. Code Ann. § 39-15-214(a)(61), (63), (68)-(69), (72), (76)-(77). The findings focused on fetal development, including the "growing body of medical evidence" that unborn children experience pain well before viability, *id.* § 39-15-214(a)(24), and evidence that abortion is being used to "eliminate children with unwanted characteristics." *Id.* § 39-15-214(a)(59).

---

[1] These ages are "calculated from the first day of" the pregnant woman's "last menstrual period." Tenn. Code Ann. § 39-15-211(a)(2); *see also id.* § 39-15-216(a)(3).

Both the Timing Provisions and the Antidiscrimination Provision include affirmative defenses that apply when, "in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision." *Id.* §§ 39-15-216(e)(1), -217(e)(1). The term "medical emergency" means "a condition that, in the physician's good faith medical judgment, . . . so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion." *Id.* § 39-15-211(a)(3).

Plaintiffs—abortion clinics and individual physicians—challenged the Timing Provisions and the Antidiscrimination Provision under the Due Process Clause. Compl., R.1, PageID#1-34. They alleged that (1) both laws violate their patients' right to pre-viability abortion; (2) the medical-emergency affirmative defenses are unconstitutionally vague under *Voinovich*; and (3) the Antidiscrimination Provision fails to sufficiently define the conduct it prohibits. *Id.* ¶¶ 121, 123, 125, 127, PageID#30-31.

The district court preliminarily enjoined the State from enforcing both laws. PI Opinion, R.41, PageID#727-68; PI Order, R.42, PageID#769. It held that Plaintiffs would likely succeed on their claim that the Timing Provisions violate the right to abortion. PI Opinion, R.41, PageID#756. Because the en banc proceedings in *Preterm-Cleveland* were pending, the district court declined to consider whether the Antidiscrimination Provision violates the right to abortion. *Id.* at PageID#758-

59. It instead held the Antidiscrimination Provision unconstitutionally vague for failing to sufficiently define the prohibited conduct. *Id.* at PageID#758-61. It further held the medical-emergency affirmative defenses vague because it was "bound to follow" *Voinovich* "[u]nless and until the Sixth Circuit overturns" that decision. *Id.* at PageID#766.

On November 20, 2020, a motions panel of this Court stayed the preliminary injunction to the extent it barred enforcement of the Antidiscrimination Provision, concluding that the district court's vagueness rulings would likely be reversed on appeal. *See* Order, Dkt. 33-2, at 4.

The partial stay remained in effect until September 10, 2021, when a divided panel of this Court affirmed the preliminary injunction on the merits. The panel majority held the Timing Provisions unconstitutional under the undue-burden standard on the theory that they pose a substantial obstacle to abortion. Op. 20.[2] It further concluded that the "justifications" the State "offered in court" to support the Timing Provisions were "mere pretext" for challenging *Roe v. Wade*, 410 U.S. 113 (1973). Op. 22. Based on this pretext analysis, the panel determined that the law had the "*purpose* . . . of placing an obstacle in the path of a woman seeking an

[2] The Supreme Court will soon consider whether a Mississippi law prohibiting elective abortions after 15 weeks is constitutional. *See Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S.). *Dobbs* provides no reason to deny the State's petition because the panel's vagueness holdings independently warrant en banc review.

abortion" and thus could not be "considered a permissible means of serving [the State's] legitimate ends." *Id.* (quotation marks omitted).

The panel declined to address Plaintiffs' substantive-due-process challenge to the Antidiscrimination Provision because the district court had yet to consider it. Op. 31. While acknowledging that "*Preterm-Cleveland* would be relevant to the Down syndrome clause of" the Antidiscrimination Provision, the panel considered the constitutionality of the race and sex clauses an open question. *Id.* It therefore instructed the district court to "analyze . . . the bans on abortions for reasons of race and sex" separately and "scrutinize the underlying data purported to support the State's rationale" for those provisions "to confirm whether the interests are indeed legitimate." *Id.* at 31-32. And the panel made clear that, in its view, those interests are not legitimate. *Id.*

Undeterred by *Preterm-Cleveland* or any other precedent, the panel held the Antidiscrimination Provision void for vagueness. It did not find the actual language of the statute unclear. It accepted the State's position that the term "knows" means actual knowledge and that "because of" incorporates a but-for causation standard. *Id.* at 25. It nevertheless concluded that the Antidiscrimination Provision is unconstitutionally vague because it "requires that a doctor know the motivations underlying the action of *another* person to avoid prosecution while simultaneously evaluating whether the decision is 'because of' that subjective knowledge." *Id.*

(quotation marks omitted). The panel reasoned that the statute "encourages arbitrary enforcement" by allowing judges and juries to decide "what constitutes illegal behavior." *Id.* And it declined to adopt a narrowing construction or certify a question to the Tennessee Supreme Court. *Id.* at 30 n.16.

Finally, after noting that the "facts and law support" the district court's determination that the medical-emergency provisions are unconstitutionally vague under *Voinovich*, the panel found it "unnecessary to decide" that issue since it had affirmed the "injunction on other grounds." *Id.* at 33.

Judge Thapar concurred in the judgment in part and dissented in part. He concurred in the panel's judgment that the Timing Provisions are unconstitutional "under the *Roe/Casey* framework," while explaining in depth why "those precedents are wrong." *Id.* at 36, 41 (Thapar, J., concurring in the judgment in part and dissenting in part). But he dissented from the panel's judgment that the Antidiscrimination Provision is unconstitutionally vague because the statute has a "core meaning" that is sufficient to give doctors fair notice of what is prohibited, *id.* at 65, as well as a "knowledge requirement" that further alleviates any vagueness concerns, *id.* at 67. Judge Thapar rejected the panel's view that "a judge's hypothetical" can "make a statute void for vagueness" and cited examples of other state and federal laws that similarly "requir[e] proof that a defendant knew another person's state of mind," all of which would be unconstitutional "under the majority's

reasoning." *Id.* And he criticized the majority for "annihilat[ing] a separate sovereign's statute" without first giving the State's own courts an opportunity to construe the law. *Id.* at 69.

REASONS FOR GRANTING EN BANC REVIEW

I. The Panel's Vagueness Holding Conflicts with Binding Precedent.

The panel's holding that the Antidiscrimination Provision is unconstitutionally vague warrants en banc review because it contravenes binding precedent and calls into question the constitutionality of numerous other laws requiring proof that a defendant knew the mental state of another person.

The threshold for invalidating a law on vagueness grounds is high. A law is unconstitutionally vague only if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. "[P]erfect clarity and precise guidance have never been required," even for criminal laws that implicate constitutional rights. *Id.*; *see also, e.g.*, *Schickel v. Dilger*, 925 F.3d 858, 879 (6th Cir. 2019). If it is "clear what the [law] as a whole prohibits," a vagueness challenge must be rejected. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Importantly, "the mere fact that close cases can be envisioned" will not "render[] a statute vague." *Williams*, 553 U.S. at 305. *Williams* rejected a vagueness

challenge to a criminal statute "requir[ing] that the defendant hold . . . the belief that the material is child pornography." *Id.* at 306. The Court explained that "[w]hether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment." *Id.* The Court acknowledged that "it may be difficult in some cases to determine whether these clear requirements have been met," but this close-case problem "is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.* at 305-06.

This Court followed *Williams* in *Paull*, 551 F.3d at 525-26. The defendant argued that a law prohibiting the knowing possession of child pornography was unconstitutionally vague because he "lack[ed] the capacity to know whether the charged items contain actual minors" or constitutionally protected "virtual images of simulated child pornography." *Id.* at 525. His argument was not that "a person cannot read the statute and determine what is illegal" but instead that, "knowing what is illegal, he cannot distinguish between the prohibited and the permitted." *Id.* This Court easily rejected that argument, explaining that the defendant's "refuge" is "putting the government to its burden to prove that he possessed child pornography." *Id.* at 526.

The panel decision squarely conflicts with these precedents. The panel committed "fundamental error" by "focus[ing] on the fact that" the Antidiscrimination Provision "may generate close cases and not the statute's

sufficiently clear description of the prohibited conduct." *Paull*, 551 F.3d at 525. Critically, the panel did not find the actual terms of the Antidiscrimination Provision vague. It instead pointed to hypothetical "ambiguous situations" in which it might be difficult to determine whether a provider had violated the statute. Op. 26-27. But *Williams* and *Paull* foreclose this approach.

The panel also turned precedent on its head by holding that the knowledge requirement *creates*—rather than alleviates—vagueness concerns. *Gonzales*, 550 U.S. at 149-50. The Antidiscrimination Provision applies only when a doctor has *actual knowledge* that the abortion is being sought because of a protected characteristic. Although the panel acknowledged that "a scienter requirement may mitigate a law's vagueness," Op. 25 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)), it refused to follow that rule by positing that this law "requires that a doctor know the motivations underlying the action of *another* person," *id.* But the Antidiscrimination Provision does not *require* a doctor to know why someone is seeking an abortion. To the contrary, it applies only when the doctor *in fact knows* that the abortion is being sought *because of* a prohibited reason. If the doctor does not know, then the Antidiscrimination Provision does not prohibit the abortion. The knowledge requirement thus "shields those acting in good faith," Op. 67 (Thapar, J., concurring in the judgment in part and dissenting in part), and precluded the panel's vagueness holding.

Precedent likewise forecloses the panel's concerns about arbitrary enforcement. The panel worried that allowing a jury to determine whether the prosecution had proved knowledge would impermissibly delegate legislative authority. Op. 25. But whether a defendant possesses the requisite state of mind is a "clear question[] of fact." *Williams*, 553 U.S. at 306. And "courts and juries every day pass upon knowledge, belief and intent." *Id.* (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 411 (1950)). If the panel is right that allowing juries to decide this question is impermissible, then every criminal law with a scienter requirement is unconstitutional.

As Judge Thapar explained, the panel decision also casts doubt on a host of federal and state criminal laws that similarly require "proof that a defendant knew another person's state of mind," including the laws of other sovereign States in this Circuit. Op. 68 (Thapar, J., concurring in judgment in part and dissenting in part); *see also* Brief of Kentucky, et al. at 4-6. And the decision clashes with principles of federalism, which require a federal court to "undertake an especially diligent effort to uphold" a state law by, among other things, interpreting it to avoid constitutional problems or allowing the State's courts to clarify its reach through certification or case-by-case adjudication. Op. 69.

Since binding precedent blocked Plaintiffs' vagueness arguments at every turn, the panel's holding can only be explained as the latest example of "abortion

exceptionalism." Op. 63 (Thapar, J., concurring in part in the judgment and dissenting in part). This Court should grant en banc review to correct course.

II. The Panel's Substantive-Due-Process Analysis Conflicts with Binding Precedent.

The panel did not limit its abortion exceptionalism to the void-for-vagueness doctrine. It also applied an abortion-specific version of rational-basis review that bears no resemblance to "traditional rational-basis review." *Bristol Reg'l*, 7 F.4th at 483 (quoting *EMW*, 978 F.3d at 440).

Rational-basis review is a "highly deferential" standard "designed to respect the constitutional prerogatives of democratically accountable legislatures." *Id.* (quotation marks omitted). "All that matters" under that standard "is whether the state conceivably had a rational basis to enact the regulation." *Id.* The State's rationales need not be supported with evidence and are not "subject to courtroom fact-finding." *Id.* at 484 (quoting *Beach Commc'ns*, 508 U.S. at 484). The challengers must instead "negative every conceivable basis which might support" the law, "whether or not the basis has a foundation in the record," *id.* (quotation marks omitted), or "actually motivated the legislature," *Beach Commc'ns*, 508 U.S. at 315.

The panel twice flouted these principles. *First*, citing a single legislator's remarks about overturning *Roe*, the panel "question[ed]" whether the state interests underlying the Timing Provisions "are, in fact, genuine." *Id.* Based solely on this

cherry-picked legislative history, the panel deemed it "likel[y] that the justifications offered in court have been mere pretext." *Id.* at 22. But the Timing Provisions survive rational-basis review because they "can *reasonably be understood* to result from a justification independent of unconstitutional grounds." *Trump v. Hawaii*, 138 S. Ct. 2392, 2417, 2420 (2018) (emphasis added). They are at least "plausibly related to" the State's legitimate interests in protecting unborn life, preventing fetal pain, and safeguarding the integrity of the medical profession, so the panel was wrong to deem them "illegitimate under rational-basis review." *Id.* at 2420.

The panel's pretext analysis also rests on the erroneous premise that overturning *Roe* is not a legitimate interest. One of the chief criticisms of the *Roe/Casey* framework is that it usurps state legislative authority and prevents state lawmakers from responding to factual developments. *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015); *McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring). Overturning *Roe* is thus a necessary step to furthering other state interests that the Supreme Court and this Court have repeatedly recognized as legitimate. *See* Appellants' Brief at 51-53. The panel concluded otherwise only by wrongly equating opposition to *Roe* with impermissible animus. *Cf. Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 283 (5th Cir. 2019) (Ho., J., concurring in judgment), *cert. granted*, --- S. Ct. ---, No. 19-1392, 2021 WL 1951792 (May 17, 2021).

Second, although purporting not to reach the substantive-due-process challenge to the Antidiscrimination Provision, the panel gave the district court detailed instructions for invalidating the law at least in part on those grounds on remand—instructions at odds with traditional rational-basis review. It admonished the district court to "scrutinize the underlying data purported to support" the interests underlying the law's sex and race clauses "to confirm whether [they] are indeed legitimate." Op. 31. The panel expounded that "[t]he lack of data and failure to analyze the root of the cited problems . . . undercut" the State's arguments that sex and race discrimination "are legitimate concerns." *Id.* at 31-32. But States are not required to produce *any* evidence to support the rationality of an enacted law, and federal courts are prohibited from scrutinizing or second-guessing a State's policy judgments. *See Bristol Reg'l*, 7 F.4th at 483.

The panel wholly disregarded principles of traditional rational-basis review, notwithstanding this Court's recent and clear holdings that those principles apply to abortion regulations. *See, e.g.*, *id.*; *EMW*, 978 F.3d at 439-40. This dangerous precedent warrants review by the full Court.

III. This Case Presents an Exceptionally Important Question.

Since it upheld the preliminary injunction on other grounds, the panel did not reach Plaintiffs' argument that the medical-emergency affirmative defenses are unconstitutionally vague. Op. 33. But the district court held itself bound by

Voinovich to enjoin the laws for that additional reason. PI Opinion, R.41, PageID#764-66. This case thus presents an opportunity to reexamine *Voinovich*.[3]

As relevant here, *Voinovich* involved a vagueness challenge to medical-necessity and medical-emergency exceptions requiring a doctor to determine "in good faith and in the exercise of reasonable medical judgment" that the abortion was medically necessary or that a medical emergency existed. 130 F.3d at 204. *Voinovich* held that "the combination" of the subjective good-faith standard with the objective reasonableness standard "without a scienter requirement" rendered the exceptions "unconstitutionally vague," because a doctor "who believed he or she was acting reasonably" could be held liable if "others later decide that the physician's actions were nonetheless unreasonable." *Id.* at 205.

Voinovich relied heavily on the Supreme Court's decision in *Colautti*. *Id.* at 204. *Colautti* held that a law requiring a physician to make a viability determination was unconstitutionally vague because it was "unclear whether the statute import[ed] a purely subjective standard" or instead a "mixed subjective and objective standard." 439 U.S. at 391. That the law lacked a scienter requirement and imposed strict liability for erroneous viability determinations "compounded" its vagueness. *Id.* at

[3] Even if this Court declines to overrule *Voinovich*, the preliminary injunction was still improper because, among other reasons, *Voinovich* is distinguishable, facial challenges based on the lack of a valid medical-emergency provision are not permitted, and any vagueness in the medical-emergency provisions is easily eliminated through severance. *See* Appellants' Brief at 31-36.

394. *Voinovich* acknowledged that *Colautti* "did not consider whether a mixed standard would be unconstitutional," but nevertheless "f[ound] *Colautti* strongly indicative of the [Supreme] Court's view that in this area of the law, scienter requirements are particularly important." 130 F.3d at 204-05.

Voinovich has been rightly and roundly criticized. Judge Boggs called the panel's reliance on *Colautti* "misplaced" since the Supreme Court had "specifically declined" to consider whether a scienter requirement was constitutionally required. *Id.* at 216 (Boggs, J., dissenting). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, similarly criticized *Voinovich* for imposing a "constitutional scienter requirement . . . under the guise of the void-for-vagueness doctrine" and found the challenged Ohio laws, which "plainly impose[d] both a subjective and objective mental requirement," easily distinguishable from the "ambiguous" statute in *Colautti*. *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1348-49 (1998) (Thomas, J., dissenting from the denial of certiorari). And the Seventh Circuit expressly disagreed with *Voinovich*, refusing to read *Colautti* to require the invalidation of an abortion statute containing an objective standard but no scienter requirement. *Karlin*, 188 F.3d at 462-63; *see also Hope Clinic v. Ryan*, 195 F.3d 857, 866 (7th Cir. 1999) (en banc) (Easterbrook, J.).

This Court should grant en banc review to reconsider and overrule *Voinovich*. There is nothing "vague, or even novel, about a statute prescribing a standard

including components of good faith and reasonableness." *Voinovich*, 130 F.3d at 216 (Boggs, J., dissenting). *Voinovich*'s holding to the contrary misconstrued *Colautti* and other vagueness precedents and warrants correction.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

CLARK L. HILDABRAND
Assistant Solicitor General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026

Counsel for Defendants-Appellants

September 23, 2021

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,898 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This petition also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

September 23, 2021

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on September 23, 2021, a copy of Defendants-Appellants' Petition for Rehearing En Banc was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MARTY HOLLAND,	)	
	)	
Appellee,	)	
	)	
v.	)	**No. W2018-01517-SC-R11-PC**
	)	
STATE OF TENNESSEE,	)	
	)	
Appellant.	)	

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

BRIEF OF STATE OF TENNESSEE

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
B.P.R. 34054
Associate Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

QUESTION PRESENTED FOR REVIEW

Whether, in an appeal from the denial of post-conviction relief, the Court of Criminal Appeals exceeded its authority by remanding to the post-conviction court to hold a hearing on an issue that the inmate failed to raise in either his post-conviction petition or on appeal.

STATEMENT OF THE CASE

On December 12, 2014, Michael Druien was attacked and robbed of a cash bag after closing his restaurant in Hardeman County. (II, 4-5.) Appellee Marty Holland, Druien's former employee, was charged by criminal information with one count of attempted first-degree murder and one count of especially aggravated robbery and pleaded guilty to those charges. (I, 5, 11; II, 5.) He was sentenced to seventeen years' imprisonment for each count, to run concurrently with each other and an unrelated federal sentence, and consecutively to an unrelated state sentence. (I, 12-13; II, 17-18.)

Holland filed a petition for post-conviction relief raising various claims of ineffective assistance of counsel. (I, 49-50.) The post-conviction court denied relief. (I, 59.) The Court of Criminal Appeals agreed with the post-conviction court that Holland was not entitled to relief on the claims raised in his petition, but nevertheless remanded to the post-conviction court to hold a hearing on a different issue that Holland had raised neither in his petition nor on appeal: whether Holland was advised of the consequences of entering a guilty plea based on an agreement that his state sentences be served concurrently with a previously imposed federal sentence. *See* *Holland v. State*, No. W2018-01517-CCA-R3-PC, 2019 WL 1418278, at *5-8 (Tenn. Crim. App. Mar. 27, 2019). This Court granted the State's application for permission to appeal.

STATEMENT OF THE FACTS

I. Trial Court Proceedings

Holland pleaded guilty to attempted first-degree murder and especially aggravated robbery on December 9, 2015. (I, 11.) The factual proffer for the guilty plea established that, after Michael Druien closed his restaurant one Friday evening, a man clad in dark clothing and a mask hit him repeatedly with a chrome tire tool while yelling, "I'm going to kill you," and stole Druien's cash bag. (II, 4-5.) Druien was airlifted to the Regional Medical Center in Memphis with serious injuries but survived. (II, 4-5.) Druien told investigators that his attacker's voice and stature matched that of Holland, a former employee who had been fired. (II, 4-5.)

The Hardeman County Circuit Court sentenced Holland according to the terms of the plea agreement. For each count, the court imposed a sentence of seventeen years' imprisonment at 100%, with up to 15% good time credit. The court also imposed a $500 fine for each count and ordered restitution of $2,000 for the robbery. (I, 12-13; II, 17-18.)

On the same day Holland pleaded guilty to the charges at issue in this case, he also pleaded guilty to an unrelated, indicted state theft charge. (II, 8-9.)[1] And at the time of Holland's guilty pleas, he was on

---

[1] The attempted first-degree murder and especially aggravated robbery charges were in Hardeman County Circuit Court No. 15-CR-187, while the unrelated state theft charge was in Hardeman County Circuit Court No. 15-CR-15. (II, 12-13.)

loan from federal custody, where he was serving a sentence for an unrelated federal bank robbery charge. He had pleaded guilty to that offense on May 29, 2015, and was sentenced on September 2, 2015. (I, 8-10; II, 2.)

The Hardeman County Circuit Court ordered that Holland's sentences for attempted first-degree murder and especially aggravated robbery run concurrently with each other and with the federal sentence, and consecutively to the unrelated state theft sentence. (I, 12-13; II, 17-18.)

At the plea hearing, Holland testified that he understood he was waiving his right to an indictment or presentment by a grand jury. (II, 9.) He understood that the attempted first-degree murder charge and especially aggravated robbery charge each had a potential sentence of fifteen to twenty-five years and a potential fine up to $50,000. (II, 10-11.) He understood that he was agreeing to sentences of seventeen years at 100%, with the possibility of 15% good time credit. (II, 11.) He understood the charges against him and intended to plead guilty and waive his rights to a jury and an appeal. (II, 11.)

When asked if he was "satisfied with the legal representation" his appointed attorney had provided, Holland replied, "Yes, sir." (II, 13.) He gave the same response when asked whether his attorney had "properly investigated [his] case" and "properly represented [his] legal interests." (II, 13.) Holland confirmed that no one was forcing him to plead guilty. (II, 14.)

The trial court determined that Holland was competent to enter his

guilty pleas and understood the direct and indirect consequences of doing so. (II, 16.) The court also determined that Holland was entering his pleas freely, voluntarily, and intelligently. (II, 16.)

II. Post-Conviction Proceedings

Holland sought post-conviction relief. His second amended petition for post-conviction relief, which was filed with the assistance of counsel,[2] alleged that his trial counsel was ineffective and that his guilty pleas were entered without understanding the nature and consequences of his pleas. (I, 49.) Holland alleged that trial counsel did not investigate his case properly and did not represent him to the best of her abilities. (I, 49.)

As the specific factual bases for relief, Holland alleged that his home had been searched pursuant to a warrant that was signed "hours after" the search had occurred (I, 50); that he should have been charged with aggravated assault rather than attempted first-degree murder based on his claim that he only intended to "rough . . . up" the victim (I, 50); that his confession to law enforcement was coerced by a promise that he would be sentenced to only ten to twelve years if he cooperated and by a threat that "his girlfriend and mother of his children . . . could have 'options' explored on her if he did not take" a subsequent offer of seventeen years (I, 49); and that his arrest was unlawful because it was based on a bench warrant for failure to appear for a court date of which

---

[2] Holland's initial petition for post-conviction relief and first amended petition were filed pro se. (I, 18-24, 32-39.)

he was never notified (I, 50).

Holland did *not* allege any problem with the agreement to run his sentences concurrently with his previously imposed federal sentence or the advice he had received from counsel regarding that agreement.

The post-conviction court held an evidentiary hearing. Holland's trial counsel, Shana Johnson, testified that she explored getting the attempted first-degree murder charge reduced to aggravated assault and was told that she must have "lost [her] legal sense if [she] thought somebody hitting someone with a crowbar and screaming 'I'm going to kill you' . . . would cause [the State] to make [her] an aggravated assault plea offer." (III, 8-9.) She felt that she had properly investigated Holland's case and recalled meeting with Holland six or seven times before he accepted the plea deal. (III, 9, 11.) Because Holland was charged by criminal information, he was not entitled to full discovery, and Johnson was not aware of the search warrant or bench warrant referenced in Holland's petition. (III, 13.) But Johnson recalled that "[m]ost of the searches and anything incident to that were as a result of the bank robbery arrest." (III, 14.)

Johnson recalled that Holland was originally offered fifteen years, and "then it was changed to seventeen," and the prosecution eventually said that "if [Holland] wanted to keep playing cat-and-mouse games . . . [he] would offer [Holland] something consecutive" to the federal sentence instead of concurrent. (III, 12.) Johnson remembered that Holland was concerned about charges his girlfriend was facing in McNairy County, but Johnson did not recall those charges factoring into Holland's plea

negotiations. (III, 12-13.) Although Holland "may not have liked" his plea offer, no one forced him to accept it. (III, 9.)

Captain Greg Moore, who had taken Holland's statement and searched his house, denied making Holland any offers. (III, 16.) Captain Moore was asked whether Holland wrote a letter "trying to cooperate in giving a confession with the understanding that . . . he could get ten to twelve years instead of the sentence he received," but he did not recall receiving any letter. (III, 17.)

Captain Moore recalled that the initial search of Holland's home was conducted based on a search warrant from McNairy County, because they were "assisting McNairy County in their investigation" of the bank robbery. (III, 17.) Captain Moore was shown a search warrant that was "signed at 8:15 p.m.," and he testified that it appeared to be the warrant that the officers had used. (III, 18.) He later clarified, however, that the search warrant for the initial search was from McNairy County and that the officers would have obtained a separate warrant if they had discovered evidence related to a different matter. (III, 19.) Captain Moore did not recall what evidence was seized during the search. (III, 18.)

Holland also testified at the evidentiary hearing. He recalled that, when Captain Moore and officers from McNairy County arrived at his house, they arrested him on a bench warrant for failure to appear and searched his house after he had been taken into custody. (III, 22-23, 25.) Holland said he confessed to Captain Moore because he "feared a worse sentence if [he] did not cooperate." (III, 27.) Holland claimed that he

asked his attorney, Johnson, for copies of the search warrant and bench warrant but that she never provided them. (III, 22, 26.) He also claimed that he asked Johnson about the validity of the warrants and that she told him they were fine. (III, 26.) Holland recalled meeting with Johnson three or four times. (III, 21.) He felt that she had "talked to nobody, had done nothing" on his case while he was in federal custody on the bank robbery charge. (III, 21-22.)

Holland acknowledged that the first plea offer he received in writing was for fifteen years. (III, 28.) The State presented Holland with a copy of his plea offer sheet. The offer sheet reflected an initial offer of fifteen years, to be served consecutively to the federal sentence. That offer was later changed to seventeen years, to be served concurrently with the federal sentence. (III, 28-29.) When asked whether he would "rather have seventeen years concurrent or fifteen years consecutive," Holland responded that "[i]t didn't matter what [the State] did" because "the Feds [had] already r[u]n [his] Fed time with the State time." (III, 29-30.)

The post-conviction trial court denied relief. The court found that Holland "ha[d] failed to establish the factual allegations contained in his petition by clear and convincing evidence." (I, 59.) The court "accredit[ed] the testimony of Attorney Johnson" regarding her representation of Holland. (I, 59.) The court found that Johnson had "met with petitioner and discussed the case, including possible sentences" and otherwise "provided adequate assistance." (I, 59.) The court also found that Holland "understood the significance and consequences" of his decision to plead guilty. (I, 59.) He was "fully aware

of the direct consequences of the plea, including the possibility of the sentence actually received," and he was "informed at the plea hearing of the sentence." (I, 59.)

Since Holland had not alleged any problem with the court's ordering his sentences to run concurrently with his federal sentence, the post-conviction court did not address that issue.

III. Appellate Proceedings

Holland appealed. (I, 63-64.) The sole issue presented on appeal was whether "[t]he trial court erred in finding Holland received effective assistance of counsel." Brief of Appellant at 14, *Holland v. State*, No. W2018-01517-CCA-R3-PC (Tenn. Crim. App.). Holland's principal argument on appeal was that trial counsel was ineffective in failing to investigate whether the search warrant for his home was valid and that, but for that failure, he would not have pleaded guilty. But, here again, Holland did *not* raise any issue related to the trial court's decision to run his sentences concurrent with his federal sentence.

The State pointed out that the record did not contain a copy of the search warrant and that Holland had therefore waived review of that claim on appeal. Brief of the State of Tennessee at 17, *Holland v. State*, No. W2018-01517-CCA-R3-PC (Tenn. Crim. App.). The State also argued that, even if the search warrant had been invalid and counsel had been ineffective for failing to discover it, Holland still was not entitled to relief because he had not suffered any prejudice. *Id.* at 18. Since Holland had

not raised any issue related to his concurrent sentences on appeal, the State's brief did not discuss that issue.

The Court of Criminal Appeals affirmed in part and reversed in part. *See* Holland, 2019 WL 1418278, *8. At the outset of its opinion, the court noted that Holland had "run[] the risk of waiver and dismissal of his appeal" by "failing to precisely state the issue presented." *Id.* at *1 n.1. The court nevertheless considered Holland's appeal and "agree[d] with the State" that Holland's argument about the search warrant was "waived for failure to present the search warrant in question to the trial court or include it in the record on appeal." *Id.* at *7. The Court of Criminal Appeals also noted that the post-conviction court had accredited Captain Moore's testimony that the initial search warrant was executed based on an unrelated charge and trial counsel's testimony that she never discovered an illegal search warrant. *Id.* The Court of Criminal Appeals similarly determined that Holland's arguments about an allegedly coerced confession and invalid bench warrant did not entitle him to relief because there was no evidence to support those arguments. *Id.* at *8. The court also found the record "devoid of testimony establishing that but for the alleged deficiency of counsel, [Holland] would not have entered a guilty plea." *Id.*

Even though Holland had "risk[ed] waiver and dismissal of his appeal" by "failing to precisely state the issue presented," *id.* at *1 n.1, the court then inexplicably granted Holland a hearing on an issue that he had not presented at all—namely, whether Holland had been advised of the consequences of entering a guilty plea based on the agreement that

his state sentence be served concurrently with the previously imposed federal sentence. *Id.* at *8. Holland had not presented that issue in his post-conviction petition or on appeal.

The Court of Criminal Appeals nevertheless felt "constrained" to consider this unraised issue because it noticed that "the state judgments in this case show[ed] that [Holland's] effective seventeen-year sentence[s] . . . are to be served concurrently with a previously imposed federal sentence for bank robbery." *Id.* The court acknowledged that "serving a concurrent state and federal sentence is not prohibited" under Tennessee law but still found it problematic that "the judgment from the federal bank robbery case," which was in the record, did not "include the sentence, the conditions imposed, or a designation that it be served concurrently to any future state sentence." *Id.* Because "there was no testimony at the guilty-plea hearing or the post-conviction hearing as to how [Holland] settled his federal case, the extent to which there was coordination between federal and state counsel to resolve the matters, or whether the federal court agreed to allow [Holland] to serve his anticipated state sentence in a federal facility," the Court of Criminal Appeals determined that it "must remand this matter to the post-conviction court for a hearing to determine whether [Holland] was advised of the consequences of entering a guilty plea based upon the agreement that his state sentence be served concurrently with a prior federal sentence." *Id.*

This Court granted the State's Rule 11 application for permission to appeal.

STANDARD OF REVIEW

An individual seeking post-conviction relief must prove the factual allegations in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see also Frazier v. State*, 303 S.W.3d 674, 679 (Tenn. 2010). On appeal, the post-conviction court's findings of fact will be upheld unless the evidence in the record preponderates against them. *Frazier*, 303 S.W.3d at 679. But the post-conviction court's application of law to the facts is reviewed de novo, with no presumption of correctness. *Id.*

ARGUMENT

The Court of Criminal Appeals Exceeded Its Authority by Remanding This Case to the Post-Conviction Court for a Hearing on an Issue the Inmate Never Raised.

The Court of Criminal Appeals correctly determined that Holland was not entitled to relief on any of the claims raised in his petition for post-conviction relief. It nevertheless remanded this case to the post-conviction court for a hearing on an issue that Holland never raised at all, at any stage of his proceedings.

The decision to remand flies in the face of the Post-Conviction Procedure Act and basic principles of appellate review. Far from being "constrained" to consider the concurrent sentencing issue sua sponte, *Holland*, 2019 WL 1418278, at *8, the Court of Criminal Appeals was in fact constrained to conclude that, because Holland had not raised that issue, the court was precluded from reviewing it.

A. The Court of Criminal Appeals Disregarded the Clear Requirements of the Post-Conviction Procedure Act.

Tennessee is not constitutionally required to provide inmates with an avenue to obtain post-conviction relief. *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013). As this Court recently reiterated, post-conviction review "is afforded solely as a matter of legislative grace—it is 'entirely a creature of statute.'" *Maxwell v. State*, No. W2018-00318-SC-R11-PC, slip op. at 2 (Tenn. Sept. 3, 2019) (per curiam) (quoting *Bush v. State*, 428 S.W.3d 1, 15-16 (Tenn. 2014)). The "availability and scope of post-conviction relief" thus "lies within the discretion of the General Assembly." *Bush*, 428 S.W.3d at 15.

The General Assembly has provided inmates with statutory post-conviction remedies since 1967. *Whitehead*, 402 S.W.3d at 621. The General Assembly reformed Tennessee's post-conviction procedures in the Post-Conviction Procedure Act of 1995, and that statutory regime continues to govern post-conviction proceedings in our State. *Id.*; *see also* Post-Conviction Procedure Act, 1995 Tenn. Pub. Acts, ch. 207, § 1 (codified at Tenn. Code Ann. §§ 40-30-101 to -122).

To balance the inmate's interest in post-conviction review with the State's interest in the finality of criminal judgments, the Act limits both the time and manner in which an inmate may seek and obtain post-conviction relief. Of particular importance here, a post-conviction petition "must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Code Ann. § 40-30-106(d); *see also id.* § 40-30-

104(d) ("The petitioner shall include all claims known to the petitioner for granting post-conviction relief and shall verify under oath that all the claims are included."); *id.* § 40-30-104(e) ("The petitioner shall include allegations of fact supporting each claim for relief . . . ."). An inmate's "[f]ailure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition." *Id.* § 40-30-106(d). At evidentiary hearings in post-conviction proceedings, moreover, "[p]roof upon the petitioner's claim or claims for relief shall be limited to evidence of the allegations of fact in the petition." *Id.* § 40-30-110(c).

And of most importance here, "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." *Id.* § 40-30-106(g);[3] *see also* *Grindstaff v. State*, 297 S.W.3d 208, 219 (Tenn. 2009). As this Court explained in discussing a similar waiver provision in the pre-2015 Post-Conviction Procedure Act, "[i]f an alleged ground was available at the time of the post-conviction hearing and the petitioner failed to litigate it, then the claim is presumptively deemed to have been waived." *Villanueva v. State*, 883 S.W.2d 580, 581 (Tenn. 1994). Indeed, the Court of Criminal Appeals itself has correctly recognized in other cases that an inmate's failure to include a ground of relief in the petition constitutes waiver of that ground. *See, e.g.*, *Walker v. State*, No. M2014-02331-CCA-R3-PC, 2016 WL 552735, at *5 (Tenn. Crim. App. Feb. 12, 2016) (deeming

---

[3] There are certain limited exceptions to this rule, but none applies here.

an issue waived when the petitioner "freely admit[ted] that the issue raised on appeal was not included in the [post-conviction] [p]etition").

Holland's petition did not contain any mention of the concurrent sentencing issue, let alone the required "clear and specific statement" of that ground with "full disclosure" of its factual basis. Tenn. Code Ann. § 40-30-106(d). Thus, that ground "is waived" under the Act. *Id.* § 40-30-106(g). And because that ground is waived, the Post-Conviction Procedure Act—which alone defines the "availability and scope of post-conviction relief" in Tennessee, *Bush*, 428 S.W.3d at 15—prohibits post-conviction relief on that ground.

Nor does the Act provide authority for a court even to hold an evidentiary hearing on that issue, for "[p]roof upon the petitioner's . . . claims for relief" in any hearing must "be limited to evidence of the allegations of fact *in the petition*." Tenn. Code Ann. § 40-30-110(c) (emphasis added). Holland's petition was devoid of any factual allegations about the concurrent sentencing issue, so there is no statutory authority for a post-conviction court to receive proof on that issue.

This Court's holding in *State v. West*, 19 S.W.3d 753 (Tenn. 2000), leaves no doubt that the Court of Criminal Appeals exceeded its authority in this case by sua sponte addressing the concurrent sentencing issue that Holland failed to raise. *West* holds that the Post-Conviction

Procedure Act[4] "expressly prohibits post-conviction review of issues" that are waived, calling such issues "beyond the scope of permissible post-conviction review." *Id.* at 753. The inmate in *West*, who had waived a ground for post-conviction relief by failing to raise it on direct appeal, argued that the post-conviction court should nevertheless review the issue under the plain error doctrine.[5] *Id.* at 755-56. This Court rejected that argument, explaining that Tennessee Supreme Court Rule 28, § 3(B), which makes the Tennessee Rules of Civil Procedure and Tennessee Rules of Criminal Procedure inapplicable to post-conviction proceedings except as otherwise specifically provided, precluded that result. *Id.*

West cautioned that, while Tennessee courts are "charged to provide a post-conviction forum in which those convicted of crimes may raise legitimate claims within a meaningful time and manner," this commitment must be balanced "with the need for finality of judgments." *Id.* at 756; *see also* *Villanueva*, 883 S.W.2d at 581. To achieve the appropriate balance, this Court declined to adopt "an open- and possibly

---

[4] The petition in *West* "was brought under the Post-Conviction Procedure Act that was repealed in 1995," but this Court made clear that its decision in that case "applie[d] equally to proceedings brought under the Post-Conviction Procedure Act currently in force." 19 S.W.3d at 757.

[5] When *West* was decided, the plain error doctrine was reflected in Tennessee Rule of Criminal Procedure 52(b). In 2009, the text of that rule was moved to Tennessee Rule of Appellate Procedure 36(b), where it remains. That move "did not alter the parameters of the plain error doctrine." *State v. Minor*, 546 S.W.3d 59, 66 n.14 (Tenn. 2018).

never-ending approach to post-conviction review." *West*, 19 S.W.3d at 756-57.

The Court of Criminal Appeals' decision in this case is the epitome of "an open- and possibly never-ending approach to post-conviction review." *Id.* When the Court of Criminal Appeals rejected the grounds for relief that Holland raised in his petition, that should have marked the end of his post-conviction proceedings (subject, of course, to further review by this Court). Instead, the Court of Criminal Appeals' decision marked the beginning of an entirely new proceeding on the concurrent sentencing issue—an issue that no party had ever asked the Court of Criminal Appeals or the post-conviction court to consider.

That approach, in which the Court of Criminal Appeals may raise issues sua sponte and allow an inmate to return to the post-conviction court to develop them, obliterates the State's finality interests and contravenes the Post-Conviction Procedure Act. This Court should vacate the Court of Criminal Appeals' decision for that reason alone.

B. The Court of Criminal Appeals Disregarded Well-Settled Principles of Appellate Review.

Even if the Post-Conviction Procedure Act did not bar the Court of Criminal appeals from sua sponte reviewing and granting relief on an issue that has been waived, the decision below would still require correction because it also violates basic principles of appellate review.

First, appellate review is generally limited to issues that a party has preserved by first raising them in the trial court. *State v. Minor*, 546 S.W.3d 59, 65 (Tenn. 2018) ("Appellate review generally is limited to

issues that a party properly preserves for review by raising the issues in the trial court and on appeal."). The requirement that a party preserve issues for appeal by raising them in the trial court serves to "promote fairness, justice, and judicial economy by fostering the expeditious avoidance or correction of errors before their full impact is realized, and in this way, may obviate altogether the need for appellate review." *Id.*

Second, "[a]ppellate review is generally limited to issues presented" to the appellate court for review. *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018). This prerequisite to appellate review is an important safeguard of the adversary system. When appellate courts adhere to this principle, they can be "more confident in the results of their deliberations" because "they have heard the issues argued by attorneys [who] are duty-bound to fully develop their opposing positions." *State v. Northern*, 262 S.W.3d 741, 766 (Tenn. 2008) (Holder, J., concurring and dissenting).

The Court of Criminal Appeals flouted not just one, but both of these well-settled principles of appellate review. Holland did not preserve the concurrent sentencing issue by raising it in the post-conviction court. Nor did he present the issue to the Court of Criminal Appeals for review. The Court of Criminal Appeals identified that issue entirely on its own and then remanded to the post-conviction court to allow Holland to develop a factual record on it.

Tellingly, the Court of Criminal Appeals cited no authority to support that extraordinary exercise of judicial power. Nor could it. Although Tennessee Rule of Appellate Procedure 13(b) "allows the

appellate court the discretion to consider other issues '(1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process,'" *Harbison*, 539 S.W.3d at 165 (quoting Tenn. R. App. P. 13(b)), that discretion applies only when "the parties . . . have been given fair notice and an opportunity to be heard on the dispositive issues." *Id.* (quoting *In re Kaliyah S.*, 455 S.W.3d 533, 540 (Tenn. 2015)). Even assuming that Rule 13(b) applies in post-conviction proceedings—a doubtful proposition given this Court's holding in *West* that plain error review does not apply—the Court of Criminal Appeals could not have relied on it here because considering the concurrent sentencing issue sua sponte *created*, rather than prevented, the problems Rule 13(b) is intended to avoid.

The Court of Criminal Appeals *created* needless litigation by ordering the post-conviction court to hold a hearing on the concurrent sentencing issue notwithstanding that there was nothing at all in the record to suggest any problem with the concurrent federal-state sentences in this case. In previous cases, the Court of Criminal Appeals has held that a guilty plea is unknowingly and involuntarily entered when the plea agreement calls for the state sentence to be served concurrently with a federal sentence but, because of some action taken by the federal government,[6] the sentences are instead served

---

[6] Because of the principle of dual sovereignty, a state court's order that a state sentence be served concurrently with a federal sentence does not bind the federal government. *Setser v. United States*, 566 U.S. 231, 241 (2012) ("If a prisoner . . . starts in state custody, serves his state sentence,

consecutively, contrary to the intent of the plea agreement. *See Holland*, 2019 WL 1418278, at *8 (citing cases). Here, however, Holland never even hinted that his plea agreement was not being honored. To the contrary, he testified at his post-conviction hearing that his *federal* judgment already provided that his federal sentence would run concurrently with his state sentences. (III, 30.)[7] Thus, the only evidence in the record on this issue indicated that the federal and state sentences would in fact run concurrently, just as contemplated by the plea agreement into which Holland knowingly and voluntarily entered.

The Court of Criminal Appeals also *created* prejudice to the judicial process by considering the concurrent sentencing issue sua sponte without providing the parties with "fair notice and an opportunity to be heard on the dispositive issues." *Harbison*, 539 S.W.3d at 165 (internal quotation marks omitted). Because Holland never raised the concurrent

---

and then moves to federal custody, it will always be the Federal Government . . . that decides whether he will receive credit for the time served in state custody.").

[7] The federal judgment that is included in the record is missing the page that specifies the sentence. (I, 8-11.) But the judgment is readily obtainable from PACER and states that Holland's federal sentence is "to run concurrently with" a number of pending state-court cases, including Hardeman County Circuit Court No. 15-CR-15, the state theft charge to which Holland pleaded guilty on the same day he pleaded guilty to the charges at issue in this case. *United States v. Holland*, No. 1:15-CR-10020-01-JDB, Dkt. 39 (W.D. Tenn. Sept. 4, 2015). This case—Hardeman County Circuit Court No. 15-CR-187—was not referenced in the federal judgment since it was not yet pending.

sentencing issue, either in the post-conviction court or on appeal, the State never had an opportunity to address that issue. It is one thing for an appellate court to review an issue that the parties addressed in the trial court and on which there is already a clear record. It is quite another for an appellate court to manufacture an issue that no party has raised and then require the parties to return to the trial court to litigate that issue. By taking that remarkable step in this case, the Court of Criminal Appeals thwarted the orderly process of judicial review and turned on its head the statutory requirement that the *petitioner* has the burden of clearly stating his grounds for relief.

* * *

The Court of Criminal Appeals' decision in this case—remanding for a hearing based on an issue that was not raised at any stage of the post-conviction proceedings—appears to be part of a trend toward disregard of the established limits on appellate review in post-conviction proceedings. That trend is manifest in *Brown v. State*, No. W2017-01755-CCA-R3-PC, 2019 WL 931735, at *9-10 (Tenn. Crim. App. Feb. 22, 2019) (perm. app. filed May 8, 2019), and *Yarbro v. State*, No. W2017-00125-CCA-R3-PC, 2018 WL 4441364, at *7-8 (Tenn. Crim. App. Sept. 17, 2018) (no perm. app. filed). In both these recent cases, the Court of Criminal Appeals allowed inmates to raise issues for the first time on appeal even though the inmates failed to include those issues as grounds for relief in their post-conviction petitions. This Court should arrest this trend.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court vacate the decision of the Court of Criminal Appeals and remand with instructions to affirm the denial of post-conviction relief.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
B.P.R. 34054
Associate Solicitor General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of the State of Tennessee is being served by first-class U.S. mail, postage paid, on the following individuals:

Marty Holland
#559660
TCIX (Main)
1499 R.W. Moore Memorial Hwy.
Only, TN 37140-4050

on this 20th day of September, 2019.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. _____**
	)	
NORMAN EUGENE CLARK,	)	**No. E2016-01629-COA-R3-CV**
	)	
and	)	**Knox County Criminal Court**
	)	**No. 103548**
ANDREA CANNING, TIM BEACHAM, CUSTODIAN OF RECORDS FOR DATELINE NBC AND NBCUNIVERSAL NEWS GROUP,	)	
	)	
Appellees.	)	

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

APPLICATION OF THE STATE OF TENNESSEE FOR PERMISSION TO APPEAL

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL (BPR 34054)
Special Assistant to the Solicitor General
and the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Rules

Other Authorities

APPLICATION FOR PERMISSION TO APPEAL

The State of Tennessee respectfully applies, under Rule 11 of the Tennessee Rules of Appellate Procedure, for permission to appeal to the Tennessee Supreme Court from the judgment of the Tennessee Court of Appeals at Knoxville, entered on February 13, 2017. The State did not file a petition for rehearing. A copy of the Court of Appeals' opinion is attached as Exhibit A.

QUESTIONS PRESENTED FOR REVIEW

After Norman Clark's first trial for the first-degree murder of Brittany Eldridge and her unborn child ended in a mistrial, Dateline NBC interviewed Clark and his attorney about the facts and circumstances of the case. The State of Tennessee sought a copy of the entire, unedited, video-recorded interview to use in connection with Clark's retrial. Dateline refused, claiming that the interview was privileged from disclosure under Tenn. Code Ann. § 24-1-208(a), commonly known as the Shield Law. The Shield Law provides that information gathered by the press or news media for publication or broadcast is privileged from disclosure, but a court must divest the privilege if a party seeking the information establishes the three factors required under Tenn. Code Ann. § 24-1-208(c)(2). The State contended that it had satisfied the three factors with respect to Dateline's interview of Clark, and, on that basis, moved to divest Dateline of the Shield Law's protection.

The questions presented for review are:

I. Whether the Court of Appeals erred in holding that the State of Tennessee did not prove by clear and convincing evidence that the "information sought [could not] reasonably be obtained by alternative means," Tenn. Code Ann. § 24-1-208(c)(2)(B).

II. Whether the Court of Appeals erred in holding that the State of Tennessee did not prove by clear and convincing evidence that the "people of the state of Tennessee" have "a compelling and overriding public interest . . . in the information," Tenn. Code Ann. § 24-1-208(c)(2)(C).

FACTS RELEVANT TO QUESTIONS PRESENTED FOR REVIEW

A. The State's Prosecution of Norman Clark for First-Degree Murder

Brittany Eldridge was twenty-five years old and nearly nine-months pregnant when she and her unborn child were murdered in her apartment on the night of December 12, 2011. (T., Vol. I, 38.)[1] Norman Clark was a person of interest from the earliest stage of the investigation. (T., Vol. VII, 863-64.) He and Eldridge were co-workers at Clayton Homes, Vanderbilt Mortgage and had a sexual relationship that resulted in Eldridge's pregnancy. (T., Vol. I, 40; T., Vol. III, 315-16.) Their relationship had deteriorated in the months leading up to Eldridge's murder, as it became clear that Clark did not intend to support Eldridge and their child financially or emotionally. (T., Vol. I, 126.)

The State charged Clark with two counts of first-degree premeditated murder and two counts of first-degree felony murder. (T.R., Vol. I, 1-3.) Clark was tried in Knox County Criminal Court in August 2015; his nine-day trial ended in a mistrial when the jury was unable to reach a verdict. (T.R., Vol. II, 261; T.R., Vol. III, 300.)

The State's theory at trial was that Clark murdered Eldridge because her pregnancy threatened to interfere with his numerous other sexual relationships and to strain him financially. (H., Vol. I, 56.) The State's case against Clark was almost entirely circumstantial. After ignoring Eldridge and expressing no interest in the baby for months, Clark had arranged to meet with Eldridge at her apartment on the evening of December 12, 2011, to discuss something important. (T., Vol. I, 11; T. Vol. IV, 471; T., Vol. VI, 675-76.) Eldridge sent Clark a text-message at 6:07 p.m. that evening that read, "I'm looking forward to seeing and talking to you

[1] The record on appeal consists of three volumes containing the technical record (T.R.), nine volumes containing the trial transcript (T.), and two volumes containing the transcript and exhibits from the hearing on the State's motion to divest (H.). References to the record will include the volume number and page number.

tonight, Boo-Ba." (T., Vol. VI, 678.) Eldridge left work at 8:05 p.m. that evening and drove to her apartment. (T., Vol. III, 341-42.) Four text messages were sent from Eldridge's phone to Clark's phone between 8:59 p.m. and 9:58 p.m. The first, sent at 8:59 p.m., read, "Love you, Boo-Ba, going to shower." (T., Vol. VI, 678-79.) The second, sent at 9:36 p.m., read "Why do you continue to ignore me? This is two nights, Boo-Ba, and I miss you. Your pussy misses you." (T., Vol. VI, 679.) The third and fourth messages, sent at 9:57 p.m. and 9:58 p.m., read, "Good night, Boo-Boo," and "Hope you are getting my text." (T., Vol. VI, 679.) Clark did not respond to this series of text messages until the next morning, when he sent Eldridge a text message stating that he had fallen asleep. (T., Vol. VI, 679.)

As his alibi, Clark claimed that he was at his parents' home, where he was residing at the time, from approximately 7:00 p.m. until 9:40 p.m. on the evening of the murder. (T.R., Vol. II at 249.) He purportedly left his parents' home between 9:30 p.m. and 9:40 p.m. and drove to the apartment of Leanne Hawn, another woman with whom he was in a sexual relationship, arriving at around 10:00 p.m. (T.R., Vol. II, 249.) Hawn testified that Clark sent her a text message at 9:19 p.m. on the evening of December 12, 2011, asking if she wanted him to come over. (T., Vol. V, 590.) She responded at 9:24 p.m. that she was already in bed. (T., Vol. V, 590.) Ten minutes later, at 9:34 p.m., she sent him another message asking if he could come over the next day instead. (T., Vol. V, 590.) Hawn testified that she was not aware Clark was in her apartment until he entered her bedroom at approximately 10:30 p.m. and told her that he had been in the living room watching television. (T., Vol. V, 563-566, 595.)

The State's theory was that the text messages sent from Eldridge's phone between 8:59 p.m. and 9:58 p.m. on the evening of December 12 were actually sent by Clark. The State introduced evidence that Clark frequently used the possessive, "my pussy," to refer to his female

sexual partners' genitalia. (T., Vol. VI, 680-81.) The State also introduced evidence that, sometime before his cell phone was seized by law enforcement officials, Clark had deleted from his cell phone certain text messages from the day of the murder, including the message that Hawn sent Clark at 9:34 p.m. asking him to come over the next day instead. (T., Vol. VI, 688.)

The State introduced expert testimony showing that Clark placed outgoing calls from his cell phone at 8:28 p.m., 8:29 p.m., and 9:05 p.m. on December 12, 2011. Those calls were transmitted by a cell phone tower with a coverage area that encompassed Eldridge's apartment. (T., Vol. VIII, 937-38.) Clark's expert witness agreed that the calls could have been placed from Eldridge's apartment, but he further opined that it was theoretically possible the coverage area also encompassed Clark's parents' residence. (T., Vol. IX, 1103.)

When Eldridge failed to report for work on the morning of December 13, 2011, her mother went to Eldridge's apartment and discovered her body lying face-up on the floor of her bedroom. (T., Vol. I, 78.) Eldridge had been strangled and stabbed in the neck with scissors and had suffered blunt force trauma to the head. (T., Vol. VIII, 1002-1020.) Eldridge's otherwise healthy, full-term unborn baby boy had also died as a result of his mother's injuries. (T., Vol. VIII, 1000.) The medical examiner estimated that Eldridge was murdered between 8:30 p.m. on the evening of December 12, 2011, and 1:00 a.m. on the morning of December 13, 2011. (T., Vol. IX, 1064.)

Clark's defense theory was that an intruder who intended to burglarize Eldridge's apartment was responsible for the murders. Clark's counsel elicited testimony that there had been a significant number of burglaries in the area near Eldridge's apartment in November and December 2011. (T., Vol. VII, 809-11.) But the State introduced evidence that Eldridge's apartment had not been forcibly entered and appeared to have been staged to look like a burglary

occurred. (T., Vol. VI, 751, 765.) The only items missing from the apartment were Eldridge's phone and a pair of scissors. (T., Vol. VI, 793.) Her wallet, laptop, and medications, which were in plain view, remained. (T., Vol. VI, 762-65.) Clark's finger and palm prints were recovered from the television in the living room that had been removed from its stand and placed on the floor. (T., Vol. II, 255-263.) Otherwise, there was no physical evidence linking Clark to the crime scene.

Clark did not testify at trial. The State introduced statements Clark made while seated in the back of a police cruiser, in which he denied visiting Eldridge's apartment on the night of the murder. (T., Vol. VI, 769-71.) The State was in possession of another video-recorded statement that Clark gave to officers at the police station, but, for strategic reasons,[2] it did not introduce that statement at trial. (H., Vol. I, 64-65.) The State also introduced Leanne Hawn's testimony that, when she met with Clark on December 22, 2011, he told her "people accuse [him] of things [he] didn't do." (T., Vol. V, 573.)

On January 7, 2016, the State announced its intent to retry Clark. (T.R., Vol. II, 261, 263.) The trial was originally scheduled for September 26, 2016, but was continued twice by agreement of the parties. (T.R., Vol. II, 263.) The trial is currently scheduled to begin on September 11, 2017.

B. The State's Attempts to Obtain a Copy of Dateline's Interview of Clark

In September 2015—about a month after Clark's first trial ended in a mistrial, but before the State announced its intent to retry him—Dateline NBC interviewed Clark and his now-former attorney, Gregory Isaacs, on camera about the facts and circumstances of the case. (T.R.,

[2] The State anticipated that Clark would testify at trial and had planned to use Clark's statement at the police station during his cross-examination rather than during its case-in-chief. (H., Vol. I, 65-66.)

Vol. III, 354.) Andrea Canning and Tim Beacham, a correspondent and producer, respectively, for Dateline, conducted the interview. (T.R., Vol. III, 354) Dateline has not yet aired any footage from the interview and does not intend to do so until after Clark is retried. (T., Vol. XIII, 38-39; T.R., Vol. III, 354.)

The State learned about Dateline's interview on December 3, 2015, when Beacham contacted Sean McDermott, the Public Information Officer for the Knox County District Attorney's Office, inquiring whether someone from his office or the Knoxville Police Department would agree to be interviewed about Clark's prosecution. (T.R., Vol. III, 299-300.) Beacham informed McDermott that Dateline had interviewed a number of people about the case, including Clark and Isaacs, after the first trial. (T.R., Vol. III, 300.) Beacham was concerned that the story was "one sided" and wanted to give the State an opportunity to "present its side of the story." (T., Vol. XIII, 38.) McDermott declined Beacham's interview request, because his office was unable to comment on pending cases, but he requested a copy of the unedited footage of Dateline's interview with Clark and Isaacs. (T., Vol. XIII, 37-39.) Beacham refused, citing journalistic privilege. (T., Vol. XIII, 39.)

On January 9, 2016, another producer from Dateline, Mason Scherer, traveled to Knoxville to cover the State's announcement of its decision to retry Clark. (T., Vol. XIII, 39.) Scherer requested an interview with the prosecutors who had tried Mr. Clark, but McDermott again declined for ethical reasons. (T., Vol. XIII, 39-40.) McDermott asked Scherer for a copy of Dateline's interview with Clark and Isaacs, but Scherer said he lacked authority to turn over the footage. (T., Vol. XIII, 40.)

After his attempts to obtain a copy of the interview from Beacham and Scherer failed, McDermott tried other avenues. On January 29, 2016, following instructions on NBC's website,

McDermott sent a certified letter to the Editor-in-Chief of NBC News requesting a copy of the interview. (T., Vol. XIII, 41.) That letter was returned as undeliverable. (T., Vol. XIII, 42.) On February 10, 2016, McDermott called Scherer to inquire who at Dateline had authority to turn over unedited interview footage; Scherer advised that Executive Producer David Corvo could make that decision. (T., Vol. XIII, 43). The next day, McDermott sent a certified letter to Corvo requesting a copy of the interview. (T., Vol. XIII, 43.) On February 22, 2016, McDermott received a letter, via facsimile, from Beth Lobel, counsel for Dateline NBC, denying the request based on "journalism standards" and the "reporters' privilege." (T., Vol. XIII, 44; H., Vol. II, Ex. 3.)

Upon learning that Dateline had denied his request, McDermott searched NBC's website for footage from the interview or any discussion of Clark's case, but he was unable to find anything. He also searched Canning and Scherer's twitter feeds but was unable to find any references to the interview. (T., Vol. XIII, 44-45.)

C. Proceedings to Divest Dateline of the Shield Law's Protection

When the State's efforts to obtain the interview without judicial assistance failed, the State petitioned the Knox County Criminal Court to issue a certificate to the Supreme Court of New York[3] requesting that court to issue summonses commanding Canning, Beacham and NBC's Custodian of Records to appear at Clark's trial and to provide an unedited copy of the interview.[4] (T.R., Vol. II, 262-71.) The Knox County Criminal Court issued the certificate on

[3] Dateline is headquartered in New York. Both Tennessee and New York have adopted the Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. *See* Tenn. Code Ann. §§ 40-17-201 to -212; N.Y. Crim. Proc. Law § 640.10.

[4] The State requested that Canning, Beacham, and the Custodian of Records for NBC be compelled to testify at trial for the purpose of authenticating the interview. Dateline has suggested that this testimony is unnecessary because the parties can instead stipulate to

April 8, 2016. (T.R., Vol. II, 272-77.) After the certificate was issued, Dateline objected in both the Knox County Criminal Court and the Supreme Court of New York to disclosing the interview or testifying at trial, on the ground that information gathered by the news media for the purpose of broadcast is protected from disclosure under Tennessee and New York's shield laws, Tenn. Code Ann. § 24-1-208(a); N.Y. Civ. Rights Law § 79-h(c). (T.R., Vol. III, 342-69.)

As relevant here, Tennessee's Shield Law provides that "[a] person engaged in gathering information for publication or broadcast connected with or employed by the news media or press . . . shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose . . . any information or the source of any information procured for publication or broadcast." Tenn. Code Ann. § 24-1-208(a). A party seeking information otherwise protected by the Shield Law "may apply for an order divesting such protection." *Id.* § 24-1-208(c)(1). The court "shall . . . grant[]" the application if the party proves by clear and convincing evidence that "(A) [t]here is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law; (B) . . . the information sought cannot reasonably be obtained by alternative means; and (C) . . . a compelling and overriding public interest of the people of the state of Tennessee in the information." *Id.* § 24-1-208(c)(2)(A)-(C).

The Supreme Court of New York held a show cause hearing and instructed Dateline to first litigate in Tennessee whether disclosure is required under Tennessee law. The New York court advised Dateline that, if the Tennessee courts ruled that the interview was not protected from disclosure under Tennessee law, Dateline could return to New York and seek the protection

---

authenticity. (T.R., Vol. III, 416.) The State agrees that, if the parties stipulate to the interview's authenticity, it would not be necessary for Canning, Beacham, or the Custodian of Records to testify at trial.

of New York's shield law at that time. (T.R., Vol. III, 346-50.)[5]

The State then filed a motion in Knox County Criminal Court pursuant to Tenn. Code Ann. § 24-1-208(c) to divest Dateline of the protection of Tennessee's Shield Law. (T.R., Vol. III, 370-90.) The State argued that the three requirements for divestiture were satisfied because the State could prove by clear and convincing evidence that Dateline's interview of Clark was "clearly relevant" to the State's prosecution of Clark for first-degree murder; that the State could not reasonably obtain Dateline's interview with Clark by alternative means; and that the people of the State of Tennessee had a "compelling and overriding public interest" in the interview because it was highly relevant to a murder prosecution. (T.R., Vol. III, 374-82.)

The Knox County Criminal Court denied the State's motion to divest Dateline of its protection under Tennessee's Shield Law. (T.R., Vol. III, 421-29.) The court concluded that the State had satisfied the first requirement for divestiture because Dateline's interview with Mr. Clark was clearly relevant to the murder of Eldridge and her unborn baby. (T.R., Vol. III, 424.) The court explained that Clark's statement would allow the jury "to test his credibility in his denials to the police" by observing his "demeanor, facial expressions, attitude, and tone of voice

---

[5] As a general matter, New York courts have held that privilege issues should be resolved in the State requesting issuance of a subpoena, since that is where the evidence is to be used. *See Matter of Codey v. Capital Cities, Am. Broad. Corp.*, 82 N.Y.2d 521, 528 (N.Y. 1993); *see also* Restatement (Second) Conflict of Laws § 139 (privilege issues governed by law of the State having the most significant relationship with the communication). In *Matter of Holmes v. Winter*, 22 N.Y.3d 300, 314-18 (N.Y. 2013), however, the New York Court of Appeals refused on public policy grounds to issue a subpoena requested by Colorado because Colorado's shield law afforded significantly weaker protection for confidential sources than New York law. The State does not believe *Holmes*'s public policy exception would apply in this case because New York's shield law does not afford materially different protection to Dateline's non-confidential interview than Tennessee's Shield Law. *See* N.Y. Civ. Rights Law § 79-h(c) (disclosure of non-confidential information may be ordered upon "clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source").

during the statement." (T.R., Vol. III, 424.) But the court held that the State had failed to satisfy the second and third requirements for divestiture. As for the second requirement, the court reasoned that the State could not show that the information contained in Dateline's interview was unavailable by other means because the State lacked proof about the "content of the interview and/or the nature of [Clark's] demeanor, attitude, mannerisms, etc. during the interview." (T.R., Vol. III, 426.) As for the third requirement, the court held that there was no compelling public interest in disclosure of the interview because there was no evidence that Clark "gave a confession, made an admission against interests, or simply contradicted his previous statements to the police in some material way that would be relevant to guilt." (T.R., Vol. III, 428.) The court declined to address New York law because the Supreme Court of New York had not yet issued the requested summonses and had indicated that Dateline could seek the protection of New York's shield law in that court if necessary. (T.R., Vol. III, 422.)

D. The Court of Appeals' Opinion

The State appealed from the Knox County Criminal Court's order refusing to divest Dateline of the Shield Law's protection. (T.R., Vol. III, 432-33.)[6] The Court of Appeals expedited the appeal (T.R., Vol. III, 448-49)[7] and affirmed the trial court. *See State v. Clark*, No. E2016-01629-COA-R3-CV, 2017 WL 564888 (Tenn. Ct. App. Feb. 13, 2017).

---

[6] The Shield Law provides that "[a]ny order of the trial court may be appealed to the court of appeals in the same manner as other civil cases." Tenn. Code Ann. § 24-1-208(c)(3)(A).

[7] The Court of Appeals found that the State had "a right to expedited consideration of its appeal" pursuant to Tenn. Code Ann. § 24-1-208(c)(3)(B), which provides that "[t]he execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal . . . , and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party." (T.R., Vol. III, 432-33.) Given that Clark's trial is currently scheduled to begin on September 11, 2017, the State also intends to seek an expedited appeal in this Court if review is granted.

The State and Dateline agreed on appeal that the State had met its burden of proving the first requirement for divestiture—that the interview was "clearly relevant" to the murders of Eldridge and her unborn child. *See Clark*, 2017 WL 564888, at *6. Thus, the only issues before the Court of Appeals were whether the State had met its burden of proving the second and third requirements for divestiture.

With respect to the second requirement, the Court of Appeals held that the State had not shown by clear and convincing evidence that it was unable to obtain the "information sought" by alternative means. *Id.* at *6-7. The Court of Appeals reasoned that "[t]he fact that the State may not be able to obtain the videotape of this specific Dateline interview . . . does not automatically lead to the conclusion that the State cannot obtain *the information contained in the interview* by alternative means." *Id.* at *7 (emphasis in original). The Court of Appeals apparently viewed the information contained in the interview as *any* statement by Clark concerning Eldridge's murder. The court rejected the notion that "every video statement made by a criminal defendant is unique," reasoning that adopting that argument would render "the second prong of the [divestiture] test . . . meaningless." *Id.* The court surmised that "[i]f the information contained on a video is considered unique no matter the actual content of the statement simply because it is on video, then by definition it cannot be obtained through any source other than the video itself." *Id.* The court further noted that, to the extent Dateline's interview with Clark contained information about Clark's demeanor, the State was already in possession of that information because Clark had given two video-recorded statements to the police before his trial, and the jury had also been able to observe Clark's demeanor at trial while the State's evidence against him was presented. *Id.*

The Court of Appeals also found it significant that the State did not know exactly "what Clark said during the Dateline interview and ha[d] no reason to believe that Clark confessed to murdering his girlfriend and unborn child." *Id.* at *9. Because the State did not know the precise contents of the interview, the court determined that requiring Dateline to disclose the interview "so the State can see what is in it would simply be a fishing expedition." *Id.* (internal quotation marks omitted). In this regard, the court relied heavily on an earlier unpublished decision of the Court of Appeals, *State v. Shaffer*, No. 89-208-II, 1990 WL 3347, at *1 (Tenn. Ct. App. Jan. 19, 1990) (no perm. app. filed). In *Shaffer*, the Court of Appeals had refused to order a television news station to disclose outtakes of its interview with a murder suspect, finding that the State could not establish the second requirement if it did not know the contents of the interview. *Id.* at *7.

With respect to the third requirement for divestiture, the Court of Appeals held that the State had not shown by clear and convincing evidence that the people of the State of Tennessee have a "compelling and overriding public interest" in the information contained in Dateline's interview. *Clark*, 2017 WL 564888, at *9. The court readily acknowledged that "it might benefit the State's case against Clark to have the Dateline interview," but it feared that finding the third requirement satisfied in this case would lead to divestiture in any case "involving [a] serious criminal matter[]," because the State's interest in this case "is neither more nor less than its interest in every murder case." *Id.* at *9-10. The court "d[id] not believe that [the] General Assembly" intended that result. *Id.* at *9.

STANDARD OF REVIEW

Tennessee's Shield Law specifies the standard of appellate review for decisions regarding divestiture: the "court of appeals shall make an independent determination of the applicability of

the standards in [Tenn. Code Ann. § 24-1-208(c)] to the facts in the record and shall not accord a presumption of correctness to the trial court's findings." Tenn. Code Ann. § 24-1-208(c)(3)(A).

REASONS FOR GRANTING REVIEW

In deciding whether to grant permission to appeal, this Court considers "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority." Tenn. R. App. P. 11(a); *see also Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997). Here, these considerations weigh strongly in favor of review. There is very little meaningful guidance from this Court or the intermediate appellate courts regarding the proper interpretation and application of the statutory requirements for divestiture of Tennessee's Shield Law, or the relationship among those requirements. Those unsettled questions are undoubtedly important and of substantial interest to the public, as they determine when the public's interest in a free press must yield to the public's interest in bringing lawbreakers to justice.

I. THE LOWER COURTS NEED GUIDANCE REGARDING THE PROPER INTERPRETATION AND APPLICATION OF THE REQUIREMENTS FOR DIVESTITURE OF TENNESSEE'S SHIELD LAW.

A. The Tennessee Supreme Court Has Not Interpreted or Applied the Shield Law in Nearly Three Decades.

The General Assembly enacted Tennessee's Shield Law in 1973, just nine months after the U.S. Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972), that the First Amendment to the U.S. Constitution does not afford journalists a testimonial privilege. *See Austin v. Memphis Publishing Co.*, 655 S.W.2d 146, 149 (Tenn. 1983). Subsection (a) of the Shield Law creates a statutory privilege for certain information gathered for publication or broadcast. It provides that

> [a] person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

Tenn. Code Ann. § 24-1-208(a).

But the privilege established by the Shield Law is a qualified one. Subsection (c) establishes a procedure by which a person seeking information that is protected under subsection (a) may apply for an order divesting such protection. *See* Tenn. Code Ann. § 24-1-208(c)(1). The application "shall be granted" if the court, after hearing the parties, "determines that the person seeking the information has shown by clear and convincing evidence" three factors: (A) that "[t]here is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law"; (B) that "the information sought cannot reasonably be obtained by alternative means"; and (C) "a compelling and overriding public interest of the people of the state of Tennessee in the information." *Id.* § 24-1-208(c)(2)(A)-(C).

In the nearly forty-five years since the Shield Law was enacted, the Tennessee Supreme Court has issued only two decisions construing or applying it, and only one of those decisions addressed the requirements for divestiture. First, in *Austin v. Memphis Publishing Co.*, 655 S.W.2d 146 (Tenn. 1983), this Court considered the scope of subsection (a) of the Shield Law. The plaintiffs in that case had filed a wrongful death suit arising from a bridge collapse that killed their son. They subpoenaed various newspapers for source material used to prepare articles related to the bridge collapse. When the newspapers asserted the Shield Law's protection, the plaintiffs contended that the Shield Law "was not intended to apply to civil cases

or non-confidential information." *Id.* at 147. Construing the plain language of subsection (a), this Court held that the Shield Law's protection extends to both non-confidential and confidential sources and applies in both civil and criminal cases. *Id.* at 148-149. Because the plaintiffs had "acknowledged that they could not meet all of the requirements of subsection (c)(2) in order to justify an order of divestiture," this Court had no occasion to consider those requirements. *Id.* at 147.

The second decision, *State ex rel. Gerbitz v. Curriden*, 738 S.W.2d 192 (Tenn. 1987), followed just four years later. In *Curriden*, a radio newscaster purported to interview an alleged murderer on his radio broadcast. The newscaster represented that the interviewee "had committed a murder but had never been apprehended," was "considered by area police as dangerous," and was "on parole for assault and battery" at the time of the murder. *Id.* at 193. But the newscaster did not disclose the identity of the alleged murderer on the broadcast and claimed not to know his true identity. *Id.* A Hamilton County grand jury subpoenaed the newscaster to give "general information," but the newscaster refused. *Id.* This Court concluded that the State had not "offered 'clear and convincing' evidence that the information sought could not reasonably be obtained by alternative means.'" *Id.* The Court reasoned that "[t]here [was] no explanation of what information was sought from [the newscaster] or what efforts, if any, the Attorney General or other law enforcement agencies had made to determine the identity of the criminal offense, the offender himself, or the site of the offense." *Id.* Moreover, "[n]o investigation or inquiry by Hamilton County officials with officials from surrounding counties appear[ed] to have been made, nor ha[d] any check of prison or parole records been shown." *Id.* The Court noted, however, that the State could "resubmit[]" the matter "[i]f appropriate law enforcement authorities" were to make a "further investigation into th[e] alleged offense." *Id.*

This Court has not revisited the Shield Law since it decided *Curriden* nearly thirty years ago. Of this Court's two decisions involving the Shield Law, only *Curriden* addressed divestiture. That decision provided little guidance on the divestiture requirements, however, because it addressed only the second requirement and presented the unique situation where there had been *no attempt* to obtain the information sought by alternative means. In short, the questions presented by this Rule 11 application, involving the interpretation and application of the second and third requirements for divestiture of Tennessee's Shield Law, have not been settled by this Court's precedents.

B. Lower Court Decisions Do Not Provide Meaningful Guidance Regarding the Requirements for Divestiture of Tennessee's Shield Law.

Besides the Court of Appeals' decision in this case, only two intermediate appellate courts have engaged in any substantive discussion regarding the requirements for divesting the Shield Law's protection.[8] But the discussion in those cases was minimal and provides no meaningful guidance on the proper interpretation and application of those requirements.

The Court of Appeals considered the second requirement for divestiture in *State v. Shaffer*, No. 89-208-II, 1990 WL 3347 (Tenn. Ct. App. Jan. 19, 1990) (no perm. app. filed). The defendant in that case, who was being prosecuted for two counts of first-degree murder, had confessed to law enforcement officials that he committed the murders. A television news station aired an interview with the defendant in which he again confessed to the murders. The State sought outtakes from the interview, arguing that they might assist the State in identifying the two murder victims and evaluating Shaffer's insanity defense. *Id.* at *5. The trial court held that the first and third requirements for divestiture were met, but it "[could] not say that there [was]

[8] The Court of Appeals held in *Dingman v. Harvell*, 814 S.W.2d 362 (Tenn. Ct. App. 1991), *perm. app. denied* (Tenn. June 10, 1991), that the first and second requirements for divestiture of the Shield Law were not satisfied, but it did not offer any analysis.

'clear and convincing' proof whether the information [could] be obtained by alternative means since neither the Court nor the State [knew] what [was] contained in the material." *Id.* at *2, *7 (internal quotation marks omitted). The Court of Appeals assumed that the first and third requirements had been met and "concur[red] in [the trial court's] finding" regarding the second requirement, without additional explanation.

The second requirement for divestiture was also at issue in *State v. Kendrick*, 178 S.W.3d 734 (Tenn. Crim. App. 2005), *perm. app. denied* (Tenn. Sept. 6, 2005). The defendant in that case was on probation for several convictions of misapplication of contract funds when he was arrested on new charges stemming from his failure to complete construction jobs for which he had contracted and already been paid. *Id.* at 735-36. The State issued a probation violation warrant against the defendant based on those new charges. *Id.* at 736. In the proceedings to revoke the defendant's probation, the defendant subpoenaed a television news reporter who had investigated a dispute between the defendant and an individual named Ms. LeCroy for a show called "ConsumerWatch." *Id.* That dispute also involved a construction contract, but not one that was directly at issue in the probation revocation proceedings. The reporter asserted privilege under the Shield Law, and the defendant moved to divest the reporter of that protection. *Id.* at 737. The Court of Criminal Appeals agreed with the trial court that the defendant had not met the requirements for divestiture. As relevant here, it found that the second requirement had not been met because the defendant "could have easily called the defendant or Ms. LeCroy to testify about the information gathered by" the reporter. *Id.* at 738. The court also summarily found that the defendant "ha[d] not established that there is a compelling and overriding public interest in the information." *Id.*

Neither the Court of Appeals' unpublished decision in *Shaffer* nor the Court of Criminal Appeals' decision in *Kendrick* offers meaningful guidance regarding the requirements for divestiture. In both cases, the courts engaged in only minimal analysis and provided scant reasoning to support their findings that the requirements for divestiture were not met. Importantly, moreover, neither case provided any guidance regarding what showing *would be* sufficient to satisfy the requirements for divestiture. Indeed, there is no reported decision finding all three requirements for divestiture of Tennessee's Shield Law satisfied.[9]

C. The Court of Appeals' Decision in This Case Highlights the Need for Guidance Regarding the Requirements for Divestiture of Tennessee's Shield Law.

The Court of Appeals held in this case that the State failed to satisfy the second and third divestiture requirements. The reasoning on which that holding was based was severely flawed and underscores the need for further guidance from this Court.

The Court of Appeals offered two primary reasons for finding that the second requirement for divestiture was not met. Both reflect a misunderstanding of the second requirement and its relationship to the other requirements. *First*, the court rejected the notion that the "information" being sought was the specific video-recorded interview in the possession of Dateline because it feared that "the second prong of the test [for divestiture] would be rendered meaningless as to protected information contained on a video of a criminal defendant if it followed [that] line of reasoning." *Clark*, 2017 WL 564888, at *7. But interpreting "information sought" to refer to the specific information actually being sought—here, Clark's

[9] Federal court decisions applying Tennessee's Shield Law have similarly held that the requirements for divestiture were not satisfied. *See In re Copeland*, 291 B.R. 740, 756 (Bankr. E.D. Tenn. 2003) (holding that first and third requirements were not satisfied); *Moore v. Domino's Pizza, L.L.C.*, 199F.R.D. 598, 601 (W.D. Tenn. 2000) (holding that second requirement was not satisfied).

video-recorded statement to Dateline—would hardly render the second requirement meaningless. That is because the applicant for divestiture must still show that all reasonable alternative means of obtaining that specific information have been exhausted. If the video-recorded statement were also in the possession of a third party, for example, the applicant for divestiture would be required to show that it had unsuccessfully sought the information from that third party.

In any event, the Court of Appeals' insistence that the "information sought" by the State must be viewed more generally as *any* statement by Clark concerning Eldridge's murder ignores the unique and irreplaceable nature of each statement. Dateline's interview of Clark is a "unique bit[] of evidence that [is] frozen at a particular place and time." *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980). The interview occurred only a month after Clark had viewed the State's case against him and offered an irreplaceable opportunity to observe his demeanor. *See, e.g.*, *In re Letellier*, 578 A.2d 722, 729 (Me. 1990) (requiring disclosure of television station's interview of public official under criminal investigation because it presented "an invaluable and irreplaceable opportunity for the grand jury to observe [the suspect's] demeanor and to hear an unedited version of his story in his own words with any subtle nuance that it may reveal"). It may well be that, because of the unique and irreplaceable nature of a criminal defendant's statement, the second requirement will often be satisfied when a video-recorded statement is exclusively in the possession of the news media. But that is no reason to give the second requirement an unduly narrow interpretation. Only a small number of motions to divest will involve such statements. And even in those cases, the first and third requirements must also be satisfied before disclosure is ordered.

Second, the court adopted *Shaffer*'s reasoning that an applicant for divestiture must know the precise contents of the information it seeks in order to prove that the information cannot

reasonably be obtained by alternative means. *Clark*, 2017 WL 564888, at *9. But that is illogical. If a journalist refuses to disclose information based on the Shield Law, then it stands to reason that other parties will be unable to learn the precise contents of the withheld information. Indeed, the only way another party could gain that knowledge would be to access the information by alternative means. If the party could obtain the information through alternative means, however, then it would be unable to satisfy the second requirement in any event.

The court's related concern that granting divestiture in this case would amount to a "fishing expedition" is misplaced as well. *Id.* It is the first requirement for divestiture—not the second—that prevents parties from going fishing. The State established that the interview was a statement by Clark concerning Eldridge's murder, and the parties agreed that the State had met the first requirement for divestiture by showing that the interview was clearly relevant to that murder. The State's lack of knowledge about what exactly Clark said during the interview does not somehow transform its attempt to obtain one specific piece of "clearly relevant" evidence into a fishing expedition.

The Court of Appeals' decision regarding the third requirement for divestiture is equally problematic. The court apparently believed that, if it were to find the "compelling and overriding public interest" requirement satisfied in this case, it would be satisfied in any case involving the prosecution of a serious crime. *Id.* Yet that is not necessarily true. To be sure, the public has a compelling interest in bringing the perpetrators of serious crimes to justice, but its degree of interest in the specific information the State seeks will also depend on the importance of that information to the underlying prosecution. In this case, the public has a compelling and overriding interest in obtaining Dateline's interview with Clark because the State's case against Clark is almost entirely circumstantial. "In a circumstantial murder case, evidence which,

standing alone, might appear innocuous can be deemed critical when viewed in combination with other circumstantial evidence." *People v. Bonie*, 141 A.D.3d 401, 403 (N.Y. App. Div. 2016) (requiring news station to disclose outtakes of interview with accused murderer because the State had satisfied requirements for divestiture of New York's shield law).

Even if it were true that the third requirement for divestiture will be satisfied in nearly every serious criminal case, that result is not inconsistent with the General Assembly's intent as the Court of Appeals surmised. The Shield Law's protection is not limited to criminal proceedings; it extends to civil proceedings, administrative proceedings, and proceedings before the General Assembly. *See* Tenn. Code Ann. § 24-1-208(a). The three requirements for divestiture apply equally whether the Shield Law is invoked in an administrative proceeding or a serious criminal prosecution. Acknowledging that the public has a stronger interest in obtaining information that is relevant to a murder than, say, a violation of a technical administrative regulation, does not strip the third requirement of meaning. It simply reflects the common sense notion that the third requirement will be easier to satisfy in some cases than in others.

If anything is inconsistent with the General Assembly's intent, it is the Court of Appeals' cramped judicial construction of the statutory divestiture requirements in this case. The Court of Appeals interpreted each requirement for divestiture in isolation, without considering the relationship among the three requirements and without appreciating that a party seeking to divest the Shield Law's protection must establish *all three* requirements. In its reluctance to make it too easy to establish any *one* of the factors in a particular kind of case, the Court of Appeals has made it virtually impossible for a party to ever satisfy all three requirements in any case. If the legislature had intended that result, it would have made the Shield Law's protection absolute rather than qualified. *See United States v. Sterling*, 724 F.3d 482, 531 (4th Cir. 2013) (Gregory,

J., dissenting) (noting that sixteen jurisdictions "make the privilege an absolute bar to compelling a reporter to divulge his sources"). This Court should grant review to clarify the standard for divestiture and to ensure that the lower courts do not thwart the legislature's intent by interpreting the divestiture requirements in a manner that makes them obsolete.

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND OF SIGNIFICANT INTEREST TO THE PUBLIC.

The proper interpretation and application of the requirements for divestiture of Tennessee's Shield Law are questions of pressing importance and significant interest to the public. The Shield Law represents the legislature's attempt to balance the broad societal interest in a free press against the public's "right to every man's evidence." *Branzburg*, 408 U.S. at 688 (internal quotation marks omitted). The divestiture requirements are the fulcrum of that balance, determining when the public's interest in a free press must yield to the public's interest in ensuring that the institutions charged with adjudicating violations of the law have before them all relevant evidence. It is therefore critically important that the divestiture requirements be interpreted and applied correctly and consistently.

The questions presented are especially important in the context of this case, which involves a double-homicide prosecution. The Court of Appeals' decision means that Dateline will be permitted to shield from the State "clearly relevant" evidence that the Court of Appeals acknowledged "might benefit the State's case against Clark." *Clark*, 2017 WL 564888, at *9. Even if the video-recorded interview does not bolster the State's case, the public still has a significant interest in giving the jury in this high-stakes case the benefit of additional relevant evidence that might assist it in reaching a verdict.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court the State's Application for Permission to Appeal.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

Sarah K. Campbell

SARAH K. CAMPBELL (BPR 34054)
Special Assistant to the Solicitor General
and the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Application of the State of Tennessee for Permission to Appeal has been sent by first class U.S. mail, postage prepaid, to the following attorneys:

Christopher M. Rodgers
P.O. Box 70764
Knoxville, TN 37938

Attorney for Norman Eugene Clark

Richard L. Hollow
Hollow & Hollow, LLC
P.O. Box 11166
Knoxville, TN 37939-1166

Attorney for Andrea Canning, Tim Beacham, the Custodian of Records for Dateline NBC and NBCUniversal News Group

on this 17th day of April, 2017.

Sarah K. Campbell
Special Assistant to the Solicitor General
and the Attorney General