The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 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.

Self-Employed Lawyer

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

2013, 032581

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.

I was admitted to the Michigan Bar in 2013 but opted not to complete the licensure process because my wife obtained a job in Tennessee, our home state, so we knew we would soon move. She works in academia (currently as a Senior Lecturer in Sociology at Vanderbilt). We knew it would be more difficult for her to find work so I followed her career.

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

No

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

-Adjunct Philosophy Professor at Eastern Michigan University, 2007-8

-Philosophy Lecturer at Washtenaw Community College, 2007-8

-LSAT Prep Teacher, 2007-8

-Graduate Student Instructor in Formal Logic at the University of Michigan, 2009-10

-Intern at the Washtenaw County Public Defender's office, in MI, 2010-11

-Adjunct Philosophy Professor at Eastern Michigan University, 2012-13

-Document Review for a few companies in Michigan and Nashville, 2012-14

-Sole Practitioner at One Shrewd Dude since 2014

-Founder and owner (jointly, with my wife) of ALDADLA Enterprises, a real estate partnership that consists of owning and managing a single-family rental home in Brentioch, since 2017

-Professional Magic: The Gathering player, on and off, 2010-20. This is a collectible card game that has taken me to California, Washington, Japan, France, and Spain to compete in Pro Tours

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 graduated law school in MI at the end of 2010 but did not receive my TN law license until the end of 2013. For most of this time, I was waiting for my wife to finish her PhD. We knew we did not want to stay in MI and it is harder to find work in academia than law. That ended up being back in Nashville. During these 3 years, I had an internship with a MI PD's office, taught philosophy as an adjunct professor, and did some document review. Even so, during those years there were a couple stretches of 6 months or so when I was not employed. I filled the time by playing professional Magic: The Gathering, as well as passing the MI and TN bar exams.

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.

From 2014-20, I dedicated myself to indigent defense--approximately 25% criminal defense and 75% juvenile law. Most of my juvenile work was as Guardian ad Litem, although I also did a fair bit of delinquency and parent representation. My criminal work included some General Sessions cases but mostly involved felonies in Criminal and Circuit Court. I have also done appellate and post-conviction work.

The pandemic caused me to scale back my practice due to being medically high-risk for complications from COVID-19. I am still practicing, just with a light caseload.

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.

As a solo, I work alone with no assistant. I have simultaneously represented as many as 150 clients in Courts across middle TN. My work has included obtaining a child support order, defending against an attempted increase in child support, child support contempt defense, parent and GAL representation in dependent-neglect matters, juvenile delinquencies, orders of protection, and criminal defense, spanning Cheatham, Davidson, Dickson, Hickman, Maury, Rutherford, and Williamson counties. I have represented clients in dozens of trials, including a 3-day felony child neglect trial in Davidson County Criminal Court and a 3-day severe child abuse trial in Davidson County Circuit Court. I have pursued appeals in both the CoA and CCA.

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

My most notable case was State v Bart Leo Tucker, M2016-01960-CCA-R3-CD, in which the CCA reversed and dismissed a 5-year conviction for Worthless Check by accepting my "verbal postdating" theory. That case was also interesting because the CCA agreed that insufficient evidence existed even though the CCA did not have the complete transcript, so the case created two precedents.

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 am an approved arbitrator for the Financial Industry Regulatory Authority (FINRA). I have also served as "special judge" in Davidson County Juvenile Court and, until the pandemic, regularly presided over Youth Court, a diversionary program held in Davidson County high schools.

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.

Much of my work has been as Guardian ad Litem for abused and neglected children.

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

I was severely physically abused growing up. At 17, in a particularly brutal incident, I was attacked by both my older brother and father. This attack caused permanent injury and disability. After fighting them off with a scented plug-in, I managed to escape and call the police. I cooperated fully, but unfortunately the police believed their story, choosing to imprison me on aggravated assault charges and repeatedly denying my requests for medical assistance. Fortunately, ADA Steven Sword, who is now a Criminal Court Judge in Knoxville, recognized that I had only been defending myself and refused to charge me, so I was released after a couple days. Shortly thereafter, I became classified as an independent student for federal financial aid purposes on the ground of child abuse. My abusers were never criminally charged. It was this experience that eventually drew me to law and drives my passion for justice.

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.

NA

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 Michigan Law School, JD, 2008-10.

-Public Service Fellowships for internships at the Washtenaw County Public Defender's office during and after law school, a Bergstrom Fellowship in Child Advocacy, and an Equal Justice America Fellowship.

- My years at the University of Michigan law school were paid for by service as a Graduate Student Instructor of Formal Logic while pursuing the JD.

Tufts University, 2005-7, Philosophy MA

-Tufts is recognized as having the nation's leading master's program in philosophy. One of my professors at Tufts was Erin Kelly. She John Rawls' last PhD student. She taught me Philosophy of Law, which motivated me to attend law school. I was the only student from a class of 11 to graduate within two years. The program was difficult because it required passing 4 comprehensive examinations—Epistemology, Ethics, Metaphysics, and one optional field. My optional field was Philosophy of Law. During this program, I served as a teaching assistant in several courses. Earning this MA allowed me to first be hired as an adjunct philosophy professor at age 24.

Vanderbilt University, 2001-5, Philosophy & German Studies Majors with an Economics Minor

-Harold Stirling Vanderbilt 4-Year Full-Tuition Honors Scholarship

-National Merit Scholarship

-Phi Beta Kappa

-Award for Top German Studies Student

-High Honors in German Studies, writing a thesis in German on a Freudian reading of Thomas Mann's Death in Venice.

-Honors in Philosophy, writing a thesis on the nature of value (i.e. Axiology).

-Honors in the College of Arts & Sciences, completing the required number of honors seminars.

-Studied abroad in London and Germany from Summer 2003-Summer 2004.

PERSONAL INFORMATION

15. State your age and date of birth.

37, [redacted]/83

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

Over 7 years. I also grew up in TN. Graduate school took me to Boston and Ann Arbor from 2005-13, but then my wife and I returned home.

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

Over 7 years.

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

Davidson

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.

NA

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.

1, dismissed.

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.

Yes.

-In 2017, I was a respondent in Christian v Reynolds-Christian. This was a §1983 action in the US District Court for the Middle District of TN, 3:2017cv00809. Basically, the mother of a child who had long been in DCS custody tried to sue everybody involved in the case. As former GAL for her child, I was included. The case was immediately dismissed against me because I was not a government actor and, thus, could not be subject to a §1983 claim. The case was only even brought to my attention after this dismissal.

-In 2014 I obtained an order of protection against Minki Feigerle in Davidson County General Sessions Court, Case # 14OP2215.

-In 2002 I was charged with misdemeanor theft in Davidson County. The case was dismissed and expunged.

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.

NA

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

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

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

No, unless you count the Boy Scouts. I became an Eagle Scout in 2001.

ACHIEVEMENTS

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

Tennessee Association of Criminal Defense Lawyers (TACDL), 2014-20

-Inducted as a Life Member of TACDL in 2017

-On the Publications Committee of TACDL since 2018

Tennessee Bar Association, 2014-20

Nashville Bar Association, 2014-15

National Bar Association, 2018-19

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.

Every year for the past half-decade, the Tennessee Supreme Court has named me an Attorney for Justice due to my pro bono work.

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

Does the New Theft Grading Apply to Defendants Whose Crime Occurred Before 2017? Article in June 30th edition of TACDL's "The Weekly Writ"

https://files.constantcontact.com/a5c2d1af001/458a9099-9862-42ad-b473-f926b716faf9.pdf

Preventing Foreign Convictions from Enhancing Sentencing Range

Published in TACDL's 2018 Q3 edition of "For The Defense"

Collaborative Case Comment on State v Myer, published in the Belmont Criminal Law Journal on 4/29/20.

https://www.belmontcriminallaw.com/category/content/collaborative-case-comments/

-Also, although this is not a formal publication, I have prepared and disseminated digests of the past 5 years' worth of activity on the TACDL list-serve, which includes nuanced discussions of many contemporary criminal law issues from top-notch defense lawyers across Tennessee.

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.

I have regularly volunteered as a supervisor in Nashville School of Law's Juvenile Justice Clinic.

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.

NA

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.

1: Theft Grading article, sole author.

2: Foreign Convictions article, sole author.

3: Collaborative Case Comment on State v Myers--supervised a law student writing a note for the Belmont Criminal Law Journal. He did the writing, but I gave him ideas, referred him to caselaw, and critiqued his writing through many written exchanges over several months.

ESSAYS/PERSONAL STATEMENTS

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

Being a judge is a noble profession that fits my personality. One of my law professors once said that "law is where the philosophical rubber meets the road." Philosophical theories are often so airy and abstract that it can be difficult to see their practical applications. But when interacting with cases, the facts raise all manner of interesting issues that are informed by philosophical considerations. It has become apparent through practice that I have a talent for discerning legal nuance. While I love practicing "in the trenches," the ways of the scholar have always been closer to my heart. It is much easier for me to persuade judges than jurors because the way that I think is deeply rooted in reason rather than emotion.

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)***

My entire career has been devoted to public service and equal justice. As a law student at the University of Michigan, I never considered applying to high-paying biglaw opportunities. Rather, I served the community through volunteer work and public-service internships. As a lawyer, I have continued this path. While I do occasionally accept a private client, I have never advertised or attempted to network my way into a lucrative position. Rather, I am happy serving the public through direct representation of the disadvantaged. In addition to this pro bono work, I have regularly volunteered as judge through Davidson County's Youth Court and as clinic supervisor through the Nashville School of Law.

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)***

This application is spurred by the recent CCA opening. My wife, children, and I are very stable and happy in Brentwood. We have many reasons to stay here forever, so I would love to be a judge in or around Davidson County. I prefer to specialize in criminal law, but am a very quick learner with a theoretical bent so could be effective in any area of law. The number of judges does not matter to me. My selection would most impact the Court through the rigorously theoretical way in which I understand the law. Having studied philosophy of law helps me see underlying issues as conceptually integrated rather than merely historical. My jurisprudential approach would reflect coherence and interdisciplinarity.

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

I regularly volunteer at local high schools as Youth Court Judge and at Nashville School of Law as Juvenile Justice Clinic Supervisor. My most pronounced talents are conceptual analysis, research, strategic thinking, and explication, so it would make sense for me to become more involved in legal education. Helping others understand how to identify and apply legal principles, through whatever opportunities arise, would be a life well spent.

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 have an exceptional ability to empathize with the underprivileged. After surviving childhood, I had to make my own way through school and did not even own a vehicle until age 30. My wife, a sociologist who teaches on class, gender, and race, comes from a poor East TN family in the middle of nowhere. Although we have recently achieved stability, I will never forget how difficult it was to live in and escape poverty. One legal issue I find fascinating is how to count life disadvantages in sentencing. The defense tends to argue that poverty, child abuse, being a minority, and other difficult circumstances are mitigating factors. But data show that people who

fall into such categories are at greater risk to recidivate, which prosecutors often argue justifies longer sentences. Could it really be that we should punish the disadvantaged more harshly, precisely because they had it rough? I have thought long and hard about difficult questions in this vein, including the justifications of punishment, the nature of legal interpretation, the ontologies of rights and rules, the essence of praise and blame, the meaning of freedom, and the relationship between law and morality. Just as these reflections have guided my practice as an advocate, they will inform any judicial decisions I am called upon to make.

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. I am a strong believer in science (and even believe that science should be considered a branch of philosophy). My wife and I have vaccinated our children as recommended by their pediatrician. We regularly get flu shots and will get the COVID-19 vaccine as soon as it is available after being proven safe and effective. Nonetheless, I was once appointed to represent an anti-vax mother whose child was in DCS custody and who wanted to keep her child from being vaccinated. As a tireless advocate for children's welfare, I vehemently disagree with this decision. Moreover, I strongly oppose the TN law allowing parents to refuse to vaccinate their children on religious grounds: I believe vaccinations should be mandatory for every child unless medically contraindicated. In the case at hand, however, my client's position was that her religion opposed abortion and vaccines are made from aborted fetuses, so she had a religious objection to vaccination. Despite my personal distaste for this particular piece of advocacy, and despite the fact that vaccines are not actually made from aborted fetuses, I obtained an order from a Magistrate prohibiting DCS from vaccinating my client's child. My obligation was to the client and her wishes, not to the child or what I want the law to be. As a judge, similarly, I would respect the law as required by Tennessee and United States jurisprudence.

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. Juvenile Court Judge Sheila Calloway: [redacted]
B. Attorney Lisa Fiehweg: [redacted]
C. TACDL President Mike Working: [redacted]
D. Kimberly Wagner, former CASA Supervisor, currently employed at Caregiver TN overseeing supported living homes and family-based providers for elder care: [redacted]
E. Amy Faeder, my wife, Senior Lecturer in Sociology at Vanderbilt University: [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] of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: 9/27, 20 20.

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.

Dustin Faeder
Type or Print Name

Signature

9/27/20
Date

032581
BPR #

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

Does the New Theft Grading Apply to Defendants Whose Crime Occurred Before 2017?

In Tennessee, Theft is graded according to value. This also holds true for various other crimes, such as Vandalism or Worthless Check. For brevity, I will simply refer to Theft for the remainder of this article, but the same reasoning should apply to any crime graded in the same manner. Until recently, the stolen item's value had to be over $500 for Theft to be a felony and over $1000 to be a D felony. But beginning 1/1/17, the legislature changed these numbers: now, Theft must be over $1000 to be a felony and over $2500 to be a D felony. This raises the question of how a defendant who is convicted of having stolen more than $500 but less than $2500.01 should be sentenced, when the crime was committed prior to 1/1/17.

One might think this is an ex post facto question, but it isn't. Ex post facto jurisprudence would only apply if the punishment were increased. This question is controlled by the following statute:

TCA § 39-11-112. Repealed or amended laws -- Application in prosecution for offense.

> When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense… in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

This statute contains an obvious tension. On the one hand, it says that if the relevant act was amended, it shall be prosecuted under the law as it was at the time the offense was committed. On the other hand, it says that if the amended act calls for a lesser penalty, then the defendant gets the benefit of the newer, more lenient sentence. The first part of the statute is friendly to the prosecution, while the last sentence is friendly to the defense. Which part controls?

Some caselaw from an analogous situation is helpful to the defense. On 7/1/92, the statute criminalizing the sale of cocaine was amended. Specifically, rather than always being a B felony regardless of amount sold, the new statute specified that sale of cocaine was only a C felony if it was under .5 grams. This raised the question of how individuals were to be sentenced if they had committed the crime before 7/1/92, but were not sentenced until after 7/1/92. TCA § 39-11-112 obviously applied, but how? When these cases inevitably drifted up to the Court of Criminal Appeals, the CCA applied the last sentence of TCA § 39-11-112, holding that the defendant would be punished under the newer, more lenient sentence because the amendment "provided for a lesser penalty." See *State v Paul Jordan* (WL 350160, 1993), *State v. Hill* (WL 492698, 1993) and *State v. Booker* (WL 539176, 1993).

However, there is also a recent case in the same vein that is friendly to the prosecution. In *Lloyd Earl Williams v. State* (W2003-02348-CCA-R3-HC, 2004 WL 948370, Tenn. Crim.

App. Apr. 29, 2004), the defendant was convicted of several counts of Unlawful Sale of Cocaine, plus one count of Possession of Cocaine with Intent to Sell, each a B felony, and each committed in June 1992. After 7/1/92, the defendant was convicted and sentenced in absentia to the B felonies. He was on the run for nearly a decade and was finally caught in 2001. He tried a PCR but was unsuccessful. Then, in 2003, he filed a habeas corpus petition arguing that he should not have been convicted of B felonies because the indictment failed to allege that he possessed .5 grams or more for any of the offenses (although it did describe many "rocks" for each offense). The CCA relied on TCA § 39-11-112 in denying the defendant's petition, reasoning that he was to be tried according to the crime at the time of the offense.

It is worth mentioning that, if a crime is completely decriminalized, the defendant can still be punished for the crime, even if the State does not bring charges until after the decriminalization occurs. The argument that decriminalization is a form of "providing for a lesser penalty" has been rejected by the CCA. In other words, reducing the punishment to zero does not trigger the defense-friendly part of TCA § 39-11-112.

In light of *Lloyd Earl Williams v. State*, prosecutors tend to proceed under the theory that the last sentence of TCA § 39-11-112 only applies when none of the elements of the crime were also amended. Otherwise, they reason, the change in punishment is justified by a change in elements. Suppose, for example, that a law mandates a 20 year sentence for rape, defined as the unconsented-to insertion of a penis into a vagina. Suppose further that the law is amended to include the unconsented-to insertion of a finger into a vagina, and at the same time reduces the mandatory sentence to 10 years. A prosecutor would argue that the last sentence of TCA § 39-11-112 does not apply because the newer sentence reflects the lesser degree of harm caused by digital rather than penile rape (the risks of pregnancy and STD transmission from penile rape are significant, but they are virtually nonexistent with digital rape).

There is some sense to this position. For example, on 7/1/16 the Tennessee Legislature amended the statute which enhanced 3rd offense of simple possession of marijuana to a felony by eliminating that enhancement. It is clear that individuals sentenced for 3rd offense or greater of simple possession of marijuana after 7/1/16, when the offense occurred before 7/1/16, are not to be sentenced as though they had committed a felony. No element of the crime changed in the amendment; the only change was the elimination of an enhancement. In this instance, the prosecution's element-based theory reaches the correct result.

But this raises a question for Theft, because value is typically considered to be an element of Theft. This can be very beneficial to the defense in other contexts. For example, considering the value of a stolen item to be an element of Theft can prevent out-of-state felony convictions from counting to enhance a defendant's sentencing range because an element analysis is often required to show that the out-of-state felony would have been a felony in Tennessee, and it sometimes cannot be shown that a "felony" theft from another state exceeded the requisite Tennessee value threshold. So if the prosecution's theory is correct that the Defendant only gets the benefit of the newer, more lenient sentence when the elements of the crime did not change

concomitantly with the sentence, then defendants would be subject to the stiffer penalties under the earlier grading for Theft crimes committed before 2017.

Fortunately, the cases from 1993 regarding the amendment to the sale of cocaine do not fit the prosecution's theory. In those cases, an element clearly changed in that .5 grams or more became required for the crime to count as a B felony, but the CCA nonetheless applied the final sentence of TCA § 39-11-112, benefitting the defendant.

The problem is that there is no easy way to theoretically unify the caselaw, which leads to a thumbs-up, thumbs-down situation where random facts (including what the judges had for breakfast) may make the difference. When arguing these cases, the defense is best served by analogizing the current situation to the 1992 sale of cocaine amendment. The defense should be prepared to use those cases as counterexamples to the prosecution's element-based interpretation. The defense should also invoke the Rule of Lenity, which gives the benefit of the doubt in close cases to the defendant. One thing is certain: these cases will drift up to the CCA, and perhaps even to the Tennessee Supreme Court.

Preventing Foreign Convictions from Enhancing Sentencing Range

Prior convictions include convictions under the laws of any other state, government or country that, if committed in this state, would have constituted an offense cognizable by the laws in this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.

—T.C.A. §'s 40-35-106(b)(5), 40-35-107(b)(5), & 40-35-108(b)(5).

This tiny statute is dizzyingly complex, but when properly understood it is a powerful weapon for the defense. Prosecutors have a very high burden to meet if they intend to use prior convictions from jurisdictions other than TN (hereafter, "foreign") to enhance a defendant's sentencing range. By statute, sentencing range enhancements must be proven beyond a reasonable doubt (T.C.A. §'s 40-35-106(c), 40-35-107(c), & 40-35-108(c)). Due to the stringent requirements for using foreign convictions to enhance sentencing range, prosecutors often cannot meet their burden. But most courts won't detect this issue if the defense attorney does not identify it. My goal in this article is to give you the tools to prevent foreign convictions from enhancing your client's sentencing range.

The first test is whether the foreign conviction is "cognizable" under the laws of TN. This is such a broad term that nearly all foreign convictions will pass this test. If the foreign conviction was labeled a misdemeanor by the jurisdiction of conviction, then it counts as a misdemeanor in TN. If the foreign conviction was labeled a felony by the jurisdiction of conviction, more tests are necessary.

The second test is whether the foreign felony is a "named felony" in TN. If it is, then it counts to enhance sentencing range. But what is a "named felony?" The appellate caselaw makes clear that, to count as a "named felony," the foreign felony must have the exact same name as a crime that is currently a felony in TN: in State v Delbert G. Mosher (1999), "Lewd Assault" did not count as a named felony; in State v Eddie Erwin (2001), "Retail Theft" did not count as a named felony; in State v James Castile (2006), "1st Degree Fleeing From or Evading Police" did not count as a named felony; in State v Jasper L. Vick (2006), "Assault of a High and Aggravated Nature" did not count as a named felony; and in State v Roland Patrick Cobbins (2009), "Breaking and Entering" and "Grand Larceny" did not count as named felonies. Thus, in each of these cases, the appellate court required a third test.

The third test is an element analysis. We use element analyses in at least two other contexts: lesser includeds and double jeopardy. For lesser includeds, we ask whether offense A contains all the elements of offense B, while for double jeopardy we ask whether offense A and offense B each have an element the other doesn't (or, conversely, whether either is a lesser included of the other). These quintessential element analyses are always done on a purely abstract, statutory level.

For the third test, the most important case to be aware of is State v Jasper L. Vick (2006). This case very clearly specifies that the element analysis required for non-TN-named foreign felonies is also done in the abstract: "The determinative factor is the elements of the conviction offense, not the facts or the elements of the originally charged offense." The underlying facts of foreign conviction do not matter, presumably because we don't want trial courts engaging in trials within sentencings. This case also specifies that the statutes to be compared are the foreign statute of conviction, *from the time of the conviction*, and the corresponding TN statute, *from the time of the conviction*: "The appropriate analysis of prior out-of-state convictions is under TN law as it existed at the time of the out-of-state conviction."

Thus, for foreign felonies that are not currently named as felonies in TN, the prosecution's burden is to show that it is impossible for a person to have committed the foreign felony without also committing what would have been a felony in TN. If the prosecutor does not provide copies of the full statutes, both from the jurisdiction of the foreign conviction and from TN, at the time of the conviction, the prosecutor cannot even begin this project. And even if the prosecutor does unearth the relevant statutes, there are often ways to prevent such foreign convictions from enhancing sentencing range.

I will now give two examples from my practice, in which I successfully avoided a range enhancement sought by the prosecution. In one case, my client had a prior felony from GA, from the turn of the millennium, for "Theft by Bringing Stolen Property into the State." Testimony during sentencing showed that the property was a newer-model truck. Under TN law at that time, for theft to be a felony the stolen object had to be over $500 in value. And also under GA law at that time, a theft was a felony if it was over $500 in value. However, there were several other ways a theft could have been a felony in GA at that time. The most obvious provision felonized any theft of a motor vehicle.

But even had that provision not existed, my client's prior felony would not have counted to enhance sentencing range because that GA statute also felonized stealing as a fiduciary or an employee of a government or financial institution, stealing a destructive device, explosive, firearm, or memorial to the dead, including flowers or other grave ornamentation, stealing while engaged in telemarketing, and even just having a prior theft conviction in GA. Because the element analysis is done in the abstract, the fact that the stolen object was a newer-model truck did not matter. All that mattered was that, theoretically, there was at least one way that my client could have been found guilty of a felony under the GA statute, without the value of the theft having been over $500, a required element under TN law.

The second example also involves conduct cognizable under TN theft laws. This client had a prior felony from GA for "Deposit Account Fraud" from 2011. That statute closely tracked the TN "Worthless Check" statute at the time. However, there was one crucial difference. In TN at that time, the crime was graded as theft, which only made the crime a felony if the value was over $500. In GA at that time, however, "Deposit Account Fraud" was a felony if the value was $500 or over. Theoretically, then, the GA felony conviction could have resulted from a check for exactly $500.00, in which case it would only have been a misdemeanor in TN. And this kept the felony from counting to enhance sentencing range, despite the fact that the prosecution was able to show that the actual value of the check was greater than $500, because an abstract analysis is required—i.e. the facts don't matter.

This area of law is very friendly to the defense, but it is intellectually rigorous to utilize. In this article I have provided you with a guide to harnessing the power of the statutes and caselaw that govern whether foreign felonies—including federal felonies—count to enhance sentencing range. We are seeing this issue more frequently in the Nashville area because so many people have moved to middle TN. I sincerely hope that this article spurs you to closely examine the State's Notice of Intent to use your client's criminal record at sentencing, so that you can and will prevent unlawful range enhancements.

CATEGORY: COLLABORATIVE CASE COMMENTS

APRIL 29, 2020

STATE V. MYERS

State v. Myers

581 S.W.3d 173

No. M2015-01855-SC-R11-CD

Attorney Contributor: Dustin Faeder

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PDF: State v. Myers

This case started on March 13, 2014, from an inspection initiated due to repeated complaints based on an alleged illegal automobile repair shop in Goodlettsville, Tennessee.[1] This was the second occasion that the inspector, Ms. Sandra Custode, had visited the premises, and this time she intended to collect photographs of the house for evidence.[2]Ms. Custode never entered the property, but the owner/defendant, Leroy Myers, Jr., saw the inspector and angrily screamed at her with clenched fists before he ultimately returned to his garage.[3] Custode left the property when Myers entered the garage, but almost immediately upon driving away she heard "several" shots and turned around to see Myers lowering a gun as one of the people with him laughed.[4] Upon reaching a safe distance, Ms. Custode called the Metro Nashville Police Department, who then arrested Myers and found a shotgun at the residence.[5]

The State charged Myers with the Class C felony of aggravated assault, with no reference to reckless endangerment.[6] The defense's primary argument was that Myers did shoot the gun, but that he was merely scaring a hawk away from his chickens rather than threatening Ms. Custode.[7] At closing of the bench trial, the defense argued that because several Tennessee cases[8] have held that actions similar to Mr. Myers's did not meet the standard of reckless endangerment, a Class E felony,

Mr. Myers's actions could not meet the standard of the Class C aggravated assault charge at issue here.[9] The Trial Court concluded that, by making this argument, the defense counsel had essentially allowed the charge of reckless endangerment to be added to the indictment, under which the Court found Mr. Myers guilty.[10] The Tennessee Court of Criminal Appeals subsequently affirmed the trial court's ruling, remanded, and affirmed the ruling upon its second appeal, at which point Mr. Myers appealed to the Tennessee Supreme Court.[11]

The Tennessee Supreme Court presented this issue of first impression as "whether and under what circumstances an 'effective amendment' to an indictment in a bench trial by other than affirmative means" can be valid.[12] The Court noted that "effective amendment" has generally been used in the context of a defendant "*actively requesting* an instruction on an otherwise improper lesser offense.[13]" The Court used *State v. Stokes*,[14] where the Court reversed a finding by the trial court that the failure to object to an improperly included lesser charge did not constitute effective amendment, to support the proposition that something more than mere passivity is required.[15]

From there, the Court dealt with the issue of whether the defendant here did, in fact, affirmatively amend the indictment.[16] The State argued that the defense did so argue on two bases: one, the closing argument statements, and two, off-the-record conversations.[17] For the former, the Court concluded that a mere trial strategy, such as saying the actions at bar would not even satisfy a similar element in a lesser charge, is not so affirmative as to create an effective amendment.[18] For the off-the-record conversations, the Court essentially said that, if the conversation affected the outcome, it should have been part of the record.[19] After quickly disposing of the idea that the defendant waived his ability to appeal, the Court reversed and remanded the case.[20]

While the Tennessee Supreme Court here was right to limit the reach of the Doctrine of Effective Amendment, the Court had an opportunity to set down a clear rule implicit in the case itself and failed to do so, implicating more appeals and the potential for violation of constitutional rights in the future. While there is a point at which a defendant should be made to face the consequences of their request for or acquiescence in an amendment, there must be clear evidence they did so, and the Court here said as much. In being faced with a judge finding amendment based on a strained reading of a closing argument and a supposed off-the-record waiver, the Court had a chance to lay down that a waiver requires a waiver on the record (a classification which would encompass a charge conference), i.e., something "clear from the record." That the Court did not do so implies either a willingness to allow amendment based on questionable evidence of acquiescence or an unwillingness to come out and state what their decisions are leading to.

The Tennessee Supreme Court last spoke on the doctrine in 2007 in *Demonbreun v. Bell*,[21] where they held that an amendment to add a charge that the defendant mistakenly thought was a lesser included charge is an effective amendment.[22] Tennessee appellate courts, by contrast, have heard cases involving the "effective amendment" issue ten times,[23] all of which involved juries rather than bench trials (besides, of course, the prior *Myers* appeals).[24] This is likely because, as *State v. Myers* hints at in a footnote,[25] the jury instruction system implemented in jury trials provides a convenient means of determining consent or lack thereof. All this is to say that this is a case of first impression of grafting the rules of Effective Amendment from jury to bench trial, and thus an opportunity to lay a firm groundwork for bench trials going forward.

Unfortunately, while the case's top line conclusion is undoubtedly the best outcome from a Due Process perspective, *Myers* leaves much to be desired as far as actual guidance is concerned. Obviously, the facts relied on here, off-the-record conversations and bare reference to legal concepts, are not sufficient to amend an indictment. What is less clear is what else is and is not sufficient. The Court attempts to create a rule, stating that an amendment must be "affirmative,[26]" that the amendment be "*clear* from the record,"[27] and a strong suggestion in a footnote that trial judges start performing "charge conferences."[28] Yet, in this very appeal, the appellate court seemed to implicitly think that this appeal met those standards.

On that note, the appeals that resulted from this case demonstrate exactly why guidance on this issue is necessary. To reiterate, this is a case where the State argued that an analogy from a closing argument and an off-record conversation were enough to effectively amend a criminal indictment.[29] Yet, despite these facts and explicit reference to the idea that a court should not "presume consent merely from the accused's silence," the appellate court twice ruled this enough to amend the indictment.[30] The appellate court believed that an analogy in a closing argument was "affirmative"[31] and that such an analogy plus reference to an off-the-record conversation is "clear from the record."[32] This is to say, despite fairly clear judicial language, there has been a tendency for lower courts to construe it more broadly than is justifiable under the case law.

The question, then, is what is the rule that is necessary or, indeed, what rule does the Tennessee Supreme Court seem to be leaning towards? The Court's clear preference seems to be making charge conferences the norm in bench trials, as this is the only direct procedural suggestion anywhere in the entire opinion. The issue is that this statement clearly is not phrased as a direct command (for one thing, it is relegated to a footnote), and trial judges may be resistant to voluntarily doing so for reasons of judicial economy and preferring the flexibility of establishing charges without resort to scheduling a formal conference. Thus, absent such a clear command, the issue

becomes defining what qualities the Court finds beneficial about such conferences that those would be the Court's only firm suggestion. In the case at bar, the Court finds such a practice beneficial because it makes clear "whether a defendant has actively pursued an instruction on an offense."[33] The question, then, is what evidence "clear from the record" outside of a record from a charges conference would achieve this?

The type of evidence that would reach this same level of clarity seems to be an on-the-record waiver of any argument against the charge they are convicted under. Such a writing or statement would simultaneously leave a similar kind of "paper trail" the results of a conference would while allowing much of the same flexibility trial courts currently have in establishing charges, short of requiring the scheduling of a formal conference. Furthermore, having a defense attorney describe exactly what the defendant is consenting to or signing would provide a direct explanation of a defendant's Due Process rights absent under the current ad hoc scheme. Finally, connecting this method to the case at hand, this rule would prevent trial judges from interpreting ambiguous statements or situations as a defendant's waiver of their right to be informed of the charges against them.

Furthermore, the Tennessee Supreme Court has shown itself able to produce such cases in the past. One of the best cases to analogize to *Myers* is *Momon v. State*,[34] which established the fundamental state constitutional right for a criminal defendant to testify in their own defense.[35] In expounding this fundamental right, the Court spent about nine reporter pages[36] describing the exact parameters of the right, including, analogous to *Myers*, a discussion as to what specifically constitutes a waiver of the right.[37] For the Effective Amendment issue, it is at least conceivable that the Court could have gone into a similar level of detail, especially considering the issue here is more narrowly focused on the waiver issue than *Momon*'s establishment of a constitutional right. Furthermore, the rule the Court there laid down is nearly completely analogous to this situation. Under *Momon*, a waiver of the right to testify must be performed by the defendant either in writing or orally on the record. There is no obvious reason why the Court is unable to establish a near-identical rule here.

In this Due Process case stemming from, of all places, an unauthorized pastoral car repair shop, the Tennessee Supreme Court clearly came to the right determination of the defendant's rights. However, the Court's broader guidance for future cases is flawed. Besides a suggestion in a footnote that trial courts are completely free to ignore, the Court, to a significant degree, restates the exact same law that resulted in the erroneous determination in the first place. As a result, while legally correct, the Court missed an opportunity to settle the issue presented once and for all by requiring a waiver on the record, and has thus set itself up for these issues to continue into the future.

[1] *State v. Myers*, 581 S.W.3d 173, 175-76 (Tenn. 2019).

[2] *Id.* at 176.

[3] *Id.*.

[4] *Id.*.

[5] *Myers* at 176.

[6] *Id.* at 175.

[7] *Id.* at 178.

[8] Specifically, *State v. Payne*, 7 S.W.3d 25 (Tenn. 1999), *State v. Terrence Shaw*, 2011 Tenn. Crim. App. LEXIS 390.

[9] *Myers* at 178.

[10] *Id.* at 178-79.

[11] *Id.* at 179. For the two appellate level rulings, see *State v. Myers*, 2016 Tenn. Crim. App. LEXIS 826 ("*Myers* Appeal I"); *State v. Myers*, 2018 Tenn. Crim. App. LEXIS 286 ("*Myers* Appeal II").

[12] *Id.* at 182.

[13] *Id.* at 183 (citing *State v. Williams*, 558 S.W.3d 633, 637 & n.1 (Tenn. 2018))(emphasis in original).

[14] 24 S.W.3d 303 (Tenn. 2000).

[15] *Myers* at 183-84.

[16] *Id.* at 184.

[17] *Id.*.

[18] *Id.* at 184-85.

[19] *Id.* at 185.

[20] *Id.* at 186-88.

[21] 226 S.W.3d 321 (Tenn. 2007). One other reported Supreme Court case, *State v. Williams*, 558 S.W.3d 663 (Tenn. 2018), referenced the Doctrine, but only as an aside in a footnote. *Id.* at 537, n.1.

[22] *Demonbreun v. Belle*, 226 S.W.3d 321, 326-27 (Tenn. 2007).

[23] Including two appeals of the current case.

[24] These include the two aforementioned *Myers* appeals, *State v. Chapman*, 2013 Tenn. Crim. App. LEXIS 228, *Chapman v. Shepard*, 2013 Tenn. Crim. App. LEXIS 606, *State v. Spraggins*, 2010 Tenn. Crim. App. LEXIS 365, *State v. Grey*, 2007 Tenn. Crim. App. LEXIS 990, *State v. Campbell*, 2015 Tenn. Crim. App. LEXIS 860, *State v. Austin*, 2015 Tenn. Crim. App. LEXIS 343, *State v. Collins*, 2017 Tenn. Crim. App. LEXIS 981, *State v. Ortega*, 2015 Tenn. Crim. App. LEXIS 295.

[25] *Myers* at 187, n.5.

[26] *Id.* at 184.

[27] *Id.* at 186 (emphasis in the original).

[28] *Id.* at 187, n.5.

[29] *Id.* at 183.

[30] *Myers* Appeal I at *13, *Myers* Appeal II at *12-*13.

[31] *Myers* Appeal II at *12-*13.

[32] *Id.*

[33] *Myers* at 187, n.5.

[34] 18 S.W.3d 152 (Tenn. 1999).

[35] *Id.* at 161.

[36] *Id.* at 157-69.

[37] *Id.* at 161-63.