The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Kim Rene' Helper

Office Address: 421 Main Street, Franklin, TN 37064
(including county) Williamson County, Tennessee

Office Phone: 615-794-7275 Facsimile: 615-794-7299

Email Address: [redacted]

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

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.

Elected District Attorney General, 21st Judicial District Tennessee (Hickman, Lewis, Perry and Williamson Counties)

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

1998. BPR #19104

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.

TN – 1998. BPR #19104, Active

NY – 1995. #2655124, Active

FL – 1994. #0002259, Active

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

No

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

District Attorney General, 21st Judicial District TN. April 2008 – Present

Assistant District Attorney General, 21st Judicial District TN. October 2003 – April 2008

Assistant Attorney General, Criminal Justice Division, TN. March 1998-October 2003

Assistant State Attorney, Hillsborough County State Attorney's Office, Tampa, FL. July 1994 – October 1997

Associate/Law Clerk. Hampp, Schneikart, James and Swain, St. Petersburg, FL. January 1994 – July 1994. Civil litigation/Worker's Compensation.

Prior to attending law school, I worked in the communications field as a radio/television broadcaster in Buffalo, NY and as a public affairs specialist for the United States Environmental Protection Agency. I also served as a staff assistant for the U.S. Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks in Washington, D.C.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

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

My current practice is 100% criminal law. As District Attorney General, my office represents the State of Tennessee in criminal prosecutions in the Circuit, General Sessions, and Juvenile Courts in the 21st Judicial District, comprised of Hickman, Lewis, Perry and Williamson Counties. We also prosecute cases in Fairview City Court. Over the course of a year, my office handles more than 10,000 cases in the Circuit and General Sessions Courts.

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.

For twenty-six years, my career in public service has focused solely on criminal law and related issues. I briefed more than 300 cases and argued more than 75 in the appellate courts in

Tennessee. I briefed and argued *habeas corpus* cases in federal court, including two oral argument cases in the Sixth Circuit Court of Appeals.

During my tenure in the District Attorney's Office in Tennessee and the State Attorney's Office in Florida, I have handled more than 2500 cases in the trial courts and have tried nearly 50 cases before juries and judges. Over the course of my legal career, I have viewed each of these cases as an opportunity to listen and learn from judges, attorneys, victims, and defendants.

As the elected District Attorney General, I continue to carry a trial court caseload while overseeing the administration of an office which has grown to include fourteen Assistant District Attorneys and twelve support staff over four counties. By actively practicing in the trial court, I maintain contact with our trial judges to assure the efficient and effective management of the criminal docket. I am available to address any issues that arise involving this Office. I recognize that time management and communication skills are keys to an effective practice, both traits that I will bring to the appellate court.

Throughout my career, I have worked closely with various agencies and specialty courts. I have established relationships with law enforcement to better understand their perspectives on how investigations are handled. I have taken part in trainings designed to improve the quality of investigative work throughout the 21st District. I have trained magistrates at their annual training on factors necessary to the issuance of warrants.

In Florida, I was one of the first prosecutors in a newly created Domestic Violence Court. I worked extensively in the Hillsborough County Juvenile Court. During that time, a colleague and I tried a fourteen-year old teenager for murder following a stolen-car chase that led to two deaths. The defendant had just been released from juvenile detention custody prior to the crash. That case showed me the challenges prosecutors face in addressing juvenile crime and how it the result doesn't always mirror the juvenile system's goal of rehabilitation. Because of my interest in juvenile justice, I represented the Attorney General's Office on the Juvenile Justice Reform Commission in 1999.

In Tennessee, in the 21st Judicial District, I am an active participant in our recovery court, serving as a team member and past member of the Board of Directors. My office staffs Williamson County's DUI and Veteran's Courts.

Over the past several years, I have actively participated as a member of task forces created by Governor Haslam and Governor Lee to take a broad look at the state's criminal justice system and to make recommendations for improvements. This dialogue has given me insight into the issues surrounding criminal justice reform and will aid in reviewing any cases that ultimately arise following implementation of reform legislation.

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

As an Assistant Attorney General, I argued several cases before the Tennessee Supreme Court: *State v. Flake,* 88 S.W.3d 540 (Tenn. 2002). This case defined the appellate standard of review

for jury verdicts rejecting the insanity defense.

State v. Ducker, 27 S.W.3d 889 (Tenn. 2000). This case defined aggravated child abuse as a "nature of conduct" offense. When prosecuting a case involving aggravated child abuse, the nature of the defendant's conduct toward the victim is the primary consideration, not the result. The discussion in this case has been cited in subsequent appellate opinions on how to apply the statutory *mens rea* to the elements defining the crime,

State v. Scott, 33 S.W. 3d 746 (Tenn. 2000). In this case, the Tennessee Supreme Court recognized the admissibility of mitochondrial DNA evidence under Tenn. Code. Ann. §24-7-117. Although the case was remanded because of errors in the trial proceeding, this was the first time that mitochondrial DNA was recognized as reliable and admissible by the Tennessee Supreme Court.

As District Attorney General, I have tried several challenging cases:

State v. Robert Zaloba, No. M2011-00855-CCA-R3-CD (December 26, 2012). The defendant was charged and convicted of three counts of rape of a child, one count of rape, and one count of aggravated sexual battery. The victim was the adopted son of the defendant. During the trial, several evidentiary issues were raised about prior bad acts and prior inconsistent statements. The verdicts were upheld on appeal.

State v. Robert Jason Burdick, Nos. M2011-01299-CCA-R3-CD (Tenn. Crim. App. 2012) and M-2012-01071-CCA-R3-CD (Tenn. Crim. App. 2013). Prior to his arrest, Burdick was characterized as "the wooded rapist" based on the character and nature of his crimes. The Williamson County indictment alleged multiple victims. The counts, based on the victims, were severed, thus leading to two trials. Burdick was convicted of varying degrees or rape and kidnapping. On appeal, Burdick challenged the sufficiency of the evidence, as well as the evidence obtained following the traffic stop which led to his apprehension. The trial court's judgments were affirmed.

State v. Christ Koulis, No. M2007-02781-CCA-R3-CD. This case received national attention on 48 hours and Dateline NBC. Christ Koulis was a plastic surgeon accused of second-degree murder for injecting his girlfriend with opiates leading to her death. The jury returned a verdict of criminally negligent homicide. The case was argued on appeal, but the defendant died prior to the issuance of an opinion, thus his conviction was abated by death.

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

Not applicable

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

Not applicable

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

In 1987, I served as a staff assistant to the U.S. Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks. In that position, I administratively assisted the operation of the subcommittee. At that time, the nomination of Robert Bork to the U.S. Supreme Court was pending and I responded to constituent calls and letters about the nomination. That work provided me with insight into the judicial nomination process on the federal level and contributed to my decision to pursue a legal career.

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.

As an Assistant District Attorney General, I applied in January 2005 for a position as a Circuit Court Judge in the 21st Judicial District. The hearing was held on January 10, 2005. My name was one of three nominees submitted to the Governor for consideration.

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.

J.D. December 1993. Stetson University College of Law, St. Petersburg, FL. January 1992 – December 1993. Major – Law. Editor, Local Government Law Symposium. Stetson Law Review. Best Student Article, Stetson Law Review. Spring 1994. (My article was accepted and written during my final year and published post-graduation) Cum laude graduate.

Rutgers' School of Law, Newark, NJ. September 1990 August 1991. Major: Law. No degree awarded because I relocated to Tampa, FL and transferred as a law student to Stetson University College of Law.

B.A. May 1981. SUNY College at Buffalo, NY. September 1979 – May 1981. Major: Communications

A.S. May 1979. Niagara County Community College. September 1977 – May 1979. Major: Communications.

PERSONAL INFORMATION

15. State your age and date of birth.

61 years old. [redacted] 1959

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

23 years. October 1997 – Present.

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

23 years. October 1997 – Present.

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

Williamson County

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

Not applicable

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

No

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

No

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

One complaint filed in September 2011. The complaint was 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.

Patrick Stockdale, et al v. Kim Helper, Sixth Circuit No. 20-5269. The issue raised in this case is whether a prosecutor's communication of her *Giglio*-decision to Plaintiffs' employer, (who terminated them because of the *Giglio*-impairment) is entitled to absolute or qualified immunity.

I have also been named in my official capacity in several lawsuits but play no active role in those cases.

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.

21st Judicial District Recovery Court, Member of the Board of Directors, April 2010 - May 2017.

Lodge #41, Fraternal Order of Police

Franklin Breakfast Rotary, Paul Harris Fellow

Keep Tennessee Beautiful Advisory Board

St. Paul's Episcopal Church, Lay Reader, Altar Guild, Spring Street Outreach

Williamson County Republican Career Women

Leadership Franklin Alumni Association

Beta Sigma Phi International Sorority

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.

Not applicable.

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 Trial Court Vacancy Commission, 2016 – Present. Secretary, 2019/20.

Advisory Task Force on the Composition of Judicial Districts, Secretary, October 2018-December 2019

Tennessee State Criminal Justice Investment Task Force, Subcommittee on Probation and Parole, 2019

Tennessee Board of Professional Responsibility, Hearing Committee, March 2016 – Present. (Term expires in 2022)

Tennessee District Attorneys General Conference, President, 2015/16

Governor, Tennessee Bar Association Board of Governors, 2013 – 2020

Tennessee Bar Association Leadership Law Alumni, 2007 - Present

Tennessee Bar Association, Member, 2007 – Present

Governor Haslam's Task Force on Sentencing and Recidivism, August 2014 – September 2015

Williamson County Bar Association, President, 2010/11

Williamson County Bar Association, Member, 2003 - Present

John Marshall American Inns of Court, Treasurer, 2013 – 2016

John Marshall American Inns of Court, Member, 2010 – 2016

Tennessee Lawyers' Fund for Client Protection, Chair, January 1, 2015- December 31, 2015, Member, January 1, 2010 – December 31, 2015.

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.

Ronald L. Davis Award, Davis House Child Advocacy Center, January 2016

Humane Society of the United States, Humane Law Enforcement Award, December 2008

Williamson County Task Force Against Domestic Violence, Legal Award, 2008

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

"Kreimer v, Bureau of Police of Morristown: The Sterilization of the Local Library." 23-2 Stetson Law Review 521.

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.

Criminal Law Update, Williamson County Bar Association. Septemher 2020 and Spring 2018

Ethical Role of Prosecutor, TNDAGC New Prosecutor's Academy, 2017 and 2018

National Association for Legal Professionals National Conference, Presentation about the operation of a District Attorney's Office, September 2016

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.

District Attorney General, 21st Judicial District. April 2008 – Present

Candidate for Circuit Court Judge, 21st Judicial District. May 2006

Applicant for Circuit Court Judge, 21st Judicial District. January 2005

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

Not applicable.

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.

State v. Koulis, No. 2007-02781-CCA-R3-CD. Brief of the State of Tennessee before the Tennessee Court of Criminal Appeals. February 2009. This is entirely my own personal effort.

Robert Jason Burdick v. State, Motion to Dismiss Petitioner's Writ of Error Corum Nobis Petition, Case No. II-CR053496, filed in the Williamson County Criminal Court on February 25, 2020. This is entirely my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

Simply stated, I am seeking this position because I love to research, I love to write, and I believe in the law. Further, my varied experiences over a lifetime of public service, from reporting on and observing our legal system to being a participant in the courtroom, have prepared me for this position. As an undergraduate communications major, I absolutely enjoyed writing for and editing the Stetson Law Review.

In addition, one of my favorite aspects of my tenure at the Attorney General's Office was the opportunity to engage in a legal discussion with the Court, based on my arguments in the State's brief. I very much enjoy trial work but miss the opportunity to spend the necessary time to file a thorough response to defense pleadings and to engage the trial court in discussion. I'm excited about the opportunity to return to my roots.

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)***

"Equal justice under law" is engraved on the U.S. Supreme Court Building serving as a reminder

that every person is to be treated equally in our justice system. As District Attorney General, that principle applies to every case that comes through my office. This summer, Harriet Wallace from Fox17 shared her experiences from the station's Fight for Equality series. My goal was to educate our office on the social issues raised through the nationwide protests and to assure we treat every defendant and victim equally, irrespective of race, gender, or economic status. Also, my membership on the sentencing reform task forces reinforced to me the need to treat all parties equally in the criminal justice system.

As a prosecutor, I am limited in providing pro bono services. I contribute financially to agencies providing legal services and I regularly share presentations with schools and community groups on criminal 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)***

The position I am seeking is one of four seats on the Tennessee Court of Criminal Appeals – Middle Section. The Court is the intermediate appellate court reviewing appeals in misdemeanor and felony cases from trial courts throughout the State.

My selection would bring diversity to the Section as no women currently sit on the Court in the Middle Section. Also, my current judicial district covers communities in Middle Tennessee with a wide variety of interests and culture. As highlighted during the recent redistricting discussion, an understanding of these differences benefits the Court.

In addition, for twenty-six years, I have exclusively practiced criminal law in both the trial and appellate courts. I have served on state task forces looking at criminal justice and juvenile justice reform. Thus, I bring extensive knowledge of the law and the court system, as well as an understanding of potential legislative reforms to the bench.

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)***

Dancing with the Stars to fight hunger for Feed America First. Remodeling a bedroom for a child with cancer through the Special Spaces organization and the Nashville Predators Foundation. Bowling with Brightstone to support adults with developmental disabilities. Creating centerpieces and favors every month for seniors in St. Paul's Spring Street Outreach program in Franklin. Chairing the Board of Directors for My Friend's House, a group home for young men in need of support and direction. Shopping with a Cop for school supplies and Christmas presents. President/supporter of the dance mom booster organizations at Franklin High School, Music City All Stars, and MTSU. These brief descriptions illustrate my involvement and commitment to community service.

Strong leadership means others are called to follow. My enthusiasm for some of these projects has led our office staff and their families to become involved as well.

If appointed judge, I intend to continue my involvement in the community as much as I can

without violating any ethical standards. I have supported St. Paul's Spring Street Outreach for close to twenty years and will continue that support. Recovery Courts change lives. I would welcome any opportunity to maintain a connection to recovery courts. Further, I intend to continue support of projects assisting children through the Nashville Predators Foundation and through work with the Peterson Foundation for Parkinsons. Involvement in the community shows leadership, teamwork, and allows a person to gain additional knowledge and experience – all qualities important for a member of the Court.

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)***

My legal career is a second career for me. My college ambitions focused on broadcast journalism/public relations. Ironically, my first career led me directly to the legal field. My desire to pursue a law degree began as a reporter covering court hearings and trials in Buffalo, NY. Working on the staff of a Subcommittee of the U.S. Senate Judiciary Committee during the Robert Bork Supreme Court hearings captivated me. In addition to judicial appointments, the subcommittee worked on legislation and issues involving patents, copyrights and trademarks. I wrote statements for the Congressional Record. During my tenure at the U.S. Environmental Protection Agency, I handled public relations for enforcement actions taken by the U.S. Environmental Protection Agency. Every job in my communications career exposed me to the various facets of the legal field and prepared me to view the law from many different sides while analyzing its impact on the community.

Similarly, as a prosecutor, I am tasked with seeking justice. To do so, I am required to look at all the facts and circumstances and move forward based on that information. Oftentimes, I seek additional information from law enforcement. I may ask defense counsel for background information about a defendant so that I can fairly judge the case. With this information in hand, I can make a careful and deliberate decision on making sure justice is served.

These communication and analytical skills are essential to an appellate court judge and my diverse life experiences have prepared me for this opportunity.

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)***

Absolutely. As District Attorney General, I am sworn to uphold the law. As an example, Tenn. R. Evid. 404(b) generally prohibits prior bad acts of a defendant to show conformity with those prior acts. Several years ago, I tried a second-degree murder case involving the death of a woman following allegations her boyfriend injected her with a controlled substance. Relying on *State v. Gilliland,* 22 S.W.3d 266 (2000), which I argued before the Tennessee Supreme Court, I tried to convince the trial court that prior instances of abuse were relevant for context. The Court disagreed with my view. I accepted the decision. Ultimately, the jury convicted the

defendant of the lesser offense of criminally negligent homicide which was devastating for the victim's family.

Subsequently, after watching a national crime program about the trial, a juror called me to apologize for the verdict and stated that she would have convicted the defendant of murder if only she had known about the prior acts. I had mixed emotions. I didn't like the rule as applied in this case, but I also saw the wisdom of convicting a defendant based on the present conduct, not because of prior bad acts. Are there cases where prior acts are relevant to fill a conceptual void in the story? Yes. The Supreme Court recognized that need in *Gilliland.* But, as the trial court ruled, not in this case. This example also highlights the principle that the DA follows the law while the Court interprets the law.

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. The Honorable Mark Davidson, District Attorney General, 25th Judicial District TN, [redacted] Ripley, TN 38063. [redacted]

B. Mike Flanagan, Attorney, [redacted] Nashville, TN 37205. [redacted]

C. David Golden, Allen & Ruth Chair of Excellence, College of Business and Technology, East Tennessee State University. (Retired) Senior VP, Chief Legal & Sustainability Officer and Corporate Secretary, Eastman Chemical Company. Email: [redacted]

D. Connie Martin, Director, 21st Judicial District Recovery Court, [redacted] Franklin, TN 37064. [redacted]

E. The Honorable Sam Whitson, Retired Army Colonel/State Representative, 65th District TN, [redacted] Nashville, TN 37242. [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: October 1st, 2020.

Kim R Helper
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.

Kim R. Helper
Type or Print Name

Kim R Helper
Signature

10/01/2020
Date

#19014
BPR #

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

TN - BPR #19104

NY Unified Court System - #2655124

FL Bar Association - #0002259

Kim R. Helper

WRITING SAMPLE #1

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	WILLIAMSON COUNTY
	)	NO. 2007-02781-CCA-R3-CD
CHRIST P. KOULIS,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE WILLIAMSON COUNTY CIRCUIT COURT

BRIEF OF THE STATE OF TENNESSEE

ROBERT E. COOPER, JR.
Attorney General & Reporter

KIM R. HELPER
District Attorney General
Special Counsel
P.O. Box 937
Franklin, Tennessee 37065-0937
615-794-7275
B.P.R. No. 19104

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TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

MISCELLANEOUS

STATEMENT OF THE ISSUES

I.

Is the evidence sufficient for a rational trier of fact to find the defendant guilty of criminally negligent homicide?

II.

Did the trial court properly rule that all of the evidence seized from the victim's apartment is admissible under the "inevitable discovery" rule?

III.

Did the trial court properly admit evidence obtained from the defendant's apartment in Chicago based on its redaction of the affidavit supporting probable cause?

IV.

Were the defendant's statements admissible based on a finding that he was not "in custody" during the time he spoke with detectives at Williamson Medical Center?

V.

Did the trial court properly refuse to give the destruction of evidence instruction?

VI.

Did the trial court properly charge the jury as to the elements of criminally negligent homicide and unanimity?

VII.

Is the defendant's conviction of criminally negligent homicide barred by double jeopardy because the jury foreman also marked not guilty of assault on the verdict form?

VIII.

Is the conviction for criminally negligent homicide barred by collateral estoppel?

STATEMENT OF THE CASE

On July 4, 2005, Lesa Buchanan died. During its investigation of Ms. Buchanan's death, the Franklin Police Department executed a search warrant for her apartment, garage, and vehicle on July 13, 2005. (XXXI, 2-11).[1]

On November 13, 2005, the Williamson County Grand Jury returned a two-count indictment charging Christ P. Koulis with one count of second degree murder resulting from the unlawful distribution of a Schedule I or Schedule II drug and one count of reckless homicide. (XXXI, 21-24).

Defendant filed a motion to dismiss the indictment and/or motion for bill of particulars on March 17, 2006. (XXXI, 77-84). The trial court, Judge Jeff Bivins, presiding, denied the motion. (XXXII, 157-58). Defendant filed a motion to suppress evidence on June 30, 2006, and an amended motion to suppress on August 7, 2006. (XXXI, 148-150; XXXII, 164-66). These motions were denied by Judge Bivins on November 30, 2006. (XXXII, 284-85; XXXV, 641-48; VII).

Subsequently, the defendant filed an amended motion to suppress his statement, as well as a "motion to suppress search warrants in light of prior court rulings" and a motion to suppress a "Chicago" search warrant. (XXXIII, 307-312, 332-34). During the pendency of the hearing on these motions, defendant filed motions asking the trial court to reconsider its earlier ruling finding the Franklin search warrant valid. (XXXIII, 351-73, 391-402).

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[1] The record in this case consists of thirty volumes of transcript, including and index (I – XXX), five volumes of technical record (XXXI – XXXV) and exhibits (Ex.).

A hearing on the amended motion and motions for reconsideration was held on February 12, 2007. (VIII, IX). Following the hearing and after consideration of the evidence and arguments, the Court denied defendant's motion to suppress the Chicago search warrant. (XXXIV, 450-453; X, 700-16). The Court also denied the defendant's amended motion to suppress and the defendant's request for reconsideration of the Court's prior ruling. (XXXIV, 564-66).

Following a two-week trial, the defendant was convicted of criminally negligent homicide on September 28, 2007. (XXXV, 625). The jury also marked not guilty on the verdict form for the offense of assault. (XXXV, 625).

On October 5, 2007, defendant filed a motion for judgment of acquittal or, in the alternative, motion for new trial. (XXXV, 626-632). He also filed a motion for judgment of acquittal pursuant to Rule 29; an amended motion for judgment of acquittal or, in the alternative, motion for new trial; a second amended motion; and a third amended motion. (XXXV, 633, 637-40, 651-654, 714-722).

On December 5, 2007, the defendant was sentenced to two years in the Tennessee Department of Correction and fined $3000. (XXXV, 735). On December 5, 2007, the Court also denied defendant's motion for new trial, but did not enter a written order until January 28, 2008. (XXXV, 747-49, XXIX, 3241-42). Notice of Appeal was filed on December 5, 2007. (XXXV, 739).

STATEMENT OF THE FACTS

Motions to Suppress/Standing Issue

On July 4, 2005, Officer Mark Sanchez of the Franklin Police Department responded to a 911 call at Lesa Buchanan's apartment. According to Officer Sanchez, Lesa Buchanan and Christ Koulis were the only two persons at the apartment other than emergency responders. Officer Sanchez recalled seeing a men's shaving kit in the bathroom while he was at the apartment. (III, 119-121). Officer Sanchez also testified that he was unable to respond quickly to the apartment because the 911 caller, Christ Koulis, was unable to pinpoint his location. In fact, Christ Koulis told Officer Sanchez that he was visiting from Chicago. (III, 122-25).

While at the hospital, Officer Sanchez observed the defendant crying loudly so he moved him to a meditation room in order to avoid disturbing others waiting in the ER. According to Officer Sanchez, he was also trying to give the defendant some time to himself. During his interaction with the defendant in the meditation room, Officer Sanchez talked about what happened prior to the 911 call from the defendant so that he could complete his report. At that time, Officer Sanchez believed it was simply a medical call. (X, 830-34).

In response to the defendant's request, Officer Sanchez used his cell phone to call Christ Koulis' sister. The defendant then spoke to his sister using the officer's phone. Once he obtained the information he needed for his report, Officer Sanchez left the room. No one asked Officer Sanchez to keep the defendant in the meditation

room until the detectives arrived. Officer Sanchez did not stand guard at the door to the room, nor did he ever have Christ Koulis in custody. (X, 834-41)

Officer John Morton-Chaffin of the Franklin Police Department testified that he arrived at the apartment shortly after Officer Sanchez. Officer Morton-Chaffin believed Christ Koulis locked the apartment door prior to heading to the hospital because he did not want anyone in the apartment. However, the officer could not say where the defendant obtained the key. Officer Morton-Chaffin then stayed at the locked apartment to make sure that no one entered the premises until the end of his shift. (III, 137-43).

Detective Becky Johnson responded to the Williamson County Medical Center Emergency Room and spoke with Christ Koulis. At that time, she asked the defendant for permission to search the apartment. He denied her request. (III, 149-51). Detective Johnson ultimately spoke with security at Alara, the apartment complex, and entered the apartment on July 4, 2005. She was accompanied by Detective Stephanie Cisco. At the apartment, they noted a duffle bag with male clothing and sex toys inside. Det. Johnson also noted an open medical bag on the counter in the kitchen, as well as prescription bottles in the name of Christ Koulis in the master bathroom. (III, 152-63). Also found in the apartment were a Comcast bill and a BellSouth bill in Christ Koulis' name. (III, 169-72; Ex. 3). While Det. Johnson was at the apartment on July 4th, Christ Koulis did not return. Det. Johnson

was uncertain whether she told him he could not enter the apartment. (III, 175-76). His name was not listed on the lease. (III, 172-73).

During the hearing on the motion to suppress statements, Det. Johnson explained that when she first arrived at the hospital, she viewed Ms. Buchanan's body, took some photographs and spoke with the officers and physician present. When she learned that the defendant was still present, she entered the meditation room to get some information about what happened in order to assist the medical examiner. Det. Johnson did not see any officers standing guard at the room although there were some officers in the waiting area. During their conversation, the defendant asked Det. Johnson about contacting the victim's family. When he finally produced a phone number, Det. Johnson asked Franklin dispatch to assist in the notification. (X, 752-54).

When Christ Koulis asked Det. Johnson if he needed an attorney, she told him that he was not under arrest but she could not give him legal advice. She told him that the decision was purely his to make. When he said he wanted an attorney, she did not discuss the case anymore except to ask him if he would give consent to search the apartment. She did not tell the defendant he could make only one phone call, nor did she hear anyone make that statement. When their conversation was complete, she told him he was free to go. (X, 756-58).

Det. Johnson explained that at the time of the interview, she believed the defendant was a witness. Specifically, she was looking for information on medication,

health problems, or alcohol or substance use that would benefit the medical examiner. Although Det. Johnson photographed the stick marks in the victim's groin, she did not at that time have an opinion as to whether the death was suspicious. (X, 760-66) During her conversation with Christ Koulis, Det. Johnson inquired about his relationship with Lesa Buchanan and the weekend's activities. When Christ Koulis left the apartment, Det. Johnson told him he could not go back into the apartment because it would be considered a crime scene until she completed her investigation. (775-91).

Detective Stephanie Cisco went to the apartment with Det. Johnson on July 4, 2005. At that time, she also saw an overnight duffle bag, a shaving kit, and a doctor's bag. Det. Cisco told Christ Koulis he would not be allowed in the apartment because the department was considering whether or not to obtain a search warrant. (III, 179-82). Detective Cisco also testified that she photographed prescription bottles taken to the hospital when Lesa Buchanan was admitted for treatment. The middle bottle indicated Christ Koulis prescribed Valtrex for Jessica Buchanan. (VIII, 608-618, Ex. 6)

Det. Cisco recalled that the defendant was alone when she entered the meditation room. Officer Sanchez was outside the room. According to Det. Cisco, the defendant asked Det. Johnson whether he needed an attorney, but continued to speak with them after Det. Johnson questioned whether he, in fact, needed an attorney. When Det. Johnson questioned the defendant's statement that he slapped

Lesa, the defendant said he thought he needed an attorney. At that time, the conversation ended. According to Det. Cisco, the defendant was specifically told he was not under arrest and no one said anything to him about making one phone call. (X, 801-14).

Christ Koulis' sister, Antonia Koulis Antonocus, received a call from Tennessee on July 4th. After answering several questions from a police officer, her brother came on the line. She stated that her brother was crying and upset because Lesa died. During the conversation, Koulis and his sister spoke a mix of English and Greek. (X, 723-29) According to Antonocus, her brother stayed with Lesa Buchanan whenever he came to Franklin. On the night of the fourth, Antonocus suggested she and Koulis stop by the apartment. However, when she saw the police, she told her brother that they needed to get out of there. Her brother stayed that night with her at a local hotel. (III, 188-95). Antonocus acknowledged that when Christ Koulis picked her up at the airport, he was driving Lesa Buchanan's car and had her keys to the car with him. (III, 196).

Tara Bentley, sister of Lesa Buchanan, explained that Lesa lived in the Franklin apartment with her teen-aged daughter, Jessie Buchanan. Lesa Buchanan's ex-husband, Steve Buchanan, co-signed the lease for the apartment. Steve Buchanan's new wife, Tonya Buchanan, was also a frequent visitor and was named on the lease. According to Tara Bentley, Christ Koulis did not live at the apartment. (III, 200-02, 212).

On the night of July 4th into July 5th, Christ Koulis repeatedly called Lesa's mother, Peggy Roberts. He said he had Lesa's keys and wondered what to do with them. He agreed to leave the keys with the manager of the apartment complex. He later told the family that he paid the rent for July. (III, 206-11).

Fifteen-year-old Jessie Buchanan lived with her mom at the Alara Apartments in Franklin. She testified that Christ Koulis would visit her mom in Franklin once a month or so. Jessie also stated that Christ Koulis did not have a key to their apartment. In fact, when he stopped by unexpectedly one night, he knocked on the door. According to Jessie, only she and her mother resided at the apartment. Her step-mother, Tonya Buchanan, visited every couple of weeks and kept belongings there. Christ Koulis did not keep any of his belongings at the apartment. (III, 235-39).

Lesa Buchanan's best friend and Jessie's step-mother, Tonya Buchanan, stated she was on the lease along with Steve Buchanan because Lesa had credit issues that would not qualify her for the apartment. Tonya spent quite a bit of time at the apartment as a friend to Lesa and as a co-parent to Jessie. In fact, during her conversations with Franklin investigators, Tonya Buchanan gave them permission to enter and search the apartment. (IV, 251-59; Ex. 4) Tonya Buchanan stated that Christ Koulis did not have a key for the apartment. She also testified that Steve Buchanan assisted Lesa with money to pay the rent. (IV, 260-63, 273-74)

Christ Koulis testified that he knew the victim, Lesa Buchanan, for approximately five and a half (5 ½) years. During that time, they shared a residence off and on. At the time of Lesa's death, the defendant lived in Chicago. The defendant stated that he often helped Lesa pay her bills. He also said he bought furnishings for the Franklin apartment and paid rent for the apartment by giving Lesa money to cover the rent. Koulis stated that he paid the Comcast and BellSouth bills that were in his name and mailed to the Franklin apartment. (V, 302-04; Ex. 8). He also claimed to have had a key to any apartments that Lesa lived in without him. (V, 291-300, 305).

On the weekend Lesa died, Christ Koulis stated that he arrived at the apartment on Saturday evening, July 2nd. Lesa was supposed to meet the defendant in Chicago, but because she was not feeling well, he came to Franklin. The defendant spent two nights with Lesa at the apartment before she died. He did not return to the apartment and refused a request from the Franklin Police Department to search the apartment. (V, 309-20).

On cross-examination, Koulis admitted that he did not live at the apartment and was not on the lease. He even told the 911 operator that he was a visitor at the apartment and could not provide an exact address. Koulis admitted that he drove back to the apartment with his sister on July 4th but did not go to the door because the police were there and he did not want to get involved with the police. (V, 321-32).

During the hearing on his statements, Christ Koulis said he was taken into a private room after Lesa died by Officer Mark Sanchez. He claimed at least one, if not more, officers were standing outside the door of the room. At the time he was in the room, Officer Sanchez was in uniform and wearing a belt with a gun. According to Koulis, every time he attempted to leave the room, he was blocked. Koulis stated that he wanted to leave the room to view Lesa's body and to make some phone calls. Koulis also maintained that he did not want to answer the officer's questions, but felt compelled to do so. The questions from Officer Sanchez related to his relationship with Lesa and the events leading up to her death. (X, 731-36).

Christ Koulis also testified that he asked Officer Sanchez to call an attorney but the officer would not allow him to make the call. Koulis claimed that when the detectives came into the room, they did not allow him to call an attorney. He told the court the detectives told him that, when they were done, he could make one phone call. (X, 736-39). Koulis said he then told them either he was under arrest or not, and detectives told him he was not under arrest, and he was allowed to leave. (X, 739)

Christ Koulis acknowledged that he had been the focus of a prior criminal investigation in Kentucky. Yes, despite his knowledge, Koulis stated that the felt he had no other choice but to speak with the detectives when they entered the room. He also agreed that common practice in the medical field is to allow a family member to spend a few moments with a deceased patient before the member is asked to leave

the room. According to Koulis, that protocol was followed in this case. (X, 740-42, 46-47). Koulis stated that he was allowed to make a call with the assistance of an officer's cell phone. But he maintained that he was not allowed to leave the room until the detectives told him he was not under arrest. (X, 744-750).

On cross-examination, Koulis admitted that he drove himself to and from the hospital. At no time was he ever in handcuffs. Koulis also agreed that he was allowed to speak with his sister. Koulis claimed that he was prevented from leaving the room at the hospital until after he spoke with the detectives. (X, 743-748). He was not arrested until several months later. (X, 750)

Cynthia Fannin is the property manager at Alara Cool Springs. She identified the lease agreement for the property. (V, 340-46, Ex. 15) Ms. Fannin testified that the lessees in this case were Steve Buchanan, Lesa Buchanan, Tonya Buchanan and Jessica Buchanan. According to Ms. Fannin, each of those parties had a legal right to be in the apartment and on the property. Christ Koulis was not listed on the lease. Ms. Fannin also indicated that payment for the apartment rent was made by Lesa Buchanan by check except for one cash payment. (V, 348, Ex. 16-17).

Regarding the search warrant for the defendant's apartment in Chicago, Det. Eric Anderson of the Franklin Police Department testified the he worked with an Assistant District Attorney in Cook County to prepare the warrant. In fact, the assistant in Chicago actually wrote the warrant. At that time, Det. Anderson had been investigating the case for 48 hours straight with little or no sleep. He stated

that he provided the Assistant District Attorney in Chicago with all of the information he had at that time. Attached to the search warrant were logs of all of the evidence taken from the Franklin apartment. (VIII, 621-26)

Part of his information was based on records obtained from Walgreen's regarding prescriptions ordered by Christ Koulis for members of Lesa Buchanan's family. None of the family members had asked Christ Koulis to prescribe medication for them. (VIII, 595-600). According to Det. Anderson, the statement in the Chicago search warrant that "he gives me drugs" was likely a statement gathered from other sources. Det. Anderson acknowledged that the list of pros and cons actually said "he brought drugs or he bought drugs." (VIII, 550–57, 579-585, Ex. 3).

In addition, Det. Anderson stated that Det. Pate's assertion that the defendant was a convicted felon was technically wrong, as he was granted post-trial diversion in Kentucky. However, at the time he obtained the search warrant, Det. Anderson relied on the information from the Kentucky detective. Later, Det. Anderson learned that Det. Pate was surprised to find out that it was a diversion sentence. (VIII, 573-74, 584).

Trial Testimony

On July 4, 2005, at 2:22 pm, a call came into 911 seeking help. (Ex. 1) Officer Mark Sanchez responded to the Alara Cool Springs Apartments in Franklin, Tennessee. When he entered the apartment, Officer Sanchez saw a woman lying on the floor. The woman was near the door with her feet facing the door. As EMS

assessed and treated the woman, the defendant, Christ Koulis, told the emergency personnel that Lesa Buchanan had taken Xanex, Ephedrine and Norco. As emergency workers tried to revive Lesa, Officer Sanchez noted a black shaving bag in the bathroom with a used syringe in the sink and an ampoule of clear liquid on the sink. The defendant said the syringes were used to inject Viagra and to bring down an erection. Officer Sanchez also saw three prescription bottles which accompanied Ms. Buchanan to the hospital. (XII, 903-10, Exs. 5, 11)

Officer Sanchez described the defendant as panicked. The defendant refused to allow the officers to lock up so that he could follow EMS to the hospital. Instead, the defendant insisted that he would lock up. At the hospital, Officer Sanchez heard the defendant tell the doctors that Lesa Buchanan was not feeling well the day before and that she complained of shoulder pain. He also told Sgt. Treanor with the Franklin Police Department that the victim collapsed in the kitchen. Yet, during a discussion with Officer Sanchez at the hospital, the defendant said Lesa Buchanan was in the bedroom watching "Pirates of the Caribbean" when she called to him saying she was not feeling well. When he went into the bedroom, he said her lips were turning blue. He slapped her to get a response. The defendant then claimed he pulled the victim into the living room to perform CPR because the air mattress provided a poor surface for compressions. (XII, 909-13) The defendant did not explain why he dragged the victim into the living room when there were other

surfaces closer to the bedroom. At no time did the defendant indicate that Lesa used IV drugs. (XII, 913)

Chris Fielder is an EMS supervisor with the Williamson County Medical Center. He responded to the July 4th call at Lesa Buchanan's apartment and found the victim wearing only a pair of jogging pants. Fielder recalled the defendant telling him that Lesa Buchanan had just returned from the pool when she collapsed on the floor. Koulis also stated that she had taken Xanax earlier in the day, but did not mention anything about IV drugs. Fielder felt like the defendant was not providing full information and was avoiding answering some of his questions. He was also puzzled by the defendant's decision not to ride in the ambulance and Koulis' reluctance to leave the apartment. (XII, 928-31). While he was at the apartment, Fielder noticed several one-cc syringes on the kitchen counter. One-cc syringes are used with small needles. The defendant said he used them to give the victim epinephrine. (XII, 944-45)

Paramedic Greg Johnson also responded to the 911 call. When he arrived, he found the victim lying on the floor with her feet facing toward the door. (XVI, 1450-53). Christ Koulis told Johnson that the victim had been feeling ill, had taken some Phenergan and Xanax, and later became unresponsive. Christ Koulis also told Johnson that he gave her an epi injection in case she was having a reaction to the medication. Johnson found that unusual because Lesa did not exhibit any signs of having an allergic reaction. At no time during his resuscitative efforts did he place an

IV in the femoral area. In an effort to revive Lesa, Johnson and his partner used Narcan, which can help if there is an overdose of narcotics. However, Johnson did not notice any overt signs that Lesa was an IV drug user. The defendant never told the paramedics that she was an IV user or that he suspected an overdose. (XVI, 1453-57).

While at the hospital, Sgt. Eric Treanor of the Franklin Police Department had a conversation with the defendant. The defendant told Sgt. Treanor that he and Lesa were trying to conceive a baby over the weekend. During their conversation, the defendant told Sgt. Treanor two different stories about what happened. He first said that Lesa collapsed in the living room. He then said she called to him from the bedroom. (XII, 956-57, 90-91).

Dr. Steven Ragle, Emergency Room (ER) Physician at the Williamson County Medical Center, treated Lesa Buchanan when she was brought to the ER by emergency responders. At first glance, Dr. Ragle was shocked that his patient was a young, healthy-appearing female. According to Dr. Ragle, most "code" patients are older with multiple medical problems.[2] Upon Ms. Buchanan's arrival at the ER, she was fully intubated by the paramedics, meaning that a breathing tube was placed in her mouth. She did not have a shirt on but was wearing black running pants. (XIII, 969-975, Ex. 2). As part of their protocol, emergency responders administered Narcan just in case the patient overdosed. (XIII, 993-94).

[2] A "code" is when someone is in cardiopulmonary arrest with no respiratory effort, no pluse and no signs of life. (XIII, 971).

The defendant accompanied Lesa Buchanan into the ER. Dr. Ragle described Christ Koulis as distraught and anxious. Koulis told Dr. Ragle that he left the room, came back, and found the victim unresponsive. Dr. Ragle explained that emergency room physicians welcome as much information as possible about a patient's health condition to assure proper treatment. However, in this case, the defendant merely stated that Lesa Buchanan had taken Xanax, Phenergan, and a narcotic during the weekend. He maintained that only minimal amounts of alcohol were consumed. Although Christ Koulis stated that Lesa Buchanan used to be an IV drug user, he told Dr. Ragle that she was clean at the time and that there was nothing in the house that could be used for IV use. (XIII, 976-978).

In addition, the defendant told Dr. Ragle that he and Lesa had a "sex marathon" over the weekend. Dr. Ragle found that statement unusual at the time. Further, the defendant insisted that a cardiologist be consulted, although that would not be routine or normal during the medical protocol being performed on Lesa. Despite his claim of past work in an ER, the defendant made demands for treatments and transport inconsistent with Lesa's medical conditions. (XIII, 979-83)

While attempting to find Lesa's femoral pulse, Dr. Ragle observed small wounds in the groin area. Because the site is not used by paramedics and because no one in the ER had attempted an IV in that area, Dr. Ragle found the marks unusual. Based on the dried blood around the marks, Dr. Ragle opined that the injections there were fairly recent. He explained that administering an IV in the femoral vein,

located in the groin area, allows medication to reach the central nervous system more quickly than by using a peripheral vein, such as a vein in the arms or legs. According to Dr. Ragle, an injection in the femoral vein can be painful because a larger needle is used to access deeper into the tissue. An injection to that vein carries the risk of infection, damage to the nerves or vessels, or puncture to the artery, or aneurism. (XIII, 983-990, 999, 1032; Ex. 3).

Dr. Ragle demonstrated that an injection into the femoral area would require an injection in an angular, upwards motion toward the head. A person unfamiliar with the anatomy or the procedure could cause nerve damage and/or introduce an infection into the area. Because of the nature of the central venous system, it is necessary to put pressure on the region after an injection. At the time of an injection in the femoral vein, a person would be lying flat. (XIII, 1000-10, 1032).

Dr. Ragle was surprised to see that the injections to the groin were well placed and "in an anatomic arrangement over the area of the femoral vein." (XIII, 990). Because of the unusual nature of the marks, and because they were not generated by any of the emergency providers, Dr. Ragle raised his concerns with the Franklin Police Department. Based on his experience, Dr. Ragle did not believe they were caused by self-injection but instead were "placed there by someone who knew the anatomy of the area." He based his opinion on the location on the body and their proximity to one another. (XIII, 990-992).

Dr. Ragle spent at least an hour trying to revive Lesa. During that time, he did not hear any indication of pulmonary edema. However, his efforts were unsuccessful, and he ended his resuscitative efforts against the wishes of Christ Koulis. (XIII, 994-96, 1014). After Dr. Ragle reviewed his notes and the medical records from Lesa's treatment, he noted that Christ Koulis said that no IV drug use was going on at the time of Lesa's collapse. In fact, the defendant stated to Dr. Ragle that "he didn't think she could have injected anything because there was nothing in the house to do it with." In addition, the defendant told Dr. Ragle that Lesa recently had a cardiac evaluation which came back negative. (XIII, 998, 1034; Ex. 4).

Dr. Ragle identified a photo of medications that were brought in with Lesa Buchanan. The medications included Alprazolam used to treat anxiety, Valtrex used to treat herpes, and hydrocodone with Tylenol for pain relief. Dr. Ragle did not know what happened to the medications once they were turned over to the hospital. (XIII, 1004-05, Ex. 5).

Franklin Det. Stephanie Cisco responded to the Williamson County Medical Center on July 4, 2005. While at the hospital, Det. Cisco photographed the prescription bottles that came in with EMS and Lesa Buchanan. Unfortunately, the hospital later destroyed the bottles before the Franklin Police Department arrived to retrieve them on July 25th. (XIII, 1046-51; XIV, 1262-63; XVII, 1583;Exs. 5-8). Williamson Medical Center Assistant Director of Pharmacy Steven Pruter explained that the medications were placed in a secure cabinet. Eleven days later, the cabinet

was full and all of the medications were destroyed as part of the hospital's standard operating procedure. (XVI, 1470-71) If the bin had not been full, the medications would not have been destroyed. (XVI, 1471).

While at the hospital, Det. Cisco also photographed the marks in the victim's femoral region. (XIII, 1051-53; Exs. 3, 4) When Det. Becky Johnson saw the marks, she immediately wondered about drug use. (XIV, 1281).

Det. Cisco accompanied Det. Johnson into the meditation room to speak with Christ Koulis about the circumstances leading up to Lesa's death. Both Dets. Cisco and Johnson stated that the defendant appeared anxious and nervous, but did not cry or shed any tears. (XIV, 1207, 1284, 1325-27). During their chat, Koulis told the detectives that Lesa was supposed to come to Chicago for the weekend but was not feeling well, so he came to Franklin. After being picked up at the airport, the pair got some pizza and watched movies. Because Lesa was not feeling well, she took a Xanax, the pair made love, and she went to sleep. According to the defendant, the next day he went to the store for steaks, Gatorade and jello. When he returned, he and Lesa engaged in "a marathon sex session". (XV, 1290) At some point that evening, the defendant said Lesa had an anxiety attack and chest pains. He thought she took something, but he did not know what it was. The next morning, the defendant claimed that Lesa had another headache and was sweaty. The defendant told Dets. Cisco and Johnson that after Lesa became ill, she went back to bed and

they again engaged in "a marathon sex session". (XIII, 1054-58; XIV, 1285; XV, 1289-91).

According to the defendant, the victim still did not feel well and was sitting up in bed. The next thing he knew, she slumped down and was having difficulty breathing. He slapped her on the face in an attempt to wake her up and then called 911. The defendant pulled Lesa off the bed in order to perform CPR. He also gave her an epi injection. (XIII, 1058-60). The defendant also told the detectives that he was not aware of any IV drug usage by Lesa that weekend, that he did not know what she was taking, and that he did not want to know what she was taking. (XIII, 1060) The defendant also stated that he and Lesa were newly engaged and trying to make a baby. However, no jewelry was observed on Lesa's hands. (XIII, 1060-61). In addition, because the detectives did not know what happened at the time, no effort was made to search the defendant or check his hands for traces of oxycodone. (XIV, 1254-57).

After speaking with the defendant, Dets. Cisco and Johnson went to the apartment as part of their effort to determine exactly what happened. Once inside, Det. Cisco saw a black bag on the kitchen countertop with a bottle of lidocaine and an epi ampoule nearby. (XIII, 1072-75, Ex. 11). Inside the black bag were unopened 30 ½-gauge and 22 ½-gauge needles and erectile dysfunction medication. (XIII, 1077-78; Exs. 15-19). Near the bag on the counter was a prescription bottle labeled with hydrocodone for Lesa Buchanan and prescribed by Dr. Dratler. (XIII, 1108; Ex.

91) Under Lesa Buchanan's purse, Det. Cisco found several unopened 18-gauge and 19-gauge needles. (XIII, 1113, Ex. 101).

In the master bedroom, Det. Cisco saw an air mattress, with sterile gauze pads nearby, sex toys, and a cell phone charger. (XIII, 1075; Exs. 13-14, 55-57). In addition, there was a blue duffle bag on the ground and an 8-millimeter video camera. (XIII, 1078-79; Exs. 20-22). In the duffle bag was a pair of blue jeans and an unopened 18-gauge needle, the same gauge needle as those used to inject Lesa Buchanan. (Exs. 27-28; XVII, 1609). Based on the clothing and identification inside, Det. Cisco determined that the bag belonged to the defendant. (XIII, 1080). In the master bathroom, Det. Cisco photographed needles and syringes in the sink and in a wicker basket. (XIII, 1079; Exs. 23-26) In the master bathroom closet, Det. Cisco observed a plastic trash bag with a prescription bottle, three syringes, needles and paper plates. One paper plate had cottage cheese on it and the second had a yogurt- like substance. (XIII, 1082; XXVI, 2935-40; Exs. 34-38, 41-42, 79, 82-86, 95-97, 102-03). In the prescription bottle was one-half of a pill that later tested positive as oxycodone. (XIV, 1124-28; Ex. 82) Also in the closet were numerous pharmaceutical samples, an IV drip bag, and a Federal Express box addressed to Lesa Buchanan from the defendant with more samples inside. (Exs. 39-40, 59-75). In the master bath trash can, Det. Cisco discovered another syringe and needle. (Exs. 43-44; Ex. 84).

Assorted prescription bottles for both the victim and defendant were found in the apartment, as well as a prescription for Valtrex in the name of the victim's daughter, Jessica Buchanan. The vial indicated that it was prescribed by Christ Koulis. (XIII, 1085-88; Exs. 45-54, 76).

After leaving the apartment on July 4th, Dets. Cisco and Johnson spoke with apartment management, who changed the lock to assure no one would enter the apartment. (XV, 1294). Subsequently, the detectives returned to the apartment after hearing from the Buchanan family. According to family members, the defendant claimed he had entered the apartment to retrieve some items. During the second walk through, the detectives observed some cell phones. One of them had a photo of Lesa Buchanan taken at approximately 12:30 p.m. on the day she died. Det. Cisco's attempts to email the photos to herself were unsuccessful. She deleted her email from the phone but did not delete any of the photos. (XIII, 1119-23; XV, 1295-1300).

Ultimately, the defendant's experts and Det. Cisco examined the cell phones. On the defendant's cell phones, there was a photo of Lesa Buchanan at 12:29 pm on July 4th. The photo shows a pale woman holding her breast. (XIII, 1128-31; XIV, 1143-44;) The photos from that time frame include Ms. Buchanan and the defendant engaged in sexual activity. Photos on the phone from July 3, 2005, show Ms. Buchanan wearing a red top and black stockings. (XIII, 1130; Exs. 186-202). Similar photos were saved to the phone on July 4, 2005, about the same time as the

photos of the defendant and victim engaged in sexual activity. (XIV, 1146-47; Exs. 199-200). Det. Cisco also looked at Lesa Buchanan's cell phone and found a face shot of Lesa Buchanan from July 3, 2005. In that photo, she appears to be normal and wearing makeup. (XIV, 1149-50).

When the detectives returned to the apartment with a search warrant, they gathered additional evidence in the master bedroom. Included was the defendant's gym bag which contained personal hygiene items, as well as an 18-gauge needle in a package. An 18-gauge needle is packaged in pink and has a pink tip. (XIV, 1158; Ex. 157). A tissue with dried blood was gathered, as well as an opened alcohol swab. (XIV, 1159-62; Exs. 158-59). Also during the search, the detectives discovered a prescription for Proctofoam in Jessica Buchanan's name and prescribed by the defendant. (XIV, 1165-66; Ex. 161). Also found were online prescription documentation. (Exs. 160, 163).

As part of the investigation, Det. Cisco and Det. Eric Anderson traveled to Chicago to search the defendant's apartment. Found in the apartment were numerous pharmaceutical samples, as well as syringes and sterile alcohol pads. (XIV, 1172-1201; Exs. 122-56). The miscellaneous sterile needles included various gauges, including two pink 18-gauge needles. (Ex. 177). Det. Cisco also identified a box of Narcan injectible ampoules found in the Chicago apartment. (XIV, 1189; Ex. 174). One of the athletic bags in the apartment also contained syringes, needles, medicines, alcohol pads, and a prescription pad for Physicians Care. (XIV, 1197-98; Ex.182).

There was also a note from a urologist in the defendant's apartment in Chicago allowing him to carry medication, syringes and needles for a medical condition. (XIV, 1248; Exs. 145, 185)

As noted above, during the search of the apartment, an 8-mm tape was discovered that documented a portion of the sex marathon engaged in that weekend by the defendant and victim. (XV, 1357-58; Ex. 106). Joshua Carder, a forensic video analyst with the Regional Organized Crime Information Center, captured some images from the videotape. His goal was to enhance the photos for better clarity on the pictures. (XVII, 1553-562; Exs. 212-13). In addition, Det. Anderson pulled still photos from the video. He did not alter the images, but merely pulled them as still pictures. One photo showed Ms. Buchanan in the red top with black stockings and a syringe lying on the floor. The second photo showed Ms. Buchanan in the same outfit but with a pill bottle on the floor and some rubbing alcohol. The third photo shows Ms. Buchanan's face with a syringe visible over her right shoulder. And the fourth photo shows Ms. Buchanan holding a piece of gauze on her groin with the defendant looking downward. (XVII, 1599-1602; Exs. 216-219) Det. Anderson also pointed out that the cell photos from July 3, 2005, pictured, Ms. Buchanan in the same red and black outfit. (XVII, 1601).

Dr. Ronnie Ghuneim practices internal medicine with Physician Care in Arlington Heights, Illinois. He was a colleague of Christ Koulis. Through his relationship with the defendant, he treated Lesa Buchanan. (XVI, 1370-72; Ex.204).

Dr. Ghuneim's first visit with Lesa was in April 2004. At that time, Lesa was stressed and anxious because of a recent death in the family. At that time, he treated her depression with Lexapro and Xanax, also known as Alprazolam. Dr. Ghuneim also noted that Lesa was not suicidal. He told the jury that he used a circle with a line through it to denote the word "no." (XVI, 1373-76; Ex.205).

Dr. Ghuneim's next personal contact with Lesa Buchanan was by phone in March 2005. At that time she indicated that she was having anal pain and was on antibiotics and Proctofoam. In response to the call, Dr. Ghuneim prescribed Narco, also known as hydrocodone. Lesa's chart suggested that a pharmacy called regarding the dosage of the prescription. Concerned about doctor shopping, Dr. Ghuneim called the pharmacy manager but found no indication of doctor shopping by Lesa. (XVI, 1378-81).

Lesa then saw Dr. Ghuneim in May 26, 2005, complaining of severe migraine headaches. Dr. Ghuneim again prescribed hydrocodone after noting that she had some left from a prescription filled on May 10, 2005. He prescribed a maximum of four per day. When Lesa Buchanan called again on June 11, 2005, he prescribed 60 tablets of Narco. (XVI, 1381-86). According to Lesa's medical records, she was never prescribed oxycodone by Dr. Ghuneim or his clinic. In fact, a written prescription is required for oxycodone. (XVI, 1386-88). At no time did Dr. Ghuneim see any signs that Lesa Buchanan was an addict or involved in drug-seeking

behavior. During his examinations of Lesa, he did not see any needle marks or track marks. (XVI, 1390-91).

Dr. Ghuneim described the relationship between the defendant and victim as "up and down, maybe dramatic." (XVI, 1388). He also opined that it is dangerous and close to impossible for anyone to self-inject in the femoral region without hurting themselves or the vein, nerve, and artery in the region. (XVI, 1392-93).

Dr. Ghuneim explained that physicians may take home some pharmaceutical samples. In addition, they may have some needles at home, but large amounts would be unusual. According to Dr. Ghuneim, needles are packaged with different colors to make them easier to identify. Dr. Ghuneim explained that the smaller the gauge number, the larger the hole in the needle. (XVI, 1397-1400). Further, Dr. Ghuneim stated that IV drip bags of sodium chloride usually are available just in a medical office. (XVI, 1398).

In reviewing records from Walgreen's, Dr. Ghuneim recognized many of the prescriptions he wrote for Lesa Buchanan. In addition, there were additional prescriptions with his name that he did not have in his records, as well as prescriptions written by Christ Koulis that were not noted in her medical records. (XVI, 1434-41; Ex. 208). At no time did Christ Koulis ever tell Dr. Ghuneim that Lesa was an addict or an IV user, although as a medical professional he would have found that information valuable. (XVI, 1441).

TBI Forensic Chemist Donna Flowers analyzed much of the evidence in this case. A prescription bottle for hydrocodone found on the kitchen counter in Lesa's name contained hydrocodone tablets, a Schedule III controlled substance. (XVI, 1497-99; Ex. 91, 210). Ms. Flowers also tested two of the syringes that were found in the trash bag stuffed in the bathroom closet. Those syringes contained oxycodone and acetaminophen. Oxycodone is a Schedule II controlled substance. (XVI, 1499-1500; Exs. 37-38, 79, 210). A syringe found in the master bath trash can also contained oxycodone, as did another syringe/needle found in the trash bag in the closet. (XVI, 1500, Exs. 44, 84, 99, 210). Ms. Flowers described the substance in each of those syringes as a wet powder. (XVI, 1501). Ms. Flowers also tested one-half of a tablet found in a bottle in the trash bag in the master bath and labeled as a prescription for hydrocodone in Lesa Buchanan's name. That tablet was identified as containing oxycodone and acetaminophen. (XVI, 1501-02; Ex. 82, 210) Of all of the medications/controlled substances tested by Ms. Flowers, only two were in containers that did not match the substance. (XVI, 1504, 210).

Despite efforts by Oaldey McKinney, latent fingerprint specialist for TBI, no identifiable prints were found on the sodium chloride bag, syringes, and plastic bags submitted for examination. (XVII, 1525-47; Ex. 211).

Medical Examiner Thomas Deering autopsied the body of Lesa Buchanan on July 5, 2005. During his external examination, Dr. Deering noted multiple puncture wounds in the femoral areas on both sides which he believed were fairly fresh, at

most, a day or two old and which had been made over a couple of different days. Dr. Deering stated it is not unusual to see puncture marks there because hospitals often use those sites. However, in this case, he was told that no emergency providers used that area to access the artery or veins. (XVIII, 1699-1700, 1707)

Initial observations made by Dr. Deering during the autopsy were severe pulmonary edema, a urine screen positive for multiple drugs, and granulomas in the lungs. When he sees substantial pulmonary edema, Dr. Deering stated it is usually a drug-related death. When he views severe pulmonary edema, Dr. Deering believes that there is some kind of narcotic, or mix of narcotics, alcohol, or muscle relaxants that slowed the respiratory function. According to Dr. Deering, although you can "rule in" pulmonary edema if froth comes out of a breathing tube, you cannot necessarily rule it out if there is no froth and a non-breathing patient. (XVIII, 1720-24).

Dr. Deering also explained that the granulomas can come from the filler material in capsules or pills that are crushed and injected. In viewing Ms. Buchanan's lungs, Dr. Deering observed some new granulomas, likely a day or two old (perhaps hours) as well as some older ones, but he was unable to date them. He suggested it could be anywhere from six weeks to sixteen years old. (XVIII, 1703-09).

When a person abuses drugs by crumbling or melting a pill for injection, the person receives a much bigger dose than if taken by mouth. In addition, the person introduces foreign body granulomas into their body. Although the granulomas might

lead to pulmonary hypertension, Dr. Deering did not find significant evidence in this case to support that diagnosis. (XVIII, 1740-46).

The toxicology of the blood in this case included a finding of oxycodone-free at a level of 428 nanograms per milliliter, as well as acetaminophen and aspirin. In assessing this number, Dr. Deering explained that, with someone like Lesa who may have had a tolerance to opiates, the level falls within the gray area for an overdose. He described oxycodone as an opiate that functions as a pain-killer, sedative, and espiratory depressant. (XVIII, 1750-54). The urine toxicology also showed oxycodone, as well as Alprazolam and hydrocodone. (XVIII, 1755-).

In reviewing his findings during the autopsy, Dr. Deering concluded that the cause of death was an "acute combined multiple drug overdose." Specifically, Dr. Deering noted that the toxicology results showed the presence of oxycodone, hydrocodone, and alprazolam (XVIII, 1725-28; 1757; Exs. 222, 223). In discussing his "mechanism of death," Dr. Deering explained that with no heartbeat present, the fluid introduced by the IVs would not lead to pulmonary edema. (XVIII, 1728-38; Exs. 225-26). Instead, he believed the pulmonary edema was the result of Lesa Buchanan undergoing a prolonged respiratory depression. However, after reviewing photos from the cell phone, Dr. Deering did not revise his cause of death but changed his mind about the mechanism of death. (XVIII, 1762-; Exs. 186-87). He ruled out death from a mitral valve prolapse because of the severe pulmonary edema. He also ruled out pulmonary hypertension. Rather, Dr. Deering concluded that the filler

material combined with the depressive characteristics of the oxycodone were the mechanisms of death. (XVIII, 1768-80).

Dr. Deering told the jury that he has autopsied drug addicts over the course of his career. During the past eleven years, Lesa Buchanan's body was the first where he has seen the femoral region as an injection site for the drugs. In fact, he did not notice any scarring or track marks on other areas of Ms. Buchanan's body. (XVIII, 1781-83). Dr. Deering concluded by saying that if Lesa Buchanan had not injected. or been injected with the oxycodone mixture, she would not have died. (XVIII, 1783,1866).

Another view of Lesa Buchanan's death was offered by defense forensic pathologist Dr. Michael Graham who was paid roughly five to ten thousand dollars. Dr. Graham concurred with Dr. Deering that Lesa Buchanan's lungs showed signs of granulomas caused by filler in her lungs. (XIX, 1957-65; XIX, 1977-78). However, he disagreed with his conclusion about the cause of death. According to Dr. Graham, Lesa Buchanan should have had a significant tolerance to opiates based on her long-term use of drugs, although he was unable to define just how long she may have used them. Therefore, the levels in her blood and urine were not high enough to cause her death. (XIX, 1967-70, 1978). However, Dr. Graham had no opinion as to whether any of the IV fluids would have diluted the level of oxycodone in her blood. (XIX, 1995-96). Instead, Dr. Graham opined that oxycodone did not play a part in Lesa's death, but rather was caused by the final injection of a crushed pill and the

accompanying acute changes caused by the filler. (XIX, 1973). Dr. Graham also testified that he occasionally sees drug users inject in the groin area. He also claimed that the pulmonary edema present in Lesa Buchanan's lungs was caused by the ingestion of fluids combined with the CPR. (XIX, 1976).

Dr. Graham agreed with the State that there is no way to tell who injected the drugs into Lesa Buchanan. According to Dr. Graham, track marks are caused by an addict failing to use a sterile technique and more commonly by the injection of pills. In this case, he acknowledged that he did not see any track marks on Lesa Buchanan and those in the groin area were recent injection sites. (XIX, 1979-80).

Dr. Graham acknowledged that physicians know that it is inappropriate to crush a pill for injection. He also stated that a physician would know to provide an emergency treatment provider with all relevant information, including IV drug use. Based on his findings, Dr. Graham believed that some IV drug use occurred right before the fatal incident and should have been reported to the emergency responders. He also agreed that the final injection pushed Lesa over the edge. (XIX, 1985-90). Finally, according to Dr. Graham, the defendant told him that he saw IV drug use involving Lesa Buchanan on the weekend she died. (XIX, 2003-05).

Defense toxicologist Bruce Goldberger reviewed the medical notes and information in this case. Although the concentration of oxycodone could have caused a person's death, Dr. Goldberger opined that an opiate user would develop a tolerance for the drug. Accordingly, the level might not be lethal in an addict. Dr.

Goldberger also disagreed with the cause of death set forth by Dr. Deering. He claimed that the drugs in Lesa Buchanan's urine would have no impact on her cause of death. (XIX, 2017-18) However, he agreed with Dr. Deering's "mechanism of death" from a combination of the filler and the oxycodone. In fact, Dr. Goldberger stated that the cause of death from a toxicology standpoint would be oxycodone intoxication. (XIX, 2019-21, 2028).

Dr. Bruce Levy, Chief Medical Examiner for the State of Tennessee, reviewed all of the medical testimony, as well as the autopsy of Lesa Buchanan, and concluded that the oxycodone was a significant contributor to Lesa's death. (XXVI, 2861-75). Prior to coming to Tennessee, he spent time working as a medical examiner in New York City. During his tenure, he never saw documented IV drug abuse in the femoral region. He also did not see any track marks on Lesa's body, although you would expect them to be visible if a person were a chronic abuser of drugs. (XXVI, 2876-77).

Federal Drug Enforcement Agent Juan Morales investigates the abuse and diversion of controlled substances in the Chicago area. He explained that oxycodone mixed with acetaminophen is generally called OxyContin. Percocet is also a brand name for oxycodone. Because of the high potential for abuse, the DEA classifies oxycodone as a Schedule II drug and monitors it very closely. Because of that scrutiny, it is very difficult for someone to purchase oxycodone online. (XVIII, 1879-82).

Even for pharmacists, a patient is required to provide a detailed prescription including the name, ID number, and signature of the requesting doctor. Based on Agent Morales' experience, some independent pharmacies may not be as vigilant about policing oxycodone prescriptions. (XVIII,1883-84, 1895-96).

TBI computer forensic analyst Howard Patterson examined the computers found in Lesa Buchanan's apartment. He reviewed some emails between the defendant and Lesa Buchanan. An email dated November 30, 2004 from Lesa to the defendant suggests that the relationship ended. (XX, 2070-77; Ex. 236). In response, the defendant discusses his payment of bills and deposit of money into Lesa's account. (XX, 2078-79; Ex. 237) Further, an email from the defendant to Lesa dated December 15, 2004, includes a statement that "[y]our medicines are at Walgreen's and can be transferred to Nashville." (XX, 2080-81; Ex. 238).

During his review of the internet history on the computer belonging to Christ Koulis, Patterson found a search for sites on alcoholism, drug abuse guidelines, times for detecting alcohol in urine, and hair and follicle testing conducted on July 14, 2005. (XX, 2088-90). On Lesa's computer, Patterson found Google searches in May 2005 for the drug hydrocodone, as well as Xanax. (XX, 2094; Ex. 239). Patterson acknowledged that he could not identify who actually used the computer, but relied on the sign-in name. (XX, 2097)

Rebecca Melton, senior pharmacy technician at Walgreen's, explained that Walgreens does not routinely dispense syringes and needles. She explained that her

pharmacy does not carry ten-milliliter syringes or eighteen-gauge needles because they are not commonly used. In fact, the pharmacy would need to order them from a wholesaler. (XXI, 2243; Ex. 101).

In May 2002, Det. Bobby Pate in Boone County, Kentucky, investigated a domestic violence call involving the victim and defendant. As part of his investigation, he interviewed Lesa Buchanan. At that time, she told him that Christ Koulis injected her with Morphine, Demoral, and Ketamine. According to Lesa, the defendant injected her to keep her "nice and naked." (XXI, 2249-50). Lesa also told Det. Pate that the defendant threatened to tell authorities she was a drug addict and would lose custody of her daughter if she left him. (XXI, 2250). During his interview with Lesa, Det. Pate observed numerous injection sites, including sites on her hands and feet, as well as her groin area. Lesa told Det. Pate that Christ Koulis taught her how to inject, but that he was responsible for most of the injections. (XXI, 2251). She also told Det. Pate that on the night before her hospitalization, she was not feeling well and the defendant gave her an injection. In addition, he gave her prescriptions to be filled and left for Tennessee. She was left in the house alone. (XXI, 2252). Det. Pate read a letter from the defendant to Lesa in which he attests that he provided all of the supplies for the IV drug injections and that he administered those injections. (XXI, 2254-57; Ex. 240). Later, as Det. Pate's investigation continued, he was given an affidavit sworn to by Lesa Buchanan stating that she did not want to hold him responsible for anything. (XXI, 2259; Ex. 244).

Lesa's family discussed her relationship with the defendant. Her mother, Peggy Roberts, identified a photo of Lesa within the week before she died. (XXI, 2274; Ex. 250). She described the five-year relationship between the defendant and her daughter as up and down. However, prior to her death, the relationship seemed to escalate toward bad times with constant phone calls and arguments. (XXI, 2276). Ms. Roberts recalled a time in May of 2002 when a friend of Lesa's called and asked her to go with him to Lesa's home. In the basement of the home, there was a mattress on the floor, blood stains, syringes and bottles. Peggy Roberts and the friend took Lesa to the local emergency room for treatment. At the time, Christ Koulis was not at the home. (XXI, 2277-79). According to Peggy Roberts, the defendant threatened Lesa with the loss of her daughter if she cooperated with the Boone County Sheriff in its investigation. (XXI, 2281).

During the course of their relationship, the defendant often called Ms. Buchanan. If no one answered the house phone, the defendant would call everyone's cell phones. (XXI,2284-85) During the week immediately preceding her death, Ms. Buchanan was helping her mother move to a new home. At that time, she was alert and assisted in painting intricate details at the new home. At no time, did Ms. Roberts see her daughter inject drugs nor did she see any needle marks. In fact, only when the defendant arrived did Lesa take a break and leave her family. Further, during her visits to Lesa's Franklin apartment, Peggy Roberts never say any signs of drug use or needles. (XXI, 2285-96).

Finally, Peggy Roberts testified that Lesa and her family put a great deal of faith in the defendant's medical knowledge. She believed he was the best doctor and often referred family members to him for medical treatment. (XXI, 2331; XXII, 2347). By stipulation, the State and defendant agreed that Lesa's Cottonwood de Tuscan records show that Lesa stated her IV drug use was limited to a six-week period between mid-March through the end of April 2002. Prior to these incidents, her only drug use was occasional use of Xanax prescribed by Christ Koulis. (XXII, 2338-29).

Lesa' sister, Tara Bentley, described her sister as very creative. She originally came to the Nashville area because of the music and songwriting community. She recounted two incidents she witnessed between her sister and the defendant. During a family trip to Pennsylvania in 2001, the defendant became very agitated because her sister was unavailable by phone. In the fall of 2001, Lesa was moving back to Kentucky and called her family for assistance. As Tara and her mom tried to comfort her anxious sister, the defendant came in and asked for some private time with her. When the pair emerged, Lesa had a glazed look in her eyes and was subdued. Tara also recounted the events of the week prior to Lesa's death. The family was helping her mom move and Lesa was an integral part of the activities. At one point, as everyone was eating and joking, the defendant walked across the circle of family members, pointed at Lesa's forehead, and said we need to fix those lines. As Tara stated, his behavior took "all of the laughter right out of her face." (XXII, 2340-52).

Tara testified that she never saw any needles or syringes around her sister or in Lesa's purse. When the defendant called the family on the night of the 4th, he told them they spent the weekend trying to make a baby, that she went into the bathroom, came out and collapsed. The next day, he told the family that they argued all weekend and that Lesa was using drugs and had track marks all over her body. At no time prior to that conversation had the defendant ever told Tara that her sister was using drugs. If she had that knowledge, Tara would have intervened and not allowed her sister to return to Franklin. (XXII, 2352-54, 2369).

Steve Buchanan, Lesa's ex-husband is the father of Lesa's daughter, Jessica Buchanan. Following their divorce, he continued to provide support for Lesa. When she moved back to Franklin in 2004, Steve and his current wife Tonya were named on the lease. Steve explained that the defendant appeared to be jealous of his continuing friendship with Lesa. During a family trip to Las Vegas in April 2005, the defendant showed up unannounced. (XXII, 2371-78). Steve also stated that he never observed any needles or syringes in the apartment in Franklin nor was trash stored in the bathroom closet. He did not see anything that would suggest Lesa was involved in drug use over the year or two leading to her death. (XXII, 2379-95).

Tonya Buchanan is Steve's wife and Lesa's best friend. She spent a great amount of time with Lesa in the Franklin apartment. She also observed the relationship with Lesa and Christ Koulis. She described that relationship as very volatile. According to Tonya, the defendant often tried to isolate Lesa from her

family and friends. (XXII, 2409-11). Tonya recalled the Las Vegas trip. According to Tonya, Lesa felt fine before the defendant's arrival. However, the next morning, she did not look well and said she was too sick to take part in the day's activities. Tonya explained that Lesa often became sick when the defendant was present. (XXII, 2411-12).

Tonya never saw any evidence of IV drug use by Lesa. In fact, she and Lesa would often get spray tans during Spring 2005. During that process, Tonya saw Lesa nude and never noticed any kind of track mark. Tonya and Lesa disliked needles and often held each other's hands during botox treatments given by the defendant. (XXII, 1412-2416, 2426-27).

As a resident of the apartment on many occasions, Tonya stated that trash was emptied regularly. Neither she nor Lesa put trash bags in the closet. (XXII, 2416-18)

Lesa's daughter, Jessica Buchanan, agreed that no one ever put trash bags in the closet. (XXII, 2464-67). She described living with her mom as like living in a dorm. She and her friends often hung out in her mom's bathroom to do makeovers and to learn how to use makeup. (XXII, 2464). She laughed that her mom said she could not even "pee" in peace. (XXII, 2464-65). At no time did she see needles or syringes in the apartment, nor did she ever see her mom use any kind of IV drugs. (XXII, 2465-71). According to Jessica, whenever Christ Koulis came for a visit, her mom would be weak or tired, "not her normal self." (XXII, 2465). Jessica also testified

that her mom felt she could manipulate Christ Koulis because her mother knew that the defendant stole medicine. (XXII, 2479).

Dr. Fernando Soler who worked with Christ Koulis at Physicians Care testified that sometimes physicians take home needles and medicine. Specifically, the medicine may be used at home for a loved one. (XXIII, 2490-2503).

Christ Koulis testified in his own behalf. His relationship with Lesa began in March 2000. At the time they met, he was a plastic surgeon. Although he had a good practice at the time, the defendant stated that the events of "9-11" affected him financially. The defendant also admitted that he was being sued in February 2001 by two former patients. In March 2002, the defendant was having trouble sleeping and started using Demoral. According to the defendant, he injected the drug until May 2002. During that span, the defendant injected Lesa Buchanan. The defendant claimed that he first injected Lesa and then she began injecting herself. The defendant testified that Lesa did not have good veins, so he explained to her how to inject in the groin area. However, on cross-examination, the defendant stated that she learned how to inject IV drugs by observing him, although he did not inject himself in the femoral region. The Demoral came from his office, as did the needles and syringes. (XXIII, 2510-22; XXIV, 2702-13).

Christ Koulis ended up surrendering his Tennessee medical license in April 2002. About that time, his parents arranged for him to go to a rehab facility in Arizona. However, on the day he was scheduled to leave, he decided to try to wean

Lesa off the Demoral by giving her several prescriptions. Christ Koulis claimed that he tried to call Lesa's family so they would know that she was in need of help. But he also said that when he left Lesa, she was walking around. (XXIII, 2525-34). The defendant denied that he left needles and vials and pill bottles all over the place as documented by the victim's mother. Koulis maintained that he wrote the letter to Lesa because she was afraid she would lose custody of her daughter. (XXIII, 2252-53; XXIV, 2725-27). As a result of his conduct in Kentucky, the defendant was charged with several counts in Kentucky, including trafficking of a controlled substance, unlawful prescribing of a controlled substance, and unlawful dispensing of a legend drug. He was eventually placed on pretrial diversion. During cross-examination, the defendant admitted that he did not have legal authority to write prescriptions for Lesa at that time. (XXIII, 2562-64; XXIV, 2730-33; Ex. 243).

The defendant testified that he urged Lesa to seek treatment at Cottonwood, but she rejected his efforts. Finally, he paid for her to stay 29 days, but she left the program early. (XXIII, 2258, 2591-92). The defendant claims that he went to Chicago and took part in a rehab program for physicians requiring random drug screens and meetings. As a result, he received his probationary license to practice medicine in Illinois. (XXIII, 2559-60).

According to the defendant, Lesa called him in the fall of 2002 and asked to reconcile. She moved with her daughter, Jessica back to the Nashville area in the winter. (XXIII, 2571-72). As the defendant started to get settled in Chicago, he

asked Lesa to move in with him. He claimed she moved to Chicago with Jessica in March 2004. But, the defendant testified, Jessica did not like Chicago. In August 2004, Jessica was visiting with her dad in Kentucky. When the defendant came home, he says Lesa was on top of the bed with a towel and blood spattered on the back wall. The defendant claimed that at that time, the bed did not have a headboard, but Jessica Buchanan disagreed. The defendant insisted that Lesa was injecting crushed pills using needles and syringes that he had in the apartment. (XXIII, 2572; XXVI, 2943; Ex. 274). The defendant testified that Lesa told him that the syringe came apart because she had not put the needle in correctly and that she was trying again when he came in. The defendant says he kicked her out. (XXIII, 2577-78; XXIV, 2748-52).

The defendant admitted that his relationship with Lesa had its ups and downs. He identified a series of emails between the two of them prior to her death. (XXIII, 2599-2506; Exs. 265-66). He agreed that he often made numerous phone calls to find Lesa if she did not answer her cell phone. (XXIV, 276-65). He acknowledged that he never told Dr. Ghuneim that he was concerned about Lesa's use of hydrocodone, although it would be important to a medical provider. (XXIV, 2755-56). In the week leading up to Lesa's death, Christ Koulis claimed the family did not celebrate Lesa's 35th birthday. According to Lesa, she felt slighted, so he had to drive to Kentucky to help Lesa celebrate the day. While there, the defendant says he noticed track marks in Lesa's groin area, so he told Tara Bentley about it. The

defendant testified that the family ignored his warnings and did nothing about it. He never called Lesa's doctor to alert him to his concern. (XXIII, 2611-16; XXIV, 2773-75).

On the July 4th weekend, the defendant testified that Lesa was supposed to come to Chicago. However, because she was not feeling well, he came to Franklin instead. The defendant brought small 30-gauge needles with him because he has erectile dysfunction. If an erection lasts too long, he can inject himself to bring the erection down. (XXIII, 2620-26).

The defendant said it was Lesa's idea to create the videotape of their sexual relationship. The defendant claimed that on Saturday evening, after eating pizza, Lesa disappeared into the bathroom. When he walked in, she was preparing to inject herself by leaning back on the toilet seat. At that time, he said he told her she would kill herself. Although he claims he was upset, he remained at the home, made love, and spent the night. (XXIII, 2626-37; XXIV, 2638, 2778-80).

The defendant claims the next time Lesa injected herself was right before they had sex on Sunday morning. He said he went into the bedroom and saw her holding pressure on her right groin. He admitted telling her to keep pressure on it. According to the defendant, at that point, "what was he supposed to do?" However, during cross-examination, the defendant stated that he saw Lesa inject for the second time in the bedroom and told her to keep pressure on it. Despite the appearance of the victim in the video, the defendant says she was not frightened. Although he says

she was impaired, he still had sex with the victim. (XXIV, 2639-41, 2783-85; XXV, 2786-89).

The defendant said Lesa again injected herself later that day when she was dressed in her black and red outfit. He says he "had to walk out of the room", but came back in to make love. However, he did not "throw away her syringes" until after they had sex. (XXIV, 2642-44; XXV, 2790-02).

The defendant claimed he then searched the bathroom and found the trash bag in the closet with the needles and syringes. He stated that he took the unused syringes and needles and threw them out. (XXIV, 2245-52). Despite his concern about Lesa using drugs, the defendant maintained they were trying to make a baby during the weekend. (XXIV, 2781-84).

On Monday, July 4th, the defendant maintains that he and Lesa engaged in sexual contact again. He says he was watching tv and eating yogurt while she was in the bathroom. Shortly after, she called him to say she was not feeling well. When he did not immediately respond, she called him again. At that time, she was sitting on an air mattress and he realized she was not breathing. He called 911 and dragged her to the front area so he could perform CPR. (XXIV, 2253-57). The defendant admitted that he told Dr. Ragle that the victim had not used any IV drugs on the 4th, which was untruthful. (XXIV, 2669-70; XXV, 2819). Although the defendant gave emergency responders three prescription bottles from the apartment, he did not give

them the hydrocodone bottle in the trash bag with the syringes. He claimed he knew it was hydrocodone because he looked at it earlier. (XXV, 2814).

During his testimony, the defendant agreed that the cell phone photos were accurate with the proper date and time stamps. (XXV, 2800-03). He claimed he took only one photo about 1:30 pm of Lesa wearing an expensive gold top and high heels. After that, she went to the bathroom, headed back to the bedroom and collapsed. When she collapsed, she was wearing the black pants, although the defendant claimed that she was not going to wear those to go out. (XXV, 2803-07).

ARGUMENT

I. CHRIST KOULIS' CONVICTION FOR CRIMINALLY NEGLIGENT HOMICIDE IS SUPPORTED BY THE EVIDENCE. HIS CONDUCT WAS THE PROXIMATE CAUSE OF LESA BUCHANAN'S DEATH. ACCORDINGLY, THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION.

Criminally negligent conduct which results in death supports a conviction for criminally negligent homicide. In this case, Lesa Buchanan died on July 4, 2005, after spending two days with the defendant, Christ Koulis. During that weekend, Lesa received at least four injections in the femoral region of an oxycodone mixture. The medical evidence supports a finding that the injections caused her death. An unopened needle identical to those used for the injections was found in the defendant's bag. In addition, the puncture marks were "in near perfect alignment." In the light most favorable to the State, the evidence supports the jury's verdict that the defendant's negligent conduct resulted in Lesa Buchanan's death.

When a convicted criminal defendant challenges the sufficiency of the evidence on appeal, the standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). In conducting this review, the appellate court does not re-weigh or re-evaluate the evidence. *State v. Cabbage*, 571 S .W.2d 832, 835 (Tenn. 1978). Nor may the court substitute its inferences for those drawn by

the trier of fact. *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). The court is required to afford the prosecution the strongest legitimate view of the evidence contained in the record, as well as all reasonable and legitimate inferences which may be drawn from the evidence. *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003). A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the accused has the burden of demonstrating that the evidence is insufficient because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982); *Grace*, 493 S.W.2d at 476.

"Criminally negligent conduct that results in death constitutes criminally negligent homicide." Tenn. Code Ann. §39-13-212(a). To establish criminally negligent homicide, the State must "prove three essential elements beyond a reasonable doubt: (1) 'criminally negligent conduct' on the part of the accused; (2) that proximately causes ('which results in'); (3) a person's 'death.'" *State v. Farner*, 66 S.W.3d 188, 199 (Tenn. 2001). Criminal negligence refers to:

> a person who acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care

> that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. §39-11-106(a)(4). "Furthermore, 'the accused must know, or should know, that his or her conduct, or the result of that conduct, will imperil the life of another given the circumstances that exist when the conduct takes place.'" *State v. Goodwin,* 143 S.W. 3d 771, 779 (Tenn. 2004) (*citing State v. Adams,* 916 S.W.2d 471, 474 (Tenn. Crim. App. 1995)). Proximate cause "is generally established in Tennessee by showing that the victim's death was the natural and probable result of the defendant's unlawful conduct." *Farner,* 66 S.W.3d at 203.

The first of these elements requires proof that the defendant engaged in criminally negligent conduct. The defendant maintains he did nothing wrong and did not owe any duty of care to Lesa Buchanan. Although he stated that he knew the conduct was dangerous, he takes no responsibility and points his finger at the victim. (XXII, 2572-78; XXIII, 2626-37). The State maintains that the record is replete with evidence of criminally negligent conduct by the defendant as defined by statute.

Although the defendant claims that Lesa alone was responsible for the injections, the physical evidence belies his claim. One of the strongest pieces of evidence to support his role in her death is the presence of an eighteen (18)-gauge BD brand pink- tipped needle in his overnight bag. (XIII, 1078-80; XIV, 1158; Exs. 27-28, 157). Needles of the same gauge were attached to syringes discovered in a trash

bag in the closet and in the bathroom.[3] (XIII, 1082, Exs. 34-38, 41-42, 99, 102-03). Those needles and syringes tested positive for an oxycodone mixture. (XVI, 1499-1502; Exs. 37-38, 79, 210, 44, 84, 210). Also in the bag were two paper plates with cottage cheese and yogurt residue, as well as a 22-gauge needle wrapper of the same brand and size found in the defendant's black bag. (Exs. 18-19, 37-38). The defendant told emergency responders that he was eating yogurt at the time of Lesa's collapse. (XII, 912). None of Lesa's family members, including her daughter who lived with her, ever saw needles or syringes in her bathroom or the Franklin apartment. (XXII, 2409-12, 2464-71). As her daughter Jessica Buchanan testified, Lesa Buchanan never put trash in the closet. (XXII, 2464-67). Based on these facts alone, a jury could reasonably conclude that the defendant injected Lesa Buchanan and then hid the trash bag containing the needles/syringes to cover up the cause of Lesa's death.

Similarly, photos from his apartment in Chicago show the same size (18-gauge) and brand (BD) of needles. (Exs. 150-53). Dr. Soler, a colleague of the defendant's in his Illinois practice, testified that it was common practice for physicians to take home needles. Significantly, a Walgreen's pharmacy tech explained that needles and syringes of the size used for these injections are not commonly sold at the pharmacy and are available only by special order. (XXI, 2243;

[3] Defendant fails to address this evidence and erroneously stated at the hearing on the motion for new trial that there was "nobody who testified in the world that that's true." (XXIX, 3238). As noted, not only did the State show the jury the needle in the overnight bag and match it to the pink-tipped oxycodone needles during closing argument, the photos clearly place the needle in the defendant's overnight bag. (XXVIII, 3069).

Ex. 101). Alcohol pads of the same type found in the defendant's black shaving kit and bag were also discovered in the bedroom and shown in the video made by the defendant and victim. (XIII, 1072-75; Exs. 56, 119; 203). Based on this evidence alone, the jury could reasonably believe that the defendant brought the needles and syringes with him to the apartment and injected the victim.

However, additional evidence supports the jury's finding that the defendant engaged in criminally negligent conduct. The defendant failed to tell emergency responders about the IV drug use when they responded to the apartment and at the hospital.[4] (XII, 913, 928-31; XIII, 976-78, 1060-61; XVI, 1453-57). He was reluctant to leave the apartment. (XII, 928-31). He is also seen on the video telling the victim to "keep pressure" on one of the injection sites. (Ex. 203). As to the injections, Dr. Ragle, Dr. Ghuneim, Dr. Deering, and Dr. Levy testified that it was highly unlikely and close to impossible that someone could inject themselves in the femoral region. (XIII, 990-92, XVI,1392-93; XVIII, 1781-83; XXVI, 2876-77; Ex. 3). In fact, Dr. Ragle detailed the near perfect alignment of the injection sites and opined that they were placed there by someone who knew the anatomy of the area. (XIII, 990-92; Ex. 3) Despite the defendant's suggestion that Lesa was a chronic IV injector, Dr. Michael Graham testified that there was no evidence of the "classic track marks" on Lesa, even in the groin area. In fact, all he observed were the recent

[4] The defendant's insistence that a cardiologist be consulted and his claim that he told Dr. Ragle about the sexual activities so that he would know she ws exerting herself could reasonably be construed by the jury as nothing more than a smokescreen to suggest that Lesa died from a heart condition, as opposed to the oxycodone injections. (XXV, 2818-20).

injection marks. (XIX, 1979-81). Christ Koulis is a medical doctor by training and testified that he used the femoral region on Lesa to draw blood during surgical procedures. (XXIII, 2510; XXIV, 2702-13). His claim that she was leaning back on the toilet seat and injecting herself is contrary to Dr. Ragle's testimony that a person would be lying flat during an injection in that area. (XIII, 1000-10, 1032). During the video, the defendant is heard telling a frightened and disoriented victim to keep pressure on the area. (Ex. 203)

Based on these additional facts, a jury could reasonably conclude that the defendant was responsible for the injections, and once she collapsed, acted to hide evidence of those injections because of his involvement. Her body was found near the door when paramedics arrived. (XVI, 1450-53). Trash was stuffed in the bathroom closet. He appeared nervous and was reluctant to leave the apartment. As noted, the defendant absolutely knew of the danger involved based on his own testimony. (XXIII, 2577-78; XXIV, 2748-52) In view of all of the evidence presented, the jury properly concluded that the defendant's actions led to Lesa's death.

As to the second and third elements requiring that the defendant's conduct be the proximate cause of the victim's death, the medical testimony supports the jury's finding. According to Assistant Medical Examiner Dr. Thomas Deering, Lesa Buchanan died from an "acute combined multiple drug overdose." (XVIII, 1725-28, 1757, Exs. 222, 223). As Dr. Deering noted, "but for" the oxycodone injection(s),

she would not have died. (XVIII, 1783, 1866). Similarly, toxicologist Dr. Bruce Goldberger agreed that Lesa likely died from a combination of oxycodone and filler from the crushed pill. (XIX, 2019-21; 2028). Likewise, Medical Examiner Dr. Bruce Levy concluded that the oxycodone was a significant contributor in Lesa's death. (XXVI, 2861-75). Even the defendant's expert, Dr. Michael Graham, opined that the final injection pushed Lesa over the edge. (XIX, 2003-05).

The defendant suggests that Lesa was responsible for procuring the oxycodone because it was found in a hydrocodone prescription bottle in her name in the master bath trash bag. (Exs. 37-38; 8 2) However, ironically, the defendant repeatedly brought to the jury's attention that he, through his attorneys, had to ask for the State to test the substance inside that bottle in order to find the oxycodone. (XIV, 1225-29; XV, 1312-15; XVII, 1635-37). The defendant also testified that he knew the hydrocodone bottle was in the trash bag but did not take it to the hospital. (XXV, 2814). Based on this line of questioning and the presence of the pill in the same trash bag as the plate with yogurt and the 22-gauge needle wrapper, as well as the defendant's failure to take that medication to the hospital, the jury could reasonably conclude the defendant placed the pill there in an effort to hide it. Similarly, testimony from Dr. Ghuneim highlighted the defendant's access to provider names and numbers for prescriptions as there were prescriptions in the victim's name prescribed by the defendant. (XVI, 1434-41; Ex. 208). A prescription pad was discovered in the defendant's belongings. (Ex. 173). As Federal Drug Enforcement

Agency Juan Morales testified, the purchase of oxycodone on line is extremely difficult. Instead, pharmacists must have a detailed prescription; although Mr. Morales noted, smaller independent pharmacies may not be as vigilant. One of the emails entered into evidence from the defendant to the victim states that her medications are at Walgreen's. (Exs. 235-38). Hearing this testimony, a jury could reasonably conclude the defendant had greater access to the oxycodone.

Defendant also claims that the State failed to prove a "web of guilt" in this case. A criminal case may be established exclusively by circumstantial evidence. However, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford,* 470 S.W.2d 610, 612 (Tenn. 1971). As stated in *Crawford,* a "web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Id.* At 613. Here, the web exists and is very strong. The medical testimony, the anatomical placement of the injections marks, the defendant's statements to the victim "to put pressure on it," the defendant's failure to tell anyone trying to save Lesa's life about the injections, the presence of the same gauge needle in his overnight bag, the use of the same alcohol pads, his knowledge of the location of the oxycodone tablet and his failure to send it to the hospital with Lesa, and the defendant's prescribing medication to Lesa in the past are all strands in this web. Clearly, the evidence supports the conviction.

II. THE SEARCH OF THE VICTIM'S FRANKLIN APARTMENT WAS PROPER. THE LESSEES CONSENTED TO THE SEARCH. IN ADDITION, ANY VIOLATION WAS CURED BY THE PROCUREMENT AND EXECUTION OF A VALID SEARCH WARRANT.

Following Lesa Buchanan's death on July 4, 2005, Dets. Johnson and Cisco with the Franklin Police Department entered her apartment with the assistance of the apartment complex management and security officer. (III, 152). After leaving the apartment, the detectives made sure that the apartment management changed the locks. (XV, 1294).

As part of their investigation, the detectives reviewed a videotape found in an 8-mm camcorder on July 5th. They then spoke with Tonya Buchanan, one of the named lessees, who gave them permission to enter and search the apartment on July 6, 2005. (IV, 257-58) She ultimately signed a "consent to search" form. (Motion to Suppress, Ex.4) Subsequently, the Franklin Police Department executed a search warrant at the apartment on July 13, 2005.

After hearing evidence, the trial court held that the warrantless entry to the apartment on July 4th was invalid, the viewing of the videotape on the 5th was invalid, and that the search on the 6th was invalid as well. The court relied on *Georgia v. Randolph*, 547 U.S. 103 (2006), to support its ruling. Specifically, the trial court recognized that the defendant refused consent to a search of the apartment. (III, 149; VII, 510-11) Even though Tonya Buchanan consented to the search on July 6th, the Court still held that her consent was invalid in light of the defendant's prior refusal. Accordingly, after reviewing the timeline, the Court ruled that the searches of

July 4th, 5th and 6th were invalid. (VII, 512-14) With this in mind, the Court excised those portions of the search warrant that it believed resulted from the improper searches. Even with the deletions, the court found probable cause in the affidavit and ruled that the search on July 13th was proper.[5] (VII, 514-16; XXV, 641-49).

The court then considered the doctrine of inevitable discovery under *Nix v. Williams*, 467 U.S. 431 (1984), and determined that compelling facts existed that the evidence would have inevitably been discovered. (XII, 516-18; XXV, 641-49). Specifically, the court stated that the "factual record in the case before this Court here today establishes that the apartment was sealed, was locked and sealed when Ms. Buchanan was taken to the hospital on July the 4th of 2005. The record further establishes that that apartment remained sealed during the additional days. The record further states that Dr. Koulis was specifically informed that he could not return to the apartment." (VII, 517-18).

This Court's standard of review for a trial court's findings of fact and conclusions of law on a motion to suppress evidence is set forth in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* at 23. As is customary, "the prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences

[5] Defendant argues in his brief that the information in the affidavit from Det. Pate did not meet the reliability standards for officers because Det. Pate was not actively involved in the investigation nor was he a citizen informant. Further, the defendant claims the information is stale. (Def. Brief, at 247-52). Because the defedant never raised this ground during the motion hearings or his motin for new trial, this argument is waived. Tenn. R. App. P. 36.

that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). Nevertheless, this Court reviews *de novo* the trial court's application of the law to the facts, without according any presumption of correctness to those conclusions. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Once the trial court has ruled on a suppression motion, our standard of appellate review requires acceptance of the trial court's findings regarding "questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence," unless the evidence preponderates against the findings. *Odom*, 928 S.W.2d at 23; *State v. Cothran*, 115 S.W.3d 513, 519 (Tenn. Crim. App. 2003).

In this case, the trial court determined that Tonya Buchanan's consent did not override the defendant's earlier refusal to detectives seeking consent to search. However, the State believes that Tonya Buchanan's consent to search cures any illegality associated with the entry into the apartment. Specifically, the Supreme Court in *Randolph* acknowledged that, while overnight guests have a legitimate expectation of privacy in their temporary quarters, a co-inhabitant has a stronger claim. Further, *Randolph* involved the question of "whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search." 547 U.S. at 108.

In this case, the testimony established that Tonya Buchanan was a co-tenant, a lessee, possessed a key, and visited often; in fact, so often that she left many of her

belongings in the apartment. In contrast, while the defendant was an overnight guest, the testimony of Tonya Buchanan and the victim's daughter established that Christ Koulis visited maybe once a month, did not leave his belongings there, and was not listed on the lease. Although the defendant claimed he was given a key to the apartment following his gift of an engagement ring to the victim, he did not produce the key and the court did not credit his testimony. (VII, 509). In *Randolph,* the Court stated that "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby not invited to take part in the threshold colloquy, loses out. *Id.* at 121-22. Accordingly, the State maintains that Tonya Buchanan's consent, as a legitimate co-tenant, was valid under *Randolph*.

The *Randolph* Court also stated that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules. . . ." *Id.* Here, the defendant refused consent to search at the hospital. However, he would not approach the apartment when he returned on July 4th because he did not want to get involved with the police. (V, 330). Accordingly, the State believes that the defendant's own conduct and refusal to approach the officers does not rise to the level of "police removal" discussed in *Randolph.*

The State would also point out that the Franklin police discovered through their investigation that the defendant was, in fact, not a lessee of the apartment.

Accordingly, acting in good faith, the detectives approached Tonya Buchanan and received valid consent. *See U.S. v. Matlock*, 415 U.S. 164 (1974) (recognizing that consent may be given by party who possessed common authority over the premises), *State v. Fountain*, 534 N.W. 2d 859 (S.D. 1995)(finding that leasehold interest is superior to overnight guest).[6] The State maintains that Tonya Buchanan's consent was valid. The trial court erred by finding that the search of July 6th was invalid. In addition, because Tonya Buchanan consented to the search on July 13th, the court did not have to redact the warrant. (Hearing, 9/6/06, Ex. 4)

Further, the State's position is that defendant's status as an "overnight guest" ended when he left the apartment and made the decision not to return because the police were present. As noted, defendant was a visitor who left the apartment when emergency medical personnel removed the victim. He has failed to show any further expectation of privacy in the apartment after that time.

If this Court finds that all of the searches leading up to the warrant on the 13th were invalid, the State asserts that the warrant still set forth sufficient probable cause to search the apartment, even when the information that had been acquired during the earlier searches is not considered. "The sufficiency of a search warrant affidavit is to be determined from the allegations contained in the affidavit alone." *State v. Henning*, 975 S.W.2d 290, 297 (Tenn. 1998). Probable cause for the issuance of a

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[6] Tennessee courts recognize that valid consent to search comes from persons who possess common authority over the priemises, as opposed to a landlord or hotel clerk. *State v. Orr*, No. W2001-02075-CCA-R3-CD--WL—(Tenn. Crim. App., Nov. 17, 2002) (copy attached). The State submits that the defendant has failed to show any common authority over the premises for purposes of consent.

search warrant exists when facts and circumstances demonstrated by an underlying affidavit are sufficient in themselves to warrant a person of reasonable caution to believe that certain items are the fruits of illegal activity and are to be found at a certain place. *United States v. Acklen*, 690 F.2d 70 (6th Cir. 1982); *see, e.g., Illinois v. Gates,* 462 U.S. 213 (1983); *Spinelli v. United States*, 393 U.S. 410 (1969). Here, the affidavit highlighted the observations of responding officer Mark Sanchez, the puncture wounds in the victim's groin area as well as the initial toxicology reports from the medical examiner, and the nature of the relationship between the defendant and the victim. Based on this affidavit, the trial court properly found probable cause and applied the concept of inevitable discovery.

"Under the inevitable discovery doctrine, illegally obtained evidence is admissible if the evidence would have otherwise been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); *State v. Ensley*, 956 S.W.2d 502, 511 (Tenn. Crim. App. 1996). Proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment. "Nix, 467 U.S. at 444 n.5." *State v. Cothran,* 115 S.W.3d 513, 525 (Tenn. 513, 525. Here, as the trial court recognized, the apartment remained sealed. Accordingly, the evidence would have been discovered during the July 6th consensual search or in the alternative, during the execution of the valid warrant on July 13th. There is no error.

III. THE SEARCH OF THE DEFENDANT'S APARTMENT IN CHICAGO WAS PROPER. THE TRIAL COURT CAREFULLY REVIEWED THE REDACTED AFFIDAVIT AND FOUND PROBABLE CAUSE TO SUPPORT THE SEARCH.

Defendant challenges the search warrant issued by the Cook County Court for his Chicago apartment. Specifically, defendant claims the warrant lacked probable cause because much of the information came from illegal warrantless searches.[7] The defendant also argues that the warrant included false statements made by Detective Anderson. Defendant maintains that these statements are essential to a finding of probable cause in this warrant and, when excised by the trial court, negated probable cause for issuance of the warrant.[8] However, as the trial court stated:

> with the Court's consideration of the remaining portion of the affidavit of Detective Anderson, that have not been excised or redacted by the Court, . . . all that excised, and also excising the portion of the affidavit regarding the statement of many seized vials containing labels identified Dr. Koulis as the prescribing physician, the Court still finds that the warrant, on its face, contains probable cause – sufficient probable cause for the issuance of the Chicago search warrant.

(X, 714). On appeal, the trial court's legal conclusions are review *de novo* with no presumption of correctness. *State v. Walton*, 41 S.W.3d75, 81 (Tenn. 2001).

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[7] As noted in its response to defendant's second argument, the State does not believe the searches of the apartment were illegal because the lessee consented to the search. However, if this Court finds they were, in fact, illegal, the State stands by the trial court's ruling that the redacted affidavit established probale cause.

[8]For the first time on appeal, the defendant argues that the inclusion of information from Det. Pate was stale. The defendant also argues for the time that several paragarphs contained conclusory statements. These arguments were never presented to the trial court. (XXII, 164-66; XXXIII, 332-34, 408-417; Defendant's brief at 277-84). Accordingly, they are waived. Tenn. R. App. P. 36.

However, a trial court's findings of fact are upheld unless the evidence preponderates to the contrary. *State v. Odom,* 928 S.W.2d18, 23 (Tenn. 1996). In this case, the trial court carefully considered the affidavits and listened to the testimony of the detectives. After redacting the evidence, the trial court still found probable cause. There is no error.

The defendant's claims regarding the information contained in the warrant from the initial searches of the defendant's apartment are addressed by the State in Argument II. Similarly, the same information was redacted by the trial court. (X, 707). As to the claim that Detective Anderson made false or reckless statements in the affidavit supporting the Chicago warrant, this Court must consider whether the statements were made with reckless disregard for the truth. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674 (1978). The Tennessee Supreme Court has recognized that "recklessness may be established by showing that a statement was false when made and that affiant did not have reasonable grounds for believing it, at that time." *State v. Little,* 560 S.W .2d 403, 407 (Tenn. 1978). As recognized in *Franks,* when reckless disregard "is established by the defendant by a preponderance of the evidence, and, *with the affidavit's false material set to one side,* the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided. . . ." 98 S.Ct. at 2676-77 (emphasis added).

Although the defendant argues in his brief that Det. Anderson deliberately set out to deceive the court in filing the affidavit, the trial court credited the testimony of

Det. Anderson and found "that there was no intent to deceive this Court." (X, 708) The court then looked at the statements at issue. In this case, defendant argues that the characterization of the prescription medications found in Lesa Buchanan's apartment as "controlled substances" was reckless and warranted exclusion of the second full paragraph. He also complains that the inclusion of information on defendant's inability to prescribe controlled substances is irrelevant. However, the State maintains that, although the warrant characterized the pill bottles as containing "controlled substances," this was not a reckless misstatement. Although many of the pills at issue are not classified as "controlled substances," they are not available without a prescription. Further, hydrocodone, as noted in the warrant, was included within the exhibit. Accordingly, defendant's inability to prescribe controlled substances is relevant to the issue of the source of the drugs that caused Lesa Buchanan's death. Here, the trial court found that although the information may be inaccurate, it did not rise to the level of recklessness. (X, 710)

Similarly, defendant complains that the statement that tapes were taken from a search on July 13th is reckless in that the tape mentioned was actually recovered and viewed during an earlier warrantless search. As demonstrated by the return of service on the July 13th warrant, tapes were recovered. No complaint is made about the content of the tape. The only concern is the implication that the date of recovery is wrong. The State maintains that this is not a reckless statement and the date is not material to the establishment of probable cause. The tape shows exactly what is

stated in the warrant. The trial court also found that the statements in the affidavit did not rise to the level of recklessness. However, the information was redacted based on the court's ruling regarding the earlier search warrant. (X, 711).

Finally, defendant argues that the statement of "he gives me drugs" as opposed to "you bought drugs" is reckless. Again, the trial court ruled that, based on the testimony of Detective Anderson, this statement does not rise to the level of a reckless disregard for the truth. (X, 712)

The trial court expressed concern about the statement in the affidavit that the defendant prescribed controlled substances. Based on its concerns, the trial court struck that statement. However, the court concluded it did not rise to a deliberate attempt to deceive the court. (X, 712-13).

Based on this careful review and by following the guidelines of *Franks* and *Little,* the trial court redacted the affidavit. Still, the court found sufficient probable cause to support the search. There is no error.

IV. THE DEFENDANT WAS NOT IN CUSTODY WHEN HE SPOKE WITH DETECTIVES CISCO AND JOHNSON AT THE WILLIAMSON COUNTY MEDICAL CENTER. ACCORDINGLY, HIS STATEMENTS WERE PROPERLY ADMITTED AT TRIAL

Following Lesa's death at the hospital, the defendant, Christ Koulis, was taken to a meditation room by Officer Mark Sanchez because he was crying loudly. (X, 830-34). According to Officer Sanchez, he wanted to give the defendant some time to himself. (X, 830-34). In fact, Officer Sanchez loaned his cell phone to the defendant so that he could call his sister. The defendant remained in the meditation room until Dets. Cisco and Johnson came in to speak with him. At no time was he in custody. In fact, he drove himself to the hospital and left the hospital by himself. When he unequivocally asked for an attorney, the detectives ended their conversation.

Defendant now claims that his statements were taken in violation of his rights under *Miranda v. Arizona*, his Fifth and Sixth Amendment rights under the United States Constitution, and his corresponding rights under Article I, Section 9, of the Tennessee Constitution. Yet, after hearing the evidence, the trial court accredited the testimony of the officers, not the defendant. After reviewing the totality of the circumstances from the perspective of a person in Christ Koulis' position, the Court found that the defendant's movement was not restrained, that he was not in custody, and that *Miranda* warnings were not required. (XXXIV, 564-66).

The Tennessee Supreme Court has recognized that:

> Questions of credibility of the witnesses, the weight and value of the evidence, and the resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). In this case, the trial court clearly accepted the testimony of Officer Sanchez and Dets. Cisco and Johnson. The court did not credit the testimony of the defendant. Accordingly, based on the trial court's evaluation of the testimony, the defendant was not in custody at the time he made statements to the detectives. The statements were properly admitted.

The United States Supreme Court has acknowledged:

> The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings (citations omitted) and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda v. Arizona,* 384 U.S. 436, 469-73, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney present during questioning, and that police must explain this right to him before questioning begins. . . .

Davis v. United States, 512 U.S. 452, 456 (1994). The Court in *Miranda* defined the issue of custody as when the defendant is under formal restraint or otherwise deprived of his freedom of action in any significant way. *Miranda,* 384 U.S. at 444.

In *State v. Anderson,* the Court set forth some relevant factors to an objective assessment of whether "a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." 937 S.W. 2d 851, 855 (Tenn. 1996). Among the factors listed:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor, the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt, and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. (citations omitted).

Id. As the *Anderson* Court noted, the list is not exclusive, and the trial court must examine the circumstances to determine whether an individual is in custody for the purposes of *Miranda.*

Here, the defendant drove himself to the hospital and left the hospital of his own accord. In fact, when he affirmatively invoked his right to an attorney, Detective Johnson testified that he was free to leave and he did leave without police supervision. (X, 752-58). As Detective Johnson stated, she spoke with the defendant to obtain information for the medical examiner and to assist in the investigation into Lesa Buchanan's death. At no time was the defendant under arrest. (X, 756-66). As

Detective Cisco testified, the defendant was told at the beginning of any questioning that he was not under arrest and was free to leave at any time. (X, 801-14).

Further, although defendant claims he was forced into the small room, the testimony of Officer Sanchez belies his claim. Officer Sanchez stated that the defendant was taken to a private room because he was crying so loudly and to give the defendant time to himself. (X, 830-34). Officer Sanchez' testimony is supported by the defendant's sister who told this Court that her brother was very upset when she spoke with him shortly after Lesa Buchanan's death. (X, 723-29). In addition, despite the defendant's claims that the officers prevented him from using the phone, Officer Sanchez allowed the defendant to use his personal phone to call his sister.[9] (X,834-41) Officer Sanchez also testified that the defendant never asked to call an attorney and never mentioned an attorney to him. (X,834-41) As stated by Officer Sanchez, the defendant was never in Officer Sanchez' custody because he believed he responded to a medical call. (X, 830-34) Nor did Officer Sanchez ever prevent the defendant from leaving the room, nor did the officer guard the door. (X,834-41) Det. Johnson testified that she did not see any officers standing guard outside the room, although there were a few in the waiting area because of the response to the call. (X, 752-54).

[9] Defendant's claim that Detectives Johnson and Cisco told him that he could make his one phone call when they were done is not supported by the evidence and makes no sense in light of Officer Sanchez's willingness to allow the defendant to sue the officer's personal phone to make a call.

Viewing the evidence in light of the factors set forth in *Anderson,* the defendant clearly was not in custody at the time of his conversations with the Franklin Police Department at the Williamson County Medical Center. As the defendant acknowledged, he was familiar with police procedure because of a prior investigation in Kentucky. (X, 740-42, 746-47). He drove to and from the hospital on his own, he was taken to a meditation room because he appeared to be distraught, he was given an opportunity to speak with his sister, and when he unequivocally asked for an attorney, the discussion ended. Although defendant relies solely on his testimony to support his argument, the trial court did not credit the defendant's testimony. (XXXIV, 564-66).

Recently, the Tennessee Supreme Court decided *State v. Kenneth Dailey, III,* No. M2007-01874-SC-R11-CD, -- W -- (Tenn., Jan. 2, 2009)(copy attached), ~~which held . . .~~ Unlike *Dailey,* the conversation here is not on video or audiotape. Therefore, the presumption of correctness remains with the trial court's findings. *State v. Payne,* 149 S.W. 3d 20, 25 (Tenn. 2004). Further, unlike *Dailey,* the defendant was not asked to come to the police station under false pretenses. The questioning was not accusatory. In fact, the testimony credited by the trial court was that the officers and detectives were merely trying to figure out what happened and to gather additional information to provide to the medical examiner prior to the autopsy. Unlike *Dailey*, the defendant was not told he would be charged with murder nor told that the officers knew he was involved in the victim's death. In addition, the

defendant was told that he was not under arrest and left voluntarily when he asked for an attorney. Accordingly, the holding in *Dailey* does not affect the trial court's ruling here.

Based on the facts and circumstances as demonstrated by the record and accredited by the trial court, the defendant's constitutional rights were protected. There is no error.

V. THE TRIAL COURT PROPERLY CHARGED THE JURY. THE COURT PROPERLY WEIGHED THE *FERGUSON* FACTORS AND DETERMINED THE INSTRUCTION WAS NOT NECESSARY.

The paramedics responding to Lesa Buchanan's hospital took three bottles of medication with them to the hospital. The Franklin Police Department photographed the evidence. (XIII, 1046-51; XIV, 1262-63; XVII, 1583; Exs. 5-8). However, when the detectives returned on July 25th to retrieve the medication, the hospital had already destroyed it. According to Williamson County Medical Center Assistant Director of Pharmacy, Steven Pruter, the medication was placed in a secure cabinet after Lesa's death. In accordance with hospital policy, it was destroyed because the cabinet was full. (XVI, 1470-71). The defendant claims this scenario required a jury instruction on the destruction of evidence.

Similarly, the defendant maintains that the instruction is warranted because Det. Cisco erased a photo on the defendant's cell phone while trying to email it to her work account. However, aside from the defendant's testimony, there was absolutely no evidence that the photo even existed. In fact, Det. Johnson stated that she mistyped the time that the photo was taken in her report. (XIII, 1119-23; XV, 1295-1300). Based on these factual situations, the trial court did not abuse its discretion by refusing to give the instruction.

In *California v. Trombetta,* 467 U.S.479, 489 (1984), the Court noted that the constitutional duty to preserve evidence is limited to evidence whose "exculpatory value was apparent before the evidence was destroyed." In *State v. Ferguson,* the Court

determined that the ultimate question when concerns are raised about the state's loss or destruction of evidence is "whether a trial, conducted without the destroyed evidence, would be fundamentally fair[.]" 2 S.W.3d 912, 914 (Tenn. 1999). The Court then discussed several factors to consider including whether the State had a duty to preserve the evidence, and if so, whether the state should suffer adverse consequences by considering the degree of negligence involved; the "significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available"; and the "sufficiency of the other evidence used at trial to support the conviction." *Id.* at 917. If the trial court considers these factors and believes that a trial without the missing evidence would lack fundamental fairness, the court may consider several options, including dismissal or an appropriate jury instruction. *Id.*

In this case, the defendant has failed to meet even the threshold showing that the exculpatory value was apparent even before the evidence was destroyed. As to the pill bottles, the evidence was not in the control of the State. In fact, the hospital destroyed the medication and bottles by the time the detectives attempted to retrieve it. Similarly, there is absolutely no evidence that the detectives destroyed the "alleged" photo of Lesa Buchanan on the phone. Det. Johnson explained that it was a typographical error in her report that suggested there was a photo on the phone at 1:30 p.m. Even so, the trial court gave the defendant the benefit of the doubt before carefully considering the *Ferguson* factors:

> for the sake of argument, I think there clearly -- there was a duty to preserve here. But then the Court also has to look at factors which is the degree of negligence involved and the significance of the destroyed evidence considered in the light of the probative value and your ability and the reliability of secondary substitute evidence remains available. In this instance the Court finds that any negligence was very limited in this case and furthermore that the destroyed evidence, which clearly where was destroyed evidence in the sense of the pill bottles, was a very limited probative value and – and is very questionably whether it's exculpatory or not. And then with regard to the picture evidence, there's very little proof that there is actually destroyed evidence at all and the Court also finds it to have very little probative value. So when the Court balances those factors, it does not feel it appropriate to render the jury charge at this point.

(XXVI, 2852-53). The court properly weighed the factors. The court did not abuse its discretion. *State v. James,* 81 S.W.3d 751, 760 (Tenn. 2002).

VI. THE TRIAL COURT PROPERLY CHARGED THE JURY AS TO UNANIMITY AND THE OFFENSE OF CRIMINALLY NEGLIGENT HOMICIDE. (Appellant's arguments 6 and 7).

Prior to the jury charge, the defendant asked the trial court for an enhanced unanimity charge and the pattern instruction for criminally negligent homicide. (XXXIV, 574-77). After a conference, the trial court stated that the court felt comfortable with the pattern charge. (XXV, 2831-33; XXVI, 2846-58). The defendant never addressed its concern about the criminally negligent homicide instruction with the court. (XXVI, 2847):

Criminally Negligent Homicide Instruction

The trial court charged the jury as to criminally negligent homicide by stating:

> Any person who commits criminally negligent homicide is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements: (1) that the defendant's conduct resulted in the death of the alleged victim; and (2) that the defendant acted with criminal negligence. (XXV, 620)
>
> "Criminal Negligence" means that a person acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint. (XXXV, 622).

Defendant complains the instruction was in error because the trial court failed to distinguish criminally negligent homicide as a "result of conduct" crime as set forth by this Court in *State v. Page,* 81 S.W.3d 781 (Tenn. Crim. App. 2002). The State disagrees. The trial court clearly stated that the State must have proven beyond a reasonable doubt that the *defendant's conduct resulted in the death of the alleged victim*; and that the defendant acted with criminal negligence. The plain reading of this element tells the jury that criminally negligent homicide is a result of conduct offense.

In *State v. Faulkner,* 154 S.W.3d 48, 59 (Tenn. 2005), the Tennessee Supreme Court was confronted by a similar argument. In discussing *Page,* the Court acknowledged that the "superfluous language in the 'knowingly' definition did not lessen the burden of proof because it did not relieve the State of proving beyond a reasonable doubt that the defendant acted knowingly." In *Faulkner,* the trial court charged the jury on premeditated first-degree murder by stating that "[a] person acts intentionally with respect to the nature of the conduct or to the result of the conduct . . ." *Id.* at 60. The Supreme Court reviewed the entire instruction and concluded that "[t]he instructions properly defined 'intentionally' with regard to the result of conduct. The entire charge on first degree premeditated murder eliminated any risk of the jury applying the wrong definition. We conclude, therefore, that the instructional error was not constitutional in nature. Furthermore, we find that the error was harmless." *Id.* Similarly here, the instruction properly defined criminal negligence and required the jury to find that the defendant's conduct caused Lesa

Buchanan's death. Accordingly, any error in using the complete definition of criminal negligence during the charge is harmless error.

Unanimity Instruction

The defendant also argues that the trial court's instruction regarding unanimity was insufficient. The instructions stated: "your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." (XXXV, 624). During discussion of the charge, the defendant suggested that an instruction be given to the jurors that they must be unanimous on each and every element. (XXVI, 2845-47). However, the trial court reviewed the defendant's concerns and concluded that the pattern instruction was sufficient. The State agrees.

The defendant was charged with second-degree murder, or in the alternative, reckless homicide. In essence, the indictment charged only one offense. Because only one offense was charged, there is no requirement for an enhanced unanimity instruction. *State v. Johnson,* 53 S.W.3d 628 (Tenn. 2001). In *Johnson,* the defendant was charged with several offenses, including sexual battery. On appeal, the defendant complained that because the testimony included allegations that the victim was touched on the breast and between her legs, the trial court was required to give an enhanced unanimity factor. Specifically, the defendant raised concerns about an election of offenses as it related to the jury unanimity. However, as recognized by the

Court in *Johnson,* "the evidence indicated only one offense, so there was no need for such an instruction." *Id.* at 635.

Here, only one offense was alleged. The State maintained throughout the trial that the defendant killed Lesa Buchanan. The pattern unanimity instruction was sufficient. There was no error.

VII. THE DEFENDANT'S CONVICTION FOR CRIMINALLY NEGLIGENT HOMICIDE IS NOT BARRED BY DOUBLE JEOPARDY PRINCIPLES. ASSAULT IS NOT A LESSER INCLUDED OFFENSE OF CRIMINALLY NEGLIGENT HOMICIDE.

The defendant was convicted by a jury of his peers of criminally negligent homicide. (XXVIII, 3114-15; XXXV,625). In returning the verdict, the jury foreman also marked that the defendant was not guilty of assault. (XXXV, 625). Defendant now takes the position that the marking of not guilty as it relates to the assault charge bars his conviction for criminally negligent homicide because in his view, he was acquitted of the lesser offense. However, assault is not a lesser included offense of criminally negligent homicide. Accordingly, defendant's argument must fail. The conviction stands.

At defendant's request, the trial court charged the jury as to the following offenses – second degree murder, reckless homicide, criminally negligent homicide and assault. (XXVI, 2983-86; XXXIV, 576-77). Specifically, the defense asked for, and received, the pattern instruction on assault. T.P.I. – Crim. 6.01 (XXVI, 2984; XXXV, 621). There is a split of authority within this Court as to whether assault is a lesser-included offense of premeditated murder. *See State v. Lia Bonds,* No. W2006-01943-CCA-R3-CD, –WL– (Tenn. Crim. App., Nov. 7, 2007), *app. denied* (Tenn. Apr. 14, 2008)(copy attached). *But see State v. John C. Walker,* No. M2005- 01432-CCA-RM-CD –WL– (Tenn. Crim. App., July 28, 2005), *app. denied* (Tenn. Dec. 19, 2005)(copy attached). However, each of these cases involved a defendant charged with premeditated murder. In this case, the defendant was charged with second

degree murder. Depending on this Court's view, assault may be a lesser-included offense of second degree murder. However, it is not a lesser-included offense of criminally negligent homicide.

The mens rea for criminally negligent homicide requires that "the defendant acted with criminal negligence." T.P.I. – Crim. 7.07. The mens rea for assault requires a finding that the defendant caused bodily injury to another and "that the defendant acted either intentionally, knowingly or recklessly." T.P.I. – Crim. 6.01. As the Court recognized in *State v. Burns,* 6 S.W.3d 453, 466-67 (Tenn. 1999), an offense is a lesser-included offense if "(a)all of its statutory elements are included within the statutory elements of the offense charged; or (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing a lesser kind of culpability; . . ." In this case, the mens rea for assault is *greater* than the culpability required for criminally negligent homicide. *See State v. Michael Ashley,* No. W2004-01319-CCA-MR3-CD –W-- (Tenn. Crim. App., April 5, 2006)(copy attached). (recognizing that there are no lesser included offenses of criminally negligent homicide). Accordingly, it cannot be a lesser offense, there is no double jeopardy, and the defendant's argument must fail.

XIII. THE DEFENDANT'S CONVICTION FOR CRIMINALLY NEGLIGENT HOMICIDE MUST STAND. THERE IS NO DOUBLE JEOPARY OR COLLATERAL ESTOPPEL ISSUE. AT MOST, THE JURY RETURNED INCONSISTENT VERDICTS

The defendant was convicted of criminally negligent homicide. The defendant now argues that because the jury's verdict form indicates that the jury acquitted him of assault, the jury must have found that he did not inject Lesa Buchanan. However, defendant's argument is nothing more than speculation about the jury's reasoning in this case.

"This Court will not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned." *Wiggins v. State,* 498 S.W.2d 92, 94 (Tenn. 1973). This Court should not speculate as to any alleged inconsistency by the jury's marking not guilty of assault on the verdict form. Because the evidence supports the verdict convicting defendant of criminally negligent homicide, the verdict should be affirmed.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

KIM R. HELPER
District Attorney General
Special Counsel
P.O. Box 937
Franklin, Tennessee 37065-0937
615-794-7275
B.P.R. No. 19104

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class mail, postage paid, to the following:

David Raybin
Hollins Wagster, Weatherly & Raybin, P.C.
Fifth Third Center, Suite 2200
424 Church Street
Nashville, TN 37219

Lee Ofman
317 Main Street, Suite 208
Franklin, TN 37064

on this the 2nd day of February 2009.

Kim R. Helper

KIM R. HELPER
District Attorney General
Special Counsel

Kim R. Helper

WRITING SAMPLE #2

IN THE CRIMINAL COURT FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

STATE OF TENNESSEE)
)
VS.)
) CASE NO. II-CR063486
)
ROBERT JASON BURDICK)

MOTION TO DISMISS PETITIONER'S WRIT OF ERROR CORAM NOBIS PETITION

Comes now the State, by and through the undersigned attorney, and files this response to Petitioner's Petition for Writ of Error Coram Nobis. The State maintains that the petition is not timely filed. Accordingly, it must be dismissed,

Petition Not Timely Filed

Tenn. Code Ann. §40-26-105 extends the writ of error coram nobis to convicted defendants in criminal cases. A petition for the writ must be filed within one year of the judgment becoming filed in the trial court. Tenn. Code Ann. §27-7-103.

In this case, petitioner's judgments became final thirty days from the trial court's denial of Petitioner's motions for new trial which occurred on May 20, 2011 and April 23, 2012. By filing his petition on December 30, 2019, Petitioner clearly is not within the one-year limitation period and the State respectfully requests dismissal based on the limitations period.

Due Process Tolling

Under Tenn. Code Ann. §40-26-105(b):

> The relief obtained by this proceeding shall be confined to errors dehors the record and to matters that **were not or could not have been litigated on the trial of the case**, on a motion for a new trial, on appeal in nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the prior time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at trial.

A petition for writ of error coram nobis "may be dismissed without a hearing, . . . if the petition does not allege facts showing the petitioner is entitled to relief." *Lane v. State*, No. W2008-02504-CCA-R3-CO (Tenn. Crim. App. July 14, 2009)(Copy of opinion attached). Here petitioner has failed to show any facts demonstrating he is entitled to relief.

Claim of Newly Discovered Evidence

Petitioner argues that the limitations period should be tolled based on due process considerations related to "newly discovered evidence". He claims the evidence was "newly discovered" only after his family members "acting on a hunch hired a private investigator, Mr. Ernie Rice, to locate the 2005 Wooded Rapist attack victim mentioned in the search warrant affidavit." (Petition, page 9) Petitioner claims that his private investigator interviewed the victim and she denied meeting with local law enforcement and/or the TBI to develop a sketch. Accordingly, he claims this interview, completed on June 27, 2019, meets the standard for newly discovered evidence.[1] The State disagrees.

Affidavit of Ernie Rice is Hearsay and Should not be Considered

Specifically, Petitioner relies on the affidavit from a private investigator hired by his family who interviewed a victim of a crime that occurred fourteen years earlier. The affidavit is replete with hearsay and should not be considered by this Court. In fact, there is no sworn statement/affidavit from the victim to verify petitioner's claim of "newly discovered evidence". As the Court of Criminal Appeals has recognized, affidavits "like the testimony of a witness, must be relevant, material and germane to the grounds raised in the petition; and the affiant must have personal knowledge of the statements contained in the affidavit. *See State v. Byerley*, 658 S.W.2d 134, 141 (Tenn. Crim. App.), per. app. denied (Tenn. 1983). Affidavits which fail to meet these criteria will not justify the granting of an evidentiary hearing since the information contained in the affidavits, taken as true, would not entitle the petitioner to relief." *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995), *perm. to appeal denied* (Tenn.1995).

[1] Ms. McCaskill was victimized in 2005.

In the affidavit attached to the petition, Investigator Ernie Rice shares no personal knowledge of the incident in question, nor any personal knowledge at all of what occurred in 2005. Instead, he purports to repeat statements from a victim related to an incident occurring fourteen years prior to his interview. In addition, although Rice indicates he subsequently received a call from a man claiming to be the victim's attorney, he provides no information about that interaction and merely states "His comments were ridiculous." (Petitioner's Exhibit 1).

Affidavit Does Not Meet the Standard for Newly Discovered Evidence

Further, the State maintains that the affidavit does not document any "newly discovered evidence". The State has attached an affidavit from Assistant District Attorney Roger Moore with the 20th Judicial District as State's Exhibit One. As General Moore explains, his Office provides open file discovery. Documentation is attached to the affidavit which includes contemporaneous notes from a Metro Police Department meeting with victim Kathryn McCaskill in 2005 and a sketch, both made available to trial counsel during any and all litigation in Davidson County. The Exhibit directly contradicts the hearsay statements that petitioner relies on in Rice's affidavit. Accordingly, the alleged "newly discovered" evidence is not "new evidence" and it would not have resulted in a different verdict because, as noted, the warrant did not include any false statements.[2] Accordingly, the petition should be dismissed.

The "Newly Discovered" Evidence was Available to Petitioner Prior to his Post-Conviction Hearing.

This Court should also recognize that the petitioner, via an investigator or trial counsel, could have litigated the issue he now raises regarding the search warrant prior to trial. The information was made available as part of the discovery process in 2008. (State's Exhibit One) Simply reaching out to the detective and/or the victim at that time would have resolved any question in petitioner's mind. In fact, the validity of the search warrant was litigated before the

[2] The State's argument does not create a disputed issue requiring a hearing because the affidavit should be disregarded based on the lack of personal knowledge. In addition, as the State also argues, this information could have and should have been raised in prior hearings.

Davidson County trial court and the Court of Criminal Appeals. *See State v. Burdick*, No. M2009-02085-CCA-R3-CD (Tenn. Crim. App. April 18, 2012)(copy attached). Further, the affidavit of Ernie Rice indicates he spoke with Ms. McCaskill "on or about June 27, 2019." (Petitioner's Exhibit One) The Petitioner's Post-Conviction Relief hearing involving the Williamson County convictions was held on November 26, 2019. Accordingly, this issue should have been raised during that hearing. However, despite having knowledge of his claimed "newly discovered evidence", Petitioner did not raise this claim.[3] Petitioner, therefore, has failed to support his claim of "newly discovered evidence nor met the statutory requirements for *coram nobis* relief.

For the above-stated reasons, the petition should be dismissed without a hearing.

Respectfully Submitted,

Kim R. Helper

KIM R. HELPER
District Attorney General
B.P. R. 19104

[3] There is no constitutional entitlement to effective assistance of post-conviction counsel. *Coleman v. Thompson*, 501 U.S. 722 (1991). While Tennessee recognizes a statutory right to counsel in a post-conviction proceeding, this statutory right does not include "the full panoply of procedural protection that the Constitution requires be given to defendants who are in a fundamentally different position-at trial and on first appeal as of right." *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995)

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above order was served by email and/or United States Mail to Robert Burdick, #454219, Trousdale Turner Correctional Center, 140 Macon Way, Hartsville, TN 37074 and filed with this Court on the 25th day of February, 2020.

Kim R. Helper
District Attorney General

State's Exhibit One

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE

AT FRANKLIN

ROBERT JASON BURDICK)
)
Petitioner,)
) Trial Court No.: II-CR053486
VS.)
)
STATE OF TENNESSEE)
)
Respondent.)

AFFIDAVIT

I, Roger D. Moore, being first duly sworn according to law do hereby state that I am a Deputy District Attorney General for the 20th Judicial District. As part of my duties with the Office of the District Attorney General, I was assigned to prosecute the case of State of Tennessee vs. Robert Jason Burdick, Davidson Criminal No. 2008-B-1350. The indictment in Case No. 2008-B-1350 contained 13 counts and charged the defendant with crimes committed between March 1, 1994 and November 19, 2007 against 9 different women.

Following arraignment and appointment of counsel, which was originally the Metropolitan Nashville Public Defender, I responded to the defendant's Request for Discovery on May 22, 2008. In the Response I advised that counsel could inspect and/or copy any materials in the State's file. A copy of the State's Response to Request for Discovery is attached to this Affidavit. The State's "open file" policy continued throughout the prosecution of this case (and to Post-Conviction).

The attached Metro Police Department Supplemental Report and composite sketch were in the case file compiled with respect to the victim in Counts 8 and 9 of the indictment. These

documents were available to original counsel and successor counsel throughout the course of the proceedings.

Further, affiant sayeth not.

Respectfully submitted,

Roger D. Moore
Tenn. Sup. Ct. Reg. #005616
Deputy District Attorney General
Washington Square, Suite 500
222 Second Avenue North
Nashville, TN 37201-1649
(615) 862-5500

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me on this the 20th day of February, 2020.

Dianne Hunt
Notary Public

Commission Expires: 3-8-2022

DIANNE HUNT
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY