The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Manuel B. Russ

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Home Address: (including county) [redacted] Nashville, TN 37205 Davidson County

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Self-employed attorney practicing 100% criminal defense

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

2004 and #023866

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

Tennessee, November, 2004 and #023866

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).

Self-Employed attorney practicing primarily criminal defense; since 2016 I have been an assistant examiner with the Tennessee Board of Law Examiners. I manage several residential rental properties.

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.

100% of my practice is state of Tennessee and Federal criminal defense focusing on appellate litigation

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.

The entire time I have practiced, I have been a solo-practitioner that has been primarily and/or exclusively focused on criminal defense, both State and Federal, trial and appellate. I have handled every type of matter for clients from misdemeanors through first degree murder trials as well as appellate argument in the Court of Criminal Appeals, the Tennessee Supreme Court and the 6th Circuit Court of Appeals. For approximately the last five years, I have focused more heavily on appellate work in the Court of Criminal Appeals and the 6th Circuit Court of Appeals handling appeals of every kind from jury trials, post-conviction proceedings, habeas corpus proceedings and writs of error coram nobis as well as handling similar matters in the trial courts, primarily in Davidson County, but also throughout Tennessee. Since 2016 I have served with the Tennessee Board of Law Examiners as an assistant bar examiner drafting and grading bar examination questions for approximately eight sittings of the Tennessee Bar Exam.

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

In 2019, in State of Tennessee v. David Scott Hall, I won a complete reversal for Mr. Hall on all conviction offenses before the Tennessee Supreme Court.

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.

On a few occasions, I was asked to sit as a special general sessions judge in Davidson County, but it has been approximately ten years since the last time I did. Otherwise, I have no other such experience.

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.

Previously, I acted as a conservator, about ten times, for the Probate Court of Davidson County, usually for inmates in the Tennessee Department of Corrections, but occasionally for other parties. I had also acted as an attorney ad litem in similar circumstances on a few occasions.

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

None

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.

None

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.

Johns Hopkins University, Honors Bachelor's Degree in History 2000, University College London, Master's Degree in History 2001, Emory University College of Law, Jurisdoctor 2004

PERSONAL INFORMATION

15. State your age and date of birth.

42, [redacted] 1978

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

16 years

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

16 years

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

Davidson

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

None

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

No

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

No

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

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

None

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

No

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

No

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

Contractor dispute in general sessions court in Davidson County in 2016 settled without trial. 16GC1940, filed on 2/8/16 and dismissed with prejudice on 6/28/16.

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.

Davidson County Drug Court Support Foundation, President from 2018-present, Vice-President from 2016-2018, Leadership Nashville Class of 2020, Board of the Tennessee Supreme Court Historical Society, Jewish Family Service of Middle Tennessee, President from 2017-2019, Vice-President from 2015-2017, Jewish Federation of Middle Tennessee, Congregation Ohabi Shalom

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your

answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

No

ACHIEVEMENTS

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

Tennessee Bar Association, 2004-present, Nashville Bar Association 2004-present, Nashville Bar Foundation 2015-present, Tennessee Association of Criminal Defense lawyers 2013-present, National Association of Criminal Defense Lawyers 2007-present

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.

Super Lawyers rising stars 2013-2018

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

Tennessee Bar Journal, co-authored 20 articles with Marlene Eskind Moses since 2015,
JANUARY 2014 | VOLUME 50 NO. 1, The 'ART' of Having Three Biological Parents, Posted by: Marlene Moses & Manuel Russ on Jan 1, 2014
MAY 2014 | VOLUME 50 NO. 5, Electronic Surveillance in Family Law, Posted by: Marlene Moses & Manuel Russ on May 1, 2014
SEPTEMBER 2014 | VOLUME 50 NO. 9, Forced Marriage, Posted by: Marlene Moses & Manuel Russ on Sep 1, 2014
JANUARY 2015 | VOLUME 51 NO. 1, Can Criminal Contempt Create Compliance?, Posted by: Marlene Eskind Moses with Manuel Benjamin Russ
May 2015 | VOLUME 51 NO. 5, Perfecting Protection, Posted by: Marlene Eskind Moses with Manuel Benjamin Russ
SEPTEMBER 2015 | VOLUME 51 NO. 9, What Obergefell v. Hodges Means for Tennessee, Posted by: Marlene Eskind Moses with Manuel Benjamin Russ
JANUARY 2016 | VOLUME 52 NO. 1, Recent Recalculation of Retirement: Employment Benefits as Separate Property, Posted by: Marlene Moses & Manuel Russ on Jan 1, 2016

MAY 2016 | VOLUME 52 NO. 5, QDRO and State/Local Government Pensions, Posted by: Marlene Moses & Manuel Russ on May 1, 2016
SEPTEMBER 2016 | VOLUME 52 NO. 9, Finding and Defining Income Available for Support, Posted by: Marlene Moses & Manuel Russ on Sep 1, 2016
JANUARY 2017 | VOLUME 53 NO. 1, FAMILY MATTERS: Inconvenient Forum, Posted by: Marlene Moses & Manuel Russ on Jan 1, 2017
MAY 2017 | VOLUME 53 NO. 5, Redefining Relocation, Posted by: Marlene Moses & Manuel Russ on May 1, 2017
SEPTEMBER 2017 | VOLUME 53 NO. 9, Modifications to Child Support Laws in 2017, Posted by: Marlene Moses & Manuel Russ on Sep 1, 2017
JANUARY 2018 | VOLUME 54 NO. 1, Elimination of the Alimony Deduction: A Tax Break for Some, a Hike for Others, Posted by: Marlene Moses & Manuel Russ on Jan 1, 2018
MAY 2018 | VOLUME 54 NO. 5, Merger Doctrine in Family Law, Posted by: Marlene Moses & Manuel Russ on May 1, 2018
SEPTEMBER 2018 | VOLUME 54 NO. 9, Changing a Life Insurance Beneficiary in Violation of an Injunction, Posted by: Marlene Moses & Manuel Russ on Sep 1, 2018
JANUARY 2019 | VOLUME 55 NO. 1, Ethics in Family Law Mediation, Posted by: Marlene Moses & Manuel Russ on Dec 31, 2018
MAY 2019 | VOLUME 55 NO. 5, Exclusive Jurisdiction of Juvenile Court, Posted by: Marlene Moses & Manuel Russ on Apr 23, 2019
SEPTEMBER 2019 | VOLUME 55 NO. 9, A Paradigm Shift to Collaborative Law, Posted by: Marlene Moses & Manuel Russ on Aug 26, 2019
JANUARY 2020 | VOLUME 56 NO. 1, Legal Separation Agreements and Their Effect on Divorce, Posted by: Marlene Moses & Manuel Russ on Dec 23, 2019
MAY 2020 | VOLUME 56 NO. 5, International Prenuptial Agreements, Posted by: Marlene Moses & Manuel Russ on Apr 24, 2020

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.

None

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.

None

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

No

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

See Attached. I drafted these pleadings entirely by myself, believe these are good examples of my appellate writing that reflect my abilities and my best personal effort

ESSAYS/PERSONAL STATEMENTS

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

I have a deep interest and commitment to the practice of criminal law, in particular appellate work. I have always served the community, both in Davidson County and in Tennessee, in my practice by representing the indigent in those communities and I think the chance to be a judge on Court of Criminal Appeals would allow for further, more meaningful service both to my community and in an area of law that I continue to find more fascinating as I learn more. I think I can help maintain and better the criminal justice system through hard work and contentiousness.

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)***

Though I have been compensated by both the State of Tennessee and the United States for my work, the vast majority of clients in my career have been indigent and unable to afford their own counsel. Not only does indigent representation present a great opportunity to gain invaluable experience, more importantly it has given me the chance to make a meaningful contribution to the community through giving people access to equal justice by providing quality, free legal representation when they need it the most. I have also occasionally taken on small claims civil cases pro bono to assist people unable to afford counsel with matters like evictions and credit card debt.

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

I am seeking a seat on the Court of Criminal Appeals for Middle Tennessee which handles exclusively criminal appellate matters throughout the state. There are 12 judges in total on the court, four from each grand division of the state. I think I could add to what is already a strong court by bringing a deep commitment to equity on both of sides of the criminal law spectrum, not merely approaching an issue from either a prosecution or a defense perspective. I also enjoy legal writing and believe it to be a strength of my practice as well as the ongoing study of criminal law. Since this is a primary focus of the appellate court, I think my best assets would serve well in this particular role.

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)***

Over the past fifteen years, I have been active, professionally, with the Davidson County Drug Court Support Foundation and I currently serve as its President. This agency assists the Davidson County Drug Court in its function of assisting felony offenders to recover from their drug addictions rather than merely serving time in incarceration. Privately, I have been actively involved in the Jewish community of Nashville. I have served on the financing and grants committees of my synagogue, The Temple in Nashville, as well as with the Jewish Federation of Middle Tennessee. More recently I have served as the President of the Jewish Family Service of Middle Tennessee which focuses on providing a variety of charitable resources to the Jewish community in Nashville and the wider Middle Tennessee community. I have also become a member of the Board for the Tennessee Supreme Court Historical Society in 2020. If I was appointed to this seat, I would continue my activity in the professional and local Community, but be conscious of any potential conflict that this may present and avoid it.

I think an important aspect of my life that would assist the council in making its decision is the commitment I have to the State, my family, my community and the practice of criminal law and how all of those things intertwine. I was raised in Tennessee and have lived almost my entire life here, all of my family is here, all of my wife's family is here, and my entire practice has been here. I love to read, I have a deep love of history and am fascinated by the history of criminal law both in the United States and other places, both past and present. I think this unceasing interest and passion in the past and how it affects the present and future, particularly in the context of criminal law, and how those interests can serve my home in a more beneficial and equitable way through the practice of criminal law brings all the strands of my life together. The combination of my interest, my ability, and my desire to serve culminating in a position like this one is something I think the Council should consider.

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)***

I would certainly uphold whatever the current statutory or precedential case law dictated regardless of my personal beliefs about the validity or wisdom of the issue itself. The role of a judge is to act as an arbiter, not to substitute their personal beliefs for the law. I think that, over the course of any criminal defense lawyer's career, they are presented with situations where their clients might have done something wrong, or they want to take a course of action that, as their attorney, you may disagree with. However, I have an ethical obligation to represent my client to the best my ability whether their criminal conduct is justifiable, or whether their

decisions make sense to me. I have to represent them fully and fairly no matter what they have done, or what decisions they may want to make in their own case regardless of my personal feelings. A judge's role is different, but similar. Personal feelings must be set aside and a judge, like a defense attorney, must do what the law requires, not what they personally think is right. I would be guided by this principle and refrain from letting my personal beliefs interfere with the administration of justice.

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. Mrs. Marlene Eskind Moses, Senior Partner, MTR Family Law, [redacted] Nashville, TN 37203, [redacted]
B. Mr. Roger Moore, Assistant Attorney General, 20th Judicial District, [redacted] Nashville, TN 37201, [redacted]
C. Mr. Russell Thomas, Executive Director of Tennessee Alcoholic Beverage Commission, [redacted] Nashville, TN 37243, [redacted]
D. Mrs. Harriet Schiftan, Director of Gilda's Club of Middle Tennessee, [redacted] Nashville, TN 37203, [redacted]
E. Mr. Bryan Noel, Special Agent in Charge for the Tennessee Bureau of Investigation, [redacted] Nashville, TN 37216, [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 5, 2020.

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

Manuel B. Russ
Type or Print Name

[signature]
Signature

10/5/20
Date

#23866
BPR #

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

None

M2018-01447-SC-R3-CD

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

NEMON WINTON,

Appellant,

v.

STATE OF TENNESSEE,

Appellee.

APPLICATION FOR PERMISSION TO APPEAL

Manuel B. Russ

Attorney for Appellant

340 21st Avenue North

Nashville, Tennessee 37203

(615) 329-1919

TABLE OF CONTENTS

TABLE OF CONTENTS..i-iii

TABLE OF AUTHORITIES ....ii-iii

PRIOR PROCEEDINGS 1-2

ISSUES PRESENTED FOR REVIEW 3

STATEMENT OF THE FACTS 4

REASONS SUPPORTING REVIEW 5-13

I. PURSUANT TO *STATE V. WHITE* THE TRIAL COURT WAS REQUIRED TO INSTRUCT THE JURY ON THE OVERLAPPING EVIDENCE REQUIRED TO PROVE THE NECESSARY ELEMENTS FOR AGGRAVATED ROBBERY AND ESPECIALLY AGGRAVATED KIDNAPPING BUT FAILED TO DO SO CONSTITUTING REVERSIBLE ERROR……………………………………………………………………5-9

II. THE STATE ADDUCED INSUFFICIENT PROOF AT TRIAL THAT THERE WAS THE CONFINEMENT OF THE VICTIMS OF ESPECIALLY AGGRAVATED KIDNAPPING WAS INDEPENDENTLY SIGNIFICANT FROM THE UNDERLYING ROBBERY……………………………………………………………9-11

III. THE TRIAL COURT ERRED WHEN IT SENTENCED MR. WINTON EXCESSIVELY……………………………………………………………11-13

CONCLUSION...14

CERTIFICATE OF SERVICE…..………………………………………..............15

TABLE OF AUTHORITIES

CASES

State v. Adkisson, 899 S.W.2d 626, (Tenn. Crim. App. 1994)……………………7

State v. Ashby, 823 S.W.2d 166, (Tenn.1991)……………………………………12

State v. Bise, 380 S.W.3d 682, (Tenn. 2012)………………………………………11

State v. Caudle, 388 S.W.3d 273, (Tenn. 2012)…………………………………...11

State v. Hester, 324 S.W.3d 1, (Tenn. 2010)………………………………………8

State v. Pollard, 432 S.W.3d 851, (Tenn. 2013)…………………………………..11

State v. Donald Smith, 24 S.W.3d 274, (Tenn. 2000)……………………………7-8

State v. Michael Smith, 492 S.W.3d 224, (Tenn.2016)……………………………7-8

State v. White, 362 S.W.3d 559, (Tenn. 2012)…………………………….5-8, 10, 14

State v. Winfield, 23 S.W.3d 279, (Tenn.2000)……………………………………13

United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)….7

STATUTES AND OTHER SOURCES

6th Amendment to the United States Constitution…………….......................6, 10, 17

Article 1 § 9 of the Tennessee Constitution ……………………..…………..6, 10, 17

T.C.A. § 40-35-101………………………………………………………………..12

T.C.A. § 40-35-102……………………………………………………………..11-13

T.C.A. § 40-35-103……………………………………………………………..11-13

T.C.A. § 40-35-113………………………………………………………………..12

T.C.A. § 40-35-114……………………………………………………………..12-13

T.C.A. § 40-35-115……………………………………………………………..12-13

T.C.A. § 40-35-401……………………………………………………………..11-12

Tennessee Rule of Appellate Procedure 36(b)…………………………………..7

PRIOR PROCEEDINGS

Mr. Nemon Winton was tried on an indictment that was amended by agreement of the parties and included a total of twelve counts. (T.R., Vol. I, Pp. 74-79) Mr. Winton's charges included counts one through four for Aggravated Assault, Aggravated Robbery, Especially Aggravated Kidnapping, and Attempted First Degree Murder of Ms. Heather Hill, counts five through seven for charges of Aggravated Assault, Aggravated Robbery and Especially Aggravated Kidnapping of Ms. Tabitha Tomlin, counts eight and nine for charges of Aggravated Assault and Especially Aggravated Kidnapping of Ms. Stephanie Trussell, as well as counts ten through twelve for charges of employment of a firearm during the commission of a dangerous felony, evading arrest and failure to stop.

Mr. Winton was tried in Coffee County, Tennessee, on September 11th and 12th, 2017, and on September 11th, 2017, the State entered dismissal judgments for counts one, two, three, eight, ten and twelve. (T.R., Vol. I, Pp. 83-89)[1] Mr. Winton proceeded to trial on five counts of the indictment. He was found guilty of the offenses in Count four of Especially Aggravated Kidnapping of Heather Hill, Count six Aggravated Robbery of Tabitha Tomlin, Count seven of Especially Aggravated Kidnapping of Tabitha Tomlin and Count nine of the lesser including offense of Aggravated Kidnapping of Stephanie Trussell. The jury found him not guilty in Count eleven of Evading Arrest.

At a separate sentencing hearing held on March 21st, 2018, the trial court sentenced him to a combination of concurrent and consecutive sentences for the counts of conviction that resulted

[1] Count Seven has a blank judgment form on page 86 and a judgment of conviction for the same count on page 101. (T.R., Vol. P 86 & P. 101) Count Five has no judgment form included, but the charge was not determined by the jury.

in an effective term of forty-five years in custody, the majority to be served at 100% release eligibility.

Mr. Winton appealed his convictions and sentences to the Court of Criminal Appeals which issued an Opinion dated April 23rd, 2020, and has been appended to this application. In that Opinion, the Court of Criminal Appeals determined that there was insufficient evidence to support the jury's verdict of guilty as to Count nine for the offense of Aggravated Kidnapping and vacated and dismissed that offense, but affirmed the remaining counts and sentence of the trial court. The reversal of Count nine did not affect the total effective sentence imposed by the trial court. Mr. Winton now brings this timely filed application for relief for the review of this Honorable Court.

ISSUES PRESENTED FOR REVIEW

I. **PURSUANT TO *STATE V. WHITE* THE TRIAL COURT WAS REQUIRED TO INSTRUCT THE JURY ON THE OVERLAPPING EVIDENCE REQUIRED TO PROVE THE NECESSARY ELEMENTS FOR AGGRAVATED ROBBERY AND ESPECIALLY AGGRAVATED KIDNAPPING BUT FAILED TO DO SO CONSTITUTING REVERSIBLE ERROR**

II. **THE STATE ADDUCED INSUFFICIENT PROOF AT TRIAL THAT THE CONFINEMENT OF THE VICTIMS OF ESPECIALLY AGGRAVATED KIDNAPPING WAS INDEPENDENTLY SIGNIFICANT FROM THE UNDERLYING ROBBERY**

III. **THE TRIAL COURT ERRED WHEN IT SENTENCED MR. WINTON EXCESSIVELY**

STATEMENT OF THE FACTS

The facts stated in the opinion of the Court of Criminal Appeals in the case *sub judice* are substantially correct. The appellant will not restate the facts pursuant to Rule 11(b), Tennessee Rules of Appellate Procedure. A copy of the opinion of the Criminal Court of Appeals is attached hereto and incorporated herein by reference.

REASONS SUPPORTING REVIEW

The Appellant, Nemon Winton, respectfully submits that this Honorable Court should grant his Application for Permission to Appeal and consider this matter upon the merits.

The Appellant asks this Court to invoke its supervisory powers and determine whether the trial court and Court of Criminal Appeals reached the proper conclusion from the facts contained in the transcript and applied the proper principles of law to the conclusions of fact. Tennessee Rules of Appellate Procedure 11(a)(4).

I. PURSUANT TO *STATE V. WHITE* THE TRIAL COURT WAS REQUIRED TO INSTRUCT THE JURY ON THE OVERLAPPING EVIDENCE REQUIRED TO PROVE THE NECESSARY ELEMENTS FOR AGGRAVATED ROBBERY AND ESPECIALLY AGGRAVATED KIDNAPPING BUT FAILED TO DO SO CONSTITUTING REVERSIBLE ERROR

Specifically, this Court should grant review to correct the mistake of the trial court and the Court of Criminal Appeals in failing to address the insufficient instructions provided to Mr. Winton's jury related to his charges of aggravated robbery versus especially aggravated kidnapping. *State v. White* provides the following unequivocal guidance for instructing the jury on the overlap of proof related to aggravated robbery and especially aggravated kidnapping:

> Under the standard we adopt today, trial courts have the obligation to provide clear guidance to the jury with regard to the statutory language. Specifically, trial courts must ensure that juries return kidnapping convictions only in those instances in which the victim's removal or confinement exceeds that which is necessary to accomplish the accompanying felony. Instructions should be designed to effectuate the intent of the General Assembly to criminalize only those instances in which the removal or confinement of a victim is independently significant from an accompanying felony, such as rape or robbery. When jurors are called upon to determine whether the State has proven beyond a reasonable doubt the elements of kidnapping, aggravated kidnapping, or especially aggravated kidnapping, trial courts should specifically require a determination of whether the removal or confinement is, in essence, incidental to the accompanying felony or, in the alternative, is significant enough, standing alone, to support a conviction. In our view, an instruction of this nature is necessary in order to

assure that juries properly afford constitutional due process protections to those on trial for kidnapping and an accompanying felony.

State v. White, 362 S.W.3d 559, 578 (Tenn. 2012)

The trial court failed to so instruct the jury in his case. (T.R., Vol. I, Pp. 45-57)[2] Mr. Winton was convicted of Aggravated Robbery in Count seven of the indictment related to Ms. Tomlin as well as Especially Aggravated Kidnapping of Ms. Tomlin in Count six of the indictment. Since Mr. Winton deprived the business of its property and Ms. Tomlin was its agent rather than a robbery of Ms. Tomlin's personal property, the single robbery count of conviction related to his conduct towards Ms. Hill as well, so the Especially Aggravated Kidnapping conviction in Count four as to Ms. Hill is also relevant to this inquiry. The language of *White* is explicit. If an indictment alleges another felony other than some grade of kidnapping, the trial shall instruct the jury so it may "determine whether the State has proven beyond a reasonable doubt the elements of kidnapping, aggravated kidnapping, or especially aggravated kidnapping" sufficiently by requiring the jury to determine "whether the removal or confinement is, in essence, incidental to the accompanying felony or, in the alternative, is significant enough, standing alone, to support a conviction." *Id.* The Court in *White* stated that an instruction on this issue was "necessary in order to assure that juries properly afford constitutional due process protections to those on trial for kidnapping and an accompanying felony." *Id.* Mr. Winton was entitled to an instruction of this nature so the jury could fairly determine if the confinement of Ms. Hill and Ms. Tomlin was

[2] The State requested that the jury charge include Tennessee Patterned Instruction 8.03 and asked for language related to the requirements in *White* be included, but the record contains no such instruction. Further, the State asserted that this instruction was only applicable to the charges related to Ms. Tomlin and not Ms. Hill which is erroneous. (T.R., Vol. II, P. 8) The trial court agreed to give the requested instruction as to Ms. Tomlin only and stated that the jury charge was "like 14 pages long or something like that" and the actual number of pages in the record for the jury charge is twelve, but contains no instruction related to the holding of *White*. (T.R., Vol. III, Pp. 155-156); (T.R., Vol. I, Pp. 45-56) Inquiry by present counsel confirmed that all jury instructions given at trial are included in the record.

sufficient to support independent convictions for Especially Aggravated Kidnapping, or if this conduct was merely incidental to the robbery of the business. The absence of this instruction renders the jury's verdict infirm and Mr. Winton is entitled to relief in the form of a new trial.

Though this issue was not raised either at the trial court, or at the appellate level, this Court should review this issue under the standard of plain error and grant relief to Mr. Winton. Tennessee Rule of Appellate Procedure 36(b) states, in part, "when necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal". The plain error doctrine in Tennessee functions as an exception to appellate review preservation requirements and "tempers the blow of a rigid application" of such requirements. *State v. Minor*, 546 S.W.3d 59, 66 (Tenn. 2018); *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). This Court has the authority to grant review of Mr. Winton's issues regardless of his prior failure, through counsel, to raise them in either the trial court, or the Court of Criminal Appeals. *Minor*, 546 S.W.3d at 66.

A reviewing appellate court may only grant relief upon plain error when there is a clear, conspicuous, or obvious error that affects the substantial rights of the defendant. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In Tennessee, an appellate court will grant relief for plain error only if (a) the record clearly establishes what occurred in the trial court; (b) a clear and unequivocal rule of law has been breached; (c) a substantial right of the accused has been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice." *State v. Michael Smith*, 492 S.W.3d 224, 232–33 (Tenn.2016); *State v. Donald Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (citing *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994)). "[T]he presence of all

five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Donald Smith*, 24 S.W.3d at 283. When the defendant asserts that there has been plain error, it is "the defendant bears the burden of persuading the appellate court that the trial court committed plain error and that the error was of sufficient magnitude that it probably changed the outcome of the trial." *Michael Smith*, 492 S.W.3d at 232–33 (citing *State v. Hester*, 324 S.W.3d 1, 56 (Tenn. 2010))

Mr. Winton is entitled to relief as the absence of the jury instruction required by *White* meets all five of the requisite criterion for plain error review. The record is clear that this required instruction was not given as it is absent from the jury instructions in the record. As noted above, *White* requires such an instruction, so a clear and unequivocal rule of law has been breached. As *White* discusses at length, this instruction is designed to ensure that a jury will "effectuate the intent of the General Assembly to criminalize only those instances in which the removal or confinement of a victim is independently significant from an accompanying felony, such as rape or robbery." *White,* 362 S.W.3d at 578. This protects a defendant's Constitutional right to a fair trial by requiring a jury to find all elements of the charge beyond a reasonable doubt. This clearly affects a "substantial right" of Mr. Winton and the absence of the instruction adversely effected this right. There is no evidence in the record that Mr. Winton, either at the trial court or the appellate level, waived this argument for a tactical reason. Lastly, consideration of this error is necessary to do substantial justice. The clear absence of a mandated jury instruction, an instruction that was mandated for factual scenarios identical to Mr. Winton's in this indictment, is an error that cannot go unchecked. It has created both uncertainty in the jury's verdict as well as substantial prejudice to Mr. Winton given the outcome of the trial. This Court should grant review to correct this plain

error as Mr. Winton has satisfied all of the criterion for plain error review. This Court should reverse the error of the trial court and the Court of Criminal Appeals and remand this matter for a new trial with a properly instructed jury.

II. THE STATE ADDUCED INSUFFICIENT PROOF AT TRIAL THAT THE CONFINEMENT OF THE VICTIMS OF ESPECIALLY AGGRAVATED KIDNAPPING WAS INDEPENDENTLY SIGNIFICANT FROM THE UNDERLYING ROBBERY

The State also failed to produce sufficient evidence at trial related to the acts committed by Mr. Winton that differentiated his conduct in Count seven from that in Counts four and six and this Court should grant review to correct this error of the trial court and the Court of Criminal Appeals.

The trial court admitted a video of the robbery of the store as an exhibit to the trial and it was played for the jury. (T.R., Vol. II, P. 20, Ex. #3) The jury also heard testimony from Ms. Tomlin, Ms. Hill and Ms. Trussell about the actions of Mr. Winton during the robbery. Ms. Trussell stated that when Mr. Winton entered the store, he had what appeared to be a firearm and instructed all of them to get on the ground, which they did, then he instructed Ms. Tomlin to take him into another part of the store to retrieve the money. (T.R., Vol. II, Pp. 32-33) This was the only confinement related to Ms. Trussell as she stated she never saw Mr. Winton again after he took Ms. Tomlin in the back of the store. (T.R., Vol. II, P. 33:13-21) Ms. Hill testified that Mr. Winton came into the store with his gun drawn, instructed her to get on the floor, she complied and stayed on the floor until Mr. Winton left the store. (T.R., Vol. II, Pp. 69-74) When reviewing the video of the robbery, Ms. Hill described Mr. Winton as “escorting” Ms. Tomlin into the back of the store to open the safe. (T.R., Vol. II, P. 77:5-6)

Ms. Tomlin testified at the trial that Mr. Winton entered the store, instructed her to get on the ground, which she did, and then asked her where the money was kept. (T.R., Vol. III, Pp. 164-165) Mr. Winton then took Ms. Tomlin into the back room, she opened the safe, and he instructed her to get on the ground in that room, which she did, while he emptied the safe without speaking to her further. (T.R., Vol. III, Pp. 166-167) Ms. Tomlin stated that Mr. Winton "didn't say nothing at all after he got the money" and then she heard the back door to the store slam shut. (T.R., Vol. III, P. 168:13-18)

The Court in *White* provided the following guidance as an instruction to the jury on this differentiation:

> To establish whether the defendant's removal or confinement of the victim constituted a substantial interference with his or her liberty, the State must prove that the removal or confinement was to a greater degree than that necessary to commit the offense of [insert offense] which is the other offense charged in this case. In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors:
>
> • the nature and duration of the victim's removal or confinement by the defendant;
>
> • whether the removal or confinement occurred during the commission of the separate offense;
>
> • whether the interference with the victim's liberty was inherent in the nature of the separate offense;
>
> • whether the removal or confinement prevented the victim from summoning assistance, although the defendant need not have succeeded in preventing the victim from doing so;
>
> • whether the removal or confinement reduced the defendant's risk of detection, although the defendant need not have succeeded in this objective; and
>
> • whether the removal or confinement created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense.

White, 362 S.W.3d at 580-581. A review of the enumerated factors in relation to Mr. Winton's robbery demonstrate that all of the factors weigh in his favor. The robbery was short in duration, the confinement was during and inherent to the offense of robbery and it did not increase the risk

to the victims, nor was it done to prevent Mr. Winton's detection or prevent the victims from summoning help. No reasonable trier of fact could have determined, based on the evidence adduced at trial from the video and from the witnesses, that Mr. Winton confined any of the victims "to a degree greater than that necessary to commit the offense" of robbery. This Court should grant review and determine that the evidence presented, even in the light most favorable to the State, was insufficient to support to separate offenses of Especially Aggravated Kidnapping as to either Ms. Hill or Ms. Tomlin. This Court should vacate the convictions in Counts four and six and dismiss those charges.

III. THE TRIAL COURT ERRED WHEN IT SENTENCED MR. WINTON EXCESSIVELY

This Court should further grant review to correct the sentencing court and the Court of Criminal Appeals decisions related to Mr. Winton's excessive sentence. Appellate review of the length, range, or manner of service of a sentence imposed by the trial court are to be reviewed under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012); see also *State v. Pollard*, 432 S.W.3d 851, 859 (Tenn. 2013) (applying the standard to consecutive sentencing); see also *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012); T.C.A. § 40-35-401(d). In conducting its review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for

rehabilitation or treatment. See T.C.A. §§ 40-35-102, -103, -210; see also *Bise*, 380 S.W.3d at 697-98. The burden is on the appellant to demonstrate the impropriety of his sentence. See T.C.A. § 40-35-401, Sentencing Comm'n Cmts.

When a defendant challenges his/her sentence, the defendant has the burden of proving the sentence imposed by the trial court is improper, or failed to comply with the guidelines of the sentencing act. T.C.A. § 40-35-401, Sentencing Commission Comments; *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991). When making a determination regarding a Defendant's sentence, as to length and manner of service, the T.C.A. § 40-35-101, et seq. promulgates a number of factors for the trial court judge to consider. In addition to the enhancing and mitigating factors that the judge may consider under T.C.A §§ 40-35-113 and 114, the trial court judge must also weigh the purpose of the sentencing statute as discussed in T.C.A. § 40-35-102. The trial court must also factor into its determination the necessity for public safety versus alternatives to confinement discussed in T.C.A. § 40-35-103. When sentencing a Defendant, the trial judge must cite, on the record, the reasons that he/she is enhancing the Defendant's sentence beyond the minimum required sentence. The trial court judge must also determine the reason that he/she chooses confinement for the Defendant rather than some form of alternative sentencing. T.C.A. § 40-35-103.

If a defendant has been convicted of one or more offenses, the trial court must determine whether the sentences shall be served concurrently or consecutively. T.C.A. § 40-35-115(b). Further, T. C. A. § 40-35-115 discussions multiple convictions and states, in its sections pertinent to this case, "(a) If a defendant is convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively or concurrently as provided by the criteria in this section. (b)

The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> (6) The defendant is sentenced for an offense committed while on probation; or
> (7) The defendant is sentenced for criminal contempt.

In addition to the specific criteria in T.C.A. § 40-35-115(b), consecutive sentencing is guided by the general sentencing principles providing that the length of a sentence be "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed." T.C.A. §§ 40-35-102(1) and -103(2).

When reviewing the issue of the proper application of an enhancement factor by the trial court, the Tennessee Supreme Court has opined that "The determination of whether an enhancement factor is applicable must be undertaken on a case-by-case basis". *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn.2000). By statute, an enhancement factor must be appropriate for the offense and not an essential element of the offense. T.C.A. § 40-35-114 (1997 & Supp.2001).

The sentencing court failed to adequately consider the sentencing principles and crafted a sentence for Mr. Winton that was greater than necessary to achieve the purposes of sentencing. He is entitled to a resentencing.

CONCLUSION

For the reasons herein stated, this Court should find Mr. Winton is entitled to relief. Mr. Winton is entitled to a dismissal of the counts of conviction for Especially Aggravated Kidnapping as the State failed to prove that the confinement was independently significant from that which was necessary to perpetrate the robbery. Mr. Winton is entitled to a new trial where the jury is properly instructed pursuant to this Court's ruling in *State v. White*. Mr. Winton is further entitled to relief by a remand for resentencing in light of the sentencing principles espoused in the Tennessee Code.

Respectfully submitted,
THIS the 9th day of June, 2020

/s/ Manuel B. Russ
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CERTIFICATE OF SERVICE

I, Manuel B. Russ, counsel of record for Appellant, do hereby certify that a true and accurate copy of the foregoing **BRIEF OF APPELLANT** has been served upon the STATE OF TENNESSEE by hand delivering a copy of same and/or depositing a copy of same into the United States Mail, first class postage prepaid to the following address, Mr. Clark Thornton, Esq., Assistant Attorney General, Office of Tennessee Attorney General, 425 Fifth Avenue North, P.O. Box 20207, Nashville, Tennessee, 37202-0207, this the 9th day of June, 2020.

/s/ Manuel B. Russ
Manuel B. Russ #23866
Attorney for Appellant

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION III

STATE OF TENNESSEE	)	
	)	
VS.	)	**CASE NO.: 2019-C-1650**
	)	
KEVIN NEWSON	)	

AMENDED MOTION FOR NEW TRIAL

Comes now the Defendant, Mr. Kevin Newson, by and through undersigned counsel, Manuel B. Russ, pursuant Tennessee Rule of Criminal Procedure 33, hereby moves this Honorable Court to grant him a new trial for the following reasons:

1. The jury verdict was contrary to the weight and sufficiency of the evidence, and the evidence was insufficient to lead any rational trier of fact to conclude that Mr. Newson was guilty beyond a reasonable doubt of the charged offenses. There was insufficient evidence to prove Mr. Newson guilty in counts one through four of the indictment as the State failed to prove beyond a reasonable doubt that he was not acting in self-defense. Secondly, the State failed to adduce sufficient proof to counts one and three in the indictment that Mr. Newson was acting with premeditation when he shot Ms. Johnson, or when he shot at Mr. Cureton. Lastly, the State operated under the theory that, during the commission of the act of attempting to murder Mr. Cureton, Mr. Newson killed Ms. Johnson supporting the theory in count two of the indictment. As the record is devoid of proof to support the underlying charge in count three so count two also has insufficient proof to support the conviction.

A. Mr. Newson argued to the jury that, after the proof properly raised the defense, that he was not guilty of any of the charged offenses based on the fact that he was acting self-defense. Tennessee Code Annotated section 39-11-611 provides:

> (b)(1) Notwithstanding T.C.A. § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.
>
> (2) Notwithstanding T.C.A § 39-17- 1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:
>
> (A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;
>
> (B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and
>
> (C) The belief of danger is founded upon reasonable grounds.

A defendant's conduct and mental state must meet an objective standard of reasonableness for the conduct to be justified under this statutory defense. *State v. Bult*, 989 S.W.2d 730, 732 (Tenn. Crim. App. 1998). Merely because the defendant believes that his conduct is justified is not sufficient as T.C.A. § 39-17-1322 states:

> (a) A person shall not be charged with or convicted of a violation under this part [Title 39-Criminal Offenses, Chapter 17-Offenses Against Public Health, Safety and Welfare, Part 13-Weapons] if the person possessed, displayed or employed a handgun in justifiable self-defense or in justifiable defense of another during the commission of a crime in which that person or the other person defended was a victim.
>
> (b) A person who discharges a firearm within the geographical limits of a municipality shall not be deemed to have violated any ordinance in effect or be subject to any citation or fine the municipality may impose for discharging a firearm within the limits of the municipality if it is determined that when the firearm was discharged the person was acting in justifiable self-defense, defense of property, defense of another, or to prevent a criminal offense from occurring.

Once fairly raised by the proof, a defendant is entitled to an instruction on self-defense. *Myers v. State*, 206 S.W.2d 30, 32 (Tenn. 1947). It is well-established in Tennessee "that whether an individual acted in self-defense is a factual determination to be made by the jury as the sole trier of fact." *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997) (citing *State v. Ivy*, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993)).

Further, once the proof has raised self-defense, it is the State's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense." *State v. Belser*, 945 S.W.2d 776, 782 (Tenn. Crim. App. 1996), rejected on other grounds by *State v. Williams*, 977 S.W.2d 101 (Tenn. 1998); Tenn. Code Ann. § 39-11-201(a)(3)(2018). Recent case law has further expounded upon the duty to instruct on self-defense as well as the shifting burden once the defense has been raised by the proof:

> The quantum of proof necessary to fairly raise a general defense is less than that required to establish a proposition by a preponderance of the evidence. To determine whether a general defense has been fairly raised by the proof, a court must consider the evidence in the light most favorable to the defendant and draw all reasonable inferences in the defendant's favor. Whenever admissible evidence fairly raises a general defense, the trial court is required to submit the general defense to the jury. From that point, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defense does not apply. Within this structure, the trial court makes the threshold determination whether to charge the jury with self-defense, and . . . the trial court, as part of that threshold determination, should decide whether to charge the jury that a defendant did not have a duty to retreat. As part of that decision, the trial court should consider whether the State has produced clear and convincing evidence that the defendant was engaged in unlawful activity such that the "no duty to retreat" instruction would not apply. Because the allegedly unlawful activity will oftentimes be uncharged conduct similar to evidence of prior bad acts, the procedure outlined in Tennessee Rule of Evidence 404(b) should be utilized by the parties.

State v. Perrier, 536 S.W.3d 388, 403 (Tenn. 2017); see also *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013).

The State was unable to overcome its burden of proving, beyond a reasonable doubt, that Mr. Newson did not act in self-defense and no reasonable trier of fact would find that it had. The proof, even in the light most favorable to the State, demonstrated that Mr. Cureton had a verbal altercation with Mr. Newson in a parking lot where he approached Mr. Newson's vehicle, that he was armed during this altercation in which he was gesticulating aggressively and Mr. Newson perceived him to be threatening him with the weapon. The death of Ms. Johnson was unintended and may have been a crime, but it was

not felony murder as he was not guilty of any offense related to Mr. Cureton that would have permitted a return of a verdict of felony murder as he asserted the positive defense of self-defense and it was not defeated by the State's proof. He is entitled to have counts one through three against him dismissed for insufficient evidence.

B. In the section pertinent to this inquiry, T.C.A. § 39-13-202 provides:

> (a) First degree murder is:
>
> (1) A premeditated and intentional killing of another;
>
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, physical abuse in violation of § 71-6-119, aggravated neglect of an elderly or vulnerable adult in violation of § 39-15-508, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy; or
>
> ….
>
> (d) As used in subdivision (a)(1), "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Even in the light most favorable to the State, and operating under the State's own theory, there was never any proof that he acted with premeditation in the death of Ms. Johnson, or that he acted in a knowing manner in her death that would have provided sufficient proof to support the conviction of the lesser included offense of second degree murder. The evidence cannot support the conviction in Count one of the indictment.

C. Further, even in the light most favorable to the State, the record is devoid of proof to demonstrate that Mr. Newson acted with the requisite premeditative intent to kill Mr. Cureton when he shot at him as charged in Count three of the indictment. The State provided no proof that a reasonable jury could use to support the contention that Mr.

Newson acted with premeditation when he shot at Mr. Cureton, notwithstanding his above argument related to self-defense. The State's proof demonstrates that, under their theory, Mr. Cureton angered Mr. Newson during a heated exchange and shot at him. This in no way provides the jury with proof that he exercised "reflection and judgment" when planning to shoot at Mr. Cureton. Likewise, it fails to provide any reasonable jury with a basis to decide he was "sufficiently free from excitement and passion" when he formed the intent to kill Mr. Cureton. The State has provided insufficient evidence and the court should dismiss these convictions. Further, again under the evidence presented by the State, Mr. Newson shot wildly, hitting a building, a car, and a passenger in another during this incident that has been labeled an attempt to kill Mr. Cureton. This is insufficient proof that he acted in a knowing manner in trying to cause the death of Mr. Cureton and the evidence is insufficient to support the lesser charge of attempted second degree murder.

D. The State failed to adduce sufficient proof to support the conviction in Count two of the indictment. For the reasons cited above, Mr. Newson could not be found guilty of either the charged offense in Count three of the indictment of Attempted First Degree Murder, that served as the requisite felony in Count two of indictment, or of the lesser included offense of Attempted Second Degree Murder that was encompassed by the greater charged offense. Since the State failed to produce sufficient evidence of his guilt in Count three as to either the charged offense, or the lesser offense, there was no basis for the jury to sustain the verdict of guilt in Count two for the offense of Felony Murder as there was insufficient evidence to prove the underlying felony. Mr. Newson is entitled to relief on this basis and to have the judgment vacated in Counts one through three for the aforementioned reasons.

2. The trial court erred when it failed to act as the thirteenth juror in this matter pursuant to Tennessee Rule of Criminal Procedure 33(d).

3. The trial court erred when it permitted the State to impeach Mr. Newson with his prior convictions for robbery and burglary. (T.T., Pp. 662-663)

Tennessee Rule of Evidence 404(b) provides:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Further, Tennessee Rule of Evidence 609(3) provides, in part:

> If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.

The Advisory Notes to T.R.E. 609(3) provide further guidance stating if the witness is the accused "the trial judge 'must' make a determination before the accused elects to testify or not that the probative value of the conviction 'on credibility' is greater than its 'unfair prejudicial effect on the substantive issues.'"

This necessitates a similar analysis to the one the Court must undertake in determining the probative value versus the prejudicial effect of evidence pursuant to T.R.E. 404(b)(4).

When making a determination as to probative value versus unfair prejudice, "The general rule excluding evidence of other crimes is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime." *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn.1994). Tennessee Courts have furthered stated, regarding admission of evidence pursuant to T.R.E 404(b), that, "Only in an exceptional case will another crime, wrong, or bad act be relevant to an issue other than the accused's character. Such exceptional cases include identity, intent, motive, opportunity, or rebuttal of mistake or accident". *State v. Luellen*, 867 S.W.2d 736, 740 (1992). "The safeguards in Rule 404(b) ensure that defendants are not convicted for charged offenses based on evidence of prior crimes, wrongs or acts." *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005) (citing *James*, at 758 (Tenn. 2002)).

Specifically, in relation to impeachment by prior convictions of the accused, the Tennessee Supreme Court has opined that "the unfairly prejudicial effect of an impeaching conviction on the substantive issues greatly increases if the impeaching conviction is substantially similar to the crime for which the defendant is being tried. Therefore, trial courts should carefully balance the probative value of the impeaching conviction on credibility against its unfairly prejudicial effect on substantive issues." *State v. Mixon*, 983 S.W.2d 661, 674 (Tenn. 1999)

Due to the similarity in the violent nature and use of firearms between the charged offenses of First Degree Murder and Attempted First Degree Murder and Mr. Newson's prior conviction for robbery, the Court erred in determining that these convictions were more probative of his character for truthfulness than they were prejudicial to a fair

determination of the "substantive issues" at trial. Mr. Newson is entitled to a new trial on this basis.

4. The trial court erred when charging the jury in Mr. Newson's case by erroneously instructing the jury on self-defense and by refusing to instruct the jury properly on all lesser included offenses fairly raised by the evidence adduced at trial.

A defendant has a constitutional right to a full and complete charge of the law. *State v. Walker*, 29 S.W.3d 885, 893 (Tenn. Crim. App. 1999) (citing *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990)); see also *State v. James*, 315 S.W.3d 440, 446 (Tenn. 2010)("[T]he trial court has a duty to provide a 'complete charge of the law applicable to the facts of the case.'"). Trial courts have an obligation to give a full instruction concerning the charge of the offense. *Id.* A jury instruction is prejudicially erroneous "only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law." *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005) (citing *State v. Vann*, 976 S.W.2d 93, 101 (Tenn. 1998)). As noted above, T.C.A. § 39-11-611 provides the statutory basis for the defense of self-defense and T.C.A. § 39-17-1322 further expounds upon the details of the defense. *Myers* and *Belser* place the burden on the State to prove, beyond a reasonable doubt, that the defendant did not act out of self-defense once the issue has been properly raised by the proof. The trial court's errors related to the self-defense instruction were twofold.

A. The trial court was in error when it determined that Mr. Newson had been engaged in "unlawful activity" at the time of the offensive conduct that would negate the portion of the instruction related to his duty to retreat as the unlawful activity he was engaged in had no "causal nexus" with the charged offenses.

As threshold matter, the trial court did not comply with the jury-out procedure and made determination that Mr. Newson was engaged in unlawful activity without hearing any proof on the matter. (T.T., P. 537 & 659-660) The trial court then determined that he was engaged in unlawful activity merely by being in possession of a weapon as a convicted felon and that fact would preclude the full instruction on self-defense despite the lack of "causal nexus" between the unlawful behavior and the offensive conduct. (T.T., Pp. 659-660) In *Perrier*, the Tennessee Supreme Court specifically noted that it did not reach the issue of whether the "unlawful activity" needed a "causal nexus" between the conduct and the exercise of self-defense. *Perrier*, 536 S.W.2d at 404-405. In a recent Court of Criminal Appeals case, the Court addressed this gap in the *Perrier* Court's explanation in substantially similar circumstances. In *State v. Booker*, the defendant was a juvenile in possession of a firearm that then argued self-defense at trial and the trial court made a similar determination that, when instructing the jury, Booker was not entitled to the "no duty to retreat" portion of the instruction because of the "unlawful activity" he engaged in by carrying a firearm as a juvenile. *State v. Booker* 2020 WL 1697367 at 24. Booker argued, and the Court of Criminal Appeals accepted that, based on the specific language from T.C.A. § 39-11-611, a person is entitled to the "no duty to retreat" instruction if the person "not engaged in unlawful activity and is in a place where the person has a right to be" refers to the common law "true man doctrine". The Court of Criminal Appeals noted that the true man doctrine is "simply another name for the no-duty-to-retreat rule" which provides "that one does not have to retreat from threatened attack" as long as "the defendant is without fault in provoking the confrontation, and when the defendant is in a place where he has a lawful right to be and is there placed in a reasonably apparent danger of imminent

bodily harm or death". Citing *Perrier*, 536 S.W. 3d at 399. More critically to this inquiry, the *Booker* court determined:

> That the 'engaged in unlawful activity' phrase is 'an elaboration of the of the "without fault in provoking the confrontation" requirement from the true man doctrine. He insists that the 'without fault' language does not refer to fault in general, but rather, fault in causing the confrontation at issue. We agree.

Booker at 26. The opinion cites older case law and common law to note that a person using force in self-defense enjoys a greater deference when he/she is "in the right", but if the person is "in the wrong" they have a duty to retreat. See *Voight v. State*, 109 S.W. 268, 270 (Tex.Crim.App. 1908); see also *Storey v. State*, 72 Ala. 329, 336 (1882). The *Booker* court goes on to say that "[t]o interpret the statute without a nexus between the 'unlawful activity' and the duty to retreat would lead to absurd results" and cites numerous out of jurisdiction cases including a case from Oregon and a case from West Virginia wherein each defendant was committing a weapons offense when exercising self-defense but that in neither case did this defeat his right to self-defense. See *Oregon v. Davis*, 51 Or. 136, 94 P. 44, 53 (1908); *West Virginia v. Foley*, 128 W.Va. 166, 35 S.E.2d 854, 861 (1945). When analyzing the propriety of *Booker* forfeiting his "no duty to retreat" entitlement because of his "unlawful activity" of being a juvenile in possession of a weapon, the Court stated that "status offenses such as this will rarely qualify as unlawful activity because a person's status alone cannot provoke, cause, or produce a situation". *Booker* at 27.

Other than the exact statute making it unlawful for Mr. Newson to possess a firearm, his situation is identical to Booker's. The case makes clear that there must be a linkage between the "unlawful activity" and the forfeiture of the "no duty to retreat" because the "unlawful activity" is requisite as the cause of the confrontation that led to use

of self-defense if it is to be forfeited by the defendant's wrongdoing. Simply being a felon in possession is insufficient to trigger this repercussion and the trial court erred when it altered the jury instruction based on that.

Further, Mr. Newson's sole defense at trial was self-defense. Any diminution of this defense was overwhelmingly prejudicial because he presented no other proof and made no other argument to the jury. Had the jury been instructed properly they would have determined that he used deadly force in a place he had a lawful right to be when he perceived that he was being threatened with like force by another individual. Changing the instruction to make it more onerous for Mr. Newson to effectively assert his chosen defense created prejudice and reversible error.

B. The trial court also further erred when it failed to follow the specifically outlined procedure from *Perrier* related to the self-defense instruction. Tennessee Patterned Criminal Jury Instruction 40.06 provides, in the pertinent part:

> Included in the defendant's plea of not guilty is *[his][her]* plea of self-defense.
> If a defendant was in a place where he or she had a right to be, he or she would have a right to *[threaten][use]* force against the *[deceased][alleged victim]* when and to the degree the defendant reasonably believed the force was immediately necessary to protect against the alleged victim's *[use][attempted use]* of unlawful force. **[Remove this bracketed language if the trial court finds the defendant was engaged in unlawful activity after a hearing. See Comment Two**: The defendant would also have no duty to retreat before *[threatening][using]* force.**]** (emphasis in original)

Comment Three to the instruction adds:

> Therefore, if the trial court decides that the State has shown that the defendant was engaged in unlawful activity at the time, the bracketed language that "the defendant would also have no duty to retreat" should not be charged to the jury. The Court left unresolved the issue of whether the bracketed language should be removed if the unlawful activity had no "causal nexus" with the offense being tried, but was some other offense completely unrelated to the facts of the case.

The State then proposed to add the following language to the charge related to the duty to retreat stating: "The defendant had a duty to retreat before using deadly force. A duty to retreat means he was obligated to employ all means in his power, consistent with his own safety, to avoid danger and avert the necessity of taking the alleged victim's life". The trial court accepted the amendment and charged the jury thusly. (T.T., Pp. 752-753)

When evaluating the propriety of a special jury instruction, the trial court must determine if the proposed special instruction adds anything to the previously determined charge. "A requested instruction may be unnecessary if the judge's main charge fully and fairly states the applicable law. A criminal defendant has no right to have redundant instructions charged at his trial. Nor does he have a right to have irrelevant instructions charged." *State v. Bryant*, 654 S.W.2d 389, 390 (Tenn. 1983); (citing *Edwards v. State*, 540 S.W.2d 641 (Tenn.1976)). This rule would apply to the State just as it applies to the defendant and the additional instruction requested by the State was, at best, redundant and should not have been included.

However, the inclusion of the special instruction went further and was more erroneous than that. Rather than follow the clear instruction provided by the Tennessee Supreme Court and Patterned Instruction 40.06 and eliminate the section about Mr. Newson having "no duty to retreat", the trial court instead erroneously adopted the State's requested special instruction and read it to the jury. (T.T., Pp. 742&752-753) This instruction not only misstates the law in Tennessee, it further is contrary to the express instruction provided in Patterned Instruction 40.06. Worse still, it created the erroneous impression on the jury that Mr. Newson had an affirmative duty to retreat before using force which not only is not supported by the case law, it shifts the burden of proof from the

State to the defense. The trial court inserted this instruction to "assist" the jury, however, absent that portion of the instruction referenced, nowhere does the phrase "duty to retreat" appear so there was no need to instruct the jury on its meaning and, rather than assisting, added confusion by shifting the burden to the defendant. This was non-harmless error and Mr. Newson is entitled to a new trial based on this error.

C. The trial court further erred when it refused to instruct the jury on the potential lesser included offense of Aggravated Assault Resulting in Death codified in T.C.A. § 39-13-102(a)(1). (T.T., Pp. 742-747&758-759) Tennessee Patterned Instruction 6.02(a) relates to Aggravated Assault. Mr. Newson requested that the trial court instruction the jury on Aggravated Assault that led to the death of an individual. The specific relevant sections of the patterned instruction state:

> Any person who commits the offense of aggravated assault 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:
> (a) that the defendant intentionally or knowingly caused bodily injury to another; and
>
> (a) that the act resulted in the death of another.

Based on the proof adduced at trial, a reasonable jury could have believed that Mr. Newson engaged in Aggravated Assault by firing the weapon into the parking lot that then led to the death of Ms. Johnson. The trial court erred when it refused to give this instruction upon request.

5. The trial court erred when it limited counsel for Mr. Newson's ability to cross examine multiple witnesses. Article 1, Section 9 of the Tennessee Constitution guarantees a criminal defendant the right to meet his accusers "face to face". This right is also

guaranteed in the Sixth Amendment to the United States Constitution. Embedded in those rights is the right to confront witnesses by being permitted to cross-examine.

If a defendant's right to cross-examine witnesses has been denied, the denial is "constitutional error of the first magnitude and amounts to a violation of the basic right to a fair trial." *State v. Hill*, 598 S.W.2d 815, 819 (Tenn.Crim.App. 1980). However, the manner in which cross-examination occurs as well as the length and scope of that examination is within the discretion of the trial court. *Coffee v. State*, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948); *Davis v. State*, 186 Tenn. 545, 212 S.W.2d 374, 375 (1948). Tennessee courts have further stated that:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness.... A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalties in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony."

State v. Reid, 882 S.W.2d 423, 427-428 (Tenn. Crim. App. 1994); citing 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970).

The trial court restricted counsel for Mr. Newson from a thorough and sifting cross-examination of various witnesses during trial. Specifically, the trial court repeatedly and erroneously instructed defense counsel for Mr. Newson that he was cross-examining Mr. Bryant Cureton improperly on several occasions claiming he was not using prior recorded testimony for impeachment correctly despite Mr. Cureton's refusal to acknowledge his

prior testimony. (T.T., Pp. 310-312&320-323) The trial court further erroneously curtailed Mr. Newson's cross-examination of Mr. Forrest Bradford when he was prevented from referencing Mr. Bradford's prior expressed opinions related to Mr. Newson's claim of self-defense. (T.T., Pp. 397-403) The trial court still further erroneously restricted Mr. Newson's counsel's ability to demonstrate the prior inconsistent statement of Mr. Kenjuante Williams through the testimony of Detective Paul Harris by claiming he could not ask about specific prior inconsistencies of Mr. Williams' testimony related to benefits for his cooperation. (T.T., Pp. 601-607) Specifically, the trial court would not permit questioning of Detective Harris about benefits to Mr. Williams related to probation violation being disposed of favorably because the trial court erroneously believed Mr. Williams had never been asked that by defense counsel. The trial court stated that defense counsel had not asked Mr. Williams if matters would be settled favorably for him. (T.T., P 604:11-605:21) However, in Mr. Williams' examination, Defense counsel asked:

> Defense Counsel: Okay. Are you hoping that after this case is over, and when you get done testifying that you can go back in front of a judge and get out of jail?
>
> Mr. Williams: No.

(T.T., P. 531:2-5) This was clearly erroneous and an improper restriction on Mr. Newson's right to cross-examine. All of these instances of restricting Mr. Newson's ability to cross-examine witnesses were improper and Mr. Newson is entitled to a new trial on this basis.

6. The Court erred when it limited defense counsel's questions during voir dire. T.C.A. § 22-3-101 state's that "[p]arties in civil and criminal cases or their attorneys shall have an absolute right to examine prospective jurors in such cases, notwithstanding any rule of procedure or practice of court to the contrary." This right is reiterated in T.R.C.P. 24(b)(1) which states that while the Court may question jurors, "[i]t shall permit the parties

to ask questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges." As long as the questions are germane to the jurors potential to be fair and unbiased as a juror for the case, they are within the right of the parties to ask. Mr. Newson's counsel's questioning of potential jurors during voir dire was improperly curtailed and constitutes error. Specifically, Mr. Newson's attorney requested that he be permitted to discuss the theory of self-defense with the potential jurors based on Mr. Newson's theory of defense, but was significantly curtailed, preemptively, by the trial court. (Trial Transcript, Pp. 16-29) This was in error and improperly restricted his ability to present a defense.

A defendant in a criminal case has the absolute right to present a defense pursuant to the due process clause of both the United States and Tennessee Constitutions. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) "Principles of due process require that a defendant in a criminal trial have the right to present a defense and to offer testimony" favorable to his cause. *State v. Flood*, 219 S.W.3d 307, 316 (Tenn. 2007) (citing *Chambers*, 410 U.S. at 294; *State v. Brown*, 29 S.W.3d 427, 431 (Tenn. 2000). This includes questioning jurors thoroughly and unfettered about their ability to be fair and impartial to his planned defense. When the trial court limited Mr. Newson's counsel from describing the more nuanced details related to self-defense in his particular case it exceeded its supervisory powers and curtailed his ability to present his Constitutionally protected defense at trial. Mr. Newson is entitled to a new trial on this basis.

7. The Court erred by admitting evidence of a car which was possibly struck by a stray bullet when there were no witnesses who could testify as to the accuracy of this assertion. Defense counsel requested that Ms. Danielle Conner be restricted from testifying that a "bullet defect" located on a car in the parking lot where the shooting occurred came from gunfire from Mr. Newson. (T.T., Pp. 432-433) The trial court erroneously permitted this as it was mere speculation on Ms. Conner's part with no foundation and it was prejudicial to Mr. Newson to allow the jury to hear about the car and surmising that it must have been hit during the incident. T.R.E. 602 states, in part, that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter". Ms. Conner did not know how or when the "bullet defect" in the unrelated vehicle occurred and to permit her to testify without restriction created the prejudicial impression to the jury that Mr. Newson's gunfire on that occasion was reckless and untargeted, undermining his later defense of self-defense. He is entitled to relief in the form of a new trial.

8. The State committed prosecutorial misconduct during closing argument, including but not limited to mischaracterizing, misstating, and misleading the jury about the evidence by accusing Mr. Newson of making statements that were not supported by the physical evidence and making arguments designed to inflame the passions or prejudices of the jury by calling Mr. Newson untruthful repeatedly. Additionally, the prosecutors made improper arguments by injecting issues broader than the guilt or innocence of the accused by discussing his incentive in the trial to be untruthful.

"The entry of a mistrial is appropriate when the trial cannot continue for some reason, or if the trial does continue, a miscarriage of justice will occur." *State v.*

McPherson, 882 S.W.2d 365, 370 (Tenn.Crim.App.1994). When an allegation of prosecutorial misconduct has been made by a defendant, the appellate court must consider several factors. "The general test to be applied is whether the improper conduct could have affected the verdict to the prejudice of the defendant." *Harrington v. State,* 215 Tenn. 338, 385 S.W.2d 758, 759 (Tenn.1965); see also *State v. Richardson,* 995 S.W.2d 119, 127 (Tenn.Crim.App.1998). The factors relevant to the court's determination are:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976); see also *State v. Francis*, 669 S.W.2d 85, 91 (Tenn.1984) Particularly in reference to improper closing argument by the State, it is improper for either party, during closing arguments, to discuss facts that are not in evidence, or to mischaracterize facts that are in evidence. "Our supreme court has long recognized that closing argument is a valuable privilege for both the State and the defense and have allowed wide latitude to counsel in arguing their cases to the jury". *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn.Crim.App. 2003); citing *State v. Cauthern,* 967 S.W.2d 726, 737 (Tenn.1994). Despite the latitude permitted, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law or they will be impermissible. *Coker v. State,* 911 S.W.2d 357, 368 (Tenn.Crim.App.1995). Specifically in relation to restrictions of the prosecution's closing arguments, the United State Supreme Court has stated that while a prosecutor must be permitted to argue their case forcefully and persuasively, the

prosecuting attorney "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

When the defense asserts improper closing argument by the State, "[t]he general test to be applied is whether the improper conduct could have affected the verdict to the prejudice of the defendant". *Harrington v. State,* 215 Tenn. 338, 385 S.W.2d 758, 759 (Tenn. 1965); see also *State v. Richardson,* 995 S.W.2d 119, 127 (Tenn.Crim.App.1998). In reference to prosecutorial misconduct in closing arguments, Tennessee courts have set forth a list of criterion to evaluate the degree and intent of the misconduct during the argument as a means of assisting a reviewing court in evaluating the conduct. The "five generally recognized areas of prosecutorial misconduct related to closing argument" are as follows:

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

Goltz 111 S.W.3d at 6.

When evaluating the effects of prosecutorial misconduct during closing argument, *Francis* and *Judge* provide a list of factors to determine whether the infraction was handled

in the appropriate manner by the trial court. In making its determination regarding improper closing statement, the trial court should review:

> 1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
>
> 2. The curative measures undertaken by the court and the prosecution.
>
> 3. The intent of the prosecutor in making the improper statement.
>
> 4. The cumulative effect of the improper conduct and any other errors in the record.
>
> 5. The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976); see also *State v. Francis*, 669 S.W.2d 85, 91 (Tenn.1984). The holding in *Goltz* further discusses the intersection between improper argument and unethical and/or unprofessional conduct by a prosecutor, citing ABA standards that the court deems favorable guidelines to assist in appellate review of the issue:

> 1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> 2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *See State v. Thornton,* 10 S.W.3d 229, 235 (Tenn.Crim.App.1999); *Lackey v. State,* 578 S.W.2d 101, 107 (Tenn.Crim.App.1978); Tenn.Code of Prof'l Responsibility DR 7–106(c)(4).
>
> 3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. *See Cauthern,* 967 S.W.2d at 737; *State v. Stephenson,* 878 S.W.2d 530, 541 (Tenn.1994).
>
> 4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. *See Cauthern,* 967 S.W.2d at 737; *State v. Keen,* 926 S.W.2d 727, 736 (Tenn.1994).

> 5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

Goltz 111 S.W.3d at 5-7.

In Mr. Newson's case, the trial court permitted the State to make improper argument by allowing the attorney for the State to reference facts not in evidence, to mischaracterize the evidence that was presented to the jury and to discuss issues other than the guilt of Mr. Newson in closing. Specifically, during the State's rebuttal argument, the State's attorney told the jury that that Mr. Newson is "not a credible witness" which comments on his truthfulness during his testimony and then pointed out places where she told the jury that Mr. Newson was, in fact, being untruthful. (T.T., Pp. 799-804)

Further, the State's attorney claimed that the version of facts presented by Mr. Newson could not be supported by the physical evidence in relation to the trajectory of various bullets fired, but also referred to supposition and conclusion that was not presented at trial relating to the bullets striking a moving car in the parking lot. (T.T., P. 801:17-22) The trial court took no remedial measures related to this improper argument. As noted above, the in *Goltz*, it is unprofessional and improper conduct for the prosecutor to argue about facts not in the record, inject his/her personal opinion into argument and to comment their perception of the falsity of any witnesses testimony. If this improper argument had not been permitted, the jury's verdict would have been different. Mr. Newson is entitled to a new trial on this basis.

9. The trial court erred in having multiple *ex parte* communications with the jury during deliberations, including but not limited to answering questions the jury apparently had and opening a box containing a gun that was introduced into evidence within the box

and never opened during the trial. The jury's questions pertained to their ability to view the firearm that was contained inside a box and also about the order of deliberation and whether they could proceed to lesser or other charges without deciding the greater and/or first charge listed on the verdict forms.[1]

The 6th Amendment to the United States Constitution and Article § 9 of the Tennessee Constitution provide a criminal defendant with the right to an impartial jury when on trial for a criminal offense. "Given the importance of judicial impartiality and fairness in appearance as well as in fact, it is generally considered improper for the trial judge to communicate with jurors off the record and outside the presence of counsel." *State v. Tune*, 872 S.W.2d 922, 928 (Tenn. Crim. App. 1993); see also *State v. Smith*, 751 S.W.2d 468, 472 (Tenn.Crim.App.1988); *State v. Mays*, 677 S.W.2d 476, 479 (Tenn.Crim.App.1984). If the *ex parte* communications between the judge and the jury are related to an aspect of the matter on trial, the trial judge should generally inform the counsel for the parties about the communication. *Rushen v. Spain*, 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983). The United States Supreme Court has ruled that questions relating to prejudice engendered by the failure of the trial court to disclose its communication with the jury to counsel may be resolved by a hearing after the trial has been completed. *Id.*

In addition to the impropriety of *ex parte* judge-jury communication, juries are not permitted to review, research or be influenced by extraneous information that was not

[1] The jury questions were not read into the record and the clerk's file does not contain copies of the questions that the jury posed to the Court.

presented during the trial of the case. The Tennessee Supreme Court has stated the following regarding extraneous evidence that a jury may not consider during deliberations:

> Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge. *Caldararo ex rel. Caldararo v. Vanderbilt Univ.,* 794 S.W.2d 738, 743 (Tenn.Ct.App.1990). When a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable. *See State v. Blackwell,* 664 S.W.2d 686, 688 (Tenn.1984). Extraneous prejudicial information has been broadly defined as information "coming from without." *State v. Coker,* 746 S.W.2d 167, 171 (Tenn.1987) (internal quotation marks omitted). More specifically, extraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case. *Robinson v. Polk,* 438 F.3d 350, 363 (4th Cir.2006); *Blackwell,* 664 S.W.2d at 688–89;*see also*27 Charles Alan Wright et al., *Federal Practice and Procedure* § 6075 (2d ed.2012) An improper outside influence is any unauthorized "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954); see also *Blackwell*, 664 S.W.2d at 689; Wright § 6075.

State v. Adams, 405 S.W.3d 641, 650-651 (Tenn. 2013)

The trial court, apparently, fielded a question of the jury in Mr. Newson's case related to their request to view the firearm used introduced into evidence and, without consulting either party, permitted one of the Court's officers to enter the jury room, open the container that held the weapon and to be present while the jury viewed the weapon. (T.T., P. 858:1-10) In addition to the impropriety of failing to inform or consult the parties about this request prior to answering it and permitting the officer to enter the room, the jury was then able to review evidence that was in a manner that was not done in open court during the trial, nor in the presence of Mr. Newson's counsel. Further, though the Court alluded to the safety issue, it permitted her officer to remain in the jury room while deliberations were going on. This *Ex parte* contact with the jury, as well as the assistance of the trial court with the review of evidence, was impermissible and prejudicial to Mr.

Newson and is exactly the type of contact that *Tune* and *Spain* warn the trial court to avoid. Further, regardless of any intent or malice on the part of the court officer, his presence in the room with the jury during deliberations violates the sanctity of the jury as well as permits the jury to review evidence that, though admitted, was not viewed by the jury during deliberation in the same manner that Mr. Newson was able to view it during his trial. Both of these pitfalls are discussed in *Adams* and the trial court is, likewise, instructed to avoid such contact with the jury, directly or through its employees and officers. Mr. Newson is entitled to a new trial on this basis.

10. Kenjuante Williams, witness for the state, committed perjury when he testified he had no agreements with the State about being released from custody and that he did not expect to get any benefit from testifying for the State on his own matters. At the time of his testimony, he was incarcerated on a probation violation in case 2014-B-1513 from Division V Criminal Court in Davidson County. After his testimony, he was released from custody on that sentence and his petition to suspend was not opposed by the State's attorney by agreement on December 2nd, 2019.

In his testimony, Mr. Williams had the following exchange on cross-examination:

> Defense Counsel: Okay. Has anyone promised you anything for your testimony today, or told you how to testify?
>
> Mr. Williams: No.
>
> Defense Counsel: Okay. Has anyone told you to not accept any kind of offer, or anything, until this case is over?
>
> Mr. Williams: No. What do you mean by that?
>
> Defense Counsel: To not accept any kind of a deal, or anything, until this case is actually over?
>
> Mr. Williams: I am still in jail.
>
> Defense Counsel: Do what?

Mr. Williams: I am still in jail, so –

Defense Counsel: Okay. Well, the case isn't over yet; is it?

Mr. Williams: What case?

Defense Counsel: This case.

Mr. Williams: No. I guess not.

Defense Counsel: Okay. Are you hoping that after this case is over, and when you get done testifying that you can go back in front of a judge and get out of jail?

Mr. Williams: No.

(T.T., Pp. 530:11-531:5) Without question, Mr. Williams' answer to the final question was untruthful since he was released from custody thirty-three days after the jury convicted Mr. Newson and he clearly "hop[ed]" that he would get a benefit for his testimony. Further, since that petition was unopposed by the State, it defies logic or common sense to believe that he truthfully answer that he had no anticipation that he would receive benefit for his testimony. Mr. Williams' testimony was perjured.

Further, it was highly prejudicial to Mr. Newson regarding the most damning of his acts. While Mr. Newson was presenting a defense theory to the jury that he had committed no crime by acting in self-defense, Mr. Williams' testimony, in part, refutes that assertion by discussing not only his plans to flee the jurisdiction, but also his plans, through the assistance of Mr. Williams and other parties, to dispose of evidence. The information served to undercut his theory that he had committed no crime and all acts were in self-defense. Had the jury heard of the bias inherent in the nature of Mr. Williams' testimony, they could have discount or wholly disregarded the truthfulness of his testimony, but his willful perjury prevented that. Mr. Newson is entitled to a new trial on this basis.

WHEREFORE, for the reasons stated above, Mr. Newson respectfully requests that the Court dismiss the various counts of the indictment wherein the State has failed to

adduce sufficient proof to support the guilty verdicts. Alternatively, based on the above arguments, Mr. Newson moves this Court to grant him a new trial on the convictions in the above styled case.

Respectfully Submitted,

/s/ Manuel B. Russ
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CERTIFICATE OF SERVICE

I hereby certify that a trued and exact copy of the forgoing Motion has been delivered to the Office of the District Attorney General, via the Criminal Court Clerk, on this the 18th day of September, 2020.

/s/ Manuel B. Russ
MANUEL B. RUSS