The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Joshua B. Dougan

Office Address: (including county) 512 Roland Ave., Jackson, Madison County, TN 38301

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) 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.

The Council requests that applicants use 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 as detailed in the application instructions. Additionally you must 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 original application, or the digital copy may be submitted via email to rachel.harmon@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant District Attorney General, 26th Judicial District of Tennessee.

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

I was licensed in 2009. My BPR number is 028066.

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

I have held an active law license in the State of Tennessee (BPR No. 028066) since October 22, 2009. In addition, I am licensed to practice in the following Federal courts:

United States Court of Appeals for the Sixth Circuit – May 28, 2010 – Active

United States District Court for the Western District of Tennessee – November 16, 2009 – Active

United States District Court for the Eastern District of Tennessee – May 21, 2014 – Active

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

No.

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

Practice of Law

During my studies at the University of Tennessee College of Law, I worked as a clerk for the Office of the District Attorney General for Tennessee's 6th Judicial District under District Attorney Randall E. Nichols. I served intermittently in this role during law school.

In September 2009, I began employment with Rainey, Kizer, Reviere & Bell, PLC in Jackson,

Tennessee. I worked as an associate attorney at Rainey Kizer through December 2012.

In early 2013, I formed The Dougan Law Firm, PLLC, where I worked as a solo attorney through December 2018.

In January 2019, I was sworn in as an Assistant District Attorney General for Tennessee's 26th Judicial District under District Attorney Jody S. Pickens. I currently serve in this capacity.

Experience Other than Practice of Law

I am fortunate to come from a family of musicians. I took up piano at an early age, and pursued those studies through college. Since high school, I have worked as an independent musician in various contexts. I continue to provide music for churches, weddings, and other events. I have appeared on a handful of albums as a studio musician. For my family and me, music provides a meaningful creative outlet that fills needed roles in West Tennessee communities.

In 2013, I began service as an adjunct faculty member at the University of Memphis. In that role, which continued through 2018, I taught undergraduate-level courses related to the legal field.

While in college, I worked in various roles at Clark Shaw's Old Country Store from 2004 through 2006.

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.

I prosecute domestic violence and sexual offenses in all circuit, general sessions, and municipal courts throughout the 26th Judicial District's three counties – Chester, Henderson, and Madison. Criminal law constitutes 100% of my current practice. I handle criminal cases at all stages of both lower court and trial court litigation, including arraignments, preliminary hearings, pretrial motions, plea colloquies, jury trials, sentencing hearings, and motions for new trial.

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.

Associate Attorney, Rainey, Kizer, Reviere & Bell, PLC, September 2009 – December 2012

My legal career began in insurance defense, workers' compensation, and civil rights defense. My time at Rainey Kizer taught me the basics of effective legal research and writing. I had the privilege of practicing in both federal and state contexts under the excellent guidance of seasoned attorneys—some of whom have proceeded to fill judicial roles. Under their direction, I learned the ability to sift salient points from voluminous materials to draw a consistent picture of a case. I spent a great deal of time researching legal issues, drafting memoranda, reviewing and summarizing discovery materials, and drafting dispositive motions and responses.

Solo Practitioner, The Dougan Law Firm, PLLC, January 2013 – December 2018

I established a solo law practice in early 2013, where I engaged in a variety of practice areas. Criminal defense constituted a substantial portion of my practice. I handled both retained and appointed cases in circuit, general sessions, and municipal courts across West Tennessee. Clients looked to me for representation from everything from traffic tickets to first-degree murder.

While in solo practice, I handled appellate matters on a regular basis. Legal research, record review, and brief drafting frequently were a substantial part of my workload. I was fortunate to engage in a number of oral arguments before the Tennessee Supreme Court, Court of Appeals, and Court of Criminal Appeals.

I also spent a great deal of time working in Tennessee's juvenile justice system. In some cases, which involved juvenile delinquency, I served as defense counsel. In others, involving allegations of dependency and neglect, I served either as counsel for a parent, or as guardian ad litem on behalf of minor children.

Like many solo practitioners, I found myself engaged in matters in a variety of legal arenas. In my experience, these included civil litigation, immigration representation, and the application of municipal environmental code regulations—a matter that found its way before the Tennessee Court of Appeals.

Operating a small business for six years taught me the discipline and work ethic necessary to survive in a competitive, demanding environment. What's more, the nature of my practice involved a necessary development of interpersonal skills. The fulfillment of advising and guiding clients from initial consultations to resolutions was rewarding.

Assistant District Attorney General, 26th Judicial District, January 2019 – present

In my current role, I prosecute crimes involving domestic assault and sexual offenses. General Pickens saw the need to establish a dedicated prosecutor for domestic violence cases. I was the first to fill this role in the 26th Judicial District.

The concept of vertical prosecution recognizes the benefit of assigning a single prosecutor to a given case from its inception in a lower court through resolution in circuit or criminal court. This position allows me to gauge each case early in its process, resolving it a lower court or

sending the matter to circuit court via a preliminary hearing or waiver as appropriate. In my district, the process of initial appearance to indictment can take some number of months; a trial, if necessary, may follow many months later. Because I continue to handle domestic violence and sexual offense cases as they move from lower courts to circuit court, I am better able to maintain contact with victims, doing my best to ensure their continued safety and cooperation.

Despite COVID-related suspensions of jury trials, I have tried over 50 cases to verdict since early 2019. These trials have ranged from single-count misdemeanor charges to lengthy and complex first-degree murder cases. Because I handle cases in three different counties, I regularly coordinate with law enforcement from a variety of agencies and backgrounds. Additionally, I have worked to compile a group of expert witnesses for issues related to domestic violence: medical professionals assist a jury in understanding the dynamics of strangulation, while mental health and psychological experts explain how victims experience and respond to cycles of domestic violence. Because domestic violence and sex offenses often affect victims in counterintuitive ways, expert witnesses continue to play an important part of my trial strategies.

Legal research and writing constitutes a modest but important part of my practice. In addition to regularly researching applicable statutes, I file motions and responses as may be appropriate in various matters. I also stay abreast of changes in the law, relaying changes to law enforcement and other actors in the criminal justice system through training sessions and educational events.

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

State v. Minor, 546 S.W.3d 59 (Tenn. 2018). Following initial counsel's withdrawal, the Tennessee Supreme Court appointed me to represent appellant on his appeal of his sentence enhancement applied under Tennessee's gang enhancement statute. The Supreme Court directed both parties to address the application of *Henderson v. United States*, 568 U.S. 266, 133 S. Ct. 1121 (2013). Through *Minor*, the Court clarified the interplay among appellate review preservation requirements, the plain error doctrine, and the retroactive application of new rules. The Court ultimately granted my client relief—overruling Tennessee appellate court precedent—and remanded his case to the trial court for resentencing.

State v. McAlister, No. W2020-00651-CCA-R3-CD, 2021 Tenn. Crim. App. LEXIS 443 (Tenn. Crim. App. Sep. 22, 2021). The Court of Criminal Appeals affirmed a case that I prosecuted at jury trial. This matter was notable for two reasons. First, I achieved a guilty verdict in a domestic violence case in which the victim refused to cooperate or appear in court. To reach a conviction, I employed the forfeiture by wrongdoing doctrine set forth in Tenn. Rule Evid. 804(b)(6). Additionally, I called an expert witness in the field of victim dynamics to help the jury understand how cycles of domestic abuse impact a survivor's mindset and behavior, including her unwillingness to appear for trial. Through the effective work of law enforcement, these trial strategies resulted in a felony conviction and prison sentence for a domestic abuser who otherwise would have walked away from his crime without consequences.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected

or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

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

While in solo practice, I served on a regular basis as guardian ad litem in cases where the State of Tennessee brought dependency and neglect actions against parents. In that role, I built and maintained connections with minors both in and out of State custody. I used those connections, coupled with other investigation as warranted, to advocate for the best interests of children in juvenile courts across West Tennessee.

Similarly, I was appointed as guardian ad litem in multiple conservatorship cases. In that capacity, I met with both petitioners and respondents, reviewed medical records, conferred with medical professionals, and collected other relevant information. That, in turn, prepared me to draft written court reports, and to appear in court to advocate for the respondent's best interests.

Since 2017, I have served on the Board of Trustees of Union University, a four-year liberal arts university in Jackson, Tennessee. Since 2021, I have served as Secretary of the Board. The Board's Finance and Audit Committee, of which I am a member, provides regular oversight of the University's operations, and guidance to the University's president and executive leadership team.

A number of years ago, I served as a trustee of First Baptist Church of Jackson. In this role, I occasionally reviewed and signed various documents related to the church's business and corporate governance.

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

The COVID-19 pandemic affected the criminal justice system in unprecedented ways. The suspension of jury trials—indeed, of nearly all facets of the court system—imposed unique challenges on domestic violence prosecutions. As victims experience the cycle of domestic violence, they often choose not to participate in the court process, either because they have returned to their abusive relationship, or because they have distanced themselves from their abusers. Maintaining victim connection and encouraging victim participation is always difficult, even in a pre-pandemic world.

In the face of these challenges, I am proud of our office's efforts to consistently engage with

victims and work towards both victim safety and defendant accountability. In a difficult environment, we continued to reach victims and provide services in addition to prosecuting domestic violence offenders to the extent possible. It's my hope that the 26th District is a safer place because of those efforts.

I have occasionally engaged in educational programs at local schools. These opportunities typically consist either of a presentation about a pending case of note, or of a more informal question-and-answer session with students about legal issues. Providing younger generations of Tennesseans with a clear-eyed view of the legal system instills confidence in the institutions of law and justice.

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

Not applicable.

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.

I attended the University of Tennessee College of Law from 2006 through 2009. I earned a Doctor of Jurisprudence, *cum laude*, with a concentration in Advocacy and Dispute Resolution. While in law school, I was twice named to the Jerome Prince Evidence Moot Court team. I served as an extern to Hon. D. Michael Swinney of the Tennessee Court of Appeals, and as a law clerk for the District Attorney's Office for the Sixth Judicial District. Upon graduation, I was named to the Order of Barristers.

I attended Union University in Jackson, Tennessee from 2002 through 2006. I earned a Bachelor of Arts degree, *cum laude*, in Political Science with a double minor in Music and Interdisciplinary Honors. I was honored to receive the Elizabeth Tigrett medal, an annual award given to the outstanding graduating senior.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 38 years old. My birthday is [redacted] 1983.

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

I have lived in Tennessee for my entire life.

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

I have lived continuously in Madison County since 2009.

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

I am registered to vote in Madison County.

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

Not applicable.

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

No.

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

No.

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

No.

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

No.

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

No.

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

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

First Baptist Church, Jackson, Tennessee. Member, 2010-present. I have served in various roles at First Baptist, including deacon, trustee, and personnel committee chair.

Union University Board of Trustees: Trustee, 2017-present. Secretary of the Board, 2020-present.

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.

While pursuing my undergraduate degree, I was a member of Phi Mu Alpha, a men's fraternity for those interested in music. My active membership in Phi Mu Alpha ended upon my graduation.

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, 2009-2018. During my tenure as a Tennessee Bar Association member, I served in multiple leadership roles with the Young Lawyers Division: West Tennessee Governor; Secretary; High School Mock Trial Committee Chair; Mock Trial Long Range Planning Committee Chair; West Tennessee Wills for Heroes Captain.

Jackson-Madison County Bar Association, 2009-2018. I served as chair of the Young Lawyers Division.

Howell Edmunds Jackson American Inn of Court, 2016-2018.

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.

West Tennessee Legal Services Award - 2017

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

None.

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.

Following the *State v. Minor* Tennessee Supreme Court case referenced above, I presented a CLE session as part of Jackson-Madison County Bar Association event.

As noted above, I taught law-related courses at the University of Memphis from 2013-2018. These included Business Law and the Legal Environment of Business.

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.

I have attached portions of two appellate briefs. Both are completely my own work.

ESSAYS/PERSONAL STATEMENTS

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

Tennesseans deserve judges who are not only fair and impartial, but who come from a variety of backgrounds and life experiences. I have been fortunate to practice in a variety of practice areas, including a substantial number of criminal cases and appeals. I am also grateful for the lessons learned during the operation of a solo law practice. It's my desire to use my experience, work ethic, and temperament to serve Tennesseans in this capacity.

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)***

While in law school and active practice, I have regularly engaged in providing legal services free of charge to persons of limited means. I participated in the University of Tennessee's Saturday Bar program, which coupled law professors with students to function as a walk-in legal clinic/answers program. Although my current employment has by its nature limited the extent to which I can provide pro bono service, I handled a number of matters pro bono while in solo practice. These occasionally came by way of referral from West Tennessee Legal Services.

As someone married to a foreign-born naturalized citizen, the value of the rights guaranteed to all Americans hits close to home for this father of four children who hold dual citizenship. Equal justice matters in a very real way to me and my family.

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

I seek a judgeship on the Court of Criminal Appeals, Western Division. The court is comprised

of twelve judges, for from each of Tennessee's grand divisions. The court hears appeals of criminal judgments – typically convictions, sentences, and post-conviction judgments – entered in circuit and criminal courts. My experience, professionalism, and judicial temperament would allow me to contribute to the court's work immediately upon appointment and confirmation. Additionally, by establishing my office in Jackson, my selection would ensure a consistent Court of Criminal Appeals judicial presence in the center of West Tennessee.

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)***

In my view, judges ought not withdraw from community life upon their assumption of the bench. As described above, I strive to take an active role in West Tennessee through my involvement in church, musical opportunities, and educational institutions. If I am selected for this role, my community service will continue.

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

I have been essentially deaf in one ear since birth. That defect, while relatively minor, has shaped my worldview. For me, listening well requires concentrated attention to both verbal and nonverbal cues. This ability contributes to the core of a judge's essential role: to listen critically, to absorb deeply, to reflect patiently, while rendering a decision accurately applying law to facts within the framework of reason and justice.

Years of working closely with domestic violence victims and their families has deepened in me the understanding that judicial decisions matter. They matter to defendants, survivors, witnesses, families, and communities. If I am selected to serve, I will approach each case with the knowledge that every case deserves my full attention, because every case affects a number of Tennesseans in real and important ways. Ultimately, my goal is to serve the people of Tennessee.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will. Judges who apply the law differently based on their own preferences or feelings erode public trust in the court system. In my own experience, I found that I disagreed with release eligibility guidelines pertaining to certain crimes, particularly aggravated assault. Regardless of my own feelings, however, my plea offers and sentencing positions followed the law with regard to each defendant's sentencing range and release eligibility.

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. Bradford D. Box
Partner – Rainey, Kizer, Reviere & Bell, PLC
[redacted]
Jackson, TN 38301
[redacted]

B. Dr. Lisa Piercey
Former Commissioner, Tennessee Department of Health
[redacted]
Milan, TN 38358
[redacted]

C. Dr. Ron Kirkland
President, Tennessee Medical Association
[redacted]
Jackson, TN 38305
[redacted]

D. Bill Dement
President, Dement Construction Company
[redacted]
Jackson, TN 38305
[redacted]

E. Dr. Samuel W. "Dub" Oliver
President, Union University
[redacted]
Jackson, TN
[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 21, 2022.

Signature

When completed, return this application to Rachel Harmon at the 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.

Joshua B. Dougan
Type or Print Name

Signature

October 21, 2022
Date

028066
BPR #

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

Introduction

In its order granting Appellant Christopher Minor's application for permission to appeal, this Court directed the parties' briefs to analyze the effect, if any, of *Henderson v. United States*[1] on the plain error analysis in this case.[2] Newly appointed counsel for Minor now offers this supplemental brief to comply with the Court's directive.

Law and Argument

This case involves a question of first impression before this Court: when a Tennessee appellate court issues a rule with constitutional implications, how does the new rule impact cases already within the appellate pipeline, but in which defendants failed to object to the error at the trial court level?

A. This Court need not resolve this case via Tennessee's plain error doctrine.

While this supplemental brief primarily addresses *Henderson's* impact on this Court's plain-error analysis, the Court could resolve this case simply by applying the appellate pipeline doctrine. Multiple Tennessee Court of Criminal Appeals decisions have retroactively applied *State v. Bonds*[3] to cases within the appellate pipeline without undertaking a plain error analysis. For example, in agreeing that it would be "nonsensical" *not* to apply *Bonds* retroactively to all cases pending on appeal, the Court of Criminal Appeals recently noted that a defendant was "entitled to the benefit of our ruling in *Bonds* because his case was pending on direct appeal at the time *Bonds*

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[1] 568 U.S. 266 (2013).
[2] *See* Order of July 20, 2017.
[3] 502 S.W.3d 118 (Tenn. Crim. App. 2016). This brief, due to its supplemental nature, does not discuss the nature and history of Tennessee's gang enhancement statute, codified at Tenn. Code Ann. § 40-35-121, nor does it outline the reasoning underlying the *Bonds* decision finding that a portion of that statute, as previously enacted, violated due process principles.

was decided. As such, the untimeliness of Defendant's motion for new trial is immaterial because he was neither required to properly raise this issue nor properly present it on appeal."[4]

Admittedly, other Court of Criminal Appeals opinions bypass the appellate pipeline doctrine and instead apply Tennessee's plain error standard to similar cases. For example, in the instant case, the Court of Criminal Appeals found Appellant ineligible for plain error relief because trial counsel failed to raise the constitutionality of the gang enhancement statute at the trial court level.[5] Should this Court decline to use the appellate pipeline doctrine and instead view this question through the lens of plain error, Appellant asserts that *whether plain error exists should be determined at the time of appellate review.* Thus, Minor deserves retroactive application of the *Bonds* standard. It is to this contention that *Henderson* speaks.

B. Tennessee should adopt *Henderson's* time-of-review plain error standard.

Tennessee's plain-error doctrine allows an appellate court to correct an error that affected an accused's substantial rights when necessary to substantial justice, "even though the error was not raised in the motion for new trial or assigned as error on appeal."[6] Appellants asserting plain-error relief must establish each of the following factors:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

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[4] *State v. Turner*, 2017 Tenn. Crim. App. LEXIS 274 at *20 (Tenn. Crim. App. Apr. 13, 2017). Notably, the *Turner* court reasoned that the case's outcome "would be the same even if we were to follow the plain error approach of *Gomez I*." *Id.* In doing so, that court looked to both *Gomez I*, 163 S.W.3d 632 (Tenn. 2005) and *Johnson v. United States*, 520 U.S. 461 (1997), to conclude that whether an error is plain or obvious is "determined by reference to the law existing as of the time of appellate consideration." *Turner* at *22-23. *See also State v. Byars*, 2017 Tenn. Crim. App. LEXIS 133 (Tenn. Crim. App. Feb. 27. 2017).
[5] *State v. Christopher Minor*, No. W2016-00348-CCA-R3-CD, 2017 Tenn. Crim. App. LEXIS 102 at *25-28 (Tenn. Crim. App. Feb. 16, 2017).
[6] Tenn. R. App. P. 36(b).

(d) the accused must not have waived the issue for tactical reasons; and,

(e) consideration of the error must be necessary to do substantial justice.[7]

The case at bar turns on the second factor: whether a clear and unequivocal rule of law was breached.[8] Specifically, this factor's temporal element stands at issue: *when* must the breach have occurred, and *when* does the knowledge of the breach count?

This Court should use *Henderson's* sound logic to find that a plain error analysis should be conducted through the lens of the law as it stands at the time of appellate review, not at the time that the error occurred in the trial court. First, *Henderson's* reasoning is consonant with Tennessee's approach to plain error. Second, *Henderson's* analysis treats similarly situated defendants fairly and consistently. Third, a time-of-review standard does not undercut contemporaneous-objection requirements. Finally, a time-of-review plain error standard undergirds the very nature of Tennessee's system of jurisprudence.

1. *Henderson*'s reasoning is consonant with Tennessee's approach to plain error.

In *Henderson*, the United States Supreme Court addressed the meaning of "plain error" within the context of Federal Rule of Criminal Procedure 52(b). There, a district court lengthened a criminal defendant's sentence in an attempt to "try to help" the defendant by qualifying him for an in-prison drug rehabilitation program.[9] Henderson's counsel failed to object.[10] While Henderson's case was on appeal, the Supreme Court decided *Tapia v. United States*.[11] *Tapia* held that a sentence similar to Henderson's was unlawful, thus making the trial court's imposition of

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[7] *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994); *see also State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the *Adkisson* factors).

[8] Ostensibly, the State agrees that each of the other four plain error elements are satisfied in this case. *See* State's Br. at 12.

[9] *Henderson*, 568 U.S. at 269.

[10] *Id.*

[11] 564 U.S. 319 (2011).

that sentence as erroneous.[12] But before *Tapia*, the question of whether a trial court could consider a defendant's rehabilitative needs in order to lengthen a sentence was unsettled.[13] Thus, the United States Court of Appeals for the Fifth Circuit concluded that, because the error was not plain *at the time of trial*, Henderson was not entitled to plain error relief.[14]

Henderson recognizes the conflict between two competing values. On one hand, "no principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to consider it."[15] Conversely, "an appellate court must apply the law in effect at the time it renders its decision."[16]

Henderson also looked towards *Johnson v. United States*.[17] There, the Court considered a trial court's decision that, although clearly correct when made by the trial court, had become "plainly erroneous due to an intervening authoritative legal decision."[18] Just as in both *Henderson* and the case at bar, trial counsel in *Johnson* failed to object to the trial court's error until the case was on appeal.[19] The *Johnson* Court concluded that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."[20]

Ultimately, the *Henderson* Court found that the temporal element of "plain error" applies at the time of review.[21] On one end, an error by a trial court (regardless of whether a defendant

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[12] *Henderson* at 270.
[13] *Id.*
[14] *Id.*
[15] *Henderson* at 271 (*quoting United States v. Olano*, 507 U.S. 725, 731 (1993)).
[16] *Id.* (*quoting Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969)).
[17] 520 U.S. 461 (1997).
[18] *Henderson* at 273.
[19] *Johnson*, 520 U.S. at 464.
[20] *Id.*
[21] *Henderson* at 273.

objects) is "plain" error as long as the trial court's decision was plainly incorrect at the time it was made.[22] The opposite bookend of this principle, as set forth in *Johnson*, is that an unobjected-to error by a trial court also falls within the scope of plain error even if the error was *not* plainly incorrect when made by the trial court.[23] By definition, then, *Johnson* explicitly rejects a time-of-error definition of plain error.

By looking to these bookends, the *Henderson* Court found that adopting a time-of-error standard for defendants who fall "in the middle"—that is, where the law at the time of the trial court's decision was neither clearly correct nor clearly incorrect, but was instead unsettled—would be inconsistent.[24] Instead, the better approach applies the time-of-review standard, as set forth in *Olano* and *Johnson*, to cases in which the legal principle at issue was unsettled at the time of the trial court's error.[25]

Since *Henderson's* publication, multiple states have adopted its reasoning. For example, the Georgia Supreme Court recently determined that *Henderson's* logic was sound:

> Recognizing that *Johnson*, *supra*, was existing progeny of *Olano*..., and that *Henderson, supra*, is based upon *Johnson's* conclusion that "plain error" includes that which is recognized as error at the time of appeal, even though it was clearly not considered error under precedent controlling at the time of trial, looking at persuasive federal authority, we reach the same conclusion under our plain error rule as the United States Supreme Court did in *Henderson* under Rule 52(b); whether an error is considered "clear or obvious" under the second prong of the plain error test is judged under the law existing at the time of appeal, regardless of whether the asserted error in the trial court was plainly incorrect at the time of trial, plainly correct at the time of trial, or an unsettled issue at the time of trial.[26]

The Minnesota Supreme Court reached the same conclusion:

> In sum, we have previously determined that plain error is determined as of the time of appellate review in three circumstances. The first circumstance is when the settled law is the same at the time of trial and appellate review. *State v. Dobbins*, 725 N.W.2d 492, 513

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[22] *Id.*
[23] *Id.* at 273-74.
[24] *Id.* at 274-75.
[25] *Id.*
[26] *Lyman v. State*, 800 S.E.2d 333, 2017 Ga. LEXIS 456 (Ga. 2017).

> (Minn. 2006); *see Olano*, 507 U.S. at 730-34. The second is when the law is settled at the time of trial and the settled law has been reversed as of the time of appellate review. *Griller*, 583 N.W.2d at 741; *see Johnson*, 520 U.S. at 464-67. The third is when the law is unsettled at the time of the district court's error and the law has become settled in the defendant's favor at the time of appellate review. *Baird*, 654 N.W.2d at 113; *see Henderson*, — U.S. at —, 133 S.Ct. at 1128–31.
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> We conclude that for purposes of applying the plain-error doctrine the court examines the law in existence at the time of appellate review, not the law in existence at the time of the district court's error, to determine whether an error is plain. Our conclusion is supported by our decision in *Baird* and the U.S. Supreme Court's decision in *Henderson*. Additionally, our conclusion simplifies the law by adopting a unified standard for the scenarios discussed in *Olano*, *Johnson*, and *Henderson*. [27]

Much like Georgia and Minnesota, Tennessee jurisprudence—specifically, by citing *Johnson* with approval—has signaled Tennessee's general adherence to federal plain error standards. Indeed, there is no dispute that a plain error avenue provides relief to a defendant in a case where the trial court made an error that was clearly wrong at the time it was made, and continued to be wrong during the course of appellate analysis.[28] Likewise, this Court has cited *Johnson* with approval, indicating its support for the proposition that an un-objected to error at the trial court level, even if clearly correct under current statements of the law at the time it was made, is grounds for relief if the error becomes plain at the time of appellate review.[29] Based on these precedents, this Court should to adopt a time-of-review standard for errors based on unsettled law, as set forth in *Henderson*, and complete the trilogy of plain error protection provided to Tennessee citizens.

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[27] *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014) (some internal citations omitted). Other jurisdictions also cite *Henderson* for the proposition that the time-of-review plain error standard is correct. *See, e.g.*, *Muir v. D.C.*, 129 A.3d 265 (D.C. Ct. App. 2016) ("*Henderson's* analysis of the plain error doctrine is persuasive..."); *State v. Maharaj*, 317 P.3d 659, 661 (Haw. 2013); *Romero v. State*, — P.2d. —, 2016 Nev. LEXIS 512 (Nev. 2016).

[28] This much is clear from Tennessee Rule of Appellate Procedure 36.

[29] *See State v. Gomez*, 163 S.W.3d 632, 646 (Tenn. 2005), *cert. granted, judgment vacated*, 549 U.S. 1190 (2007).

The case at bar presents an appropriate vehicle for Tennessee to adopt a uniform and consistent plain error doctrine, and to continue its tradition of general adherence to federal plain error standards. *Henderson*'s logic is persuasive, and this Court should adopt its reasoning.

2. *Henderson's* time-of-review standard applies the law fairly and consistently to similarly situated defendants.

Henderson's analysis treats similarly situated defendants fairly and equally. As discussed above, to apply a time-of-review standard to defendants whose counsel failed to object to trial court errors that were either plainly correct or plainly wrong at the time of their making, while applying a time-of-error standard to plain errors about unsettled law, imposes significantly different results on similarly situated defendants. *Henderson*'s discussion of this discrepancy, set forth *supra*, is apt.[30]

Importantly, the goal of applying legal principles in a just manner is not a novel concept. For example, the United States Supreme Court has long recognized that "because 'selective application of new rules violates the principle of treating similarly situated defendants the same,'" courts should "refuse[] to continue to tolerate the inequity that result[s] from not applying new rules retroactively to defendants whose cases had not yet become final." [31] What's more, there exist "no practical reasons to apply traditional principles of waiver to dismiss this issue." [32]

Based on this reasoning, Appellant asks this Court to adopt a time-of-review plain error standard in order to provide equal protections to similarly situated defendants.

3. *Henderson's* time-of-review standard does not undermine contemporaneous-objection requirements.

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[30] *Henderson*, 568 U.S. at 274-75.
[31] *Teague v. Lane*, 489 U.S. 288, 304 (1989) (*quoting Griffith v. Kentucky*, 479 U.S. 314, 323-24 (1987)).
[32] *Minor*, 2017 Tenn. Crim. App. LEXIS 102 at *34 (McMullen, J., dissenting).

The State complains that to adopt *Henderson*'s rationale would free defense attorneys to ignore contemporaneous objection requirements.[33] But not only is such concern overblown, it also presumes that criminal defense attorneys will willfully ignore both law and procedural rules.

Trial counsel must raise assignments of error in a timely manner.[34] Appellant acknowledges that, in theory, a time-of-error rule in cases in which the law is undecided might provide an added incentive to trial attorneys to call the trial court's attention to possible errors. And, in cases where the trial court makes a written ruling on an unsettled issue that is later part of a case that is appealed, the lower court's analysis conceivably may assist the reviewing court in deciding the issue.[35] But, as *Henderson* points out, any added incentive carries "little, if any, practical importance."[36] Trial counsel have good reasons for bringing potential error to the trial court's attention.[37]

A defense attorney who—scheming to take advantage of a time-of-review plain error standard—refuses to raise a possible trial court error has chosen to gamble on the narrowest of windows through which good fortune may shine upon a client. In practice, such a strategy would benefit a defendant only if (1) the legal question is actually undecided at the time a defendant foregoes an opportunity to challenge it, (2) the law indeed changes in a defendant's favor, (3) the change comes after trial but before an appeal is decided, (4) the error affects a defendant's "substantial rights," and (5) the error "seriously affected the fairness, integrity or public reputation of judicial proceedings."[38] A defense attorney foregoing the contemporaneous objection requirement in order to chance such a fortunate scenario runs the risk of failing to competently

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[33] State's Br. at 15-19.
[34] *See, e.g., In re: Adoption of E.N.R.*, 42 S.W.3d 26, 32-33 (Tenn. 2001) (internal citations omitted).
[35] *See Henderson* at 275-76.
[36] *Id.*
[37] *See id.*
[38] *Id.*; *see also Olano*, 507 U.S. at 732.

represent the defendant. This Court ought not implement a time-of-error plain error rule based on a fear that defense attorneys will ignore their own legal and ethical obligations to their clients.

4. *Henderson's* time-of-review standard underscores the nature of Tennessee's system of jurisprudence and provides clear guidance to intermediate appellate courts.

A fundamental element of Tennessee's appellate review rubric is that an appellate court should apply the law in effect at the time it renders its decision.[39] Indeed, the Supreme Court recognized this principle over two hundred years ago: in cases where a governing rule changes while a case is on appeal, the "court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."[40] Historically, this Court has also employed the same principle.[41]

Adopting a time-of-review standard advances this principle by confirming the immediate authority of appellate decisions. Indeed, as this Court recognized in *Adkisson*, plain error relief is appropriate in circumstances that "seriously affect the fairness, integrity or public reputation of judicial proceedings," and when necessary to prevent a miscarriage of justice.[42] Here, the retroactive application of the new constitutional rule announced in *Bonds* cuts to the very heart of the integrity of judicial proceedings. To adopt the State's position, in which similarly situation defendants are treated differently, would damage the public reputation of judicial proceedings by creating a rule in which a technical error (i.e., failing to challenge the rule in question at the trial court level) overrides the consistent application of constitutional standards. The "seemingly harsh

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[39] *See, e.g., Lease v. Tipton*, 722 S.W.2d 379 (Tenn. 1986).
[40] *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801); *see also Thorpe*, 393 U.S. at 281.
[41] *Lease v. Tipton*, 722 S.W.2d 379 (Tenn. 1986).
[42] 899 S.W.2d at 639.

impact" of the Court of Criminal Appeals' ruling in the instant case is both easily avoidable and detrimental to the fairness of Tennessee's judicial proceedings.[43]

Finally, this Court's implementation of *Henderson* would provide clear guidance to the Tennessee Court of Criminal Appeals. *Henderson*'s time-of-review test is simple. Rather than engage in the "temporal ping-pong" that concerned the *Henderson* Court, a time-of-review standard permits appellate courts to apply the law as it stands at the time of appeal. This rule comports with the basic principle of appellate courts noted above: that an appellate court must "apply the law in effect at the time it renders its decision."[44]

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[43] *Minor*, 2017 Tenn. Crim. App. LEXIS 102 at *28.
[44] *Henderson* at 275, 271 (internal citations omitted).

Conclusion

For these reasons, this Court should adopt *Henderson*'s rationale to declare a time-of-review plain error standard, find that the *Bonds* standard should be retroactively applied, reverse the Court of Criminal Appeals' decision, and remand this matter to the trial court for further proceedings.

Statement of Facts

In September of 2010, a jury convicted Appellant Bobby Croom of three counts of rape of a child and three counts of aggravated sexual battery.[1] On direct appeal, however, this Court dismissed four of Croom's convictions.[2] Croom received a new trial on the two remaining counts: Count 5, rape of a child, and Count 6, aggravated sexual battery.[3] In 2013, a jury convicted him on both counts.[4] The trial court imposed an effective sentence of 50 years.[5] Trial counsel subsequently filed a Motion for New Trial and/or Judgment of Acquittal.[6] After the trial court denied that motion, Croom once again appealed his case to this Court, which affirmed his conviction and sentence.[7]

Croom subsequently filed a petition for post-conviction relief.0 At the post-conviction hearing, trial counsel testified that the demonstrative evidence offered by the state was a "dramatic moment" during trial, "very damaging" to Appellant, and "powerful testimony."[8] At the hearing's conclusion, the trial court denied Petitioner's request for post-conviction relief.[9] This appeal followed.

Standard of Review

To obtain post-conviction relief, a petitioner must show that his or her "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the

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[1] Vol. I, 1.
[2] *See State v. Croom*, W2011-00461-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 296 (Tenn. Crim. App., May 10, 2012) (referred to below as *Croom I*).
[3] *Id.*
[4] Vol. I, 149-50.
[5] *Id.*
[6] Vol. II, 151.
[7] *See State v. Croom*, W2013-01863-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 685 (Tenn. Crim. App., Jul. 11, 2014) (referred to below as *Croom II*).
[8] PCR Vol. III, 61-62.
[9] PCR Vol. I, 42; Vol. II, 45.

Constitution of Tennessee or the Constitution of the United States."[10] A post-conviction petitioner bears the burden of proving factual allegations by clear and convincing evidence, which leaves "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence."[11]

Appellate courts do not reassess the trial court's determination of witness credibility.[12] But, although the post-conviction court's findings of fact are conclusive on appeal absent a preponderance of evidence to the contrary, conclusions of law receive no such presumption of correctness.[13] As a mixed question of law and fact, this Court reviews Appellant's ineffective assistance of counsel claims *de novo* with no presumption of correctness.[14]

Argument

A. The State failed to properly elect offenses.

1. Proof of multiple offenses requires an election.

When evidence at trial indicates that the defendant has committed multiple offenses against the victim, the "prosecution must elect the facts upon which it is relying to establish the charged offense…"[15] The election requirement "safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence."[16] Indeed, there is "no question that the unanimity of twelve jurors is required in criminal cases under our state constitution."[17] Thus, a trial court must take

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[10] Tenn. Code Ann. § 40-30-103.
[11] Tenn. Code Ann. § 40-30-110(f); *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010).
[12] *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009).
[13] *Berry v. State*, 366 S.W.3d 160, 169 (Tenn. Crim. App. 2011); *see also Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).
[14] *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011).
[15] *State v. Johnson*, 53 S.W.3d 628, 630 (Tenn. 2001)(internal citations omitted).
[16] *Johnson* at 631.
[17] *State v. Brown*, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991).

precautions to ensure that the "jury deliberates over the particular charged offense, instead of creating a 'patchwork verdict' based on different offenses in evidence."[18]

Even if a jury manages to agree that a defendant is guilty of a certain offense, a failure to properly elect prevents both the trial court and reviewing appellate courts from determining whether the jury's verdict truly was unanimous. For example, in *State v. Shelton*, the defendant was charged with unlawfully touching a minor at some point "between April 7 and September 6, 1989."[19] Although the defendant objected to the absence of more specific dates, the trial court permitted the evidence to go to the jury with instructions that "every juror be united on the one alleged offense…"[20] The Tennessee Supreme Court reversed, finding that such an instruction was an inadequate substitution for the requirement that the prosecution "identify the specific offenses for which it seeks convictions."[21]

The lack of a specific election as to incidents or dates in both *Shelton* and in the present case stands in stark contrast to the properly executed election found in *State v. Valentine*.[22] Like the instant case, the defendant in *Valentine* was charged with rape of a child and aggravated sexual battery.[23] The trial court gave the following instruction to the jury regarding the State's election of offenses:

> In this case, the State has elected to submit for your consideration of Count One of the Indictment the act of [penile]/vaginal penetration described by the victim during her testimony as occurring the same night defendant peed on her hand while in the bed with the defendant in her mother's bedroom at the victim's home on Vern Street.[24]

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[18] *State v. Kendrick*, 38 S.W.3d 566, 568 (Tenn. 2001)(internal citations omitted).
[19] *State v. Shelton*, 851 S.W.2d 134, 136 (Tenn. 1993).
[20] *Id.*
[21] *Id.*
[22] 2014 Tenn. Crim. App. LEXIS 915 (Tenn. Crim. App. 2014).
[23] *Id.* at 1.
[24] *Id.* at 12.

In *Valentine*, the victim's testimony identified acts that occurred at a single definite time and location, and the trial court's subsequent election instruction explicitly referenced that testimony.[25] Thus, the "election sufficiently distinguished a particular act to ensure 'unanimity among the jury members as to the specific act which constituted the offense.'"[26]

2. Croom's trial contained testimony alleging multiple offenses.

The proof in Croom's case met the threshold requirement for an election requirement because it indicated that the defendant had committed multiple offenses against the victim.[27] The State, in its direct examination of the victim, began by turning her attention to a general time period – "July of 2009."[28] The State continue to question the victim about "July of 2009."[29] This line of questioning informed the jury not only that was the date of the alleged incident unclear, but also that the victim alleged that Croom had engaged in multiple instances of the unlawful contact. The prosecutor asked the victim about "the time that made you tell your grandmother," thus implying multiple instances of contact.[30] A few moments later, the victim responded that Croom "had been touching" her.[31] The State later asked the victim about her location "this time that you told your grandmother when this started."[32] Similarly, the State's expert witness related the victim's statement that Croom "has been giving me bad touch."[33] Shortly thereafter, the

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[25] *Id.*
[26] *Id.* (internal citations omitted).
[27] *See Johnson*, 53 S.W.3d at 630.
[28] Vol. VI, 12.
[29] *Id.* at 12, 14, 15.
[30] *Id.* at 16.
[31] *Id.*
[32] *Id.* at 21-22.
[33] *Id.* at 92.

expert discussed "the most recent" incident.[34] Finally, the expert again related the victim's statement that Croom would "frequently" make a specific statement to her.[35]

This terminology was not benign. The consistent vocabulary used by both the alleged victim and the State's expert witness indicated recurring conduct. A reasonable juror would have no difficulty in recognizing that multiple incidents had taken place. Thus, the proof presented at trial required the State to make an election.

Importantly, both the State and the trial court agreed that an election was necessary. Before this case proceeded to trial, Croom's counsel filed a motion to have the State identify a definite date and time on which the offenses allegedly occurred.[36] The State's response identified the need for a "proper election."[37] And, at the trial's outset, the trial court noted that the "State will make elections as to Counts 5 and 6 and what acts they are relying upon."[38] Following the trial, the trial court provided election instructions to the jury.[39]

3. The record contains no proof of election.

Although the State and the trial court agreed that election was necessary in Croom's trial, the State never made an election. This failure to make an election, coupled with the testimony alleging that Appellant committed repeated offenses, left each juror to decide at which point in time the events in question may have occurred. This stripped the verdict of its constitutionally required unanimity.

The trial court ostensibly sought to remedy the State's failure to elect by including broad language in its election instructions to the jury. These instructions, however, failed to cure the

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[34] *Id.* at 93.
[35] *Id.* at 105.
[36] Vol. I, 7.
[37] Vol. I at 12.
[38] Vol. VI, 8.
[39] Vol. I, 95, 107.

problem. Rather than provide specificity for the offenses (including dates) with which Croom was charged, the trial court's election instructions noted merely that the acts occurred "on or about July 12, 2009 through July 18, 2009."[40] Although the election of an exact date of an offense is not always required,[41] it is often a critical element in accomplishing the "essential purpose" of election: ensuring that jurors consider the same incident.[42] In contrast with the detailed specifics contained in a proper election instruction (like those found in *Valentine*), this case's election instructions refer to a week-long window.[43]

Notably, the trial court's findings following the post-conviction hearing underscore the lack of election made by the State. When making its oral ruling on this issue, the trial court made no reference to any purported election *by the State*. Instead, the trial court looked only to the jury instructions that it provided.[44] However, as the Tennessee Supreme Court recognized in *Shelton*, corrective jury instructions are not a panacea for the State's failure to make a proper election.[45]

The right to a unanimous jury verdict on every count is "fundamental, immediately touching on the constitutional rights of the accused."[46] And here, both the State and the trial court recognized the need for the State to make an election of offenses. However, this case's proceedings show no evidence that the State ever made a proper election. And the trial court's attempt to solve this problem through jury instructions was insufficient. So, Croom is entitled to post-conviction relief on this issue.

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[40] Vol. I, 95, 107 (original emphasis omitted).
[41] *See Shelton*, 851 S.W.2d at 137-38.
[42] *Valentine* at 11-12.
[43] Vol. I, 95, 107.
[44] PCR Vol. III, 74.
[45] *See Shelton* at 136.
[46] *State v. Burlison*, 501 S.W.2d 801, 804 (Tenn. 1973).

B. Trial counsel ineffectively represented Croom.

When presenting a challenge based on ineffective assistance of counsel, a petitioner must establish (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense.[47] Counsel's effectiveness is determined within the range of competence demanded of attorneys in criminal cases.[48] To establish that counsel performed deficiently, a petitioner must show that counsel's acts fell below an "objective standard of reasonableness under prevailing professional norms."[49] Similarly, to prove prejudice, a petitioner must establish a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.[50] A reasonable probability is a "probability sufficient to undermine confidence in the outcome."[51]

1. The motion for new trial failed to preserve important issues for appeal.

a. The State's expert introduced impermissible hearsay.

At trial, the court heard testimony from a pediatrician who interviewed and examined the victim.[52] The court accepted the State's witness as an expert in the area of child maltreatment diagnosis and treatment.[53] The expert testified regarding statements made by both the victim *and the victim's mother* during her interview.[54] The trial court overruled counsel's hearsay objections to the statements made to the expert.[55] Additionally, the trial court admitted the expert's written

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[47] *Dean v. State*, 59 S.W.3d 663, 667 (Tenn. 2001) (*citing Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) and *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).
[48] *Baxter*, 523 S.W.2d at 936.
[49] *Strickland*, 466 U.S. at 688.
[50] *Dean*, 59 S.W.3d at 667.
[51] *Strickland* at 694.
[52] Vol. VI, 82 et seq.
[53] Vol. VI, 86.
[54] Vol. VI, 91 et seq.
[55] Vol. VI, 92.

report without objection.[56] That report contained statements made by both the victim and the victim's mother.[57]

Following trial, counsel filed a Motion for New Trial and/or Judgment of Acquittal on Croom's behalf.[58] In this motion, trial counsel argued only that the trial court erred in allowing the expert to testify about *the victim's* statements.[59] Trial counsel's motion neglected, however, to assert that the trial court erred in allowing the expert to testify about the statements made by *the victim's mother*. Likewise, the Motion failed to allege that the trial court erred in admitting the expert's report that contained statements from both the victim and the victim's mother.

On direct appeal, trial counsel argued that, in addition to erroneously allowing the expert to testify regarding the victim's statements, the trial court erred by allowing her to testify about the victim's mother's statements, and by admitting her report that contained these statements. This Court, however, ruled that these issues were waived because they were not included in the motion for new trial.[60] What's more, this Court declined to address these issues under plain error review because trial counsel never requested such review.[61]

Had trial counsel properly drafted the motion for new trial to include these issues, this Court may well have found that the trial court erroneously admitted hearsay that aided the State in convicting Croom. But because trial counsel failed to preserve these issues in the motion for new trial, and because he did not request plain error review, trial counsel deprived Croom of the opportunity to seek review.

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[56] Vol. IV, Ex. 7; Vol. VI, 104.
[57] *Id.*
[58] Vol. II, 151.
[59] Vol. II, 151.
[60] *See Croom II* at 9.
[61] *Id.*

b. The State improperly introduced prejudicial demonstrative evidence.

Demonstrative evidence is admissible only if relevant under Tennessee Rule of Evidence 401.[62] Thus, demonstrative evidence should "assist the trier of fact in understanding and evaluating the other evidence offered at trial."[63] Rule 403, however, proscribes the admission of relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice.[64] Most Tennessee cases in which this Court has looked favorably upon demonstrative testimony are those in which a witness reenacts an event that is difficult to describe through spoken testimony alone.[65]

At trial, the State directed the victim to leave the witness stand and demonstrate for the jury various physical positions and acts allegedly performed by the victim and Croom.[66] Trial counsel did not object.[67] The victim's physical acts, however, held little probative value. Rather than display some act or process that could best be understood through demonstration, the victim's actions reflected alleged occurrences that could easily be described through spoken testimony alone. Indeed, the State summarized the victim's position in a few brief words following each movement.[68] But the victim's physical demonstration carried great danger of unfair prejudice. Had trial counsel objected and preserved this issue for appellate review, either

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[62] *State v. Coulter*, 65 S.W.3d 3 (Tenn. Crim. App. 2001), *abrogated in part on other grounds by State v. Johnson*, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. Dec. 3, 2013).
[63] *Id.* at 56.
[64] Tenn. R. Evid. 403.
[65] *See, e.g. State v. DeBow*, 2000 Tenn. Crim. App. LEXIS 595, at *10-11 (Tenn. Crim. App., August 2, 2000) (approving a courtroom demonstration by a TBI special agent showing the shell ejection pattern of the shotgun); *Waller v. State*, 2000 Tenn. Crim. App. LEXIS 558 at *12-16 (Tenn. Crim. App., July 18, 2000) (approving a courtroom demonstration by a testifying defendant of the manner in which he allegedly fended off an attack by the murder victim).
[66] Vol. VI, 27-28, 31-32.
[67] *Id.*
[68] *See, e.g.* Vol. VI, 28 ("[S]he's laying straight on her back with her legs spread."); 32 ("[S]he's sitting on her knees with her legs folded underneath her.").

the trial court or this Court easily could have found that this demonstrative testimony was inadmissible due to its great danger of unfair prejudice.

E. The aggregate effect of these errors require relief.

Even if Croom cannot convince this Court that any one error, taken alone, is sufficient to grant post-conviction relief, this Court should grant relief based on their aggregate prejudicial effect. As described in the context of an ineffective assistance of counsel claim, the "absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense[, as] prejudice may result from the cumulative impact of multiple deficiencies."[69] Here, the aggregate effect of the errors in Croom's case make it reasonably probable that his trial could have had a significantly different outcome. So, Appellant urges this Court to consider not only each issue's influence on his case but also their cumulative impact.

Conclusion

For these reasons, Croom respectfully asks that this Court reverse the trial court's dismissal of his post-conviction petition, and remand his case to the trial court for further proceedings.

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[69] *State v. Sexton*, 368 S.W.3d 371, 429 (Tenn. 2012), *quoting Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978).