The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: William Mark Ward

Office Address: (including county) Not applicable

Office Phone: Not applicable Facsimile: Not applicable

Email Address: [redacted]

Home Address: (including county) [redacted] (Shelby County), Tennessee 38104

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

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.

Author, *Tennessee Criminal Trial Practice* (Thomson Reuters Publishing)
Adjunct Professor, Cecil C. Humphreys School of Law, The University of Memphis
Criminal Court Judge, (Retired as of September 1, 2022)

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

1979; No. 06521

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; May 5, 1979; 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).

2000-present	Author, *Tennessee Criminal Trial Practice* (Thomson Reuters Publishing)
2000-present	Adjunct Professor, Criminal Procedure II Cecil C. Humphreys School of Law The University of Memphis
2004-2022	Criminal Court Judge, Division 9 Thirtieth Judicial District

1983-2004 (part-time before 7/1/97)	Assistant Shelby County Public Defender Appellate Division
1996-2001	Adjunct Professor, Criminal Justice Department of Criminology & Criminal Justice The University of Memphis
Aug. 1997-May 1998	Adjunct Instructor of Legal Methods Cecil C. Humphreys School of Law The University of Memphis
Jan. 1997-July 1997	Clinical Instructor, General Litigation Clinic Cecil C. Humphreys School of Law The University of Memphis
1981-1997	Private Practice of Law, Self-employed *Described in Answer to Question Eight*
1979-1981	Law Clerk Presiding Judge Mark A. Walker Tennessee Court of Criminal Appeals

Description of Teaching at The University of Memphis:

CECIL C. HUMPHREYS SCHOOL OF LAW:

Criminal Procedure II, 2000-present

This course is designed to cover the law of criminal procedure applicable to the adjudication phase of a criminal prosecution. This course covers all aspects of a criminal case in chronological order from the decision to prosecute and ending with a discussion of Federal Habeas Corpus. Hence, it covers all pre-trial, trial, appellate and post-conviction remedies available in Tennessee. Upon completion of the course, the student should have a thorough and practical understanding of the Tennessee Rules of Criminal Procedure.

General Litigation Clinic, Spring 1997 & Summer 1997

This course is a live-client clinic allowing the students the opportunity to provide legal representation in court to actual persons with real legal problems. The students handle the cases under the supervision and direction of a Clinical Instructor. The goal of the course is to provide the student with practical knowledge and real experience in court.

Legal Methods, Fall 1997 & Spring 1998

This course is designed to teach first-year law students the skills needed for legal research, legal writing, and legal analysis as well as the ability to make persuasive arguments. The course culminates in the student drafting an appellate brief and orally arguing the case before a mock appellate court.

DEPARTMENT OF CRIMINOLOGY AND CRIMINAL JUSTICE:
Graduate School:

CJUS 7570 – Legal Issues in Criminal Justice
Spring 1999, Spring 2000, Spring 2001

This course is a graduate level course in constitutional criminal procedure and covers application of United States constitutional principles to investigative and prosecutorial processes with emphasis on the 4th, 5th, 6th, 8th, and 14th Amendments as they relate to arrest, search and seizure, interrogation, and identification procedures. Also included is a discussion of trial and appellate courts.

Undergraduate:

CJUS 1100 – Introduction to Criminal Justice
Summer 1996, Fall 1996, Spring 1997, Fall 1997, Spring 1998, Fall 1998

This course introduces the American criminal justice system in its three dimensions: police, courts and corrections.

CJUS 3521 – Criminal Procedure
Fall 1998, Spring 1999, Fall 1999, Spring 2000, Fall 2000, Fall 2001

This course is basically an undergraduate criminal procedure course covering the same topics described above with regard to the graduate course.

CJUS 4130 – Ethical Dilemmas in Criminal Justice, Fall 1997

This course examines the legal, moral and social implications of various ethical dilemmas in criminal justice.

CJUS 4530 – Principles of Evidence and Proof
Spring 1998, Fall 1999, Fall 2000

This course discusses the rules of evidence and matters of proof affecting criminal investigations in investigatory and prosecution stages of criminal justice. Basic rules of evidence, including hearsay rules, impeachment, materiality and relevancy as well as privileges are covered.

CJUS 4520-6520 – Substantive Criminal Law
Summer 1998, 1999, 2000, and Spring 2001

This course discusses substantive criminal law including common law sources and basic principles, the definition of various offenses both at common law and under the Model Penal Code and includes consideration of criminal responsibility, justification, excuses and other related areas.

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 am presently not practicing law. I have agreed to sit as a special judge anywhere in the State pursuant to Tenn. Code Ann. § 17-2-109 to assist the judiciary with the congested dockets due to the COVID crisis.

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.

I have been licensed to practice law for over forty-three (43) years. From 1979 to 1981, I served as the sole Law Clerk for Judge Mark A. Walker, who was then the Presiding Judge of the Tennessee Court of Criminal Appeals. In that position I was tasked with observing oral arguments, reading appellate records, researching the applicable law and drafting appellate opinions. When Judge Walker was not holding court in Jackson, Nashville or Knoxville, I worked out of his office in Covington. In my two-year four-month tenure with the Court of Criminal Appeals, Judge Walker issued over 150 appellate opinions and participated in another 300 appellate cases.

From 1981 to 1997, I engaged in the private practice of law in Memphis. I associated with and shared office space with multiple attorneys in the early years, including Joseph B. Daily and Russel X. Thompson. In 1984, I began my association with Virgil Padgett, George Whitworth, and Robert Donohue, and continued with them until 1997. Although my private practice was conducted primarily in Shelby County, I handled cases in other parts of West Tennessee. I specifically recall cases in Tipton, Lauderdale, Dyer, Obion, Fayette, Henderson, McNairy and Gibson counties. Approximately sixty percent (60%) of that practice involved criminal cases. My private criminal practice involved a broad range of misdemeanors and felonies as well as post-conviction cases and included cases pending in Criminal Court and in all the inferior courts in Shelby County. My practice also included work in the Court of Criminal Appeals and the Tennessee Supreme Court. The remainder of my practice was devoted to general civil matters including personal injury, general litigation and civil appeals, worker's compensation, probate, bankruptcy, collections, corporate formation, and family law.

From 1983 to 1997, I also was employed by Shelby County Government as a part-time Assistant Shelby County Public Defender assigned to the Appellate Division. From 1997 to 2004, I served as a full-time Assistant Public Defender and was the Supervisor of the Appellate Division. My practice as a public defender was exclusively devoted to criminal law, and involved, among other things, extensive appellate court experience. I have orally argued a case in the United States Supreme Court, thirty-five (35) cases in the Tennessee Supreme Court and handled over 200 cases in the Court of Criminal Appeals. As a result, I have practical experience as an attorney handling every kind of case that may come before the Court of Criminal Appeals.

From 2004 to 2022, I served as Criminal Court Judge for the Thirtieth Judicial District at Memphis. The Criminal Court in Shelby County is a court of general criminal jurisdiction and does not consider civil cases. Like the Court of Criminal Appeals, its jurisdiction is exclusively criminal. I presided over pre-trial matters, guilty pleas, trials and sentencing proceedings in both misdemeanor and felony cases as well as numerous other matters including habeas corpus, extradition, post-conviction and contempt proceedings. The cases involved the full spectrum from the simplest misdemeanor to the most serious felonies – including cases involving the death penalty. As judge of a court devoted exclusively to the administration of criminal matters, I presided over approximately 1,200 criminal cases every year. As a trial judge, I presided over more than 300 jury trials and the disposition of over 20,000 criminal cases.

In addition to practicing law and serving as a jurist, I have taught various law-related courses at the undergraduate, graduate and law school level for the last twenty-five (25) years. For the last twenty-two (22) years, I have been teaching Criminal Procedure II at the Cecil C. Humphreys School of Law at The University of Memphis.

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

As mentioned in the previous answer, as a lawyer, I have extensive experience practicing in the appellate courts. Most of that experience was in the Tennessee Court of Criminal Appeals, but some of the cases made it to the Tennessee Supreme Court and one case to the United States Supreme Court. As an example of my work, I was sole or lead appellate counsel in the following "published" criminal appeals:

Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 698 (2001)
State v. Archie, 639 S.W.2d 674 (Tenn. Crim. App. 1982)
State v. Workman, 667 S.W.2d 44 (Tenn. 1984)
State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984)
State v. McKay, 680 S.W.2d 447 (Tenn. 1984)
State v. Leach, 684 S.W.2d 655 (Tenn. Crim. App. 1984)
State v. Martin, 702 S.W.2d 560 (Tenn. 1985)
State v. Norfleet, 737 S.W.2d 310 (Tenn. Crim. App. 1987)
State v. Herrod, 754 S.W.2d 627 (Tenn. Crim. App. 1988)

State v. Porterfield, 746 S.W.2d 441 (Tenn. 1988)
State v. Alley, 776 S.W.2d 506 (Tenn. 1989)
State v. Payne, 791 S.W.2d 10 (Tenn. 1990)
State v. Boyd, 797 S.W.2d 589 (Tenn. 1990)
State v. Lowe, 811 S.W.2d 526 (Tenn. 1991)
State v. Howell, 868 S.W.2d 238 (Tenn. 1993)
State v. Norris, 874 S.W.2d 590 (Tenn. Crim. App. 1993)
State v. Carter, 890 S.W.2d 449 (Tenn. Crim. App. 1994)
State v. Jackson, 890 S.W.2d 436 (Tenn. 1994)
State v. Smith, 893 S.W.2d 908 (Tenn. 1994)
State v. Kimbrough, 924 S.W.2d 888 (Tenn. 1996)
State v. Keen, 926 S.W.2d 727 (Tenn. 1994)
State v. Summerall, 926 S.W.2d 272 (Tenn. Crim. App. 1995)
State v. Walton, 958 S.W.2d 724 (Tenn. 1997)
State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998)
State v. Carter, 970 S.W.2d 509 (Tenn. Crim. App. 1997)
State v. Addison, 973 S.W.2d 260 (Tenn. Crim. App. 1997)
State v. Nesbit, 978 S.W.2d 904 (Tenn. 1998)
State v. Butler, 980 S.W.2d 359 (Tenn. 1998)
State v. Galmore, 994 S.W.2d 120 (Tenn. 1999)
State v. Rogers, 992 S.W.2d 393 (Tenn. 1999)
State v. Langford, 994 S.W.2d 126 (Tenn. 1999)
State v. Buggs, 995 S.W.2d 102 (Tenn. 1999)
State v. Carter, 988 S.W.2d 145 (Tenn. 1999) (*Amicus*)
State v. Palmer, 10 S.W.3d 638 (Tenn. Crim App. 1999)
State v. Keen, 31 S.W.3d 196 (Tenn. 2000)
State v. Sims, 45 S.W.3d 1 (Tenn. 2001)
Miller v. State, 54 S.W.3d 743 (Tenn. 2001) (*Amicus*)
State v. Walls, 62 S.W.3d 119 (Tenn. 2001)
State v. Dean, 76 S.W.3d 352 (Tenn. Crim. App. 2001)
State v. Holston, 94 S.W.3d 507 (Tenn. Crim. App. 2002)
State v. Powers, 101 S.W.3d 383 (Tenn. 2003)
State v. Terry, 118 S.W.3d 355 (Tenn. 2003)
State v. Armstrong, 126 S.W.3d 908 (Tenn. 2003)

All of the above referenced forty-three (43) cases were significant enough to be selected for publication in the National Reporter System. However, a discussion of all the cases would be too time-consuming. The following is a summary of some of the more noteworthy criminal matters which I have handled on appeal. In each case I was either the sole or lead attorney and I alone presented the oral argument.

A. *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001)

Wilbert Rogers was involved in a stabbing incident in 1994 which caused the death of the victim fifteen (15) months later. At the time of the incident, Tennessee followed the common-law year-and-a-day rule, which provided that a person accused of homicide could not be convicted of murder unless the victim died within a year and a day of the act. Mr. Rogers was convicted of second-degree murder. On appeal, the Tennessee Court of Criminal Appeals held that the legislature had effectively abolished the year-and-a-day rule in Tennessee in 1989 by adopting a criminal code which made no reference to the rule. The Tennessee Supreme Court rejected the reasoning of the Court of Criminal Appeals and found that the common-law year-and-a-day rule was in effect in Tennessee at the time of the stabbing and the death of the victim. Nevertheless, the Tennessee Supreme Court, considering the matter five (5) years after the incident, decided to abolish the year-and-a-day rule in Tennessee and to apply its decision retroactively so as to uphold Mr. Roger's conviction for second degree murder. The United States Supreme Court granted *certiorari* to determine whether the retroactive change in the criminal law violated *ex post facto* or Due Process principles. The significance of the case was that it allowed the United States Supreme Court the opportunity to fully analyze the extent to which general *ex post facto* principles apply to judicial decisions via the Due Process Clause. The Court held that the Fourteenth Amendment prevents judicial decisions from retroactively changing the criminal law if the change is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” Applying this test, the Court held in a 5-4 opinion that the change in the year-and-a-day rule in Tennessee was not “unexpected” and its retroactive application to Mr. Roger's case did not violate Due Process. *My brief filed in the United States Supreme Court is attached as a writing sample.*

B. *State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996)

The defendant was involved in a shooting at a "drug house" in Memphis in which two (2) people were wounded. One of the victims died as a result of his wounds. The defendant was convicted of voluntary manslaughter for this killing and sentenced to six (6) years in prison. With regard to the victim who survived his wounds, the defendant was convicted of attempted felony murder and was sentenced to twenty-five (25) years imprisonment. The defendant was indigent and I was assigned the task of perfecting an appeal. Upon review of the case, I noticed that the defendant received a much greater sentence for the crime in which the victim survived than he did for the crime in which the victim died. This did not seem to be consistent with a retributive theory of punishment. It also appeared as though there was some inconsistency with combining the law of attempt (which requires intent) with the law of felony murder (which requires no intent). Upon researching the law, the overwhelming majority of jurisdictions in this country confirmed that there can be no criminal offense of "attempted felony murder." I raised this issue for the first time on direct appeal and the Court of Criminal Appeals followed the majority rule and held that Tennessee would not recognize the validity of any such criminal offense. Upon request by the State, the Tennessee Supreme Court granted an Application for Permission to Appeal, but affirmed the action of the Court of

Criminal Appeals. As a result of this case, the Supreme Court has clarified that there is no criminal offense in Tennessee of "attempted felony murder." *My brief filed in the Tennessee Supreme Court is attached as a writing sample.*

C. *State v. Martin*, 702 S.W.2d 560 (Tenn. 1985)

The defendant was convicted of first-degree murder and sentenced to death. During the trial, the defendant contended that the killing was accidental. More specifically, he testified that his weapon accidentally discharged as he was attempting to strike the victim with his gun in self-defense. On appeal, the Tennessee Supreme Court noted that the sufficiency of the evidence of guilt presented a close question, especially with regard to premeditation and malice. However, the Court found sufficient evidence to support the verdict. Although not raised by the trial attorney in the trial court, the Supreme Court allowed me on appeal to challenge the sufficiency of the trial judge's instructions to the jury regarding malice and premeditation. The Supreme Court, departing from over 150 years of precedent, found the instructions inadequate and reversed the conviction. The Supreme Court held that trial judges could no longer instruct juries that a killing raises a "presumption" of maliciousness. Instead, trial judges were ordered to instruct juries that an "inference" of maliciousness may arise from a killing. In addition, trial judges were ordered to explain to the jury that this inference could be rebutted from any evidence introduced in the case. Although this issue had been previously raised in the Supreme Court, this is the landmark Tennessee case in which the Supreme Court overruled its prior holdings which approved the challenged instructions.

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

I served as Criminal Court Judge of Division Nine of the Criminal Court of Shelby County from December 2004 until August 31, 2022. My name was submitted by the Tennessee Judicial Selection Commission in the fall of 2004, and the Governor appointed me on December 9, 2004. I faced opposition in each of my subsequent elections but was re-elected in both 2006 and in 2014. I ran for re-election in 2022, but lost by 145 votes in a race with 115,207 votes cast.

As judge of a court devoted exclusively to the administration of criminal matters, I presided over approximately 1,200 criminal cases every year. As an example of “noteworthy” cases, I have presided over the following twenty-eight (28) week-long, first-degree murder jury trials which resulted in convictions and life sentences (***All have been affirmed on appeal***):

State v. Justine Welch, No. 18-00253 (Verdict, August 2021 – on appeal)
State v. Ryan Winston, No. 19-01781 (Verdict, July 2021 – on appeal
State v. Johnson, 2019 WL 4008113 (Tenn. Crim. App. 2019)
State v. Jones, 568 S.W.3d 101 (Tenn. 2019) (**death sentence imposed**)
State v. Austin, 2018 WL 4849141 (Tenn. Crim. App. 2018)
State v. Buckingham, 2018 WL 4003572 (Tenn. Crim. App. 2018)
State v. Buford, 2018 WL 1182908 (Tenn. Crim. App. 2018)
State v. Bass, 2017 WL 401371 (Tenn. Crim. App. 2017)
State v. Blocker, 2016 WL 3009255 (Tenn. Crim. App. 2016)
State v. Arnold, 2016 WL 1705210 (Tenn. Crim. App. 2016)
State v. Holmes, 2016 WL 929282 (Tenn. Crim. App. 2016)
State v. Wilson, 2015 WL 8555599 (Tenn. Crim. App. 2015)
State v. Caronna, 2014 WL 6482800 (Tenn. Crim. App. 2014)
State v. Churchman, 2014 WL 12651043 (Tenn. Crim. App. 2014)
State v. Phillips, 2013 WL 6529308 (Tenn. Crim. App. 2013)
State v. Pennington, 2013 WL 6500153 (Tenn. Crim. App. 2013)
State v. Heath, 2013 WL 2297133 (Tenn. Crim. App. 2013)
State v. Parker, 2013 WL 593869 (Tenn. Crim. App. 2013)
State v. Britt, 2012 WL 2022692 (Tenn. Crim. App. 2012)
State v. Reed, 2010 WL 4544777 (Tenn. Crim. App. 2010)
State v. Ragland, 2009 WL 4825182 (Tenn. Crim. App. 2009)
State v. Kelley, 2009 WL 4282031 (Tenn. Crim. App. 2009)
State v. Carlton, 2009 WL 2151818 (Tenn. Crim. App. 2009)
State v. Lumpkin, 259 S.W.3d 671 (Tenn. 2008)
State v. Sanders, 2008 WL 1850934 (Tenn. Crim. App. 2008)
State v. Mathis, 2007 WL 2120190 (Tenn. Crim. App. 2007)
State v. Brimmer, 2006 WL 1205625 (Tenn. Crim. App. 2006)
State v. Lumpkin, 2007 WL 1651881 (Tenn. Crim. App. 2007)

The following is a discussion of some significant cases:

A. *State v. Justine Welch*, No. 18-00253 (Verdict, August 2021-on appeal)

Mr. Welch was involved in a crime-spree in Memphis in which he shot two people who were dining outside at a downtown Memphis restaurant. He then fled the scene and shot another person in the parking lot of the Bass Pro Shop. After fleeing that scene, he ran over a Memphis police officer during a high-speed chase through downtown Memphis. Two of the victims, including the police officer, died. The other two survived, but one was paralyzed as a result of his injuries. Mr. Welch was charged with one count of first-degree murder, two counts of attempted first degree murder, and one count of vehicular homicide. After a ten-day sequestered jury trial, the jury found the defendant guilty of all charges. With regard to the murder, the jury returned a sentence of life without parole. *This case was noteworthy for many reasons. First, by all accounts the police officer who died did so saving the lives of multiple other persons who were in the path of the high-speed chase. Second, the case was unusual as it involved multiple and extended pre-trial competency proceedings which included the issue of whether the defendant could be forced to take medications that would render him*

competent to stand trial. In the early stages of the case, the defendant successfully feigned a mental illness and pretended not to be competent to stand trial. After extended hearings, the ruse was discovered and the case was able to be tried. My order denying a pre-trial motion to suppress in this case is attached as a writing sample.

B. *State v. Jones*, 568 S.W.3d 101 (Tenn. 2019) (**death sentence imposed**)

Mr. Jones brutally murdered an elderly couple in their home in Bartlett, Tennessee in 2003. The defendant was charged with the first-degree murder of both victims, successfully convicted and sentenced to death in 2009. However, the Tennessee Supreme Court reversed the convictions and ordered a new trial in 2014 as a result of evidentiary errors committed by the former trial judge. *State v. Jones*, 450 S.W.3d 866 (Tenn. 2014). The case was then assigned to Judge Bobby Carter for retrial and Judge Carter ruled on all the pre-trial motions. On the day that the case was set for trial, a potential conflict of interest was brought to Judge Carter's attention and he entered a recusal order. Without any notice and in order to prevent any further unnecessary delay, I agreed to take the case for purposes of trial. The jury once again found the defendant guilty and returned death sentences as to both victims. The Tennessee Supreme Court affirmed all of my trial rulings. *This was a significant case to me not only because it involved the death penalty but because of the age of the case and the need for a retrial. I believe that by agreeing to take this death penalty case for trial on the day it was set for trial that I advanced both the rights of the defendant and the victims to a speedy trial and also indicated my own work ethic and ability to work collegially with other judges.*

C. *State v. Davis*, 466 S.W.3d 49 (Tenn. 2015)

In this case the only eyewitness to the homicide was a young boy who identified the defendant as the perpetrator in both a written statement given to the police during the investigation and in his testimony at a preliminary hearing. By the time the case went to trial it appeared that the young boy had been intimidated and he testified that he could not remember the incident. I allowed the written statement to be introduced into evidence pursuant to Tenn. R. Evid. 803(5) (recorded recollection) and 803(26) (prior inconsistent statement of a testifying witness). I allowed the preliminary hearing transcript to be introduced under Tenn. R. Evid. 804(b)(1) (former testimony) and under 803(26). My rulings were affirmed by the Tennessee Supreme Court. *The significance of this case is that it allowed the Supreme Court to clarify that a claim of lack of memory is "inconsistent" with a prior statement pursuant to 803(26) and renders the witness "unavailable" for purposes of 804(b)(1). The Supreme Court further ruled that it made no difference in the legal analysis if the lack of memory was feigned or real and that the fact that the witness could not remember did not affect the confrontation rights of the accused. This case was also the subject of a nationally televised "After the First 48" episode.*

D. *Phillips v. State*, 647 S.W.3d 389 (Tenn. 2022)

Mr. Philipps was convicted of felony murder, aggravated rape, three counts of especially aggravated kidnapping and especially aggravated burglary. I presided over the trial and was affirmed by the Court of Criminal Appeals. *State v. Phillips*, 2013 WL 6529308 (Tenn. Crim. App. 2013). After losing his direct appeal, Mr. Phillips filed a petition for post-conviction relief claiming that his trial counsel provided ineffective assistance of counsel by failing to file a motion to suppress on Fourth Amendment grounds. After conducting a hearing on the matter, I denied the petition finding that the defendant had failed to establish ineffective assistance of counsel. Among other things, I concluded that there was no merit to a motion to suppress on Fourth Amendment grounds. I was affirmed by the Court of Criminal Appeals. The Tennessee Supreme Court granted permission to appeal for the sole purpose of clarifying how the two-prong *Strickland* standard is modified when there is an allegation of ineffective assistance of counsel for failure to litigate a motion to suppress on Fourth Amendment grounds. The Court concluded that in order to prove ineffective assistance of counsel based on counsel's failure to file and litigate a motion to suppress evidence on Fourth Amendment grounds, the petitioner must prove: (1) a suppression motion would have been meritorious; (2) counsel's failure to pursue the motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence. If the Petitioner fails to prove even one of the three elements, the inquiry ends. The Supreme Court agreed that there was no merit to the Fourth Amendment claim and I was affirmed. *The significance of this case is that it gave the Tennessee Supreme Court the opportunity to resolve some conflicting opinions from the Court of Criminal Appeals as to the appropriate standard to be applied by reviewing courts. My order denying the petition for post-conviction relief is attached as a writing sample.*

E. *Bane v. State*, 2011 WL 2937350 (Tenn. Crim. App. 2011)

In 1990, a Shelby County jury convicted John Michael Bane of felony murder and imposed a death sentence. On appeal, the Tennessee Supreme Court affirmed the conviction but remanded for resentencing. *State v. Bane,* 853 S.W.2d 483 (Tenn. 1993). After a new sentencing hearing, the jury again imposed a sentence of death, and the Tennessee Supreme Court affirmed the jury's imposition of the sentence. *State v. Bane*, 57 S.W.3d 411 (Tenn. 2001). Mr. Bane then filed a petition for post-conviction relief which was eventually assigned to me. Mr. Bane contended: (1) he received ineffective assistance of counsel at both his original trial and at his resentencing hearing; (2) the trial judge incorrectly instructed the jury in multiple ways; and (3) the death penalty was unconstitutional. After conducting multiple evidentiary hearings involving numerous witnesses, I denied the petition and was affirmed on appeal by the Court of Criminal Appeals. The Tennessee Supreme Court also denied permission to appeal. *This case was significant because it was a complex and lengthy capital post-conviction matter that involved a great number of allegations and a challenge to the constitutionality of the death penalty.*

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.

None

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

My interest in criminal justice predates my graduation from law school. In 1977 at seventeen (17) years of age I began my studies at The Institute of Criminal Justice at Memphis State University. In addition, while in law school I was employed as a law clerk for the Shelby County Public Defender and participated in the West Tennessee Parole Revocation Defense Project. In that program I represented approximately twenty (20) defendants in parole revocation proceedings before the Parole Board. I also participated in a Legal Assistance Program at Turney Center for Youthful Offenders. I went to the prison one Saturday each month to offer legal advice, primarily civil, to the inmates. Including my undergraduate and law school years, I have been continuously involved in criminal justice for the last forty-five (45) years.

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.

In 1994, I applied for appointment to the Court of Criminal Appeals, and the Appellate Court Nominating Commission did not submit my name to the Governor as nominee.

On September 12, 1996, June 29, 1998, September 18, 1998, February 19, 1999, and July 26, 2004, I applied for appointment to the Court of Criminal Appeals, and the Tennessee Judicial Selection Commission submitted my name to the Governor as nominee.

On November 1, 2004, I applied for appointment to the Criminal Court for the Thirtieth Judicial District, and the Tennessee Judicial Selection Commission submitted my name to the Governor as nominee. I was appointment by the Governor to the Criminal Court on December 9, 2004.

On April 14, 2007, I applied for appointment to the Tennessee Supreme Court, and the Tennessee Judicial Selection Commission did not submit my name to the Governor as nominee.

In 2008, I applied for appointment to the Court of Criminal Appeals, and the Tennessee Judicial Selection Commission did not submit my name to the Governor as nominee.

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.

1976 Bachelor of Arts (*cum laude)*
Memphis State University
Institute of Criminal Justice
Major: Law Enforcement
Dates of attendance: 1973-1976

1978 Juris Doctor
Memphis State University
Cecil C. Humphreys School of Law
Dates of attendance: 1976-1978

- American Jurisprudence Award in Criminal Law
- Certificate of Appreciation, West Tennessee Parole Revocation Defense Project
- Certificate of Merit, Tennessee Department of Correction, Legal Assistance Program at Turney Center

1986 Master of Arts in Religion (*magna cum laude)*
Memphis Theological Seminary
Dates of attendance: 1982-1986

1998 Master of Arts in Criminal Justice
The University of Memphis
Department of Criminology and Criminal Justice
Dates of attendance: 1994-1998

- National Criminal Justice Honor Society (Alpha Phi Sigma)

I have also completed the General Jurisdiction Course at the National Judicial College, University of Nevada at Reno, and the course at the Tennessee Judicial Academy.

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 65

Date of Birth: [redacted] 1956

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

63 years

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

63 years

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

Shelby 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.

As a criminal court judge and a criminal defense attorney, I have had several complaints filed by disgruntled criminal defendants. All but one were summarily dismissed without a required response and were found to be without merit. In Board of Judicial Conduct File No. B14-5824, a prisoner complained in 2014 that I had not entered an amended judgment *adding community supervision for life to his judgment* as ordered by another court on May 2, 2013. Disciplinary Counsel sought clarification. I responded that the allegation was without merit, explaining that I had previously entered an amended judgment adding community supervision for life six (6) years earlier in 2008. The complaint was then dismissed on November 4, 2014.

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.

Memphis Bonding Company, Inc. v. Criminal Court of Tennessee Thirtieth District, 490 S.W.3d 458 (Tenn. App. 2015). All the criminal court judges in Shelby County were individually named as parties to this litigation filed by a bonding company seeking injunctive relief and declaratory judgment as to the validity of the local rules of practice concerning bonding companies. The chancellor granted a temporary restraining order. The Court of Appeals dismissed the complaint finding the chancery court had no jurisdiction over criminal court.

A stipulated divorce granted August 22, 2012, Shelby County Chancery Court, Docket No. CH -12-0064.

An uncontested, irreconcilable differences divorce granted October 31, 2002, Shelby County Chancery Court, Docket No. CH-02-0572.

A Petition for Custody of son, Stephen Ward, filed in 1992 when former spouse moved from Tennessee. Settled by Consent Decree, Shelby County Circuit Court, Docket No. 131824-1.

An uncontested, irreconcilable differences divorce granted January 16, 1991, Shelby County Circuit Court, Docket No. 131824-1.

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.

Leo Bearman, Sr. Chapter, American Inns of Court

Memphis Bar Foundation

Overton Park Conservancy

Memphis Zoological Society

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.

As a child, I was a member of the Cub Scouts and the Boy Scouts. I have not associated with either organization since adulthood.

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 Judicial Conference, 2004-present
Tennessee Trial Judges Association, 2004-present
Criminal Pattern Jury Instruction Committee, 2004-present
Co-Chair 2012-2022
Executive Committee, 2008-2009

Memphis Bar Association, 1987-present
Criminal Law Section, 1987-present
Chair, Criminal Law Section, 1995
Vice Chair, Criminal Law Section, 1994
Fellow, Memphis Bar Foundation, 2005-present

Tennessee Bar Association, 1994-present
Chair, Criminal Justice Section, 1995-1996
Executive Committee, Criminal Justice Section, 1994-2001
Editor, Section Newsletter, CRIMINAL LAW, 1996-2000

Leo Bearman, Sr. American Inn of Court, 2005-present
Pupillage Team Leader and Master, 2005-2008

Tennessee Association of Criminal Defense Lawyers, 1994-2004
Board of Directors, 1996-2003
Amicus Committee, 1996-2003
Co-chair, *Amicus* Committee, 1997-1998
Secretary, 1998-1999
Treasurer, 1999-2000
President-elect, 2000-2001
President, 2001-2002

SPECIAL APPOINTMENTS:

Judicial Liaison to Tennessee Supreme Court's Advisory Commission on the Rules of Practice and Procedure, 2018 – 2022

Member, Juvenile Justice Subcommittee, Criminal Justice Reinvestment Task Force, 2019

Tennessee Judicial Conference, Bench-Bar Relations Committee, 1999-2002

Member of Tennessee Supreme Court Indigent Defense Commission, 1997-2001

Member of IOLTA (Interest On Lawyers' Trust Accounts) Grant Review Committee of the Tennessee Bar Foundation, 1996-1999

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.

2020 "Adjunct Professor of the Year," The University of Memphis School of Law

2017 "Adjunct Professor of the Year," The University of Memphis School of Law

2013 "Adjunct Professor of the Year," The University of Memphis School of Law

2011 "Adjunct Professor of the Year," The University of Memphis School of Law

2007 "Highest Rated Judge in Shelby County" Memphis Bar Association Bi-annual Judicial Evaluation of 84 federal, state, county and municipal judges

2005 "Highest Rated Judge in Shelby County" Memphis Bar Association Bi-annual Judicial Evaluation of 71 federal, state, county and municipal judges

2005 "Judge of the Year" Memphis Bar Association, Criminal Law Section

1998 "Public Service Attorney of the Year" Tennessee Bar Association

1998 "Robert W. Ritchie Award" Tennessee Association of Criminal Defense Lawyers

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

BOOKS:

W. Mark Ward, *Tennessee Criminal Trial Practice* (Thomson Reuters Publishing Company 2004-2022).

W. Mark Ward & Paula R. Voss, *Tennessee Criminal Trial Practice* (Harrison Publishing 2000).

W. Mark Ward & Paula R. Voss, *Tennessee Criminal Trial Practice Forms*, 1999 Cumulative Supplement (Harrison Publishing 1999).

JOURNALS:

W. Mark Ward, *Launch Your Appeal: How to Get Your Case Before the State's Highest Court*, 41 No. 6 TENN. B. J. 16 (2005).

W. Mark Ward, *Criminal Appeals as of Right in Tennessee*, 31 No. 6 TENN. B.J. 19 (1995).

NEWSLETTERS:

W. Mark Ward, *The Good-Faith Exception to the Exclusionary Rule: Tennessee Law in a Nutshell, Part II*, *Constitutional Violations,* THE MEMPHIS LAWYER, Memphis B. Assn.), 36, No. 2 (2019).

W. Mark Ward, *The Good-Faith Exception to the Exclusionary Rule: Tennessee Law in a Nutshell, Part I*, *Non-Constitutional Violations,* THE MEMPHIS LAWYER, Memphis B. Assn.), 35, No. 3 (2018).

W. Mark Ward, *Appellate Briefs in the Court of Criminal Appeals*, THE MEMPHIS LAWYER, (Memphis B. Assn.), July/August 2005, at 25.

W. Mark Ward, *How to Lose an Appeal*, THE MEMPHIS LAWYER, (Memphis B. Assn.), May/June 2003.

W. Mark Ward, *Insanity Defense Reform: Guilty by Reason of Mental Illness,* CRIMINAL LAW (Tenn. B. Assn. Crim. Just. Sec., Nashville), Fall 1998, at 1.

W. Mark Ward, *Trial Evidence*, CRIMINAL LAW (Tenn. B. Assn. Crim. Just. Sec., Nashville), June 1997, at 5.

W. Mark Ward, *Late Notice of Appeal*, THE PUBLIC DEFENDER FORUM (Tenn. Dist. Pub. Def. Conf., Nashville), Jan. 1996, at 4.

W. Mark Ward, *Release Pending Appeal*, FOR THE DEFENSE (Tenn. Assn. Crim. Def. Law., Nashville), Nov. - Dec. 1995, at 10.

W. Mark Ward, *Lawyers in the Criminal Justice System: Guardians of Liberty*, CRIMINAL LAW (Tenn. B. Assn. Crim. Just. Sec., Nashville), Oct. 1995, at 10.

W. Mark Ward, *Meritless Briefs*, CRIMINAL LAW (Tenn. B. Assn. Crim. Just. Sec., Nashville), March 1995, at 4.

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.

LAW SCHOOL:

Cecil C. Humphreys School of Law
The University of Memphis
Course:
Criminal Procedure II, 2000-2022
In the past five years I taught this course six times.

C.L.E. PRESENTATIONS:

I have made eighty-five (85) C.L.E. presentations over the course of my career, the following within the last five (5) years:

Oct. 26, 2022 "Criminal Law Update" Tennessee Judicial Conference (*scheduled)*
Oct. 4, 2022 "Criminal Law Update" Tennessee Judicial Commissioner Conference
March 10, 2022 "Tenn. R. Evid. 404(b)" Tennessee Judicial Conference
Nov. 23, 2021 "Criminal Court Practice" Ben Jones Chapter, NBA
Oct. 20, 2021 "Criminal Law Update" Tennessee Judicial Conference
Dec. 2020 "Criminal Court Practice" Ben Jones Chapter, NBA
Oct. 26, 2020 "Search Warrants" Tennessee Judicial Commissioner Conference
Oct. 20, 2020 "Criminal Law Update" Tennessee Judicial Conference
July 31, 2020 "Tenn. R. Evid. 404(b)" TACDL
Dec. 2019 "Criminal Court Practice" Ben Jones Chapter, NBA
Oct. 22, 2019 "Criminal Law Update" Tennessee Judicial Conference
Dec. 12, 2018 "Criminal Court Practice" Ben Jones Chapter, NBA
Oct. 23, 2018 "Criminal Law Update" Tennessee Judicial Conference
Dec. 8, 2017 "Criminal Court Practice" Ben Jones Chapter, NBA
Oct. 24, 2017 "Criminal Law Update" Tennessee Judicial Conference
July 21, 2017 "Criminal Case Update" Memphis Bar Association

TENNESSEE LAW COURSE:

The Tennessee Law Course is described in Tenn. Sup. Ct. R. 7, § 1.07. Effective March 29, 2019, in order to obtain a law license in the State of Tennessee an applicant must successfully complete the Tennessee Law Course. The course is taken online, takes about 7.5 hours to complete and covers eleven (11) specific areas of Tennessee law. The various topics are taught by specialists who have pre-recorded their presentations. The Board of Law Examiners asked me to make the presentation on Tennessee Criminal Law and Procedure. As mentioned, since 2019, every person who has obtained a law license has viewed my presentation.

ADDITIONAL SIGNIFICANT PRESENTATIONS:

As mentioned previously, before taking the bench I had extensive experience as an appellate attorney. I made the following C.L.E presentations which specifically addressed appellate practice:

April 21, 2006 “Advanced Legal Writing Skills” Memphis Bar Association
Feb. 1, 2006 “State Appellate Practice” Tennessee Bar Association
May 6, 2004 “Appeals of Certified Questions of Law” Ben Jones Chapter, NBA
Aug. 22, 2003 “Appellate Practice Update” TACDL
April 1, 2003 “Appellate Procedure” Ben Jones Chapter, NBA
June 22, 2002 “Appellate Practice in a Nutshell” TACDL
Oct. 24, 2001 “Appellate Practice” Tennessee Public Defender’s Conference
April 27, 2001 “U.S. Supreme Court Practice” Memphis Bar Association
Dec. 14, 2000 “Appellate Practice” Ben Jones Chapter, NBA
Nov. 1, 2000 “U.S. Supreme Court Litigation” National Ass. of Attorneys Generals
Oct. 6, 2000 “Capital Appeals” TACDL
Nov. 18-22, 1998 “Appellate Practice” National Legal Aid & Defender Association
Oct. 29, 1998 “Criminal Appeals” Ben Jones Chapter, NBA
Dec. 12-13, 1997 “Appellate Practice” TACDL
Oct. 24, 1996 “How to Lose an Appeal” District Public Defender Training Conference
Oct. 5, 1996 “State Appeals” TACDL
Dec. 19, 1995 “Criminal Appeals” Memphis Bar Association.
Dec. 14, 1995 “Preservation of Error for Appellate Review: Protecting the Record in Criminal Cases” Ben Jones Chapter, NBA

As a practicing attorney I appeared five (5) times before the Tennessee Supreme Court as a part of the SCALES (Supreme Court Advancing Legal Education for Schools) program. Each time, one of my cases was selected by the Court and I made the oral argument with the high school students in attendance, and then after the argument took questions from the students.

State v. Nesbitt, 978 S.W.2d 872 (Tenn. 1998)(Dyer County Courthouse – 3/4/1998)

State v. Butler, 980 S.W.2d 359 (Tenn. 1998)(The University of Memphis – 5/13/1998)

State v. Rogers, 992 S.W.2d 393 (Tenn. 1999)(Henry County Courthouse – 4/14/1999)

Ahern v. Ahern, 15 S.W.3d 73 (Tenn. 2000)(Shelby County Courthouse – 11/17/1999)

State v. Walls, 62 S.W.3d 119 (Tenn. 2001)(Sumner County Courthouse – 10/5/2001)

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 other than as addressed previously

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.

My practice is to prepare detailed, written orders on all pending motions and post-conviction matters not only to foster confidence and respect for the ruling but also to facilitate appellate review. As examples, I have attached the following:

(1) My written order denying motion to suppress eyewitness identification testimony in *State v. Justine Welch*, which is currently on appeal to the Court of Criminal Appeals.

(2) My written order denying the Petition for Post-Conviction Relief in *Phillips v. State* which was later appealed to both the Court of Criminal Appeals and the Tennessee Supreme Court. *See Phillips v. State*, 647 S.W.3d 389 (Tenn. 2022).

I have also attached the following appellate briefs:

(3) My brief filed in the United States Supreme Court in *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct.1693, 149 L.Ed.2d 697 (2001).

(4) My brief filed in the Tennessee Supreme Court in *State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996).

Each example is one-hundred percent (100%) my work. With regard to my brief in the United States Supreme Court, I drafted the entire brief, but had my associates review the draft who likely suggested minor edits.

ESSAYS/PERSONAL STATEMENTS

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

My first job after law school was as a clerk for Mark A. Walker, then the Presiding Judge of the Court of Criminal Appeals. He taught me more things than I could ever express in this essay. From his mentoring I gained not only a very high respect for Judge Walker but also for the role of an appellate judge. When my clerkship ended, I left with the hope that someday I would return to the Court as a judge. With twenty-five years of experience as an advocate, both at the trial and appellate level, and nearly eighteen years as a trial judge I believe that I now have the experience, perspective, and maturity to assume the responsibility of a Court of Criminal Appeals judge. If selected, I would consider it a very high honor.

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)***

I believe my duties as a former public defender and the manner in which I conducted myself in the performance of my duties attests to my commitment to equal justice under the law.

In addition, I was a Memphis Area Legal Services volunteer and was referred clients from the senior citizens panel, the YWCA abused women panel, and the HIV+/AIDS panel. As a result of my efforts, on June 20, 1998, I received the Tennessee Bar Association Public Service Attorney of the Year Award for outstanding service to indigent clients.

From 1998 to 2008, I was also involved with the Community Legal Center, an agency similar to Memphis Area Legal Services, dedicated to providing pro bono legal assistance to those in need. I served on the Board of the Community Legal Center from 1998 until 2008, and was President of the Board from 2000 to 2002. Prior to becoming a judge in 2004, I also was regularly assigned pro bono cases from the Center.

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 applying to become a judge of the Court of Criminal Appeals. The Court has statewide jurisdiction over all criminal appeals from courts of general trial jurisdiction. The Court has twelve (12) judges that sit in rotating panels of three (3) in Jackson, Nashville and Knoxville.

As far as my impact on the Court, I believe I offer to the Court the perspectives of an appellate practitioner, a trial judge and an educator. With regard to the latter, appellate judges serve as educators by: (1) writing appellate opinions which give clear guidance to trial judges and lawyers; (2) participating in continuing legal education (CLE) programs; and (3) publishing legal articles. To a large extent, I have already taken on many of these tasks. If appointed, I pledge to continue my role as an educator with the overall goal of trying to improve the administration of criminal justice in 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)***

Currently, I serve the community and the legal profession by seeking to improve the administration of criminal justice. I do this by teaching criminal law and procedure across Tennessee to law enforcement officers, law students, attorneys, and judges and by authoring and keeping current a treatise on Tennessee criminal trial practice for judges, prosecutors, and defense lawyers. Whether I am appointed or not, I will continue these activities with the hope that I can have some positive impact on the administration of criminal justice in Tennessee. If appointed, I would imagine my opportunities for such activities will only increase.

Additionally, I have actively participated in expungement clinics sponsored by the Shelby County Criminal Court Clerk and have sponsored a local church for back-to-school supply drives. As previously mentioned, I served on the Board of the Community Legal Center from 1998 to 2008, and was President of the Board from 2000 to 2002. I also served on the Board of a halfway house (Dismas House, Inc.) and as a member of the Kiwanis Club prior to becoming a judge. While still a public defender I also actively participated in Habitat for Humanity and the Adopt-A-School Program at Peabody Elementary School.

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 began law school at nineteen (19) years of age as the youngest person in my class and was one of the Law School's youngest graduates at the age of twenty-two (22). I also worked throughout college and law school to pay one hundred percent (100%) of my educational expenses which taught me a solid work ethic and commitment to goals. That work ethic has continued throughout my career.

I have learned that judges should be evaluated not just by the length of their service or the extent of their experience, but by the "quality"' of that service including consideration of their judicial demeanor and commitment to impartiality. I have also learned that the lawyers who practice before a judge are the best evaluators of that judge. Although the Memphis Bar Association has not conducted a recent judicial evaluation due to cost, in its last two evaluations in 2005 and 2007, I was the highest rated judge for "overall job performance" of all federal, state, county and municipal judges in Shelby County. I also was the highest rated judge in the categories of "knowledge of the law," use of "sound legal reasoning," maintaining "proper judicial demeanor," remaining "fair and impartial" and being "courteous and respectful to all." That reputation has continued throughout my judicial career, and, in 2022, I was endorsed in my election by the lawyers of the Ben Jones Chapter of the National Bar Association and was overwhelmingly deemed "most qualified" by the lawyers of the Memphis Bar Association.

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)***

Without question I will follow the law as passed by the legislature and interpreted by the Tennessee Supreme Court regardless of whether I agree with the law or the result it has on the case before me. Judges take an oath to be faithful to the law and support the Constitution of the United States and the Constitution of the State of Tennessee. Inherent in this oath is the recognition that the legislature is tasked with making laws – not the courts – and that the best place for public policy to be debated and considered is in legislature.

Because the doctrine of separation of powers is engrained in me, I do not spend a great amount of time considering whether I agree with a law or a rule, I simply apply either as written. On the other hand, upon reflection, there have been instances when the law required me to suppress evidence and I followed the law even though I did not personally like the result it had on the case. Likewise, there have been instances in which the law did not allow the consideration of any form of alternative sentence and I followed that law even though I personally thought that the sentence may have been too harsh. As a trial judge, my reputation has been that I am faithful to the law and I promise to continue this faithfulness if appointed to the Court of Criminal Appeals.

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. Garland Erguden, [redacted] Memphis, TN 38103 (Retired Chief Judicial Officer/Magistrate Judge, Shelby County Juvenile Court) [redacted]
B. Mark Jordan, Special Agent, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) [redacted]
C. Kirby May, Assistant District Attorney General, 30th Judicial District, [redacted] Memphis TN 38103, [redacted]
D. Marlon Evans, Shelby County Deputy Sheriff and Millington, Tennessee School Board Member, [redacted] Millington, TN 38053, [redacted]
E. Clyde "Kit" Carson, Grand Jury Foreperson, [redacted]. Memphis, TN 38103, [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 if 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 14, 2022.

William Mark Ware

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.

William Mark Ward

Type or Print Name

Signature

October 14, 2022
Date

06521
BPR #

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

WRITING SAMPLE 1

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION IX

STATE OF TENNESSEE	)	
	)	
v.	)	**No. 18-00253**
	)	
JUSTINE WELCH,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO SUPPRESS

The Defendant has filed a Motion to Suppress the out-of-court and in-court identifications made by multiple lay and law enforcement witnesses. The Court conducted an evidentiary hearing on October 18, 2019, at which the following persons testified: Lt. Robert Wilkie, Randy Henderson, John Steven Lyon, and Michael Becker. Another evidentiary hearing was conducted on December 12, 2019, at which the following witnesses testified, all of whom were law enforcement officers: Zackery Apel, Matthew Wheeler, Bryan Rickett, Robert Fobert, and Patrick Meads.

LAW

The Due Process Clause of the Fourteenth Amendment of the United States Constitution imposes limitations on governmental identification processes. The Due Process standard applies to two kinds of identification testimony. First, it applies to the admissibility at trial of pre-trial identifications. Second, it applies to the question of whether or not the witness will be permitted to identify the defendant in court at the time of the trial. If a pre-trial identification "was so unnecessarily suggestive and conducive to mistaken identification" as judged by a totality of the circumstances surrounding it, the defendant is said to have been denied Due Process of law and testimony of the pre-trial identification should be excluded. *Stovall v. Denno*, 388 U.S. 293 (1967).

Insofar as admission of in-court identifications, where there is a question as to whether or not Due Process has been violated, a two-step analysis is used. First, the threshold inquiry is whether "law enforcement officers used an identification procedure that is both suggestive and unnecessary" and only if so, is the second question reached. *Perry v. New Hampshire*, 565 U.S. 228 (2012). Second, was there a substantial likelihood of irreparable misidentification? These questions are to be answered in light of the totality of the circumstances surrounding the identification. Insofar as the question of likelihood of misidentification is concerned, it comes down "to the central question whether under the 'totality of the circumstances' the identification was reliable even though the confrontation was suggestive." *Neil v. Biggers*, 409 U.S. 188 (1972). According to *Biggers*, the "factors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." *Id.* at 199. If the factors indicating an ability to make an accurate identification are outweighed by the factors indicating the corrupting effect of law enforcement suggestion, the identification should be suppressed. Otherwise, if the evidence is admissible in all other respects it should be submitted to the jury for its evaluation. *Perry*, 565 U.S. 228.

To summarize, in order to suppress the testimony of an identification witness, the question is not whether the identification procedure was less than ideal or could have been better, the question is whether it was so flawed by government suggestion as to violate the Due Process rights of the defendant. Whether the government has violated the Due Process rights of the defendant is determined by weighing "the corrupting effect of law enforcement suggestion" against factors indicating an ability to make an accurate identification, under the aforementioned totality of the circumstances test. Unless there is a Due Process violation, it is for the jury to decide the weight of identification testimony.

Burden of Proof and Burden of Going Forward

The procedural question as to who has the burden of proof in a motion to suppress an identification has not been clearly decided by the Tennessee appellate courts. It is clear that the defendant has the burden of proving that an identification procedure is unnecessarily and impermissibly suggestive. At least one Tennessee court has implied that the defense also has the burden of proving a very substantial likelihood of misidentification. *See State v. Philpott*, 882 S.W.2d 394 (Tenn. Crim. App. 1994) (the defendant has the burden of proving that the identification procedure was impermissibly suggestive and must be able to call witnesses to testify to facts that tend to prove that those procedures gave rise to a very substantial likelihood of irreparable identification). Other courts have implied that if the defendant establishes the identification procedure was unnecessarily suggestive, the burden shifts to the State to show the reliability of the identification despite the suggestiveness. *See State v. Beal*, 614 S.W.2d 77 (Tenn. Crim. App. 1981) ("...the State may elicit in-court identification testimony if the prosecution can show that it is not tainted by the pretrial identification procedure"). It is respectfully submitted that the bench and bar of this State need guidance on this matter.

This Court believes that the better rule would place the burden on the defendant to prove a very substantial likelihood of misidentification. Other courts have adopted this position. *See State v. Newsome*, 265 So.3d 1223, 2019 (La. App. 2019) (in order to suppress identification defendant must meet a two-fold burden: the defendant must prove that the identification procedure was suggestive and that there is a substantial likelihood of misidentification as a result of the identification procedure); *Demorst v. State*, 228 So. 3d 323 (Miss. Ct. App. 2017) (defendant has burden of establishing very substantial likelihood of irreparable misidentification); *Commonwealth v. Martin*, 850 N.E.2d 555 (Mass. 2006) (defendant's burden to prove by a preponderance of the evidence that the procedure was unnecessarily suggestive and conducive to irreparable mistaken identification); *People v. Norris*, 320 N.E.2d 152, 23 Ill. App. 3d 745 (Ill. App. Ct. 1974) (on a motion to suppress identification the defendant has the burden to establish that the circumstances were so suggestive as to give rise to a very substantial likelihood of irreparable misidentification). A blanket rule shifting the burden to the state after a showing of suggestiveness does not

take into account that identification procedures will have varying degrees of suggestiveness.

Notwithstanding the above, absent clear guidance from the Tennessee appellate courts on this matter, this Court has applied the standard most favorable to the Defendant, the burden shifting standard, alluded to in *Beal*, 614 S.W.2d 77. While it does not appear to make any difference in the outcome of the present case, there will be cases in the future in which the question of which side has the burden of proving a very substantial likelihood of misidentification will be controlling.

Photographic Lineups

With regard to photographic lineups, the fact that the defendant's photograph stands out in some way from the others may indicate suggestiveness. On the other hand, a photographic display is unnecessarily suggestive only when the other photos are "grossly dissimilar" to the defendant's photograph. *See State v. Scarborough*, 300 S.W.3d 717 (Tenn. Crim. App. 2009). "Many courts have held that the suspect's distinctive appearance in a photo display does not render the procedure suggestive." Sobel, Eyewitness Identification: Legal and Procedural Problems (2nd ed. 1983) § 5:7 (citing numerous cases). On the other hand, "some courts will give greater weight to the uniqueness of the defendant's photograph *if it portrays a uniqueness that was prevalent in the pre-lineup descriptions of the defendant.* Id. (citing numerous cases).

Black Eye

With regard to the fact that the suspect defendant is the only person in a photospread with a black eye, most courts have found this fact alone not to indicate suggestiveness when the previous descriptions of the suspect did not include the presence of a black eye. *See People v. Gourdine*, 223 A.D.2d 428, 636 N.Y.S.2d 760 (1st Dep't 1996) ("Although defendant was the only participant who appeared in the lineup with a bruised face and a black eye, these were not features the witnesses utilized in describing the perpetrator of the crime and did not create a substantial likelihood that he would be singled out for identification."); *People v. Murakami*, No. B158049, 2003 WL 22429290

(Cal. Ct. App. Oct. 27, 2003) (none of the robbery victims reported that the robbers had tattoos or a black eye. It is likely that defendant did not have a black eye at the time of the robbery making it, in fact, more difficult to select defendant's photo); *Cooper v. State*, 96 Idaho 542, 531 P.2d 1187 (1975) ("The existence of the black eye at the time of the lineup was not an identifiable characteristic of the perpetrator of the robbery and does not elevate the lineup to the requisite level of suggestiveness); *State v. Ratliff*, 90 P.3d 79 (Wash. Ct. App. 2004) ("...no witness described the robber with a black eye. Thus, [defendant's] black eye does not point to him as the robber."). *People v. Rodriguez*, 274 Cal. App. 2d 487, 79 Cal. Rptr. 187 (1969) (If the witness was unaware that the culprit had a black eye, the fact that the defendant was the only one in the lineup with a black eye would be of no significance).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Sgt. Wilkie testified that he was assigned as the case coordinator for the investigation of this case on June 5, 2016. Before he became involved the Felony Response unit had already prepared a photospread using the Defendant's driver's license photograph as the base. This photospread was labeled Photospread A (Ex. A). Wilkie testified further than when he observed the photospread he thought it was suggestive as the Defendant was the only one of the six persons who had puffy hair and only one or two others appeared to have any facial hair. He then had someone generate another photospread using the Defendant's booking photograph at the time of his arrest on this case and the mugshot data base. This was Defendant's first arrest in Shelby County, so there was no other booking photographs of the defendant available. This photospread was labeled Photospread B (see e.g. Ex. R) and also contained five filler photographs with persons with hairstyles more closely resembling the Defendant's hairstyle. Wilkie was concerned, however, that the Defendant was the only person in photospread B with a band-aid on his forehead. As a result, he took a black Sharpie and put black marks across the foreheads of all six of the photographs in Photospread B. (See e.g. Ex. B). Multiple copies of Photospread B were made by Wilkie, but somehow two persons, Michael Becker

and Randy Henderson, were inadvertently shown the version of Photospread B in which the Defendant was the only person with a band-aid on his forehead. (Exs. G and R).

When questioned as to why Wilkie did not have a second photospread generated from the driver's license database, he explained that the driver's license database generated fewer pictures to choose from and that it did not allow the flexibility to continue to search for fillers. In addition to the fact that the Defendant had a Band-aid on his forehead, Defense argues that the fact that the Defendant is the only person in Photospread B with a black eye makes the photospread unnecessarily suggestive to the extent that is gives rise to a likelihood of misidentification. An examination of Photospread B does indicate that the Defendant has a bruised left eye socket, but it is by no means pronounced. (See e.g., Ex. B). Wilkie testified he did not "think that the Black Eye stood out enough to make him be the one that jumps off the page and make people pick him." Significantly, none of the witnesses which are the subject of the present Motion to Suppress mention the black eye unless questioned about the same by the attorneys. With regard to the band-aid, of the two witnesses who viewed a photospread in which the Defendant was the only person with a band-aid, only one, Michael Becker, indicated that it influenced his selection in any way and this will be discussed more fully below. Significantly, Defendant raises no other complaints about the fairness of Photospread B; and this Court finds that the filler photographs are not "grossly dissimilar" to the defendant's photograph.

A. The Lay Witnesses

Randy Henderson testified that on June 4, 2016, he went to a gas station in Memphis in the area of Perkins Road and Mendenhall. He parked his 2012 silver Chevrolet Camaro at the first gas pump closest to the door and he went inside to buy some beer. While he was inside the store he saw an individual walking toward his car, open the car door, get in, and drive away. He testified that this occurred around 7:00 p.m. and although it was starting to get dark, it was not dark. He also testified that his car was parked under an awning and that the area was well lit and he got a look at the man's face, when the man turned and looked in his direction. Mr. Henderson called 911 and reported the theft of his car to the police. He described the thief as a male black with dreadlocks

and a heavy build. He explained during the Motion to Suppress hearing that the culprit actually had "twists" not dreadlocks but he gave the description of dreadlocks because he thought they may not understand "twists." He also explained the culprit had on baggie clothes, which may have made him look heavier than he was.

Mr. Henderson was shown Photospread B (Ex. G) the version in which the Defendant is the only one with a faint black eye and a band-aid. Mr. Henderson, who himself is black, identified the photograph of the Defendant as the person who stole his car. He indicated that at the time he made his identification he did not know that his car had been in a wreck. Furthermore, he did not give a prior description of the culprit as having a band-aid or a black eye. As to why he picked the Defendant's photograph, he indicated that the car was an anniversary gift and that he would never forget a person taking his car. He indicated that he recognized the Defendant's face as the person he saw take his car. He was not asked whether he noticed the black eye or the band-aid at the time of the identification procedure or whether it influenced his decision in any way.

Considering the fact that Mr. Henderson did not previously describe the culprit as having either a black eye or a band-aid, and did not know of any crash or injuries to the suspect, this Court concludes that any suggestiveness in photospread B (Ex. G) was minimal. Weighing this degree of suggestiveness against the totality of the circumstances, this Court concludes that there is no substantial likelihood of irreparable misidentification and, hence, no Due Process violation. Accordingly, the request to suppress both the out-of-court and in-court identification of the Defendant by Mr. Henderson is denied. The weight to be accorded to the identifications will be for the jury to determine.

Although there is no doubt that Mr. Henderson did not view the face of the culprit for long, the culprit looked at Mr. Henderson before he entered the car allowing Mr. Henderson to see his face from a relatively short distance away. This occurred in a well-lit area. Furthermore, as for the degree of attention, Mr. Henderson was not a mere bystander or a victim of a violent crime staring down the barrel of a gun. The culprit was taking his car which had been given to him as an anniversary present. In these circumstances, his degree of attention was heightened. *See Moore v. State*, NO. 01-00-00931-CR, 2001 WL 1243569 (Tex. App.—Houston [1st Dist.] Oct. 18, 2001) (a witness to a crime who is also a victim of

a crime has a greater degree of attention than a mere bystander). Although his prior description of a heavy man with dreads appears somewhat inaccurate, Henderson explained the inconsistency in the hearing. Further, there remains a big difference between a person's ability to "describe" someone and their ability to "recognize" someone. Although no one asked Mr. Henderson as to his degree of certainty at the time he made his identification, he read the directions on Ex. F telling him to make no identification unless he was positive. Finally, the identification procedure occurred on June 7, 2016, a mere three days after he witnessed the Defendant take his car.

John Steven Lyon testified that on June 4, 2016, he was at Westy's, a local pub, with seven of his friends when he heard gunshots outside. He looked out the window and saw a man standing in the middle of the street. He observed the man through the window for five to eight minutes and then went outside where he observed the man for as much as another five minutes. Although it was getting dark, Mr. Lyon described the area outside the pub as "highly lit" and he indicated that the man was facing him, allowing him to get a face-to-face look at the man. He described him as a male black in his early to late 20's with a little goatee. He could not see his hair as the man was wearing a hoodie, but he described him as having a small or thin build. He further indicated that while he was making his observations he came to within forty feet of the man (although it appears that Mr. Lyon is not good with measurements). He also saw the man put a gun in his pocket and saw him run off in the direction of the Bass Pro Shop.

Mr. Lyon was shown Photospread B (Ex. N) the version in which all six photos have a black sharpie mark on the forehead. However, this version of Photospread B is somewhat "darker" than other versions, such that the "black eye" on the Defendant is even slightly fainter than in other versions. He was shown the photospread on June 16, 2016, some twelve days after he witnessed the incident. When shown the photospread, Mr. Lyons "immediately" picked out the person he saw because he had seen his face. However, when he chose the photograph of the Defendant he wrote on the Photospread: **"Saw him on TV after News Showed him."** (Ex. N). He testified at the motion to suppress hearing that the person he identified in the Photospread was both the person he saw on the news and the person he saw outside Westy's. He was not asked whether he

noticed the black eye at the time of the identification procedure or whether it influenced his decision in any way.

Considering the fact that Mr. Lyon did not describe the culprit prior to his identification procedure as having a black eye, this Court concludes that any suggestiveness in the photospread was minimal. Although Mr. Lyon testified that he knew there had been a crash, he did not indicate any knowledge of how serious the crash was or as to whether the suspect was injured. Weighing this degree of suggestiveness against the totality of the circumstances, this Court concludes that there is no substantial likelihood of irreparable misidentification and, hence, no Due Process violation. Accordingly, the request to suppress both the out-of-court and in-court identification of the Defendant by Mr. Lyon is denied. The weight to be accorded to the identifications will be for the jury to determine.

Mr. Lyon had an unusually long time to view the suspect as he loitered around after the shooting. The area was well-lit and Mr. Lyon was able to look at the man face-to-face, from as close as forty feet away. As far as degree of attention, Mr. Lyon was not the victim, but was observing an extremely dangerous situation. Naturally, his attention would have been heightened. It is unclear from the record whether Mr. Lyon gave a physical description on the night of the incident or in his statement to the police, but at the same time there is no indication of their being any material differences. The record is also unclear as to his level of certainty. He viewed the photospread twelve days after the incident, a relatively short period of time. Further, the fact that the identification may have, in part, been influenced by Mr. Lyon seeing a photograph of the Defendant on the news prior to making his identification does not invoke State action. *See State v. Martin*, 505 S.W.3d 492, 502-03 (Tenn. 2016) ("the fact that the photographic array shown to the [witness] included the same booking photograph that was on the ... website [or in this case on the news] does not indicate 'improper state conduct.'" [citation omitted]).)

Michael Becker testified that he was at Westy's with Mr. Lyon on June 4, 2016. His testimony is basically consistent with that of Mr. Lyon's except for variations in the amount of time that transpired while he was looking at the suspect. More specifically, he testified that after he heard the shots fired, he looked out the window "briefly" and saw a man

standing in the street holding a gun "gangster style." He then went outside and observed the man still standing in the middle of the street under the lights where he observed him for about a "minute" from about 15-20 feet away. He testified further that nothing was covering the man's face and he was able to look the man with a "straight shot" and "eyeball to eyeball" and "stared" at him "point blank." Mr. Lyon gave a description of the suspect at the scene as a person of small build and between 5'7" and 5'9". He did not describe the man as having a black eye, band-aid on his forehead or as having any kind of injuries. Significantly. Mr. Becker testified that after the incident and before he was shown a photospread ten days later, he had seen pictures of the person who was arrested, i.e., the Defendant in the extensive media coverage

Mr. Becker was shown Photospread B (Ex. R), the version in which only the Defendant has a band-aid on his forehead, on June 14, 2016, and he circled the Defendant's photograph and wrote: "This is the person I saw that shot both victims @ Westy's Restaurant." On direct, he further testified that he picked the Defendant's photo because he recognized him "from what happened."

Mr. Becker's testimony in the motion to suppress hearing further gives rise to the inference that it was influenced both by what Mr. Becker had seen on the news after the incident, but also by the fact that he "googled" the case in preparation for his testimony. According to Becker, his internet search also revealed pictures of the Defendant that he observed just prior to his testimony. This would explain the reason why Mr. Becker identified the person in his testimony during the Motion to Suppress hearing as having a band-aid on his head and a funny looking goatee, although he made no mention of either in his statements of description given at the scene. It can be reasonably inferred that he observed the same from the photograph of the Defendant disseminated by the news media and on the internet. This inference is further bolstered by the fact that none of the other witnesses indicated in their pre-identification procedure descriptions that the culprit had a band-aid on his forehead. This inference is further bolstered by an examination of Ex. W, a photo of the Defendant sitting in a police car at the scene of his arrest. There is no band-aid on the forehead of the Defendant at that time. Other testimony indicates that the Defendant was treated at the scene of his arrest. Further evidence of this influence can be

seen from the exact wording used by Mr. Becker in describing the person he picked out of the photospread. According to Becker: "that was a photo of the gentleman who was accused of shooting those two people." He later described the person he saw holding a gun that night as "the gentleman accused of killing those two people." The record is clear that Mr. Becker observed and followed the extensive media coverage of this matter before he was asked to make his identifications. In addition, the testimony at the suppression hearing is ambiguous as to the time Mr. Becker learned that there had been a car crash.

Against this backdrop, Mr. Becker was asked "is there anything about that bandage being placed in that photographic lineup that assisted you in selecting the individual that you selected in that photographic lineup?" Mr. Becker responded, "well, it was quite apparent he had something on his forehead and that's – that's how I determined, you know, it was him." The Court then sought clarification and asked: "So you picked this guy out because he had a band-aid on?" Mr. Becker responded, "I picked him out because of the facial feature. I picked him out because his – this goatee was – had a little goatee. And that's the reason why." The Court inquired further: "I thought you just said I picked him out because he had a band-aid on?" Becker responded: "Well. He had a band-aid too." This Court concludes based upon the evidence and inferences that flow therefrom that Mr. Becker confused his on the scene viewing of the suspect with the pictures he saw on the news and by the time of the suppression hearing thought the man he had seen had a band-aid on his head at the time. The defense argues that a legitimate interpretation of Mr. Becker's testimony is that he only picked out the Defendant's photo because the band-aid, standing alone, singled out the Defendant for identification. This Court declines to so interpret Mr. Becker's testimony. A more logical interpretation is that the presence of the band-aid on the defendant's photo contributed to the identification primarily because Mr. Becker had followed the media and seen pictures of the Defendant with a band-aid prior to making his formal identification.

Considering the fact that Mr. Becker did not describe the culprit as having a band-aid, a black eye, or any other injuries on the night of the incident or at any time prior to viewing the photospread, this court concludes that any suggestiveness in the photospread was minimal. Although Mr. Becker testified that he knew by the time he viewed the

photospread that there had been a crash, he did not indicate any knowledge of how serious the crash was or as to whether the suspect was injured. Weighing this degree of suggestiveness against the totality of the circumstances, this Court concludes that there is no substantial likelihood of irreparable misidentification and, hence, no Due Process violation. Accordingly, the request to suppress both the out-of-court and in-court identification of the Defendant by Mr. Becker is denied. The weight to be accorded to the identifications will be for the jury to determine.

Mr. Becker "briefly" saw the suspect through the window and then again saw him outside Westy's for at least a minute. The area was well-lit and Mr. Becker was able to look at the man face-to-face, from as close as 15-20 feet away. As far as degree of attention, like Mr. Lyon, Mr. Becker was not the victim, but was observing an extremely dangerous situation. Naturally, his attention would have been heightened. The only material difference in the physical description given by Becker that night was with regard to the culprit's height, something that is very subjective. As for his level of certainty, Ex. Q indicates that he was told not to make an identification unless he was positive. He viewed the photospread ten days after the incident, a relatively short period of time. Further, the fact that the identification was, in part, influenced by Mr. Becker seeing a photograph of the Defendant on the news prior to making his identification does not invoke State action. *See State v. Martin*, 505 S.W.3d 492, 502-503 (Tenn. 2016) ("the fact that the photographic array shown to the [witness] included the same booking photograph that was on the ... website [or in this case on the news] does not indicate 'improper state conduct.'" [citation omitted]). Simply put, although the presence of the band-aid may have assisted Mr. Becker in making his identification, it did so primarily because Mr. Becker had seen a photograph of the defendant with a band-aid on his forehead in the news media prior to making his formal identification.

B. Law Enforcement Officers

Defendant is requesting that both the out-of-court and in-court identifications of the Defendant by the law enforcement officers who arrested the Defendant be suppressed. This Court finds this request somewhat perplexing as the identity of the Defendant as the

person who was arrested is not likely to be a material issue in this case; and can be proven by means other than eyewitness testimony.

The law enforcement officers assisting in the apprehension of the Defendant were (1) Zackery Apel, (2) Matthew Wheeler, (3) Bryan Rickett, (4) Robert Fobert, and (5) Patrick Meads. These officers participated in the apprehension and arrest of the Defendant on June 4, 2016. They were all shown Photospread B (Exs. T, V, Y. AA, and CC), the version where all six persons had a black mark on their foreheads, within one to three days after the arrest, and all identified the Defendant as the person they observed at the scene and arrested. With regard to the level of certainty, three said they were "100%" certain, one said he was "positive" and the other said he knew "immediately." All five signed a form indicating they would make no identification unless they were positive. None of the five officers made any statements of identification prior to viewing the photospreads that were in any way inconsistent with the Defendant's actual appearance. In fact, since the Defendant was already in custody, there would be little reason to describe the culprit, after his identity had become known and he was booked into jail. As far as an opportunity to view the suspect, these officers had ample and extensive opportunities to do so. All participated in his capture and were able to see his face at an extremely close distance for a significant period of time. As for the degree of attention, these law enforcement officers knew that there had been multiple shootings by the suspect and that an officer was "down." They also knew and/or participated in a high-speed chase through the downtown streets of Memphis. Under such circumstances the degree of attention by the officers would be "off the charts." *Consider Manson v. Brathwaite*, 432 U.S. 98, 115 (1977) (a trained police officer on duty brings a particular high degree of attention to making observations in the course of his duties); *People v. Smith*, 2019 IL App (1st) 161984-U) (when a police officer is responding to a call his degree of attention is high and in all likelihood greater than the average citizen). *See also State v. Buggs, 211 S.W.3d* 744, 751-52 (Tenn. Crim. App. 2006) (citing cases). In *Buggs*, a police officer who had bought drugs from the suspect *who was not arrested at the time*, was shown a single driver's license photograph of the suspect two months after the drug buy and the officer identified the defendant. The trial court's denial of the motion to suppress was affirmed primarily based on the fact that the

identification was made by a trained and experienced law enforcement officer. The Court cited several cases in which the showing of a single photograph to a law enforcement officer was held not to violate due process primarily because the identification was made by a law enforcement officer.

Weighing the degree of suggestiveness in the identification procedures with these five officers against the totality of the circumstances, this Court concludes that there is no substantial likelihood of irreparable misidentification and, hence, no Due Process violation. In fact, the *Biggers* factors are so strong in this case indicating an ability to make an accurate identification that there would not be a violation of Due Process if the arresting officers had merely been shown the single booking photograph of the defendant. All of the factors in the present case are far stronger than those in the *Buggs* case. Accordingly, the request to suppress both the out-of-court and in-court identification of the Defendant by the five officers is denied. The weight to be accorded to the identifications will be for the jury to determine.

CONCLUSION

For the aforementioned reasons, this Motion to Suppress is hereby **DENIED**.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant's MOTION TO SUPPRESS is DENIED.

ENTERED this 16th day of December, 2019.

JUDGE W. MARK WARD
CRIMINAL COURT DIVISION IX

WRITING SAMPLE 2

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION IX

TOMMIE PHILLIPS,	)	
	)	
Petitioner,	)	
VS.	)	**No. 09-05231**
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR POST-CONVICTION RELIEF

This cause came on to be heard on the *pro se* Petition for Post-Conviction Relief filed in this cause on December 29, 2014, and Amended Petitions filed May 19, 2016, September 16, 2016, and October 11, 2017, and the record as a whole.

PROCEDURAL HISTORY

On August 13, 2009, the Shelby County Grand Jury returned a sixteen (16) count indictment [No. 09-05231] charging the Petitioner, Tommie Phillips, with four counts of felony murder, one count of premeditated murder, two counts of criminal attempt to commit murder in the first degree, two counts of aggravated rape, six counts of especially aggravated kidnapping, and three counts of especially aggravated burglary. The matter was assigned to Division IX of the Criminal Court of Shelby County, Judge W. Mark Ward, presiding. The Shelby County Public Defender was appointed to represent the Petitioner. The case was assigned to Assistant Shelby County Public Defenders Gerald Skahan and Robert Gowan. After a jury trial, the jury returned verdicts finding the Petitioner guilty of four counts of felony murder, one count of reckless homicide, two counts of attempted first degree murder, one count of aggravated rape, one count of aggravated sexual battery, six counts of especially aggravated kidnapping, and two counts of especially aggravated

burglary. The trial court merged the four counts of felony murder and one count of reckless homicide into one felony murder conviction and merged the aggravated sexual battery conviction with the aggravated rape conviction. The trial court also merged the six counts of especially aggravated kidnapping into three convictions-one per victim-and merged the two especially aggravated burglary convictions into one conviction. The trial judge sentenced Petitioner to life imprisonment plus sixty (60) years.

On December 13, 2013, the Court of Criminal Appeals affirmed the conviction and sentences with a slight modification. *State v. Phillips*, No. W2012-01126-CCA-R3-CD, 2013 WL 6529308 (Tenn. Crim. App. Dec. 13, 2013). In the Court of Criminal Appeals, the Petitioner raised as error: (1) the failure to suppress his statement to the police; (2) the failure to suppress his photographic identification; (3) alleged improper instructions related to the kidnapping; and (4) the insufficiency of the evidence. Application for permission to appeal was denied by the Tennessee Supreme Court on March 25, 2014.

On December 29, 2014, Petitioner filed his *pro se* Petition for Post-Conviction Relief. On January 7, 2015, attorney Joseph McClusky was appointed to assist the Petitioner. Mr. McClusky was allowed to withdraw as attorney of record on July 17, 2015, and attorney Josie Holland was appointed. Thereafter, with aid of court-appointed counsel, Amended Petitions were filed on May 19, 2016, September 16, 2016, and October 11, 2017.

In the May 19, 2016 Petition, it was alleged that counsel were ineffective by failing: (1) to adequately prepare for the case; (2) to fully investigate the case; (3) to properly communicate with Petitioner; (4) to call all appropriate witnesses; (5) to file and litigate all proper motions, including a Fourth Amendment challenge to his statement, and (6) by failing to develop a proper strategy. It was also alleged that appellate counsel failed to raise pertinent issues on the appeal.

In the September 16, 2016 Petition, it was further alleged that trial counsel were ineffective by failing: (7) to file a motion to preserve evidence; (8) to file a motion requesting the State to memorialize its interviews with witnesses; (9) to object to a bifurcated hearing on the motion to suppress; (10) to adequately impeach Christian Lee as he gave testimony different than other witnesses; (11) to object to the introduction of a video of the crime scene taken years after the event; and (12) to object to the admission into evidence of the gun on

the basis of failure to establish the chain of custody.

In the Petition filed on October 11, 2017, no new issues were alleged. It did provide some specificity by claiming that counsel were ineffective in not challenging the introduction of the Petitioner's statement due to the unconstitutionality of his forty-eight (48) hour hold; and failed to investigate the role of Main and Nick in the investigation.

Evidentiary hearings were conducted on May 11, 2018, August 20, 2018, and May 14, 2019. After giving the parties an opportunity to obtain and review a transcript of those hearings, the parties presented their oral arguments to the Court on September 20, 2019.

UNDERLYING FACTS

The opinion of the Court of Criminal Appeals contains a detailed summary of the evidence presented in the trial court. To summarize further, the State's proof showed that the Petitioner broke into the residence where the victims lived on December 9, 2008, armed with a shotgun, and while there murdered an eighty-five (85) year-old woman and attempted to kill two of the other residents. In addition, the proof showed that he sexually assaulted one of the victims. Three of the surviving residents identified the Petitioner as the culprit. In addition, the Petitioner gave a pre-trial statement to the police admitting his responsibility for killing the eighty-five (85) year-old victim and stabbing the two victims for which he is alleged to have attempted to murder. He did attempt to minimize his responsibility by alleging that the eighty-five (85) year old victim that died by strangulation in a bathtub was simply an accident, and that his assaults upon the other two people were the result of an argument.

LAW

In a post-conviction proceeding, the burden is on the petitioner to prove the allegations of fact by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). With regard to a claim of ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). To establish deficient performance, the petitioner must show that counsel's performance was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930,

936 (Tenn. 1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In other words, the petitioner must show that the deficiencies "actually had an adverse effect on the defense." *Id.* at 693. A petitioner who fails to establish either the deficient performance component or the prejudice component is not entitled to relief. Moreover, "a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." *Goad*, 938 S.W.2d at 370.

In evaluating a lawyer's performance, a reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999). The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). A reviewing court should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689. Counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690.

As mentioned, reviewing courts must indulge a "strong presumption" that counsel's conduct was within the range of competence demanded of attorneys in criminal cases. This presumption of competence interacts with the post-conviction petitioner's burden of proof. The petitioner has the burden of persuasion, and that burden never shifts to the State. As a consequence, a record that is inadequate or incomplete regarding counsel's actions and strategy is inadequate to displace the strong presumption of competence. *Cauthern v. State*, 145 S.W.3d 571, 604 (Tenn. Crim. App. 2004). This is in part because there is also a strong presumption that counsel took the actions he or she did for tactical reasons rather than through neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

To prevail on an ineffective assistance of counsel claim with regard to the failure to subpoena or produce a potential witness, the defendant must (1) produce the witness at the post-conviction hearing, (2) show that trial counsel could have located the witness, and (3)

elicit both favorable and material testimony from the witness. *Denton v. State*, 945 S.W.2d 793, 802-03 (Tenn. Crim. App. 1996). *See also Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("[W]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing" in order to show prejudice). When a petitioner presents, at a post-conviction hearing, a witness he claims should have been called at trial, the post-conviction court must determine whether the testimony would have been (1) admissible at trial, (2) material to the defense, and (3) must assess the credibility of the witness. *Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008).

The decision of a trial attorney whether to object is often primarily a tactical decision. *Davidson v. State*, No. M2005-02270-CCA-R3-PC, 2006 WL 3497997 (Tenn. Crim. App. Dec. 4, 2006). More specifically, the decision of a trial attorney whether to object to opposing counsel's arguments is also largely a tactical decision. Attorneys may often choose not to object to damaging evidence for strategic reasons so as to avoid emphasizing the unfavorable evidence. *Id.* When there is no proof in the record as to "why" counsel chose not to object, a reviewing court has no evidence that counsel provided anything other than effective assistance of counsel. *See State v. Sexton*, No. M2004-03076-CCA-R3-CD, 2007 WL 92352 (Tenn. Crim. App. Jan. 12, 2007) ("There is no proof in the record indicating why counsel chose not to object to the other statements. Without testimony from trial counsel or some evidence indicating that his decision was not a tactical one, we cannot determine that trial counsel provided anything other than effective assistance of counsel.").

In order to establish "prejudice" on a claim of ineffective assistance of counsel as a result of a failure to investigate, the petitioner must actually show what a proper investigation would have revealed. Petitioner must make:

> a comprehensive showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained from such an investigation and whether the information, assuming its admissibility in court, would have produced a different result....Courts should insist that the defendant show to the extent possible precisely what information would have been discovered through further investigation.

United States v. Askew, 88 F.3d 1065, 1073, 45 (D.C. Cir. 1996) Fed. R. Evid. Serv. 167

(D.C. Cir. 1996). *See also United States v. Gwyn*, 481 F.3d 849, 855 (D.C. Cir. 2007) ("a defendant may not merely allege that counsel failed to undertake an investigation, but must show to the extent possible precisely what information would have been discovered through further investigation").

With regard to the failure to file a motion to suppress, the petitioner has the burden of proving that his trial attorney's decision not to file a motion to suppress was deficient. When the petitioner fails to show deficiency, trial counsel's decision will be given deference, so long as the tactical choice is an informed one based on adequate preparation. Further, assuming arguendo that the failure to file a motion to suppress is deficient, the petitioner must establish prejudice by demonstrating a reasonable probability that the motion to suppress would have been granted and a reasonable probability that it would have made a difference in the outcome of the case. *See Hunter v. State*, No. M2013-01142-CCA-R3-PC, 2014 WL 3058425 (Tenn. Crim. App. July 8, 2014).

The petitioner in a post-conviction proceeding cannot add additional issues for the court's consideration that are outside the legal claims or factual allegations contained in the petition or the amended petition. *Long v. State*, 510 S.W.2d 83, 85 (Tenn. Crim. App. 1974) (no relief can be sought on grounds not raised in the petitions; a post-conviction petition must rest upon the factual allegations it contains; petitioner cannot allege one case and prove another).

Finally, if a petitioner raises an issue in his written petition but fails to present any evidence on that issue in the post-conviction evidentiary hearing, the issue has been waived. *Lyons v. State*, No. W2010-00798-CCA-R3-PC, 2011 WL 3630330 (Tenn. Crim. App. Aug. 18, 2011) (failure to present evidence on matter results in waiver of issue).

EVIDENTIARY HEARINGS

Evidentiary hearings were conducted on May 11, 2018, August 20, 2018, and May 14, 2019.

Robert Gowen testified that he was employed by the Shelby County Public Defender and represented the Petitioner at trial, along with then attorney Gerald Skahan. Mr. Skahan was lead counsel. He testified that he was part of a Capital Defense Team that was

assigned to the case. He recalled obtaining discovery on the case and visiting with the Petitioner in jail as the case was pending. He did not specifically recall the investigator who was assigned to the case. A full social history was prepared in anticipation of sentencing and, in fact, although the State was seeking life without parole, the jury returned a life sentence. He recalled going to the property room before the case went to trial and found the shotgun with a live shotgun round in the chamber, but the round did not match the shotgun. This would account for the testimony that the shotgun failed to fire at the scene.

Larry Nance testified that he represented the Petitioner and was first appointed shortly after the Petitioner's arrest. At the time he was an Assistant Shelby County Public Defender and a member of the Capital Defense Team. He represented the Petitioner during his preliminary hearing and initially represented him in Criminal Court until his retirement. Mr. Nance recalled discussing and considering the issue of the Memphis Police Department forty-eight (48) hour hold policy during his representation, but did not raise the issue during the motion to suppress. He could not recall "why" he chose not to raise the issue. Exhibit 1 was a copy of the arrest ticket. Exhibit 2 was a copy of a court order finding probable cause and authorizing the detention of the Petitioner. He did not recall filing a motion to preserve and did not see any need to do so in the case. He also considered that a matter of trial strategy. He did not recall the reason that the motion to suppress hearing was bifurcated.

Carolyn Mason testified that she worked for the Memphis Police Department. She assisted in investigating the present case. Vivian Murray was the lead investigator, but she retired approximately three years ago. Mason recounted that one of the surviving victims identified the Petitioner at the hospital. As a result, the Petitioner was developed as a suspect. Thereafter, the Petitioner flagged down the police and turned himself in on December 10, 2008. He came into the office at about 12:40 p.m. The Petitioner was advised of his *Miranda* rights at approximately 1:52 p.m. The Petitioner signed an agreement to give his DNA on December 10, 2008. (Ex. 3). She testified further that she conducted the interrogation in the present case. At one point in his interview, the Petitioner requested an attorney, after he had already partially confessed to stabbing two of the victims. After that, the forty-eight (48) hour hold was obtained by Lt. Mullins. At the time the forty-eight (48) hour hold was obtained, at least one of the victims had identified the

Petitioner and he had partially confessed. Mason testified that she prepared the arrest ticket after the fact, but placed the time 12:40 on it because that was when he was taken into custody. Ex. 4 is the "Supplement" of Lt. Mason regarding the interview of the Petitioner.

Gerald Skahan testified that he was lead counsel representing the Petitioner at the time of trial. At the time of trial he was working with the Shelby County Public Defender as the lead attorney for the Capital Defense Team. The Capital Defense team had two investigators, but he could not remember which investigator was assigned to the case. He testified further that he could not remember how many times he visited with the Petitioner in jail, but stated it was his practice to meet with the clients at least two to three times per month. He had very little recollection of the specifics of his representation, including the details of the discovery. He did recall finding a live round in a shotgun during the discovery process. His lack of memory is understandable as the trial took place in November 2011 and Mr. Skahan took the bench as a General Sessions Judge on September 1, 2014. He had no recollection of objecting to the admission of the video of the crime scene. He did state that he often did not object to matters that he did not feel a need to dispute or that there was no legal grounds justifying exclusion.

Petitioner, **Tommie Phillips** testified that he was not pleased with the outcome of his trial. He felt like his constitutional rights were violated. He testified he was arrested on Felix Street on December 10, 2008. He surrendered himself after he was surrounded by the police. He was brought to the 11th Floor at 201 Poplar. He was put in an interrogation room by Mullins and Mason and shackled to a bench. Mullins and Mason told him he was a person of interest as to the Faxon event. He then signed an Advice of Rights form and answered some of their questions. He claimed he "lawyered up" around 2:30 to 3:00 p.m., after he refused to admit to harming the elderly victim. He had already acknowledged prior to "lawyering up" that he was at the scene and stabbed at least one of the victims, but claimed it was in self-defense.

With regard to his motion to suppress on the grounds that he had invoked his right to counsel, he believes that his trial counsel were ineffective in failing to relitigate the motion to suppress a second time when discovery received after the motion to suppress hearing revealed that Sgt. Murray must have been in the area of 201 Poplar at the time the

Petitioner invoked his right to remain silent. He surmises that if Sgt. Murray was in the area and in communication with others she must have known that he had invoked his right to remain silent [contrary to her testimony in the suppression hearing] and this additional information would have sufficiently impeached Sgt. Murray and resulted in the suppression of his confession.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitions in this matter, in true "shotgun" fashion, raise numerous issues. This Court will address each issue raised in the Petitions:

(1) Failure to adequately prepare for the case.

Petitioner alleges his counsel were ineffective in failing to adequately prepare the case. At the post-conviction evidentiary hearing Petitioner presented no proof in support of this allegation. On the other hand, although both trial counsel lacked specific memory of the extent of their preparation, it does appear that counsel received "discovery" in the case, that at least one investigator was assigned to the case, that a full social history was prepared, and that counsel met with the Petitioner numerous times. In addition, trial counsel fully litigated the motion to suppress prior to the trial. On this issue Petitioner has failed to carry his burden of proof on the factual allegations and failed to demonstrate either "deficient performance" or "prejudice."

(2) Failure to fully investigate the case.

Petitioner also contends that his attorneys failed to fully investigate the case. At the post-conviction evidentiary hearing Petitioner presented no proof to support this allegation. More specifically, Petitioner failed to establish that his attorneys failed to investigate the case or what information a proper investigation would have revealed that would have had any influence upon the outcome of his case. On this issue Petitioner has failed to carry his burden of proof on the factual allegations and failed to demonstrate either "deficient performance" or "prejudice."

(3) Failure to properly communicate with Petitioner.

Petitioner alleges that his trial counsel failed to properly communicate with him. At the post-conviction evidentiary hearing Petitioner acknowledged meeting with his attorneys

regularly, although he claimed he met more with Mr. Gowan. Attorney Skahan testified that it was his practice when he was in charge of the Capital Defense Team to meet with his clients on a regular basis. Attorney Gowan also testified as to visiting the Petitioner in jail. On the other hand, at the post-conviction evidentiary hearing Petitioner provided no specifics to support this very general allegation. On this issue Petitioner has failed to carry his burden of proof on the factual allegations and failed to demonstrate either "deficient performance" or "prejudice."

(4) Failure to call appropriate witnesses.

Petitioner alleges in his pleadings that trial counsel were ineffective in failing to call appropriate witnesses. However, no such witnesses were produced at the post-conviction evidentiary hearing. On this issue Petitioner has failed to carry his burden of proof on the factual allegations and failed to demonstrate either "deficient performance" or "prejudice."

(5) Failure to litigate all proper motions.

At the post-conviction evidentiary hearing, Petitioner raised two sub-issues. **First**, he believes that his trial counsel were ineffective in failing to relitigate the motion to suppress a second time when discovery received after the motion to suppress hearing revealed that Sgt. Murray must have been in the area of 201 Poplar at the time the Petitioner invoked his right to remain silent. He surmises that if Sgt. Murray were in the area and in communication with others she must have known that he had invoked his right to remain silent [contrary to her testimony in the suppression hearing] and this additional information would have sufficiently impeached Sgt. Murray and resulted in the suppression of his confession. At the post-conviction evidentiary hearing, Petitioner first claimed that this additional discovery showed conclusively that Sgt. Murray had lied during the suppression hearings. However, when pressed to identify exactly what discovery he was referring to, Petitioner could produce no such discovery indicating that Sgt. Murray had lied. He then asserted that the additional discovery had shown that Sgt. Murray had been in the area of 201 Poplar at the time he invoked his right to remain silent and had throughout the case been in touch with other officers. From this he jumps to the conclusion that Sgt. Murray lied during the suppression hearing. To put it bluntly, Petitioner failed to produce any additional discovery that showed that Sgt. Murray had lied during the suppression hearing or that

provided any additional information that the trial court was unaware of at the time of its ruling on the motion to suppress. Trial counsel fully litigated the motion to suppress pre-trial and the matter was argued in the motion for new trial. As far as the allegation that the motion should have been re-litigated pre-trial, Petitioner has failed to demonstrate either "deficient performance" or "prejudice."

Second, Petitioner contends that trial counsel were ineffective in failing to file a motion to suppress his statements given to the police as being in violation of the Petitioner's Fourth Amendment rights. At least one of the victims identified the Petitioner as the culprit. As such, it is clear the police had probable cause to arrest the Petitioner, even if he had not voluntarily turned himself in to the police. More specifically, it appears as though the Petitioner is making a claim that his Fourth Amendment rights were violated because he was not given a *Gerstein* probable cause determination as required by law. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). It appears the police responded to the scene of the crime around 3:00 p.m. on December 9, 2008. The Petitioner turned himself in to the police at around 12:40 p.m. on December 10, 2008. Probable cause was determined by a judicial commissioner on December 10, 2008 (document is stamped filed at 7:13 p.m.). According to the finding of probable cause the Petitioner had already turned himself in and confessed at the time the probable cause determination was made. As such, a *Gerstein* determination was, in fact, made within seven (7) hours of Petitioner coming into custody. Accordingly, there was no *Gerstein* violation. *See State v. Gonzales*, No. W2017-00941-CCA-R3-CD, 2018 WL 5098204 (Tenn. Crim. App. Oct. 18, 2018) (neither defendant's presence nor an adversary hearing is required to satisfy *Gerstein*; the only question is whether there is probable cause determination made by a magistrate). Accordingly, Petitioner has failed to demonstrate either "deficient performance" or "prejudice."

(6) Failing to develop a proper trial strategy.

Petitioner contends that his trial counsel were ineffective in failing to develop a proper trial strategy. On the other hand, neither the Petitioner nor his post-conviction counsel has suggested any trial strategy that might have resulted in a different outcome of the case considering that he was identified by multiple parties, confessed and the offense involved a sexual assault. On this matter, Petitioner has failed to demonstrate either "deficient

performance" or "prejudice."

(7) Failing to file a motion to preserve evidence.

Petitioner contends that trial counsel were ineffective in failing to file a motion to preserve evidence. On the other hand, Petitioner does not mention what evidence he wished to have preserved that was not preserved. Furthermore, there was no mention of this issue in the evidentiary hearings. On this matter, Petitioner has failed to demonstrate either "deficient performance" or "prejudice."

(8) Failing to file a motion requesting the State to memorialize its interviews with witnesses.

There was no mention of this issue in the evidentiary hearings. On this matter, Petitioner has failed to demonstrate either "deficient performance" or "prejudice."

(9) Failing to object to a bifurcated hearing on the motion to suppress.

The motion to suppress was bifurcated by the trial court. The Petitioner submits that trial counsel should have objected to the bifurcation. This Court often conducts hearings in a bifurcated fashion to accommodate the parties and witnesses. Trial counsel's failure to object does not amount to "deficient performance." Had an objection been made [on the grounds that the Court should only hear the proof that the defense wanted to be heard] it would most likely have been denied. This Court is concerned with hearing all evidence relevant to an issue in a search for the truth. It is not interested in procedural technicalities which have the effect of limiting the evidence to be considered. Petitioner has failed to show "deficient performance."

(10) The remaining allegations of the Petition.

The written pleadings in this case contain numerous other allegations of ineffective assistance of counsel. All the remaining issues have either been abandoned or no evidence or argument concerning the same occurred in the post-conviction hearings. Nevertheless, this Court has examined all of the unargued issues and find that as to all of these issues Petitioner has failed to carry his burden of proof as to both "deficient performance" and "prejudice."

CONCLUSION

In summary, the Petitioner has failed to prove ineffective assistance of counsel.

IT IS, THEREFORE, ORDERED that the Petition for Post-Conviction Relief is hereby denied.

Entered this 25th day of September, 2019.

W. Mark Ward, Judge
Criminal Court, Div. IX
Thirtieth Judicial District at Memphis

WRITING SAMPLE 3

No. 99-6218

In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the retroactive application of a judicial abolishment of the substantive rule of criminal law known as the "year-and-a-day rule" to an assault committed five years prior to that abolishment violates the Fourteenth Amendment of the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee (JA, 11-21) is reported at *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The opinion of the Tennessee Court of Criminal Appeals (JA, 7-9) is unreported.

JURISDICTION

The opinion of the Supreme Court of Tennessee was entered on May 24, 1999. The Supreme Court of Tennessee denied a Petition to Rehear on June 21, 1999. The petition for a writ of certiorari was filed on September 16, 1999, and was granted on May 22, 2000. Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits that this case involves application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause is contained in Section 1 of the Fourteenth Amendment and provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves Article I, Section 10 of the United States Constitution, which provides that:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

STATEMENT OF THE CASE

A. Procedural History

On August 9, 1994, Petitioner Wilbert K. Rogers was indicted by the Shelby County (Tennessee) Grand Jury and charged with the May 7, 1994 attempted first degree murder of James Bowdery. (JA, 2-3). The victim died in August 1995, more than a year-and-a-day after the assault. (R. Vol. II, 3, 138-139, 142). Thereafter, on September 12, 1995, a new indictment was returned against Petitioner charging him with first degree murder. (JA, 4-5; R. Vol. I, 1-13). The Shelby County Public Defender was appointed to represent Petitioner who was found guilty of second degree murder by a petit jury on January 31, 1996. He was sentenced to thirty-three years imprisonment. (JA, 6; R. Vol. I, 34).

On appeal to the Tennessee Court of Criminal Appeals, Petitioner argued that he could not be convicted of murder because of the common law year-and-a-day

rule enunciated by the Tennessee Supreme Court in *Percer v. State*, 103 S.W. 780, 782 (1907), and cited as authority by the Tennessee Court of Criminal Appeals in *Cole v. State*, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974). Petitioner contended that, at most, he could be convicted of attempted second degree murder which carries a determinative sentence with a range of eight to thirty years imprisonment.

In an opinion filed on October 17, 1997, the Tennessee Court of Criminal Appeals rejected Petitioner's appeal, holding that the state legislature abolished the year-and-a-day rule by its failure to specifically include it as a defense in the 1989 codification of the criminal code. (JA, 9). As authority, the Court of Criminal Appeals cited TENN. CODE ANN. § 39-11-203(e)(2) which specifically abolished all common law defenses and its prior opinion, *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995), which was decided *after* the assault on Mr. Bowdery. In *Ruane*, the Court of Criminal Appeals characterized the year-and-a-day rule as a common-law defense and found that all common-law defenses had been abolished by the Tennessee Criminal Sentencing Reform Act of 1989. *Id.* at 774.

The Tennessee Supreme Court granted Petitioner's Application for Permission to Appeal and on May 24, 1999 issued its opinion as *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court rejected the notion that the year-and-a-day rule was a criminal defense reasoning that "[w]hile similar in some respects to a defense in the sense that it precludes a conviction, the year-and-a-day rule is even more powerful than a

defense because it entirely precludes a murder prosecution." *Id.* at 400. (JA, 23). It found that the year-and-a-day rule had not been abolished by the codification of the Tennessee Criminal Code and thus was in full force and effect when Bowdery was assaulted. *Id.* (JA, 24). However, it found that the common law year-and-a-day rule was no longer justified and judicially abolished the rule.

The Tennessee Supreme Court concluded that its 1999 abrogation of the rule could be retroactively applied to the 1994 assault without violating the Fourteenth Amendment of the United States Constitution because its decision was "not an unexpected and unforseen judicial construction of a principle of criminal law." *Id.* at 402. (JA, 27-28).

On June 21, 1999, the Tennessee Supreme Court denied a Petition to Rehear. (JA, 31). A petition for writ of certiorari was filed on September 16, 1999 and was granted, along with a motion to proceed in forma pauperis, on May 22, 2000.

B. Statement of Facts

This case is purely a question of law. There is no factual dispute that the victim was stabbed on May 6, 1994 and died in August 1995. *Id.* at 395. (JA, 13).

SUMMARY OF THE ARGUMENT

Although the Ex Post Facto Clause contained in Article I, § 10 applies only to restrict the actions of state legislatures, this Court has held that general ex post facto

principles are applicable to judicial rulings through the Due Process Clause of the Fourteenth Amendment. More specifically, this Court has held that the Due Process Clause of the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *See Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964), and *Marks v. United States*, 430 U.S. 188, 191-192 (1977).

Three issues must be addressed to determine whether the decision of the Tennessee Supreme Court is contrary to due process. First, whether general ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature. Second, whether any such prohibition applies to the Tennessee Supreme Court through the Due Process Clause. Third, whether the decision of the Tennessee Supreme Court to abolish the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

Petitioner submits that basic ex post facto principles clearly prohibit the Tennessee legislature from retroactively eliminating the year-and-a-day rule, that the purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree, and finally that the Tennessee Supreme Court's decision to abolish the rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

The decision of the Tennessee Supreme Court to overrule its own precedent and judicially abolish the year-and-a-day rule was so unexpected and indefensible with respect to the law that had been expressed in Tennessee that it relied upon two extremes to justify its conclusion that the ruling was not unexpected and indefensible. First, the Court justified the ruling by looking to the law of other states, reasoning that abolition of the rule in other states would put a defendant on notice that the rule was in question in Tennessee. Under this theory, Tennessee citizens could not rely upon the rulings of the Tennessee Supreme Court as stating the status of the law in Tennessee, but must be cognizant of the law in all fifty states. The mere fact that the Tennessee Supreme Court had to look to the law of other states demonstrates that the law in Tennessee did not render its opinion expected and defensible.

Second, after the Tennessee Supreme Court rejected all prosecution arguments that the Tennessee Criminal Code of 1989 had actually eliminated the year-and-a-day rule as a substantive requirement, the Court, nevertheless, justified its conclusion that its rejection of the rule was foreseeable by asserting that the very same Criminal Code had put the viability of the rule in question. The implied reasoning of the Court must be that, although properly interpreted the Criminal Code did not affect the year-and-a-day rule, the Criminal Code could have theoretically[1] been misinterpreted as affecting the rule, thus,

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[1] The word "theoretically" is used because no court had actually misinterpreted the Criminal Code when the acts were committed in the present case.

causing its continued viability to be in question. It is submitted that the Tennessee Supreme Court's reliance upon a theoretically possible misinterpretation of the Tennessee Criminal Code further demonstrates that the law, correctly interpreted, did not render its decision expected and defensible.

In sum, the law in Tennessee was such that the opinion of the Tennessee Supreme Court was constitutionally unexpected and indefensible based on the law that had been expressed in Tennessee. Accordingly, the retroactive application of the decision to abolish the year-and-a-day rule to Petitioner's case violated the Fourteenth Amendment.

ARGUMENT

1. The year-and-a-day rule is a substantive rule of law.

On May 7, 1994, the date James Bowdery was stabbed, the common law year-and-a-day rule was in full force and effect in Tennessee. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974); *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). As conceded by the State of Tennessee in the Tennessee Supreme Court,[2] the year-and-a-day rule was a substantive principle of Tennessee law.[3] In *Percer v. State, supra*, at

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[2] *See State v. Rogers*, 992 S.W.2d 393, 399 (Tenn. 1999).

[3] *See also United States v. Chase*, 18 F.3d 1166 (4th Cir. 1994) (finding the common law rule to be a substantive rule of law). *Chase* relied heavily upon *Ball v. United States*, 140 U.S. 118

782, the Tennessee Supreme Court, quoted with approval WHARTON ON HOMICIDE (3d ed.), p. 18, which said of the common law rule: "In murder, the death must be proven to have taken place within a year and a day from the date of the injury received." In *State v. Rogers, supra,* at 396, the Tennessee Supreme Court cited this same quote for the proposition that it had recognized "the viability of the rule in Tennessee" since 1907. Thus, as interpreted by the Tennessee Supreme Court, the common law year-and-a-day rule dealt with an essential element of the proof which the prosecution was required to prove.

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature.

Article I, § 10 of the United States Constitution forbids the passage of an ex post facto law by any state. Two elements must be present for a criminal law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham,* 450 U.S. 24, 29 (1981). An ex post facto law within the meaning of the federal constitution has been defined as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done; criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d.

(1891) ("The controlling *element* which distinguished the guilt of the assailant from a common assault was the death within a year and a day.") (emphasis added).

> Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798), cited in *Carmell v. Texas*, ___ U.S. ___, 120 S.Ct. 1620, 1627 (2000).

Petitioner submits that all four types of ex post facto laws described in *Calder* would have been involved if the Tennessee Legislature had passed a law in 1999 amending the Tennessee Criminal Code to eliminate the year-and-a-day rule as a requirement of homicide and that law had been applied retrospectively to Petitioner's case.

The first category has been broadly interpreted by this Court to include situations where a legislature changes or eliminates an element or ingredient of an offense.[4] Under the Ex Post Facto Clause states "may not retroactively alter the definition of crimes," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), nor may they "change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Territory of Utah*, 110 U.S.

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[4] *See Carmell v. Texas*, 120 S.Ct. 1620, 1631 (2000) (the fact that the statute did not change the elements of the offense simply demonstrates that it did not fit within the first category); *see also id.* at 1632-33 (comparing the fourth category with something as unfair as "retrospectively eliminating an element of the offense"); *id.* at 1651 (Ginsburg, J., dissenting) (the fact that "[l]egislatures may not retroactively alter the definition of crimes" noted as an example of the first category, but not the fourth).

574, 589-590 (1884). An ex post facto law has also been defined as a law "which deprives one charged with a crime of any defense available according to law at the time when the act was committed." *Collins*, 497 U.S. 37, 42 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925)). Hence, the retrospective application of a new statute eliminating the year-and-a-day rule to Petitioner's case would have violated the first *Calder* category, as it has been interpreted by this Court.

The second *Calder* category would also have been involved in that elimination of the rule five years after the assault would have aggravated the offense and made it greater than it was when committed and greater than it was when the year had expired. After the year-and-a-day passed without the death of the victim, an act of the legislature to retrospectively eliminate the rule would have aggravated the offense from a lesser offense to a homicide. *Cf. State v. Gabehart*, 836 P.2d 102, 105 (N.M. 1992); *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987); *State v. Young*, 390 A.2d 556 (N.J. 1978) (all three cases found that retroactive judicial abolishment of year-and-a-day rule would aggravate the offense).

A legislative act retroactively eliminating the rule would also have been a retroactive increase in punishment from that which was authorized at the expiration of the year-and-a-day for assault to that which would be authorized for homicide. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982) (finding court's retroactive abolishment of year-and-a-day rule would increase the authorized penalty).

Finally, such legislation would also involve the fourth *Calder* category. Eliminating the need for the prosecution to prove that the death occurred within a year-and-a-day would lessen the proof required to be presented by the prosecution. *Cf. State v. Vance*, 403 S.E.2d 495, 501 (N.C. 1991) (retroactively eliminating year-and-a-day rule would permit conviction of defendant on "less evidence").

Without question, if the Tennessee Legislature had passed legislation abolishing the year-and-a-day rule after Petitioner's act, any application of the new law to his case would have violated the Ex Post Facto Clause of the United States Constitution.

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

The Ex Post Facto Clause contained in Article I, § 10 of the United States Constitution is a limitation on the power of state legislatures and does not of its own force apply to judicial rulings. *Marks v. United States*, 430 U.S. 188 (1977); *Frank v. Magnum*, 237 U.S. 309 (1915). Nevertheless, this Court has held that general ex post facto principles are applicable to judicial rulings through the Due Process Clause of the Fourteenth Amendment. More specifically, this Court has held that the Due Process Clause of the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."

See Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964), and *Marks v. United States*, 430 U.S. 188, 191-192 (1977). This Court reasoned that if a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State's highest court is also barred by the Due Process Clause from achieving precisely the same result by judicial decree. *Bouie*, 378 U.S. at 353-354. The Court stated that: "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Id.* at 354 (citation omitted). In evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power. *Id.* at 355. Under authority of *Bouie*, Due Process prevents the Tennessee Supreme Court from retroactively applying its abrogation of the year-and-a-day rule to Petitioner's case if it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.* at 353-354.

In addition to relying on the specific authority of *Bouie*, Petitioner contends that the purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

The principal interests that the Ex Post Facto Clause is designed to serve include (a) fundamental fairness, (b) the notion that citizens be given fair warning of the law, and (c) the prevention of arbitrary and vindictive laws.

See Carmell v. Texas, ___ U.S. ___, 120 S.Ct. 1620, 1631-33, 1650 (2000).

This Court has recognized that fundamental fairness issues apply to all four *Calder* categories:

> All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life. *Carmell*, 120 S.Ct. at 1633.

Ex post facto laws violate notions of fundamental fairness because they "are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Id.*[5] Furthermore, ex post facto laws violate notions of fundamental fairness even when there is no notice or reliance interests involved. *Id.* at 1631-32 n. 16.

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[5] *See also, Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J. concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. . . . Justice Story said that 'retrospective laws are . . . generally unjust. . . . The presumption of nonretroactivity, in short, gives effect to enduring notions of what is fair.").

With regard to fair warning, this Court has not confined the concept to simply warning of those acts which are deemed criminal. *See Weaver v. Graham*, 450 U.S. 24 (1980) (statute reducing good-time credit for offense committed before its effective date violated ex post facto). "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf v. USI Film Products*, 511 U.S. 244, 282, n. 35 (1994) (citing *Weaver v. Graham*, 450 U.S. at 28-30). Accordingly, this Court has concluded that legislative enactments must do more than give fair warning of what conduct is criminal, they must give "fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Carmell*, 120 S.Ct. at 1632, n.21.

Ex post facto principles prevent legislatures from arbitrarily and vindictively singling out individuals for criminal sanctions in response to news that they have committed a serious act of offensive behavior. In such cases, political pressure from voters or constituents may cause legislators to wish to punish offensive behavior that otherwise would escape punishment or would receive a lesser punishment based on existing statutes. The prohibition against ex post facto laws minimizes the possibility that legislators may use the criminal law to target identifiable individuals based on their prior conduct.

Each of the three purposes that the Ex Post Facto Clause is designed to serve, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are implicated in the present case. The Tennessee

Supreme Court waited until it had a live defendant in front of it in 1999 to determine what law would govern the defendant's 1994 act. By announcing a change in substantive law, rather than interpreting existing law, the Tennessee Supreme Court's decision below raises the very concerns for arbitrariness and vindictiveness that animate the ex post facto limitation on legislative power. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148-149 (Mich. 1982). It was fundamentally unfair to eliminate the requirement that the prosecution prove the death of the victim within a year-and-a-day of the assault and retroactively apply its ruling to an assault that had occurred five years earlier. When the year expired and the victim was still alive, the State was barred from ever establishing a homicide if the victim died in the future. This was the law in effect when the assault occurred and when the year had passed without the victim's death. To abolish the rule five years later would be "fundamentally unjust" and "fundamentally unfair in a jurisdiction devoted to the rule of law." *State v. Young*, 390 A.2d 556, 560 (N.J. 1978). Likewise, although Petitioner was on notice that his conduct was criminal at the time of the act, he was entitled to rely upon the applicability of the year-and-a-day rule to bar a homicide prosecution if the victim did not die within the required period. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982). Furthermore, reliance on the rule would be naturally heightened after the victim slipped into a coma and Petitioner was charged with attempted murder, and even further heightened when the year passed without the victim's death.

The principles on which the Ex Post Facto Clause is based, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are core concepts of constitutional liberty. *Cf. Marks v. United States*, 430 U.S. 188, 191 (1977) (principle of fair warning is fundamental to concept of constitutional liberty); *Rubino v. Lynaugh*, 845 F.2d 1266, 1273 (5th Cir. 1988) ("ban on ex post facto legislative or judicial action does more than ensure fair warning; it also curbs vindictiveness"). As such, the Due Process Clause of the Fourteenth Amendment prevents courts from applying judicial rulings in ways which impinge upon these same principles. Where ex post facto laws are by their nature fundamentally unfair when enacted by a legislature, they are likewise "fundamentally unfair" as the result of judicial rulings. Whether the governmental actor responsible for the unfair law is a legislature or a court is irrelevant. The same can be said for the prevention of arbitrary and vindictive laws. State supreme courts which are politically accountable to the electorate may be susceptible to the same kind of influences which justify the ex post facto limitations placed on legislatures.

The law applicable to evaluating challenges under the Ex Post Facto Clause is equally applicable to a determination of whether retroactive application of a judicial decree violates the Due Process Clause.[6] This is especially

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[6] As will be discussed more fully in the next section, this Court held in *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." The notion that court decisions may be

true when a court is not "interpreting" the law, but is, in fact, engaged in the process of judicial "legislation." As early as 1907, the Tennessee Supreme Court recognized the year-and-a-day rule as a substantive requirement of Tennessee law. *See Percer v. State,* 103 S.W. 780 (Tenn. 1907). In Petitioner's case the Tennessee Supreme Court recognized that this rule "has in fact never been a part of the statutory law of [Tennessee]" and that the existence of the rule was unaffected by the Tennessee Criminal Code of 1989. *State v. Rogers,* 992 S.W.2d 393, 400 (Tenn. 1999). Hence, when the Tennessee Supreme Court "abolished" the rule, *id.* at 401, it did so not upon the interpretation or construction of a statutory provision. Nor was the rule abolished based upon the interpretation or construction of prior judicial opinion. Prior judicial precedent clearly recognized the year-and-a-day rule in Tennessee. Rather, the Tennessee Supreme Court abolished the rule merely because of its determination that the reasons originally supporting it no longer existed. *Id.*

Accordingly, when the Tennessee Supreme Court "abolished" the existing substantive rule of law which required the prosecution to establish the death of the

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applied retroactively without violating Due Process is premised on the idea that if a court decision is expected and defensible by reference to law which has been expressed prior to the conduct in issue, the purpose of fair warning is not implicated and the likelihood that the ruling is the result of vindictive and arbitrary action is lessened. On the other hand, if the ruling is unexpected and indefensible by reference to the law, the defendant has been denied fair warning and the likelihood that the ruling is arbitrary and vindictive is increased.

victim within a year-and-a-day of the assault, it assumed a legislative capacity.

Existing statutory and case law did not support the abolishment of the substantive rule of law. Hence, the Court was not "interpreting" or "construing" existing law, but was acting as a legislative body. Petitioner submits that the Due Process Clause prevents a court acting in a legislative capacity from accomplishing what legislatures are prohibited from doing under the Ex Post Facto Clause. *Bouie,* 378 U.S. at 353-354.

4. The abolishment of the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed at the time of Petitioner's conduct.

A. Introduction

In *Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964) (citing Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) at 61), this Court held that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."

In the present case, the Tennessee Supreme Court recognized the general prohibition against retroactive application of judicial decisions. However, it reasoned that retroactive application of the decision to abrogate the rule did not violate Due Process because it was not an unexpected and unforseen judicial construction. It stated:

> Given the fact that the rule has been abolished by every court [referring to other states] which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforeseen judicial construction of a principle of criminal law.

Rogers, 992 S.W.2d at 402.

The Tennessee Supreme Court erred by applying its decision retroactively as the abrogation of the year-and-a-day rule was unexpected and indefensible by reference to the law expressed before Petitioner's acts.

B. General principles

Whether the decision of the Tennessee Supreme Court to overturn prior precedent and abolish the rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" is a question of federal law subject to this Court's independent determination. *Cf. Moore v. Wyrick*, 766 F.2d 1253, 1255 (8th Cir. 1985); *Weaver v. Graham*, 450 U.S. 24, 33 (1981) (ex post facto law claim is one of federal law).

The proper standard or frame of reference used to determine whether the Tennessee Supreme Court's ruling was unexpected and indefensible is that of a person of ordinary intelligence. *Bouie*, 378 U.S. at 351; *Johnson v. State*, 472 A.2d 1311, 1316 (Del. 1983) (common intelligence). To apply such a standard a legal fiction is employed whereby a person of ordinary intelligence is

under a duty to ascertain the state law, including established rules of judicial construction, which might be applicable to his or her conduct. *United States v. Anderson*, 356 F.Supp. 445 (D.C. Del. 1973). The subjective expectation of a particular defendant is irrelevant. *Bouie*, 378 U.S. at 355 n. 5.

C. At the time of Petitioner's acts the year-and-a-day rule was recognized as a viable part of Tennessee law.

As the Tennessee Supreme Court recognized in the present case, the year-and-a-day rule is deeply rooted in the common law. As early as 1894, this Court held that common law murder undoubtedly included the year-and-a-day rule and that "such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute." *Louisville, Evansville, & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 239 (1894). Tennessee is a common law state which, in its Constitution of 1796, adopted the common law of England as it stood in 1776. Further, that common law prevails in Tennessee unless and until specifically changed by statute. *See State v. Alley*, 594 S.W.2d 381, 382 (Tenn. 1980). As such, the year-and-a-day rule would have been part of the body of Tennessee common law even if the Tennessee Supreme Court had remained mute concerning the rule. Instead, it specifically recognized its existence in *Percer v. State*, 103 S.W. 780 (Tenn. 1907), as did the Tennessee Court of Criminal Appeals in *Cole v. State*, 512

S.W.2d 598 (Tenn. Crim. App. 1974).[7] Further, no Tennessee decision had ever called the year-and-a-day rule into question until after Petitioner's act. The citizens of a state should be able to rely upon the last opinion of its highest court and the overruling of long established precedent, while always "possible," is unforeseeable for due process purposes. *See Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 345 (10th Cir. 1989) (citing *Marks v. United States*, 430 U.S. 188, 192-196 (1977)); *People v. Farley*, 53 Cal. Rptr. 2d 702, 710 (1996) ("whether existing judicial precedent will be overruled is a matter of speculation and conjecture").

D. The omission of a specific reference to the year-and-a-day rule in the Tennessee Criminal Code of 1989 would not give a reasonable person sufficient constitutional notice that the year-and-a-day rule was in question in Tennessee.

In the Tennessee Supreme Court, the prosecution abandoned its contention that the year-and-a-day rule was a defense, but argued that the rule had been abrogated because it was not included in the definition of criminal homicide found in the Tennessee Criminal Code of 1989. The 1989 Code defined criminal homicide as "the unlawful killing of another person which may be first

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[7] Both cases are cited in West's TENNESSEE DIGEST 2d, Vol. 17, *Homicide* § 6 (1986). Likewise, the year-and-a-day rule is mentioned in 14 TENN. JURIS., *Homicide*, § 4, p. 171 n.1 (1984), citing *Cole v. State*, 512 S.W. 2d 598 (Tenn. Crim. App. 1974). The rule was not an obscure point of law, but a well recognized principle of homicide law.

degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide." TENN. CODE ANN. § 39-13-201. The State reasoned that the rule had been abolished by the failure of the legislature to specifically include it in the statutory definition of homicide.

To support its argument, the State cited provisions of the Criminal Code which expressed the desire of the Tennessee legislature to replace all common law offenses with statutory offenses, *see* TENN. CODE ANN. § 39-11-102(a), and its stated objective to "give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and culpable mental state which together constitute the offense." TENN. CODE ANN. § 39-11-101(2). Petitioner submits that these additional provisions of the Criminal Code bear no relationship to the year-and-a-day rule as it is not a "common law offense" and has no bearing upon either the actus reus or mens rea of a criminal offense.

The Tennessee Supreme Court rejected the State's argument and concluded that the year-and-a-day rule was unaffected by its omission from the 1989 Criminal Code. *Rogers*, 992 S.W.2d at 400. Nevertheless, the State will, in all likelihood, argue in this Court that the failure to include the rule in the 1989 codification was sufficient constitutional notice that the viability of the year-and-a-day rule was in question in Tennessee. Petitioner submits that the mere omission of a specific reference to the common law rule in the 1989 Criminal Code cannot constitute sufficient constitutional notice that the rule was in question.

As noted in the preceding subsection, the rule was a part of the common law of Tennessee. Further, it was specifically recognized as a requirement of the law by the Tennessee Supreme Court in 1907. *Percer v. State*, 103 S.W. 780 (Tenn. 1907). Although long acknowledged as a rule of law, it has never been codified in any Tennessee statute or code. The lack of specific reference to the rule in the 1989 Criminal Code simply continued long-standing Tennessee tradition before and after 1989. Thus, its omission in the Criminal Code could not give notice of the argued problematic viability of the rule.

In addition, it is a general rule of statutory construction that statutes do not alter the common law further than the act expressly declares or than must necessarily be implied from the fact that the act covers the whole subject matter. *State v. Cooper*, 113 S.W. 1048 (Tenn. 1908); *State v. Watkins*, 130 S.W. 839 (Tenn. 1910). *See also United States v. Texas*, 507 U.S. 529 (1993) (presumption that common law principles of law are retained except when a statutory purpose to the contrary is evident; in order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law). The 1989 Criminal Code, like all codes before it, contained no provision relating to the year-and-a-day rule. As such, the 1989 Criminal Code could not have reasonably been interpreted as altering the common law rule.

Another rule of statutory construction provides that criminal statutes are to be strictly construed against the State and in favor of a defendant. *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998).

Unlike many criminal codes, the 1989 Criminal Code specifically included provisions approving common law judicial decisions and interpretive rules. The 1989 Code provides that:

> The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.

TENN. CODE ANN. § 39-11-104.

The Sentencing Commission Comments to TENN. CODE ANN. § 39-11-102 further clarified the legislative intent: "While this revised criminal code supersedes common law offenses, the commission does not intend to abrogate the interpretive rules developed under common law and specifically includes such interpretations under § 39-11-104."

The 1989 Criminal Code omitted any provision in the definition of homicide relating to "causation." Hence, a citizen examining the Code would be left with only two choices – that causation had been eliminated as an element of the offense because it was not found in the codification or that the causation element was governed by the common law rule. The State has conceded the more reasonable interpretation that the common law prevails on the element of causation absent a specific reference in the 1989 Criminal Code.

Based on all of these considerations, the Tennessee Supreme Court rejected the State's contention that the failure to specifically include the common law rule in the

statutory definition of homicide resulted in its abolishment. No reasonable Tennessean would be put on notice that the 1989 codification sans a specific reference to the year-and-a-day rule brought its continued viability into question given: (a) that the rule has never been contained in any criminal code, (b) applicable rules of statutory construction do not support such interpretation, (c) the 1989 Criminal Code's specific reference to and adoption of common law interpretations, and (d) the illogical reasoning necessary to interpret the 1989 Code as having eliminated all common law principles, such as causation.

E. The erroneous ruling by the intermediate appellate court that the year-and-a-day rule had been abolished was rendered after Petitioner's act and could not suffice to put a reasonable person on notice that prior precedent would be reversed.

In reviewing Petitioner's case, the Tennessee Supreme Court rejected any notion that the year-and-a-day rule was affected by the 1989 Criminal Code. However, the Tennessee Supreme Court did conclude that an erroneous opinion of the intermediate appellate court, rendered after Petitioner's assault of Bowdery and which stated, *in dicta*, that the rule had been abolished for a different reason, *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995), was evidence of "uncertainty surrounding the continuing viability of the rule in light of the passage of the 1989 Act." *Rogers*, 922 S.W.2d at 402.

Significantly, the intermediate appellate court did not find that the rule was in question due to an omission of a specific reference to the rule. Rather, it determined that

the year-and-a-day rule was a "defense" and that the rule had been abolished under the 1989 Code which did away with all common law defenses. *Ruane*, 912 S.W.2d at 774. In the present case, the Tennessee Supreme Court rejected the reasoning of the intermediate appellate court and determined that the year-and-a-day rule was not a "defense," but something more. *Rogers*, 992 S.W.2d at 400. (JA, 23). However, the Tennessee Supreme Court cited the erroneous *Ruane* decision as evidence of uncertainty as to the continued viability of the rule and as justification for the retroactive application of its ruling. *Id.* at 402. (JA, 27-28). The problem with the analysis of the Tennessee Supreme Court is threefold.

First, the opinion of the intermediate appellate court in *State v. Ruane* was rendered on July 14, 1995, more than one year after the act committed in the present case. Petitioner could not logically be put on constitutionally adequate notice of a potential change in the law by an erroneous opinion rendered after his act in the present case.

Second, as of the date of Petitioner's act, his anticipation of a subsequent reversal of the year-and-a-day rule based on the 1989 Criminal Code would require that he either (a) foresee the future erroneous ruling of the intermediate court *and* misinterpret the law by wrongly determining that the rule was nothing more than a defense, or (b) wrongly conclude that the Code's failure to specifically mention the rule had resulted in its abrogation. The Tennessee Supreme Court found as a matter of law that the year-and-a-day rule is not a defense and that the 1989 Criminal Code did not affect the status of the rule in Tennessee. Accordingly, only a misinterpretation of the

existing law would have put one on notice that the 1989 codification might result in a potential reversal of the rule. The 1989 Criminal Code did not, in fact, have any effect on the common law year-and-a-day rule. Petitioner was deemed to know this law and should have been able to rely upon the law as it was, rather than as it could have been misinterpreted.

Such erroneous interpretations of the law are not reasonable. The notion of the year-and-a-day rule as a defense finds no support in the general common law or the common law as expressed in *Percer v. State.* It was always deemed a substantive element of the offense. Likewise, as discussed in the previous subsection, no reasonable person could interpret the failure to specifically refer to the rule in the 1989 Code as an abrogation of the rule.

Third, the Tennessee Supreme Court misjudged the focus of the *Bouie* test. Under *Bouie* the test is whether the overruling of the prior precedent of the Tennessee Supreme Court and its judicial abolishment of the year-and-a-day rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie,* 378 U.S. at 354 (citing Hall, General Principles Of Criminal Law (2d ed. 1960, at 61)). The test is not whether a misinterpretation of the 1989 Criminal Code might render the viability of the rule in question. At the time of Petitioner's act a clear ruling of the Tennessee Supreme Court recognized the viability of the year-and-a-day rule and a correct interpretation of the 1989 Criminal Code would not support a rejection, abolition or modification of the rule. As such, the overruling of the prior precedent of the Tennessee Supreme Court

and its judicial abrogation of the rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

F. In light of the Tennessee Supreme Court's specific approval of the year-and-a-day rule in 1907, it was improper to look to the law of other jurisdictions to place that ruling in doubt.

The Tennessee Supreme Court misapprehended the rule of *Bouie* by finding that it could look to the law of other jurisdictions to determine whether its abrogation of the year-and-a-day rule was "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue."

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the defendants' trespass convictions were affirmed by the South Carolina Supreme Court based upon its retroactive application of an interpretation of a trespass statute to include the act of remaining after receiving notice to leave the premises. The pertinent statute made it a criminal offense to *enter* another's premises after receiving notice that entry was prohibited. Quoting Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960, at 61), this Court stated, "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie* at 378 U.S. 354. In determining whether the state court's construction of the criminal statute was so unforeseeable as to deprive the defendant of fair warning, this Court focused primarily on the prior decisional law of South Carolina. Looking

at such prior law, this Court concluded that the new interpretation of the statute to include remaining on premises "has not the slightest support in prior South Carolina decisions." *Id.* at 356. Accordingly, the Court concluded that the pre-existing South Carolina law gave the defendants no warning of the judicial construction of the statute.

With regard to whether the law of other states could be consulted this Court said: "It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Id.* at 359-360. Petitioner submits that decisions from another state cannot give a defendant notice that an unequivocal ruling from his own State's highest court is in question. *See, e.g., Moore v. Wyrick*, 766 F.2d 1253, 1258 (8th Cir. 1985) ("[I]n light of prior unquestioned Missouri authority directly on point, it cannot reasonably be argued that cases from other jurisdictions supply the fair warning that is constitutionally required by the due process clause.); *Bouie*, 378 U.S. at 359-60, 84 S.Ct. at 1705-06."); *Lopez v. McCotter*, 875 F.2d 273, 277-78 (10th Cir. 1989) (the decisional precedents of other states could not have afforded defendant fair warning).

The *Bouie* test focuses upon prior judicial decisions of the state of defendant's offense, not other states. Petitioner submits that Tennessee citizens are not duty-bound to know the law in all fifty states.[8] Thus, a change in the

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[8] A reasonable citizen searching the law would find a significant number of jurisdictions continue to follow the year-

law of another state cannot provide the foundation of "fair warning" to a Tennessee citizen as to the substance of Tennessee law.

A consideration of prior Tennessee decisions clearly established the year-and-a-day rule as Tennessee law. *Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974). As of the date of Petitioner's act, no Tennessee decision had ever called the year-and-a-day rule into question. The lack of specific reference to the rule in the Tennessee Criminal Code of 1989, like all prior Tennessee codes, had no effect upon the rule's viability as ultimately held by the Tennessee Supreme Court in Petitioner's case. As such, Tennessee law as it "had been expressed prior to the conduct in issue" offers neither the slightest support for abrogation of the year-and-a-day rule nor the required "fair warning" to Petitioner that the rule was under question at the time of his offense.

5. The majority of jurisdictions that have considered the present issue have determined that retroactive judicial abrogation of the year-and-a-day rule would violate Due Process.

In *State v. Vance*, 403 S.E.2d 495, 501 (N.C. 1991), the North Carolina Supreme Court, citing *Bouie*, refused to apply its decision to abrogate the common law year-and-a-day rule retroactively finding that it would permit the

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and-a-day rule. *Homicide – Time Between Injury and Death*, 60 ALR3d 1223 (1974); *State v. Minster*, 302 Md. 240, 486 A.2d 1197, 1200, n.5 (1985).

conviction of the defendant upon "less evidence" than would have been required at the time the victim died.

In *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987), the Rhode Island Supreme Court, citing *Bouie*, declined to retroactively apply its decision to do away with the common law year-and-a-day rule. The Court reasoned that retroactive application of the rule "would 'aggravate' the crime of assault and battery, making it greater than it was when committed or greater than it could have been before the expiration of the year and a day."

In *People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982), the Michigan Supreme Court, citing *Bouie*, refused to retroactively apply its decision to abolish the common law year-and-a-day rule. In reaching its decision, the Court, among other things, rejected prosecution arguments that the defendant had fair notice that his conduct was criminal and that the defendant did not actually rely upon the year-and-a-day rule at the time of the assault. In addressing the prosecution's fair notice argument, the Court first noted that fair notice is not the sole purpose of the Ex Post Facto Clause. It also protects against retroactive increases in punishment. The Court stated:

> A murderer has fair notice that his conduct is criminal, yet this Court would not approve a retroactive increase in the authorized punishment. . . . In this case, abolishing the rule retroactively would permit a possible increase in the maximum authorized punishment from life (assault with intent to rob while armed) to mandatory life without the possibility of parole (first-degree murder). Increasing the authorized penalty after the fact does not deny the defendant fair notice of what conduct is criminal, yet

> it still violates the rule against ex post facto criminal laws. Abrogating the year and a day rule in this case would apply this opinion to events occurring before it and would clearly disadvantage the defendant unfairly.

Stevenson, 331 N.W.2d at 148.

The Court also rejected the prosecution argument that the Constitution only prohibited criminalizing an act which was legal when done. The *Stevenson* Court said:

> The prosecutor's view that the Ex Post Facto Clause only prohibits making illegal what was legal when done is far too narrow. Under the prosecutor's analysis, the Legislature or this Court could retroactively redefine murder to include those cases in which the victim was critically injured, but fully recovered. The retroactive elimination of the requirement that the victim actually die would be justified by the rationale that the defendant did not lack fair warning that his conduct was illegal.

Id. at 149.

In dispatching the "actual reliance" argument of the prosecution, the Court said:

> Arguably, the defendant could have relied on the year and a day rule, not in expecting that the victim would survive that long, but reasonably expecting that if the victim did in fact survive that long, a murder conviction could not result. However, actual reliance or even fictional reliance is not the sole interest protected by due process. The ex post facto principle also protects against erratic or arbitrary action improper in a lawgiver. It would be nothing if not erratic to declare for the first time today, almost five years

> after the year and a day rule effectively barred a murder prosecution in this case, that such a prosecution could be maintained. The defendant's subjective intent or reliance is simply not controlling in this case. A defendant may not even be aware of various important evidentiary rules or the maximum punishment at the time of the offense, and yet such protections may not be abolished retroactively. *Id.* at 148-149 (citations omitted).

In *State v. Young*, 390 A.2d 556 (N.J. 1978), the New Jersey Supreme Court, citing *Bouie*, also refused to give retroactive effect to its decision to abolish the common law year-and-a-day rule finding that to do so would be "fundamentally unjust" and "fundamentally unfair in a jurisdiction devoted to the rule of law." *Id.* at 560. The Court noted that the *Bouie* reasoning applied, despite defendant's criminal conduct, because *Bouie* indicated that its principles applied when a judicial decision aggravates a crime, or makes it greater than it was when committed. *Id.* (citing *Bouie*, 378 U.S. at 353-354). The New Jersey Supreme Court also rejected the prosecution argument that there had been no actual reliance upon the rule by the defendant at the time of the assault:

> Actual reliance by a defendant on the preexisting state of the criminal law is not a prerequisite to invocation of the principle under consideration. While foreseeability of consequences and fair warning to the public are sometimes considered part of the philosophical basis for the Ex post facto and related due process principles, those principles are operative entirely without regard to whether the defendant in the particular case actually relied on the prior state of the

> criminal law at the time of the conduct in question. *Young*, 390 A.2d at 560-561 (citation omitted).

In *United States v. Jackson*, 528 A.2d 1211 (D.C. App. 1987), the District of Columbia Court of Appeals, also citing *Bouie*, refused to retroactively apply its judicial abolition of the common law year-and-a-day rule. Although not viewing the situation as falling within the fair notice or increased punishment categories, the Court reasoned that abrogation of the rule would deprive the defendant "of a substantial right, or more accurately of a plea that would bar prosecution, which was available to him at the time" he assaulted the victim. *Id.* at 1223-1224.

In *Commonwealth v. Lewis*, 409 N.E.2d 771 (Mass. 1980), the Supreme Judicial Court of Massachusetts, also citing *Bouie*, refused to retroactively apply its decision to reject the common law year-and-a-day rule.

In *State v. Gabehart*, 836 P.2d 102, 105 (N.M. 1992), the Supreme Court of New Mexico refused to retroactively apply its decision to abrogate the common law year-and-a-day rule. The Court reasoned that to do so would aggravate a crime from a lesser offense to a homicide.

The Tennessee Supreme Court cited authorities from three other states as supporting the decision to apply its abrogation of the year-and-a-day rule retroactively. *People v. Snipe*, 192 Cal. Rptr. 6 (Ca. Ct. App. 1972); *Commonwealth v. Ladd*, 166 A.2d 501 (Pa. 1960), and *State v. Sandridge*, 365 N.E.2d 898 (Ohio Ct. C.P. 1977). Petitioner submits that these three authorities pale in comparison to those cited above which found such retroactive application to violate ex post facto and due process concerns.

Significantly, *Ladd* predated *Bouie* and both the *Snipe* and *Ladd* decisions involve jurisdictions where the year-and-a-day rule was considered nothing more than a rule of evidence rather than a substantive rule of law.[9] The State conceded in the present case that the Tennessee rule is a substantive rule of law. Additionally, in *Snipe* the legislature changed the year-and-a-day rule before the year had expired. The *Snipe* Court placed great weight upon the fact that the law changed before the right to the rule had vested. Finally, *Sandridge* involves only a trial court opinion in which ex post facto concerns were not considered nor mentioned.

Thus, all jurisdictions which consider the year-and-a-day rule as a substantive rule of law and which have considered whether judicial abrogation of the common law year-and-a-day rule could be applied retroactively have concluded that the constitutional principles enunciated in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), prevent retroactive application of the change in the law.

CONCLUSION

The opinion and judgment of the Supreme Court of Tennessee should be reversed. Retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violates the Fourteenth Amendment of the United States Constitution. Accordingly, this case should

[9] The *Snipe* and *Ladd* Courts obviously labored under the misconception that all rules of evidence could be changed without violating Ex Post Facto and Due Process principles.

be remanded to the Supreme Court of Tennessee for a determination as to whether Petitioner's sentence may be modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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WRITING SAMPLE 4

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,

Plaintiff-Appellant,

VS.

Shelby Criminal
No. 02S01-9503-CR-00028

BRIAN KEITH KIMBROUGH,

Defendant-Appellee.

BRIEF OF THE APPELLEE, BRIAN KEITH KIMBROUGH

ON APPEAL BY PERMISSION PURSUANT TO
TENN. R. APP. P.11

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This case is before this Honorable Court pursuant to the Court granting the State's Application for Permission to Appeal, pursuant to T.R.A.P. 11.

ISSUE PRESENTED FOR REVIEW

WHETHER THE COURT OF CRIMINAL APPEALS WAS CORRECT IN RULING THAT THE CRIMINAL OFFENSE OF ATTEMPTED FELONY MURDER DOES NOT EXIST IN TENNESSEE.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Appellant's Brief is satisfactory to the Appellee.

STATEMENT OF THE FACTS

The Statement of the Facts set forth in the Appellant's Brief and in the Opinion of the Court of Criminal Appeals is satisfactory to the Appellee.

ARGUMENT

WHETHER THE COURT OF CRIMINAL APPEALS WAS CORRECT IN RULING THAT THE CRIMINAL OFFENSE OF ATTEMPTED FELONY MURDER DOES NOT EXIST IN TENNESSEE.

The Court of Criminal Appeals, in an Opinion authored by Judge Paul G. Summers, and concurred in by Special Judge Paul R. Summers, held that the crime of attempted felony murder does not exist in Tennessee. The Court specifically held:

> By definition, felony murder is an unintended result, i.e. a reckless killing. Criminal attempt, on the other hand, requires the intent to commit a crime. Thus, the crime of attempted felony murder is a self-contradiction; an attempt to achieve an unintended result. As such, we hold that the crime of attempted felony murder does not exist in Tennessee. (Opinion, p. 7).

Appellee, Brian Keith Kimbrough, respectfully submits that the Court of Criminal Appeals was correct in its analysis of the law and that the crime of attempted felony murder does not exist in Tennessee.

There is no reported Tennessee Opinion which has considered this issue. Therefore, it appears to be a matter of first impression in the Tennessee appellate courts.[1]

Appellee respectfully submits that upon considering the specific wording of the Tennessee attempt statute, authorities from other jurisdictions, public policy and the

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[1]In an analogous situation, the Supreme Court has refused to expand the felony murder rule to the former offense of assault with intent to commit murder in the first degree, TENN. CODE ANN. § 39-2-103 (1982), when no death results. Floyd v. State, 50 Tenn. 342, 344 (1871).

In another analogous situation, the Court of Criminal Appeals, Judge O'Brien writing for the Court, concluded, *in dicta*, in Lay v. State, 501 S.W.2d 820, 824 (Tenn. Crim. App. 1973), that there can be no offense of attempt to commit involuntary manslaughter.

consequences of the State's interpretation of the attempt statute, it becomes abundantly clear that the offense of attempted felony murder does not exist in Tennessee.

A. STATUTORY LANGUAGE

In its Supplemental Brief, the State contends that the offense of attempted felony murder exists in Tennessee by virtue of the plain wording of TENN. CODE ANN. § 39-12-101(a)(2) and TENN. CODE ANN. § 39-13-202(a)(2).

Tennessee's felony murder statute, TENN. CODE ANN. § 39-13-202(a)(2), provides that felony murder is:

> A reckless[2] killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnaping or aircraft piracy;

TENN. CODE ANN. § 39-12-101(a)(2) defines criminal attempt as occurring under the following circumstances:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:...
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part;...(emphasis added).

Appellee respectfully submits that a clear understanding of the emphasized portion of the statute is necessary to resolve the present legal issue. The State misconstrues "with intent to cause a result." It is this phrase which renders the statute such that it retains the traditional common law requirement of specific intent to commit an offense.

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[2]The reckless *mens rea* requirement has been removed from the statute by action of the 1995 legislative session and the list of felonies has been expanded. 1995 Tenn. Pub. Acts 460.

The Sentencing Commission Comments to TENN. CODE ANN. § 39-12-101, provide, in part, as follows:

> Criminal attempt is an offense directed at the individual whose intent is to commit an offense, but whose actions, while strongly corroborative of criminal intent, fail to achieve the criminal objective intended...
>
> Subsection (a) defines three varieties of the offense of criminal attempt; all three varieties retain the traditional requirement of specific intent to commit an offense. Thus, a person must either intentionally engage in criminal acts or intend to accomplish a criminal result. This requirement is consistent with common law...
>
> Subdivision (a)(2) is a codification of the generally accepted "last proximate act" doctrine as a basis for imposing attempt responsibility. If an offense is defined in terms of causing a certain result, an individual commits an attempt at the point when the individual had done everything believed necessary to accomplish the intended criminal result. (emphasis added).

These comments establish two points. First, criminal attempt requires specific intent to cause a result. Second, some offenses are defined in terms of causing a certain result, e.g. the death of another individual. Absent a resulting death, there can be no felony murder.

The State argues that robbery is a "result" of felony murder and that when a defendant acts with intent to commit such a "result" to-wit: robbery, the attempt statute is satisfied, and the defendant is guilty of an attempted felony murder. The fallacy of this argument by the State is that robbery is not the result contemplated by the felony murder statute. The result contemplated and a part of the definition contained in TENN. CODE ANN. § 39-13-202(a)(2) is a "killing." Robbery may be an element of felony murder, but it is not the "result" upon which felony murder is based.

The MODEL PENAL CODE § 5.01(1)(b) provides that:

> (1) **Definition of Attempt.** A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:...
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part;...

The MODEL PENAL CODE § 1.13(9) further defines "element of the offense" to include, "(I) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct...." Thus, while a result may be an element of the offense, all elements of the offense are not results. Some elements refer to conduct and some refer to attendant circumstances. In the case of felony murder, the result is a killing.

> In respect to the requirement of a result, some crimes are so worded that a bad result is needed for commission of the crime. For instance, criminal homicide requires the death of a human being....

LaFave & Scott, Substantive Criminal Law, § 1.2, at 9 (2nd. ed. 1986).

> Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be an intent to bring about that result. Thus, if A, B, C and D have each taken the life of another, A acting with intent to kill, B with an intent to do serious bodily injury, C with a reckless disregard of human life, and D in the course of a dangerous felony, all three are guilty of murder because the crime of murder is defined in such a way that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only A is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm, that he acted in reckless disregard for human life, or that he was committing a dangerous felony. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another).

LaFave & Scott, Substantive Criminal Law, § 6.2 at 500-501 (2nd. ed. 1986).

The result of felony murder is a killing. If a defendant acts with intent to cause such a result i.e. a killing, and a killing does not result, the defendant would be guilty of attempted common law murder. This is the only type of attempted murder contemplated by the attempt statute as it is the only type in which the defendant "acts with intent to cause a result which is an element of the offense."

It is clear from a reading of both TENN. CODE ANN. § 39-12-101(a)(2) and the MODEL PENAL CODE, upon which our statute is based, that something more than an intent to commit an element of the offense is required to satisfy the statute. In order to satisfy the statute, the defendant must intend to cause a result which is an element of the offense.

Accordingly, the ultimate issue in this case is whether robbery is a "result" of felony murder.

Contrary to the State's assertion, robbery is not "a result which is an element of the offense." If robbery is a "result" which is an element of felony murder, then every person who acts with intent to commit a robbery is automatically guilty of attempted felony murder. Robbery is the "result" of robbery. A killing is the result of felony murder. If a defendant acts with intent to cause the result of robbery, he or she is guilty of an attempted robbery if the crime is not completed. In addition, if the defendant causes serious bodily injury to the victim, he or she will suffer enhanced punishment. TENN. CODE ANN. § 39-13-402, 403. On the other hand, he or she could not be guilty of

attempted felony murder because the "result" i.e. the killing was not intended.[3]

Although not argued in its Supplemental Brief, the State, in its Application for Permission to Appeal, argued alternatively that attempt to commit felony murder exists in Tennessee by virtue of TENN. CODE ANN. § 39-12-101 (a)(3). This section provides:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. TENN. CODE ANN. § 39-12-101 (a)(3). (emphasis added).

The State also misconstrues the emphasized portion of the statute above.

The State again reasons that robbery is a completed course of action that would constitute felony murder or is a result that would constitute felony murder. Thus, according to the State, the intent to commit the robbery satisfies this portion of the attempt statute. Appellee submits that acting with an intent to commit a robbery is substantially different from acting with intent to "complete a course of action or cause a

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[3]Prior to 1989, assault with intent to murder was an offense in Tennessee. TENN. CODE ANN. § 39-2-103 (1982). The Supreme Court refused to expand the felony murder rule to this offense. In Floyd v. State, 50 Tenn. 342, 344 (1871), the Court stated:

> But from this it does not follow, that in every case where the accused would be guilty of murder in the first degree if death ensue, he will therefore be guilty of a assault with intent to commit murder in the first degree, in the meaning of section 4626, if death do not ensue. To illustrate, by the express provision of section 4598, a murder committed in the perpetration of, or attempt to perpetrate a robbery, is murder in the first degree. And in such a case, it is not necessary to show the deliberation, and premeditation, required to make out murder in the first degree, when committed by the ordinary means; but, in such a case it is only necessary to show, that the murder was committed in the perpetration of, or attempt to perpetrate robbery. Yet, in such a case, if death do not ensue from the injuries inflicted, it is not an assault with intent to commit murder in the first degree, but an assault with intent to commit robbery, a separate and distinct felony, under a different section of the Code.

result that would constitute" felony murder. The commission of a killing is the completed course of action and the result of felony murder. If a defendant acts with intent to kill, then both prongs of (a)(3) are satisfied, but the offense is attempted common law murder. Attempted felony murder does not exist under (a)(3), as specific intent to complete the course of action which would constitute the offense or to cause the result that would constitute the offense is necessary to satisfy the statute.

Attempt requires specific intent to cause a result. With regard to murder, the result is death. Absent a specific intent to cause a death, there can be no attempted murder. Accordingly, while the offense of attempted common law murder is valid, there is no offense of attempted felony murder.

B. OTHER JURISDICTIONS

As correctly stated by the Court of Criminal Appeals, the overwhelming majority of jurisdictions which have considered this issue have refused to recognize the criminal offense of attempted felony murder. The Court of Criminal Appeals cited authorities from eight states as denying the existence of the offense of attempted felony murder. See, e.g., People v. Viser, 343 N.E.2d 903 (Ill. 1975); Head v. State, 443 N.E.2d 44 (Ind. 1982); Bruce v. State, 566 A.2d 103 (Md. 1989); State v. Dahlstrom, 150 N.W.2d 53 (Minn. 1967); State v. Darby, 491 A.2d 733 (N.J. 1984); State v. Price, 726 P.2d 857 (N.M. 1986); Commonwealth v. Griffin, 456 A.2d 171 (Pa. 1983); State v. Bell, 785 P.2d 390 (Utah 1989).

In addition to the authorities cited by the Court of Criminal Appeals, at least seven other states have also rejected the notion of attempted felony murder, Gray v. State, 57 Crim. L. Rep. (BNA) 1207 (Fla. Sup. Ct. May 4, 1995); State v. Robinson, 883 P.2d 764 (Kan. 1994); State v. Pratt, 873 P.2d 800, 812 (Idaho 1993); People v. Patterson, 257 Cal. Rptr. 407, 209 Cal. App.3d 615 (1989); People v. Burress, 505 N.Y.S.2d 272, 122 App. Div.2d 588 (1986); Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988) (one can attempt murder only with express malice, not with implied malice); State v. Huff, 469 A.2d 1251 (Me. 1984) (there is no crime of attempted manslaughter as one cannot intend to be reckless).

In People v. Viser, 343 N.E.2d at 910, the Supreme Court of Illinois concluded:

> There can be no felony murder where there has been no death, and the felony murder ingredient of the offense of murder cannot be made the basis of an indictment charging attempted murder. Moreover, the offense of attempt requires an intent to commit a specific offense, while the distinctive characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result.

In State v. Darby, 491 A.2d at 736, the New Jersey Supreme Court stated "the purported crime of attempted felony murder is manifestly unintelligible....The fact is that the concepts of attempt and felony murder cannot rationally be joined".

In State v. Bell, 785 P.2d at 393, the Utah Supreme Court stated that "[t]he crime of attempted murder does not fit within the felony-murder doctrine because an attempt to commit a crime requires proof of an intent to consummate the crime...."

Finally, in Head v. State, 443 N.E.2d at 50, the Supreme Court of Indiana concluded:

> [W]hether the underlying felony has been completed or attempted, the felony-murder rule cannot be applied unless the death of another occurred by virtue of the commission or attempted commission of the underlying felony. In other words, absent death the applicability of the felony-murder rule is never triggered.

Only one[4] jurisdiction that has considered this issue has found that attempted felony murder is a valid criminal offense. White v. State, 585 S.W.2d 952 (Ark. 1979). Thus, the overwhelming majority of jurisdictions reject the existence of the criminal offense of attempted felony murder. In addition, the State, in its Application for Permission to Appeal (p. 6), acknowledges that the Court of Criminal Appeals' "analysis is philosophically correct with respect to the common law crimes of attempt and felony murder." Thus, the one jurisdiction cited by the State and relied upon by the Dissenting Opinion, as authority for the existence of such an offense is insignificant in light of the fifteen jurisdictions which refuse such recognition and the State's acknowledgment that such offense cannot exist at common law.[5] Surely, the collective wisdom of the common law and fifteen jurisdictions should be given great weight in this court's analysis.

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[4]The dissenting opinion and the State also rely upon Amlotte v. State, 456 So.2d 448 (Fla. 1984), but this opinion has been recently overruled. Gray v. State, 57 Crim. L. Rep. (BNA) 1207 (Fla. Sup. Ct. May 4, 1995). Florida joins the majority in not recognizing attempted felony murder.

[5]TENN. CODE ANN. § 39-11-104 provides that the common law should be considered in construing the criminal code.

C. PUBLIC POLICY

The Appellee submits that extension of the felony murder doctrine to the law of attempts is against public policy. The official commentary to the MODEL PENAL CODE provides:

> ...reckless and negligent homicide are offenses under this Code, as they are generally. Cases will arise where the defendant engaged in conduct that recklessly or negligently created a risk of death, but where the death did not result. Should the law of attempts encompass such cases? The approach of the Model Code is not to treat such behavior as an attempt.... The Institute's judgment was that the scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility....

Commentary, A.L.I. MODEL PENAL CODE AND COMMENTARIES, Part I, 5.01, p.p. 303-304. (1985).

In addition, the trend in this country is to limit or abolish the felony murder doctrine. See. State v. Price, 726 P.2d at 859-860; Head v. State, 443 N.E.2d at 48-51. In Tennessee, the felony murder doctrine is limited to certain specific offenses. Considering this trend in limiting the felony murder doctrine, its scope should not be expanded to include attempts.

D. THE PRACTICAL EFFECT OF THE STATE'S INTERPRETATION OF THE ATTEMPT STATUTE TO INCLUDE ROBBERY AS A "RESULT" OF FELONY MURDER.

Appellee respectfully submits that adoption of the State's interpretation of the attempt statute, which alleges that robbery is a "result" of felony murder, will result in consequences which were clearly not anticipated by the legislature.

Appellee submits that under the State's interpretations of the attempt statute,

every defendant who attempts to commit a felony named in the felony murder statute is automatically likewise guilty of attempted felony murder. Clearly, a defendant who intentionally commits one of the serious felonies contained in the felony murder statute, is acting recklessly.[6] Under the State's interpretation of either section, the commission of any reckless or intentional act in the commission of one of the named felonies constitutes attempted felony murder.

Furthermore, under the State's interpretation of the attempt statute, which alleges that robbery is a result of felony murder, how does one determine the difference between an attempted robbery and an attempted felony murder in the course of a robbery? In addition, now that the legislature has removed the "reckless" element of felony murder, what elements of attempted felony murder in the course of a robbery and an attempted robbery would be different? Under the State's interpretation of the attempt statute, the elements would be identical.

In addition, Appellee respectfully submits that the legislature never intended for the attempt statute to be combined with the felony murder statute. Evidence of this fact can be found in the fact that the legislature has provided for enhanced punishment when a defendant causes serious bodily injury in the commission of several of the felonies enumerated in the felony murder statute. See, TENN. CODE ANN. § 39-14-302 (Aggravated Arson); § 39-13-502 (Aggravated Rape); § 39-13-402, § 39-13-403 (Aggravated and Especially Aggravated Robbery); § 39-14-404 (Especially Aggravated Burglary); and § 39-13-305 (Especially Aggravated Kidnaping).

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[6]Recklessness can be presumed from the commission of one of the dangerous felonies listed in the felony murder statute. *Cf.* MODEL PENAL CODE § 2.10.2(1)(b)(1985).

Under these statutes, the legislature has enhanced punishment without regard to whether the defendant intended to cause bodily injury. Appellee submits that had the legislature contemplated a strict liability offense of attempted felony murder, it would not have created enhanced punishments for causing serious bodily injury in commission of the above-enumerated offenses. The legislature never contemplated the offense of attempted felony murder and the creation of such an offense by adopting the State's overly broad interpretation of the attempt statute would subsume many other criminal offenses in contravention to legislative intent.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that attempted felony murder is not a criminal offense in Tennessee and, accordingly, the Opinion of the Court of Criminal Appeals should be affirmed in all respects.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief has been mailed, postage prepaid, to Mr. Jerry L. Smith, Deputy Attorney General, 500 Charlotte Avenue, Nashville, TN 37243, this ___ day of June, 1995.

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