

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Tracy Jenkins

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Blount County

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(including county)

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am currently employed as an Assistant District Attorney General for the 5th Judicial District.

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

I have been licensed since 2005. BPR: 024528

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

I have only ever been licensed in the state of Tennessee.

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).

Since receiving my license in 2005, I have been employed as an Assistant District Attorney General. I worked in the 8th District from August 2005 through September 2014. I have been employed in the same capacity in the 5th District from October 2014 through present.

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

I have been continuously employed since being licensed.

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 currently work in both General Sessions and Circuit/Criminal Court. I prosecute any and all offenses that occur in our jurisdiction. Those offenses range from misdemeanors through all levels of felonies up to and including capital murder cases. I am involved from the time of charge, through preliminary hearing, pre-trial motions, bench or jury trial or plea, and finally on petition for any post conviction relief. One hundred percent of my law career has been devoted to the practice of criminal law.

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 began my legal practice as a DUI prosecutor upon graduating from law school in August 2005. I conducted preliminary hearings in the general sessions courts and jury trials in the criminal court of the 8th Judicial District in a circuit that includes Campbell, Claiborne, Fentress, Scott and Union counties.

Beginning in January 2007, I moved out of the DUI prosecutor position and into the role as the prosecutor handling all matters (Juvenile, Sessions and Criminal) in Union County where I was the sole prosecutor. I conducted hearings in all three courts. I argued motions in all three courts. I conducted bench trials in juvenile and sessions court. I prosecuted both bench and jury trials in Criminal/Circuit Court. I was responsible for the handling of all pre-trial matters and motions. I also managed all post-conviction matters that arose in Circuit/Criminal Court. My work included an evaluation of and prosecution of any and all types of criminal offense.

In 2014, I made the lateral move to Blount County where I remain employed through today. I am the specially designated prosecutor for the City of Maryville. If an offense occurs in the

city, I handle that criminal matter (with the exception of DUI's, domestics and juvenile offenses) from its inception until its resolution. This work includes case review for charging decisions, preliminary hearings in General Sessions Court and motion hearings in Circuit Criminal Court. I negotiate cases with defense counsel and handle pleas and motion matters in front of our two Circuit Judges. I discuss with and consult with victims in case resolutions, pleas or trials. Finally, I handle any and all subsequent post conviction proceedings.

In addition to the above Maryville assignment, I am also responsible for three General Sessions Court dockets where I handle matters that arise out of cases investigated by the Blount County Sheriff's office. This assignment involves the same work as referenced for the above Maryville dockets.

In each of those capacities, I negotiate, litigate and prosecute any cases that arise on those dockets from inception until final resolution.

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

I have never had an opportunity to conduct any hearing in the appellate or administrative courts or bodies of our great state. My work has been limited to trial practice. I have tried more than forty jury trials since beginning my work as a prosecutor. I have additionally been involved in a significant number of post-conviction hearings or motions in matters that I did not try. The following are some cases of note on which I have worked:

Hill v. State, 2021 Tenn. Crim. App. LEXIS 57; 2021 WL661194: In this post conviction proceeding on a first degree murder trial, I reviewed the record and successfully argued that trial counsel was not ineffective in his representation of the defendant. The defendant had been tried and convicted for the premeditated killing of his wife in 2003. Since I did not try the case, my involvement necessitated a thorough review of the transcripts of motions, trial and appellate history, preparation of a response to the petition for post conviction relief and a multiple day motion hearing. The Court of Criminal Appeals upheld the conviction and upheld the trial court's agreement with the state's argument that trial counsel was not ineffective.

Fish v. State, 2019 Tenn. Crim. App. LEXIS 373; 2019 WL 2636426: In this petition for habeas corpus, the petitioner attacked the conviction which placed him on the sexual offender registry and also required him to report to community supervision for life. Following the filing of the motion by petitioner and response by the state, the trial court heard argument on the matter. I successfully argued the matter at the trial court. The Court of Criminal Appeals upheld the trial court's agreement with the argument posited by the state that the defendant lacked standing to collaterally attack the judgement that had been entered against him more than a decade previously.

State v. Nuchols, Blount County Circuit Court Case # 26596, 97, 98 and 99: This jury trial involved my successful prosecution of a defendant who was paroled on a life sentence for a murder of a man he had just had a sexual encounter with in Grainger County in the early 1990's. Upon his release on parole from prison, the defendant had developed a relationship with a local young man who vanished. Despite the absence of the victim, I was able to successfully garner a jury verdict for four counts of identity theft and Theft over \$10,000 for the defendant having cashed checks on and depleted the bank account of the victim after his disappearance. The motion for new trial has been denied. The case remains on appeal at this time.

State v. Harmon, 2021 Tenn. Crim. App. LEXIS 402; 2021 WL 3852807: This was a matter I tried jointly with another prosecutor in my office. The defendant was convicted of Second Degree Murder, Especially Aggravated Kidnapping, Theft, Arson, and Abuse of a Corpse. The defendant was convicted of shooting and killing the victim, burning her house down while her body was inside, stealing her property and kidnapping her baby granddaughter. The Court of Criminal Appeals affirmed the jury's verdict in this case.

State v. Beason, 2010 Tenn. Crim. App. LEXIS 317; 2010 WL 1508522: I tried this matter in a jury trial. The Court of Criminal Appeals upheld the jury verdict finding the defendant guilty of Attempted First Degree Murder for the drive-by shooting of the victim while the victim was on a riding lawn mower. This case was upheld on appeal

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 have not served as a mediator, an arbitrator or a judicial officer.

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.

I have not had the opportunity to serve in a fiduciary capacity.

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

My legal experience is fully set out above.

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.

I have never submitted an application for judgeship.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee College of Law, August 2003-May 2005, Juris Doctorate, Magna Cum Laude, Law Review 2003-2005, Business Transactions Concentration, Research Assistant to Dr. Otis Stephens in his project, Unreasonable Searches and Seizures: Rights and Liberties Under the Law, Law Clerk at offices of Morton & Morton

Cumberland School of Law, August 2002-May 2003, transferred to University of Tennessee College of Law, Tennessee Bar Association 2002-2003

University of Tennessee, August 1999-May 2001, Bachelor of Arts, Political Science, Summa Cum Laude

Tennessee Technological University, Spring 1994-Spring 1997, left college to work

University of Tennessee, May 1993-December 1993, transferred to Tennessee Technological University

PERSONAL INFORMATION

15. State your age and date of birth.

I am 47 years old and was born [REDACTED] 1974.

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

I have lived in Tennessee for over 40 years. For a very short period of time prior to my birth, my mother and father moved to Muncie, Indiana and I was born there. Less than one year later, they returned to their hometown of Jamestown, Tennessee. For another brief period, prior to my entering kindergarten, they returned to Indiana and then moved to Alabama where we stayed for another short time. They again returned to Jamestown where I lived continuously from the age of 4 until I graduated from high school in 1993. From 1997-1999, while I remained a Tennessee resident, I worked as a live-in nanny in Bernardsville, New Jersey. I returned to Knoxville, Tennessee in 1999 to complete my bachelor's degree at the University of Tennessee. In 2002, I began law school at Cumberland School of Law in Birmingham, Alabama where I had a temporary residence from July 2002-May 2003. In May 2003, I returned to Knoxville, Tennessee where I graduated from the University of Tennessee School of Law. I have remained in East Tennessee continuously since that time. I lived in Knoxville until 2019. My husband, daughter and I moved to Blount County in 2019.

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

I have lived in Blount County since 2019.

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

I am registered to vote in Blount 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.

I have not served in the military.

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.

I have not had any formal complaints filed against me.

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

No.

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

No.

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

No.

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

Vice Chair of the Board – The GATE (Gateway to Independence) January 2022 – present
Member – the GATE (Gateway to Independence) January 2021 – present
Leadership Blount – Class of 2021
Volunteer Basketball Coach (10-12 year old girls) – November 2021 – present
Sevier Heights Baptist Church - Non-Member but regular attendee since 2003

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

I was a member of the Law Women organization when I was at University of Tennessee College of Law, but that participation ceased when I graduated from law school.

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.

Blount County Bar Association 2020-present
Federalist Society 2022-present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

N/A

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

I have not published any legal articles or books.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have not taught any law school courses or conducted any CLE seminars. I have provided training to law enforcement officers at the Maryville Police Department in furtherance of their accreditation. The training related to the United States Constitution's 4th Amendment and the Tennessee Constitution's article 1, section 7 limitations on police/citizen encounters. That training was provided at the Maryville Police Department and at their request.

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.

I have never sought an elective office. In my current position, I serve at the pleasure of the elected District Attorney for my district.

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.

Stanley Blair Hill v. State of Tennessee – Attached is Response of the State of Tennessee to Petitioner's Post Hearing Brief in Support of his Petition for Post-Conviction Relief. This response was filed following a request for briefs to be filed after a hearing for relief was conducted in the trial court. The trial court found for the State and denied the petition. The Court of Criminal Appeals upheld the trial court's ruling. I did not conduct the trial of this case. The post conviction hearing was not conducted until many years following the jury trial. As such, my work relied upon the record as well as additional testimony provided at the post conviction hearing. The brief is one hundred percent my work.

Steven Douglas Fish v. State of Tennessee – Attached is State's Motion to Dismiss Petition for Writ of Habeas Corpus. This motion was filed following the filing of a Petition for Writ of Habeas Corpus. I did not handle the original plea which resulted in the Petitioner being placed on the Sexual Offender Registry and being required to comply with Community Supervision for Life. My work required a review of developing law in the State of Tennessee as it related to

community supervision for life and the argument for retroactive application of a post-conviction remedy to a petitioner who was otherwise outside the statute of limitations for filing the petition. The trial court dismissed the petition and denied post conviction relief. The Court of Criminal Appeals upheld that decision. The motion is one hundred percent my work.

Duane R. Pressley v. State of Tennessee – Attached is State’s Response to Amended Petition for Post -Conviction Relief. Petitioner had alleged ineffective assistance of counsel following a guilty plea. The post-conviction claim was withdrawn prior to a hearing by Judge Green, sitting by interchange, in Knox County. The response is one hundred percent my own work.

ESSAYS/PERSONAL STATEMENTS

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

My professional career has been committed to serving the interests of my community and my state through my work as a prosecutor. It has been my honor to do so. The expertise I have gleaned in that capacity would provide me with crucial insight as a judge reviewing the very issues I have encountered in the courtrooms of our state for the last seventeen years. My work requires an analysis of the facts and the law in each particular case. The unique perspective that the prosecutor’s position brings is also that of whether justice is being done in each case. That requirement of a prosecutor is a unique one in the legal profession. I have endeavored to apply that balance to each case I evaluate. I believe that experience would be valuable to a person sitting on the Court of Criminal Appeals.

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)*

Because my work as a prosecutor limits my ability to do pro bono service, I have had no opportunities to point to specific service in that capacity. I have, however, endeavored to make certain each defendant I have prosecuted received equal justice notwithstanding their status as a pro se litigant, an indigent defendant or a defendant who has hired the most experienced defense counsel available.

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

The Tennessee Court of Criminal Appeals is a statutorily created court authorized under Title 16 Chapter 5 of the Tennessee Code Annotated. Twelve judges comprise the court. They review

(on appeal) felony and misdemeanor criminal cases, habeas and post-conviction proceedings, civil or criminal contempt arising out of criminal matters and extradition cases. I seek appointment to one of two openings in the Eastern grand division of the state. My vast experience in the trial courts of this state make me uniquely qualified for this position. I have worked at all levels of the trial courts in our state; have participated in forty-two criminal jury trials in six counties in east Tennessee; have been a pro tem prosecutor in an additional three counties. My practice has included arguing habeas and post-conviction motions at the trial level. This experience would provide invaluable perspective in reviewing these types of cases.

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

I am currently actively involved as the newly elected Vice Chair of a local non-profit. That organization, The GATE, is dedicated to providing pre-vocational and social activities to young adults with disabilities here in Blount County. I also currently serve as a volunteer head basketball coach to a team of 10-12 year old girls through Blount County Parks and Recreation. Additionally, I have a ten year old daughter who is in fourth grade at a local public school. I volunteer to assist with extracurricular activities at her school as much as possible. If appointed to this judgeship, I would continue to be actively involved with community activities and organizations to the extent I am permitted by the code of judicial conduct and to the extent that I am able to do so and remain fully committed to my work and family.

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

My work as a prosecutor has provided me with a tremendous amount of opportunity to develop time management skills. Multi-tasking docket management, victim contacts, law enforcement consultations, case negotiations, defense attorney conferences, trial preparation, hearings, and other responsibilities require an ability to prioritize and effectively execute a busy and sometimes hectic calendar. I take great pride in my commitment to timely responses to phone calls and correspondence from victims, defense bar and judges with whom I work on a daily basis. I believe these skills coupled with my criminal law experience would make me an effective and efficient addition to the Court of Criminal Appeals.

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

Yes. I was raised in a small rural Tennessee community and a home where rules mattered, and we were expected to follow them. My mother manifested in me a mantra that we should endeavor to speak and seek the truth even if it is inconvenient. Bending the facts or the law to

suit your own narrative only serves to hinder your ability to persuade people to your way of thinking. That foundation informs my decision making to this day. It is the job of the judiciary to do what is right and comply with the substance of the law in the face of any perceived or actual external pressure to the contrary. My job has provided more than one instance where I have been asked to evaluate a case with pressure to charge a defendant when insufficient evidence existed to support a finding of guilt beyond a reasonable doubt. The decision to not prosecute a case can, at times, generate more controversy than a decision to prosecute. My oath to uphold the constitutions and laws of our great country and great state compels me to uphold the law even if that decision might be unpopular. I would continue to apply that analysis to any and all cases I would consider in the position as Judge on 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. Tammy Harrington, Blount County Circuit Court Judge, [REDACTED] [REDACTED]
B. Joe Costner, Costner & Greene, Attorneys at Law, Maryville, TN [REDACTED]
C. Tony Crisp, Chief of Police, Maryville, Police Department, [REDACTED]
D. William Paul Phillips, General Counsel of the Elgin Foundation, [REDACTED]
E. Kristin Sweat, Friend, Mother and Non-Practicing Registered Nurse, [REDACTED] [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] Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: February 17, 2022.


Signature

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



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

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

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

WAIVER OF CONFIDENTIALITY

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

Tracy Jenkins

Type or Print Name

Tracy Jenkins

Signature

2/17/22

Date

024528

BPR #

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

N/A

IN THE CIRCUIT COURT OF BLOUNT COUNTY, TENNESSEE

STANLEY BLAIR HILL)	
Petitioner,)	
)	
vs.)	No. C-22929
)	
STATE OF TENNESSEE,)	
Respondent.)	

**RESPONSE OF THE STATE OF TENNESSEE TO PETITIONER’S POST
HEARING BRIEF IN SUPPORT OF HIS PETITION FOR POST-CONVICTION
RELIEF**

COMES NOW the State of Tennessee and in response to Stanley Blair Hill’s (hereinafter the “Petitioner”) brief in support of his petition for post-conviction relief and would submit the following:

I. CONTROLLING LAW

The Tennessee Post Conviction Procedure Act is codified at Title 45, Chapter 30 of the Tennessee Code Annotated. Tenn. Code Ann. 45-30-101. Petitioners are afforded the opportunity to seek relief when “the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. 40-35-103. The burden of proof lies with the petitioner who must prove the allegations by clear and convincing evidence. Tenn. Code Ann. 40-35-110(f). Proof of the Petitioner’s allegations shall be limited to evidence of the allegations of fact in the petition. Tenn. Code Ann. 40-35-110(c).

The right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 9, of

the Tennessee Constitution. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and this Court have recognized that this right to representation "encompasses the right to 'reasonably effective' assistance, that is, within the range of competence demanded of attorneys in criminal cases." *Burns*, 6 S.W.3d 453, 461 (citing *Strickland v. Washington*, 466 U.S. 668, 687, and *Baxter*, 523 S.W. 2d at 936).

The well settled standard by which effective assistance of counsel is judged is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To succeed on a claim of ineffective assistance of counsel, a petitioner must establish both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Baxter*, 523 S.W.2d at 936; *Strickland*, 466 U.S. at 687. A criminal defendant is also entitled to effective assistance of counsel on appeal. *Campbell v. State*, 904 S.W.2d 594, 596 (Tenn. 1995); *Evitts v. Lucey*, 469 U.S. 387 (1985). To prove a deficiency at either the trial or appellate levels, a petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. To prove prejudice, a petitioner must establish a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Id.* at 694. Counsel's performance is not deficient if the advice given, or the services rendered "are within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d at 936.

II. STATE'S ARUGMENT

The State notes that Petitioner's brief in support of his argument that he is entitled to post conviction argues the following bases for relief under the post-conviction statute:

1. Petitioner was denied effective assistance of counsel and due process of law by trial counsel's failure to obtain adequate expert and investigative assistance and/or to present such testimony at trial.
2. Trial counsel failed to object to the introduction of improper, irrelevant, inflammatory and prejudicial evidence.
3. Trial counsel failed to provide effective assistance of counsel in plea negotiations in this cause by failing to competently and adequately advise Mr. Hill whether to accept or reject the plea offers made by the State.

Following the motion hearing in this matter, the petitioner requested arguments be made in writing. The court granted the petitioner's request, and the State is filing this brief in response to the arguments made by petitioner in brief. To the extent that Petitioner's original and amended petition states any other bases other than those argued in brief, the State avers that by requesting arguments be made in writing and limiting the scope of his own argument, that petitioner has waived any other issues not addressed in brief. Notwithstanding the waiver argument, the State avers the proof offered at the post-conviction hearing only raised the issues asserted by Petitioner in brief and as such the evidence offered at hearing affords no other arguable bases for relief other than those argued by petitioner's counsel in brief.

I. Petitioner was not denied effective assistance of counsel and due process of law by trial counsel's failure to obtain adequate expert and investigative assistance and/or to present such testimony at trial.

Trial counsel consulted with an expert that had been involved in the case prior to Petitioner fleeing to California. (Post-Conviction Hearing p. 46) That expert did not feel she could offer testimony without incriminating Petitioner. (Post-Conviction

Hearing p. 46) Trial counsel did not feel that pathological or forensic experts were something he needed to focus on. (Post-Conviction Hearing p. 46) Trial counsel set out his trial strategy was to argue this was not a murder, it was an assisted suicide. (Post-Conviction Hearing p. 48) This strategy was based on trial counsel's review of the videotaped statements given by his client to authorities. (Post-Conviction Hearing p. 48) He retained an expert, Dr. Pamela Jones to assist in that defense. (Post-Conviction Hearing p. 48).

Trial counsel's strategy in attempting to convince the jury that Petitioner did not commit a murder but instead simply assisted his wife in her desire to kill herself is a sound position supported by the evidence (as it was understood to exist at the time the trial began) as well as supported by the lengthy and incriminating statements offered by Petitioner to law enforcement as well as the forensic evidence in this case.

The test for deficient performance is whether counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Henley*, 960 S.W.2d at 579. The Court must evaluate the questionable conduct from the attorney's perspective at the time, *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982), 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). This Court will not use hindsight to second-guess a reasonable trial strategy, *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994), even if a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980).

In reviewing trial counsel's performance, appellate courts must not use "20-20 hindsight."

Instead, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." "[A] reviewing court must be highly deferential and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). "[T]he burden to 'show that counsel's performance was deficient' rests squarely on the defendant."

Nesbit v. State, 452 S.W.3d 779, 787-788 (Tenn. 2014) (internal citations omitted)

The State avers that Mr. Daniel's performance was well within the standard of competence demanded of attorneys in criminal cases and that his trial strategy should not be second guessed with hindsight.

II. Petitioner's constitutional rights were not violated by trial counsel's failure to object to the introduction of improper, irrelevant, inflammatory and prejudicial evidence.

The three initial portions of the transcript referenced in brief by Petitioner are not improper, irrelevant, inflammatory and prejudicial. Relevant evidence is evidence that tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tennessee Rules of Evidence 401. The proffered evidence, observations of the officers that Mr. Hill seemed to be trying to muster a showing of emotion about the death of his wife but was unable to do so, was relevant to a determination as to whether Petitioner was guilty of the murder of his wife. Counsel's failure to object to such evidence does

not support a finding that he was ineffective, or that Petitioner was deprived of a constitutionally sound trial.

As to the additional portions of the ROA cited by counsel as Vol. IV, 163-218; and Vol. IV 236-283, the State avers that trial counsel asserted at the trial of this matter that there were portions of the proffered tape that probably both sides would want to be viewed, but it was going to be difficult to redact the tape. (ROA, Blount County Circuit Court Transcript, Vol. II, p. 234) Mr. Daniel additionally noted the parties had come to a meeting of the minds. (ROA, Blount County Circuit Court Transcript, Vol. II, p. 234) The court, upon agreement of the parties, gave a curative instruction prior to the playing of the statement. (ROA, Blount County Circuit Court Transcript, Vol. II, p. 235-36). The State avers that the unredacted statement benefitted both parties as it was viewed tactically by defense counsel and that the agreed curative instruction given was sufficient to address any issues.

Juries are presumed to follow the trial court's instructions. *State v. Young*, 196 S.W.3d at 111; *State v. Shaw*, 37 S.W.3d at 904. Here, the instruction given by the judge adequately addressed the issues presented by playing the statement in its entirety. The tactical decision by the defense, viewed at the time of the trial, did not amount to ineffective representation.

III. Trial counsel did provide effective assistance of counsel in plea negotiations in this cause.

Mr. Hill testified at the post-conviction hearing that he rejected an original offer to plead to second degree murder and a sentence of 20 years at 85%. (Post-Conviction Hearing p. 7) He indicated that he told his attorney he would take a manslaughter at 15 years. (Post-Conviction Hearing p. 8). Petitioner indicated he received no other offers from the state. (Post-Conviction Hearing p. 8) He also indicated he never asked his attorney to negotiate another plea. (Post-Conviction Hearing p. 8) He further indicated that leading up to the trial he met with trial counsel on a nightly basis. (Post-Conviction Hearing p. 9) He never had any plea discussions with his trial counsel during that time. (Post-Conviction Hearing p. 9-10) He did not ask trial counsel to try to get a plea offer for him. (Post-Conviction Hearing p. 10) On cross examination, Mr. Hill admitted that he was still in jail prior to fleeing to California when the initial plea offer was made to him by the state. (Post-Conviction Hearing p. 18). To his knowledge the state never made another plea offer once he had fled to and was apprehended in California. (Post-Conviction Hearing p. 19.)

Trial Counsel testified that he had worked as an attorney for 30 years. (Post-Conviction Hearing p. 44) He took over the case when his father passed away and Mr. Hill was returned from California. (Post-Conviction Hearing p. 45) It was trial counsel's understanding that a plea to second degree murder had been proffered prior to the fleeing to California and Mr. Hill was not interested. (Post-Conviction Hearing p. 47) Following his involvement in the case, trial counsel attempted to get an offer from the assistant district attorney. (Post-Conviction Hearing p. 47) The assistant district attorney consulted with the family and indicated there was not going to be an offer. (Post-Conviction Hearing p. 47)

The United States Supreme Court has held that a defendant claiming that trial counsel's performance was deficient in the plea negotiations process has the burden to show by a reasonable probability that, but for counsel's deficient representation, (1) the defendant would have accepted the plea, (2) the prosecution would not have withdrawn the offer, and (3) the trial court would have accepted the terms of the offer, such that the penalty under its terms would have been less severe than the penalty actually imposed. *Lafler*, 132 S. Ct. at 1385. We agree that this is the appropriate standard for determining whether a defendant is entitled to relief for ineffective assistance of counsel during the plea negotiation process and therefore apply the *Lafler* standard here.

Nesbit v. State, 452 S.W.3d 787-88 (Tenn. 2014). Here the post-conviction hearing shows the petitioner rejected an initial plea offer, fled to California, and upon his return to Tennessee, the State never extended an additional offer. Petitioner is not entitled to relief.

Based on the foregoing, the state respectfully asks that the request for post-conviction relief be denied.

Dated in Maryville, Tennessee, this the ___th day of _____, 2018.

Respectfully submitted,
MIKE FLYNN
District Attorney General

Tracy L. Jenkins
Assistant District Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the foregoing Response to Petitioner's Post Hearing Brief in Support of His Petition for Post-Conviction Relief to Randall Reagan and Douglas Trant, counsels for Petitioner Stanley Blair Hill, by first class mail to the address at 100 W. Summit Hill Drive SW, Knoxville, TN 37902.

This the ____ day of _____, 2018.

Assistant District Attorney General

IN THE CIRCUIT COURT OF BLOUNT COUNTY, TENNESSEE

STEVEN DOUGLAS FISH)	
Plaintiff)	
)	
vs.)	No. C-25826
)	
STATE OF TENNESSEE)	
Defendant)	

STATE'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

FACTS

In Blount County Circuit Court case number C-12446, Defendant was convicted of the offense of Attempted Rape of a Child after entering an Alford Plea on March 1, 1999. He received an eight-year sentence to serve and was placed on probation after serving a split confinement of 30 days. The defendant subsequently violated the conditions of his probation and was ordered to serve the balance of his sentence on August 13, 2001. See State v. Fish, 2002 Tenn. Crim. App. LEXIS 847 (Tenn. Ct. Crim. App. 2002) (upholding the revocation of the petitioner's sentence revocation). On May 23, 2008, an amended judgement was entered reflecting that petitioner was required to comply with conditions of community supervision for life. He served out the sentence and was released from prison at expiration.

Upon his release from prison, the defendant has been required to report as a sexual offender and has been subject to community supervision for life. On January 29, 2018, the defendant was arrested and charged with thirty-six new charges of violations of community supervision for life and the sexual offender registry for having contact with minor females. Following his arrest on the new offenses, the defendant filed a Petition for Writ of Habeas

Corpus seeking a finding that the judgement entered in C-12246 was void on its face and as such constituted an illegal sentence.

I. PETITIONER'S WRIT OF HABEAS CORPUS IS MOOT, AS THE UNDERLYING CONVICTIONS, IN CASE C-12446, HAS EXPIRED, AND AS SUCH THE PETITION SHOULD BE DISMISSED

The State of Tennessee would note that the case number under which Defendant has filed his Writ of Habeas Corpus has expired. In C-12446, Defendant was convicted of the offense of Attempted Rape of a Child after entering an Alford Plea on March 1, 1999. He received an eight year sentence to serve on probation after serving a split confinement of thirty days. The defendant subsequently violated the conditions of his probation and he was ordered to serve the balance of his sentence on August 13, 2001. He served out that sentence and was released from prison.

Tennessee Code Annotated § 29-21-101(a) states that: "Any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in subsection (b) and in cases specified in § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint." Petitioner is not being held on C-12446 and he cannot attack its validity through a Petition for Habeas Corpus.

II. PETITIONER'S JUDGEMENTS ARE NOT VOID ON THEIR FACE AND THEREFORE A REQUEST FOR HABEAS RELIEF IS INAPPROPRIATE

While the initial judgement filed in the defendant's conviction may have been illegal, the judgment was appropriately amended by the trial court. The amended judgment attached to Petitioner's motion which sentenced the defendant to comply with the conditions of community supervision of life is valid and not void. The judgment was appropriately amended on May 1, 2008 to comply with the law at the time of the offense. As noted in State v. Nagele, 353 S.W.3d 112, (Tenn. 2011) "Whether the trial court's failure to check the box on the

judgment form to indicate that the Defendant was sentenced to community supervision for life is considered to result in an illegal sentence or to be a clerical error, trial courts have the authority, as well as a duty, to correct the judgment as soon as the error is brought to their attention.” Id. at 119-120. The trial court appropriately amended the judgment. Petitioner did not challenge the amendment at that time. Further, the defendant never challenged his subsequent reporting to community supervision for life up to and until his arrest on thirty-six new charges related to his violation of community supervision for life and the sex offender registry in 2018. This challenge came a decade following the amended judgment placing him on the registry and requiring community supervision for life.

The Tennessee Supreme Court has noted and reaffirmed “the purpose of a habeas petition is to contest void and not merely voidable judgements. A petitioner cannot collaterally attack a facially valid conviction in a habeas proceeding.” Archer v. State, 851 S.W.2d 922, 926 (1993) (citing State ex. rel. Holbrook v. Bomar 364 S.W.2d 887, 883 (1963)) (internal quotations omitted). The defendant’s judgement being facially valid, the habeas petition is not the appropriate avenue to challenge the defendant’s prior conviction.

The cases cited by Petitioner are inapposite to the instant case. In Ross v. State, 2014 WL 3954060 (Tenn. Ct. Crim. App. 2014) the habeas petition was filed and pending while petitioner was still serving the 25 year sentence for the aggravated rape conviction. In that case, the trial court amended judgment during the pendency of the habeas petition. In the instant case, Mr. Fish’s judgment was amended ten (10) years ago. In Hoover v. Steward, 2013 WL 238196, the petitioner was serving a twenty-one year sentence for convictions for rape and incest at the time he challenged his pleas through his habeas petition. In both of the foregoing cases, the petitioner’s claims were appropriate because they were being held, at the

time of the filing, on the convictions that were being challenged. In the instant case, petitioner is not being held on the expired sentence. Instead, he remains incarcerated on new charges.

III. POST CONVICTION RELIEF SHOULD BE DENIED

Since habeas relief is not available to the petitioner, the next issue is whether a claim for post conviction relief might be available. The grounds for relief authorized under the Tennessee Post-Conviction Procedure Act are stated as follows: “Relief under this part shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” T.C.A. 40-30-103. Petitioner has alleged that his constitutional rights were violated by an illegal plea, one where he was not informed that he would be required to be on community supervision for life. “[B]ecause this petition seeks only to void a judgment valid on its face and valid on the record of the proceedings held to render that judgment, the claim must be brought within the time period allowed by T.C.A. § 40-30-102 or be barred.” Archer at 164. Because petitioner’s final judgement of conviction (as amended) was filed in 2008 and his subsequent challenge comes nearly ten years after entry of that final judgement, his request is well outside the time limitations period as set out in T.C.A. 40-30-102. The only two potential exceptions to the tolling statute in the instant case are retroactive application or a due process tolling.

A. RETROACTIVE POST-CONVICTION RELIEF

The analysis as to whether post conviction relief can be granted retroactively falls to the application of the Tennessee Supreme Court’s decision in Bush v. State, 428 S.W.3d 1 (Tenn. 2014). In Bush, the Tennessee Supreme Court evaluated the “retroactive application of Ward v. State, 315 S.W.3d 461 (Tenn. 2010).” Bush at 5. The Ward case held “trial courts

have an affirmative duty, before accepting a guilty plea to a crime carrying a mandatory sentence of community supervision for life, to inform the defendant desiring to plead guilty of the consequence of lifetime supervision.” Id. Similar to petitioner’s case, Mr. Bush had pled guilty in 2000 to an offense which subjected him to community supervision for life and at the time of entry of the plea, he did not know that he would be subjected to the requirements of community supervision for life. Id. at 7-8. Mr. Bush asked the court to find the Tennessee Supreme Court’s holding in Ward v. State, 315 S.W.3d 416 (Tenn. 2010), created a new rule of constitutional criminal law requiring retroactive application, and, as such, the provisions of the Tennessee Post Conviction Act should be tolled. Bush at 7. In holding that the retroactive application did not apply, the court noted the legislature’s adoption of limitations as to retroactivity of the post conviction statute as codified in T.C.A. 40-30-122 and stated “we decline to find that the Ward v. State rule requires retroactive application under the standard established in Tenn. Code Ann. § 40-30-122.” Id. at 20-21. The application of the holding in that case to the facts of this matter clearly show that Petitioner’s filings are time barred and the Court’s holding in Ward v. State, 315 S.W.3d 416 (Tenn. 2010) may not be used to retroactively toll the statute of limitations: “In conclusion, we hold that our decision in Ward v. State does not require retroactive application under Tenn. Code Ann. § 40-30-122. Therefore, our Ward decision does not toll the post-conviction statute of limitations under Tenn. Code Ann. § 40-30-102(b)(1).” Id. at 53.

B. DUE PROCESS TOLLING

The Bush court further evaluated whether due process considerations might justify a tolling of Mr. Bush’s post conviction time frame limitations. In concluding that they did not, the court noted, “a post-conviction petitioner is entitled to due process tolling of the one-year

statute of limitations upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing. Whitehead v. State, 402 S.W.3d at 631. This rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.” Id. at 22 (internal citations omitted). The facts of Bush are, again, similar to the instant case, and the Bush court found,

This case could be construed as one in which the grounds for overturning the conviction arose after the one-year deadline had already passed. On one hand, the violation of Mr. Bush's due process rights actually occurred before the trial court entered its judgment of conviction. On the other hand, Mr. Bush did not discover that he had been sentenced to lifetime community supervision until after he was released from jail. This discovery may or may not have occurred within a year of his conviction becoming final. Mr. Bush was sentenced to serve one year in the Sumner County jail, and the record does not make clear when that term began or ended. However, we do know two things: (1) Mr. Bush essentially admitted that he knew about lifetime community supervision by December 2004 at the latest; and (2) Mr. Bush did not apply for post-conviction relief until April 2011. Under these facts, we cannot find that Mr. Bush was diligently pursuing his rights under [**53] the first prong of the Whitehead-Holland test. Even if Mr. Bush's claim could fairly be characterized as a later-arising claim, nothing prevented him from filing his petition in the intervening years between his discovery of the undisclosed sentence and the filing of his post-conviction petition. In light of the General Assembly's clear preference that the postconviction statute of limitations be strictly construed, we do not find this to be one of those rare unconscionable cases that cries out for due process tolling.

Id. at 22. The facts in the instant case will bear out that Petitioner's sentence had already expired between nine and ten years prior to the filing of the habeas petition, he was represented by counsel at a number of stages throughout the intervening years, and that he failed to make any attempt at challenging the imposition of the requirement of community supervision for life

until he was charged with a multitude of new felony and misdemeanor offenses relative to contact with minor children.

IV. CONCLUSION

For the foregoing reasons, the State requests that, following a hearing on the merits of this case, Petitioner's Writ of Habeas Corpus should be dismissed and any request for a finding that petitioner should be granted post conviction relief should also be denied.

This the ____ day of May, 2018.

Respectfully submitted,

Tracy Jenkins
Assistant District Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I furnished a true and correct copy of the foregoing Motion to Dismiss Writ of Habeas Corpus to Andy Long, counsel for Petitioner Steven Douglas Fish, by email and fax. This the ____ day of _____, 2018.

Tracy Jenkins
Assistant District Attorney General

IN THE CIRCUIT COURT FOR BLOUNT COUNTY, TENNESSEE

DUANE R. PRESSLEY)
)
V.)
)
STATE OF TENNESSEE)

CASE NO. C-24280

**STATE’S RESPONSE TO AMENDED PETITION FOR POST- CONVICTION
RELIEF**

Comes the State of Tennessee by and through the Office of the District Attorney General and responds to the Amended Petition For Post-Conviction Relief and generally denies petitioner has set out a basis for Post Conviction Relief as to either trial counsel George Waters or Michael Tabler.

Procedural History

As relates to the procedural history underlying the petitioner’s request for relief it instructive to set out petitioner’s cases:

C-23363 – April 10, 2015, the petitioner pled guilty by information in this case to DUI 4th offense after waiving his right presentment to the Grand Jury. The memorandum, information, waiver of indictment, plea form and judgement of conviction are attached as Exhibit 1. The petitioner was represented by the public defender’s office. At the time of that plea, the petitioner’s driving history showed five (5) prior convictions for DUI. Exhibit 2. The petitioner’s blood alcohol was a 0.177. Exhibit 3. On September 1, 2015 a probation violation report was issued which alleged the petitioner had violated the conditions of his probation by picking up new offenses on August 29, 2015. Exhibit 4. The petitioner’s new charges included DUI 7th Offense, Violation of Implied Consent, Leaving the Scene of An Accident with Injury, Driving on Revoked, Failure to Render Aid, Failure of Duty Upon Striking Fixtures and Immediate Notice of

Accident. Exhibit 5. On September 11, 2015, the Public Defender's Office was appointed to represent the petitioner on the Violation of Probation. Exhibit 6. On January 29, 2016, the public defender's office was removed from the petitioner's case and Michael Tabler was appointed to represent the petitioner on the Violation of Probation. Exhibit 7. On March 7, 2016, the petitioner submitted to the Violation of Probation, his probation was revoked, and he was ordered to serve his sentence. Exhibit 8. The petitioner filed a request for additional jail credit and on August 2, 2016, the state filed a proposed order setting out jail credit to which the petitioner was entitled. Exhibit 9. Petitioner received appointed counsel, Nick Black, at some point during the pendency of his post conviction filings. On January 9, 2017, an order to withdraw permitted Mr. Black's coming off the case and on February 13, 2017, Rick Owens was appointed on this case and all other post conviction proceedings. Exhibit 10

C-23897 – August 29, 2015, the petitioner was arrested on 12 different charges including a felony DUI offense and a driving on revoked 3rd offense. A Tennessee Bureau of Investigation official alcohol report issued on October 23, 2015, showed a blood alcohol level of 0.259. Exhibit 11 Upon agreement of the parties, on November 30, 2015 ten charges were dismissed and the petitioner, with assistance from defense counsel, George Waters of the public defender's office, waived his right to a preliminary hearing and sent the case to Circuit Court for plea by information on the two remaining charges (DUI 4th or subsequent and Driving on Revoked 3rd). The case was set for disposition on December 18, 2015. The petitioner did not enter his plea on December 18, 2015. The public defender's office was relieved from representing the petitioner and Michael Tabler was appointed on January 29, 2016. Exhibit 12 On March 7, 2016, the

petitioner waived indictment, signed a plea waiver and pled guilty to the charges of DUI 4th or subsequent and Driving on Revoked 3rd. The memorandum, waiver of indictment, plea form and judgement of conviction are attached as Exhibit 13. The petitioner received a sentence of 1 year to serve in custody consecutive to his charges in C-23363.

Law

Both the Sixth Amendment to the Constitution of the United States and article I, section 9 of the Tennessee Constitution guarantee the right of an accused to the effective assistance of counsel. In order to sustain a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn.1975). Under the two-prong test established by Strickland v. Washington, 466 U.S. 668, 687 (1984), a petitioner must prove that counsel's performance was deficient, and that the deficiency prejudiced the defense. See Burnett v. State, 92 S.W.3d 403, 408 (Tenn.2002). Because a petitioner must establish both elements in order to prevail on a claim of ineffective assistance of counsel, "failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." Henley, 960 S.W.2d at 580. "Indeed, 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 v. State, 938 S.W.2d 363, 370 (Tenn.1996) (citing Strickland, 466 U.S. at 697).

The test for deficient performance is whether counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional

norms. Strickland, 466 U.S. at 688; Henley, 960 S.W.2d at 579. This Court must evaluate the questionable conduct from the attorney's perspective at the time, Hellard v. State, 629 S.W.2d 4, 9 (Tenn.1982), 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). A defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S.W.2d 793, 796 (Tenn.Crim.App.1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987) (quoting United States v. Cronin, 466 U.S. 648, 665 n.38 (1984)). This Court will not use hindsight to second-guess a reasonable trial strategy, Adkins v. State, 911 S.W.2d 334, 347 (Tenn.Crim.App.1994), even if a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279–80 (Tenn.Crim.App.1980). "The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation." House v. State, 44 S.W.3d 508, 515 (Tenn.2001) (quoting Goad, 938 S.W.2d at 369). However, this deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. Cooper v. State, 847 S.W.2d 521, 528 (Tenn.Crim.App.1992).

Even if a petitioner shows that counsel's representation was deficient, the petitioner must also satisfy the prejudice prong of the Strickland test in order to obtain relief. Prejudice is shown where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Burns, 6 S.W.3d at 463 (quoting Strickland, 466 U.S. at 694). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Id.*

Analysis

The State of Tennessee submits the petitioner's current position that trial counsel Michael Tabler and George Waters were ineffective lacks merit and should be denied. Mr. Waters and Mr. Tabler both reviewed the materials provided by the State of Tennessee, including a Tennessee Highway Patrol video, as well as blood alcohol results and reports of the arresting officer. Not one, but two separate defense attorneys reviewed the evidence, considered the pending violation of probation, and concluded it was in the interest of their client to recommend to him that he accept the offer made by the state. The State avers the strategy of both counsel was to avoid the possibility the petitioner would be convicted and would receive a two (2) year sentence consecutive to his prior conviction. The *Strickland* test when applied under the circumstances would show that neither counsels' performance was deficient nor did the petitioner suffer prejudice.

Respectfully submitted this the _____ day of _____, 2017.

Tracy L. Jenkins
Assistant District Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for the petitioner by United States mail this the ___ day of _____, 2017.

Tracy L. Jenkins
Assistant District Attorney General