Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Samuel K. Lee

Office Address: 108 S. Main Street, Clinton, Tennessee, 37716
(including county)

Anderson County

Office Phone: 865-457-0755 Facsimile: 865-457-4878

Email Address: LEELAWS@TDS.NET

Home Address: [redacted]

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. 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 Commission 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 word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper

copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney, Ridenour & Ridenour Law Firm

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

1996 - BPR No. 018082

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.

1994 - Florida - Bar No. 0016306 - Inactive - I requested my license be inactive because my practice is exclusive to Tennessee

1995 - District of Columbia - Bar No. 447502 - Inactive - I requested my membership be inactive because my practice is exclusive to 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).

Not applicable

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).

Attorney, Ridenour & Ridenour, Clinton, Tennessee — 2008 to Present: Full spectrum criminal law defense in the General Sessions Courts, Criminal Courts and Juvenile Courts of East Tennessee as well as Federal criminal law matters before the United States District Court for the Eastern District of Tennessee. Additional practice areas include Seizure hearings before the Tennessee Department of Safety, Indication hearings before the Tennessee Department of Children's Services, and personal injury, workers compensation and domestic relations civil litigation.

Assistant District Attorney, Knox County, Knoxville, Tennessee — 2006 to 2008: Represented the State of Tennessee in matters before the Knox County Criminal Court Division I, the Grand Jury, and Felony General Sessions Court.

Assistant District Attorney, Anderson County, Clinton, Tennessee — 1999 to 2006: Represented the State of Tennessee in misdemeanor and felony matters before the Anderson County Criminal Court, Juvenile Court, and General Sessions Courts.

Attorney, Joyce, Meredith, Flitcroft & Normand, Oak Ridge, Tennessee — 1996 to 1999: Represented the State of Tennessee in Child Support matters in Anderson and Knox Counties and provided complex civil litigation support.

Law Clerk, United States Department of Energy, Washington, District of Columbia — 1994 to 1996: Provided litigation and legal research support to the Assistant General Counsel for Environment.

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.

Associate Attorney handling criminal matters for a well established law firm with offices in Clinton, Anderson County, Tennessee and Kingston, Roane County, Tennessee. I have represented criminal defendants in Anderson, Blount, Campbell, Claiborne, Fentress, Grainger, Hamilton, Knox, Loudon, Monroe, Morgan, Roane, Scott, Sevier, Union and White Counties. Additionally, I am a Criminal Justice Act panel attorney accepting appointments from the United States District Court for the Eastern District of Tennessee to represent criminal defendants charged with federal crimes. Percentage of total practice: criminal defense 90%, juvenile matters 4%, family law 4%, and worker compensation and personal injury 2%.

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 Commission 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 Commission. Please provide detailed information that will allow the Commission 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. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

As Associate Attorney at Joyce, Meredith, Flitcroft & Normand, I began as a child support attorney litigating establishment of support, paternity and contempt matters in the Anderson Chancery and Juvenile Courts. I later became Lead Child Support Attorney in Knox County and prepared and tried contested matters in the Fourth Circuit and Juvenile Courts. I was then promoted to Associate assigned to the Managing Partner and provided complex plaintiff's civil litigation support. I supervised discovery, legal research and trial preparation for a case in the United States District Court for the Eastern District of Tennessee against a major commercial insurance company. Prepartion for this case spanned one year and we tried the case before a jury with the defedant's offering significant settlement prior to the trial concluding.

As Assistant District Attorney for the Anderson County, I was assigned to the Criminal, Juvenile, and General Sessions Courts. On Monday and Wednesday, I litigated all juvenile delinquency charges arising out of Anderson County before the Juvenile Court. I litigated delinquents crimes ranging from underage consumption to rape and litigated all matters from detention to final disposition. On Tuesday and Thursday, I litigated all misdemeanor and felony matters arising out of Oak Ridge, Oliver Springs and Lake City before the General Sessions Court Division II. I litigated crimial charges ranging from public intoxication to homicide and litigated all matters from bail to violations of probation. On Friday, I appeared in Criminal Court to handle cases ranging from driver license charges to double homicide. In the Criminal Court, I tried numerous cases to a jury.

As Assistant District Attorney for Knox County, I was assigned to Criminal Court Division I, the Grand Jury, and Felony General Sessions Court. While assigned to Criminal Court, although most cases were resolved by plea agreement, I regularly prepared several different cases for jury trial each week. Additionally, I litigated numerous supression issues, assisted in search warrant preparation and conducted interface with law enforcement. In Felony Sessions Court, I litigated only felonious criminal charges and any related matters such as bail, extradition, and pleas by information. While assigned to the Grand Jury, I presented felony cases bound over from Felony Sessions Court. I also coordinated law enforecement scheduling and appearances before the Grand Jury.

Currently, I am with a law firm with a 50 year history. The firm has deep ties to the community and our client base is primarily private referrals from long-standing clients that believe in the work ethic and expertise of the firm. My practice focus is full spectrum criminal law defense representation in the Criminal Courts, Juvenile Courts, and General Sessions Courts of East Tennessee and before the United States District Court for the Eastern District of Tennessee. In the past five years I have handled and concluded appoximately 435 criminal defense cases ranging from simple misdemeanors to Class A Felonies. I conduct the legal research, motion practice, law enforcment interface and trial preparation for each case. My experiences as a prosecutor allow me to provide my clients with multi-perspective representation. I am sensitive to the concerns and objectives of the victims, law enforcement, prosecutors, witnesses, and the defendants.

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

While Assistant District Attorney in Anderson County, I was second chair prosecutor in a case where the Defendant was indicted for two counts of first degree murder and two counts of felony murder. My primary assignement was to refute and exclude the Defendant's contention that there was a biological impairment of his ability to premeditate the crime. Through extensive legal research and collaboration with expert witnesses, we succesfully attacked the trustworthiness and reliability of the defendant's expert witness' report. The Defendant was convicted after jury trial and the trial court merged the felony murder convictions into the two convictions for premeditated first degree murder and imposed concurrent life sentences. After the denial of a motion for new trial, Defendant appealed several issues inlcuding, but not limited to, whether the trial court erred by prohibiting expert testimony about the effect of Appellant's genetic predisposition to stress on his ability to premeditate. The Court of Criminal Appeals determined the trial court properly excluded unreliable scientific evidence and affirmed the trial court. *See*, State v. Seals, No. E2007-02332-CCA-R3-CD, WL 55914 (Tenn.Crim.App. 2009).

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 sat as special Judge in the Juvenile Court for Anderson County at the request of the Judge. I did this during the Holiday season and on occasions where the Judge had scheduling conflicts. I presided over detention hearings and conducted the regular business of the Court during a delinquency docket. I enjoyed the opportunity to serve and strived to represent the Court in a simple, understandable and approachable manner.

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

I hold general power of attorney and power of attorney for health care for my 82 year old mother. Mother had a catastrophic stroke 22 months ago and cannot live independently. Mother is a retired physician and prior to her stroke lived a full and independent life. Handling Mother's finances has been relatively simple. However, developing a mental health and physical care plan in the midst of competing desires of family members is emotional, complex, and arduous. To determine a prudent course of action, I have sought the counsel of professionals, listened to and discussed each family member's concerns and objectives, and carefully studied how Mother herself historically handled such matters.

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

Operating a private criminal defense practice has taught me that effective lawyering is relational. Although I miss prosecution, representing criminal defendants has taught me how to serve others when life for them is turmoil. I have learned to be more compassionate and open minded. I have become a better listener and communicator. I strive to simplify rather than complicate and I respect each individual's situation and circumstances.

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

Not applicable

EDUCATION

14. List each college, law school, and other graduate school which 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.

8/1994 - 1/1996 The George Washington University, Washington, District of Columbia — LLM
8/1991 - 6/1994 Nova Southeastern University, Fort Lauderdale, Florida — JD
1/1985 - 12/1989 The University of Tennessee, Knoxville, Tennessee — BA
8/1984 - 12/1984 Canisius College, Buffalo, New York (transefer to UTK)

PERSONAL INFORMATION

15. State your age and date of birth.

47 years old, born February 13, 1966

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

28 years

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

24 years

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

Knox

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 are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

Not applicable

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.

Not applicable

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable

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.

Not applicable

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

Not applicable

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.

Not applicable

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 which you have held in such organizations.

Two Rivers Church, Lenoir City, Tennessee

Farragut Church of Christ, Farragut, Tennessee - Member Finance Committee, 2009-2010

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

Not applicable

ACHIEVEMENTS

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

Anderson County Bar Association, 2003 to present

Knox County Bar Association, 2006 to present

Roane County Bar Association, 2008 to present

Tennessee Association of Criminal Defense Lawyers, 2008 to present

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

accomplishments.

Congressman's Award - December 14, 1997 - for exemplary service and outstanding effort and dedication to the Korean American Association - given by U.S. Congressman John Duncan

Certificate of Appreciation - December 17, 2006 - in recognition of loyal and unselfish support and effort which contributed to growth and harmony of the Korean Association of Tennessee - given by President of the Federation of Korean Associations Eugene Yu

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

Not applicable

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.

Trial Practice - University of Tennessee College of Law

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.

Not applicable

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

Not applicable

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

Attached are two Memoranda of Law. I composed both memorandums and had the assistance of a law clerk and various templates.

ESSAYS/PERSONAL STATEMENTS

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

The matters appealed to the Court of Criminal Appeals are forged after extensive investigation, exhaustive legal research, motions and trial. These issues represent real life scenarios where parties attempt to blend the law and facts to advance their positions. I have tried cases as a prosecutor and defense attorney. I have had countless interactions with victims, law enforcement officials, witnesses, and defendants. I have tried cases in metropolitan and rural communities, and I understand the idiosyncrasies of different jurisdictions. I want to use my experiences and bring a multi-disciplined practical understanding of what transpires in the trial courts to make the analysis that occurs on appeal more effective. I am blessed with a wonderful family life and in my prime. It is the optimum time to take my expertise and work ethic and administer justice.

36. State any achievements or activities in which you have been involved which 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)***

Although 90% of my practice involves being retained to represent criminal defendants, I accept appointed cases in Anderson, Roane and Loudon counties. Additionally, I accept federal appointments for indigent defendants before the United States District Court for the Eastern District of Tennessee. I have taken many pro bono cases referred by professional contacts, friends, and church members. I take pride in listening and trying to understand the questions of any person with legal problems. In private practice I have learned to develop and maintain business, however, I continue to offer free consultations and always respond to telephonic inquires. I find great reward in getting the people I counsel to genuinely feel that I understand the facts and circumstances of their case and that I can improve their situation.

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

I seek to be Judge of the Court of Criminal Appeals for the Eastern Section. My experiences and integrity will bring depth and breadth to the fabric of the court. As a lawyer I have prepared and tried cases from the prosecution and defense perspective. As an individual, I am a Korean American who was born and raised in Western New York but will always call East Tennessee home. I completed my undergraduate studies in Knoxville and my graduate studies in Florida and the District of Columbia. East Tennessee is a burgeoning confluence of diverse culture where I seek the opportunity to work hard, efficiently and effectively to hear and understand those that I encounter. I will approach each case in a manner that strives to give every participant a sense of justice.

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 recently began teaching as an adjunct professor at UT. Teaching is rewarding and a great way to learn. I believe that preparing young lawyers well is key to growing a professional and compassionate legal community. My community involvement activities are tied directly to family life. You will find me at my children's school functions, on the tennis courts with them or at church with them. My children are A students and tournament tennis players and most of my weekends are spent interacting with the local tennis community. We are family of faith and we attend many church functions including small group meetings and personal growth groups. If appointed Judge I intend to maintain and strengthen all our current activities and embrace appropriately suited opportunities to teach and serve others.

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

When I was 20 my father died. I finished undergraduate studies at UT but was without focus. I entered the restaurant business but thankfully my mother pressed me to enter graduate school. I chose Law school because I recognized that the law is the foundation of our society. I, however, was not passionate for the law until second year when I realized that a legal career would give my life purpose. I became focused and matriculated to George Washington Law School where I received my Master of Laws degree. My legal career has opened doors to opportunity and to relationships. Practicing law has allowed me to realize that serving others and helping people when they are at a low point is a privilege. This realization in conjunction with support from my family and church men's group further fuel my desire to serve others. Two years ago my mother suffered a devastating stroke and is no longer able to live independently. Mother's situation gives my desire to serve urgency. I want to serve now while I am able to do so passionately and without disruption.

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

I will absolutely uphold the law even if I disagree with the substance of the law. In cases with especially vulnerable victims, it is difficult to defend criminal defendants when you know factually they have committed a crime. I am still a prosecutor at heart and one of the greatest challenges transitioning from the prosecutor mindset to defense lawyer is looking beyond guilt and innocence. Our Constitutions guarantee criminal defendants the presumption of innocence and places the burden of proof on the government. Often times however, the facts, as articulated by my client, satisfy the elements of the crime and therefore my client is "guilty". Although this scenario sometimes seems unjust, legally, the burden lies with the State, so I look beyond guilt or innocence and focus on requiring the State to satisfy its legal burden.

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 Commission or someone on its behalf may contact these persons regarding your application.

A. Ron Ridenour, retired attorney, [redacted] Knoxville, TN 37922 [redacted]
B. John Gill, Special Assistant, Knox County District Attorney General's Office, 400 W. Main Ave., Ste. 168, Knoxville, TN 37901-1468 (865) 215-2515
C. Hon. Ronald N. Murch, General Sessions Court Judge, Division II, 101 Bus Terminal Road, Oak Ridge, TN 37831 (865) 425-0370
D. Gus Simmerly, retired, [redacted], Knoxville, TN 37934 [redacted]
E. Dr. Ceecy Yang, physician, 9314 Parkwest Boulevard, Medical Arts Building, Suite 400, Knoxville, TN37923 (865) 540-1650

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals Eastern Section of Tennessee, and if appointed by the Governor, 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 questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

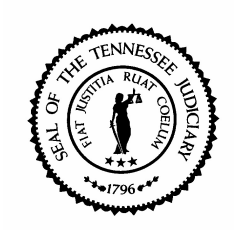
I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the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

Dated: June 11, 2013.

/S Samuel K. Lee

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



TENNESSEE JUDICIAL NOMINATING COMMISSION

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 which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Samuel K. Lee

/S Samuel K. Lee

Signature

June 11, 2013

Date

018082

BPR #

IN THE CRIMINAL COURT FOR ANDERSON COUNTY, TENNESSEE

STATE OF TENNESSEE,

V. No. XXCRXXXX

XXXXXXX XXXXXXXXX XXXXXX

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

Comes now the Defendant Xxxxxxx Xxxxxxxxx Xxxxxx, by and through counsel, and hereby submits to the Court a memorandum of law in support of his motion to suppress the evidence obtained through the search warrant executed April 4, 20XX at 7:20 p.m.

I. Facts

The Defendant was arrested on or about the 4th day of April, 20XX at 130 X. Xxxxxx Lane in Oak Ridge, Tennessee and was taken into custody by the Oak Ridge Police Department ("ORPD"). Prior to being arrested, the State secured a search warrant in the name of Defendant's brother, Xxxxxxx Xxxxxx, for the above residence. This search warrant was based upon the allegations of a confidential informant ("CI") who aided in the production of an affidavit, attached hereto as "Exhibit 2," in support of the search warrant by giving Investigator A. Xxxxxxx Moore information about alleged criminal activity performed by Xxxxxxx Xxxxxx at the above-residence.

Specifically, the search warrant affidavit states that the CI told Investigator Moore that though "[Xxxxxxx] Xxxxxx does not live at [130 X. Xxxxxx Lane]; [he]

frequents and uses the residence as a location to sell crack cocaine with the permission of the resident, Melissa XxXxx." (Search Warrant Affidavit, p. 2, ¶ 2.) The search warrant affidavit also states that the CI "has made controlled purchases of crack cocaine from Xxxxxxx Xxxxxx" at the residence and that the last controlled purchase was made by the CI within 48 hours of the affidavit. (Id. at ¶ 4-5.) Though the search warrant affidavit identifies the substance purchased at the last controlled purchase to be "crack cocaine," no field testing confirming the identity of the substance is alleged in the affidavit. (Id. at ¶ 5.) The reliability of the CI is not established within the search warrant affidavit, as it merely states that the CI "has provided services and information in the past to the ORPD and other law enforcement agencies" and that Investigator Moore "has been able to prove that this CI's information is reliable and credible." (Id. at ¶ 3.)

Upon searching the premises, the Defendant was allegedly found to be in possession of illegal substances and was thereafter taken to Anderson County Jail. He was thereafter indicted on the charges of Possession of Marijuana with Intent to Sell; Possession of Firearm During Commission of a Felony; Drug Paraphernalia; Possession of Cocaine with Intent to Sell (+.5); Possession of Cocaine with Intent to Sell (+.5); and Possession of Schedule I/Resale.

II. Standard of Review

The Fourth Amendment to the United States Constitution requires that search warrants be issued only upon "probable cause" supported by affirmation or Oath. U.S. CONST. amend. IX. Furthermore, Article I, § 7 of the Tennessee Constitution precludes the issuance of search warrant except upon "evidence of the fact

committed." TENN. CONST. art. 1, §7. Therefore, under both federal and state Constitutions, no warrant should be issued except upon probable cause.

An affidavit establishing probable cause is an indispensable pre-requisite to the issuance of a search warrant. State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). Such probable cause "must appear in the affidavit [itself] and judicial review of the existence of probable cause will not include looking to other evidence provided to or known by the issuing magistrate or possessed by the affiant." Id. Therefore, "the sufficiency of a search warrant affidavit is to be determined from the allegations contained in the affidavit alone." State v. Norris, 47 S.W.3d 457, 468 (Tenn. Crim. App. 2000). The search warrant affidavit should therefore "recite sufficient underlying facts to enable the issuing magistrate to perform his detached function and not serve merely as a rubber stamp for the police." State v. Abernathy, 159 S.W.3d 601, 603 (Tenn. Crim. App. 2004) (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)). Furthermore, in making his probable cause determination, the magistrate must rely on accurate information and false or misleading statements may invalidate a search warrant. See State v. Little, 560 S.W.2d 403 (Tenn. 1978) (where the Supreme Court stated that an affidavit will be impeached on its face if immaterial or material false statements were either intentionally made to deceive the court or if material false statements were recklessly made to the court).

III. Argument

A. THERE IS NO ESSENTIAL NEXUS TYING XXXXXXX XXXXXX' CRIMINAL ACTIVITY TO THE PREMISES SEARCHED

In State v. Longstreet, it was established that "facts providing a nexus between the crime and the place to be searched are a critical element that must be included in the affidavit." 619 S.W.2d 97, 99 (Tenn. 1981). However, "the nexus may be established by the type of crime, the nature of the items, and the normal inferences where a criminal would hide evidence, as long as those inferences are based on facts set forth in the affidavit." State v. Saine, No. M2007-01277-CCA-R3-CD, 2008 WL 918511 at *9 (Tenn. Crim. App. 2001) (quoting State v. Smith, 868 S.W.2d 561, 572 (Tenn. 1993)). Furthermore, there is no per se rule that if a person is determined by a magistrate to be a drug dealer, probable cause is shown to search that person's residence. Id.

The Defendant alleges that all evidence obtained under the search warrant should be suppressed because the search warrant affidavit failed to establish this essential nexus between criminal activity and the premises searched. Defendant asserts this allegation on the basis that the search warrant affidavit was not sufficiently clear as to link Xxxxxxx Xxxxxx to the home of Melissa XxXxx. Defendant specifically points to the Transcript of the Evidence, attached hereto as "Exhibit 1," where Investigator Moore stated that it was unknown at the time of the search warrant affidavit "if [XxXxx] had knowledge or not" of Xxxxxxx Xxxxxx' alleged illicit activities performed at her residence or whether she had given him permission to perform such activities—two points specifically alleged in the search warrant affidavit. (Transcript of the Evidence, p. 30, line 6.) Defendant further points to the Transcript of the Evidence where Mr. Moore stated that at the time the CI helped make the search warrant affidavit, there was only

information that Xxxxxxx Xxxxxx "frequents" the residence of XxXxx, a position that very tenuously links Xxxxxxx Xxxxxx to the home of XxXxx. (Id. at p. 31, line 13.) Since in this situation the facts providing the "essential nexus" linking the activity of Xxxxxxx Xxxxxx to the residence of Melissa XxXxx were asserted in the search warrant affidavit without any clarity as to whether the CI had actual knowledge of the above-alleged facts, the search warrant fails to sufficiently establish probable cause that the evidence would be located at Melissa XxXxx's residence.

B. THE SEARCH WARRANT AFFIDAVIT FAILS TO ESTABLISH THE 'VERACITY' OF THE CONFIDENTIAL INFORMANT OR THE RELIABILITY OF THE INFORMATION PROVIDED

In reviewing whether a search warrant affidavit establishes sufficient probable cause, if the information is received from an informant, probable cause in Tennessee is determined by the application of the Aguilar-Spinelli two-pronged test. See State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989) (where the Tennessee Supreme Court adopted the Aguilar-Spinelli test). The Aguilar-Spinelli test requires the establishment of the basis of knowledge and veracity of the informant providing the hearsay information. Saine, 2008 WL 918511 at *9. The basis of knowledge prong "requires that the search warrant affidavit contain facts from which the judge may determine the informant had a basis for the claim regarding criminal conduct or contraband." Id. The veracity prong "requires that the affidavit contain facts from which a judge may determine either the inherent reliability of the informant or the reliability of the information provided." Id.; See Moon, 841 S.W.2d at 338.

By the allegations in the affidavit that the CI engaged in controlled purchases of illegal substances from Xxxxxxx Xxxxxx, it appears that the search warrant affidavit will meet the knowledge prong of the Aguilar-Spinelli test. Therefore, this analysis will focus on the "veracity" requirement of the test.

Though State v. Lowe has previously provided that "[t]he requisite volume or detail of information needed to establish the informant's credibility is not particularly great," the case further clarifies that "the affiant must provide some concrete reason why the magistrate should believe the informant." 949 S.W.2d 302, 305 (Tenn. Crim. App. 1996). This assertion that the search warrant affidavit must provide some independent indicia of reliability has been upheld and applied further in subsequent cases. In State v. Morales, for example, the search warrant affidavit merely stated that "[a]ll information received from this source has all proven to be true through past drug investigations." No. E2001-01768-CCA-R3-CD, 2003 WL 21297308 at *3 (Tenn. Crim. App. Jun. 05, 2003). In that case, the Court subsequently held that the fact that the search warrant affidavit does not provide the number of times that the informant has provided reliable information or whether the information has resulted in previous convictions was fatal to establish the credibility of the informant. Id. at *5.

In this case, the affidavit similarly makes no assertion leading to the belief that the CI has reliable information on this particular occasion as it merely states that the CI has provided "services and information in the past" to the ORPD and made no reference to the accuracy of that information. (Search Warrant Affidavit at p. 2, ¶ 3.) The search warrant affidavit is therefore completely contrary to the

above-mentioned requirements as set out in State v. Morales and State v. Lowe, as it fails to provide any statements that all information received from the source has been proven reliable through past drug investigations. Since in this case the search warrant affidavit neither states the number of times the confidential informant has provided accurate information nor the number of previous convictions in which the confidential informant's information has resulted, the affidavit should be invalidated for failing to establish the CI's "veracity" and inherent reliability.

Defendant further asserts that the search warrant affidavit failed to establish the inherent reliability of the information obtained by the CI in the alleged controlled purchases, as there is no evidence within the search warrant affidavit that the ORPD tested the substance alleged to be crack cocaine. Since the ORPD failed to establish that the substance purchased by the CI was indeed the illegal substance of crack cocaine, the inherent reliability of the CI remains in question, leaving open the question of what substance the CI actually purchased from Xxxxxxx Xxxxxx.

C. THE SEARCH WARRANT AFFIDAVIT FAILS TO ESTABLISH THAT INDEPENDENT POLICE CORROBORATION OVERCAME THE INABILITY OF THE SEARCH WARRANT AFFIDAVIT TO ESTABLISH THE CI'S VERACITY

If either prong is deficient, independent police corroboration can "make up the deficiencies in either prong," but each prong "represents an independently important consideration that 'must be separately considered and satisfied or supplemented in some way.' Jacumin, 778 S.W.2d at 436 (citing Commonwealth

v. Upton, 476 N.E.2d 548 (1985)). Furthermore, the police must corroborate "more than a few minor elements" of the informant's information. Moon, 841 S.W.2d at 341. In some of the post-Jacumin drug cases police corroboration was held sufficient to justify a search warrant where the police confirming, with one of their senses, drug manufacturing or sale taking place. State v. Carter, 160 S.W.3d 526, 533-34 (Tenn. 2005). However, in those cases, some indication of an officer "sensing" a drug transaction was alleged within the search warrant affidavit.

In this case, the search warrant affidavit merely states that the CI wore an electronic audio monitoring device, failing to allege any "sensing" of the Xxxxxxx Xxxxxx admitting to any illegal activity. (Search Warrant Affidavit at p. 2, ¶ 5; See also State v. Delashmit, No. W2004-00946-CCA-R3-CD, 2005 WL 1388041 at *3-4 (Tenn. Crim. App. Jun. 13, 2005)), where the Court held that an informant wearing a monitoring device who actually caught the defendant talking about manufacturing illegal substances at his residence established the CI's inherent credibility.) Furthermore, when the CI exited the residence with the alleged illegal substance obtained during the controlled buy, the search warrant affidavit merely states in a conclusory matter that the substance was "crack cocaine" without any indication that the substance was field tested. (See State v. Norris, 47 S.W.3d 457, 469-470 (Tenn. Crim. App. 2000), where the Court stated that conclusory statements about a thermal imaging device detecting marijuana plants without stating facts as to why the conclusions were valid rendered the affidavit in question invalid.)

There is furthermore no indication of police corroboration of the CI's statements as to Xxxxxxx Xxxxxx' connection with the residence of Melissa XxXxx. As previously mentioned, Investigator Moore confirms in the Transcript of Evidence that the CI possessed no actual knowledge of the statements made connecting Xxxxxxx Xxxxxx to the residence of Melissa XxXxx. The lack of independent police corroboration of the CI's statements, coupled with the lack of any indicia of reliability to establish the CI's veracity, renders the affidavit—and ultimately the search warrant—fatally flawed.

D. THE EVIDENCE OBTAINED UNDER THE SEARCH WARRANT SHOULD BE SUPPRESSED BECAUSE THE AFFIANT RECKLESSLY MADE FALSE STATEMENTS OF MATERIAL FACT

In State v. Little, the Tennessee Supreme Court held that a search warrant affidavit would be sufficiently impeached on its face in two circumstances: (1) a false statement made with intent to deceive the Court whether material or immaterial to probable cause, or (2) a false statement, essential to the establishment of probable cause, made recklessly to the Court. 560 S.W.2d 403, 407 (Tenn. 1978). Additionally, "recklessness may be established by showing that a statement was false when made and that the affiant did not have reasonable grounds for believing it at the time." Id. at 407. To be essential to the establishment of probable cause, the false statement must be "the only basis for probable cause or if not, the other bases, standing alone, must not be sufficient to establish probable cause." Norris, 47 S.W.3d at 469. Furthermore, statements which are made as conclusory without stating facts as to why the

conclusions are valid were found to be reckless miss-statements of the truth in State v. Norris. 47 S.W.3d at 470.

In this case, the admissions of affiant Investigator Moore in the Transcript of the Evidence show that the affiant recklessly made false statements to the Court by swearing that the confidential informant's material statements as to the connection between Xxxxxxx Xxxxxx and the residence of Melissa XxXxx were credible while knowing that at least some of the statements were not entirely true. Defendant specifically points to the Transcript of the Evidence, where affiant states that at the time of the issuance of the search warrant affidavit, it was "unknown if [XxXxx] had knowledge or not" of Xxxxxxx Xxxxxx' alleged illicit activities performed at her residence or whether she had given him permission to perform such activities—both of which were asserted by the CI in the affidavit. (Transcript of the Evidence, p. 30, line 6; Search Warrant Affidavit, p. 2, ¶ 2.)

Defendant also points to the fact that Mr. Moore stated that at the time he worked with the confidential informant there was only information that Xxxxxxx Xxxxxx "frequents" the residence, a fact that very tenuously links Xxxxxxx Xxxxxx to XxXxx's residence while stated as conclusory in the search warrant affidavit. (Transcript of the Evidence, p. 31, line 13; Search Warrant Affidavit, p. 2, ¶ 2.) Mr. Moore further made a conclusory statement in the search warrant affidavit that Xxxxxxx Xxxxxx is known to stay at XxXxx's residence since he suffered a single gunshot wound during a home invasion style burglary at the house in September of 2007. (Search Warrant Affidavit, p. 2, ¶ 7.)

These facts become even more tenuous when coupled with Mr. Moore's statements in the Transcript of the Evidence that "Officer Coleman's statements" linked Xxxxxxx and Xxxxxxx Xxxxxx to the residence of Melissa XxXxx after the September 2007 call-in. (Transcript of the Evidence, p. 32-33, lines 18-6.) The fact that Mr. Moore had no independent personal knowledge of Xxxxxxx Xxxxxx' connection with Melissa XxXxx's residence and yet failed to independently verify any statements made to this effect before swearing to their veracity makes assertions that Xxxxxxx Xxxxxx "is known to stay at 130 X. Xxxxxx Ln." reckless misstatement of the truth. (Search Warrant Affidavit, p. 2, ¶ 7.) These sort of conclusory statements are therefore unsupported by any concrete facts affirmatively linking Xxxxxxx Xxxxxx to XxXxx's residence, especially in light of the fact that Investigator Moore had no personal knowledge of Xxxxxxx Xxxxxx' connection with XxXxx's residence.

It is clear from the Transcript of the Evidence that the affiant did not have reasonable grounds to believe the CI's statements linking Xxxxxxx Xxxxxx to the residence of Melissa XxXxx, by his own admission. Furthermore, these statements linking Xxxxxxx Xxxxxx to the residence of Melissa XxXxx were essential for probable cause, because without these statements, the search warrant affidavit could not link Xxxxxxx Xxxxxx' alleged illicit activities to the residence of Melissa XxXxx, and the affidavit would fail to establish the essential nexus necessary to link the crime and the place searched. Furthermore, since it was already known to the affiant that some of the CI's statements were possible serious and material miscalculations of the truth, the affiant should have—but

failed to--link the CI's statements to his own independent police corroboration within the search warrant affidavit in some meaningful way. Thus, by failing to independently verify statements that were material to probable cause, but that were known by the affiant to be possible untruths, the affiant made a reckless misstatement of the truth to the Court when he swore to the statements of the CI. Therefore, since these statements were material to the affidavit's establishment of probable cause, the investigator recklessly made false misrepresentations of material fact to the Court.

Because the search warrant affidavit failed to establish an essential nexus between Xxxxxxx Xxxxxx and the residence of Melissa XxXxx, did not establish the "veracity" of the confidential informant's statements, and contained reckless misstatements of facts material to probable cause, the evidence obtained under the search warrant should be suppressed.

Respectfully submitted this _____ day of _____, 20XX.

_____
Samuel K. Lee, BPR #018082

RIDENOUR & RIDENOUR
108 S. Main Street
P.O. Box 530
Clinton, Tennessee 37717-0530
Telephone: 865-457-0755

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES	)	
	)	
Plaintiff	)	
	)	
v.	)	No. X:XX-CR-XXX
	)	(VARLAN/SHIRLEY)
	)	
XXXXXX XXXX	)	
	)	
Defendant	)	

MEMORANDUM IN SUPPORT OF MOTION FOR BILL OF PARTICULARS

I. Introduction

The Defendant, Xxxxxx Xxxx, by and through undersigned counsel and pursuant to Fed. R. Crim. Proc. 7(f), has respectfully moved this Honorable Court for an Order requiring the United States to submit a Bill of Particulars in this matter identifying the unindicted co-conspirators.

Defendant Xxxx has been charged in Count One (1) of this Indictment with conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine hydrochloride and 50 grams or more of a mixture and substance containing cocaine base, also known as “crack”, Schedule II controlled substances, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) and (b)(1)(B). As a result of the charges in the indictment, the defendant is exposed to a possible sentence of ten years or more in prison.

Because of the broadness of the charges, the Defendant's rights to a fair trial, due process, and protections against double jeopardy obligate the government to provide a Bill of Particulars.

The instant indictment does not contain sufficient particularization in that the indictment indicates the existence of unindicted co-conspirators without identifying them and alleges a conspiracy without listing overt acts of the alleged co-conspirators. A Bill of Particulars is necessary to avoid surprise, ensure adequate preparation of a defense, and protect the double jeopardy rights of the defendant.

Each of these issues is discussed in detail below.

II. Particularization is Appropriate.

The authority for a Bill of Particulars is set forth in Fed. R. Crim. P. 7(f): "The court may direct the filing of a bill of particulars." The rule has been interpreted to vest broad discretion in the trial court to grant or deny a defendant's request for a bill. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981).

> The determination of whether a given bill falls within or exceeds (the) … permissible purposes is seldom subject to precise line drawing. More often it is an exercise calling for discrete decisions properly infused with the ambience of the trial scene and tailored to fit the facts before the judge. Not surprisingly then, in passing on motions for a bill of particulars, a trial court is afforded substantial discretion.

United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978); see also Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Barrett, 505 F.2d 1091,

1106 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975); United States v. Kendall, 665 F.2d 126, 134 (6th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Trial courts are not without guidance as to the exercise of their discretion. First, those who drafted the present version of Rule 7(f) left a clear statement of their intent to encourage the use of bills of particulars.

> The amendment to the first sentence eliminating the requirement of a showing of cause is designed to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases.

Advisory Committee Note to 1966 Amendment to Fed.R.Crim.P. 7(f).

There are well-recognized guideposts in deciding whether to grant or deny specific requests for bills of particulars in specific cases. The purposes of a bill of particulars, which should be considered by the court in ruling upon such a motion, are: (1) to ensure that a defendant understands the nature of the charges against him so that he can adequately prepare for trial; (2) to avoid or minimize the danger of unfair surprise at trial; and (3) to enable the defendant to plead double jeopardy if he is later charged with the same offense when the indictment itself is too vague and indefinite for such purposes. United States v. Automated Med. Labs., Inc., 770 F.2d 399, 405 (4th Cir. 1985); United States v. Birmley, 529 F.2d 103, 108 (6th Cir. 1976); United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965); see also United States v. Giese, 597 F.2d 1170, 1180 (9th Cir.), cert. denied, 444 U.S. 979 (1979); United States v. Addonizio, 451 F.2d 49, 64 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972). There is a body of trial court decisions that demonstrates the expansive use of Rule 7(f) and the underlying purposes of

that use.[1] Therefore, in constitutional terms, a request for a bill of particulars is concerned with and implicates principles of due process, rights to a fair trial, and protections against double jeopardy.

These concerns for adequate trial preparation and protection against double jeopardy often are lost in governmental responses that surface in opposition to requests for particularization. The prosecution often correctly states that the trial court has broad discretion to deny requests for particularization, without noting that courts have equally broad discretion to grant these requests. To say, then, that the decision to grant or deny a request for particularization is discretionary is not to say that the request ought to be denied.

The prosecution sometimes suggests that the government ought not to be compelled to reveal evidence or prosecution theories. This statement, like the one about discretion, is not an adequate response. Indictments are generally skeletal outlines. Particularization of these skeletons necessarily involves evidence and legal theories. In each case where district courts have granted requests for particularization (see note 1, supra), the particularization has involved evidence and legal theories. A bill of particulars is intended to satisfy a defendant's "need to know the evidentiary details establishing the facts" of the offenses charged. Moreover, "any information which elaborates upon the nature

[1] See United States v. Rogers, 617 F. Supp. 1024, 1027 (D. Col. 1985) (A request should be granted where "it is necessary that the defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided."); see also United States v. Osticco, 563 F.Supp. 727 (M.D. Pa. 1983); United States v. Joseph, 510 F.Supp. 1001 (E.D. Pa. 1981); United States v. McCoy, 492 F.Supp. 540 (M.D. Fla. 1980); United States v. Holman, 490 F.Supp. 755 (E.D. Pa. 1980); United States v. Mannino, 480 F.Supp. 1182 (S.D.N.Y. 1979); United States v. Grindstaff, 479 F.Supp. 599 (E.D. Tenn. 1978); United States v. Hubbard, 474 F.Supp. 64 (D. D.C. 1979); United States v. Eilberg, 465 F.Supp. 1076 (E.D. Pa. 1978); United States v. Hedman, 458 F.Supp. 1384 (N.D. Ill. 1978); United States v. Isaacs, 347 F.Supp. 743 (N.D. Ill. 1972).

of the offenses charged is likely to itself constitute 'evidence'." United States v. Tanner, 279 F.Supp. 457 (N.D. Ill. 1967). When necessary, a bill of particulars is granted "even though it requires the furnishing of information which in other circumstances would not be required because evidentiary in nature." United States v. Smith, 16 F.R.D. 372 (W.D. Mo. 1954) (opinion of Justice Whittaker cited with approval in Advisory Committee Note to Rule 7(f)); see, e.g., Will v. United States, 389 U.S. 90, 98-99 (1967) ("[I]t is not uncommon for the Government to be required to disclose the names of potential witnesses in a bill of particulars"); United States v. Levine, 546 F.2d 658, 666 (5th Cir. 1977) (bill of particulars expected to inform defendant "as to what proof" he must meet at trial); United States v. Brighton Bldg. & Maintenance Co., 435 F.Supp. 222, 236 (N.D. Ill. 1977) (partial list of witnesses ordered produced); United States v. Feola, 651 F.Supp. 1068 (S.D.N.Y. 1987) (list of witnesses to overt and substantive acts ordered produced).

III. The Instant Indictment Does Not Contain Sufficient Particularization.

The instant indictment does not contain sufficient particularization in that the indictment covers a nine-month span of time, involves five defendants, alleges that the defendant conspired with "other persons" in addition to the named defendants, and that the defendants "did combine, conspire, confederate, and agree" to commit the alleged violations. The identity of these "other persons" is not included within the indictment and no overt acts are specified in the conspiracy allegation.

While a bill of particulars cannot be used to save an otherwise invalid indictment, Russell v. United States, 369 U.S. 749, 770 (1962), circumstances like this are precisely the reason Rule 7(f) gives this Court the discretion to grant a motion for bill of particulars. Additionally, just providing the defendant with everything the prosecution has during discovery is insufficient; a defendant may have unlimited discovery and yet not know the particularity of the charges against him. United States v. Davidoff, 845 F.2d 1151, 1154 (2d Cir. 1988) (finding that pretrial turnover of some 6,000 pages of material concerning wiretap application and transcripts of wiretapped conversation did not provide notice of defendant's alleged extortion against companies not named in indictment so as to excuse a lack of particulars requested by defendant on conspiracy charge).

Here, the defendant seeks basic information as to the charges. Motions seeking particularization of the time and place of the alleged offense are routinely granted as being necessary in order for the defendant to know against what he must defend, and what the prosecution intends to prove. See, e.g., United States v. Tedesco, 441 F. Supp. 1336 (D. Penn. 1977); United States v. Baker Brush Co., 197 F. Supp. 922 (D. N.Y. 1961); see also One C. Wright, Federal Practice and Procedure, Criminal Section 129 (1982), at 134 ("Thus, in order for the defendant to know against what he must defend, it will frequently be necessary to require the Government to disclose a time and place of the alleged offenses, and the names of the persons present when the offense took place." (citations and footnotes omitted)).

IV. Identity of Co-Conspirators

Count One of the indictment charges conspiracy between the defendants and "other persons." In order for defendants to adequately defend against the charge, defendants must be apprised of the identity of the co-conspirators.

"It is well settled that the government must identify undisclosed and unidentified co-conspirators, aiders and abettors, and other individuals involved in the criminal acts charged; especially where the government plans to call such persons as witnesses." United States v. Rogers, 617 F. Supp. 1024, 1028 (D. Colo. 1985) (citing United States v. Thevis, 474 F. Supp. 117, 125 (N.D. Ga. 1979)); see also, Clay v. United States, 430 U.S. 934 (1976); United States v. Vastola, 670 F. Supp. 1244, 1270 (D. N.J. 1987); United States v. Mannino, 480 F. Supp. 1182 (S.D.N.Y. 1979); United States v. Rosenstein, 303 F. Supp. 210 (S.D.N.Y. 1969). Courts have even required disclosure of the identities of each defendant's role in the object of a conspiracy, as well as a list of unindicted co-conspirators. United States v. Fine, 413 F. Supp. 740, 746 (W.D. Wis. 1976); see United States v. Rogers, 617 F. Supp. 1024 (D. Colo. 1985); United States v. Strawberry, 892 F. Supp. 519, 527 (S.D.N.Y. 1995) (ordering disclosure of the names of all persons whom the Government will claim at trial were co-conspirators and the dates the Government will claim the defendants and co-conspirators joined and left the conspiracy).

In the instant case, the indictment indicates that there are additional conspirators. The identity of the persons with whom defendants allegedly conspired is absolutely essential in order for defendants to be able to adequately

prepare their defense. Accordingly, the defendant requests the Court to grant an order compelling the Government to file a bill of particulars identifying all co-conspirators.

V. Specific Information Regarding Overt Acts Constituting the Alleged Conspiracy

Count One of the indictment charges that the defendants "did combine, conspire, confederate and agree with other persons" to commit the alleged violations. In order for defendants to adequately defend against the charge, defendants must be apprised of the overt acts constituting the alleged conspiracy.

To pass constitutional muster, an indictment must meet a two-prong test: First, the indictment must set out all of the elements of a charged offense and must give notice to the defendant of the charges he faces; second, the indictment must be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on the same facts. Russeli v. United States, 369 U.S. 749, 763-64 (1962); United States v. Martinez, 981 F.2d 867 (6th Cir. 1992). Moreover, for an indictment to be sufficient, it must contain elements of the offense charged and fairly inform the defendant of charges against which he must defend. United States v. Caldwell, 176 F.3d 989 (6th Cir. 1999); United States v. Gatewood, 173 F.3d 983 (6th Cir. 1999); Allen v. United States, 867 F.2d 969 (6th Cir. 1989).

Under the circumstances of this case and with regard to dates of the alleged conspiracy, the Motion for Bill of Particulars should be granted because

Mr. Xxxx cannot adequately defend against the allegations of the conspiracy from August 2006 to April 2007. The Government has provided the defendant with no information that would provide any notice of overt acts during this period. The indictment must sufficiently warn a defendant of charges against him so that he may adequately prepare his defense. United States v. Caldwell, supra.

In the instant case, the indictment charges a conspiracy but does not provide specific information of overt acts constituting the alleged conspiracy. Specificity as to the overt acts being alleged is absolutely essential in order for defendants to be able to adequately prepare their defense. Accordingly, Mr. Xxxx requests the Court to grant an order compelling the Government to file a bill of particulars listing all overt acts.

VI. Conclusion

For these reasons, the defendant respectfully requests this Court to enter an order compelling the Government to file a bill of particulars identifying the "other persons" with whom it is alleged he conspired and listing the overt acts that constitute the alleged conspiracy.

Respectfully submitted this _____ day of _____, 20XX.

By: s/SAMUEL K. LEE (#018082)
RIDENOUR & RIDENOUR
ATTORNEY FOR DEFENDANT
108 South Main Street
P.O. Box 530
Clinton, Tennessee 37717-0530
(865) 457-0755