APPLICATION OF WILLIAM J. BROWN

TO THE TENNESSEE JUDICIAL NOMINATING COMMISSION

FOR STATE OF TENNESSEE FOR THE POSITION OF

JUDGE OF THE TENNESSEE COURT OF CRIMINAL APPEALS

EASTERN SECTION

JUNE 12, 2013

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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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.

I am the owner of the Law Firm, William J. Brown & Associates. I work as a general practitioner. I have two associates who work for me.

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

1977; BPR#0005450

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

Tennessee is the only state that I have been admitted to the practice of law. I was admitted to the practice of law on September 17, 1977. This license is active. In addition, I am currently representing clients in the State of North Carolina under a pro hac vice status.

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).

Private Practice of Law: Bradley County, Tennessee, January 1988- present

Assistant District Attorney, 10th Judicial Circuit of Tennessee (Bradley, McMinn, Polk, and Monroe), September, 1982- January 1988

Assistant District Attorney, 3rd Judicial Circuit of Tennessee (Knox County), March, 1980-August, 1982

Assistant District Attorney, 5th Judicial Circuit of Tennessee (Overton, Clay, Pickett, Putnam, White, and Cumberland Counties), September, 1978-March, 1980

Private Practice, Knox County, Tennessee, March 1978-September, 1978

Law Clerk, Fowler, Rowntree, Fowler & Robertson, Knoxville, Tennessee, June, 1975-September, 1977

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.

Immediately after I graduated from Law School, I had a commitment to the United States Army to perform "Active Duty for Training" based on my ROTC Commission from college. I attended the Armor Officer Basic Course at Ft. Knox Kentucky for a period or approximately six months and then returned to Knoxville where I went briefly into private practice until I took a position as an Assistant District Attorney in Livingston, Tennessee. I also began my military career with the Tennessee National Guard at that point.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am a general practitioner. I provide legal services to clients in many areas but primarily in the area of litigation. 60% of my practice is in civil litigation; 10% in criminal defense; 10% in personal injury; 10% in probate and conservatorships; 10% in domestic relations.

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.

My legal experience has primarily involved litigation. I have also done some transactional work involving the preparation of wills, deeds and contracts for individuals and small businesses.

I worked as an Assistant District Attorney (ADA) for the first nine years of my legal career, and I have been in private practice for the past twenty-five years. During the nine years that I served as an ADA, I represented the State of Tennessee in every type of trial court responsible for criminal and juvenile cases.

I first went to work in Livingston Tennessee as an ADA for District Attorney John Roberts between the years 1978 and 1980. During that time, I was personally responsible for handling all the cases in Juvenile Court, General Sessions Court and the Criminal Court for Overton, Clay and Picket Counties. I was responsible for the prosecution of every kind of crime imaginable. In addition, I provided legal advice to virtually all of the law enforcement officers in those three counties including the T.B.I., Wildlife Resource Officers, and Sheriffs for each of those counties. I would typically prepare the search warrants for the officers, participated in investigations, and prepared them and their cases for trial. Because two of my counties were on the state line with Kentucky, I was responsible for handling a substantial number of extraditions for individuals who would commit crimes in Tennessee and go across the border to Kentucky. I prosecuted a number of Child Sexual Abuse cases and murder cases, as well as the garden variety traffic violations, theft, burglary, DUI and drug cases. I also handled a number of violent crimes such as armed robbery, aggravated assault, and murder cases. I witnessed my first autopsy while serving in that office. In addition to all of the criminal cases, I was responsible for handling child support collections.

In 1980, I was given the opportunity to move to Knox County, Tennessee and work for District Attorney Ron Webster. I worked for him until September of 1982. My first assignment was to prosecute all cases that arose in the Knoxville City General Sessions Court. All of the criminal cases that arose within the Knoxville City limits and not taken directly to the Grand Jury, went through this court. We would have over a hundred criminal defendants a day whose cases were processed in that court. In addition, I was responsible for providing legal advice to the police officers associated with the Knoxville Police Department. I learned how to move a large number of cases, including doing multiple preliminary hearings, in an expeditious manner.

After approximately six months in this position, I moved to the trial division of the District Attorney's office and immediately began handling a large volume of felony cases. Two days a week, I was responsible for a trial division court's docket and the disposition of felony and misdemeanor cases in an expeditious manner. Since all motions were heard on Friday, I had basically two days a week to prepare for the pending cases. These cases involved every kind of crime imaginable. I had contact with victims of every gender and ethnic background as well as every level of society. I prosecuted individuals from all of those back grounds as well. In my time in this office, I obtained a substantial amount of trial experience associated with complicated and technically challenging cases. I did a substantial amount of work associated with constitutional issues arising from search and seizure matters and due process issues.

In September of 1982, I went to work for District Attorney Jerry Estes in Bradley County, Tennessee. General Estes had just been elected after defeating a long term incumbent District Attorney. The former DA left the office and the criminal docket in terrible shape, and we started from scratch in building the office, procedures, and case files. Every file in the office had been purged of any records except for the indictment, the office had been stripped of any office supplies, and the former DA was trying to steal the phone number for the office. Needless to say, our work was cut out for us. Under General Estes' leadership and with the help of other ADA's and support staff, we rebuilt the files, reconstructed the office procedures, and brought the office into an efficient and highly effective operation. This was all accomplished while attending to all of the criminal and juvenile court proceedings in Bradley, McMinn, Monroe and Polk Counties. I continued to receive extensive experience in trying criminal cases and moving large dockets in an efficient and effective manner involving all types of crimes while providing advice to law enforcement agencies in this office.

Three counties in our district had I-75 pass through them. We investigated and prosecuted serious national drug trafficking as it would infiltrate into our local communities. This gave me an opportunity to deal in the prosecution of numerous drug cases involving substantial amounts of serious controlled substances, working with local law enforcement and federal authorities.

While in this office, I prosecuted several complicated white collar crime and embezzlement cases. I also participated in the investigation and prosecution of serious organized crime activities involving stolen automobiles and parts.

During my service in this office, General Estes identified a serious problem with our prosecution of child sexual abuse cases. He correctly noted that children were being victimized as much by going through the prosecution process as they had been by the perpetrator. He strongly believed that these kinds of cases should be treated differently than other types of criminal cases. He assigned me the responsibility to develop a system for our district to mitigate harm to children during the process and to set up a team approach for the prosecution of these sensitive types of crimes. For the first time in our district, we brought together trained professionals from law enforcement, protective services, counselors and medical providers to create a systematic and well thought out approach to the investigation and prosecution of these very sensitive cases. This would include support for other family members who were injured by intra-familial accusations. The new approach was to try and build a strong case from the beginning including families of the victims in the support process. This support was carried through to the disposition of the case. This substantially improved the success rate as to the prosecution of these sensitive and difficult cases. It also mitigated the harmful effects that come from the intense pressure placed on children when they become the center of serious and unwanted controversy.

After serving as a prosecutor for nine years, I decided that I wanted to do something different. In 1988, I opened an office in Cleveland, Tennessee as a sole practitioner. My office has been on the same street for twenty-five (25) years and in the same building for twenty-three (23) of those years. During that period, I have practiced law as legal counsel for private parties and corporations. Since the year 2000, when I started keeping cumulative records, my firm has taken in for representation more than 2,000 clients. As my practice grew, I have employed lawyers to work for me as associates, but I have primarily done my own work. With the exception of Social

Security Disability, Patents and Trademarks, and Securities and Corporate Derivatives actions, I have handled cases on virtually every legal topic that can be identified. I have done the traditional divorce and domestic relations cases, personal injury, criminal defense as to all kinds of charges, collections and contract disputes, cases involving faulty construction of buildings, boundary line disputes, conservatorships, probate, consumer protection, and bankruptcy cases. In all of these cases, I have done the legal work that was required to conclude the cases. As to each of these kinds of cases and others, I have represented parties on both sides of the issue. I have also appeared in administrative hearings associated with the Department of Safety and the Department of Human Services. These cases involved the confiscation of vehicles and the licensing of day care facilities.

As to my experience in private practice, I have handled litigation at all levels of the judicial system in federal and state courts involving criminal and civil matters. I have done extensive appellate work as both the appellant and appellee in civil and criminal cases at the state level. I have prepared briefs and argued before the appellate courts of the State of Tennessee thirty-nine times, including three before the Tennessee Supreme Court. These were in both criminal and civil matters. I have filed briefs and argued before the 6th Circuit Court of Appeals on three different occasions and filed appellate briefs before the United States Supreme Court on three different occasions. In the case of *Tennessee v. Lane*, 541 U.S. 509 (2004), certiorari was granted and I filed a brief and prepared oral argument to that court. With the exception of the *Lane* case, where I collaborated with other counsel who regularly practiced before the Supreme Court, I have always done all my own work. I have never hired a person to prepare a brief for me to an appellate court. My family will vouch for the fact that I will invest whatever time is necessary, sometimes to their sacrifice, to see that my work is done professionally, properly and timely. I take my responsibilities for my client's legal needs very seriously.

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

While I was an undergraduate at Tennessee Tech University, I served on a jury and was elected to be the foreman of a murder trial in Bradley County, Tennessee. This case involved four men charged with robbing and killing a convenience store owner. This trial lasted for ten days and we were sequestered the whole time.

While I served as an Assistant District Attorney in Livingston, Tennessee, I was responsible for the prosecution of all cases in the Juvenile, General Sessions and Criminal Court and was also responsible for handling a child support docket in Clay, Overton and Pickett Counties. I learned to try a lawsuit against some of the most accomplished criminal defense attorneys in the State of Tennessee, and have benefited from that experience.

When I served in Knox County, as a prosecutor, I was initially assigned to handle the Knoxville City General Sessions Court. This court would have a docket involving hundreds of cases daily. I learned how to manage a large docket with limited resources. I was later promoted to the trial

division of the Knox County District Attorney's office where I was responsible for the disposition by trial or plea of eight or more felony cases a week. I would regularly have one or more jury trials a week. These would involve all types of criminal charges with criminal defendants who were represented by very accomplished criminal defense attorneys.

When I moved to Cleveland Tennessee and first worked as a prosecutor, there was a tremendous backload of cases. I hold the record in the District for disposing of the most defendants cases (72) in one day. I worked diligently thereafter towards reducing the docket to a manageable level.

During my tenure as an Assistant District Attorney in Bradley County, I was responsible for the prosecution of all types of cases in both Bradley and Polk Counties. I handled cases at all trial levels including Juvenile, General Sessions and Criminal Court.

During my service as an Assistant District Attorney in Bradley County, I was responsible for leading the Child Abuse Task force and was the primary prosecutor for that unit. In this capacity, I worked extensively with the Department of Children's Services and law enforcement to handle these difficult and delicate cases attempting to prosecute the cases vigorously without having the children further victimized.

In my practice both as a prosecutor and defense attorney, I have participated in three death penalty cases. The death penalty was never imposed in any of those cases.

I was actively involved in the representation of five sets of families in the Tri-State Crematory civil cases. This case involved an unlicensed crematory operator who defrauded hundreds of families by failing to properly cremate their family members. My clients did not want to participate in the Class Action side of the cases, primarily due to the fact that their loved ones bodies were never identified. In the process of our representing them, we were able to identify two of the bodies that were otherwise unidentified by the Georgia Bureau of Identification. Two other bodies were never identified. Through our investigation and prosecution of this case, we were able to demonstrate the horrible circumstances that bodies were handled and obtain a judgment against the perpetrator, T. Ray Brent Marsh. This particular case went to the Tennessee Supreme Court and is reported as *Akers v. Prime Succession*, 387 S.W.3d 495 (Tenn. 2012)

In 1998, I undertook the representation of an indigent defendant named George Lane. Mr. Lane was charged in the General Sessions Court for Polk County, Tennessee with Driving on Revoked License. Mr. Lane was a paraplegic and confined to a wheel chair. He had previously made two court appearances at the Polk County Court House where the court room was located on the second floor. The first time, he was compelled to climb up the stairs to get to the court room to make his court appearance. After sitting in the court room all day, he was directed to return another day for his case to be considered. He had to crawl down the stairs to leave the building. The next time he came to court, he refused to crawl up the steps and a bench warrant was issued for his arrest for failure to appear. He was arrested on the first floor of the court house and stayed in jail for ten days unable to make the additional bail. Finally after he was released, he came to see me about representing him. I pursued his defense through every level of the Tennessee Judiciary to insure that he was able to have his case resolved in an accessible court

room, and was turned down by each court. After failing in those proceedings, I filed suit in Federal District Court in Nashville seeking to force the State of Tennessee and twenty-five counties that I identified as having inaccessible court houses to comply with the requirements of the Americans with Disability Act.

Ultimately, I represented eight different clients from throughout the State of Tennessee who had been victimized by the State and counties failure to provide accessible court houses. One of those was Beverly Jones. Ms. Jones was a paraplegic confined to a wheel chair. She provided court reporting services for attorneys in the Upper Cumberland area and other counties in Middle Tennessee. She was repeatedly confronted with accessibility issues when she would appear as a court reporter at court houses. Most of the time her only accommodation was to be physically carried to the court room along with her wheel chair. This often placed her at risk for her physical safety and the public humiliation of asking people to carry her up the stairs to do her job.

After the State of Tennessee lost on a motion for summary judgment at the district level, an appeal was pursued ultimately to the United States Supreme Court. We prevailed at all levels in that case. The decision in that case is reported as *Tennessee v. Lane*, 541 U.S. 509 (2004). After we prevailed in that case, we proceeded to prosecute the case at the District level and obtained consent decrees from all defendants guaranteeing that all future court proceedings in the State of Tennessee will held in accessible facilities, and specifically addressed the problems in court houses in twenty-five counties. As a part of that consent decree, the Tennessee Administrative Office of the Courts posts the ADA policy for the judiciary on its web page and provides ADA coordinators for all of the judicial districts in the State of Tennessee.

After the resolution of the *Lane* case, I was asked to represent my client Beverly Jones when she testified before the Judiciary Committee for the United States Senate during the confirmation hearings for Chief Justice John Roberts. I assisted her in preparing her statement to the committee and addressing questions from Senators.

In addition to the State of Tennessee, I am admitted to practice before the Federal Courts for the Eastern, Middle and Western Districts of Tennessee, the 6th Circuit Court of Appeals and the United States Supreme Court. I have been attorney of record in cases in all of those courts.

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, arbitrator or judicial officer.

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.

In the course of my thirty years of practice, I have been appointed numerous times to serve as Guardian ad Litem for minors and disabled adults in legal proceedings.

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

My previous presentations would address all of my legal experience.

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.

None.

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.

Bachelor of Science Degree from Tennessee Tech University, 1974

(Majored in Political Science and Minored in History)

Doctor of Jurisprudence Degree from the University of Tennessee College of Law, 1977

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61 years of age and was born on May 21, 1952.

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

I was born in Cleveland Tennessee in 1952. My father was career military and we traveled extensively due to his military career, but we always considered Tennessee our state of residence. In 1965, while he was stationed at Ft. Campbell, Kentucky, he moved our family to Clarksville, Tennessee where I graduated from high school. I have lived in Tennessee continuously since that date or approximately 48 years.

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

Thirty-one years

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

Bradley 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.

Commissioned 2nd Lt., United States Army Reserve, June, 1974-1981, Served in numerous leadership positions as a platoon leader at armories located throughout East Tennessee.

Captain, Tennessee Army National Guard, October, 1981 – 1988. Received an Honorable Discharge, January 1, 1992.

Commanded three cavalry troops in Knoxville, Athens and Cleveland Tennessee and was S-4 for the 1/278th ACR in Athens, Tennessee.

Winner, Draper Armor Leadership Award as Commander of the Outstanding Company Size Unit in 2nd Army Region. 1987

Awarded Two Army Achievement Ribbons for Service

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.

I have received approximately 5 traffic citations for speeding in the course of my life for which I paid a fine and court cost. I do not remember, nor do I have any documentation concerning those events and can provide no other information except to say that the last one was more than five

years ago. Other than that, I have never pled guilty or been convicted of any crime, regulation or ordinance.

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. 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.

No.

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

No.

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

No.

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

I was divorced in the Knox County Circuit in 1980. This was an irreconcilable divorce with no children involved. I do not have any records from those proceedings.

I was sued one time in the Circuit Court for Hamilton County, Tennessee by an individual that I had previously represented another client against him for divorce. He claimed that I had invaded his privacy because I had subpoenaed his medical records for the trial of the divorce proceedings. The style of that case is *Stephen Todd Coleman v. Thad Huff*, et al, Docket # 07C1445. The

claims against me were dismissed with prejudice on June 24, 2008.

I have pursued collections activities against former clients who did not pay for the services they received. I have attached a printout from the Bradley County General Sessions Court that reflects those cases and docket numbers. The dispositions of those cases would typically be a judgment against them or a dismissal where the matter was settled.

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.

Cleveland Noon Day Rotary Club 1990 to the Present. I served as the Treasurer for the year 1996-97. I served on the Board of Directors for the year 1997-98.

Sons of the American Revolution, Col. Benjamin Cleveland Chapter, Currently serving as Chancellor

Member, 1st Cumberland Presbyterian Church, Cleveland, TN, I have served and continue to serve as a Sunday School Teacher and a member of the Session for the Church, as well as serving on several Committees.

"The Caring Place of Cleveland, TN", Member, Board of Directors, September 2012 to Present (This Organization is committed to providing assistance in the form of food, clothing and other resources for the poor of Bradley County).

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.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member

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

President of the Bradley County Bar Association, 2012-2013

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.

As a result of my role in the *Lane* case, I have received numerous invitations from throughout the country to speak about the case and issues associated with the American's with Disability Act. I was honored to participate at the University of Tennessee College of Law for a symposium on the case and its implications.

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

I have not published any 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.

Earlier this year, I presented a CLE accredited course on preparing and responding to written discovery. One hour CLE credit was given for this course.

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 served on the Cleveland City School Board from 1994 through August of 2010. I was initially appointed by the Cleveland City Commission. After two years, the law was changed to require elections for members of the City School Board. I ran for the office and was elected thereafter. I served as Chairman of the Board from 2004-2007.

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

No.

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.

1. This is the Appellee's Brief in the case of *Tennessee v. Lane* before the Supreme Court of the United States. 50% of this brief was my work. I collaborated with Sam Bagenstos and Tom Goldstein, both accomplished Supreme Court attorneys and certainly more experienced than I in the procedures of that court. We exchanged drafts of the brief numerous times among ourselves to develop what was to be a successful argument. This case is reported at 541 U.S. 509.

2. This is the Appellee's Brief in the case of *Akers v. Prime Succession* before the Supreme Court of the State of Tennessee. 100% of this brief was my work. I was successful in most of my argument in this case, where the trail court's decision was affirmed in all regards. The decision in this case is reported at 387 S.W.3d 495.

3. This is the Appellant's Brief in the case of *State v. Shirley* before the Tennessee Supreme Court. 100% of this brief is my work. I was successful in my argument in this case. The decision in this case is reported at 6 S.W.3d 243.

4. This is the Appellants Brief in the case of *State v. Gaddis* before the Tennessee Court of Criminal Appeals. This is the last case that I have presented before the Tennessee Court of Criminal Appeals. I worked with an associate in my office in the preparation of this brief. He prepared the "Statement of the Case" and the "Statement of Facts" portion and I prepared the argument. I edited and proofed the entire brief. 75% of this brief was my work. We were not successful in this argument. It is reported at 2012 Tenn. App. LEXIS 432.

ESSAYS/PERSONAL STATEMENTS

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

I wanted to be a trial lawyer since I was in the 6th grade. I have been able to live my dream. Over my thirty-six years of practice, I have experienced virtually every aspect of the practice of law that can be imagined. That experience was gained on both sides of the court room in both civil and criminal cases, at all levels in both State and Federal Courts. Now, I want to do something different. It would be my great honor serve on the Tennessee Court of Criminal Appeals. This is the position where I would like to begin the next phase of my professional career. I would like to use my experience to make sound decisions for all of our people and that promote the common good.

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)***

During the course of my private practice, I have been appointed to represent indigent clients in both criminal and civil proceedings. I generally do not file a fee application in those cases accepting that this is a professional responsibility I have to the community.

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 the open position on the Tennessee Court of Criminal Appeals, Eastern Section. This court is responsible for hearing direct appeals from the criminal trial level courts for the Eastern part of our State. I believe that with the breadth of my legal experience, as otherwise expressed above, I can bring insight and sound judgment to the cases the court is charged with deciding.

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 have been active in my Rotary Club for 23 years. This has allowed me to interact with a broad cross section of our community and to enjoy and learn from those experiences. I would want to continue to participate in that organization.

My wife and I have been active members of the 1st Cumberland Presbyterian Church in Cleveland, Tennessee for thirty-years. This relationship has kept me grounded in my faith and the importance of values I have learned through my faith in how I live my life and relate to my fellow man. I will continue to practice my faith through my Church.

I would like to continue my service on boards associated with charitable organizations such as "The Caring Place". This takes me out of my comfort zone, and lets me see what life is like for many in our society who are not as fortunate as I have been. I will continue to do that as my responsibilities allow.

I would like to continue to attend my local Bar Association Meetings, time permitting. I enjoy talking with practicing lawyers and engaging with them in conversations about how the law is being applied day to day. I want to be able to mentor and encourage young lawyers to be good ethical representatives of their client's interest.

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)***

During my service in the military, I was taught the elements of leadership and given an opportunity to exercise various leadership roles. I was responsible for leading hundreds of soldiers to accomplish defined missions using millions of dollars of equipment. I was also given

an opportunity to observe good leaders and those who were not so good and discern the difference between the two. I think I am a good leader, and I know how to follow those who are superior to me.

During my service on the School Board, I learned how to communicate with the public. In the 15 years that I served on the School Board, our board was able to obtain over $60 million dollars for school construction for our school system. It required effective communication to generate public support in a conservative community to raise this kind of revenue. I will bring my communication experience and skills to the bench, and help the court to generate confidence in our judicial system.

My experience with local charitable organizations has taught me the importance of compassion and an appreciation that many people are not as fortunate as I have been. I know that with compassion it is important to help people gain self-respect by being responsible for their actions. This is demonstrated by the Drug Court Program developed by our local courts. This program contains elements of compassion, giving people their self-respect back and encouraging respect for the law.

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 uphold the law, even if I disagree with the substance of the law at issue, or who it might confront. In the *Tennessee v. Lane* case that I have discussed above, my client, George Lane, was not well respected in his community and he was punished by the system humiliating him because of his disability. I felt that the law, the Americans with Disability Act (ADA), was clear that his disability should have been accommodated. More importantly, he should not have been subjected to such harsh treatment that was, in fact, prohibited by the law. I defended him on the driving on revoked case, and pursued his case against the State of Tennessee through every level of the state judiciary. I then filed suit against the State of Tennessee to insure that judicial proceedings were conducted in accessible court rooms not only in Tennessee but throughout the country. That fundamental principle is now a matter of the U.S. Constitution and the law.

While I was ultimately compensated at the end of six years of litigation, neither Mr. Lane nor any of my other clients were able to assist me financially in this litigation during that period. I was put under great financial and professional stress pursuing this case. I accepted that risk to make the point that the constitution guarantees that judicial proceedings will be conducted in facilities that are accessible and that people with disabilities should have their disabilities accommodated during judicial proceedings.

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. Kevin Brooks, State Representative, District 24, Phone 423-310-3026

Email: rep.kevin.brooks@capitol.tn.gov

B. Steve Wright, President, Wright Brothers Construction Company

1500 Lauderdale Memorial Highway

Charleston, TN 37310

Ph: (423) 309-1007

swright@wbcci.com

C. Lawrence H. Puckett, Circuit Court Judge, 10th Judicial Circuit of Tennessee

Bradley County Courthouse, Suite 207

P.O. Box 846

Cleveland, TN 37364-0846

Ph: (423) 476-0537

sandy.riojas@tncourts.gov

D. J. Michael Sharp, Circuit Court Judge, 10th Judicial Circuit of Tennessee

Bradley County Courthouse, Suite 207

P.O. Box 846

Cleveland, TN 37364-0846

Ph: (423) 476-0537

[redacted]

E. Carroll L. Ross, Criminal Court Judge, 10th Judicial District of Tennessee

130 East Washington Ave, Suite 3

P.O. Box 1356

Athens, TN 37371-1356

Ph: (423) 744-2835

judge.carroll.ross@tncourts.gov

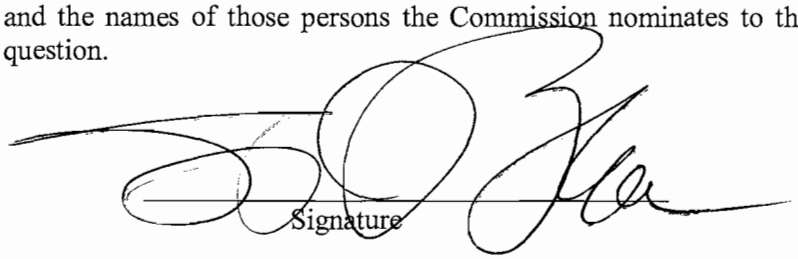
AFFIRMATION CONCERNING APPLICATION

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 (Eastern Section) for the State 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 12, 2013.



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.

William J. Brown
Type or Printed Name

Signature

June 12, 2013
Date

0005450
BPR #

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

Attachment to Question # 25

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Search by: Party

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Case Type: (All) Find Now

Case Sub Type: (All)

Party Name: william brown

Role: Plaintiff

Open Only

Party Name	Role	Case Number	Case Sub Type	Filing Date	Status	Status Date	Style of Case
William J Brown	Plaintiff	6GS2-2011-CV-3565	CD	11/8/2011	Closed	3/15/2012	William J Brown vs Kortney Payne Hutcheson
William J Brown	Plaintiff	6GS2-2013-CV-1438	CD	4/24/2013	Open	4/24/2013	William J Brown vs Kimberly Creasman
William J Brown	Plaintiff	6GS2-2011-CV-3562	CD	11/8/2011	Closed	8/14/2012	William J Brown vs Earl Baumgartner
William J Brown	Plaintiff	6GS2-2010-CV-4137	CD	9/29/2010	Disposed	1/12/2011	William J Brown vs Kelly Herd
William J Brown	Plaintiff	6GS2-2009-CV-1738	CIV	4/13/2009	Closed	4/29/2009	William J Brown vs Mark Woods (et. al)
William J Brown	Plaintiff	6GS2-2009-CV-1153	CIV	3/6/2009	Closed	12/10/2010	William J Brown vs Debra Goins
William J Brown	Plaintiff	6GS2-2009-CV-863	CIV	2/24/2009	Open	2/24/2009	William J Brown vs Kristy Loftis
William J Brown	Plaintiff	6GS2-2008-CV-4755	CIV	9/29/2008	Closed	2/25/2009	William J Brown vs Carlos Lopez
William J Brown	Plaintiff	6GS2-2008-CV-3091	CIV	6/26/2008	Closed	8/6/2008	William J Brown vs Tabitha M Hewitt-Good (et. al)
William J Brown	Plaintiff	6GS2-2008-CV-3090	CIV	6/26/2008	Open	6/26/2008	William J Brown vs John Rosenberger
William J Brown	Plaintiff	6GS2-2008-CV-3089	CIV	6/26/2008	Closed	8/6/2008	William J Brown vs Elisabeth M Orr
William J Brown	Plaintiff	6GS2-2007-CV-3326	CIV	7/9/2007	Closed	8/1/2007	William J Brown vs Lucille Hollenhead
William J Brown	Plaintiff	6GS2-2007-CV-3213	CIV	7/5/2007	Closed	8/1/2007	William J Brown vs Betty Howard
William J Brown	Plaintiff	6GS2-2007-CV-1131	CIV	3/8/2007	Closed	6/22/2007	William J Brown vs Anthony McCammon
William J Brown	Plaintiff	6GS2-2007-CV-1130	CIV	3/8/2007	Open	3/8/2007	William J Brown vs Ronald Gaither
William J Brown	Plaintiff	6GS2-2007-CV-1129	CIV	3/8/2007	Open	3/8/2007	William J Brown vs Bobby Trammell (et. al)
William J Brown	Plaintiff	6GS2-2007-CV-193	CIV	1/11/2007	Closed	4/4/2007	William J Brown vs Brian Hafley
William J Brown	Plaintiff	6GS2-2007-CV-192	CIV	1/11/2007	Closed	7/11/2007	William J Brown vs Brian Johnson
William J Brown	Plaintiff	6GS2-2007-CV-191	CIV	1/11/2007	Open	1/11/2007	William J Brown vs Mark 2 Smith
William J Brown	Plaintiff	6GS2-2007-CV-190	CIV	1/11/2007	Open	1/11/2007	William J Brown vs David Brummel
William J Brown	Plaintiff	6GS2-2007-CV-118	CIV	1/9/2007	Closed	1/24/2007	William J Brown vs Angela Bullard
William J Brown	Plaintiff	6GS2-2006-CV-1971	CIV	6/15/2006	Open	6/15/2006	William J Brown vs Stephanie Burt
William J Brown	Plaintiff	6GS2-2006-CV-1970	CIV	6/15/2006	Open	6/15/2006	William J Brown vs Sally K Bandy
William J Brown	Plaintiff	6GS2-2006-CV-1969	CIV	6/15/2006	Closed	6/22/2007	William J Brown vs Jamie Morgan

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Search by: Party

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Case Type: (All) Find Now

Case Sub Type: (All)

Party Name: william brown

Role: Plaintiff

Open Only

Party Name	Role	Case Number	Case Sub Type	Filing Date	Status	Status Date	Style of Case
William J Brown	Plaintiff	6GS2-2006-CV-1968	CIV	6/15/2006	Open	6/15/2006	William J Brown vs Denward Barfield
William J Brown	Plaintiff	6GS2-2006-CV-1596	CIV	5/19/2006	Open	5/19/2006	William J Brown vs Joe Taylor (et. al)
William J Brown	Plaintiff	6GS2-2006-CV-1595	CIV	5/19/2006	Closed	8/9/2006	William J Brown vs Bryan S Thompson
William J Brown	Plaintiff	6GS2-2006-CV-1594	CIV	5/19/2006	Closed	6/14/2006	William J Brown vs Thomas Lane
William J Brown	Plaintiff	6GS2-2006-CV-1593	CIV	5/19/2006	Closed	6/14/2006	William J Brown vs William Pell
William J Brown	Plaintiff	6GS2-2006-CV-671	CIV	3/6/2006	Closed	4/5/2006	William J Brown vs Larry Conners (et. al)
William J Brown	Plaintiff	6GS2-2006-CV-670	CIV	3/6/2006	Closed	4/5/2006	William J Brown vs Rodger E Jones
William J Brown	Plaintiff	6GS2-2006-CV-669	CIV	3/6/2006	Disposed	4/5/2006	William J Brown vs Billy S Farmer
William J Brown	Plaintiff	6GS2-2006-CV-668	CIV	3/6/2006	Open	3/6/2006	William J Brown vs Sandra Dill
William J Brown	Plaintiff	6GS2-2006-CV-667	CIV	3/6/2006	Closed	6/25/2007	William J Brown vs Scott Lewis
William J Brown	Plaintiff	6GS2-2006-CV-666	CIV	3/6/2006	Open	3/6/2006	William J Brown vs Jessie J Prince
William J Brown	Plaintiff	6GS2-2005-CV-3977	CIV	12/16/2005	Open	12/16/2005	William J Brown vs Shonda Jones
William J Brown	Plaintiff	6GS2-2005-CV-3976	CIV	12/16/2005	Disposed	3/22/2006	William J Brown vs Eric Hollingsworth
William J Brown	Plaintiff	6GS2-2005-CV-3975	CIV	12/16/2005	Disposed	6/14/2006	William J Brown vs David Dailey
William J Brown	Plaintiff	6GS2-2000-CV-2906	CIV	10/3/2000	Open	10/3/2000	William J Brown vs Mickey Weir
William J Brown	Plaintiff	6GS2-1999-CV-1369	CIV	7/12/1999	Closed	9/21/1999	William J Brown vs Jeffrey L Suttles
William J Brown	Plaintiff	6GS2-1998-CV-2414	CIV	10/13/1998	Closed	1/6/1999	William J Brown vs William Cunningham
William J Brown	Plaintiff	6GS2-1998-CV-2413	CIV	10/13/1998	Closed	11/4/1998	William J Brown vs Sandra Bright
William J Brown	Plaintiff	6GS2-1998-CV-2412	CIV	10/13/1998	Closed	12/9/1998	William J Brown vs Bo Ellis
William J Brown	Plaintiff	6GS2-1998-CV-2411	CIV	10/13/1998	Closed	12/9/1998	William J Brown vs Justin Beck
William J Brown	Plaintiff	6GS2-1997-CV-558	CIV	3/3/1997	Closed	4/16/1997	William J Brown vs Anissa Buckner
William J Brown	Plaintiff	6GS2-1996-CV-1852	CIV	8/14/1996	Closed	10/2/1996	William J Brown vs Randall West (et. al)
William J Brown	Plaintiff	6GS2-1995-CV-2561	CIV	12/15/1995	Closed	1/24/1996	William J Brown vs Teresa Berg
William J Brown	Plaintiff	6GS2-1995-CV-2560	CIV	12/15/1995	Closed	1/24/1996	William J Brown vs Randy Vaughn
William J Brown	Plaintiff	6GS2-1995-CV-2530	CIV	12/13/1995	Closed	1/24/1996	William J Brown vs Jerry Palmer

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Search by: Party

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Case Type: (All) Find Now

Case Sub Type: (All)

Party Name: william brown

Role: Plaintiff

Open Only

Party Name	Role	Case Number	Case Sub Type	Filing Date	Status	Status Date	Style of Case
William J Brown	Plaintiff	6GS2-1994-CV-71	CIV	1/11/1994	Closed	2/23/1994	William J Brown vs Scott Shaw

1st Attachment to Question # 34

No. 02-1667

IN THE

Supreme Court of the United States

State of Tennessee,

Petitioner,

v.

George Lane, Beverly Jones, and
United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PRIVATE RESPONDENTS

Samuel R. Bagenstos
1545 Massachusetts Ave.
Cambridge, MA 02138

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

William J. Brown
(Counsel of Record)
William J. Brown & Assocs.
23 North Ocoee St.
Cleveland, TN 37364
(423) 476-4515

June 2, 2003

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and thus validly abrogates state sovereign immunity.

2. Whether the Section 5 analysis of Title II should proceed on a facial basis that considers the statute as a whole or should instead examine whether Congress had power to apply the statute to the particular circumstances of this case.

3. Whether Title II is valid Section 5 legislation only when applied to enforce the Due Process Clause of the Fourteenth Amendment.

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TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

BRIEF FOR THE PRIVATE RESPONDENTS

Respondents George Lane and Beverly Jones respectfully acquiesce in the Petition for Writ of Certiorari filed by the Attorney General and Reporter for the State of Tennessee in this cause.

OPINIONS BELOW

The opinions below are correct as presented.

JURISDICTION

The respondents acknowledge the jurisdiction of the court to entertain the petition.

STATEMENT

This case involves the State of Tennessee's failure, in violation of federal law, to conduct proceedings at courthouses that are accessible to individuals with disabilities. The plaintiffs, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to those proceedings to perform her work as a court reporter. The other plaintiff, George Lane, was harmed when the state held proceedings in the criminal case in which he was a defendant in the inaccessible second-floor courtroom; *the state arrested him* for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed this suit under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, to challenge the state's failure to hold proceedings in accessible courthouses.

1. *The Statutory Scheme*—The ADA was signed into law on July 26, 1990, and Title II took effect eighteen months later. See 42 U.S.C. 12131 note. Title II broadly prohibits any "public entity"—including state governments—from "subject[ing]" any "qualified individual with a disability" to

"discrimination." *Id.* § 12132. To give content to that broad requirement, Congress expressly required the Attorney General to promulgate regulations implementing Title II. *Id.* § 12134. The Attorney General's regulations, which became effective January 26, 1992, require public entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a).

Recognizing that this mandate might require states to make physical alterations of buildings, the Attorney General included a series of provisions to accommodate states' need for an orderly transition to compliance. The Attorney General required each public entity, by January 26, 1993, to "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and * * * proceed to make the necessary modifications." 28 C.F.R. 35.105. Where "structural changes to facilities" were necessary to achieve compliance, the regulations required entities like Tennessee to "develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. 35.150(d)(1). And "[w]here structural changes in facilities are undertaken to comply" with the accessibility requirement, the regulations provided that "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible." *Id.* § 35.150(c).

2. *The Facts—(a) George Lane*—Respondent George Lane has paraplegia and uses a wheelchair for mobility. Pet. App. 13. In September 1996, Lane was compelled to appear at the Polk County courthouse to answer a set of criminal charges the state had filed against him. Pet. App. 15. Although Title II had been in effect for over four years at that point, the courthouse had not been brought into compliance with the statute's accessibility requirements. Because all proceedings in that courthouse occurred in rooms on the second

floor, and the building had no elevator, Lane was required to leave his wheelchair and crawl up the steps with his hands in order to appear in court. *Id.* Following his arraignment on the charges, Lane was summoned to appear at an October hearing in the same courtroom. *Id.* Lane duly arrived at the courthouse but sent word to the trial judge that he refused to go through the humiliation of crawling up the courthouse steps again, nor would he put his safety at risk by permitting court employees to carry him up the steps. *Id.* On the order of the trial judge, Lane was arrested for failure to appear and taken to jail. *Id.*

Subsequent proceedings in Lane's criminal case occurred in the same inaccessible courthouse. At these proceedings, Lane typically waited at the bottom of the stairs while his attorney shuttled back and forth to the courtroom. Pet. App. 16. As a result, the court conducted proceedings, including discussing the course of future proceedings and the possibility of a change of venue, out of Lane's presence. Lane did have an opportunity to attend his preliminary hearing, which was held in the ground-floor courthouse library, but that location was not generally accessible to the public. Pet. App. 16; cf. *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984) (criminal defendant has constitutional right to public suppression hearing). When an arraignment hearing was called in the second-floor courtroom after the grand jury returned an indictment containing new misdemeanor charges in March 1997, Lane's attorney requested that the court dismiss or at least stay the proceedings until accessible facilities could be provided. Pet. App. 16. The trial court denied that request; the judge ruled that Lane might have a right to bring an independent civil suit to make the courthouse accessible, but that the inaccessibility was no basis for not moving forward with the pending case. See 3/17/97 Tr. 5. The Tennessee appellate courts declined to accept jurisdiction over Lane's request for extraordinary relief. Pet. App. 16-17. Proceedings were subsequently stayed in Lane's criminal case, *id.* 17, and Lane ultimately pleaded

guilty to a single charge of driving on a revoked license after the state added an accessible elevator to the courthouse.

(b) Beverly Jones—Respondent Beverly Jones has paraplegia and uses a wheelchair for mobility. Pet. App. 19. She works as a certified court reporter, but because courthouses in many Tennessee counties are inaccessible, her opportunity to perform her work has been significantly impeded. *Id.* 19-20; see *id.* 22 (listing 23 Tennessee counties in which the courthouses were inaccessible at the time the complaint was filed in this case). She has specifically requested modifications to the courthouses in four Tennessee counties, but none has been made accessible to her. *Id.* 20.

3. Proceedings Below—Respondents brought this suit against petitioner and a number of Tennessee counties under Title II seeking injunctive relief and damages. They sued in their individual capacities and as representatives of a class of persons denied access to the state's courthouses because of their disabilities. The district court declined to dismiss the case on Eleventh Amendment grounds. Pet. App. 6-7.

On petitioner's appeal, the United States intervened. The Sixth Circuit affirmed the district court's judgment on the basis of the *en banc* court's holding in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, cert. denied, 123 S. Ct. 72 (2002), that ADA Title II validly abrogates the states' sovereign immunity to the extent the statutory violation implicates due process principles. *Popovich* held, however, that the abrogation is invalid to the extent the statutory violation in question instead implicates equal protection principles. As amended on rehearing, the panel's opinion explained that respondents were "seeking to vindicate" their due process "right of access to the courts in Tennessee." Pet. App. 5. The panel left for remand the fact-specific question whether respondents' allegations amount to "due process violations." *Id.*

REASONS FOR GRANTING THE WRIT

The judgment of the Sixth Circuit was correct and should be affirmed. Title II of the ADA—whether considered on its face or as applied to the specific fact setting of this particular case—is a proper exercise of Congress's authority to enforce the Fourteenth Amendment. Accordingly, the district court was correct to deny the state's motion to dismiss, and the Sixth Circuit was correct to affirm that denial.

We agree with the state, however, that this Court should grant the petition for certiorari. The courts of appeals are deeply split over both of the issues presented by the state's petition. On the basic constitutional question, three circuits and a panel of a fourth have held that Title II is, at least in some circumstances, proper Section 5 legislation; five circuits have rejected that conclusion and held that the statute exceeds Congress's Section 5 power. On the facial-versus-as-applied question, two circuits and a panel of a third have held that challenges to the Section 5 basis for Title II must be evaluated in an as-applied manner, while three circuits have held that challenges to the statute's Section 5 basis are necessarily facial in nature. This case squarely implicates both issues that have divided the courts of appeals.

This case furthermore presents the unusual circumstance in which civil litigants' interests lie in acquiescing to certiorari from a judgment under which they prevailed. This Court has granted certiorari to decide the first question presented *three* separate times in recent Terms. Even if this Court were not to review this particular case, it seems all but inevitable that the Court would relatively soon resolve the validity of Title II's abrogation of state sovereign immunity in another case. Proceedings on remand in this case in the meantime under the cloud of uncertainty that hangs over Title II claims against state entities are all but pointless. So long as the state retains the prospect that this Court will vindicate its sovereign immunity claims in some other Title II case, the state will have no incentive to enter into meaningful settlement discus-

sions and every incentive to delay the proceedings in the lower courts for as long as possible.

Moreover, respondents have an important interest in review in this Court because, although the Sixth Circuit's *judgment* is entirely correct, the discussion in that court's opinion reflects an unnecessarily crabbed view of the circumstances in which Title II might validly abrogate state sovereign immunity. In particular, the Sixth Circuit's suggestion that Title II validly abrogates state sovereign immunity *only* when it enforces due process rights and *never* when it enforces equal protection rights may lead the district court to be unjustifiably skeptical of respondents' claims, which rest on a right of access to courts that implicates both due process and equal protection principles. Respondents Lane and Jones accordingly have a strong interest in this Court's prompt resolution of the questions presented by this case.

I. This Case Implicates The Conflict Over Whether ADA Title II Is Proper Section 5 Legislation

In *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), this Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by applying ADA Title I to the actions of state governments. However, the Court specifically limited its holding to Title I of the statute (the title that prohibits disability-based employment discrimination) and reserved the question whether Title II (which prohibits disability-based discrimination in the provision of public services) could nonetheless be upheld as a proper exercise of Congress's Section 5 power. See *id.* at 360 n.1; *id.* at 371 n.7. And indeed, the Section 5 basis for Title II is substantially stronger than is the Section 5 basis for Title I.

First, "the scope of the constitutional right at issue," *Garrett*, 531 U.S. at 365, is different. Title I applies to state governments only when they act in their capacity as employers—a context in which the state's decisions are judged only by the deferential rational basis test. See *id.* at 366-368; cf.

Board of County Comm'rs v. *Umbehr*, 518 U.S. 668, 676 (1996) ("'[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.'") (quoting *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality)). But Title II much more directly enforces the principle that is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection"—"the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Not only does Title II operate broadly to protect individuals with disabilities against being effectively shut out of opportunities to have access to and influence on their state governments, but the statute also applies to a wide range of specific circumstances in which states have obligations to individuals with disabilities that go well beyond the minimal requirement of a rational basis. The fact setting of this case, which involves access to judicial proceedings and public facilities, provides one example. See Pet. App. 3; *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813-815 (6th Cir.) (en banc) (detailing obligations that the Due Process Clause imposes on states to assure that individuals with disabilities can participate meaningfully in proceedings that adjudicate important rights), cert. denied, 123 S. Ct. 72 (2002). The statute's application to election procedures and voting qualifications,[1] the conditions of confinement of prisoners with disabilities,[2] and the unnecessary institutionali-

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[1] See, *e.g.*, *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 51-59 (D. Me. 2001) (state constitutional provision disenfranchising persons under guardianship by reason of mental illness violates both the Fourteenth Amendment and ADA Title II).

[2] See, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, 19-22 (1st Cir.) (failure to accommodate medical, sanitary,

zation of individuals with mental disabilities[3] provide other examples. As this Court recently made clear in *Nevada Department of Human Resources* v. *Hibbs*, No. 01-1368 (May 27, 2003), slip op. 12-13, Congress has substantially greater leeway when, as in Title II, it enforces constitutional principles that involve a "heightened level of scrutiny" of state conduct.

Second, there is a much greater "history and pattern" of violations of the constitutional rights of individuals with disabilities, *Garrett*, 531 U.S. at 368, in the public services context addressed by Title II than in the employment context addressed by Title I. The *Garrett* Court itself recognized that the "overwhelming majority" of examples of state disability discrimination presented to the congressionally created fact-finding task force involved public services. *Id.* at 371 n.7.[4]

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and safety-related needs of prisoner with Amyotrophic Lateral Sclerosis violates both the Cruel and Unusual Punishments Clause and ADA Title II), vacated on grant of reh'g en banc, 310 F.3d 785 (1st Cir. 2002).

[3] Compare *Olmstead* v. *L.C.*, 527 U.S. 581, 587 (1999) (holding that Title II prohibits unnecessary institutionalization of individuals with mental disabilities when, *inter alia*, "the State's treatment professionals have determined that community placement is appropriate") with *Youngberg* v. *Romeo*, 457 U.S. 307, 324 (1982) (institutionalized persons with disabilities have Due Process right to freedom from restraint "except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training").

[4] The Court suggested that the record of state violations of the constitutional rights of individuals with disabilities might also have related to matters covered by Title III, the ADA's public accommodations title. See *Garrett*, 531 U.S. at 371 n.7. But Title III by its terms covers only "private entities." 42 U.S.C. 12181(7). To the extent that states violated the constitutional rights of individuals with disabilities outside of the employment context, it is Title II that responds to those violations. See *id.* 12132 (Title II provision

And although Congress tellingly omitted any mention of *governmental* employment discrimination from its statutory findings, see *id.* at 371, Congress expressly found that "discrimination against individuals with disabilities persists in such critical areas as * * * access to public services." 42 U.S.C. § 12101(a)(3). Finally, unlike in the employment context, examination of judicial decisions reveals "extensive litigation and discussion of the constitutional violations," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), in the public services context. See Brief for the United States, *Medical Board of California* v. *Hason*, No. 02-479, at 1a-8a (listing more than 60 "[c]ases [e]videncing [u]nconstitutional [t]reatment of [i]ndividuals with [d]isabilities").

A number of circuits, recognizing these key distinctions between Titles I and II of the ADA, have held that Title II is, in whole or in part, proper Section 5 legislation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167, 1170 (9th Cir. 2002), cert. dismissed, 123 S. Ct. 1779 (2003); *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 111-12 (2d Cir. 2001); *Popovich*, 276 F.3d at 813-16; see also *Kiman*, 301 F.3d at 24 (panel opinion, currently pending on rehearing *en banc*). A number of other circuits, by contrast, have ignored these distinctions and held that Title II was not a proper exercise of Congress's Section 5 authority. See *Wessel* v. *Glendening*, 306 F.3d 203, 215 (4th Cir. 2002); *Klingler* v. *Director, Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (per curiam); *Thompson* v. *Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *Reickenbacker* v. *Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Walker* v. *Snyder*, 213 F.3d 344, 347 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001). This conflict in the circuits is deep and persistent, and this case squarely implicates it. The Court should grant certiorari to resolve the conflict and make clear that Ti-

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broadly prohibiting any public entity from "subject[ing]" a qualified individual with a disability to "discrimination").

tle II is, whether as a whole or as applied here, proper Section 5 legislation.

II. This Case Implicates The Conflict Over Whether Section 5 Challenges To ADA Title II Must Be Evaluated In A Facial Or An As-Applied Manner

This case also directly implicates a second conflict in the circuits. The Sixth Circuit held that even if Title II exceeds Congress's Section 5 authority in some of its applications, the statute must nonetheless be upheld as applied to cases in which individuals with disabilities invoke it to obtain redress for violations of constitutional rights guaranteed by the Fourteenth Amendment's Due Process Clause. Pet. App. 3; see also *Popovich*, 276 F.3d at 811-16 (holding that Title II was a proper exercise of Congress's authority to enforce the Due Process Clause as applied to require that hearing-impaired parent be provided hearing assistance in child custody proceeding). The Second Circuit has similarly employed an as-applied analysis in holding that Title II can be upheld as proper Section 5 legislation when it is applied to cases where the state's action "was motivated by either discriminatory animus or ill will due to disability," even if it cannot be upheld as applied to a case involving a mere failure to provide reasonable accommodation. *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 111-12 (2001). And a panel of the First Circuit has held that Title II may be upheld as proper Section 5 legislation in any case in which the statute is invoked to provide a remedy for an actual violation of the plaintiff's constitutional rights. See *Kiman* v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, 19-22, vacated on grant of reh'g en banc, 310 F.3d 785 (2002).

These holdings accord with the basic rules governing facial challenges to statutes. As this Court has emphasized, a "facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which

the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The Court has twice applied that principle in the specific context of a claim that Congress has adopted a statute that exceeded the authority to enforce the Civil War Amendments. In both *United States* v. *Raines*, 362 U.S. 17, 20-26 (1960), and *Griffin* v. *Breckenridge*, 403 U.S. 88, 102-07 (1971), this Court held that if Congress had power to reach the specific facts alleged in the plaintiff's complaint, the statute must be upheld as applied to those facts even if the statute might have other applications that went beyond the legislature's enforcement authority. See also *Hibbs*, slip op. 3 (Scalia, J., dissenting) (stating that the *Salerno* principle applies to facial challenges to the Section 5 basis for a congressional enactment).

Disregarding these principles, three courts of appeals have refused to examine the constitutionality of Title II in an as-applied manner. They have instead held that the Section 5 basis for Title II must be established for the statute "as a whole." *Dare* v. *California*, 191 F.3d 1167, 1175-77 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); see also *Wessel* v. *Glendening*, 306 F.3d 203, 207-08 (4th Cir. 2002) (where plaintiff's claim "arises directly under Title II," rather than under a specific regulation implementing the statute, Section 5 analysis must consider Title II as a whole); *Thompson* v. *Colorado*, 278 F.3d 1020, 1028 n.4 (10th Cir. 2001) (holding that it is appropriate to "conduct the abrogation analysis by considering Title II in its entirety"), cert. denied, 535 U.S. 1077 (2002). The conflict between these decisions and the decisions holding that an as-applied analysis is appropriate is, like the basic conflict over the constitutionality of Title II, widespread and persistent.

This case squarely implicates the conflict over whether Section 5 analysis of Title II should proceed on a facial or an as-applied basis. Unlike some of the Title II cases in which petitions for certiorari have been filed in this Court, cf. *Thompson*, *supra* (plaintiffs challenged the state's imposition

of a $2.25 fee for receipt of a handicapped parking placard), this case involves an application of Title II that directly enforces core constitutional rights. Respondents Lane and Jones contend that the state violated Title II by operating a court system that "when viewed in its entirety" was "not readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Such an inaccessible court system threatens to violate numerous constitutional rights, including: the First Amendment right of citizens to petition the government for redress of grievances, which encompasses a "right of access to the courts," *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 525 (2002) (internal quotation marks omitted); the First Amendment right of the public to attend court proceedings, see *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8-15 (1986); the Sixth Amendment rights of criminal defendants to be present at their trials and to have their trials open to the public, see *Waller* v. *Georgia*, 467 U.S. at 46 (right to public trial); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (right to be present); and the guarantee under the Due Process and Equal Protection Clauses of the Fourteenth Amendment that full and meaningful access to important court proceedings will not be denied because of a litigant's poverty or other constitutionally irrelevant factor, see *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 124 (1996); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971). Even if any given individual with a disability who cannot attend a particular proceeding in an inaccessible courthouse might not experience a violation of his or her constitutional rights, the widespread inaccessibility of courthouses throughout the nation[5]—and the significant threat that inaccessibility poses to a range of constitutional rights—fully justifies Title II as "reasonably prophylactic legislation" in

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[5] For examples of challenges to inaccessible courthouses, see *Shotz* v. *Cates*, 256 F.3d 1077, 1080-81 (11th Cir. 2001); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533-34 (W.D. Ark. 1998); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 752 (E.D. Mo. 1991).

this context. *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 88 (2000); see also *Hibbs*, slip op. 15 (reaffirming Congress's prophylactic Section 5 power).

And indeed, the plaintiffs in this case have alleged facts that, if established, would demonstrate that the state actually violated their Fourteenth Amendment rights. Respondents Lane and Jones were denied their constitutional right of access to a judicial proceeding simply because of the state's decision to hold court in inaccessible courthouses. The violation of respondent Lane's constitutional rights went even further, for the inaccessibility of the courtroom denied Lane his right as a criminal defendant to be present at proceedings involving the case against him. And Lane's Kafkaesque arrest for failure to appear at his pretrial hearing—a hearing that was held in an inaccessible second-floor courtroom in a building with no elevator—further deprived him of liberty without due process. This case thus directly presents the question whether Title II can be upheld as proper Section 5 legislation as applied to a case in which the plaintiff challenges state conduct that violated his or her constitutional rights.

III. This Case Presents the Important Question of What Constitutional Violations ADA Title II Must Seek to Remedy in Order Validly to Abrogate State Sovereign Immunity

This case also presents an opportunity to resolve the confusion that persists among those courts that have held that the Section 5 basis for Title II should be evaluated in an as-applied manner. The First Circuit panel held that Title II is proper Section 5 legislation as applied to any case in which the plaintiff challenges conduct that actually violated his or her constitutional rights. See *Kiman*, 301 F.3d at 24. But the Second and Sixth Circuits have artificially limited the circumstances in which the statute can be upheld as applied—though they have done so in different ways. The Second Circuit has ruled that the statute may be upheld only when it is applied to

state conduct that was motivated by "discriminatory animus or ill will due to disability"—conduct that the court believed violated the Equal Protection Clause. *Garcia*, 280 F.3d at 112. The Sixth Circuit, by contrast, has ruled that the statute can be upheld only when it enforces due process—and *not* equal protection—rights. See *Popovich*, 276 F.3d at 811-15.

Those limitations only confuse the issue. A statute must be upheld as proper enforcement legislation whenever Congress had power to reach the facts alleged in the plaintiff's complaint. See *Raines*, 362 U.S. at 20-26; *Griffin*, 403 U.S. at 102-07. Accordingly, Title II must be upheld as applied to any case in which the plaintiff challenges conduct that falls in either of two categories: (a) conduct that actually violated the plaintiff's constitutional rights; or (b) conduct that Congress may regulate to prevent a meaningful risk that constitutional rights will be violated. See *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997) (Section 5 gives Congress power to "remedy or prevent unconstitutional actions").

This case accordingly presents the Court an opportunity both to reaffirm that the ordinary rules governing facial challenges apply to claims that Congress has exceeded its Section 5 authority and to make clear that ADA Title II may be upheld whenever it provides a remedy for the violation of *any* right the Fourteenth Amendment guarantees to individuals with disabilities. The Court should accordingly grant certiorari and affirm the judgment of the Sixth Circuit, but it should not endorse the due process/equal protection distinction that appears in the Sixth Circuit's case law.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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June 2, 2003

2nd Attachment to Question # 34

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

RONDAL & LUCINDA AKERS v. PRIME SUCCESSION
OF TENNESSEE, INC., ET AL.

BRIEF OF APPELLANTS RONDAL & LUCINDA AKERS

No. E2009-02203-SC-R11-CV

Appeal from the Tennessee Court of Appeals No. E2009-02203-COA-R3-CV
and
the Circuit Court of Bradley County No. V-02-623
Neil Thomas, III, Judge Sitting by Interchange

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I. ISSUES PRESENTED ON APPEAL

1. Did the Court of Appeals commit error by holding that the body of Rondal Akers, III could not be the subject of a bailment responsibility because:

   (a) a dead body is not "personalty"; and,

   (b) that there was no agreement between the parties for Marsh to take possession of the body?

2. Did the Court of Appeals commit error by holding that the Tennessee Consumer Protection Act did not apply in this case because the term "actual damages" does not include damages for emotional distress?

II. STATEMENT OF THE CASE

The events that occurred at the Tri-State Crematory have fostered substantial litigation, much of which has resulted in previous appellate review. The Tennessee appellate courts have reviewed various issues associated with the defendant T. Ray Brent Marsh that have associations with the Akers. In *Crawford v. J. Avery Bryan Funeral Home,* 253 S.W.3rd149 (Tenn. App. 2007) (perm app. denied 2008) and *Akers v. Buckner-Rush Enterprises* (Akers I), 270 S.W. 3d 67(Tenn. App. 2007) (perm app. denied 2008)(Akers I), in companion decisions, the Eastern Section of the Court of Appeals resolved the issue of the standing of the Akers and other companion plaintiffs1 whose claims had been dismissed because the trial court found that the plaintiffs had no standing to bring claims. In *Akers*, the Court of Appeals reversed the trial court's dismissal, finding that the Akers and other plaintiffs did have standing to bring claims against the defendant T. Ray Brent Marsh. In*Floyd v. Prime Succession of Tenn.*, 2007 Tenn. App. LEXIS 517 (Aug. 13, 2007)(copy attached), the Eastern Section of the Court of Appeals considered issues associated with the admissibility and instructions to a jury as to a party's claim of 5th Amendment privilege. In that case, the Court of Appeals reversed the trial court because the court had made a general finding that Marsh did not have a right to claim 5th Amendment privilege and remanded for the trial court to make individual rulings as to each specific question. This appeal comes from a ruling by the Court of Appeals from the trial of the issues between the Akers and T. Ray Brent Marsh (Akers II).

In addition, there was Federal litigation that was consolidated in a Multi-District Class

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1The cases that were included in *Akers I* were *Donna Burns v. T. Ray Brent Marsh*, Bradley Circuit Docket # 02-624; *Susan Hall v. T. Ray Brent Marsh*, Bradley Circuit Docket #02-620. *Floyd v. T. Ray Brent Marsh*, Bradley Circuit Docket #02-621 had a separate appellate review on the 5th Amendment issue. That case was not dismissed with those associated with *Akers I*, because the plaintiff was the husband of the decedent and as such clearly had standing. These cases are still pending at the trial level subject to the decision in this case.

Action proceeding. The class certification order is reported at 215 F.R.D. 660 (N.D. GA, 2003).

Specific Case History Of These Proceedings

Appellants, Rondal and Lucinda Akers (Akers), filed their initial Complaint on July 26, 2002 (T.R., Vol. I, pp. 1-13) and later amended the same on March 3, 2003. (T.R., Vol. I, pp. 64-67). The Amended Complaint was filed for the purpose of including causes of action for Breach of Bailment Responsibility, violations of the Tennessee Consumer Protection Act, *T.C.A.§ 47-18-101 et seq*, and Conversion.

The appellees, Brent Marsh (Marsh) and Tri-State Crematory, Inc. (Tri-State), filed their Answer & Defenses at Law on August 26, 2002. (T.R., Vol. I, pp. 14-18). On February 12, 2003 the defendants filed a Motion to Amend Answer to Complaint to asses fault on the State of Georgia and its agents for what was contended to be a failure to identify bodies at the Tri-State Crematory. (T.R., Vol. I, pp. 14-18). This Motion to Amend was subsequently amended to remove bankruptcy as a defense on February 18, 2003.

Prior to the filing of both the Akers Amended Complaint and the Defendants' Amended Answer to Complaint, the Akers submitted a "Request for Admissions to Defendants". (T.R., Vol. I, pp. 33-35). The "Request for Admissions" propounded to Marsh were answered, in large part, by invoking Mr. Marsh's 5th Amendment privileges to the United States Constitution. As a result of Marsh's invocation of his 5th Amendment privileges, the Akers filed a Motion on January 30, 2003 to accept those responses where the 5th Amendment was implicated, as conclusive admissions. (T.R., Vol. I, pp. 31-38). Marsh filed a Response to the Motion on February 5, 2003 (T.R., Vol. I, pp. 39-46) and the trial court issued an Order addressing the Akers Motion on March 3, 2003. The trial court's Order found that Marsh's invocation of his 5th Amendment privilege constituted an inference that, if responded to, the answer would be adverse

to the his defense of this case. (T.R., Vol. I, pp. 68-69). Further, the trial court permitted Marsh, until June 6, 2003, to amend his 5th Amendment invocations to either admit or deny the facts asserted, if the Defendant so chose. (T.R., Vol. I, pp. 68-69).

On March 6, 2006, Marsh, filed a Motion for Interlocutory Appeal or Alternatively Certifying a Question to the Tennessee Supreme Court with regard to a February 27, 2006 Order of the trial court prohibiting the Defendant from invoking the 5th Amendment self-incrimination privilege to the United States Constitution during future depositions. (T.R., Vol. I, pp. 70-78). In summary, the basis of the trial court's order was the belief that the applicable statute of limitations for criminal charges against the Defendant expired on February 17, 2006 and, accordingly, Marsh's 5th Amendment privilege was no longer available. (T.R., Vol. I, p. 71). Akers filed a response to this Motion on March 27, 2009. (T.R., Vol. I, pp. 79-85).

On November 3, 2008, the Marsh filed a Motion for Summary Judgment, Memorandum of Law, and Statement of Material Facts seeking the trial court to dismiss the action against the Defendants based on the assertion that the Akers did not have standing to bring their claims because the decedent had a minor daughter, and that she was the next of kin and only person permitted to bring a claim. (T.R., Vol. I, pp. 92-129). Marsh alleged that recovery by the Akers was impermissible under the claims of negligent infliction of emotional distress, intentional infliction of emotional distress/outrageous conduct, misrepresentation, contract bailment, and/or any cause of action existing under the Tennessee Consumer Protection Act. (T.R., Vol. I, p. 92). The Akers responded to the Motion for Summary Judgment on December 12, 2008 (T.R., Vol. II, pp. 139-149), Marsh replied on December 19, 2008 (T.R., Vol. II & III, pp. 157-328), and a Supplemental Brief in Support of Arguments on Summary Judgment on January 5, 2009 (T.R., Vol. III, pp. 329-333). On March 20, 2009 the trial court issued a Memorandum and Order

whereby it found in favor of Marsh as to negligent infliction of emotional distress and the misrepresentation claims; however, in all other respects the Motion for Summary Judgment was denied.

Following the deposition of Agent Greg Ramey of the Georgia Bureau of Investigation on April 2, 2009, Marsh, filed a motion to reconsider the trial court's ruling with regard to the previously mentioned Motion for Summary Judgment. (T.R., Vol. X, pp. 1414-1666). Marsh alleged that based on Mr. Ramey's testimony and the hereafter referenced Motions in Limine, essential elements of the Plaintiffs' remaining claims had been negated and, accordingly, the Plaintiff's claims of intentional infliction of emotional distress/outrageous conduct, breach of contract, bailment, and Tennessee Consumer Protection Act, should have been dismissed. The Akers filed a response to the Motion to Reconsider on April 9, 2009. The record does not contain an order as to the final disposition of Marsh's Motion to Reconsider, but the case proceeded to trial with the remaining viable claims as the trial courts March 20, 2009 Memorandum and Order as to summary judgment indicated.

The following pleadings were filed in preparation for the trial of this matter: On April 1, 2009, the Akers filed a document entitled "Objections to and Motion in Limine as to Certain Portions of the Deposition of Sheriff Steve Wilson of Walker County Georgia." (T.R., Vol. III, pp. 334-339). On April 2, 2009, Marsh filed motions in limine as to the licensing of the Tri-State Crematory (T.R., Vol. III, pp. 340-350); the testimony of the Akers expert, Dr. Bill Bass (T.R., Vol. III, IV, & V, pp. 351-642); the exclusion of evidence of photographs and videotapes (T.R., Vol. V – IX, pp. 643-1323); the exclusion of evidence relating to the indictments and charges against Marsh (T.R., Vol. IX, pp. 1324-1329); the exclusion of evidence relating to any lack of intent to prosecute Marsh in the future (T.R., Vol. IX, pp. 1330-1335); the exclusion of evidence

of litigation not related to the Aker's case (T.R., Vol. IX, pp. 1336-1337); the exclusion of references to or use of Marsh's deposition (T.R., Vol. IX, pp. 1338-1345); the exclusion of testimony relating to Akers need for future mental health treatment and/or counseling (T.R., Vol. IX, pp. 1346-1349); the exclusion of evidence as to the cremation, or lack thereof, of the Aker's relative (T.R., Vol. IX – X, pp. 1350-1400); and the exclusion of Marsh's responses to the Akers previously submitted request for admissions (T.R., Vol. X, pp. 1411-1413).

The Akers filed responses to each of these Motions in Limine on April 9, 2009. The trial court, instead of deciding each Motion in Limine prior to trial, elected to reserve its ruling on the issues until such time as was necessary during trial itself; accordingly, the rulings by the trial court are contained in the trial transcript and shall be referenced when addressed in the foregoing argument section to this brief.

The Aker's non-suited the Defendant, Tri-State Crematory, Inc. on April 17, 2009, leaving Marsh as the sole defendant for purposes of trial. (T.R., Vol. XII, p. 1760; "Order").

The trial of this matter commenced on April 20, 2009 and lasted until April 29, 2009. T.R., Vol. XII, p. 1760). Upon the conclusion of proof and argument of the parties, the jury deliberated, found Marsh liable for intentional infliction of emotional distress, violation of the Tennessee Consumer Protection Act, and bailment responsibilities, and returned a verdict in favor of the Akers for a collective amount of seven hundred and fifty thousand ($750,000) dollars.[2] (T.R., Vol. XII, pp. 1758-1759; "Jury Verdict Form"). The trial court entered a Final Judgment on May 5, 2009 and granted Akers' request to present claims for treble damages, attorney fees, and discretionary costs under the Tennessee Consumer Protection Act at a later date. (T.R., Vol. XII, pp. 1760-1762;).

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[2]Rondal Akers was awarded $275,000 and his wife Lucinda was awarded $475,000.

On May 27, 2009, Marsh filed a "Motion for New Trial or to Set Aside the Jury Verdict and to Prohibit Award of Attorney Fees or Treble Damages under the Tennessee Consumer Protection Act." (T.R., Vol. XII, pp. 1763-1807).

On June 4, 2009, the Akers filed a Motion for attorney fees and expenses (T.R., Vol. XIII, pp. 1808-1836) and a Motion for treble damages under the Tennessee Consumer Protection Act (T.R., Vol. XIII, pp. 1837-1839). Marsh responded to the Plaintiffs' Motions on July 29, 2009. (T.R., Vol. XIII, pp. 1840-1851). The Aker's subsequently filed a Memorandum of Law in Support of the Motion for Attorney Fees on September 29, 2009. (T.R., Vol. XIII, pp. 1852-1864).

On October 22, 2009 the trial court issued an Order on the issues of judgment notwithstanding the verdict, new trial, treble damages, and attorney fees. (T.R., Vol. XIII, pp. 1865-1867). The trial court, after hearing argument of counsel, reviewing the motions and briefs filed by both the parties, and reviewing the transcript as a whole, was of the opinion the Akers claims under the Tennessee Consumer Protection Act and bailment theory should have been dismissed on directed verdict and were not valid claims in the context of the case. The trial court determined the issues regarding the award of attorney fees and treble damages were mooted. However, the trial court found that the claim of intentional infliction of emotional distress or outrageous conduct was a valid claim and the judgment was justified on that basis. The trial court thereafter denied Marsh's Motion for New Trial. (T.R., Vol. XIII, p. 1867).

Marsh filed a Notice of Appeal on October 29, 2009. (T.R., Vol. XIII, pp. 1868-1872). The parties filed their respective briefs and in those briefs, the Akers raised on appeal the dismissal of their claims for Breach of a Bailment Responsibility and for violations of the Tennessee Consumer Protection Act. On November 21, 2007, the Court of Appeals published its

opinion in this cause affirming the trial court's decision in all respects including the dismissal of the Akers claims under Bailment and the Tennessee Consumer Protection Act. (Copy Attached)

On November 7, 2011, Marsh filed his "Application for Permission to Appeal" to this court. On November 22, 2011, the Akers filed their response to the application and their "Application for Permission to Appeal". This court granted both parties applications to appeal on January 11, 2012 and entered a scheduling order on January 18, 2011 in which it stipulated that the Akers would be considered the preliminary appellant in this matter. This brief is submitted pursuant to that order.

III. STATEMENT OF THE FACTS

The facts associated with this case are well presented by the Court of Appeals in its opinion in this case. In addition, the facts associated Marsh's guilty plea are developed in the Court of Appeals decision in *Floyd v. Prime Succession of TN,* No. E2006-01085-COA-R9-CV, 2007 WL 2297810; 2007 Tenn. App LEXIS 517 (Aug. 13, 2007) no app. perm appeal filed, and are cited by the court in its summary of the facts. (See page 4 of the published opinion). Not to belabor the facts that were noted by the Court of Appeals, but rather to assist the court with references in the record, the Akers would hereby submit this statement of facts.

(a) The facts and circumstances associated with the specific claims of Rondal Akers and Lucinda Akers.

Rondal Akers, III was the son of the Appellants, Rondal Akers, Jr. and Lucinda Akers. (The Akers) Their son died at their home on November 23, 2001 just prior to his 36th birthday after a brief illness. Their son had told them that he wanted to be cremated, and despite their reservations, they honored his request. They had his body delivered to the Buckner-Rush funeral home where they executed the required paper work for his cremation. This included a Services Contract and a Cremation and Disposition Authorization. The Cremation and Disposition

Authorization included a description of the process that would be involved in the cremation. (T.E. Vol. XXVI, pgs. 1016 – 1026; Ex. 2A & 3A, Exhibits pgs. 2-6)(Copy attached for convenience of the court). It is the Akers position, that this document is the bailment agreement that was breached by Marsh.

At the time of his death he weighed over 300 pounds. (T.E. Vol. XXVI, p. 1016) After his funeral, he was delivered to be cremated wearing only a shirt and some underwear. He was not wearing blue jeans. He had not had open heart surgery and he did not have a pacemaker. (Id at 1028 – 1029)

Based on the Cremation Authorization form, the Akers fully expected that they would get back the unadulterated cremains of their son. (Id. at 1029). Mrs. Akers picked up the cremains on December 5, 2001. She took the cremains to their home and placed them in her back bed room. She talked to them because she thought it was her son. (T.E. Vol. XXVII, pgs. 1142 – 1146)

Dr. Akers found out about the circumstances at Tri-State Crematory by hearing them from a friend. He contacted Buckner-Rush Funeral Home a few days later and was advised by them that his son was in fact delivered to Tri-State Crematory for cremation. He called his wife and told her as she was driving back from Florida with their daughter. He called a 1-800 number for information and watched the news. He heard that they were having meetings at the WalkerCountyCivicCenter so he decided to go down there to get some information. He felt an overpowering need to find out something. (T.E. Vol. XXVI, pgs. 1033 – 1035)

When he arrived, he spoke with Agent Ramey who asked him to deliver the cremains to the G.B.I. for inspection. He called his wife to see if she could deliver them. She was willing to turn them over to the G.B.I., but she did not wish to go down to the facility, so a close personal

friend delivered them to the G.B.I. in Walker County. The cremains were taken out of the plastic bag that the friend had carried them in and then they were placed in a brown paper bag and sealed with evidence tape. They were left with the G.B.I. (Id at 1035 – 1037). The cremains with the evidence bag and tape were introduced as Exhibit 9. (Exhibits, p. 118 – 125)

The parties stipulated that these cremains were human and that they contained a rivet that was from a pair of Wal-Mart blue jeans. (T.E. Vol. XXII, p. 326) These cremains were further adulterated with sternum wires which were likely from surgery, staples, and small springs. (T.E. Vol. XXIII, p. 471; Vol. XXIV, p. 734; Ex 104, Exhibits 275). All of these would be inconsistent with what should be found in the unadulterated cremains of the Aker's son. (T.E. Vol. XXVI, pgs. 1028 – 1030). There is no objective evidence to support the conclusion that the cremains returned to the Akers were those of their son's. In fact, as testified by Hugh Berryman, there is no way to scientifically make an association of cremains with a specific person from the character of the cremains. The only way would be from "someone telling him who's in there". (T.E. Vol. XXIV, pg. 753)

In interrogatories submitted Brent Marsh, he was asked numerous questions concerning, generally, what had happened to the bodies that had been delivered to Tri-State Crematory, and specifically, if Exhibit 9 constituted the cremains of Rondal Akers, III. Akers responded by taking the Fifth Amendment to all those inquires. His interrogatory responses were read into the record at trial. (T.E. Vol. XXVI, pgs. 924 – 947). His redacted deposition was played for the jury in which he again was asked numerous questions associated with the Akers case, including if the purported cremains were those of Rondal Akers III. Marsh asserted the 5th Amendment rights not to incriminate himself as a justification for not answering the questions. (T.E. Vol. XXVI, pgs. 948 – 972).

Both Dr. Akers and Mrs. Akers testified about the extreme emotional impact the circumstances of their son's body being taken to Tri-State Crematory and mistreated by Mr. Marsh has had on them emotionally. Their specific descriptions demonstrate extreme emotional distress due to these circumstances. (T.E. Vol. XXVI, pgs. 1041 – 1064 (Testimony of Dr. Akers); T.E. Vol. XXVII, pgs. 1146 – 1177 (Testimony of Mrs. Akers).

(b) The factual circumstances and conditions as to Tri-State Crematory and the G.B.I. investigation.

The circumstances conditions at Tri-State Crematory were discovered on February 15, 2002 by special agent Greg Ramey of the Georgia Bureau of Investigation (G.B.I.). On that date, he received a call from the Walker County Coroner requesting his assistance. There was a report that a human skull had been discovered at the Tri-State Crematory property. After going home to change his cloths, Agent Ramey went to the location and met Brent Marsh. Agent Ramey introduced himself and other investigators to Marsh as the group began walking around the property. The Coroner, Dwayne Wilson began to point out small bones lying around the property. The party continued to walk further onto the property and saw more dead bodies and body parts. In one circumstance, they found a shipping crate containing the mummified body of a black man in a suit. Based on these preliminary findings, Agent Ramey began to initiate videotaping of the property and the human remains that were on the property. This video tape was introduced as Exhibit 13A.[3] (T.E. Vol. XXII, pgs. 332 – 338; Exhibits pgs. 138 & 139)

After these discoveries, Agent Ramey sat down with Brent Marsh and began to interview him to try and get a grasp of just how many funeral homes he was dealing with and where they needed to proceed with the investigation. The G.B.I. agents opened up all of the buildings and discovered additional human remains in all of the out buildings. Agent Ramey then asked Marsh

3 This video was later redacted by order of the trial court and presented to the jury as Exhibit 13B.

if he would assist him with making some sort of identification of the bodies, and Marsh agreed. Marsh told Agent Ramey that he had taken the business over from his father in late '96 or '97 after he became ill. He stated that he was dealing with approximately 20 to 25 funeral homes in North Georgia, Southeast Tennessee and Northeast Alabama. He did not give him an explanation as to why the bodies were out there on the ground. (T.E. Vol. XXII, pgs. 338 – 339).

When Agent Ramey asked Marsh about how he could identify the bodies, he produced a Mead Memo book. This memo book was introduced as Exhibit 14. (Exhibits, p. 141 – 153). At page 151, the name Akers appears with the date "11-30". During the course of the video, Marsh specifically pointed to a body on the floor of a building and identified that body as "Akers". The body he identified later turned out to be someone else. (T.E. Vol. XXII, pgs. 333 – 345 generally, p. 344 specifically on the identification).

Thereafter, Agent Ramey and his colleagues began to discover more and more bodies lying about the property. (See Exhibit 11, Exhibits p. 137). The condition of the bodies found at the site are represented by the photographs identified as Exhibits 18, 19, 27, 28, 29 30, 32, and 67, Exhibits, pgs. 154–200). Thereafter, it is well documented that a massive investigation was initiated by the Georgia Bureau of Investigation and various other Federal, local and state agencies primarily focused on identification of the bodies and preparing the prosecution of Mr. Marsh. As a result of that investigation, 339 recoveries were made on the property representing approximately 320 bodies. (T.E. Vol. XXII, pgs. 391 – 392). Of these bodies/body parts, the investigation identified 226 individuals. Roughly 110 bodies/body parts were not identified. (T.E. Vol. XXII, p. 397). All of the unidentified bodies and parts of bodies were buried in a mass grave in WalkerCounty. (Id. at 398). The G.B.I investigation revealed that over 1100 bodies were taken to the Tri-State Crematory during the time that Brent Marsh was operating it.

(Id. at 400).

There was only one retort at Tri-State Crematory. At the time of the discovery, the body of Gregory Greer was found still in the retort. (Id at 400; See Exhibit 18, Exhibits pgs. 154 – 157). The condition of this retort was described in intimate detail by Marsh's expert, Hugh Berryman. Dr. Berryman is a board certified forensic anthropologist. At the time of the trial there were only 63 in the United States. (T.E. Vol. XXIII, p. 456) Berryman was hired by Marsh to physically examine the retort and determine how cremains were returned and whether they were commingled. (T.E. Vol. XXIII, p. 487) It was apparent to him when he looked at the retort and specifically its floor, that it would be very, very difficult to cremate on individual and to remove the bones just from that one individual. This was because the floor was in such terrible condition. Due to that condition, it would be impossible to remove one individual's cremains without commingling or mixing them with the previous individuals who were cremated because unburned body fat, pieces of bone and teeth, and other metal and wood fragments and objects were left behind. (Id at 488). Berryman found commingling in the cremains returned to the Akers and others that he examined. (Id. at 488-489). When asked if a family who receives cremains has to rely upon the integrity of the entity performing the cremation, Dr. Berryman agreed that it is was not possible to determine if cremains belong to a certain person. He stated: "I would have to depend on someone telling me who's in there." (T.E. Vol.XXIV, pgs. 752-753).

As a part of his preparation for investigation, Berryman visited the East Tennessee Crematorium Company in Maryville, Tennessee for the purpose of watching a "quality operation". (T.E., Vol. XXIII at 521) There he observed a cremation. The retort was exactly like the one at Tri-State Crematory, except that it was in great shape. The floor was really

smooth. The body was placed in the retort with ease utilizing the equipment that was there and the door was closed. They preheated the retort to between 660 degrees and 800 degrees for about 15 minutes and then slowly raised the temperature to 1600 degrees Fahrenheit to cremate the body. After two and a half hours, there was a cooling off period and then she would use a long tool and reach back and move some of the bones of the legs up under the central part of the fire. After the cooling off period, the cremains were taken out and placed on a table where she ran a magnet through the residue to remove any metal. She then placed the residue in an industrial sized blender and ran the blender for approximately 60 seconds at which time the bones were turned to dust. At that time she placed a tag in the bag to identify the remains and placed them in a box. With this process there was no commingling. (Id. pgs. 522 – 525).

Berryman's examination of Tri-State revealed quite a different process. Dr. Berryman prepared a series of work books that recorded his activities in examining and excavating the retort. These are presented as Collective Exhibits 162 and 164. (Exhibits, pgs. 366 – 452) He found layers upon layers of human remains still in the retort including bones, teeth, body fat, as well as metal from various devices and implements. He retained that residue and it was introduced as an exhibit at trial. (T.E. Vol. XXIII, pgs. 495 – 521; See Photographs included with Exhibits 162 & 164, Exhibits, pgs. 329 – 483)

As a part of his investigation, Berryman discovered that the tools that were used to operate the crematory were long metal hoes and that wood chippers were used as the means to reduce the bone residue to powder. (T.E. Vol. XXIII, p. 526) Berryman concluded that there was no comparison between East Tennessee Crematory and Tri-State Crematory. (Id at 527)

He described the retort floor as having pockets with fisher running through it that were two inches deep. His description was that the retort floor was in horrible shape. (T.E. Vol.

XXIII, pgs 530 – 532). Berryman concluded that there was "no wonder you get things mixed up". (Id. at 532) He ultimately concluded that it would be almost impossible to remove cremains from the retort without mixing them with others. (Id. at 537).

Based on the investigation by the G.B.I. and the District Attorney General's Office for Bradley County, Tennessee, Brent Marsh pled guilty in the State of Georgia to 122 counts of burial service fraud; 47 counts of false statements; and 179 counts of abuse of a dead body; all felonies. (T.E. Vol. XXII, p. 404; Collective Exhibit 8, Exhibits pgs. 58 – 117). In addition, he pled guilty in Bradley County, Tennessee to one count of theft of services, 35 counts of abuse of a corpse, and seven counts of criminal simulation associated with his service at the Buckner-Rush facility in Bradley County, Tennessee. (See Collective Exhibit 7, Exhibits pgs. 10 – 57). Marsh specifically pled guilty to criminal simulation as to the Akers family and their son's body. (See Exhibits 5, 6 & 7, Exhibits pgs 8 – 10).

IV. ARGUMENT

I. INTRODUCTION

In the certification of the Federal class action case in Georgia as to the Tri-State Crematory matters, District Judge Harold L. Murphy cited to an opinion of Justice Joseph H. Lumpkin of the Georgia Supreme Court published in 1905 dealing with the law as to dead bodies. Beginning his consideration of the merits of the party's claims and justifications for creating the class, he noted:

> "Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things--must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the

> rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes. *Louisville & Nashville R.R. Co. v. Wilson,* 51 S.E. 24, 25(Ga. 1905).

Justice Lumpkin's reasoning applies to this court's responsibilities to express the law as to the disposition of the dead and the rights accorded to those who have a lawful and superior interest associated with the proper care of the body. The issues raised by this appeal give to this court the opportunity to express the law in this state as to the consequences for the improper disposition of dead bodies. The Akers issue of "bailment" presents this court with the opportunity to establish who has the burden of proving what happened to the body when it is not returned or is returned in a mutilated condition, and the damages associated with a failure to fulfill the trust/contractual responsibilities imposed on one who takes possession of a dead body.

It is a fundamental principal of "bailment" law, that when a party has personalty placed in their possession, if the personalty comes back damaged or in a condition not authorized at the time of delivery, the burden of proving what happened falls on the person who took possession. *T.C.A. §24-5-111*; *Steiner-Liff Iron & Metal Co. v. Woodmont Country Club*, 480 S.W.2d 533 (Tenn. 1972); *Matthews v. Cumberland Chevrolet Co.*, 640 S.W.2d 582 (Tenn. Ct. App. 1982); *Crook v. Mid-South Trans. & Storage*, 499 S.W.2d 255 (Tenn. Ct. App. 1973) This principle of law is based on the sound reason that that since the bailee ordinarily would have within his exclusive knowledge of the facts to explain the circumstances causing the damage, then the burden of proof should shift to then when the bailor establishes the preliminary facts of delivery in good condition and non-delivery or that the body was redelivery in a damaged condition.

Steiner-Liff at 538.

Throughout the course of the Akers actions against T. Ray Brent Marsh, they have asked to have their son's body returned to them or in the alternative for Mr. Marsh to tell them what he did with the body. Mr. Marsh's response to that request has been that it's the Akers burden to prove the material delivered to them was not their son's cremains. He has maintained his silence concerning this issue, even after he entered a guilty plea in Bradley County to "Criminal Simulation" (*T.C.A. §39-14-115*) as his conduct as to the body of Rondal Akers, III. This also occurred after the trial court ruled that he did not have a 5th Amendment privilege.4 Without Marsh's testimony, it would be virtually to prove that the cremains did not include that of Rondall Akers, III. As noted by the Court of Appeals in its decision referring to the testimony of Hugh Berryman, Mr. Marsh's expert forensic anthropologist, it is impossible to determine if cremains belong to a certain person because of the nature of cremation. Mr. Berryman stated: "I would have to depend on someone telling me who's in there." (Opinion at pg. 9; T.E. Vol. XXIV, pg. 753)

The issue of the application of the Tennessee Consumer Protection Act (*T.C.A. §47-18-101 et seq)*(TCPA) resolves who should pay for the cost of resolving what happened to the body. From the very beginning and throughout these lengthy proceedings, the Akers have asked Mr. Marsh to tell them what happened to their son's body. This was done via interrogatories and at his deposition. A simple answer to these questions would have saved them thousands of dollars. Mr. Marsh paid Hugh Berryman $120,000 to examine the conditions at Tri-State

4Mr. Marsh has a constitutional right to claim privilege against self incrimination. However, in the resolution of a civil case, the privilege does not shield him from the natural inferences and consequences that would come from that silence.*Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976); *Levine v. March*, 266 S.W.2d 426, 442 (Tenn. Ct. App. 2007)

Crematory to explain what happened there. (T.E.Vol. XXIV, pg. 687) Mr. Marsh would not even discuss the facts with Dr. Berryman. (T.E. Vol. XXIV, pg. 693). As such, the significance of the TCPA claim would be to require Mr. Marsh to be responsible for paying for the cost of resolving the issue of what happened to the body and compensating the Akers for their damages.

During the course of the trial of this cause, the trial court charged the jury and allowed them to deliberate as to the Akers claims based on a "Breach of a Bailment Agreement" and violating the Tennessee Consumer Protection Act. The jury returned a verdict finding that Marsh had breached his Bailment Responsibility to the Akers as well as violating the Tennessee Consumer Protection Act by committing an Unfair and Deceptive Trade Practice.

After judgment was entered on the Jury Verdict, the defendant Marsh filed a Motion for New Trial and to Dismiss Not Withstanding the Verdict pursuant to Tenn.R.Civ.P 59. (T.R., Vol. XII, pp. 1763-1807). The trial court granted that motion essentially holding that because the Akers were not in privity with Marsh, they could not bring claims against him for either of these causes of action. (T.R., Vol. XIII, pp. 1865-1867).

These issues were raised as error by the Akers in their counter appeal. In response to those issues the Court of Appeals affirmed the trial court's decision. In affirming the trial court on the issue of the Breach of the Bailment Responsibility, the Court of Appeals ruled that (1) a dead body does not fit within the definition of personalty, and (2) that because the Akers did not know that Marsh was given possession of the body and because the Akers didn't give permission for him to cremate the body, there is no cause of action for bailment. In reaching these conclusions, other than citing to the definition of "bailment" noted in *Merritt v. Nationwide Warehouse Co., Ltd.,* 605 S.W.2d 250, 252 (Tenn. App. 1980), the opinion referenced no authority or reasoning associated with these conclusion. The court's opinion just says this is the

law. (Opinion, pg. 32)

Citing to its previous unpublished opinion in *Searle v. Harrah's Entm't, Inc.,* No. M2009-02045-COA-R3-CV, 2010 Tenn. App. LEXIS 627 (Tenn. Ct. App. Oct. 6, 2010)(copy attached), the Court of Appeals held that emotional distress damages do not constitute "actual damages" under T.C.A. §47-18-109 and the trial court was correct in granting judgment notwithstanding the verdict. (Opinion at pg. 33). The Akers would respectfully suggest that these holdings are error and that both the Court of Appeals and the trial court should be reversed as a matter of law.

II. THE STANDARD OF REVIEW

The jury found that Marsh was liable for a Breach of a Bailment Responsibility and a violation of the Tennessee Consumer Protection Act. A jury's determination of fact is binding on the appellate courts of this state unless there is no material evidence to support those findings. Tenn. R. App. P. 13(d); *Barkes v. Riverpark Hospital Inc.,* 328 S.W.3d 829, 833 (Tenn. 2010). In determining if the evidence is sufficient, this court must assume the truth of all evidence that supports the verdict, allow all reasonable inferences to sustain the verdict, and discard all countervailing evidence. Id. In light of the jury's findings of fact in this cause that Marsh violated a Bailment Responsibility and violated the Tennessee Consumer Protection Act, there are no factual issues in dispute. The only issue is the application of the facts to the law.

In that there are is no conflict in the evidence as to any material fact, the issues in this appeal are issues of law. The scope of review is therefore de novo with no presumption of correctness as to the findings of the trial court and the Court of Appeals holding in this cause as to the Akers claims. *Knox Cnty. ex rel Envtl. Termite and Pest Control v. Arrow Exterminators Inc.,* 325 S.W.3d 578, 581 (Tenn. 2010).

III. THE COURT OF APPEALS COMMITTED ERROR BY HOLDING (1) THAT A DEAD BODY DOES NOT CONSTITUTE "PERSONALTY" UNDER THE DEFINITION OF BAILMENT; AND, (2) THAT A BAILMENT REQUIRES THAT THE PARTY WHO HAS A RIGHT TO CONTROL THE "PERSONALTY" MUST KNOW AND APPROVE THE POSSESSION OF THE PERSONALTY BY THE OFFENDING PARTY.

(a) A dead body constitutes "personalty" under the definition of "bailment".

Traditionally, the law of bailment is recognized as creating a trust relationship with the bailee becoming the trustee of the object placed in their possession. If the bailee violates the trust reposed in them, and dispose of the object in a manner not authorized or contemplated by the terms of the trust, they may be held liable for a conversion, aside from the question of negligence. *Breeden v. Elliott Brothers*, 173 Tenn. 382, 118 S.W.2d 219, 386 (1939). The term bailment is more particularly defined as ". . .the delivery of personalty for a particular purpose or on mere deposit, on a contract, express or implied, that after the purpose has been fulfilled, it shall be re-delivered to the person who delivered it or otherwise dealt with according to his direction or kept until he reclaims it." Id at 118 S.W.3d 383; *Merritt v. Nationwide Warehouse Co., Ltd.,* 605 S.W.2d 250, 252 (Tenn. Ct. App. 1980); *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973); *Dispeker v. New Southern Hotel Co.*, 213 Tenn. 378, 373 S.W.2d 904 (1963). The cremation authorization signed by the Akers clearly is a contract stipulating that the body of the Aker's son would be delivered for cremation under the terms and conditions contained in the agreement. (T.E. Vol. XXVI, pgs. 1016 – 1026; Ex. 2A & 3A, Exhibits pgs. 2-6)(Copy attached to this Brief for convenience of the court). The Court of Appeals held that because a dead body was not "personalty", this contract could not be a bailment agreement between the Akers and Marsh. This court should find that this conclusion was error by the Court

of Appeals.

"Personalty" or "personal property" is uniformly defined as everything that is the subject of ownership and does not constitute real estate. It is a right or interest in an object that is personal, but doesn't amount to real property. It is any right or interest which one has in things movable. *Westside Health & Racket Club, Inc., v. Jefferson Financial Services*, 19 S.W.3d 796, 801 (Tenn. Ct. App. 1999) citing to BLACK'S LAW DICTIONARY 1217 (6th ed. 1990). Under this definition, the critical factors are: (1) that the object must be personal that is to say it is subject to a right, interest, control or ownership in another, (2) that it not be real property, and (3) that it must be movable. A dead body meets these criteria and is therefore "personalty".

A dead body is an object that is subject to right, interest, control or ownership. Id. In *Akers v. Prime Succession, Inc.,* 270 S.W.3d 67 (Tenn. Ct. App. 2007) (perm. app. denied 2008), the determining factor for standing to bring a claim in tort was based on who had the right to "control the body".5 (See also, *Crawford v. J. Avery Bryan Funeral Home, Inc.*, 253 S.W.3d 149 (Tenn. Ct. App. 2007)) The adult next of kin has the right to control the disposition of a dead body and are the only person's with standing to bring a claim in tort for a violation of that control. *Akers* at 74. In supporting this conclusion, the Court of Appeals relied heavily on RESTATEMENT (SECOND) OF TORTS §868. Among the provisions of that authority, the court specifically referred to Comment (a) which states in part:

> "The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a "property" or a "quasi-property" right. This does not, however, fit very

5 The court likewise held that a person who is not next of kin has standing to bring a claim in contract and under the Tennessee Consumer Protection Act if it can otherwise be sustained .Id at 74.

> well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation."

Clearly, the determination of standing to bring a claim associated with a dead body is grounded in personal property principles. The restatement comment recognizes, however, that there are characteristics that are unique to a dead body. While a dead body meets all of the criteria of "personalty" in the traditional definition, a body cannot be sold or title transferred and has a utility for only one purpose, to be buried.6 These characteristics should not prevent the application of bailment principles to a dead body, especially when it comes to the placing of the burden of proof on the party who had possession of the body to explain what happened to it.

Other jurisdictions have considered whether bailment principals apply to an embryo, an object that had the potential for life and could not be bought or sold. It was held in those cases that the contract for the care of the embryo was a bailment agreement. *Jetter v. Mayo Clinic Arizona,* 121 P.3d 1256, 276 (Ariz. App. 2005); *York v. Jones*, 717 F. Supp. 421, 422-425(E.D. Va. 1989). However, this court has said that viable embryo's do not constitute either a "person" or "property" because there is a "potential for life". Because there was only a potential for life, this court held that an embryo did not qualify for the same rights as a live person under the 14th Amendment to the United States Constitution. *Davis v. Davis*, 842 S.W.2d 848, 596 (Tenn. 1992) In *Davis*, the court noted that embryos occupied an "interim category" that entitled them to "special respect" because of that potential of life. However, the holding in *Davis* should not defeat the application of contract/bailment principles, because in the case of a dead body there is no potential for life. The critical question should be whether an object is movable and subject to ownership. The ability of a person to control what happens to an object is the fundamental

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6 The conclusion that a dead body cannot be bought or sold is contradicted by the fact there is a substantial illegal trade in dead bodies. See attached article from USA TODAY.

criteria for the definition of "personalty" rather than fitting into a category associated with having the potential for life, dead or inanimate. 7

The issue of market value suggested in the RESTATEMENT (SECOND) OF TORTS §868 COMMENT (a) has been addressed in the context of other Tennessee cases. Tennessee has long recognized that emotional damages are the natural and foreseeable consequence when a dead body is mishandled. In *Hill v. Travelers' Insurance Co.*,154 Tenn. 295; 294 S.W. 1097 (1927), the court had before it a case where a widow had given an insurance company permission to do an autopsy with certain limitations including that the autopsy not be done in a public way and that the body not be mutilated. After the body was delivered to the defendant, they had the autopsy performed in a public place, and the heart was removed and used as an exhibit for public lectures. Id. at 1097. The court described the nature of the cause of action pled as <u>not</u> being one for "personal injury", but instead the emotional damages arose from the interference with the widow's "right" to the undisturbed "possession and control" of the body. In addressing the defence's argument that the claim had not been brought within the one year statute of limitations for "personal injury", the court stated:

> "The contention is made by the defendants that the cause of action stated in the declaration is "for injuries to the person." The authorities cited herein clearly force a contrary holding. The damages recoverable in such a case are not for the injury done to the dead body, but are for the wrong or trespass on the plaintiff's right to the undisturbed <u>possession and control</u> of the body, measured by the mental anguish and suffering of the plaintiff occasioned thereby. Clearly this is not an action for "injuries to the person." Id at 303 (emphasis added).

In *Hill*, the concepts of trespass, possession and control clearly establish that the

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7 If Rondal Akers, III had a ring on his body at the time of deliver to Marsh, there is no doubt that it would be personalty, and subject to bailment principals. To hold that Marsh would be responsible for a bailment as to the ring but not as to the body because the ring had value because it could be bought and sold, but the body would not because it could not be bought and sold would create an absurdity that would bring discredit to the law.

mishandling of the body should be treated the same as "personalty". Citing to the Minnesota case of Larson *v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891), the court noted that "mental suffering and injury to the feelings would be ordinarily the natural and proximate result of the knowledge that the remains of the decease husband had been mutilated . . ." *Hill* at 298. The damage to the object was measured not by market value, but instead based on what would have been contemplated by the parties as the natural result of the damage to the dead body.

This same analysis was articulated in *Johnson v. Women's Hospital*, 527 S.W.2d 133 (Tn. Ct. App. 1975) where it was held that a jury was justified in holding that a contract existed between a patient and the hospital and the hospital breached the contract to provide a proper burial for the deceased child's body. The child's mother was allowed to collect emotional damages for a breach of that contract, even if outrageous conduct could not be established. Id at 140 (emphasis added). In that case, after the child was still born, a hospital employee took the body of the child from the mother and put it in a bottle of formaldehyde. Later employees of the hospital presented the body to the mother in that condition resulting in the extreme emotional distress of the mother. While not specifically calling the contract a "bailment", the court applied bailment principles with damages arising, not from the pecuniary loss, but from the emotional distress to the party who had a right to control the dead body of the child. It has been noted by other courts, based on the *Johnson* case, that Tennessee recognizes a "breach of contract" cause of action for the failure to properly bury a dead body. *Trinity Universal Insurance Company v. Turner Funeral Home*, 2003 U.S. Dist. LEXIS 27205, *38 (E.D. TN Sept. 18, 2003) (copy attached).

Traditionally, the basis for damages with reference to "personalty" is the cost of repairs or the fair market value of the object if it is damaged or destroyed in a way that makes repair

impractical. See T.P.I – Civil 14.40, "Damage to Personal Property; Civil 14.42 "Personal Property-Lost or Destroyed". However, Tennessee law has recognized that a breach of a bailment contract associated with the misuse of film can result in liability for emotional damages even though the film was not destroyed or damaged. In *Dunn v. Photo Moto, Inc.*, 828 S.W.2d 747 (Tenn. Ct. App. 1991), the court sustained a judgment for emotional damages when a photo developing company revealed embarrassing photographs of a customer to other unauthorized parties. After acknowledging a tort claim for intentional infliction of emotional distress, the court went further and found that when the plaintiff delivered the film to the photo developing company, a "bailment" contract was created which permitted the recovery of damages for the emotional distress of the customer. The court noted that emotional damages are allowed for a breach of contract if those types of damages would have been in the contemplation of the contracting as a natural consequence of the breach at the time of the contract. Id at 754. This principal of damages has long been recognized under Tennessee law. *Western Union Telegraph Company v. Potts*, 120 Tenn. 37; 113 S.W. 789 (1907) (failure to timely deliver telegram breached contract and resulted in recovery for emotional damages).

In light of the long history in Tennessee jurisprudence that a party may recover emotional damages for the breach of a bailment agreement, and that liability attaches for emotional damage from the interference with a parties possession and control of dead body, there is no just reason for this court not to permit the application of bailment principals in this case as a matter of law. Whether in tort or contract, the damages associated with the mishandling of a dead body are and always have been for emotional distress. What bailment principals would bring to bear are two important distinct legal principals different from a claim for intentional infliction of emotional distress. First is that the burden of proving what happened to the mutilated body or the

adulterated cremains would fall rightly on the party who took responsibility for the proper handling of the body. Second, as noted *Johnson*, the emotional damages would be recognized without the requirement of proof of intentional conduct or "outrageous conduct". *Johnson* at 142. The damages would flow from what was contemplated by the parties as a natural consequence of a breach of the agreement. This court should find that the mishandling of a dead body by a party constitutes a breach of a bailment responsibility.

(b) The Court of Appeals committed error by holding there was no bailment relationship between the Akers and Marsh because there was no agreement between these parties.

The second justification for affirming the trial court's dismissal of the bailment claim was that the "agreement" was between the Funeral Home and the Akers, and not between the Akers and Marsh. While not specifically stating that the Akers and Marsh were not in "privity", it would appear that is the foundation for the conclusion that there was no "bailment" agreement. (Opinion pg. 32). The Court of Appeals noted that the Akers did not even know that the body was being taken to Tri-State Crematory, and that Dr. Akers testified that had he known about Tri-State Crematory, he never would have consented to allow the release of the Deceased's body to Tri-State. (Opinion at pgs. 32-33). The Court of Appeals drew this conclusion without citing to any authority, nor reflecting on the overwhelming body of Tennessee law to the contrary. The Akers would respectfully present to the court that this finding was error as a matter of law.

As noted earlier in this discussion, the definition of bailment is a contract that may be either express or implied. *Merritt*, at 252. An implied bailment is one created by duty or obligation imposed by the law when ones comes into the lawful possession of an object. In *Campbell v. State*, 2 Tenn. Crim. App. 39, 450 S.W.2d 795 (1995), the court was presented with a circumstance where an indictment charging theft alleged that a record player was owned by

Mrs. Hobbs. The actual facts were that the record player had been delivered to Mrs. Hobbs by a party who had stolen it from Mrs. Mars, and left with Mrs. Hobbs for several weeks before it was stolen again by the defendant from her home. At the time Mrs. Hobbs received the record player, she didn't know who the record player belonged to or that it was stolen. The defense alleged a fatal variance between the indictment and the facts in that Mrs. Hobbs was not the owner. Id at 3 Tenn. Crim. App at 50, 450 S.W.2d at 800.

In *Campbell,* the court held that despite the fact that Mrs. Hobbs was not the owner, that the property was stolen, and that she did even know the name of the true owner, that she was still a "bailee". Because of her responsibilities and duties to care for the item left in her possession, she could be alleged to be the "owner" of the property, and the theft by Campbell violated her duties. The court recognized that traditional bailment principals require a "contract", but the court emphasized that a bailment may result from the"actions and conduct of people concerning the goods in question, though not foreseen or contemplated". Citing to AM.JUR.and RULING CASE LAW as authority, the court noted that:

> "Where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he ought, upon principles of justice, to keep it safely and restore it or deliver it to the owner, for example, where possession has been acquired accidentally, fortuitously, through mistake, or by an agreement, since terminated, for some other purpose, such person and the owner of the property are, by operation of law, generally treated as bailee and bailor under a contract of bailment, irrespective of whether or not there has been any mutual assent, express or implied, to such relationship * * * " Id at 3 Tenn. Crim. App 51, 450 S.W.2d 801.

This principal is well recognized by other Tennessee authorities. *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569, 670(Tenn. 1973); *Dispeker v. New Southern Hotel Co.*, 213 Tenn. 378, 373 S.W.2d 904 (1963); *Merritt v. Nationwide Warehouse Co., Ltd.,* 605 S.W.2d 250,

253 (Tenn. Ct. App. 1980); *Oakland Gin Company,Inc. v.* Marlowe, 44 F.3d 426, 429 (6th Cir. 1995); *In re Crabtree*, 48 Bankr. 528, 532 (Bankr. E.D. Tenn. 1985). The principle factor in an implied contract is whether the object has been taken into the bailee's possession and while in their possession, they held full custody and control. Holding full custody and control of the object imposed a duty to care for the object and not allow it to be damaged or destroyed. *Rhodes* at 570; *Merritt*, at 253.(See also *Jackson v. Metropolitan Gov't of Nashville*, 483 S.W.2d 92 (Tenn. 1972); *Scruggs v. Dennis*, 222 Tenn. 714, 440 S.W.2d 20 (1969); *Old Hickory Parking Corp. v. Alloway*, 26 Tenn. App. 683, 177 S.W.2d 23(1944)).

The facts are not in dispute associated with how Marsh came into the possession of the body of Rondal Akers, III. He was given the body by the Funeral Home to cremate. This was after the body had been delivered, under express contract, to the Funeral Home to perform the service of cremation. Once delivered to the Funeral Home for cremation, the Akers lost total physical control of the body. Once the body left the Funeral Home, Marsh had complete control of the body. The control of this particular body was no different than the 1,100 other bodies that he took into his possession and control for the sole purpose of cremation.

It should also be recognized that the duties that Marsh undertook to cremate the body of Rondal Akers, III, as well as the other 1,100 bodies delivered into his care, is regulated by State law in both Tennessee and Georgia. See *T.C.A.§§62-5-504 & 513; Tenn. Comp. R. & Reg. 0660-9-.01*; *O.C.G.A. 31-21-5, 43-18-8 & 72, GA Comp. R. & Reg. r 250-6-.01, .07& .09.* The duties imposed by these statutes and regulations would transcend any contract that parties may have to the contrary.The imposition of these duties on what he is to do while the body is in his possession, clearly establishes the elements of control and duty that are typically associated with a bailment responsibility. The Akers would respectfully suggest that the Court of Appeals

committed error as a matter of law when it held that the principals of bailment could not apply to Mr. Marsh because the parties were not in privity.

IV. THE COURT OF APPEALS COMMITTED ERROR BY HOLDING THAT THE TENNESSEE CONSUMER PROTECTION ACT REQUIREMENT FOR PROOF OF "ACTUAL DAMAGES" DOES NOT INCLUDE DAMAGES FOR EMOTIONAL DISTRESS.

In affirming the trial court's dismissal of the Akers claim for damages under the Tennessee Consumer Protection Act (*T.C.A. §47-18-101 et seq, §109*)(TCPA), the Court of Appeals cited to the Middle Section's opinion in *Searle v. Harrah's Entm't Inc.*, No. M2009-02045-COA-R3-CV, 2010 Tenn. App. LEXIS 627(copy attached) in holding that damages for emotional distress are not "actual damages" under the TCPA. That case involved an attempt by a company to collect on a bad check by the persistent threatening of criminal prosecution. It turned out that the check was not dishonored. The court permitted the plaintiff to recover damages for emotional distress under an intentional infliction of emotional distress theory, and out of pocket losses under the TCPA, but, without citing to any authority or analysis, concluded that damages for emotional distress were not "actual damages" This resulted in the inability of the plaintiff to recover treble of damages arising from emotional distress. Ironically, the plaintiffs were still able to recover their attorney fees because of the pecuniary loss arising from the defendant's actions.

The *Searle* case is contradicted by the unreported opinion of the Western Section Court of Appeals in the case of *Wood v. Woodhaven Memory Gardens,* 1991 Tenn. App. LEXIS 507 (June 27, 1991)(copy attached). In that case, the Western Section Court of Appeals considered a claim of damages under the TCPA where a commercial cemetery had failed to place a marker on a grave site to the emotional distress of the family of the decedent. The court relied on this

court's decision in *Whitting v. Grand Valley Lakes, Inc.*,547 S.W. 2d 241, 243 (Tenn. 1977), holding that "actual damages" are defined as "a loss supported by some proof". The Court of Appeals stipulated that in order for a plaintiff to recover under the TCPA, they must prove that they have been "legally injured". Acknowledging that there is emotion associated with any burial, the court concluded under the circumstances of the case that the plaintiff had failed to prove their legal damages because the failure to place a marker on a grave would not qualify as "outrageous conduct" and the plaintiff's injuries were not "serious". It would appear under that court's analysis, "actual damages" under the TCPA would include emotional damages if it is proven that the plaintiff had suffered "a loss" by the defendant's conduct, that the conduct was "outrageous", and the injuries were "serious".

The Akers would respectfully suggest to the court that with reference to the loss of a dead body or mutilation of a dead body, emotional damages are the natural consequence of the loss, and as such, those damages are recoverable under the TCPA. The TCPA is a cause of action that is created by statute. The claim for damages arises from *T.C.A. §47-18-109(a)(1)* which provides:

> "Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages."

From the literal words of the statute, there is a requirement for a loss of an object, and if that loss can be ascertained, an individual may recover "actual damages". The type of objects covered by the act seems to be comprehensive.[8] In this case, the object that was lost or damaged

[8]In enacting the statute, the legislature went beyond just using the word "property". Instead it utilized the words real, personal, mixed, article, commodity, or thing of value. This

was the body Rondal Akers, III and was not an issue in the decision made by the Court of Appeals.

The legislature did not include a definition as to what "actual damages" would be, however, the term has been defined and described numerous times by our courts. In *Whitting v. Grand Valley Lakes, Inc.*, 547 S.W. 2d 241 (1977), this Court dealt with a plaintiff's claim of trespass to real property and the application of punitive damages where there was "minimal testimony of damages". In that case, the defendant's employees had repeatedly gone on to the plaintiffs' property and removed top soil. The plaintiff complained that she had told the defendant to stop removing her top soil and they refused to do so. She presented proof that she had spent $500 to $600 to replace the top soil and sow the repaired area in grass. After a jury trial, the court awarded her $1,500 in compensatory damages and $2,500 in punitive damages. In addressing the nature of the damages required as a predicate for punitive damages, this courtdefinedthe term "actual damages" as "some actual loss supported by proof." Id. at 243. The court used the words "compensatory damages" as a synonymous term earlier in the opinion to distinguish compensatory damages or actual damages from "nominal damages" and "punitive damages". Id at 242.9

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comprehensive description applies to anything that may be possessed and controlled and should include a dead body. A dead body is always the subject of a "service", typically by a funeral home. The legislature included the term "services" under the definition of "Consumer". *T.C.A. §47-18-103(2)* In addition, the legislature defined the term services. *T.C.A. §47-18-103(10).* Engaging in conduct that is deceptive to the consumer is considered an unfair or deceptive trade practice and actionable at the time of the events in this case. *T.C.A. §47-18-104(27).* This section was modified in 2011to permit only the Attorney General and the Director of the Division to enforce the provisions of subsection (27). Public Acts 2011, ch. 510.

9The TCPA was adopted by the legislature in 1977, as such it should be accepted by this court that the legislature was utilizing terms of art that were used by the Supreme Court if not otherwise defined by the statute.

In 1982, this court published the case of *Pera v. Kroger Co.,* 674 S.W.2d 715. This court addressed the issue of whether emotional damages may be recovered under the provisions of *T.C.A.§ 47-4-402* permitting a cause of action against a bank or other entity for "actual damages" arising from the wrongful dishonor of a check. In dismissing the case against the bank for failure to file suit within one year of the incident, the court noted that plaintiff's damages were all associated with the humiliation and embarrassment arising from the plaintiff's arrest. Citing to the statute which provided for the recovery of damages for humiliation and embarrassment from the improper dishonor of the check, the court used the term "actual damages", "compensatory damages" and "emotional damages" as synonyms for the damages described in the statute. *Id* at 718.

In 1992, this court addressed the issue of damages associated with a violation of the Tennessee Human Rights Act in the case of *Robertson v. University of Tennessee*, 829 S.W.2d 149. The language of the statute provides for damages described as "special and general damages, including, but not limited to, damages for emotional distress, reasonable attorney's fees and costs, and punitive damages". See *T.C.A. §4-21-701(b).* In describing these statutorily defined damages, the court again used the term "actual damages" as a synonym to describe what was available for recovery under the statute. Id at 152.

In *West v. Media General Convergence Inc.,* 53 S.W.3d 640(2002), this court addressed the issue of what damages were recoverable under the distinct tort of "false light invasion of privacy". After an extensive discussion of the tort, and its relationship to the torts of libel and slander, the Court noted:

> "Consistent with defamation, we emphasize that plaintiffs seeking to recover on false light claims must specifically plead and prove damages allegedly suffered from the invasion of their privacy. *See Memphis Publishing, 569 S.W.2d at 419*. As with defamation, there must be proof of actual damages. *See Myers v.*

> *Pickering Firm, Inc., 959 S.W.2d 152 (Tenn. Ct. App. 1997).* The plaintiff need not prove special damages or out of pocket losses necessarily, as evidence of injury to standing in the community, humiliation, or emotional distress is sufficient. Id at 648.

Here again, the legal concept of "actual damages" included claims for emotional distress and humiliation.

Finally, when the legislature amended the TCPA in 2011, the amendment specified that the modifications to the act under *T.C.A. §47-18-104 (b)* would apply to all liability actions for injuries, deaths, and losses covered by the act which accrue on or after October 1, 2011. As such, it would appear that the legislature understood that the provisions of the act included damages other than pecuniary loss such as "emotional distress. There could be no better determination of legislative intent than a specific expression by the legislature.

In this case, the jury had sufficient evidence to conclude that the Akers had been deprived of their son's body and/or his unadulterated cremated body. As such, they have suffered a loss of property, article, or thing of value. As noted in the discussion earlier, the statute deals with all things that may be possessed or controlled and as such a dead body is within the contemplation of the statute. The Akers submitted proof to the jury of their actual damages by demonstrating the intentional conduct of the defendant Marsh and their serious emotional injuries. Except for contract damages such as recovery of the cost of a cremation that never took place, it would appear that emotional damages are the only damages that they may recover for the loss of their son's body. In this case, the Akers originally petitioned the court to force the defendant Marsh to return the body of their son. (T.R., Vol. I, pp. 14-18 "Complaint"(See request for relief, p. 17-18)). Marsh entered a guilty plea to criminal simulation, admitting that he had not returned the body. The loss is obvious; the damages

associated with the loss are ascertainable under this State's law of damages. (See RESTATEMENT OF TORTS (SECOND) § 868& T.P.I. – Civil 4.35 "Intentional Infliction of Emotional Distress; T.P.I. – Civil 4.36 "Negligent Infliction of Emotional Distress) It would seem unjust for the TCPA to give monetary relief for the loss of a ring, but not allow a recovery for damages for the loss of a loved one's body. While the method of calculating damages for the loss of an object may be different, the fact that there is a "loss" is the same.

Marsh failed to return the object that he was entrusted with keeping. As noted in *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747 (Tenn. App. 1991), the loss or misuse of personal property can result in legally recognized damages in the form of "serious emotional damages". By recognizing the availability of a TCPA claim, this court will not substantially alter the result of what would be recovered under the tort of "Intentional Infliction of Emotional Distress". The recovery for emotional damages would still be based on "serious emotional injuries". The opportunity for damages in the form of treble damages would be very much the same as punitive damages that would be recoverable under the tort claim for "Intentional Infliction of Emotional Distress".10

The most important remedy under the TCPA claim is the plaintiff's ability to recover attorney fees to compensate them for having to pursue the recovery of a loved one's body. It should be noted that the in this case, the defendant Marsh had virtually unlimited resources to defend a case where the magnitude of his egregiousness conduct was obvious. It was the explanations as to individual bodies that required serious, time consuming and often expensive

10The Akers would have to elect as to recover treble damages under the TCPA or punitive damages. In this case, they chose to pursue remedies under the TCPA to take advantage of the right to recover attorney fees.

effort.[11] Marsh himself spent hundreds of thousands of dollars in his defense including over a hundred thousand dollars to hire a forensic anthropologist to opine about what happened when Marsh knew what he done to the bodies. In the end,all Marsh had to do was tell the families what he did with the bodies and why. That is a responsibility that Marsh has failed to do to this day.

In this case, the Akers had to hire experts and do examinations costing substantial sums of money. They have incurred thousands of dollars in attorney fees in pursuit of multiple appeals and the trial of this case for the sole purpose of finding out what happened to their son's body. They have a right to know what happened to their son's body, as did every other family that sent their loved ones to Tri-State Crematory. They should not have to bear the expense of accomplishing what could have been done by Mr. Marsh's simple truthful responses to questions in an ordinary deposition. Not to mitigate the Akers emotional injuries in any way for the loss of their son's body, but it should be understood and acknowledged that a substantial part of the Akers "actual damages" came from the cost associated with their pursuit of the truth as to what happened to their son's body and their attempted recovery for a proper disposition. It is now obvious that they will never recover their son's body, but they felt a personal, moral and emotional responsibility to try. Their inability to recover the body should not in any way mitigate the necessity for the search, and their actual damages associated with that pursuit. The Akers would respectfully suggest that the recovery of their attorney fees and expenses amounts to an "actual damage" providing a powerful justification for the application TCPA as a distinct cause of action. The Akers would respectfully request this court to reverse the Court of Appeals, and hold that the trial court committed error in dismissing their TCPA claim the jury verdict

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[11]The Georgia Bureau of Investigation spent millions of dollars in attempting to locate and make proper identifications of bodies.

notwithstanding.

V. CONCLUSION

The Akers would respectfully request this court to reverse the decision of the Court of Appeals and remand the case to the trial court with instruction that the trial court render judgment on the claims for Bailment and under the TCPA and require the trial court to consider the claims for treble damages and attorney fees and expenses under the act.

Respectfully submitted,
Rondal& Lacinda Akers, Appellants

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this appellant's brief was delivered to the counsel for the Appellee, Brent Marsh, by emailing a copy of same and placing a copy of the same in the U.S. Mail with sufficient postage to insure delivery and addressed to:

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On this the 10th day of February, 2012.

_____
William J. Brown

3rd Attachment to Question # 34

IN THE SUPREME COURT
FOR THE STATE OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, Plaintiff/Appellee,	*	
	*	APPEAL NO.
v.	*	03S01-9902-CR-00014
	*	
DONALD RAY SHIRLEY Appellant	*	

ON APPEAL FROM THE TENNESSEE COURT OF CRIMINAL APPEAL PURSUANT TO APPELLANT'S APPLICATION TO APPEAL

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

The defendant, Donald Ray Shirley, has been convicted of three counts of Aggravated Robbery from which he appeals. He was originally arrested on December 10, 1995 after a warrant less stop and arrest by a Bradley County Deputy Sheriff. (T.T. pg. 86). A preliminary hearing was held on December 19, 1995. (T.T., Vol. III, pg. 317). The indictment was returned on January 17, 1996. (T.R. pg. 1). This indictment contained four counts of aggravated robbery. The defendant waived his arraignment on February 7, 1996 and the case was set for trial on April 3, 1996. (T.R. pg. 4). [1]

On March 11, 1996, the defendant filed motions to suppress and a motion to sever the trial of the various counts of the indictment. (T.R. pgs. 6 & 7). These motions came to be heard on March 28, 1996. The motion to sever was denied and the motion to suppress evidence obtained as a result of the arrest of the defendant and the search of his automobile was denied. (T.T. pgs. 1 & 152).

The trial of this cause began on April 3, 1996 on all counts of the indictment. (T.T. pg. 153) and went through April 4, 1996. (T.T. pg. 420). At the conclusion of the trial, the jury was charged and retired to deliberate. They returned with a verdict of not guilty of count one and a verdict of guilty on counts two, three, and four. (T.T. pg. 530). Judgment was entered on the jury's verdict on April 8, 1996. (T.R. pg.19).

The defendant filed a Motion for New Trial on May 15, 1996. (T.R. pg. 20). A sentencing hearing was held on May 20, 1996, at which time the defendant was sentenced to twelve years on each count, to be served concurrently. (T.R. pgs. 24-26); (T.T. pg. 532). The Motion for New Trial was overruled on May 20, 1996. (T.R. pg. 27). The defendant filed his notice of appeal on June 20, 1996. (T.R. pg. 32).

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[1] For purposes of this brief, "T.R." refers to the technical record, and "T.T." refers to the trial transcript.

The Court of Criminal Appeals filed its opinion in this cause on the 27th day of May, 1998 and the appellant filed his application for permission to appeal on 22nd day of July, 1998. This court granted the appellant's application for permission to appeal on a limited basis on the 4th day of February, 1999 as to the issue of whether the Court of Criminal Appeals applied the proper standard of review as to the issue of Rule 14(b) of the Tennessee Rules of Criminal Procedure and the severance of multiple counts of armed robbery.

STATEMENT OF THE FACTS

The defendant has been convicted of three counts of Aggravated Robbery. He was acquitted of a robbery that occurred on November 29, 1996 at the Rocky Top Market. The charges he was convicted of were the alleged robberies that occurred on December 9th and 10th, 1996.

The first robbery for which proof was introduced was at the Golden Gallon on 25th Street in Cleveland, Tennessee. This occurred on November 29th, 1996. The testimony that was introduced at the trial concerning this charge is found at T.T. Vol. II, at pages 244 - 282. The defendant was acquitted of this charge. The first robbery for which the defendant was convicted occurred at the "Take Two Video Store" on the evening of December 9, 1996 (Count 2 of the Indictment). The BP Station (Count 3 of the Indictment) and the Mr. Zip (Count 4 of the Indictment) occurred on December 10, 1996.

1. The "Take Two Video" Robbery:

On the evening of December 9, 1996, Kim Ochoa and her 15-year old son, Mike, were at the "Take Two Video" store where they work. At about 7:10 p.m. a white male came into the store and robbed the store of $125. There were three people who had an opportunity to see the robber. They were Kim Ochoa, Mike Ochoa and Kelly Roberts.

Approximately 20 minutes after the robbery, Mrs. Ochoa described the robber as a white male, 5'8", and his hair was sandy colored. She indicated that the robber was wearing a green army jacket that was hip length. She said he had on gloves and a black or dark brown ski mask. She stated that the robber entered the business and produced a black handgun. She did not see the vehicle that the individual drove away in. She described the individual as having a southern accent. She did not mention his eyes, nor did she mention any facial hair. She described the jacket as being zipped up all the way in such a way that she could not make out what he was wearing underneath. She did not notice his pants or his shoes. (T.T. pgs. 304-315, Ex. 24 & 25).

At the time of the trial, while the defendant was present before her, Kim Ochoa described the individual who robbed her as being a white male, approximately 5'6" to 5'7" tall, weighing about 150 to 160 pounds. She described his eyes as being light blue and his approximate age as late 20's - early 30's. She described his hair as being sandy blond. She said she could see his hair coming out of the bottom of the mask. She said that the hair had a wave to it. The District Attorney asked the defendant to stand up and turn around. Mrs. Ochoa said that the defendant's hair was the way it looked at the time of the robbery except that it was a little longer. She said he had on a dark ski mask. She said he had a mustache consistent with the mustache he had at the time of trial. She said he had a green army jacket like one the State had seized from the defendant, and a ski mask like the one seized from the defendant. She identified a glove that was found outside the business as one that looked like the one the robber had on. She also identified a BB gun seized from the defendant as similar to the one she saw the robber put to her face. (T.T. Vol. III, pgs. 284-294). She said that she could not see anything under the jacket, because the jacket was zipped up. (T.T. Vol. III, pg. 313). The defendant's jacket did not have a zipper and could not be buttoned up. (T.T. Vol. III, pgs. 358-359).

She identified the defendant as the person who robbed her. She stated that she was sure he was the person who robbed her. She stated that it was her instincts telling

her that he was the one. (T.T., Vol. III, pg. 295-296).

However, at the preliminary hearing, some ten days after the robbery, she stated that she was not certain that he was the person who robbed her. This was because she "never really saw his face". At the time of robbery, she thought that the gun used was a real gun. (T.T. Vol. III, pg. 317-318).

Kim Ochoa's fifteen year old son, Mike, was standing next to his mother while the robber was in the shop. He testified that he could not identify the robber based on his observations in the store, only after he went outside the store. (T.T. Vol. III, pg. 321-338). This was more than 40 feet across the dark parking lot. (T.T. Vol. III, pg. 347). He said he didn't see the robber drop the glove. He doesn't know if the glove that was dropped was one worn by the robber. (T.T. Vol. III, pg. 339).

He gave a statement to the detectives within minutes of the robbery. (T.T. Ex. 11). He described the gun that he saw as being a black Crossman BB gun. The gun seized from the defendant was a black Marksman BB gun. He described the robber as being white, with sandy blonde hair, and wearing a green army coat. He did not describe his eyes or any facial hair. He said that the man drove away in a white four-door Corsica. He said the person was 5'8". (T.T. Ex. 8).

His trial description of the individual who came into the store was that he was a white male between 5'8" and 5'10". He weighed about 160 pounds. He described the person as having light blue eyes, and being in his late 20's to early 30's. He said that the individual had hair coming out of the back of a ski mask and that the hair was curly sandy-blonde. His description was that the robber's hair was the same as the defendant's as he sat before him in the court room. He identified the ski mask that was taken from the defendant at the time of his arrest based on the three holes "and everything". (T.T. Vol. III, pgs. 324-328).

He said that the robber was wearing a green jacket just like the one that was seized from the defendant. He said that the arms of the jacket just came out straight. (T.T. Vol. III, pg. 327). He had not seen the green field jacket until the trial. (T.T. Vol. III, pg. 326). He could not describe any pants or what he was wearing on his feet.

At the trial, he said the man had on black gloves and then when shown the glove found at the scene (which was a brown one) he said that he "would have to say that was the glove" (T.T. Vol. III, pg. 328).

He was presented the BB gun that was found at the time of the defendant's arrest. He said that this gun looked exactly like the one the robber had. (T.T. Vol. III, pg. 329). This is despite the fact, as noted above, that the gun he reported to the deputies was a Crossman and the one that he was shown was a Marksman.

He described the car the robber drove off in as being a white Corsica, and testified that he and the robber had eye-to-eye contact across the parking lot. He said the person had "white, blondish-brown or sandy-blonde hair". At the trial with the defendant sitting in front of him, he said he wasn't sure about the mustache at the time of his interview with the police, but that he was "pretty sure he had something on his lip". (T.T. Vol. III, pg. 335). He then identified the defendant as the person who robbed him and his mother. (T.T. Vol. III, pg. 336).

Under cross examination at the trial, Mr. Ochoa testified that Kelly Roberts, a customer who was in her car outside the store when the robber left the store, was between him and the car the robber drove off in. He testified that it was dark outside. He testified that there was no problem seeing and he could see the driver's face and him holding the wheel and "everything". (T.T. Vol. III, pg. 349).

The third witness that testified was Kelly Roberts. She was a bank teller and a

bank branch manager. She had received training in how to deal with robbery situations. (T.T. Vol. III, pg. 359-360).

She was a customer of the "Take Two Video Store". She arrived outside the store at the time the robber exited the store. She saw the person exit the store and run to a white Corsica that was located to the left front of the store. He put the vehicle in reverse and backed out to the road. He then put the car into forward and drove off. She clearly established that she could not see what the person looked like because it was dark and she concentrated on the color and type of vehicle. She said that all she could identify was that the person was a male. She could not identify his race. He was medium height 5'7" or 5'8". He weighed 150 to 170 pounds. She could not make out the color of his eyes or his age. She could not see any hair, in fact it looked slick. The person was wearing a mask. She could not identify the ski mask that the defendant was found with. She said that the person had a large coat on. She could not tell the color. She could not identify the jacket that the defendant had as the jacket she saw. She could not tell anything about what the person had on their legs or feet. She said the person had a weapon that was square in appearance. (T.T. Vol. III, pgs. 362-369).

Under cross examination, Mrs. Roberts testified that the glove that was introduced at trial was one that was lying by her car and that was never close to where the robber had been. (T.T. Vol. III, pg. 372). She again acknowledged that it was too dark in the parking lot to see anyone. (T.T. Vol. III, pg. 373).

2. The "BP Station" Robbery:

An employee of the BP Station located on Westside Drive in Cleveland, Tennessee named Sarah Marlowe, reported on December 10, 1996 at 4:18 p.m. that this establishment had been robbed. (T.T. Vol. III, pgs. 379-380 & 401). At that time, she was nineteen years old, not married, and had only been working at the store for two weeks.

(T.T. Vol. III, pg. 390). She made $4.75 an hour. She was the only person in the store at the time of the robbery. On the day of the robbery, she said the person stopped for 15 or 20 seconds in front of the store before he put on a mask and came in. She gave a description of the robber to the police at that time of the robbery. This is contained in Exhibit 4. She said the person wore a ski mask, wore blue jeans, an army jacket, and had a black semi-automatic hand gun. This person had short hair and was clean shaven. She described the person as being tall. He had light to pale complexion. She didn't notice anything about his eyes. She said she didn't pay much attention to the color of the jacket and it could have been black. (T.T. Vol. III, pgs. 401-405).

Within an hour of the arrest of the defendant, Detective John Dailey of the Cleveland Police Department called her and said they had the person under arrest. (T.T. Vol. III, Ex. 28). Rather than conducting a lineup, they reviewed the description of the person over the phone. She described the robber as being 5'11" and slender. He was a white male with short sandy-blonde hair. (T.T. Vol. III, pg. 408-409). Even with prompting from Detective Dailey, she insisted that the robber's hair was straight and was not curly. (T.T. Vol. III, pg. 409). He had on blue jeans and she thought a heavy jacket. She didn't describe it as an "army jacket". She said the gun was a black automatic. She further testified that the jacket that was worn by the robber was zipped up in the front and she couldn't see what he was wearing underneath including a blue sweat shirt. (T.T. Vol. III, pg. 412). She admitted under cross examination, however, when she was confronted by the defendant wearing the blue sweatshirt he had on the day of his arrest along with the jacket, that if it was him and he was the one wearing the jacket that she could have clearly seen the blue sweat shirt. (T.T. Vol. III, pg. 417-419).

At the time of the trial, she described the robber as being in his mid-20's, to early 30's, pretty young. She said his hair was sandy colored and kind of wavy and about the same length as the defendant's hair. She identified the mask that the defendant had at the time of his arrest as looking like the mask worn on the night of the robbery. She said that

the person was wearing a green army jacket, and she identified the jacket seized from the defendant as looking very much like the jacket worn that night. She said that he was wearing blue jeans, and couldn't give a description of what he had on his feet. She didn't notice anything on his hands. She said that the weapon seized from the defendant was the same one used the day she was robbed. She testified that $66 to $75 was stolen. She testified that when he left, he went towards the Econo Lodge, next door. She did not testify as to how he made his escape. (T.T. Vol. III, pgs. 380-389). She positively identified the defendant as the man who robbed her. (T.T. Vol. III, pg. 389).

The witness is near sighted, and she testified at the preliminary hearing that she had a hard time identifying him across the courtroom, yet at the trial she said that she could clearly identify him. (T.T. Vol. III, pg. 413). She testified at the trial that she thought the gun seized from the defendant was the gun used. Yet at the preliminary hearing, she testified that she didn't think that the gun that was used at the time of the robbery was a BB gun. She only decided that the gun was a BB gun when Detective Dailey told her that the man they had arrested had a BB gun. They didn't bring that gun over to her on the 10th of December, and she did not see the gun until December 19, 1996, the day of the preliminary hearing. The same with the ski mask and the jacket. (T.T. Vol. III, pgs. 413-415).

The State called Brenda Underwood, the assistant store manager. She testified that $70 was stolen. (T.T. Vol. IV, pg. 421). She further testified that there was no way of verifying if a robbery had taken place except by the testimony of the employee. If an employee wanted to report a robbery and steal the money themselves, there would be little or no way of proving it. (T.T. Vol. IV, pg. 427).

3. The "Mr. Zip Station On Mouse Creek Rd." Robbery

Michelle Shutt was a clerk at the Mr. Zip Station on Mouse Creek Road on the

afternoon of December 10, 1995. She testified that a robbery occurred on that date at 4:30 p.m. (T.T. Vol. IV, pg. 428). She gave a statement to the police at approximately 20 minutes after the robbery. The incident report noted that the report of the robbery was made at 4:47 p.m. The police arrived at 5:05. She stated in the report that the person who robbed her had taken $165. She said that the person had blondish brown hair and was 5'8" tall and weighed about 150 pounds. She said the person had on a gray sweatshirt and mentioned nothing about a green coat. She said that they had on blue jeans and a black ski mask with black gloves. The person had collar length hair. They did not have any facial hair and had pale to light complexion. The person was of average build and had an automatic hand gun. She did not see a BB gun. The gun was a .45 caliber weapon, black or blue in color. She said that the person who came in was angry. The person came in told her to open the register and "chambered the slide of the weapon pointing the gun toward her". T.T. Vol. IV, pgs. 444-451; Ex. 7).

Shortly thereafter, Detective John Dailey called and told Ms. Shutt that they had the person who robbed her in custody. He wanted to do his interview over the telephone because he wanted to get some "general Information". In this interview she described the robber as having on a black ski mask. She said she couldn't remember if he had on a coat. She said that she thought he had on a gray sweatshirt, but she said that she was so shook up she didn't know what kind of clothes he was wearing. She didn't remember the robber wearing a green jacket. She said that he had on black gloves. She described the gun he had as looking like the one the police officer had. She said she never saw his face. She said that as he was running around the building she saw that he had straight shoulder length hair. She said she couldn't tell if he had a beard or anything and that his height was 5'6" to 5'7". (T.T. Vol. IV, pgs. 453-457).

After she provided this information to Detective Dailey, and without her ever seeing the Defendant or any of the items of clothing that he had or even identifying him as the person who robbed her, Detective Dailey made this comment to her,

"All right. Like I say, as far as I know, we have him in custody. Everything points towards him on every one we've had, and we're going to charge him. And we'll be getting in touch with you later at the store." (T.T. Vol. IV, pg. 457; Ex. 32).

At the trial of this case, Ms. Shutt described the person as being a white male. He was approximately 5'6" to 5'7" tall and weighed 150 to 160 pounds. He was in his late 20's or early 30's. She said his hair was blondish brown and straight. She said that the defendant's hair at the trial was "straight". She said that the person who robbed her had shorter length hair than the defendant did at the time of trial. She said that the person who robbed her was wearing a black ski mask. She identified the mask the defendant had at the time of his arrest as being like the one the person had on at the time of the robbery. This was because it had two eye holes and the nose hole. She said that she didn't see any lint on the ski mask that the person had on that robbed her. The mask recovered from the defendant was covered with lint balls. She said the mask was rolled down in the front. She said he had on a green jacket that was zipped up. She said she could identify the jacket because it was green and "that it was zipped up". She said that it could not have been buttoned up in the front. She said that she did not see him wearing a gray sweat shirt. She said that she told the police that because that is what she "assumed". She said that he was wearing blue jeans and didn't notice anything about his feet. She said that he was wearing black gloves. She said he had a weapon in his left hand. She identified the gun as the one the person had that robbed her. She said that she didn't recognize it as being a BB gun at the time of the robbery. She testified that she saw him leave by going to the left of the building. (T.T. Vol. IV, pgs. 430-438).

She testified that the night after the robbery she went home and began to have "flash backs". In the flashbacks she had it revealed to her that it was not a gray sweatshirt, but a green jacket. (T.T. Vol. IV, pgs. 438).

When asked by the District Attorney if the person who robbed her was in the

courtroom, she said:

"Q. Do you recognize the person, Ma'am, as that – is the person who robbed the store, is this person in the courtroom?

A. I couldn't tell you because he had on the black ski mask. (T.T. Vol. IV, pgs. 439).

She reconfirmed her lack of ability to identify the defendant under cross examination. She testified:

"Q. Ms Shutt...today, based on what you saw of this individual who was staring you eye to eye with that mask on, you cannot say that you can identify that person.

A. No sir.

Q. And you had a good, eye to eye look at him, right?

A. Yes.

Q. That's because the person that robbed you had the mask over their face.

A. Yes.

Q. Covered their whole face.

A. Uh-huh.

Q. Couldn't make out any distinguishing features.

A. All I saw was light colored eyes.

Q. And so today, you can't say that Donald Shirley is the person that robbed you?

A. No.

Q. And you have told that to these police officers and the District Attorney—

A. Yes.

Q. –since day one.

A. Yes.

Q. And you're still testifying in this case today.

A. Yes.

(T.T. Vol. IV, pg. 460).

4. The Defendants Actual Physical Description

The defendants description according to his drivers license was that he was a white male, whose height was 5'7" and who weighed 165 pounds. His facial features are displayed in a mug shot that was taken at the time of his arrest. It clearly shows the defendant with a mustache. (Ex. 1 & 2).

ARGUMENT

I. THE COURT OF CRIMINAL APPEALS APPLIED THE WRONG STANDARD OF REVIEW OF THE TRIAL COURT'S DECISION NOT TO SEVER FOR TRIAL THE FOUR AGGRAVATED ROBBERY CHARGES.

This case involves the conviction of the defendant Donald Shirley of three counts of armed robbery. He was tried on four counts and was acquitted of the first count of the indictment which was the most distant in time of the four charges that were placed against him. Prior to the trial, the defendant filed a motion to sever each of the armed robbery charges for trial. This motion was heard on March 28, 1996 and is included in its entirety as Volume I of the transcript of these proceedings. At the conclusion of the proceedings, the trial court took the matter under advisement and thereafter without explanation or

written order overruled the defendant's motion to sever. (T.T. Vol. I, pg. 152).

Upon review of the record on appeal the panel for the Court of Criminal Appeals addressed the issue of severance by making the following observations:

> "We begin our discussion of the issue with our standard of review of a trial court's denial of a severance under Rule 14(b)(1), Tenn. R. Crim. P. Traditionally, the decision to sever offenses rested within the sound discretion of the trial court. See, e.g., Hardy v. State, 519 S.W.2d 400, 402 (Tenn.Crim.App. 1974). However, since the enactment of Rule 14(b)(1), Tenn. R. Crim. P., there has been some questions as to whether the same standard applies. See, e.g. State v. McKnight, 900 S.W.2d 36, 50 (Tenn.Crim.App. 1994)(stating that severance is ordinarily a matter that rests with the trial court's discretion but that the general rule "is not necessarily applicable to the severance of offenses"); State v. Edwards, 868 S.W.2d 682, 691 (Tenn.Crim.App.1993); State v. Peacock, 638 S.W.2d 837, 839 (Tenn.Crim.App. 1982)(noting that the matter of severance under Rule 14(b)(1) is "not solely within the discretion of the trial court" and that cases to the contrary predate the rule). But see State v. Furlough, 797 S.W.2d 631, 642 (Tenn.Crim.App. 1990)(noting that the decision to grant a severance is "within the trial court's discretion").

The Court of Criminal Appeals concluded its evaluation of the facts and the law by stating as follows:

> "we believe that our standard of review of a trial court's denial of a severance under the rule is the same as our standard of review of a trial courts decision to admit or exclude evidence of other crimes under Rule 404(b), Tenn. R. Evid. When a trial court substantially complies with the procedural requirements of the rule, its determination will not be overturned absent an abuse of discretion. State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997)".

Appellant would respectfully suggest to this court that this is not the proper standard

for review of the trial courts decision to order or not order a severance of charges such as existed in this case, and even if that is the standard, that the trial court did not substantially comply with the procedural requirements of the rule.

(a) THAT THE STANDARD OF REVIEW ON APPEAL OF A TRIAL COURT DECISION NOT TO ORDER A SEVERANCE UNDER RULE 14(b) OF THE RULES OF CRIMINAL PROCEDURE SHOULD BE BASED ON A DE NOVO REVIEW WITH NO PRESUMPTION OF CORRECTNESS.

Rule 14(b) of the Tennessee Rules of Criminal Procedure provides that :

"(b) Severance of Offenses.

(1) If two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.

This rule clearly creates a "right" that the defendant in a criminal proceeding has a right to exercise. By reading the rule, it is clear that this right is one that the State has no right to exercise and the exercise of that right is conditioned on only one exception. That exception is if the offenses that are to be tried together constitute "a common scheme or plan and the evidence of one would be admissible on the trial of the other". It would appear that this would constitute a "due process" right under the 14th Amendment to the United States Constitution and under Article I, Section 8 of the Tennessee Constitution since the determination by the trial court and on review by the appellate court would involve a fundamental issue of fairness. *Featherstone v. Estelle,* 948 F.2d 1497, 1503 (9th Cir. 1991); *Odle v. Calderon,* 884 F.Supp.1404, 1414(D.C. Calif., 1995).

The Appellate Courts of this State have stated quite clearly that for two offenses to be a common scheme or plan, two or more offenses "must be so similar in modus operandi

and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person. *State v. Peacock,* 638 S.W.2d 837, 840 (Tenn.Crim.App. 1982); *State v. Wooden*, 658 S.W.2d 553, 557 (Tenn.Crim.App.1983); *State v. Edwards*, 868 S.W.2d 682 (Tenn.Crim.App.1993). This was applied to Rule 8(b) and Rule 14(b)(1) of the Tennessee Rules of Criminal Procedure in *State v. Morris*, 788 S.W.2d 820 (Tenn.Crim.App.1990) and *State v. Adams*, 859 S.W.2d 359, 362 (Tenn.Crim.App, 1992) when the Court of Criminal Appeals pronounced that:

> "two or more sets of offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s). The mere fact that a defendant has committed a series of armed robberies, or a series of rapes, or a series of other crimes does not mean that they are part of a common scheme or plan although the offenses may be of the 'same or similar character'."

There are no cases that counsel has been able to discover where this court has held otherwise on issues of severance, however, this court has effectively came to the same conclusion by holding that evidence of other crimes by a defendant is not admissible to prove his or her disposition to commit such a crime as that on trial. Evidence of other crimes is only admissible when it is relevant to prove some other material issue on trial such as motive, intent, absence of mistake or accident, identity, or a common scheme or plan for commission of two (2) or more crimes so related to each other that proof of one tends to establish the others. *State v. Parton*, 694 S.W.2d 299 (Tenn.1985); *Bunch v. State*, 605 S.W.2d 227 (Tenn.1980); *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523 (1963).

As such, by judicial pronouncement, the appellate courts have defined what a "common scheme or plan" is and "when the evidence of one crime would be admissible upon the trial of the others". This is not a question of fact. It clearly is a question of law. In addition, this determination defines the exception to an absolute right that a defendant

has, not a discretionary right of the trial judge. As such, appellant would respectfully suggest that an "abuse of discretion" standard for appellate review makes no sense on an issue where the trial judge is not exercising "discretion" and in fact is pronouncing a finding of law. For Rule 14(b) purposes the trial judge is applying facts to the legal standard established by this court. This requires a de novo review with no presumption of correctness by the appellate courts because this is the only way that this court can control the legal standard under which a criminal defendant is allowed to exercise his rights under Rule 14(b). It makes no legal sense and plays havoc with a reasonable concept of equal justice and fair play that a trial judge in one district, or the same judicial district for that matter, may hold that four armed robbery charges could be tried at the same time and another on the same set of facts could hold that they should not and either way is appropriate because they are exercising their "discretion". It will also ultimately mean that a criminal defendant has no "right" to not have crimes tried together, as provided in Rule 14 because appellant would respectfully suggest that a trial judge's preference for procedures that facilitate judicial economy will weigh in more in the determination of discretion than the evaluation of the fairness impact on the defendant's guilt or innocence.

In every circumstance where an appellate court is reviewing the application of law to facts, this court has held that there is a de novo review by the appellate court. This court has established a de novo review as the standard of review for suppression issues when it applies law to facts. *State v. Yeargan*, 958 S.W.2d 626, (Tenn.1997) citing *Beare Co. v. Tenn. Dept. Of Revenue,* 858 S.W.2d 906, 907 (Tenn.1993). The issue of whether a constitutional error was harmless is a de novo review. *Yates v. Evatt*, 500 U.S. 391, 405-06, 111 S.Ct. 1884, 1894, 114 L.Ed2d 432(1991). These involve issues of a defendant's "rights".

When the court is considering issues where the trial judge is given discretion by statute or rule, the standard is one of determining if the trial judge has abused his discretion. *State v. Harkins*, 811 S.W.2d 79 (Tenn.1991)(review of revocation of

community correction sentence); *State v. DuBose*, 953 S.W.2d 649(Tenn.1997)(review of admission of evidence as to question of relevance is abuse of discretion subject to substantial compliance with procedural requirements).

Appellant would respectfully suggest that under the current status of the law and based on the testimony produced at the suppression hearing, these four charges should not have been tried together. There were five "eye witnesses" that testified at this hearing. Kimberly Ochoa, Mike Ochoa, and Kelly Roberts were all associated with the "Take Two Video" robbery. None of them identified the defendant at the suppression hearing as the person who robbed the store. (T.T. Vol. I, pgs. 4 - 71). Sara Marlowe testified concerning the "BP Station Robbery". She did not identify the defendant as the person who robbed her. (T.T. Vol. I, pgs 61 - 71). Michelle Shutt testified concerning the "Mr. Zip Station on Mouse Creek Rd. Robbery". She did not identify the defendant as the person who robbed her. (T.T. Vol. I, pgs. 75 - 79). No one testified at all concerning the "Golden Gallon Robbery" (Count 1 of the Indictment for which the defendant was acquitted). Yet all four of these crimes were tried at the same time.

At the conclusion of the hearing, the court took the case under advisement and just reported through the court reporter that the motion to sever was denied. There were no findings of any kind; either fact or law.

In this case, there is no "signature" to the robberies. Looking at the initial report given by the witnesses, the person who robbed "Take Two Video" was a white male, 5'8" tall, with sandy blond hair wearing a black ski mask, zipped up green army jacket, carrying a black hand gun, possibly a Crossman bee-bee gun, wearing gloves and driving a white Corsica.

The next day at the "BP Station" , immediately after robbery, the person who committed the robbery was a white male, tall, 5'11", slender, with short straight not wavy,

sandy blonde hair. He was clean shaven. He had on a "black" jacket that was zipped up the front. He was wearing a black ski mask and was carrying a black hand gun.

Within eleven minutes of the robbery of the "BP Station" a person walks into the "Mr. Zip on Mouse Creek Rd." This person was described as being a white male having blondish brown hair, 5'8" tall, weighing 150 pounds. This person had on a gray sweat shirt, blue jeans, black gloves and a ski mask. This person was carrying a .45 caliber weapon.

With the exception of it being a white male wearing a black ski mask and having blonde hair, it is a different person. It is important to note in the only documented phone conversations of Detective John Dailey to Sarah Marlowe and Michelle Shutt, and before they had seen the defendant, they were told that the police had the man in custody. (T.T. Vol. III, pgs. 406; Vol IV 453 & 457). How does a Detective that had little or no information draw the conclusion that Shirley is the robber without letting the witnesses to the crime draw that conclusion ?

The police wait until December 19, 1995, the date of the preliminary hearing before they show any of the evidence or put the witnesses through a line up. When they show it to them it is in the context of "we have the man who robbed you, he is sitting across the courtroom, here is the evidence, please identify these as the items that were used at the time you were robbed". It is in this context the Michelle Shutt has a flash back in her dreams and remembers that the robber had on a green jacket that was zipped all the way up to his throat. The Defendant's coat could not be zipped or even buttoned up at the time of his arrest. This is despite the fact that within minutes of the robbery she saw the man with a gray sweatshirt. The defendant was wearing a blue sweatshirt.

Defendant would admit that the description that Kim Ochoa, Mike Ochoa, Sarah Marlowe, and Michelle Shutt gave at trial was consistent with the appearance of the

defendant in the courtroom. They describe the man that is sitting in front of them and identify the evidence that is in front of them. The District Attorney even had the defendant stand up and asks the witnesses if the defendants hair was like the robber's. It was very much akin to shooting a duck in a barrel. But it is entirely inconsistent with the descriptions given within minutes of the robbery that they were involved in.

It is in this context that the provisions of Rule 14(b) are so important. It is not a fair determination of the defendant's guilt of each individual crime to permit the jury to hear the testimony of all of these witnesses and all of these charges and then tell them that they must make an independent determination of the defendant's guilt on each charge. It creates the egregious situation that occurred in the "Mr Zip on Mouse Creek Rd." robbery. The only witness to the crime cannot identify the defendant as the person who robbed her, gave inconsistent descriptions of the clothing ranging from a gray sweatshirt to a green army field jacket that was zipped to the top and made it impossible to see what he was wearing underneath, and the jury finds him guilty of that robbery. **There is absolutely no identification of him.** The jury still convicts. What is the basis for this jury to make a finding of guilt beyond a reasonable doubt except the one thing that they can't do. This conclusion can only be from the impact of trying all of these robberies at the same time. That is not a fair determination of the guilt of the defendant based on the evidence that applies to each particular charge.

There is no difference between this case and *State v. Adams,* 859 S.W.2d 359, 362(Tenn. Crim. App., 1992). In that case, two robberies occurred within one hour and within three miles of each other. The descriptions were similar. The Court of Criminal Appeals through the opinion of Judge Birch (now Justice Birch) stated:

> "The felony-murder charge against *Adams* could have been tried without any reference whatsoever to the earlier armed robbery, and the converse is likewise true. No physical evidence linked the cases together except the evidence that both crimes were committed by the same person.

> As we stated in *State v. Morris*, 788 S.W.2d 820 (Tenn. Crim. App.1990)(quoting *State v. Peacock*, 638 S.W.2d 837 (Tenn.Crim.App.1982), Tennessee Rules of Criminal Procedure 8(b) and 14(b)(1) justify consolidation when: 'two or more sets of offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s). The mere fact that a defendant has committed a series of armed robberies, or a series of rapes, or a series of other crimes does not mean that they are part of a common scheme or plan although the offenses may be of the 'same or similar character.'
>
> Granted, the offenses were similar; however, we find the suggestion of shared motivation for the otherwise two otherwise separate crimes to be insufficient under 8(b) and 14(b)(1) to establish a "common scheme or plan." Accordingly, we hold that the connection between the two cases were far too tenuous to support joinder or consolidation, and the trial judge erred in ordering consolidation under Rules 8(a), 8(b), and 14(b)(1), Tennessee Rules of Criminal Procedure." *Supra* at 362.

This analysis seems to suggest that "common scheme or plan" and "evidence that would be admissible at the trial of the other" would amount to evidence of one crime that would as a matter of necessity have to be introduced at the trial of the other. If this is the standard, which is what it should be, then a joint trial would only be appropriate if the evidence of one crime had to be introduced to prove the other crime. This of course makes legal sense because the evidence will be before the jury no matter what. Why have multiple trials? In the cases that are now before the court, this would not be true. Could the State of Tennessee have tried any one of the armed robberies without necessarily introducing evidence of the other? Of course they could. They could have introduced the testimony of each victim and their identification and then introduced the physical evidence that was obtained at the time of the defendant's arrest. The jury could then have made the determination of the defendant's guilt based on the strength or weakness of each victims' identification and corroborating evidence.

The only reason that the State could have justified the introduction of the other

crimes at the trial of the other would be to show the "evil propensity" of the defendant which is not relevant to the issues at trial. *State v. Harris,* 227 S.W.2d 8, 10 (Tenn. 1950). The Court of Criminal Appeals in its opinion stated that the crimes were "unique" because:

> " the robber wore a green army jacket and a black ski mask and used a gun. Each of the victims gave the same general physical description of the robber and described the gun that the robber uses as being similar to the BB gun taken from the defendant. In each instance, the robber demanded money, and the robber ordered the two victims that did not automatically put the cash drawer on the counter to do so." Opinion at page 22.

While this may have been the trial testimony, it certainly wasn't the testimony given at the time the initial statements were taken from the witnesses or their testimony at the preliminary hearing. But even more importantly, it takes away from the *Adams* courts pronouncement that:

> "The mere fact that a defendant has committed a series of armed robberies, or a series of rapes, or a series of other crimes does not mean that they are part of a common scheme or plan although the offenses may be of the 'same or similar character'." *Supra* at 362.

Even more of concern, it brings the status of the law closer to saying that "evil propensity" is a basis for the introduction of multiple crimes.

There is little difference between this case and the *Adams* case with the one exception being that the defendant confessed to both crimes in the *Adams* and in this case there is no such evidence. That is why the trial of all four of these crimes at the same time was so devastating to the defense. That is why this case should be reversed and remitted for a new trial on each of the three remaining counts and that those counts should be tried separately.

(b) THAT EVEN IF THE STANDARD OF REVIEW IS ABUSE OF DISCRETION, THE TRIAL COURT FAILED TO FOLLOW THE PROPER PROCEDURE BY FAILING TO MAKE A SPECIFIC FINDING OF FACTS AND APPLICATION OF THE FACTS TO THE LAW.

The Court of Criminal Appeals stated the Standard of Review of Severance issues under Rule 8(b) and 14(b) would be based on an evaluation of:

> "When a trial court substantially complies with the procedural requirements of the rule, its determination will not be overturned absent an abuse of discretion. *State v. Dubose*, 953 S.W.2d 649, 652 (Tenn. 1997)." Opinion at page 15.

The rule the court was citing to was Rule 404(b) of the Tennessee Rules of Evidence. The appellant would respectfully suggest that the trial court failed to follow the proper procedure. There is no indication from the record that the trial court ever determined what material issue of fact other than the character trait of the defendant that the charges were being consolidated for trial. There is no indication that the trial court ever undertook the balancing test required by Rule 404(b)(3) to determine if the probative value outweighed the prejudicial effect of the joint trial. There is no indication from the record that the trial court made a determination that there was "clear and convincing evidence" that the defendant committed another crime. *State v. Parton,* 694 S.W.2d 299 (Tenn, 1985); (Note Advisory Comments to Rule 404 of the Tennessee Rules of Evidence).

In that there is no statement by the court concerning its findings, there is no basis for appellate review for a determination of whether the court abused its discretion. The trial court has thus abused its discretion by not making a statement concerning its findings and thus substantially complying with the rule. As such, the Court of Criminal Appeals should have remanded the case back to the trial court for a new trial with each count being tried separately.

CONCLUSION

Because of the arguments advanced above, the appellant would respectfully petition this court to remand this cause to the Criminal Court for Bradley County for a new trial with the instruction that the individual counts of armed robbery should be tried separately.

Respectfully submitted,
Donald Shirley, Appellant

By: _____

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4th Attachment to Question # 34

CERTIFIED MAIL
3/24/11

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TENNESSEE AT KNOXVILLE

DAVID GADDIS, Appellant,	)	
	)	**POLK COUNTY**
v.	)	**Case No. E2011-00003-CCA-R3-CD**
	)	
STATE OF TENNESSEE, Appellee.	)	**ORAL ARGUMENT REQUESTED**

BRIEF OF THE APPELLANT

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I. INTRODUCTION

The record on appeal is composed of the technical record and four (4) volumes of the transcript of evidence from the pre-trial hearing, jury trial, and post-trial motions heard in this cause. For purposes of citation, the technical record shall be referred to as "T.R." and the transcripts of evidence shall be referred to as "T.E." with the specific volume and page numbers indicated.

II. STATEMENT OF THE CASE

The Appellant David Gaddis ("Mr. Gaddis") was indicted in the Ducktown Law Court of Polk County, Tennessee, on or about the 28th day of August, 2006, of one count of second offense driving under the influence in violation of T.*C.A. § 55-10-401* and one count of driving on an expired license in violation of *T.C.A. § 55-53-31.* (T.R. pp. 2-3). After a preliminary hearing in the General Sessions Court for Polk County, Tennessee, the charges were bound over to the grand jury and an indictment was issued on or about the 28th day of August, 2006, for one count of second offense driving under the influence in violation of T.C.A. § 55-10-401 and one count of driving on an expired license in violation of T.C.A. § 55-53-31. (T.R. pp. 2-3). Mr. Gaddis was arraigned on or about the 11th day of September, 2006. (T.R. p. 9).

Trial counsel filed a motion to dismiss the indictment on or about the 5th day of October, 2007, and a subsequent motion to dismiss the indictment on or about the 22nd day of January, 2008. (T.R. pp. 10-12). Both motions alleged that the indictment was defective in that it did not set forth requisite information to establish that the offense charged was committed within the geographical boundaries of the jurisdiction of the Ducktown Law Court. (Id.). The State subsequently filed a motion to amend the indictment on or about the 26th day of January, 2008, seeking to change the alleged offense date from the 23rd of March, 2005, to the 21st of January, 2005. (T.R. p. 17). Argument on the motion was hearing on or about the 26th day of January, 2009, at which time the trial court granted the State's motion over objection from defense counsel. (T.R. p. 18; T.E. Vol. I, pp. 1-19). An order denying defense counsel's motion to dismiss the indictment was entered on or about the 28th day of January, 2008. (T.R. p. 19).

On or about the 15th day of May, 2009, Mr. Gaddis filed a Motion to Recuse asking that Judge Reedy recuse herself from the case at bar. (T.R. pp. 20-21). As a basis for said motion,

Mr. Gaddis listed that the court had sentenced him to an excessive jail sentence as a result of a prior trial and conviction, that the court had expressed a disrespectful demeanor toward both him and trial counsel, and that the court had improperly compared his case to that of a Miss Baliles. (Id.; see also *State of Tennesse v. David Gaddis*, 2008 TENN CRIM APP LEXIS 907). Argument on this motion took place on or about the 19th day of May, 2009, at which time Mr. Gaddis raised the additional issue of having been placed under a $50,000.00 appeal bond by the trial court after a prior conviction despite the fact that his original bond was only $2,500.00. (T.E. Vol. I, pp. 20-41). The trial court denied Mr. Gaddis' motion and proceeded to trial on this matter. (Id.).

A jury trial was held on or about the 17th day of June, 2010, in the Ducktown Law Court of Polk County, Tennessee. (T.E. Vol. I, pp. 42-ff.). During the trial, defense counsel sought to introduce evidence regarding prior difficulties and controversies Mr. Gaddis had encountered with a woman by the name of Connie Hope ("Ms. Hope"); however, the trial excluded this evidence on grounds of relevance. (T.E. Vol. I, pp. 107-108). The trial court subsequently allowed Mr. Gaddis to make proffer as to Ms. Hope. (T.E. Vol. II, pp. 162-178). The trial court affirmed its earlier ruling on this issue and excluded the proffered evidence on the basis of relevance. (Id.).

The jury found Mr. Gaddis guilty of one count of driving under the influence and one count of driving on an expired license. (T.R. p. 24-A). The State then introduced evidence of a prior conviction for driving under the influence in Cherokee County, North Carolina. (T.E. Vol. II, pp. 226-227; T.E. Vol. IV, Exhibit 19). Trial counsel for Mr. Gaddis objected to the entry of the conviction on the grounds of improper authentication, but did not challenge this issue in a motion for new trial. (Id.; T.R. 38-43). The jury then retired for deliberation and returned with a

verdict of guilty on second offense driving under the influence and set a fine in the amount of $3,500.00. (T.E. Vol. II, pp. 230-231).

At the conclusion of the trial in this cause, the trial court set the matter for a sentencing hearing on the 16th of July, 2010, to be held in McMinn County. (T.E. Vol. II, p. 232). The court then went on to set an appeal bond in the amount of $50,000.00 "based on the fact that Mr. Gaddis does have a prior record in addition to what we have heard here today." (Id.). Sentencing was conducted in McMinn County on or about the 16th day of July, 2010. (T.E. Vol. III, pp. 233-272).

The trial court ultimately sentenced Mr. Gaddis to eleven (11) months and twenty-nine (29) days probation, suspended after service of seven (7) months incarceration on the charge of second offense driving under the influence. (T.R. p. 36). Mr. Gaddis was also sentenced to six (6) months on the charge of driving on expired license to run concurrent with the sentence on the charge of second offense driving under the influence. (T.R. p. 37).

On or about the 14th of July, 2010, trial counsel for Mr. Gaddis filed a motion for leave to allow interview of jurors and a motion to set aside jury verdict with a memorandum in support. (T.R. pp. 25-26, 29-31, 32-35). In the memorandum, trial counsel recounted that on the evening of the trial a juror left a message on Mr. Gaddis' answering machine and subsequently gave an affidavit to a family member of the defendant regarding certain issues surrounding the verdict in this trial. (T.R. p. 32). Mr. Gaddis was in custody at the time this juror attempted to contact him; however, Mr. Gaddis' daughter did speak with the juror and was presented with an affidavit of this juror. (T.E. Vol. III, p. 280).

During argument on the motion for new trial the affidavit of Juror Ray Tanner ("Juror Tanner") was presented to the trial court as an exhibit. (T.E. Vol. IV, p. 395). In his affidavit,

Juror Tanner stated in part that he had only agreed to the guilty verdict in this cause on the belief that Mr. Gaddis would only be given a fine if convicted "and that a hung jury would mean he would have to go through another trial if it was brought back." (Id.). Trial counsel argued that he should be given leave to interview the jurors in this matter, as Juror Tanner's affidavit gave the impression that the jury may well have been exposed to extraneous information or improper influence during deliberations. (T.E. Vol. III, pp. 326-331). This request was denied by the trial court, as was Mr. Gaddis' motion for new trial by entered on September 24, 2010. (T.R. p. 44). A notice of appeal was thereafter timely filed on or about the 22nd day of October, 2010. (T.R. p. 45).

III. STATEMENT OF FACTS

Testimony introduced at trial established that on or about the 21st day of January, 2005, Tony Jones ("Mr. Jones") and his wife were traveling east bond on U.S. Highway 64. (T.E. Vol. I, p. 83). Upon reaching the intersection with State Route 68, Mr. Jones testified that a car later identified as a Toyota Corolla pulled out in front of his vehicle and a collision occurred. (Id.). During the accident, Mr. Jones impacted the passenger's side of the car with the front of his Ford F-150 pickup truck. (T.E. Vol. I, pp. 87-88). After the collision, Mr. Jones took a few minutes to compose himself and check on his wife, and then proceeded to the other vehicle. (T.E. Vol. I, p. 83). Mr. Jones observed an individual in the other vehicle; however, he testified that he only "saw the side and the back of the person in the vehicle" and was unable to identify Mr. Gaddis as the individual occupying the vehicle after the collision. (T.E. Vol. I, pp. 92-93). Mr. Jones further testified that by the time the other vehicle's occupant was airlifted from the scene of the accident, he and his wife had already been transported to the hospital. (T.E. Vol. I, pp. 93-94).

Shortly after the accident, Deputy Mike Mull of the Polk County Sheriff's Department arrived on scene. (T.E. Vol. I, pp. 98-99). Deputy Mull testified that when he arrived and checked the occupant of the Toyota Corolla, he could not tell who the individual was as the individual's head and shoulders were underneath the passenger side airbag. (Id., at 99-100). Deputy Mull later identified Mr. Gaddis as the individual removed from the vehicle by EMS and the fire department, but he did not identify him as the driver. (Id.). During cross-examination, Deputy Mull verified that he recalled seeing blood on the passenger's side airbag and did not recall seeing blood on the driver's side airbag. (T.E. Vol. I, pp. 105-106).

Trooper Larry Fowler ("Trooper Fowler") of the Tennessee Highway Patrol was dispatched from the Cleveland, Tennessee area to work the accident. (T.E. Vol. I, p. 113).

Trooper Fowler arrived on the scene after Mr. Gaddis had been airlifted from the scene. (Id.). On cross examination Trooper Fowler confirmed that there was blood present on the passenger side air bags and did not dispute an EMS report stating that Mr. Gaddis was located near the passenger door to the vehicle. (T.E. Vol. I, pp. 123-125). Trooper Fowler further did not dispute that Mr. Gaddis sustained significant injury to the right side of his body. (Id.).

Mr. Gaddis testified at trial that he was a passenger in the vehicle the night of the accident and sustained significant injury to his right side during the accident. (T.E. Vol. II, pp. 144-145). Mr. Gaddis testified that his first cousin Carl Simmons had been driving the vehicle that night. (Id.). A witness for the defense Richard Amick testified that he had personally observed Mr. Gaddis riding as a passenger in the vehicle in question within a couple of hours prior to the accident. (T.E. Vol. II, pp. 196-203). Mr. Gaddis testified that the two men had been visiting local establishments throughout the course of the evening, when they encountered Connie Hope at the Runway Bar. (T.E. Vol. II, 150-151). Ms. Hope, who was an ex-girlfriend, began following Mr. Gaddis and his cousin in her own vehicle and initiated a rear-end collision with them, which forced them into the path of on-coming traffic. (T.E. Vol. II, pp. 151-155).

Medical records introduced from Erlanger Hospital showed that at the time blood was taken Mr. Gaddis had a blood alcohol level of 263.00 milligrams per deciliter. (T.E. Vol. IV, p. 374). Testimony from Special Agent Margaret Massengill established that when converted to the standard used in DUI cases, this would have resulted in a blood alcohol level of approximately .21 to .26. (T.E. Vol. II, pp. 129-133).

As a result of the accident which occurred on the 21st of January, 2005, Trooper Fowler issued a citation to Mr. Gaddis for third offense driving under the influence. (T.R. p. 5). Mr. Gaddis was further cited for driving on an expired license. (T.R. p. 7). These citations were

issued on the 23rd day of March, 2005. (T.R. pp. 5, 7).

IV. QUESTIONS PRESENTED FOR REVIEW

1. Did the trial judge err when she denied defendant's motion to recuse?

2. Did the trial court err when it enhanced the sentence imposed upon him as a result of the convictions in the present case?

3. Did the trial court err when it denied defense counsel's motion to investigate jury dissatisfaction and reaction to the verdict reported in this cause?

4. Did the trial court err when it denied defendant's motion for judgment of acquittal at both the close of the State and the defense's proof on the basis that the evidence did not support a finding of guilt in this matter?

5. Did the trial court err by excluding evidence and testimony regarding controversies and difficulties which had occurred between the Defendant and an individual named Connie Hope, which was relevant and necessary to his defense?

V. ARGUMENT

Mr. Gaddis would respectfully submit that numerous reversible errors were committed by the trial court during the course of the proceedings. Those errors are submitted in the "Questions Presented for Review", as specifically addressed in the arguments presented hereinafter. Based on these arguments, the defendant would respectfully submit that he was denied a fair trial and this cause should be remanded for a new trial presided over by another judge.

A. THE TRIAL COURT ERRED WHEN SHE FAILED TO RECUSE HERSELF FROM HEARING THIS CASE.

This case presents the second time the defendant has presented an appeal to this court from a case tried by the Honorable Amy Reedy, Criminal Judge for Polk County, Tennessee. The first cause was heard by this court in a case styled *State v. David Gaddis*, 2008 Tenn. Crim. App. LEXIS 907 (perm app denied, May 18, 2009, 2009 Tenn. LEXIS 728) and published on November 28, 2008. That particular case also involved a driving while intoxicated charge. While this court affirmed Gaddis' conviction and sentence, this court specifically admonished Judge Reedy for certain conduct directed at the defendant and his counsel during those proceedings. [1] This court made the following comments:

> "Nonetheless, we find it necessary to admonish the trial court. A bench conference should not have been conducted without defense counsel, and the trial judge's comments to defense counsel following the bench conference, regarding his stature and girth, were inappropriate, particularly when made in front of the jury. See *Tenn. R. Sup. Ct. 10, Canon 3B(4), (5)*. Moreover, the trial court should have preserved the dignity and decorum of the courtroom by admonishing Officer Beeam for his crude and vulgar language. See Tenn. R. Sup. Ct. 10, Canon 3 B(3). However, the record does not establish that the trial court's actions deprived the Defendant of a fair trial." Supra at *3-*4.

1. While this court affirmed the defendant's conviction and his sentence, it is significant that the court declined to consider this issue in the appeal because the defendant's trial counsel had failed to make a contemporaneous objection, or to raise it in his motion for new trial. This court found that there was no indication that the defendant did not get a "fair trial" and therefore appeared to not apply a review that may have resulted in the defendant receiving a new trial.

Prior to trial, Mr. Gaddis filed a motion requesting that the trial judge recuse herself from any further proceedings in this cause. Mr. Gaddis' motion and the subsequent proceedings in this matter clearly illustrate that he was denied his constitutional right to a fair and impartial tribunal and that recusal was appropriate in this matter. As the trial judge erred by denying the motion to recuse, the ruling of the trial court should be reversed.

This courts admonition was obviously known to Judge Reedy and she was obviously defensive about it because at the hearing on the Motion for New Trial in this case, the judge reflected on the comment and gave a justification for her failure to act to protect the proceedings and the defendant, while promising to never do it again. However, she stated that the admonition was not a justification for her to recuse herself. (T.E. Vol. III, pg. 325). It would seem to be obvious to a person of reasonable prudence that there would be a reasonable basis for questioning her impartiality.

It is a well establish legal principle that the "right to a fair trial before an impartial tribunal is a fundamental constitutional right." *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002). "No judge shall preside on the trial of any cause in the event of which he may be interested." Tenn. Const. art. VI, § 11. Tennessee courts have opined that this protection exists " 'to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.' " *Bd. Of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538 (Tenn. 2004) (quoting *State v. Benson*, 973 S.W.2d 202, 205 (Tenn. 1998)).

"We have recognized that it is important to preserve the public's confidence in a neutral and impartial judiciary." *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (citing *Slavin*, at 548). Recusal motions should be granted when "the judge has any doubt as to his or her ability to preside impartially in the case [or] 'when a person of ordinary prudence in the judge's

position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartially.'" *Davis v. Liberty Mut. Ins. Co.,* 38 S.W.3d 560, 564-565 (Tenn. 2001) (quoting *Alley v. State,* 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). A judge should disqualify himself or herself when "'the judge's impartiality might be reasonably questioned'". *Id.* (quoting Tenn. Sup.Ct. R. 10, Canon 3(E)(1))

"[T]he appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Id.* "The inquiry [regarding recusal] is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral or whether there is an unconstitutional 'potential for bias.'" *State v. Reid,* 213 S.W.3d 792, 815 (Tenn. 2006) (quoting *Davis,* 38 S.W.3d at 565). Once judicial bias is proven, reversal is required without any separate consideration of whether proof of prejudice exists. *Ali v. State,* 2003 *Tenn. Crim. App. LEXIS 333,**31 (perm app. denied, Nov. 3, 2003)

This court has stated that the words "bias" and "prejudice" are central to the determination of whether a recusal should be granted. Both of these words relate to the trial judges "state of mind" or "attitude" that works to predispose a judge for or against a party. Prejudice relates to the personal attitude a judge has towards a party where the judge has a mental bias towards a party; either hostile or favorable. The standard for disqualification requires that the "prejudice" is of a personal character, directed at the litigant and emanates from an "extra-judicial source" and result in a decision on some basis other than what the judge learned from participation in the case. *Ali*, Supra at *32. [2] Thus it would appear that the appearance of

2. During the hearing on the Motion for New Trial, the trial judge commented that there was no basis for a recusal because nothing had been brought to her attention, including this court's admonishment that had not been "done in court". (T.R. Vol. III, pg. 325) This appears to be an attempt by the trial judge to justify not recusing herself when the prejudicial matters are facts that the court has heard in court during the course of the proceedings. Obviously, this court's admonishment is not a matter that was before the trial Judge, and within the exception.

prejudice must arise from a source that was not before the judge, whose recusal is requested, during that judge's execution of their duties on the bench in the form of evidence, conduct or judicial rulings by that judge.

With all due respect to Judge Reedy, the defendant would suggest that the public embarrassment to her from this courts admonition in the first case is indicative of an extra-judicial action that would lead a reasonable person to conclude that she could be prejudiced and/or biased against Mr. Gaddis. Certainly, it is not the ordinary event for a trial judge to be publicly admonished by an appellate court. This court felt that the circumstances were so egregious, that it needed to publicly chastise the judge for her omissions and commissions during the trial of his first case. With this public embarrassment, the defendant would suggest that the appearance of personal bias by Judge Reedy is well documented, without the necessity of proof of prejudice. See *Ali*, supra. This standard notwithstanding, there is ample evidence to suggest that the judge acted on this prejudice.

During the trial, the defendant testified that he was not the driver of the automobile, and that, in fact, his cousin was the driver of the automobile. This was his principle defense, and this assertion was amply supported by objective evidence. The State attempted to solicit testimony from Trooper Larry Fowler concerning an interview that he had with the defendant several months after the accident. The District Attorney withdrew the question after a bench conference without a ruling by the court. (T.E. Vol. 1, pgs. 119 – 121) After the defendant testified, he came under intense cross examination by the Assistant District Attorney. Over defense counsel's objection, and without any discussion or curative instruction by the judge, this cross examination consisted almost exclusively of questioning the defendant as to why he didn't tell law enforcement or anyone else before the trial that he had not been driving the vehicle. (T.E. Vol. II,

pgs 185-190; 191-194) [3] This line of questioning was not only improper, it amounted to an improper and unconstitutional impingement on the defendant's right to remain silent. *Braden v. State*, 534 S.W.2d 657 (Tenn. 1976)(Tennessee restricts impeachment by post-arrest silence to where it is blatantly inconsistent with trial testimony). Despite this clear and well established principle of law, and, in light of the previous withdrawal by the State of this line of questioning in its proof in chief, it would appear that the trial judge ignored a fundamental principle of constitutional law to the prejudice of the defendant.

Furthermore, in post trial proceedings, the trial court again imposed a $50,000.00 appeal bond *sui sponte*. The courts justification was based solely on the assertion "that Mr. Gaddis does have a prior record in addition to what we have heard here today." (T.E. Vol. II, p. 232). At no point did the trial court or the State of Tennessee allege that such a bond was necessary to insure his appearance or that he represented an immediate threat to the public. This particular case had been pending for over five years, and in that period the State had never raised any issue of the defendant being a flight risk. There were no allegations that Mr. Gaddis had ever failed to appear for court or that he had failed to appear to serve his 120 day sentence on his prior conviction for DUI. Taken together with the $50,000.00 appeal bond the trial court imposed on Mr. Gaddis' prior case, the trial court's actions take on the impression of being punitive in nature.

Finally, and as more specifically addressed in the argument below, the trial court imposed a seven month jail sentence on a second offense conviction of driving under the influence. While, a trial judge has wide discretion in sentencing in a misdemeanor case, the

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3. Inexplicably, defense counsel failed to raise this obvious error in his motion for new trial. As such, and through no fault of his own, the defendant is barred from raising this issue as error in this appeal. See Motion for New Trial, T.R., pg. 38-43.

appearance that the judge took an opportunity to "tee off" on the defendant cannot be overlooked in a review of whether the apparent prejudice of the judge was acted upon.

These actions by the trial court certainly create an air of impropriety surrounding both the prior and the present case. Further, given the fact that the trial court had been specifically admonished by this Honorable Court for these prior actions, an objective review of the facts would have supported recusal.

Also in post trial proceedings an issue was raised regarding the propriety of alleged contact between Mr. Gaddis' daughter Amanda Clark ("Ms. Clark") and a juror in this cause. (T.E. Vol. III, pp. 272-291). During these post-trial proceedings, Attorney Chuck Burks of the Knox County bar was retained to represent Ms. Clark and made an appearance at a hearing on these matters on or about the 20th day of August, 2010. (T.E. Vol. III, pp. 292-298). The matter was reset for hearing on or about the 24th day of September, 2010, in Cleveland, Tennessee. (T.E. Vol. III, p. 299).

Mr. Burks again appeared at that hearing and advised the trial court that he felt compelled to withdraw from representation of Ms. Clark. (T.E. Vol. III, pp. 299-303). The record reflects that in the period between the hearing on the 20th day of August, 2010, and the hearing on the 24th day of September, 2010, the trial judge had retained Mr. Burks as her personal counsel. (T.E. Vol. III, pp. 303-305). The propriety of the trial court's actions are called into doubt when the trial judge specifically retained as personal counsel an attorney who had made an appearance for an individual in this case during the approximate one (1) month period which elapsed between the first and second hearings noted above.

An objective review of the facts in this cause clearly shows that the trial court abused its discretion by denying the motion to recuse. Multiple factors cast doubt upon the trial court's

ability to preside over this cause in an impartial and unbiased manner. As the trial judge erred by denying the motion to recuse, the ruling of the trial court should be reversed.

B. THE TRIAL COURT ERRED WHEN IT ENHANCED THE SENTENCE IMPOSED UPON HIM AS A RESULT OF THE CONVICTIONS IN THE PRESENT CASE.

In the present cause, the trial court sentenced Mr. Gaddis to eleven (11) months, twenty-nine (29) days to be probated after serving seven (7) months incarceration. This sentence was excessive and unreasonable under the facts of this cause; therefore the sentence imposed by the trial court should be reversed.

Sentencing in misdemeanor cases is governed by *T.C.A. § 40-35-302*. As opposed to the more stringent guidelines involved in felony sentencing, sentencing in misdemeanor cases is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. *See State v. Troutman,* 979 S.W.2d 271, 273 (Tenn. 1998); *State v. Baker,* 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). However, sentences imposed are required to conform with the principles and purposes set forth in the 1989 Criminal Sentencing Reform Act. *See State v. Palmer,* 902 S.W.2d 391 (Tenn. 1995); *T.C.A. § 40-35-302(b)*. Trial courts have "authority to place the defendant on probation either...(1) [a]fter service of a portion of the sentence in periodic confinement or continuous confinement; or (2) [i]mmediately after sentencing." *T.C.A § 40-35-302(e)*.

The specific penalties for driving under the influence are set forth in *T.C.A. § 55-10-403*. In relevant part, this section requires a mandatory minimum period of confinement of not less than forty-five (45) days upon a conviction for second offense driving under the influence and a maximum period of confinement not more than eleven (11) months and twenty-nine (29) days. *T.C.A. § 55-10-403(a)(1)(A)(iv)*. In previous cases this Honorable Court has held that the DUI

statute "in effect, mandates a maximum sentence for DUI, with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be suspended." *State v. Combs,* 945 S.W.2d 770 (1996).

In the present case, the trial court sentenced Mr. Gaddis to eleven (11) months and twenty-nine (29) days suspended after service of seven (7) months incarceration on the conviction for second offense driving under the influence and six (6) months concurrent for driving on an expired license. (T.R. pp. 36-37). During the sentencing hearing, the State presented no evidence other than a judgment of conviction for driving under the influence on a prior case in Polk County, Tennessee. (T.E. Vol. III, pp. 233-234).[4] However, Mr. Gaddis presented witnesses whose testimony showed that he had remained largely alcohol free and clear of any further criminal trouble for a significant period of time. (T.E. Vol. III, pp. 234-253). Moreover, the offenses for which he was convicted occurred more than five (5) years prior to the sentencing hearing.

Among the factors the trial court relied upon in sentencing were Mr. Gaddis' criminal record, an unspecified need for rehabilitation, and an alcohol problem which the court felt that Mr. Gaddis was in denial of having. (T.E. Vol. III, pp. 266-269). From these findings, the trial court concluded that Mr. Gaddis needed to be incarcerated and incarcerated for a period beyond the minimum requirement. (Id.). Respectfully, Mr. Gaddis would argue that the trial court's findings were not supported by the record.

In regard to the first factor, which was prior criminal record, Mr. Gaddis would submit that this is a similar issue to that presented to the Court in *State v. Combs*. In that case the court

4. It should be noted that this was not the conviction introduced at trial to enhance to a second offense driving under the influence. That conviction, as pointed out above, occurred in 2003 in Cherokee County, North Carolina.

used as an enhancement factor the defendant's prior history of alcohol abuse which was "evinced by his two prior convictions for DUI[.]" *Combs,* 945 S.W.2d at 775. This Court observed that there was no evidence in the record to support the fact that the defendant had a prior history of alcohol abuse. *Id.* In fact, the Court found that the only indication that the defendant had ever consumed alcohol was his three (3) prior convictions for DUI. *Id.* "While this is an obvious repeated and serious violation of the law, it hardly establishes an alcohol problem which could be used to incarcerate appellant for more than the statutory minimum." *Id.*

Like *Combs,* the State presented no evidence in the case at bar that the defendant had a long history of alcohol abuse in the present case. In fact, the witnesses who testified at the sentencing hearing indicated that Mr. Gaddis had drank primarily on weekends, but had not drank in several years prior to the sentencing hearing. (T.E. Vol. III, pp. 234-253). The trial court remarked during sentencing that "someone that is a .26 that has to be given beer as has been testified to here today at a hospital, that is a significant alcohol problem[.]" (T.E. Vol. III, p. 267). However, no evidence in the record reflects that this is accurate. The only medical records in evidence are the blood alcohol reports from Erlanger Hospital, which at no time mention Mr. Gaddis having been administered beer. (T.E. Vol. IV, p. 374). The only competent testimony regarding this issue came from Amanda Clark ("Ms. Clark"), Mr. Gaddis' daughter. Her actual testimony was that Mr. Gaddis' ex-girlfriend had requested the beer at the hospital and that Mr. Gaddis had refused to drink it. (T.E. Vol. III, p. 250). The trial court's characterization of this event is not supported by the evidence in the record and is clearly unfounded.

Furthermore, the court pointed to a need for rehabilitation and that less restrictive measures had been ineffective. (T.E. Vol. III, p. 267-268). Respectfully, Mr. Gaddis would submit that this conclusion is simply not supported by the record. The convictions in the present

case arose as a result of an accident which occurred on the 21st of January, 2005, which was over five (5) years prior to the trial and sentencing hearing. The other Polk County conviction for driving under the influence arose from events which occurred on or about the 13th day of August, 2005. *State v. David Gaddis,* 2008 Tenn. Crim. App. Lexis 907. Due to the fact that the cases were tried out of chronological order, the prior conviction stemmed from events occurring later in time. Moreover, the conviction introduced into evidence from Cherokee County, North Carolina, had occurred in 2003, more than seven (7) years prior to the sentencing hearing. (T.E. Vol. IV, p. 386). The uncontroverted evidence in this matter was that Mr. Gaddis had not been cited for any violations associated with alcohol for a number of years prior to sentencing. Nor was there any proof that he had been cited for any violations after being released from confinement on the previous Polk County conviction.

Respectfully, Mr. Gaddis would submit that the trial court erred when it sentenced him to seven (7) months incarceration on the charge of driving under the influence and six (6) months concurrent for driving with an expired license. The record is devoid of any factors which would support confinement beyond the mandatory minimum period of forty-five (45) days, therefore the ruling of the trial court should be reversed and an appropriate sentence imposed.

C. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO INVESTIGATE JURY DISSATISFACTION AND REACTION TO THE VERDICT REPORTED IN THIS CAUSE.

The trial court erred in denying Mr. Gaddis' motion for leave to interview jurors. The record reflects the possible existence of extraneous information or improper influence and testimony as to these issues is not barred by Rule 606(b). Therefore, the ruling of the trial court should be reversed.

Rule 606(b) of the Tennessee Rules of Evidence states, in pertinent part:

> "[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotion...except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion[.]"

The Tennessee Supreme Court adopted Federal Rule of Evidence 606(b), which was later embodied as Tennessee Rule of Evidence 606(b), in 1984. *Walsh v. State,* 166 S.W.3d 641, 646 (Tenn. 2005) (citing *State v. Blackwell,* 664 S.W.2d 686 (Tenn. 1984)). The court "recognized in *Blackwell* that Rule 606(b) was essentially a codification of established Tennessee law in this respect." *Id.* By adopting the federal rule, Tennessee further established Rule 606(b) as "'the rule governing the exclusion and admissibility of evidence to impeach a jury verdict in this State.'" *Id.* (citing *Blackwell,* 664 S.W.2d at 688; *State v. Parchman,* 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997)).

The courts have stated that the principles underlying Federal Rule 606(b) are "grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Tanner v. United States,* 483 U.S. 107, 121 (1987). Rule 606(b) "promotes full and frank discussion in the privacy of the jury room and protects jurors from harassment by the losing party who might seek to impeach the verdict." *Walsh,* 166 S.W.3d at 646 (citing *Tanner,* 483 U.S. at 108). "Thus, the overarching purpose of both the federal and Tennessee Rule 606(b) is to protect the integrity of the jury's deliberative process." *Id.* (citing *Tanner*, 483 U.S. at 119-120; *Caldararo v. Vanderbilt Univ.,* 794 S.W.2d 738, 741 (Tenn. Crim. App. 1990)).

The scope of the inquiry permitted under 606(b) was definitively settled by the Tennessee Supreme Court in *Walsh.* In that case, the court examined the history of Rule 606(b) and the

somewhat divergent opinions that had arisen during its interpretation. *Walsh*, 166 S.W.3d at 645-649. The court ultimately held that the rule "permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative process is inadmissible." *Id.*, at 649. Moreover, a showing that a juror was exposed to extraneous prejudicial information or improper influence creates a rebuttable presumption of prejudice, which the State then has the burden to show was harmless. *Blackwell,* 664 S.W.2d at 689; *Parchman,* 973 S.W.2d at 612.

On or about the 14th of July, 2010, trial counsel for Mr. Gaddis filed a motion for leave to allow interview of jurors and a motion to set aside jury verdict with a memorandum in support. (T.R. pp. 25-26, 29-31, 32-35). In the memorandum, trial counsel recounted that on the evening of the trial a juror left a message on Mr. Gaddis' answering machine and subsequently gave an affidavit to a family member of the defendant regarding certain issues surrounding the verdict in this trial. (T.R. p. 32). Mr. Gaddis was in custody at the time this juror attempted to contact him; however, Mr. Gaddis' daughter did speak with the juror and was presented with an affidavit of this juror. (T.E. Vol. III, p. 280).

During argument on the motion for new trial the affidavit of Juror Ray Tanner ("Juror Tanner") was presented to the trial court for consideration. (T.E. Vol. IV, p. 395). In his affidavit, Juror Tanner stated that he had only agreed to the guilty verdict in this cause on the belief that Mr. Gaddis would only be given a fine if convicted "and that a hung jury would mean he would have to go through another trial if it was brought back." (Id.). Trial counsel argued that he should be given leave to interview the jurors in this matter, as Juror Tanner's affidavit gave the impression that the jury may well have been exposed to extraneous information or some sort of improper influence. (T.E. Vol. III, pp. 326-331).

In addition to the affidavit, the jury presented three (3) written questions to the trial court during their deliberations. (T.E. Vol. II, pp. 221-223; Vol. IV, p. 398). These questions included issues about Mr. Gaddis' weight and the interior of the car; however, there was a further question involving a juror who made statements about Mr. Gaddis and his habit of using a designated driver. (Id.). After a bench conference, the trial court instructed the jury that these questions could not be answered. (Id.).

Mr. Gaddis argued during the hearing on this motion and as part of the motion for a new trial that absent leave from the trial court to interview the jurors, he was effectively rendered unable to firmly substantiate a claim under Rule 606(b). (T.E. Vol. III, pp. 326-331). The trial court denied this motion, along with the motion to set aside jury verdict, and the motion for new trial. (T.R. p. 44).

On the face of Juror Tanner's affidavit, there is a clear indication that at least one juror in this cause was somehow convinced that Mr. Gaddis would only be subjected to a fine if convicted. This affidavit raises a substantial question as to whether or not this belief was engendered by exposure to extraneous information or improper influence of someone involved in the jury deliberations. Furthermore, when the issue is considered in light of the questions propounded to the trial court by the jurors during deliberation, the possibility of extraneous information having been considered is substantially magnified. While Rule 606(b) and the supporting case absolutely prohibits juror testimony as to the effect that this extraneous information or undue influence had upon their verdict, the Rule clearly contemplates and allows juror testimony regarding the existence of extraneous information or undue influence.

Trial counsel's request to interview the jurors in this matter was properly filed with the trial court. Further, trial counsel went so far as to suggest that any questioning allowed by the

trial court be conducted "under appropriate perimeters so that jurors aren't intimidated, jurors aren't chilled and that sort of thing." (T.E. Vol. III, pp. 327-328). The record reflects that the manner and method in which trial counsel approached this issue was open and transparent and undertaken with no small amount of caution. Moreover, Rule 606(b) merely prohibits a juror from testifying about certain issues. At no point does the Rule actually prohibit jurors from being interviewed about these issues.

The trial court erred in denying Mr. Gaddis' motion for leave to interview jurors. The record reflects the possible existence of extraneous information or improper influence, which is not barred by Rule 606(b). Therefore, the ruling of the trial court should be reversed.

D. THE EVIDENCE PRESENTED IS INSUFFICIENT TO SUPPORT A FINDING OF GUILT IN THIS CAUSE.

At the close of both the State's case in chief and at the close of proof in this matter, Mr. Gaddis made a motion for judgment of acquittal pursuant to Rule 29 of the Tennessee Rules of Criminal Procedure on the grounds that the evidence was insufficient to support a conviction. The trial court erred in denying these motions, as the record clearly demonstrates that the evidence in this cause was insufficient to support conviction. For this reason, the rulings of the trial court should be reversed.

"Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R.App. P. 13(e). In applying this rule of appellate procedure, Tennessee courts have held "[t]he proper inquiry for an appellate court reviewing a challenge to the sufficiency of the evidence to support a conviction is whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." *State v. Reid,* 91 S.W.3d 247, 276-277 (Tenn. 2002) (citing *Jackson v. Virginia,* 443 U.S. 307, 99 (1979); *State v. Hall,* 8 S.W.3d 593, 599 (Tenn. 1999)). "A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury." *Id.* (citing *State v. Carruthers,* 35 S.W.3d 516, 557-558 (Tenn. 2000); *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982)).

In the present case, the State of Tennessee failed to present any evidence to show beyond a reasonable doubt that Mr. Gaddis was driving the vehicle in question at the time of the accident. Testimony from the occupant of the other vehicle established that he and his wife were traveling east bond on U.S. Highway 64. (T.E. Vol. I, p. 83). Upon reaching the intersection with State Route 68, Mr. Jones testified that a car pulled out in front of his vehicle and a collision occurred. (Id.). A few minutes after the collision, Mr. Jones approached the other vehicle and observed an individual in the other vehicle; however, he testified that he only "saw the side and the back of the person in the vehicle" and was unable to identify Mr. Gaddis as the individual occupying the vehicle after the collision. (T.E. Vol. I, pp. 92-93). Mr. Jones further testified that by the time the other vehicle's occupant was airlifted from the scene of the accident, he had already been transported to the hospital. (T.E. Vol. I, pp. 93-94).

Shortly after the accident, Deputy Mike Mull of the Polk County Sheriff's Department arrived on scene. (T.E. Vol. I, pp. 98-99). Deputy Mull testified that when he arrived and checked the occupant of the Toyota Corolla, he could not tell who the individual was and that the individuals head and shoulders were underneath the passenger's side airbag. (Id., at 99-100). Though Deputy Mull did later identify Mr. Gaddis as the individual removed from the vehicle by EMS and the fire department, he never identified him as the driver. (Id.). During cross-

examination, Deputy Mull verified that he recalled seeing blood on the passenger side airbag and did not recall seeing blood on the driver side airbag. (T.E. Vol. I, pp. 105-106).

Trooper Larry Fowler of the Tennessee Highway Patrol was dispatched from the Cleveland, Tennessee area to work the accident underlying the case at bar. (T.E. Vol. I, p. 113). Trooper Fowler arrived on the scene after Mr. Gaddis had been airlifted from the scene. (Id.). On cross examination Trooper Fowler confirmed that there was blood present on the passenger side air bags and did not dispute an EMS report stating that Mr. Gaddis was located near the passenger door to the vehicle. (T.E. Vol. I, pp. 123-125). Trooper Fowler further did not dispute that Mr. Gaddis sustained significant injury to the right side of his body. (Id.).

None of the evidence introduced by the State at trial indicated that Mr. Gaddis was the driver of the car involved in this accident. In fact, Mr. Gaddis testified that he was a passenger in the vehicle and sustained significant injury to his right side during the accident. (T.E. Vol. II, pp. 144-145). Mr. Gaddis testified that his first cousin Carl Simmons had been driving the vehicle that night. (Id.). Furthermore, a witness for the defense Richard Amick testified that he had personally observed Mr. Gaddis riding as a passenger in the vehicle in question within a couple of hours prior to the accident. (T.E. Vol. II, pp. 196-203).

Unlike cases such as *State v. McCloud,* 310 S.W.3d 851 (Tenn. Crim. App., 2009), where the Court has found evidence sufficient to support a conviction of driving under the influence, there was no evidence presented at trial that Mr. Gaddis was, in fact, the driver of the vehicle in question. In *McCloud*, the passenger in the vehicle at the time of the accident had indicated that the defendant was driving and the officer noted that the injuries to the left side of the defendant's body also were consistent with him having driven the care into a telephone pole. *McCloud,* at 857. In the present case, there was no testimony presented at trial which could reasonably

establish that Mr. Gaddis was the driver of the vehicle in question.

As the evidence introduced at trial clearly failed to support a conviction on the offenses of driving under the influence and driving on an expired license, the trial court erred in denying defendant's motions for judgment of acquittal. Therefore, the rulings of the trial court should be reversed and judgment entered in defendant's favor.

E. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE AND TESTIMONY WHICH WAS RELEVANT AND NECESSARY TO HIS DEFENSE.

The trial court excluded certain evidence and testimony Mr. Gaddis sought to introduce as an element of his defense regarding an individual by the name of Connie Hope on the basis that it was irrelevant. Mr. Gaddis would respectfully show that this evidence was not only relevant, but was necessary to affirmatively establish an element of his defense. As the trial court erred in excluding this evidence, the ruling of the court below should be reversed.

Under Rule 402 of the Tennessee Rules of Evidence "[a]ll relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible." Tenn. R. Evid. 402. Relevant evidence is defined as evidence which has "any tendency 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." Tenn. R. Evid. 401. The admissibility of relevant evidence is tempered by Rule 403, which provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. T. Evid. 403.

Rulings by the trial court as to the relevance of evidence under Rule 401 are reviewed upon an abuse of discretion standard. *State v. Powers,* 101 S.W.3d 383, 395 (Tenn. 2003). However, evidentiary exclusions may violate principles of due process, despite their compliance with the rules of evidence. *State v. Flood,* 219 S.W.3d 307, 316-317 (Tenn. 2007). Criminal defendants have a right, associated with due process, to present a defense and to offer testimony. *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973); *State v. Brown,* 29 S.W.3d 427, 431 (Tenn. 2000). "In determining whether an exclusion of evidence rises to the level of a constitutional violation, we are directed to consider the following: (1) whether the excluded evidence is critical to the defense; (2) whether the evidence bears sufficient indicia of reliability; and (3) whether the exclusion of evidence is sufficiently important." *State v. Garrett,* 2011 WL 486846 (Tenn. Crim. App.) (citing *Flood,* 219 S.W.3d at 317).

During the trial in the present cause, Mr. Gaddis sought to introduce testimony and evidence concerning an individual by the name of Connie Hope. (T.E. Vol. I, pp. 107-109). The trial court sustained the State's objection on the basis that any testimony would be irrelevant. (Id.). During Mr. Gaddis' testimony, the trial court allowed him to make a proffer on this issue. (T.E. Vol. II, pp. 160-171; Vol. IV, pp. 387-394). Mr. Gaddis testified that he had been involved with a woman by the name of Connie Hope, with whom he had numerous difficulties prior to the night of the accident. (Id.). Ms. Hope had been harassing Mr. Gaddis to the point where a restraining order was issued by the General Sessions court for Polk County. (Id.). In fact, Mr. Gaddis further testified that Ms. Hope had stabbed him on at least one occasion. (Id.).

This evidence was not only relevant, but was necessary to Mr. Gaddis' defense. Mr. Gaddis testified that on the night of the accident he had been riding in a vehicle with his cousin. (T.E. Vol. II, 144-145). The two men had been visiting local establishments throughout the

course of the evening, when they encountered Ms. Hope at the Runway Bar. (T.E. Vol. II, 150-151). Ms. Hope began following Mr. Gaddis and his cousin in her own vehicle and initiated a rear-end collision with them, which forced them into the path of on-coming traffic. (T.E. Vol. II, pp. 151-155). Pictures of Mr. Gaddis' vehicle clearly showed damage to the rear end, which would be consistent with having been struck from behind. (T.E. Vol. IV, pp. 369-370).

The evidence which was excluded by the trial court was critical to the defense, as it corroborated the difficulties Mr. Gaddis had been having with Ms. Hope and supported his statements that she had been a contributing factor to the accident in question. The reliability of the evidence excluded is beyond reproach as to the documentary evidence, as these items were pleadings and orders from another court of law. As to the testimony of Mr. Gaddis, this was supported by documentation from the courts which tends to show its reliability as well. The exclusion of this testimony and evidence was extremely important as it rendered Mr. Gaddis substantially unable to corroborate his theory of defense.

Based upon the foregoing, Mr. Gaddis would respectfully submit that his due process rights were violated when this evidence and testimony was excluded at trial. The trial court committed reversible error in this matter and Mr. Gaddis would ask this Honorable Court to enter a ruling accordingly.

VI. CONCLUSION

For the foregoing reasons, the Appellant David Gaddis would respectfully request that the decision of the trial court be reversed, that his conviction and/or his sentence be vacated, and that this cause be remanded for a new trial by another judge.

Respectfully submitted,
David Gaddis, Appellant

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this Appellant's Brief has been served upon counsel for all parties in this action, or upon said parties as required by law, by hand delivering a copy thereof, or by depositing a copy of the same in the United States Mail, with sufficient postage affixed thereto to ensure delivery to the following:

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This the 24th day of March, 2011.

WILLIAM J. BROWN & ASSOCIATES

By: _____

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