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.

Staff Attorney, Tennessee Court of Appeals, Eastern Division

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

2007, BPR No. 25824

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.

State of Tennessee, BPR No. 25824 (Active) January 2007
State of Florida, Bar No. 83186 (Active) July 1996

* In January 2001, I began the application process to become a member of the State Bar of California. I received a positive determination of moral character in May of 2001. I never sat for the California Bar Examination because my husband and I decided not to re-locate to California.

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).

From August of 2008 until December of 2010, I voluntarily elected inactive status with The Florida Bar in order to pay a reduced annual licensure fee.

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).

Staff Attorney, **Tennessee Court of Appeals** (Knoxville, TN)
December 2012 – Present
Staff Attorney, **Tennessee Court of Criminal Appeals and Court of Appeals** (Knoxville, TN)
February 2009 – November 2012
Capital Case Attorney, **Second Judicial Circuit** (Knoxville, TN)
April 2007 – January 2009
Associate, **Butler, Vines & Babb, PLLC** (Knoxville, TN)
May 2006 – April 2007

Career Attorney, **First District Court of Appeal of Florida** (Tallahassee, FL)
(Chambers of the Honorable James R. Wolf)
January 2005 – April 2006
Staff Attorney (Clerk's Office), **Supreme Court of Florida** (Tallahassee, FL)
February 2002 – December 2004
Career Attorney, **First District Court of Appeal of Florida** (Tallahassee, FL)
(Chambers of the Honorable James R. Wolf)
April 1997 – February 2002
Central Staff Attorney, **First District Court of Appeal of Florida** (Tallahassee, FL)
October 1996 – April 1997
Trial Court Law Clerk, **Seventh Judicial Circuit of Florida** (Daytona Beach, FL)
October 1995 – September 1996
Post-GraduateLegal Intern, **Volunteer Lawyers' Resource Center (VLRC)** (Tallahassee, FL)
June 1994 – July 1995

I have never engaged in any occupation, business or profession other than the practice of law. I began my college education immediately after high school and attended law school immediately following my graduation from college. As most students do, I worked both part-time and full-time in various jobs at restaurants, in mail rooms, at print shops, in retail stores, and the like while in high school, college and law school. While in college, I was a runner for a law firm for a period of time. While in law school, I worked in both paid and unpaid clerkships and internships for various attorneys in Florida as well as a non-profit legal services organization. I also was awarded a competitive, paid legal internship, funded by the Florida Bar, with the trial courts of the **Sixteenth Judicial Circuit of Florida** (Key West, FL), which I held during the summer of 1993.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

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

At the present time, I am the Staff Attorney for the Eastern Division of the Tennessee Court of Appeals. My job duties require me to focus 100% of my time on appellate practice and procedure. I am responsible for reviewing all motions filed in pending appeals in the Eastern Division of the Court and drafting proposed orders for the judges disposing of said motions. I am also responsible for recommending show cause orders on the Court's own motion designed to move a case to disposition when the parties are not complying with deadlines established by the Tennessee Rules of Appellate Procedure. I review all applications for interlocutory and extraordinary appeals filed in the Eastern Division pursuant to Rules 9 and 10 of the Rules of Appellate Procedure and make recommendations to the Court regarding whether to grant or deny said applications. I review for jurisdictional defects all records transmitted by the trial court clerks for every civil appeal filed in the Eastern Division of the Court. In those cases where the Notice of Appeal was not timely filed or the appeal is premature as a result of all claims not having been disposed of by the trial court prior to the filing of the Notice of Appeal, I prepare proposed panel opinions dismissing said appeals on jurisdictional grounds. I review all Petitions for Recusal Appeal initiating expedited interlocutory appeals as of right from orders denying motions to recuse or disqualify a trial court judge from presiding over a case, said appeals being governed by Rule 10B of the Rules of the Supreme Court of Tennessee. Because such appeals are to be decided on an expedited basis, I prepare proposed panel opinions for the judges of the Court disposing of such appeals within days of the filing of the Petitions initiating such appeals. I also audit claims for attorneys' fees and expenses filed by court-appointed appellate counsel in parental termination appeals prior to said claims being submitted to the judges for review and approval. Finally, I am responsible for responding on a daily basis to general inquiries from attorneys, trial court clerks, and the lay public regarding pending appeals and appellate practice in general.

My current position requires me to have a general working knowledge of all areas of civil law including, but not limited to, personal injury, medical malpractice, contracts, probate, property, corporate structure, bankruptcy (to the extent the filing of federal bankruptcy petitions automatically stay certain state court appeals), parental termination, dependency and neglect, divorce, statutory interpretation and constitutional law, just to name a few. More importantly, both my present position and my lengthy history of working for the appellate courts in both Tennessee and Florida on civil and criminal appeals, including death penalty appeals, has given me the ability to think and write from the perspective of an appellate court judge.

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.

Through my work with the courts of Tennessee and Florida, I have developed a thorough understanding of the myriad issues that arise both at the trial and appellate levels in all manner of cases, both civil and criminal. I have assisted trial and appellate court judges on literally thousands of cases by performing complex legal research and writing extensive legal memoranda and proposed decisions with minimal supervision.

For a little over three years, I was the Staff Attorney for the Eastern Divisions of both the Tennessee Court of Criminal Appeals and the Tennessee Court of Appeals. I was the only Staff Attorney in the State of Tennessee during that time to simultaneously work on a daily basis for two appellate courts. My responsibilities as a Staff Attorney for the Court of Criminal Appeals were similar to my present duties as a Staff Attorney for the Court of Appeals, as outlined above in Question #7, the only difference being that I was responsible for accomplishing the tasks required for both courts at the same time. For instance, as a Staff Attorney for the Court of Criminal Appeals, I provided the same assistance with regard to motions, show cause orders, applications for interlocutory and extraordinary appeals filed pursuant to Rules 9 and 10 of the Rules of Appellate Procedure, Petitions for Recusal Appeal, claims for attorneys' fees and expenses, and communications with attorneys, trial court clerks, and the lay public regarding pending appeals and appellate practice in general. In addition, I was responsible for reviewing, and making recommendations as to disposition, all applications for permission to appeal from orders denying motions to re-open prior post-conviction proceedings, which applications are filed in the Court of Criminal Appeals pursuant to Rule 28 of the Rules of the Supreme Court of Tennessee. I also reviewed, and made recommendations as to disposition, all motions filed pursuant to Rule 8 of the Rules of Appellate Procedure seeking appellate review of orders granting, denying, setting or altering the conditions of a defendant's release from incarceration pending trial or appeal. I also provided substantial assistance to the Court of Criminal Appeals in drafting opinions in those cases in which memorandum opinions were appropriate pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. By far the most important and time-consuming work I performed for the Court of Criminal Appeals was the preparation of extensive bench memoranda and proposed opinions in direct and collateral post-conviction appeals in capital cases. This work required me to meticulously review the records in each capital appeal and provide a cogent legal analysis for the Court of all issues raised by counsel in these cases. Working on death penalty cases was, by no means, new to me. By the time I worked as a Staff Attorney for the Court of Criminal Appeals, I had spent almost my entire career "tinkering with the machinery of death," as Justice

Blackmun once described it, see Callins v. Collins, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 1130, 127 L.Ed.2d 435, 436 (1994) (Blackmun, J., dissenting), in both Tennessee and Florida.

For almost two years prior to working as the Staff Attorney for the Court of Criminal Appeals and Court of Appeals, I was one of five Capital Case Attorneys for the State of Tennessee responsible for assisting trial court judges with the legal issues that arise in death penalty trials and post-conviction proceedings. In that capacity, I regularly drafted legal memoranda and proposed orders for the judges, prepared certain questions for use by the trial courts during jury selection, and assisted in preparing the jury instructions for capital trials. I would often attend pretrial, trial and post-conviction hearings upon request of the trial judges presiding over such cases. My duties also included preparing and filing monthly reports with the Tennessee Administrative Office of the Courts (AOC) on the status of pending trial court proceedings in capital cases. Through my work as a Capital Case Attorney, I was privileged and honored to be able to meet and work with most of the trial court judges who handle criminal cases in the 9th, 10th, 11th, 12th, 13th and 31st Judicial Districts as well as many of Tennessee's retired senior judges who were designated to preside over some of the cases on which I provided assistance.

Other than the year I spent working at a civil litigation firm upon my arrival in Tennessee, which provided me with invaluable experience in terms of Tennessee trial practice and procedure, my entire career as a licensed attorney before I moved to Tennessee was spent in service to the Florida State Courts System. I was the first attorney ever to hold the position of Clerk's Office Staff Attorney at the Supreme Court of Florida. The primary purpose of my position was to manage and monitor the status of cases involving related issues and/or parties, including death penalty appeals. In that capacity, I helped develop a plan for efficiently handling the loss of counsel in numerous capital appeals following the legislative abolition of the state-funded collateral post-conviction advocacy office charged with representing death row inmates convicted and sentenced in the northern region of the state. My duties as a Staff Attorney for the Supreme Court of Florida also included reviewing and providing recommendations for the disposition of pre-assignment motions and extraordinary writ petitions o ver which the Court had constitutional jurisdiction. I also assisted the deputy clerks in processing all *pro se* filings and correspondence as well as identifying those cases appropriate for administrative dismissal. Where necessary and requested, I prepared for the Clerk of the Court and the assigned administrative justice legal memoranda on different issues that arose in the context of the day-to-day operations of the Clerk's Office (e.g., public records requests, court record privacy issues, clarification of the Court's jurisdictional jurisprudence, etc.). I also assisted in the development of appellate jurisdiction training materials for court staff attorneys and law student interns, drafted amendments to the Court's Internal Operating Procedures, spearheaded the formation of a Pro Se Case Processing Committee at the Court, and supervised unpaid law student interns at the Court.

Both before and after working at the Supreme Court of Florida, I was for many years a Career Staff Attorney at the First District Court of Appeal, one of five intermediate appellate courts in Florida. In that capacity, I prepared bench memoranda and proposed opinions on hundreds of appeals, both criminal and civil. Unlike Tennessee, Florida's intermediate appellate courts have general jurisdiction over specific geographic regions of the state. As a result, the First District Court of Appeal, which is the largest of the five intermediate appellate courts, hears all criminal and civil appeals emanating from the northern region of the state. The First District also is unique in that, by statute, it has statewide jurisdiction over all workers' compensation appeals in the state. Thus, the appeals I worked on as a Career Staff Attorney at the First District included criminal direct and collateral post-conviction appeals, appeals from the denial of habeas corpus petitions, appeals from final decisions of administrative agencies, all manner of extraordinary writ petitions over which the appellate courts in Florida have jurisdiction (i.e., mandamus, habeas corpus, quo warranto, prohibition and certiorari), workers' compensation appeals, and appeals from final judgments in civil actions involving all areas of civil practice (e.g., personal injury, medical

malpractice, contracts, property, corporate structure, tax, divorce, parental termination, dependency and neglect, etc.). As a Central Staff Attorney at the First District, I also screened criminal and civil cases for jurisdictional defects and recommended summary disposition for those cases over which the Court did not have jurisdiction.

Working for the trial court judges of the Seventh Judicial Circuit of Florida, and as a paid legal intern during law school for the trial court judges of the Sixteenth Judicial Circuit of Florida, prepared me well for determining harmful error at the appellate level. In working for these trial courts, I often prepared draft orders that included detailed findings of fact and conclusions of law in criminal and civil cases. Similar to my work as a Capital Case Attorney in Tennessee, I also often attended pretrial and trial proceedings in criminal and civil cases, including many high-profile death penalty cases. In fact, during my tenure with the Seventh Judicial Circuit, I assisted the trial judges in disposing of post-conviction relief petitions filed by death row inmates such as Konstantinos Fotopoulos, Louis Gaskin, Ted Herring, Deidre Hunt, Kenneth Quince, and Robert Teffeteller. The capital post-conviction assistance I provided included work on several cases simultaneously remanded by the Supreme Court of Florida for individual hearings on the now famous issue in Florida of whether defense attorney Howard Pearl, who represented many capital and non-capital defendants, had a conflict of interest because he was a "special" deputy sheriff in Marion County, Florida while simultaneously functioning as a defense attorney.

Working on death penalty cases can be daunting; however, I was prepared for the enormity of the work by the very first position I held upon the completion of my law school education. Upon my graduation from law school, I accepted a position with the Volunteer Lawyers' Resource Center (VLRC), a non-profit entity responsible for recruiting pro bono counsel for death row inmates. The mission of VLRC was to engage in direct representation for these capital clients while simultaneously attempting to find them permanent pro bono counsel. As a result, I often drafted portions of pleadings for state and federal courts in collateral post-conviction proceedings involving the clientele of VLRC. I also conducted client interviews and field investigations, often utilizing public records requests to compile necessary data pertaining to clients. During this time, I performed legal work to varying degrees on the capital cases of many inmates, four of whom I regularly met with in prison. Some of the inmates upon whose cases I worked are now deceased, some having been executed and others having died of natural causes while awaiting execution. Many remain on death row in Florida to this day.

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

As an employee of the court systems of both Tennessee and Florida, I have become a creative problem solver and have very often successfully proposed innovative ways of more efficiently processing cases, thereby delivering better service to the public. For example, I was involved in the beginning stages of the on-going project in the Florida State Courts System of "going paperless" in terms of e-filings and the digital circulation of memoranda and draft opinions. In Tennessee, I have continued to be involved in the nationwide trend of state appellate courts utilizing technology to better deliver service. For instance, I assisted the Eastern Divisions of the Court of Criminal Appeals and Court of Appeals in transitioning to the electronic filing and processing of claims for attorneys' fees and costs by court-appointed appellate counsel. Along with all of my fellow court personnel in the appellate courts of Tennessee, I am also preparing for the imminent transition to the new C-Track docketing system that will function, at least internally, more like the PACER system of the federal courts than the JITS program utilized now.

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

Not applicable.

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

Not applicable.

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

Over the past four years, I have assisted family members with probate and other legal matters attendant to the passing of a loved one. In 2009, two of my maternal aunts passed away within the same thirty-day period leaving no heirs other than my grandmother. One of them lived in California at the time of her death and had no will. In 2012, my grandmother passed away and I assisted my mother, who was named the executor of my grandmother's estate, in probating the will. That probate proceeding closed in April of 2013. In May of 2013, my sister passed away here in Tennessee and I am assisting my brother-in-law in closing out her affairs. No attorney has been utilized, or will be utilized, in handling any of these matters other than me.

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

Not applicable.

EDUCATION

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

UNIVERSITY OF MIAMI SCHOOL OF LAW, Coral Gables, Florida 1991 - 1994
Juris Doctor (J.D.) *Cum Laude*
- University of Miami Law Review
- Order of the Coif
- Honor Council
- International Legal Fraternity of Phi Delta Phi (Bryan Inn)
- Paul B. Anton Merit/Leadership Scholarship Recipient (Full Tuition for Two Years)
- American Jurisprudence Book Award, Federal Civil Procedure
- Vice President, Forum for Women & the Law 1992 - 1993
- Staff Writer, *Res Ipsa Loquitur* (law school newspaper)

UNIVERSITY OF CALIFORNIA, SAN DIEGO, La Jolla, California 1987 - 1991
Bachelor of Arts (B.A.) Political Science (Dual Minors: History / Law)
- Provost's Honor list (4 of 12 trimesters)
- Senior Editor, *Course & Professor Evaluations* (annual student-published guide to courses)
- Staff Writer, *UCSD Guardian* (campus newspaper)

PERSONAL INFORMATION

15. State your age and date of birth.

I am 43 years old. My date of birth is August 16, 1969.

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

7 years, 2 months

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

7 years, 2 months

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

Loudon County, Tennessee

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

Not applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No, with the exception of paying citations for minor traffic infractions.

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.

Not applicable.

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

Barclays Bank Delaware v. Porsche Lyn Shantz, Case No. 10-CV-1335 (General Sessions Court of Loudon County) – This civil warrant was served upon me in November of 2010, after I had already negotiated a settlement with this company for an outstanding debt on a closed credit card and begun making payments pursuant to that settlement agreement. The civil action was voluntarily dismissed in February of 2011, after I filed an answer explaining the mistake and spoke to the attorneys representing Barclays. Apparently, I was not the only person against whom Barclays had initiated wrongful collection actions. In May of 2012, I received a cash payment in the amount of $100.00 as a result of the settlement reached in Gutierrez v. Barclays, Case No. 10-CV-1012 DMS BGS (S.D. Cal.), a class action instituted against Barclays based upon its alleged wrongful debt collection practices.

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

On March 31, 2005, I filed with my now former husband a joint Voluntary Petition for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Florida. The case style and

number were as follows: In Re: Ian Lamar Haigler & Porsche Lyn Shantz, Case No. 05-40376-LMK (Bankr. N. D. Fla.). The order of discharge was entered on July 12, 2005.

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.

Other than the legal proceedings listed in Questions #23 & #24, the only other legal proceeding in which I have been a party was my divorce. The case style and number were as follows: Porsche Lyn Shantz v. Ian Lamar Haigler, Case No. 10991 (Chancery Court for Loudon County). The final judgment was entered on April 16, 2007. Our divorce was amicable and was resolved pursuant to a Marital Dissolution Agreement and Agreed Permanent Parenting Plan. Mr. Haigler did not attend the final hearing because, at the time of the filing of the Complaint and up to the present time, he has resided in the People's Republic of China where he is an English professor at Nantong University. Despite the distance, we continue to work together in parenting our minor child. Pursuant to our mutual belief that despite our personal differences our child should be raised by us as a family, Mr. Haigler is a guest in my home every summer when he travels to the United States to exercise his co-parenting time with our child.

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.

Member, Loudon County Republican Women

I also have attended many churches with family members since becoming a resident of Tennessee; however, I would consider myself mostly a member of the Episcopal Church of the Resurrection in Loudon County, Tennessee, because that is the church of my particular faith. Before moving to Tennessee, I was an active member of Holy Comforter Episcopal Church in Tallahassee, Florida.

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.

Yes. I was a member of the Girl Scouts of America in my youth. It is my understanding that only females may become members of this organization.

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.

I became a member of the Knoxville Bar Association (KBA) in August of 2006, and have been a member off and on of the American Bar Association (ABA) throughout my career as a lawyer. I am not a member of either organization at the present time and cannot recall the exact dates when I ceased being a member of either organization.

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.

I was appointed by the President of The Florida Bar to serve on the Appellate Court Rules Committee of Florida from 2005 until 2008. During my tenure on the Committee, I served on the Criminal Rules, Family Law and Original Proceedings Subcommittees and assisted in the drafting of several proposed amendments to the Florida Rules of Appellate Procedure that have since been adopted by the Supreme Court of Florida. For instance, I drafted with other Criminal Law Subcommittee members what became the 2009 amendments to Rules 9.142 and 9.200 of the Florida Rules of Appellate Procedure pertaining to the content of the record in death penalty cases.

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

I co-authored the Tennessee Capital Case Bench Book (2007) published by the Tennessee Administrative Office of the Courts for use by Tennessee's trial court judges in handling death penalty trials and post-conviction proceedings. My research, writing and editorial assistance also has been formally acknowledged by the authors in the following published legal articles and books:

- James R. Wolf, Judicial Discipline in Florida: The Cost of Misconduct, 30 Nova L. Rev. 349 (2006)
- Harry Lee Anstead, Gerald Kogan, Thomas D. Hall and Robert Craig Waters, The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431 (2005)
- Philip J. Padovano, Florida Civil Practice (1999 ed.)
- Anthony V. Alfieri, Impoverished Practices, 81 Geo. L.J. 2567 (1993)
- Anthony V. Alfieri, Stances, 77 Cornell L. Rev. 1233 (1992)
- Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769 (1992)

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

I have not taught any law school courses, CLE seminars, or other law related courses within the last five (5) years.

However, in August of 2007, I was an invited presenter at the "Managing the Capital Case in Tennessee" three-day program for Tennessee trial court judges held in Nashville, Tennessee. This program was sponsored by the Tennessee Administrative Office of the Courts and the National Judicial College. I functioned as a break-out discussion group leader at that conference.

In April of 2007, I participated in a lunch series sponsored by the Criminal Law Society of the University of Tennessee by giving a lecture entitled "Communicating Effectively with a Condemned Client." I discussed my past experience interviewing death row inmates as part of the legal team representing said inmates.

In October of 2004, I was an invited presenter at the 5th Annual Florida Advanced Capital Cases Seminar. This was also a three-day program. It was sponsored by the Commission on Capital Cases of the Florida Legislature. My part of the program was entitled "The Unwritten Rules of the Florida Supreme Court."

In July of 2004, I participated in a death penalty roundtable discussion as an invited presenter at the 28th Annual Seminar of the Council of Appellate Staff Attorneys (CASA).

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.

On February 16, 2010, I submitted a completed Candidate Nominating Petition for the purpose of being placed on the ballot for the Republican Party primary as a candidate for the position of General Sessions Judge of Loudon County. I subsequently withdrew my candidacy prior to the primary because, upon checking my personal records, I would not have lived in the State of Tennessee for five (5) years on the date I would have had to assume office.

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

Not applicable.

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

I have attached two samples of my writing from my work as a staff attorney for the courts of Tennessee and Florida. These writing samples are 100% my own work and do not represent any actual court memoranda or order, except for the legal analyses contained therein.

In addition, I would note that I provided substantial drafting assistance on the following death penalty opinions in Tennessee, see Nickolus L. Johnson v. State, No. E2010-00172-CCA-R3-DD, 2012 WL 690218 (Tenn. Crim. App., Knoxville, Mar. 5, 2012); Leonard Edward Smith v. State, E2007-00719-CCA-R3-PD, 2010 WL 3638033 (Tenn. Crim. App., Knoxville, Sept. 21, 2010), as well as the following reported opinions of the Supreme Court of Florida. See Baker v. State, 878 So. 2d 1236 (Fla. 2004); Gandy v. State, 846 So. 2d 1141 (Fla. 2003); Logan v. State, 974 So. 2d 472 (Fla. 2003); Persaud v. State, 838 So. 2d 529 (Fla. 2003); Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002); Tyson v. The Florida Bar, 826 So. 2d 265 (Fla. 2002).

ESSAYS/PERSONAL STATEMENTS

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

I am a daughter of Tennessee without actually having been born here. My grandfather came here from North Carolina in 1944 as a carpenter for the work that was available in building the infrastructure for the City of Oak Ridge that, at the time, was part of the Manhattan Project. I was born in Washington, D.C., where my mother, who grew up in Oak Ridge, found a career in public service with the federal government and met my father, who by the time he met her was also a career public servant after serving in the United States Navy. My parents taught me the value of public service as we moved about the country when I was a child. Throughout it all, the one place that was constant for me was Tennessee. My parents moved to Loudon County in 1988 when my father retired, and East Tennessee has been home to me every day since. I wish to serve the citizens of Tennessee in the way I was raised to do so, with my work.

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)***

I believe that my work history speaks for itself in terms of my commitment to equal justice under the law and public service. Upon my graduation from law school, I committed myself to public service even though I was heavily recruited by large law firms in both Florida and New York. In furtherance of my commitment, I accepted a position representing death row inmates in collateral post-conviction proceedings. I have never regretted that decision and have consistently pursued a career in public service with the courts of Florida and now Tennessee based upon that experience. It should be noted that pro bono legal activity has only been a possibility for me since I became a resident of Tennessee. Attorneys who work for the judicial branch in Florida are prohibited from engaging in legal practice while employed with the courts, including the provision of legal service on a pro bono basis.

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 appointment as a judge in the Eastern Division of the Tennessee Court of Criminal Appeals. The Court of Criminal Appeals was created by the Legislature in 1967 to hear appeals from final judgments in felony and misdemeanor cases, as well as post-conviction matters, including appeals from orders

disposing of petitions for writs of habeas corpus and coram nobis. The jurisdiction of the Court was expanded in 1992 to include appeals from final judgments in capital cases, which previously were heard only by the Supreme Court of Tennessee. My appointment to the Court would give it a new judge who not only has a great deal of criminal appellate experience, but also a pre-existing knowledge of how the Court operates internally. My appointment would also provide the Court with a judge capable of assisting it in transitioning to the predominantly electronic environment that is the future of appellate courts nationwide.

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)***

It always has been my belief that those who work for the judicial branch should promote public confidence in the rule of law by giving back to their community in the form of service. To that end, even though I have been a working mother for virtually my entire legal career, I have tried in small ways to give my time in service to my community.

For instance, in December of 2011, I organized a visit to the Knoxville Supreme Court building for Loudon County Girl Scout Troop 20654. The girls were able to meet Supreme Court Justice Sharon Lee and Court of Criminal Appeals Judge Norma Ogle, and earned credit toward their government badges for learning from the judges how appellate courts work. Very recently, I also participated in Career Day at my youngest daughter's elementary school. While still in Florida, I volunteered as a Moot Court Judge at the Florida State University College of Law and regularly participated in elementary and high school law-related education activities. To me, it cannot be overstated how valuable it is to show the youth and children of my community that there are no limits to what they can achieve. I would like to continue these efforts as a judge by becoming more active in the Boys & Girls Club of the Tennessee Valley and the Girl Scout Council of the Southern Appalachians.

As an active member of Holy Comforter Episcopal Church in Tallahassee, Florida, I also volunteered my time sorting donated food to provide to the needy every week. The work was very rewarding and something I desire to do again as my youngest child grows older and my time as a working, single mother is not as taxed. Until that time, I involve myself, as I have done for years, at least financially and as a prayer partner, in the missionary work of my cousins in Honduras and Guatemala. Their work has provided so much already to the people of these countries and, as a judge, I would be honored to play a greater role in supporting their calling.

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)***

The entirety of my life has made me the ideal candidate for this judicial position. As previously stated, I did not become a lawyer for financial gain or prestige. The choices that have shaped the path of my career have been driven by the need to serve the public, and particularly those who cannot afford legal services. I was not born into wealth, nor was I born into a family of lawyers or legal professionals. I discovered the law as a passion by being a student of history. Judges, particularly appellate judges who decide cases upon a "cold" record, must never forget that their decisions have life-altering consequences for those who are subject to their pronouncements. The law is about people. In college, I was privileged

to have as one of my professors, Peter H. Irons, who educated me about the most well-known, landmark United States Supreme Court cases of our time, through the eyes of the litigants who brought those cases. I knew then that a legal career could be a calling, and I have always pursued it as such. In my career as a court law clerk and staff attorney, I have never forgotten the faces of the condemned men I met personally in the early days of my career. I remember them, not because they were innocent or worthy of mercy or pity, but to remind me that it is always a life that a court adjudicates every time it acts.

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)***

"A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Tenn. Sup. Ct. R. 10, RJC 2.2. I understand and have upheld as a staff attorney for the courts of two states this particular provision of the Code of Judicial Conduct. Personally, I have been constrained by the law to recommend the granting of relief on occasion on what the lay public terms "technicalities" because application of the substance of the law required such results. I understand that this is not really an example of upholding the law despite my personal disagreement with it. Instead, it is an example of applying the law to reach a result that may not comport with my personal sense of justice. It is my belief that it should be a rare circumstance in which a judge would find himself or herself in a position of "disagreeing" with the actual substance of the law. I understand that, as citizens, we elect representatives to enact laws that we feel are wise and comport with our personal beliefs. However, a judge is not at liberty to "disagree" with the substance of the law because the law, as duly enacted, represents the will of the people. Alexander Hamilton said it best in Federalist No. 78, an essay written to explain to the citizens of the ratifying states the structure of the judiciary under the proposed Constitution of the United States, "There can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller who unite the requisite integrity with the requisite knowledge."

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. Thomas D. Hall, Clerk of the Court, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399; Ph. (850) 488-0125; email: hall@flcourts.org

B. Sherry D. Williams, Senior Vice President and Chief Ethics & Compliance Officer, Halliburton Company, 2107 City West Blvd., Bldg. 4-1323A, Houston, TX 77042; Ph. (713) 839-2627; FAX: (713) 839-4563; email: sherry.williams@halliburton.com

C. Martin L. Ellis, 190B Market Place Blvd., Knoxville, TN 37922; Ph. (865) 643-8508; FAX: (865) 951-2907; email: mellis@mlellislaw.com

D. Jim Shields, Lenoir City Councilman, 407 North E Street, Lenoir City, TN 37771; Ph. (865) 986-5783

E. Christopher A. Johnson, Master Sergeant (Ret.), United States Marine Corps / Department of Defense GS-13 Civilian Retiree, [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] of Criminal Appeals of Tennessee, and if appointed by the Governor, 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 10, 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

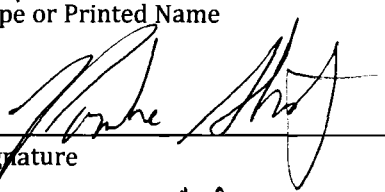
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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.

Porsche L. Shantz
Type or Printed Name


Signature

June 10, 2013
Date

25824
BPR #

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

The Florida Bar, State of Florida, Bar No. 83186

TENNESSEE WRITING SAMPLES
submitted by Porsche Shantz

DISCLOSURE: The following writing samples are fictionalized to conceal any names associated with actual cases; however, they may reflect the legal analyses utilized in actual court orders.

Analysis of a Rule 9 Application for Permission to Appeal

Pursuant to Rule 9 of the Rules of Appellate Procedure, counsel for the Defendant has filed an application for permission to appeal from the trial court's denial of his motion to dismiss the presentment charging him with first degree premeditated murder. The State of Tennessee opposes the application on grounds that: (1) the trial court properly denied the speedy trial claim presented in the motion to dismiss; and (2) speedy trial issues have been held to be inappropriate for interlocutory review. For the reasons that follow, we disagree with the State and conclude that interlocutory review of the challenged order is appropriate under the unique circumstances presented in this case.

The Defendant was arrested on May 1, 1985, and charged with having sexually assaulted a three-year-old. On May 7, 1985, jail personnel responded to a fire in the Defendant's cell at the County Jail. John Smith, the Defendant's cellmate, was found hanging from the ceiling and burning. In response to questioning, the Defendant gave a complete statement and admitted to having hung and set fire to Smith. The Defendant was arrested on May 8, 1985, and charged by general sessions warrant with first degree murder in connection with the death of Smith. The Defendant was held without bond on that charge. Later that month, the General Sessions Court entered an order directing an in-patient mental health evaluation to determine the Defendant's competence to stand trial and mental condition at the time of the alleged murder. The results of that evaluation were that the Defendant was not competent to stand trial on any of the charges against him. The evaluation team indicated that the Defendant met the criteria for judicial commitment to the Mental Retardation Secure Facility at Middle Tennessee Mental Health Institute pursuant to Tenn. Code Ann. § 33-5-305 (1984), which was replaced in 2000 by Tenn. Code Ann. § 33-5-403 (2000).

On July 1, 1985, the Grand Jury returned indictment number 115 charging the Defendant with two counts of aggravated rape for the sexual assaults on the three-year-old. Within days of the return of that indictment, the State filed a complaint, pursuant to the recommendation of the mental health evaluation team, seeking the involuntary commitment of the Defendant to a secure facility until such time as he is capable of standing trial on both the charges pending in that case and the first degree murder charge still then pending in the

General Sessions Court. The complaint initiated a case independent from the pending criminal cases. On July 17, 1985, an order was entered in that case committing the Defendant to the Mental Retardation Secure Facility at Middle Tennessee Mental Health Institute. In the order of commitment, the trial court found "by clear, unequivocal, and convincing evidence" that the Defendant "is mentally retarded and, because of this mental retardation, poses a likelihood of serious harm" to both himself and others.

The Defendant has remained incompetent to stand trial since his commitment. In 1988, the director of the Mental Retardation Secure Facility reported to the trial court that the Defendant remained incompetent to stand trial and was "not likely to become competent in the foreseeable future." In 1990, the director of that same facility, now known as the Harold W. Jordan Habilitation Center ("HJC"), reported to the trial court that the Defendant remained incompetent to stand trial, but was "being transferred from a secure to a non-secure status" in the transitional program located at the Middle Tennessee Mental Health Institute based on his "encouraging improvements." The Defendant remained in non-secure developmental centers from 1991 until 1999. At that point, he was transferred back to secure status at HJC based on an incident that occurred on October 5, 1999, in which he apparently attacked his roommate and threatened to kill him. In 2003, the trial court was informed that the Defendant remained incompetent to stand trial and that competency restoration training services had been discontinued in May of 2000 after it was determined that the Defendant "was incapable of attaining competency to stand trial due to his cognitive limitations, specifically mental retardation." The trial court received another status report dated March 1, 2005, indicating that the Defendant remained incompetent to stand trial, that he had participated in sex offender treatment, and that he still met the criteria for commitment because he continued to pose a substantial likelihood of serious harm to himself or others.

In a status report dated September 1, 2005, the trial court was advised that the Defendant remained incompetent to stand trial and "will not ever be competent in any foreseeable future." However, the report also stated:

> [The Defendant] has primary psychiatric diagnoses (DSM-IV) of Mild Mental Retardation and Personality Disorder, Not Otherwise Stated. He is not prescribed any psychotropic medications.
>
> While at HJC, [the Defendant] has had the opportunity to participate in sex offender treatment and in supplemental social skills strengthening groups. While he shows an occasional minor misbehavior, [the Defendant] generally abides with center rules and is peaceable with peers. [The Defendant] denies all charges against him.

> We have completed our forensic obligations for [the Defendant] and wish to transition him to a suitable supervised living situation outside of a secure setting. An Independent Professional Evaluation (Quality Review Panel) conducted March 9, 2005 at Clover Bottom Developmental Center indicated that [the Defendant] could be recommended for community placement as the benefits from institutional care had largely been maximized.
>
> As [the Defendant] no longer meets the commitment standards under which he was originally admitted to [HJC], and in accord with T.C.A. 33-5-410, we are notifying the court of our plans to transition [the Defendant] to a suitable residential or community placement. This letter is to serve as notification of our intention to transition [the Defendant] from a secure facility to an appropriate residential, mental health, or community placement based upon his needs for treatment and supervision. Upon release, [the Defendant] will no longer be under the custodial care of the Department of Mental Retardation. It is our understanding that if the court does not set a hearing and notify the facility within fifteen (15) days of its receipt of this notice, the facility shall release the person from involuntary commitment.

On September 13, 2005, the State filed in case number 115 a motion in opposition to the Defendant's release into the community and requested a hearing, pursuant to Tenn. Code Ann. § 33-5-410 (2000), for the purpose of determining whether the Defendant continued to meet the criteria for judicial commitment set forth in Tenn. Code Ann. § 33-5-403 (2000). The State also filed a motion for an independent mental health evaluation in case number 115, which the trial court granted. The results of this forensic evaluation indicated that the Defendant was now competent to stand trial. As such, in April of 2006, the State filed a motion for a competency hearing to determine whether the Defendant had finally attained the competency necessary to stand trial on the charges pending against him.

In November of 2006, defense counsel filed a motion to dismiss the indictment in case number 115, which substantively sought dismissal of the murder charge still pending against the Defendant in General Sessions Court, on grounds that the length of time that charge had remained pending against the Defendant, while he remained incompetent to stand trial, violated his due process and speedy trial rights as recognized in Jackson v. Indiana, 406 U.S. 715 (1972). Pursuant to a subsequent referral for a determination of the Defendant's competence to stand trial on all criminal charges pending against him, it was determined by an evaluator at HJC that the Defendant "is not competent to participate in his own defense and is not restorable to competency related to cognitive deficits consistent with mild mental

retardation, including his lack of retention capacity, limited vocabulary, and poor reasoning ability." This report indicates that the Defendant's history of diagnostic testing reflects the following full scale IQ scores over the course of his lifetime: 1971 (age 10) - 45; 1977 (age 15) - 45; 1979 (age 18) - 56; 1996 (age 35) - 67; 1999 (age 38) - 67; 2004 (age 43) - 52; 2006 (age 44) - 59. This report also stated that the Defendant "will be eligible for Division of Mental Retardation Services (DMRS) community services once he is discharged from HJC," but cautioned:

> He should continue to be provided with stress management skills to help him identify triggers for anger and stress and develop coping skills for handling stressors. Once released from HJC, he would benefit [from] a continuously supervised living situation due to his poor judgment, limited reasoning skills, and remote history of lack of self control and aggression. He is at risk for future acting-out behavior that may involve the legal system if he is inadequately placed and monitored in the community.

On September 12, 2007, the Grand Jury returned indictment number 116 charging the Defendant with one count of first degree premeditated murder in connection with the death of John Smith on May 7, 1985. At a hearing in August of 2008, the trial court considered defense counsel's motion to dismiss as having been filed in case number 116 and denied the motion. On May 18, 2009, the trial court entered a written order confirming the denial of the motion to dismiss as well as a written order granting the Defendant permission to appeal from the denial of the motion to dismiss pursuant to Rule 9 of the Rules of Appellate Procedure. In granting permission to appeal, the trial court noted that, if the Defendant proceeded to trial on the murder charge, there was a strong likelihood that he would be convicted based upon his written statement implicating himself in the death of Smith. The trial court reasoned therefore that the need to prevent needless, expensive and protracted litigation supported the granting of an interlocutory appeal under the circumstances.

Relying primarily on Jackson and this Court's decision in Cox v. State, 550 S.W.2d 954 (Tenn. Crim. App. 1976), defense counsel argues in the application for permission to appeal that immediate review of the trial court's order denying the motion to dismiss should be granted because the trial court clearly ignored these applicable precedents in denying the motion to dismiss. We agree that, under the circumstances presented in this case, an interlocutory appeal of the trial court's order denying the motion to dismiss is warranted.

We acknowledge, as the State asserts in its response, that our supreme court has held that "a defendant is not entitled to interlocutory review of speedy trial claims." State v. Hawk, 170 S.W.3d 547, 556 (Tenn. 2005) (affirming the denial by this Court of an

application for interlocutory appeal pursuant to Rule 9 from an order rejecting a claimed speedy trial violation). However, as the supreme court commented in Hawk, the reason such claims are inappropriate for interlocutory review is that such appellate review "would frustrate the very right the Speedy Trial Clause of the Sixth Amendment seeks to protect—the timeliness of prosecution." Id. at 554. In this case, the prosecution of the Defendant already has been delayed for over twenty (20) years. If anything, immediate review of the challenged order "will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed" as contemplated by Rule 9(a) of the Rules of Appellate Procedure.

We also disagree with the State on the Defendant's probable success on the merits of his challenge to the order denying the motion to dismiss. In Jackson, the United States Supreme Court held "that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." Jackson, 406 U.S. at 738. In reaching this conclusion, the Supreme Court noted that "[t]here is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time." Id. at 726. The Defendant in Jackson was described by the Supreme Court as "a mentally defective deaf mute with a mental level of a pre-school child." Id. at 717. In Cox, this Court held that the trial court in that case "was in error in failing to grant the defendant's motion to dismiss the indictment because the accused had been denied his right to a speedy trial for the reasons set out in Jackson v. Indiana." Cox, 550 S.W.2d at 955. Notably, the defendant in Cox had been charged, like the Defendant in this case, with first degree murder. See id. at 955. However, unlike the Defendant in this case, who appears to have no foreseeable hope of being restored to competence as reflected in the numerous mental health evaluations conducted since his judicial commitment, the defendant in Cox ultimately was determined to be competent to stand trial and obtained reversal of his criminal conviction on direct appeal based upon the trial court's denial of his motion to dismiss the charge while he remained incompetent. See id. at 956, 958. In reversing the defendant's first degree murder conviction in that case, this Court commented that the ten-year period that it took to restore the defendant to competence "was perhaps the longest ever to come to the attention of this Court." Id. at 956. The twenty-four (24) years that have now elapsed since the Defendant in this case was arrested, declared incompetent to stand trial, and judicially committed pending the restoration of his competence far exceeds what this Court determined in the 1976 decision in Cox to have been the "longest" ever to come to the attention of the Court.

Accordingly, the application for permission to appeal is GRANTED. The record on appeal shall be transmitted to this court within the time provided by Rule 9(e) of the Rules of

Appellate Procedure. This appeal shall then proceed in accordance with the Rules of Appellate Procedure and the rules of this Court. The proceedings in the trial court are hereby STAYED pending the outcome of this appeal.

Analysis of a Rule 8 Motion

Pursuant to Rule 8 of the Rules of Appellate Procedure, and Rule 32(d)(2)(B) of the Rules of Criminal Procedure, counsel for the Defendant has filed a motion asking this court to admit the Defendant to bail pending the outcome of this appeal. Having considered the motion and applicable law, together with the record, we conclude that the motion is not well-taken.

A jury convicted the Defendant of the following offenses: (1) resisting a stop, frisk, halt or arrest; (2) burglary of a business; (3) vandalism of property valued over $1000 but not greater than $10,000; and (4) theft of property valued over $1000 but not greater than $10,000. The trial court sentenced the Defendant to six months for the resisting offense and as a career offender to twelve (12) years' imprisonment on all remaining offenses to be served concurrently with one another but consecutively to an unexpired Alabama sentence.

On June 3, 2010, the day the jury announced its verdicts, the trial court revoked the Defendant's pretrial bond and the Defendant was taken into custody. Following the trial court's denial of the Defendant's motion and amended motions for a new trial, defense counsel timely filed a Notice of Appeal from the Defendant's judgments of conviction and sentence. On February 11, 2011, a little over a month after filing the Notice of Appeal, counsel for the Defendant filed a motion requesting the trial court to release him to bail pending the outcome of this appeal. A hearing on the motion was held on March 7, 2011. Defense counsel presented the testimony of seven witnesses at this hearing. Before any witnesses testified, the prosecutor announced that Alabama had dropped its hold on the Defendant so that if the Defendant were granted release on bond by the trial court, he would not be transported to Alabama for service of his sentence there. The State presented no evidence at the hearing other than its cross-examination of the witnesses.

John Smith was the first witness presented in support of the motion. He testified that he had been a close friend to the Defendant for the past three years, had worked with the Defendant on business projects and attended car shows with the Defendant, and that he did not feel that the Defendant would pose any danger or risk to the community if he was released on bond pending the outcome of this appeal.

Eric Williams testified next in support of the motion. He stated that he is the program manager for Haven House, a non-profit organization that helps people with criminal records find employment and rebuild their lives. Williams testified that he had helped the Defendant many years ago and that the Defendant would be eligible for his services should he be granted release on bond by the trial court. Williams testified that the Defendant was a man of above average intelligence with substantial artistic talent. Williams testified that his program would be happy to work with the Defendant if he were released on bond and that, in fact, a picture of the Defendant and his daughter were on the front page of the organization's website advertising its services.

Jack Taylor testified next in support of the motion. He stated that he is the chairperson of the Outreach Committee at St. Paul's Episcopal Church and also volunteers at Haven House. Taylor testified that he would be willing to work with the Defendant and provide him with supportive services if he were released on bond.

William Jones testified next in support of the motion. He stated that he was retired from work as a probation manager to the juvenile division for the Tennessee Department of Children's Services. Jones testified that he had been the Defendant's probation officer when the Defendant was a juvenile. Jones testified that while the Defendant was on juvenile probation he successfully completed high school through a program run by the Seventh Day Adventists in Detroit, Michigan. Jones stated that he had been in touch with the Defendant in the last few years and that he did not believe that the Defendant posed any risk or threat to the community if released on bond.

Mary Johnson testified next in support of the motion. She stated that she is the mother of the Defendant's first two children who are sixteen and six years of age, respectively. She testified that prior to the Defendant's incarceration for these offenses, he was very involved in the day-to-day care of their two children. She testified that her son, the younger of the two children, had been asking about his father a lot since the Defendant had been incarcerated and that this child had also started having issues in school relative to his father's incarceration. Johnson testified that she works and goes to school full-time and that taking care of the children by herself had been difficult during the Defendant's incarceration. She stated both of her children have health issues for which she must take them to doctors on a regular basis. She testified that she also had two surgeries back to back during the pendency of the Defendant's case and that her continuing problems from those procedures made it even more difficult to care for her children without the Defendant's help. Johnson testified that while the charges had been pending against the Defendant for the past two and a half years, he had made no attempts to flee or avoid any court appearances. She further testified that she had no fears that he would attempt to flee if he were released on bond.

David Brown testified next in support of the motion. He stated that he is the executive director of Hope, Inc., an organization that teaches life skills and provides gang intervention and other services to children in the Shelby County School system. He also stated that he had been an ordained minister for the past eleven years, serving for the last five years as the minister at Main Street Baptist Church. Brown testified that he knew the Defendant and his family very well and that the Defendant had been working diligently with young people through Brown's organization up to the point of his incarceration. Brown testified that the Defendant, because he had been in trouble with the law, had a unique ability to communicate with the troubled young people Brown's organization sought to help. Brown testified that he had never seen or known the Defendant to use drugs or alcohol, which Brown commented was amazing to him given the environment the Defendant had been exposed to in his life. Brown further testified that he knew that the Defendant had three children and was very active in the lives of all three. Brown conceded on cross-examination that he was not familiar with the full extent of the Defendant's criminal record, that he was not aware that the Defendant qualified for career offender sentencing, and that he was not aware that the Defendant previously had been fired as an adult for stealing from his employer. Bennett maintained that despite the Defendant's record, he believed that the Defendant had been making a real effort to change recently.

Jane Jackson testified as the last defense witness in support of the motion. She stated that she is the Defendant's mother. She testified that the Defendant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) when he was nineteen (19) years old and that he will not be able to obtain the medication and psychotherapy needed for his condition while incarcerated. She testified that if the Defendant were released on bond he could obtain work and provide the court-ordered child support for his children that he has fallen past due on while incarcerated. Jackson testified that the Defendant is an only child and that she requires his assistance for her own medical needs. She testified that her son is very active in the lives of his children and that the Defendant's incarceration has been particularly devastating on his six-year-old son. Jackson testified that she did not believe that the Defendant was a threat to the community or a flight risk. She stated that the Defendant remained out on bond for two and a half years prior to trial and made every court date without fail. Jackson testified that the Defendant's devotion to his children would make fleeing the last thing on his mind. She testified that the Defendant owns a home and therefore would have a place to live while on bond. On cross-examination, Jackson admitted that at the age of nineteen (19), the Defendant faked his own death while awaiting trial on other charges, failed to appear in court, and had to be apprehended on a federal fugitive warrant.

At the conclusion of the testimony, the trial court also accepted into evidence a letter of support and request for leniency for the Defendant from Dr. Thomas Ross, who serves on the Shelby County Commission. In the letter, Dr. Ross states that he has known the Jackson family for over thirty (30) years. Dr. Ross states that he believes the Defendant recognizes the mistakes he has made and is taking steps to avoid making those same mistakes in the future.

The trial court denied the Defendant's motion to set bond pending appeal. In so doing, the trial court commented that the Defendant has one of the worst non-violent criminal theft records the court had ever seen. The trial court further determined that the Defendant had been given opportunities in his past and had failed to take them. The trial court acknowledged that the Defendant was very bright and talented, but stated that every time the Defendant had been released from incarceration in his life he had committed new crimes. The trial court also noted "that time where he fled and did not turn himself in." Based upon these announced reasons, the trial court concluded that the Defendant was a flight risk and refused to grant him an appearance bond pending the outcome of this appeal.

The constitutional right to bail, set forth in article I, section 15 of the Tennessee Constitution, is lost upon conviction. See State ex rel. Brown v. Newell, 391 S.W.2d 667, 670 (Tenn. 1965); Goins v. State, 237 S.W.2d 8, 10 (Tenn. 1951); Hicks v. State, 168 S.W.2d 781, 782 (Tenn. 1943). A trial judge is granted the discretionary authority to set an appearance bond pending the outcome of an appeal where the sentence imposed provides for confinement in the state penitentiary. Tenn. Code Ann. § 40-26-102(a). In determining whether to grant a defendant bail pending appeal, the trial court may consider "whether or not the defendant is likely to flee or pose a danger to any other person or to the community." Id. at § 40-26-102(b). In this case, there was no evidence presented to the trial court that established that the Defendant presently is likely to flee if released on bond. To the extent the trial court relied on the Defendant's failure to appear in court and fugitive status when he was nineteen (19) years of age, the Court notes that the Defendant presently is thirty-seven (37) years of age and that the testimony presented at the bond hearing established that he had made no attempts to flee or avoid any court appearances while on bond during the two and a half years prior to trial in this case. However, the record does support the conclusion that the Defendant poses a danger to the community if released on bond. It is clear from the extent and length of the Defendant's criminal record that his propensity to commit crimes when not incarcerated poses a danger to the community sufficient to support the denial of bond.

Accordingly, the Defendant's motion for release on an appearance bond pending the outcome of this appeal is DENIED.

Analysis of a Rule 28 Application for Permission to Appeal

The Petitioner filed a timely *pro se* application for permission to appeal from an order denying his motion to re-open his prior post-conviction proceeding to consider a new claim of constitutional error. See Tenn. Code Ann. § 40-30-117(c); see also Tenn. S. Ct. R. 28, § 10(B). The State of Tennessee filed a response in opposition to the application. Upon due consideration of the arguments presented in both the application and response, together with applicable law, we conclude that the Petitioner has not demonstrated that an appeal from the order denying the motion to re-open is warranted.

The Petitioner is currently serving a twenty-five (25) year sentence for second degree murder, a Class A felony. The offense occurred on December 14, 1996. Pursuant to the Sentencing Reform Act of 1989, as it existed before its 2005 amendments, the Petitioner's presumptive sentence for the murder was enhanced by the trial court to twenty-five (25) years' imprisonment based on enhancement factors (1), (8), and (9). These factors were:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
> . . .
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; [and]
> (9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense[.]

Tenn. Code Ann. § 40-35-114(1), (8) and (9) (1995). On direct appeal, this Court affirmed the Petitioner's conviction and his enhanced sentence. See State v. Thomas Smith, No. 13, slip op. (Tenn. Crim. App., Knoxville, Oct. 18, 1999), *perm. to appeal denied* (Tenn. Apr. 15, 2000). In 2003, this Court affirmed the post-conviction court's denial of the Petitioner's petition for post-conviction relief which complained only that trial counsel had been ineffective in failing to present certain favorable defense witnesses and in denying the Petitioner the right to testify in his own defense. See Thomas Smith v. State, No. 14, slip op. (Tenn. Crim. App., Knoxville, Feb. 14, 2003), *perm. to appeal denied* (Tenn. May 1, 2003). This Court also affirmed the dismissal of the Petitioner's petition for a writ of error coram nobis in which he claimed, among other things, that "certain enhancement factors were erroneously applied." Thomas Smith v. State, No. 15, slip op. at 2 (Tenn. Crim. App., Knoxville, Jan. 2, 2004), *perm. to appeal denied* (Tenn. Apr. 5, 2004).

On May 21, 2009, the Petitioner mailed to the post-conviction court a motion to re-

open his post-conviction proceeding. In both his motion and application for permission to appeal filed in this Court, the Petitioner claims he is entitled to relief from his enhanced sentence based on the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which he alleged had been held, in Butler v. Curry, 528 F.3d 624 (9th Cir. 2008), to be retroactively applicable to cases which were not final when Apprendi was decided. The Petitioner alleges that his conviction and sentence did not become final on direct review until July 14, 2000, the deadline upon which he could have filed a petition for writ of certiorari in the United States Supreme Court. The Petitioner also specifically points out that Apprendi was decided on June 26, 2000, before his conviction and sentence became final on direct review.

The Post-Conviction Procedure Act of 1995 provides that a motion to re-open a prior post-conviction proceeding may raise a claim "based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). "The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]" Id. "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122. The post-conviction court denied the petitioner's motion to re-open on grounds that it had not been filed within one (1) year of the date upon which Apprendi was decided by the United States Supreme Court. The State argues in response to the application that the trial court properly determined that the motion to re-open had not been filed timely and that, even if the claim were considered on the merits, the Petitioner would still not be entitled to relief because this Court has held repeatedly that Apprendi and its progeny cannot be applied to cases on collateral review. The Petitioner contends in a reply to the State's response that the State waived the arguments it now makes by not filing a response to the motion below. We disagree and conclude, consistent with the position taken by the State in its response, that the motion to re-open was not filed timely and was without merit.

In Apprendi, the Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court expanded the reach of Apprendi by holding that,

[T]he "statutory maximum" for Apprendi purposes is the maximum sentence a

> judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Id. at 303-04 (emphasis in original). Our supreme court's decision in State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007) ("Gomez II"), issued on remand after reconsideration in light of Cunningham v. California, 549 U.S. 270 (2007), confirms that Apprendi and Blakely provide a basis for relief from enhanced sentencing under the Sentencing Reform Act of 1989, as it existed before the 2005 amendments. However, as the State asserts in its response to the application, this Court has held repeatedly that neither Apprendi nor Blakely can be retroactively applied to cases on collateral review. See, e.g., Jeffrey Owen Walters v. State, No. M2008-01806-CCA-R3-PC, slip op. at 7 (Tenn. Crim. App., Nashville, Oct. 20, 2009); Tony Martin v. State, No. W2008-01361-CCA-R3-PC, slip op. at 2 (Tenn. Crim. App., Jackson, May 21, 2009); Travis J. Woods v. State, No. E2007-02379-CCA-R3-PC, slip op. at 15 (Tenn. Crim. App., Knoxville, Mar. 18, 2009), *perm. to appeal denied* (Tenn. Aug. 17, 2009). In reaching this conclusion, this Court has utilized the Teague v. Lane, 489 U.S. 288 (1989) analysis for determining retroactivity, see, e.g., Donald Branch v. State, No. W2003-03042-CCA-R3-PC, slip op. at 10-11 (Tenn. Crim. App., Jackson, Dec. 21, 2004), *perm. to appeal denied* (Tenn. May 23, 2005), which our supreme instructed in Meadows v. State, 849 S.W.2d 748 (Tenn. 1993), was the test to be applied when determining the retroactivity of a new federal rule of law. See id. at 754 (" [S]tates are bound by federal retroactivity analysis when a new federal rule is involved."). While it is true that the United States Supreme Court held in Danforth v. Minnesota, 552 U.S. 264 (2008), that the states are no longer required to apply the Teague analysis when determining whether to give retroactive effect to a new federal rule of law, we are bound to follow the supreme court's directive in Meadows as to the retroactivity analysis to apply to new federal rules until the supreme court decides otherwise. See State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995).

Accordingly, the application for permission to appeal from the order of the trial court denying the Petitioner's motion to re-open his prior post-conviction proceeding is hereby DENIED. Because the record reflects that the Petitioner is indigent, costs on appeal are taxed to the State of Tennessee.

FLORIDA WRITING SAMPLE
submitted by Porsche Shantz

DISCLOSURE: The following writing sample is a fictionalized internal court memorandum. It does not represent an actual court memorandum written in conjunction with any case currently or previously pending in the State of Florida.

TO: Justice Smith

DATE: February 8, 2007

RE: The Law on Belated Discretionary Review in the Florida Supreme Court in Non-Capital Criminal Cases

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Introduction

Rule 9.141(c) of the Florida Rules of Appellate Procedure, currently provides a uniform procedure through which non-capital criminal defendants may file petitions seeking belated appeals "in the appellate court to which the appeal was or should have been taken." Fla. R. App. P. 9.141(c)(2). As presently worded, rule 9.141(c) does not specifically provide a mechanism for seeking belated discretionary review in the Florida Supreme Court.

As pointed out in the committee notes to the 1996 amendments to rule 9.141(c)'s predecessor, the procedure for seeking belated appeal set forth in the rule was merely intended to codify the procedure for seeking belated appeals previously available only by way of a petition for a writ of habeas corpus filed in the appellate court. See Committee Notes to 1996 Amendments to Rule 9.140(j) of the Florida Rules of Appellate Procedure. The fact that there was a brief period of time, following the supreme court's decision in State v. District Court of Appeal, First District, 569 So. 2d 439 (Fla. 1990), during which there were two procedures for seeking belated appeals in criminal cases—i.e., Florida Rule of Criminal Procedure 3.850 when the right to appeal was frustrated by the ineffectiveness of trial counsel, and habeas corpus for everything else—is not relevant to this discussion because the promulgation of the procedure set forth in rule 9.141(c) was intended "to reinstate the procedure as it existed prior to State v. District Court of Appeal, First District." Committee Notes to 1996 Amendments to Rule 9.140(j) of the Florida Rules of Appellate Procedure; see also Finch v. State, 717 So. 2d 1070 (Fla. 1st DCA 1998) (recognizing that the promulgation of rule 9.141(c)'s predecessor superseded the decision in State v. District Court).

In State v. Meyer, 430 So. 2d 440 (Fla. 1983), the supreme court indicated that the rationale behind allowing criminal defendants to obtain belated appeals by way of habeas, where the right to appeal had been frustrated by counsel's failure to timely file the notice of appeal, was not that "state action" had frustrated the defendant's right to appeal, but that counsel's failure to timely file the notice, due to "neglect, inadvertence or error," constituted ineffective assistance of counsel "as a matter of law."

In reaching this conclusion in Meyer, the supreme court noted the "difficulties" which had followed its holding in Baggett v. Wainwright, 229 So. 2d 239 (Fla. 1969), that a court-appointed attorney's failure to timely file a notice of appeal constituted "state action" that frustrated the defendant's right to appeal in violation of his constitutional due process rights, necessitating the granting of a belated appeal. See Meyer, 430 So. 2d at 442. The supreme court explained that the "state action" rationale supporting the decision in Baggett and its progeny, "which all dealt with state action affecting taking of appeals by right," had been used by a federal court in Pressley v. Wainwright, 540 F. 2d 818 (5th Cir. 1976), to require belated discretionary review in the Florida Supreme Court when court-appointed counsel had failed to timely file for discretionary review. See Meyer, 430 So. 2d at 442. In its opinion in Meyer, the supreme court pointed out that the views expressed by Justice England in his "stinging dissent" to the Florida Supreme Court's order complying with the federal directive in Pressley[1] had proven to be prophetic in that "the effect [of the Baggett case and its progeny] [had been] to erode the jurisdictional requirements the Florida Supreme Court had established for all appeals or, potentially, to offer a different measure of justice to the non-indigent appellant." Id. In response to both the unintended effect of the Baggett reasoning and the United States Supreme Court's then recent decision in Polk County v. Dodson, 454 U.S. 312 (1981),[2] the Court in Meyer abandoned the "state action" theory of belated appeals and instead adopted the view that court-appointed counsel's failure, due to "neglect, inadvertence or error," to timely file a notice of appeal constituted ineffective assistance of counsel "as a matter of law." Meyer, 430 So. 2d at 443.

The adoption by the Court in Meyer of the "ineffective assistance of counsel" justification for belated appeals, and abandonment of the "state action" theory which had supported the federal court's decision in Pressley, would seem to indicate that any right a criminal defendant might have to a belated appeal derives fundamentally from the right to counsel and its companion right to the effective assistance of counsel. Consequently, it would appear that any right a criminal defendant might have to belated discretionary review in the Florida Supreme Court would have to similarly derive from the right to counsel—specifically, the right to appellate counsel.

Federal Law on the Scope of the Right to Appellate Counsel

In Douglas v. California, 372 U.S. 353 (1963), the United States Supreme Court held that an indigent criminal defendant has a right to court-appointed counsel in his first appeal as of right in state court. The Supreme Court based its conclusion, not on the right to counsel guaranteed by the Sixth Amendment to the United States Constitution, but on "that equality demanded by the Fourteenth

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[1]See Pressley v. Wainwright, 367 So. 2d 222 (Fla. 1979).

[2]In Polk County, the Supreme Court held that a court-appointed public defender is not acting "under color of state law," when performing the traditional functions of defense counsel in a criminal case, such that a subsequent action by the defendant against court-appointed counsel, based on alleged inadequacies in the representation, would lie under section 1983 of the Civil Rights Act. See Polk County, 454 U.S. at 317-26.

Amendment." Id. at 358. The Supreme Court explained that, "[w]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Id. at 357. The Supreme Court specifically limited, with the following language, the scope of the right to counsel it was recognizing:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike, from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction, or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion.

Id. at 356 (citations omitted).

Over ten years later, the Supreme Court in Ross v. Moffitt, 417 U.S. 600 (1974), was faced with answering one of the questions left open in Douglas—i.e., whether an indigent criminal defendant has a federal constitutional right to court-appointed counsel in state discretionary appeals, or for the purpose of seeking certiorari review in the United States Supreme Court, where the defendant had already had one appeal as of right with the benefit of counsel. See id. at 602 ("We are asked in this case to decide whether Douglas v. California, . . . which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications for review in this Court."). The Supreme Court held that neither the due process nor equal protection clauses of the Fourteenth Amendment, which the Supreme Court indicated had apparently provided the basis for the Douglas decision, required states to provide indigent criminal defendants with court-appointed counsel for the purpose of seeking discretionary review in either state or federal court after the first appeal as of right. See id. at 608-18.

In reaching its conclusion in Ross, the Supreme Court explained that, unlike the indigent criminal defendant without a lawyer on his first appeal as of right, the indigent criminal defendant seeking further discretionary review following the affirmance of his conviction would have available to him a record of his or her trial proceedings, the brief prepared by his court-appointed attorney during his initial appeal setting forth his claims of error, and in many cases an opinion from the state appellate court which decided his first appeal as of right. See id. at 615-17. The Supreme Court indicated that "[t]hese materials, supplemented by whatever submission [the criminal defendant] may make pro se, would appear to provide [either the state supreme court or the United States Supreme Court] with an adequate basis for its decision to grant or deny review." Id. at 615. The Supreme Court recognized that, while "a skilled lawyer . . . trained in the somewhat arcane art of preparing petitions for discretionary review," might prove helpful to the indigent criminal defendant in seeking further review, "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." Id. at 616. The Supreme Court noted, however, that its

decision in no way foreclosed the states from providing, "as a matter of legislative choice," a right to court-appointed counsel for indigent criminal defendants seeking further discretionary review after the conclusion of their first appeal as of right. See id. at 618-19.

Almost eight months after the Supreme Court decided the landmark case of Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court was again faced, in Evitts v. Lucey, 469 U.S. 387 (1985), with answering another question left open in Douglas—i.e., whether the right to counsel recognized in Douglas included the right to the effective assistance of counsel. See id. at 392 ("The question presented in this case is whether the appellate-level right to counsel also comprehends the right to effective assistance of counsel."). The Supreme Court concluded that "the promise of Douglas that a criminal defendant has a right to counsel on appeal—like the promise of Gideon [v. Wainwright, 372 U.S. 335 (1963),] that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel." Evitts, 469 U.S. at 397. The Supreme Court, therefore, held that "[a] first appeal as of right . . . is not adjudicated in accord with due process if the appellant does not have the effective assistance of an attorney." Id. at 396. The Supreme Court indicated in a footnote that "the considerations governing a discretionary appeal," as discussed in Ross, were not affected by its recognition of the right to the effective assistance of counsel in the right to counsel afforded by Douglas because "the right to effective assistance of counsel is dependent on the right to counsel itself." Id. at 396 n.7. In support of this statement, the Supreme Court cited to its decision three years earlier in Wainwright v. Torna, 455 U.S. 586 (1982).

In Torna, the Supreme Court had essentially been asked to consider whether the United States Court of Appeal for the Fifth Circuit had properly applied, to circumstances involving privately retained counsel, its decision in Pressley v. Wainwright, 540 F. 2d 818 (5th Cir. 1976), discussed earlier in this memorandum. See Torna, 455 U.S. at 586-87 & n. 2. The Supreme Court, relying on its decision in Ross, effectively overruled the Fifth Circuit's decision in Pressley and held that, because the criminal defendant had no constitutional right to counsel for the purpose of pursuing discretionary state appeals, "he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." Id. at 587-88.

The decisions in Ross, Evitts, and Torna appear to collectively stand for the proposition that, because there is no federal constitutional right to counsel for the purpose of pursuing discretionary state appeals, a failure by appellate counsel to timely invoke the discretionary jurisdiction of a state supreme court cannot constitute the deprivation of any federal right to the effective assistance of appellate counsel. The lack of any federal recognition of such a right does not, however, foreclose the Florida Supreme Court from either interpreting the federal constitution differently or interpreting Florida's Constitution or statutory law in such a way as to afford such a right to Florida criminal defendants. In fact, Justice Anstead, in his special concurrence in Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999), suggested that numerous provisions of Florida's Constitution supported the formal recognition of a state constitutional right to postconviction counsel in capital cases, notwithstanding the fact that the United States Supreme Court had declined to find such a right in the federal constitution.

Florida Law on the Scope of the Right to Discretionary Review Counsel

In Green v. State, 620 So. 2d 188 (Fla. 1993), the Florida Supreme Court was faced with determining whether the scope of the right to appellate counsel in Florida should be extended, beyond the parameters set forth in federal case law, to include the right to have court-appointed counsel for the purpose of filing for discretionary appellate review following an affirmance in the first appeal as of right. The defendant in Green had been convicted of two counts of first degree murder and sentenced to death on both counts. See id. at 188. After the supreme court affirmed the defendant's convictions and sentences, his court-appointed counsel filed a motion in the trial court to have his appointment extended at county expense for the purpose of filing a petition for a writ of certiorari in the United States Supreme Court. See id. at 189. The trial court denied the motion. See id. On appeal, the county argued that the defendant was not entitled to "this type of discretionary representation" and that the Supreme Court's decision in Ross controlled. See id. The defendant argued that denying him appointed counsel for the purpose of seeking certiorari review in the United States Supreme Court amounted to treating him differently from other similarly situated defendants being represented by the public defender, in violation of the equal protection and access to the courts provisions of article I, sections 2 and 21, of the Florida Constitution. See id.

Relying on statements from Graham v. State, 372 So. 2d 1363 (Fla. 1979), and State ex rel. Smith v. Brummer, 426 So. 2d 532 (Fla. 1982), to the effect that court-appointed counsel might have a "professional responsibility" in some circumstances to seek further discretionary appellate review after the conclusion of a first appeal as of right, see Green, 620 So. 2d at 189-190, the Florida Supreme Court in Green held that, "where a defendant is represented by court-appointed counsel and is sentenced to death, the court-appointed counsel must have the same professional independence to seek federal relief on an individual basis as the public defender whom court-appointed counsel replaces and must be compensated accordingly." Id. at 190. The supreme court explained that, "[t]o hold otherwise would deny Green the equal protection of the laws under the circumstances presented in this record." Id.

The Florida Supreme Court's limited holding in Green not only does not apply by its specific terms to noncapital cases, but also cannot even be reasonably read as expanding the constitutional right to appellate counsel in Florida, for even all death-sentenced defendants, to the filing for discretionary review in the United States Supreme Court of an affirmance in the first appeal as of right in a capital case. The Green "right" to discretionary review counsel was based on the fact that the public defender, who the court-appointed attorney had replaced in that case, routinely sought federal discretionary review of an affirmance by this Court in capital cases as a matter of policy. See id. at 190. Given that the supreme court did not even mention the decision in Green when it discussed the scope of the right to counsel in Florida in State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 407 (Fla. 1998), it seems reasonable to conclude that the Court's recognition in Green of an equal protection "right" to discretionary review counsel was extremely limited and is incapable of maturing

into an independent constitutional right to discretionary review counsel, even in capital cases, which would carry with it a concomitant right to the effective assistance of discretionary review counsel. See id. at 410 (rejecting the Capital Collateral Regional Counsel's equal protection argument, in support of its claim that it should have the authority to pursue federal civil actions on behalf of death-sentenced inmates, because "the fact that a capital defendant with private counsel could pursue actions without limitation is no different from the fact that noncapital defendants who are afforded no statutory right to postconviction counsel could likewise hire private counsel to pursue such claims").

A review of Florida's current statutes and rules of procedure governing the duties of the public defender and the circumstances under which counsel should be appointed in criminal cases reveals that there appears to be no express authority providing that the duties of court-appointed appellate counsel in Florida extend to the filing of a notice to invoke discretionary jurisdiction in the Florida Supreme Court. The statute setting forth the duties of the public defenders in Florida specifically states that the statutorily designated appellate public defenders shall "handle all circuit court appeals within the state courts system and any authorized appeals to the federal courts." § 27.51(4), Fla. Stat. It does not specifically mention discretionary review proceedings in the Florida Supreme Court. Moreover, while subsection (5)(a) of the statute appears to now specifically authorize the appellate public defenders to continue their representation of a death-sentenced defendant through discretionary certiorari proceedings to the United States Supreme Court from the decision affirming the conviction and sentence on direct review, this subsection by its terms applies only in capital cases and therefore could not be interpreted as specifically granting a statutory right to public defender representation in discretionary review proceedings in the Florida Supreme Court. See § 27.51(5)(a), Fla. Stat. In addition, the rule of criminal procedure governing the appointment of counsel in criminal cases mentions the appointment of counsel for the purpose of appellate proceedings only once in the following passage: "Counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including postconviction proceedings and appeals therefrom, . . . and other proceedings that are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal." Fla. R. Crim. P. 3.111(b)(2). While both this rule and rule 9.140 of the Florida Rules of Appellate Procedure, state that counsel shall not be permitted to withdraw from representing a criminal defendant until either the time has expired for filing an authorized "notice of appeal" and no such notice has been filed or "a notice of appeal" has been filed, see Fla. R. Crim. P. 3.111(e)(1)(A); Fla. R. App. P. 9.140(d)(1)(A), neither of these rules specifically curtails counsel's ability to withdraw prior to filing a notice to invoke the Florida Supreme Court's discretionary jurisdiction.

While the Florida Supreme Court has repeatedly, by unpublished order and without explanation in several cases in the past, granted belated discretionary review to criminal defendants on the theory that appellate counsel's error resulted in discretionary review not having been timely invoked, the Third District Court of Appeal, in perfunctory fashion, has determined that appellate counsel cannot be deemed constitutionally ineffective for failing to pursue discretionary review in the supreme court because the right to appellate counsel does not encompass the right to have counsel pursue discretionary review in the supreme court. See Nerey v. State, 634 So. 2d 206, 207 (Fla. 3d DCA

1994) ("[P]etitioner had no constitutional right to counsel to pursue discretionary review by the Florida Supreme Court, thus he was not deprived of effective assistance of counsel by his counsel's failure to appeal to the Florida Supreme Court an additional point he had raised in his defense."); see also Rhome v. State, 293 So. 2d 761, 762 (Fla. 3d DCA 1974)("[W]e do not think appellant's right to appeal is violated when his counsel fails to seek a writ of certiorari or alternatively to notify his client of his right to apply for it. Certiorari is limited to specific situations in the Supreme Court, and is discretionary with that court."). In Partridge v. Moore, 768 So. 2d 1128, 1129 (Fla. 1st DCA 2000), the First District Court of Appeal cited with approval the Third District's decision in Nerey, albeit in dicta. Finally, the Fourth District Court of Appeal has explicitly refused, on the authority of Ross v. Moffitt, 417 U.S. 600 (1974), to appoint counsel to a criminal defendant for the purpose of seeking discretionary review in the Florida Supreme Court. See Cox v. State, 320 So. 2d 449 (Fla. 4th DCA 1975).

The Right to Belated Discretionary Review in Other States

A survey of the law in other state court jurisdictions has revealed eight states with some case law on the issue of the right to belated discretionary review. They are: Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, Tennessee, and Texas.

Alabama

The Alabama Court of Criminal Appeals appears to have taken the unequivocal position that because a criminal defendant does not have a constitutional right to counsel to pursue discretionary state court review or discretionary review in the United States Supreme Court, he can maintain no postconviction claim of ineffective assistance of counsel based on counsel's failure to timely seek discretionary state court review or discretionary review in the United States Supreme Court. See Kinsey v. State, 545 So. 2d 200, 202-05 (Ala. Crim. App. 1989) (rejecting defendant's postconviction claim of ineffective assistance of counsel which had been based on counsel's failure to timely pursue discretionary state court review following the affirmance of the defendant's conviction and sentence in his first appeal as of right); Thomas v. State, 511 So. 2d 248, 257-58 (Ala. Crim. App. 1987) (rejecting defendant's postconviction claim of ineffective assistance of counsel which had been based on counsel's failure to timely pursue discretionary review in the United States Supreme Court following the affirmance of the defendant's conviction and sentence in his first appeal as of right).

Colorado

The Supreme Court of Colorado has explicitly held that because a petition for discretionary review in that court is "an application of right" under that state's constitution, a criminal defendant has a right to counsel for purposes of preparing and filing that application as well as the associated right to the effective assistance of counsel in connection with such a filing. See People v. Valdez, 789 P. 2d 406, 408-10 (Colo. 1990).

Georgia

The Supreme Court of Georgia has taken the position that because a criminal defendant in that state has neither a federal nor a state constitutional right to counsel for the purpose of pursuing discretionary state court review, a criminal defendant's direct appeal counsel in that state has no duty to seek discretionary state court review on behalf of his client and belated discretionary review in that state's highest court cannot be based on the theory that appellate counsel provided ineffective assistance in failing to seek discretionary state court review. See Malone v. State, 2000 Ga. LEXIS 280, * 1 (Ga. 2000) ("Because petitioner has exercised his direct appeal of right and because the habeas court had no authority to permit petitioner to file in this Court an otherwise untimely petition for certiorari, its order granting an 'out-of-time appeal' was ineffective to confer jurisdiction upon this Court."); see also Wooten v. State, 266 S.E.2d 927, 927 (Ga. 1980) ("Pretermitting the question of whether the superior court has the authority to appoint counsel to pursue such discretionary appeals, we find that, absent such an order, appointed counsel has no duty to apply for writ of certiorari to the Court of Appeals on behalf of his indigent client."); Strozier v. Hopper, 216 S.E.2d 847, 850 (Ga. 1975) ("[C]ounsel appointed by the state to represent an indigent has discharged his and the state's duty when the right of review by means of appeal within the state system has been completed.").

Kansas

The Kansas Court of Appeals, that state's intermediate appellate court, has explicitly held that because a criminal defendant "has no constitutional right to counsel to pursue a discretionary appeal to the Kansas Supreme Court, he is not deprived of the effective assistance of counsel by his appointed counsel's failure to file a petition for review or the failure of such counsel to inform [him that] he had the option of seeking discretionary review." Foy v. State, 844 P.2d 744, 745 (Kan. Ct. App. 1993).

Louisiana

The Louisiana Court of Appeal for the Fourth Circuit, one of that state's intermediate appellate courts, has held that because a criminal defendant has no constitutional right to pursue discretionary state court review following the first appeal of right, he or she can maintain no postconviction claim of ineffective assistance of counsel based on counsel's failure to inform the defendant of the time frame for seeking discretionary state court review. See Talley v. Maggio, 451 So. 2d 1358, 1361 (La. Ct. App. 1984).

Mississippi

The Supreme Court of Mississippi has expressly held that the failure of appellate counsel to advise his or her criminal defendant client of the possibility for further discretionary state court review does not require the suspension of the rules for consideration by that court of an out-of-time petition for writ of certiorari. See Harris v. State, 704 So. 2d 1286, 1292 (Miss. 1997) ("The majority view, and

in our judgment the prudent one, is that, in the absence of a specific state statute or rule, the failure of counsel to advise his client of the possibility of further review does not require suspension of the rules for an out-of-time consideration of a party's petition for writ of certiorari."). It is worth noting that the Supreme Court of Mississippi concluded, after surveying both state and federal law out of Florida, all of which is discussed elsewhere in this memorandum, that "a party in Florida has neither a state based nor a federally constitutionally mandated right to claim a violation of his appellate rights when his attorney has failed to preserve his opportunity to seek discretionary review by the Supreme Court of Florida." Id. at 1291.

Tennessee

In 1974, before the United States Supreme Court decided Ross v. Moffitt, 417 U.S. 600 (1974), the Supreme Court of Tennessee held that, under Tennessee's then-existing statutes and rules, a criminal defendant had a state right to the effective assistance of counsel in drafting and timely filing a petition for writ of certiorari seeking discretionary state court review in that state's highest appellate court following an affirmance in the first appeal of right. See Hutchins v. State, 504 S.W.2d 758, 761-62 (Tenn. 1974). In Hutchins, the Supreme Court of Tennessee further held that the appropriate remedy in the event appellate counsel failed to effectively prepare and timely submit such a petition for discretionary review was "the vacating of the [lower] appellate court's order . . ., and the reinstatement of the order so as to start anew the statutory period for filing of a petition for certiorari." Id. at 762.

In 1975, the Supreme Court of Tennessee reaffirmed its decision in Hutchins notwithstanding the United States Supreme Court's intervening decision in Ross v. Moffitt. See generally State v. Williams, 529 S.W.2d 714 (Tenn. 1975). However, in 1976, the Tennessee Legislature amended the statute in that state pertaining to the right to counsel to effectively abrogate the decisional law in Hutchins and Williams. The statute now reads that "appointed counsel is required to represent the defendant only through the initial appellate review, and is not required to pursue the matter through a second tier discretionary appeal, by applying to the supreme court for writ of certiorari." Tenn. Code Ann. § 40-14-203. While there is no case law from the Supreme Court of Tennessee expressly acknowledging the statutory abrogation of Hutchins and Williams, there is case law from the Tennessee Court of Criminal Appeals providing the relief discussed in Hutchins (i.e., vacating and reinstating intermediate appellate court's decision in order to restart the time for filing for discretionary review), notwithstanding the statutory change in 1976, where the criminal defendant was affirmatively misled by his appellate counsel into believing that appellate counsel was going to timely seek discretionary review in Supreme Court of Tennessee. See State v. Hopson, 589 S.W.2d 952, 954 (Tenn. Crim. App. 1979). Seven years after the statutory change, the Tennessee Court of Criminal Appeals pointed out in State v. Brown, 653 S.W.2d 765 (Tenn. Crim. App. 1983), that, notwithstanding the statutory change in 1976, if appellate counsel failed to advise his or her criminal defendant client before withdrawal that discretionary review in the Supreme Court of Tennessee was not being sought and of the time limits associated with seeking such review, then the relief discussed in Hutchins would be appropriate.

Texas

The Texas Court of Criminal Appeals subscribes to the view that while "indigent defendants are not entitled by the Constitution or laws of Texas or of the United States to the assistance of counsel for purposes of pursuing discretionary post-conviction remedies, . . . it is the professional duty of an appellate lawyer to explain the meaning and effect of an appellate court decision in his client's case, to acquaint his client with available options for further review of the case, and to assist his client with the decision whether to seek such review." Ex Parte Jarrett, 891 S.W.2d 935, 943-44 (Tex. Crim. App. 1995). Thus, the Texas Court of Criminal Appeals has held that "an attorney who still represents a criminal defendant at the moment his conviction is affirmed on direct appeal does not provide reasonably effective assistance merely by communicating to his client that the latter's conviction was affirmed or by informing his client that further review may be possible within certain time limits." Id. at 944. Instead, appellate counsel "must also stand ready to assist his client until the appellate process is exhausted and the attorney/client relationship concluded with the decision whether to seek discretionary review, and he must make it clear to his client that he is ready to so." Id.