The Governor's Commission for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 34 hereby charges the Governor's Commission for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the 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 original (unbound) completed application (*with ink signature*) and eight (8) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Jerry Gonzalez, PLC

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

1997, TN Bar No. 018379

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.

Michigan 1996, P50960. This license is not currently active. I requested inactive status when I moved to Tennessee in 1997. I then asked to be placed back on active status in 1999 but after several years of paying annual dues to the Michigan Bar with no cases in Michigan, I asked to resign my membership in October, 2010.

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).

Yes. I was placed on inactive status in Michigan by request from 1997-1999 after I moved to Tennessee.

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).

See attached C.V. I am not sure I would consider it an "occupation, business, or profession" but I was a graduate teaching assistant in statistics at MTSU while pursuing a Master of Arts in Sociology while also practicing law. I was paid a stipend and received tuition reduction for this position. I also am currently Associate Editor for Sociological Spectrum, a peer-reviewed, scientific journal. This position is unpaid. Many years ago, I would occasionally provide horse

riding lessons but I no longer do that.

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.

After graduating from law school in May, 1996 I was unemployed while I concentrated on studying for the bar exam. After taking and passing the Michigan Bar Exam, we moved to Tennessee and I was unemployed until about April 1997 while recovering from surgery and chemotherapy for cancer and while studying to pass the Tennessee Bar Exam.

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

I presently concentrate my practice in the area of civil rights (20%), employment discrimination (40%), and federal and state criminal defense (40%).

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.

While in law school, I clerked for a small-size medical malpractice firm my second year and with a mid-size insurance defense firm as a 3L. I personally drafted more summary judgment briefs than I could count.

I began my practice of law in 1997 as an associate in a general practice law firm in Lebanon, Tennessee. There, I was involved in cases dealing with probate, real estate, worker's compensation, contracts, and personal injury. After starting my own practice and soon partnering with another lawyer, I concentrated on civil rights, medical malpractice, probate, real estate, and personal injury. My partner and I also won the contract as city attorneys for the City of Lebanon. As such, I advised the Board of Zoning Appeal, Planning Commission, Lebanon City Council,

and prosecuted traffic tickets in municipal court. I soon added state criminal work to my basket while I worked as a second chair (pro bono) in federal criminal cases to qualify for appointments through the Criminal Justice Act. I also started taking class action cases with one of my first cases involving a challenge to the new Driver Certificate program on behalf of all lawfully present aliens who would be denied full driver's licenses. Since getting named to the CJA panel, federal criminal appointments have kept me very busy but I still take state criminal cases and accept cases if a state judge calls me to take over a case.

Lately, in addition to criminal appointments, I have a fairly large case load in the civil rights area dealing with police excessive force and employment discrimination. I regularly try to bring cases that deal with novel areas of law.

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

I consider all my cases of "special note", but I should point out that most of my cases deal with a great deal of legal writing and research.

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

I served as a member of several disciplinary panels with the Board of Professional Responsibility. I was a panel officer during a one week-long BPR trial that resulted in disbarment of the respondent lawyer. Another panel case I participated in was resolved through summary disposition where I drafted the entire opinion.

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.

As a young lawyer, I accepted appointments as guardian ad litem in child dependent/neglect cases in juvenile court.

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

attention of the Commission.

Around 1998, I filed for an injunction on behalf of a foreign exchange student who was denied participation in commencement ceremonies by the Wilson County School Board. We settled when the school board agreed to let her sit on stage with her classmates.

A few years later, I represented a Mixteco Indian woman (a region in Mexico) who was told by a Wilson County General Sessions judge that he would terminate her parental rights if she did not learn to speak English at the Sixth Grade level to prove to him that she really loved her child. (This was put down in a written order by the court.) The dependent/neglect part of the case went to trial in Circuit Court with the Southern Poverty Law Center as co-counsel. I took this case pro bono and between us we spent over $30,000 on experts and other expenses. The case settled with the child returned to her biological father and both the D/N case and the parental termination case were dismissed.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Commission for Judicial Appointments 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.

I have never before applied for any position as a judge.

EDUCATION

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

See attached C.V. With regards to graduate coursework that did not result in a degree, I started working on my MBA while I was ending my career in the U.S. Navy. Once I went on inactive reserve and accepted a position as a Special Agent with the U.S. Secret Service, the nature of the job just did not allow me to continue my education. After the Secret Service, I attended law school. When I moved to Tennessee, I again attempted to move forward with my MBA but my law practice took priority. I finally decided a few years ago to start towards a Master of Science in Applied Economics instead of an MBA then switched to Sociology (which applied my economics courses towards my degree).

PERSONAL INFORMATION

15. State your age and date of birth.

I am 51 years of age and I was born on August 17, 1962.

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

I have lived continuously in Tennessee since January, 1997.

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

I have lived in Rutherford County continuously since 2007.

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

Rutherford County

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

See attached C.V. I sought release from the drilling reserves just before I completed law school in 1996. In June, 2002, I received a final honorable discharge with my final rank of Lieutenant Commander.

During my service, I was awarded two Navy Achievement Medals, a National Defense Service Medal, Battle "E", Sea Service Ribbon, and an Expert Marksman Ribbon.

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.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

1. In approximately 1998 or 1999, a person (I do not recall his name) who was not my client filed an ethical complaint against me claiming that he hired me to represent his brother as a conservator for another brother and that he was the true client. I considered the conservator brother my client and the complainant and the conservator brother had a falling out about the ward-brother. The complaint was dismissed.

2. In approximately 2002 (?) an attorney named Mark Henderson filed a complaint against me after reading a newspaper article quoting me as saying, after a day at trial, that I had "never seen anything like this" with regards to the trial court's rulings. My comment was after the trial judge had suggested my client did not deserve to have custody of her child because see suffered from low self-esteem as evidenced by her always looking at the ground. (See comment above with regards to Mixteco case.) The trial judge also expressed reservations about returning custody when a cultural anthropology expert commented about Mixtecs worshipping two Gods, the Sun God and the Judeo-Christian God. The complaint was dismissed.

3. In 2011, an attorney named Suzette Peyton filed an ethical complaint on behalf of her client who was an opposing party in a case. She claimed that I had recorded a confidential attorney-client communication between her and her client during a deposition. I responded by pointing out that before all depositions I conduct, I warn the parties that I am recording and do not turn off recordings so they should leave the room during breaks. During a break in the deposition, I stepped out of the room with my client and Ms. Peyton and her client made comments, in the presence of the court reporter who remained in the room, that were disrespectful of a federal judge and suggested a plan to taint the jury with irrelevant facts (this was the purported attorney-client communication). This was not a protected communication. Additionally, on the recording, Ms. Peyton acknowledged to her client that my recorder was still on. The complaint was dismissed.

These are all the "formal" complaints that I recall. There have been a couple that were resolved through the Consumer Assistance Program but all formal and informal complaints have been resolved in my favor.

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

No.

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

Yes. I filed for Chapter 11 bankruptcy in 2004 after my law partner abruptly quit private practice and abandoned his share of the practice and left me with a five year lease on a large office suite along with a five year lease on an expensive copy machine and staff. I tried to meet overhead for as long as could but eventually had to file for a temporary reprieve.

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.

Yes. In approximately 2001, I was a named plaintiff along with several neighbors in the case of Harper v Sloan, Wilson County Chancery, Case No. 98254, involving the private/public nature of an abandoned road adjacent to my house in Wilson County. After the road was declared a public road, I was a named plaintiff (in 2006) in Gonzalez v Armistead, Wilson County Chancery (assigned to Chancellor Carol McCoy in Nashville by interchange), Case No. 01178, seeking to force Wilson County to properly maintain the road. After prevailing on summary judgment, the judgment was vacated by the Court of Appeals after I sold the property and the issue became moot.

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

See attached C.V.

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

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

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

No.

ACHIEVEMENTS

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

See attached C.V.

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

None.

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

None.

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.

See attached C.V. under "Presentations" section.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None.

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

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other

legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached two writing samples. Both reflect 100% of my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I am an individual that constantly strives to obtain diversity in the journey called life. From serving in the military, to law enforcement, to practicing law, seeking a position as a judge is yet another step in that journey. As a former military officer, federal agent, practicing attorney, and immigrant from Chile who has lived all over the world, I bring a unique and diverse perspective to the law. I have a particular expertise in critical problem solving through my training in quantitative analysis (statistics) and running my own solo firm as a paperless office that should prove useful as a judge on the Supreme Court of Tennessee as it transitions to electronic filing.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

As stated earlier, I regularly take cases on a pro bono basis that involve unique questions of law. For example, the case of the foreign exchange student, the Mixtec woman ordered to learn English, and challenging the Driver Certificate program. I also tried a case pro bono in Davidson County Chancery to establish the birth of a child born at home and never registered with vital statistics.

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 a position on the Tennessee Supreme Court. I am a very hard worker, self-sufficient, self-motivated, and as evidenced by my desire to continue my education through graduate courses in a variety of fields, I constantly seek out new knowledge. I enjoy learning, reading and writing and enjoy sharing what I learn with others. I also manage my own website and that of the Tennessee Employment Lawyer's Association and maintain my own server and network in my paperless office. I am intimately familiar with all technological aspects of networking and computers and can help guide the Court into the electronic filing age.

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)***

See attached C.V. If appointed, I would like to continue to teach at the college level (in particular statistics courses) and to give presentations in law, law and sociology, statistics, and law firm technology. I also am always interested in participating on any board of directors for non-profits. Finally, I would continue to volunteer at an annual equestrian fundraiser for St. Jude's Children's Hospital.

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)***

I was born in Chile and immigrated to the United States as a child and quickly learned English through full immersion in school while living in Kentucky. I have lived in and attended school in Europe where I was exposed to countless other nationalities and cultures and where everyone learned to get along despite our differences. Serving in the United States Navy taught me how to be a leader and to remain calm in times of stress and military confrontations. There is little that can compare to the stress of dealing with unexpected events while launching or landing on an aircraft carrier at night. As a Secret Service agent, I was exposed to highly secret conversations of our elected officials and foreign heads of state and entrusted to maintain those secrets and to put my life on the line for the life of others.

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)***

Absolutely. As a practitioner, I have never had to "uphold" any law that I disagreed with, but I certainly argued the law on behalf of clients, even those clients who committed acts that I disagreed with.

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. Brian Hinote, Ph.D., Department of Sociology & Anthropology, Middle Tennessee State University, Box 10, 1301 East Main Street, Murfreesboro, TN 37132. brian.hinote@mtsu.edu. 615-898-2508.
B. Jackie Eller, Ph.D., Department of Sociology & Anthropology, Middle Tennessee State University, Box 10, 1301 East Main Street, Murfreesboro, TN 37132. jackie.eller@mtsu.edu. 615-898-2508.
C. Jennifer Thompson, Esq., 3200 West End Ave., Suite 500, Nashville, TN 37203. Nashvilleattorney@gmail.com
D. Carl Spining, Esq., Ortale, Kelley, Herbert & Crawford, 200 4th Ave. North, Nashville TN 37219. 615-780-7476. cspining@ortalekelley.com
E. Van S. Vincent, Esq., Assistant United States Attorney, 110 9th Ave. So., Suite A-961, Nashville, TN 37203. (615) 736 5151. van.vincent@usdoj.gov.

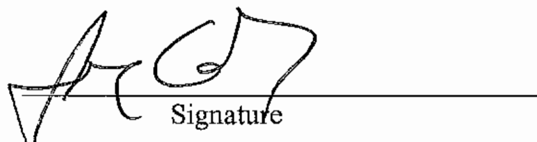
AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Supreme Court 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: 02 · 20, 2014



Signature

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

THE GOVERNOR'S COMMISSION FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

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

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

WAIVER OF CONFIDENTIALITY

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

Jerry Gonzalez
Type or Print Name

Signature

02.20.2014
Date

018379
BPR #

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

Michigan P50960 admitted 1996 (now inactive)

I dedicate this thesis to all those souls who are sitting in local county jails because they are too poor to post bail.

ACKNOWLEDGMENTS

I wish to acknowledge and thank my thesis committee for all their guidance and mentoring over the last several years as I sought to complete this project. Dr. Jackie Eller welcomed me into sociology with open arms and an enthusiasm that was infectious and she was the first to encourage me to complete this project even before I joined her department. The hours we spent over my first summer in the program discussing sociological theory were truly enlightening and at times she had to kick me out of her office lest I consumed her entire day. Dr. Meredith Dye was instrumental in helping me understand criminological theory, something that was woefully absent in law school and, sadly, absent from the knowledge base of the bench and bar. Indeed, our discussions regarding criminology helped me see my criminal defense clients in a new, more objective, light. She also guided me through a deeper understanding of advanced statistics, recommended essential texts to further my education in that area, and likewise showed an enthusiasm for these areas of sociology that was a driving force. Dr. Brian Hinote, my department mentor and committee chair, cannot be thanked enough. As a graduate teaching assistant for him over two semesters in undergraduate statistics he imbedded in me a love for quantitative analysis and teaching. He graciously invited me to be associate editor for Sociological Spectrum and together, along with Dr. Kevin Breault, we navigated the maze of publishing a peer review journal into the electronic age as a true team. For hours we would discuss my project and he was instrumental in guiding me through the process and keeping me on track. I could not have asked for a better mentor. Last, but certainly not least, I need to thank my wife, Denise Gonzalez, who would listen to me talk about statistics with glazed eyes but always with a smile.

ABSTRACT

Rutherford County, Tennessee was sued in 2008 for setting bail that was based only on the charged offense and based on an antiquated preset bail schedule. As part of a settlement agreement, judicial commissioners promised to stop the practice and set bail only after considering *all* the factors predictive of nonappearance per state law and to keep a record of questions and responses. A random sample of questionnaires from 2012 was selected and various parametric and nonparametric statistical tests were conducted to check on the promise. Results indicated that Rutherford County judicial commissioners continue to set bail based primarily on the charged offense and consistent with the preset bail schedule previously used, in violation of the settlement agreement. Possible reasons for why this practice continues despite assurances to the contrary and recommendations for the future are made.

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I. INTRODUCTION

"The greatest dangers to liberty lurk in insidious
encroachments by men of zeal, well-meaning, but without understanding"
Olmstead v. United States (1928).

Bail, as it is presently practiced in Tennessee and many other states, is the process where a magistrate determines whether a person arrested is a flight risk or if the person poses a danger to the community if released pretrial. If such a risk is identified, the magistrate then imposes conditions (home confinement, ankle bracelet, phone reporting, to name a few) directed at addressing and minimizing the risk. Conditions may also include the payment of money, or "bail".

The idea of posting bail in exchange for the release of an accused prior to trial likely originated in England sometime before 1300 C.E. Understanding the origin of the system of bail, its evolution and its modern manifestations, is critical to understanding a system currently in place that is ripe for corruption and abuse. In this thesis, I examine deposition transcripts involving quasi-judicial officials from various Tennessee counties to illustrate the misapplication of the very purpose behind the concept of bail as originally designed and ultimately adopted by the framers of the U.S. Constitution. This initial scrutiny of public officials' understanding of bail and how they actually apply the concept to the lives of real people will serve to set the contours of an issue that affects thousands of Tennesseans every day. How it is that the original purposes behind bail metastasized into the system that exists today in Tennessee will be illustrated through a discussion of the history of bail and the internal manifestations of its application in real life scenarios. Using quantitative analysis of questionnaires administered in the process of setting bail in one Tennessee county, I will then refine the issues and contrast the

findings with what judicial authorities who set bail claim to do. More specifically, I will examine which factors asked by judicial commissioners in Rutherford County, Tennessee have a relationship to any determined risk of flight and to the amount of bail that is presumably the least amount necessary to address this risk. Discussion of my findings, limitations of the study, recommendations and policy issues will then follow.

II. BAIL GENERALLY

Bail, as practiced under the current American system of jurisprudence, usually involves the payment of money to secure the appearance of a person arrested and charged with a crime. Absent this monetary yoke, it is generally argued, a person accused of a criminal offense and released prior to trial would have little incentive to voluntarily appear for a trial where conviction is possible and incarceration likely. The money payment to secure the person's return serves the purpose, in part, of assuring he or she appears for trial and sentencing if convicted.

In the days of pre-Norman England, a person accused of a crime and jailed could wait quite a long time before a magistrate could arrive and consider the charges. The practice of pretrial release likely originated by the local sheriff releasing people in his jail to lighten the burden of upkeep, however light the burden may have been in relative terms. This practice was formalized in England through the Statute of Westminster in 1275 (3 Edw. I, Ch. 15 (1275)) by King Edward I [1] (Wisotsky 1970; Yale Law Journal

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[1] Otherwise referred to as the First Statute of Westminster, Chapter 15, it read in relevant part, "... shall henceforth be released by sufficient surety (for which the sheriff shall be answerable) and this without any payment. And if sheriffs or others release on bail anyone who is not replevisable, if he be sheriff, constable or other bailiff of fee who has the keeping of the prisoners, and is convicted of this, let him lose the fee and the bailiwick forever. And if an undersheriff, constable, or bailiff' of him who has this fee for keeping the prisoners has done this without his lord's wish, let him or any other bailiff who is not of fee be imprisoned for three years and make fine at the king's pleasure. And if any one detains prisoners who

1961; United *States v Edwards* 1981) that set conditions for pretrial release and qualifications for sureties who were tasked with assuring or guaranteeing the presence of the accused, usually individuals of means or landowners. If the person did not appear to answer the charges, the landowner had to forfeit some property (Yale Law Journal 1961).

The idea of bail for pretrial release was imbedded in the American judicial system through the Eighth Amendment to the U.S. Constitution which reads that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This clause was "adopted almost verbatim from section nine of the Virginia Declaration of Rights of 1776, which in turn was derived from the English Bill of Rights of 1689" (*United States v Edwards* 1981:1326). The idea of prohibiting excessive bail came from abuses of the English crown and as a "specific remedy for judicial abuse of the bail procedure as otherwise established by law ... " (*United States v Edwards* 1981:1327).

A. Bail Under Tennessee State And Federal Law.

The most frequent process by which a person is introduced to the criminal justice system begins with an arrest by a police officer. The police officer handcuffs the arrestee, transports the person to the local jail, and hands over control of the individual to corrections officers who run the jail so they can complete the booking process (fingerprinting and booking photo). This scenario is sometimes interrupted by the police officer taking the arrestee to a location for a custodial interrogation, but that usually only

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are replevisable after the prisoner has offered sufficient surety he shall be liable to heavy amercement by the king. And if he exacts payment for releasing him he shall restore double the amount to the prisoner and also be liable to heavy amercement by the king" (Rothwell 1996).

occurs where a confession is needed to complete the investigation or where the police suspect the individual may be involved in other crimes. While the booking process is completed, the arresting officer will usually type out an affidavit in support of probable cause summarizing the facts of the crime which is then presented to an impartial magistrate, such as a judicial commissioner, for a determination if probable cause exists and the issuance of an arrest warrant if it does. The arrestee is then presented to the magistrate for the purpose of determining risk of flight or danger if released pretrial. If a risk of flight or danger exists, the magistrate then considers what conditions, if any, including monetary bail, will ensure the appearance in court of the defendant and which will ensure the safety of the community. The general process is illustrated in Figure 1.

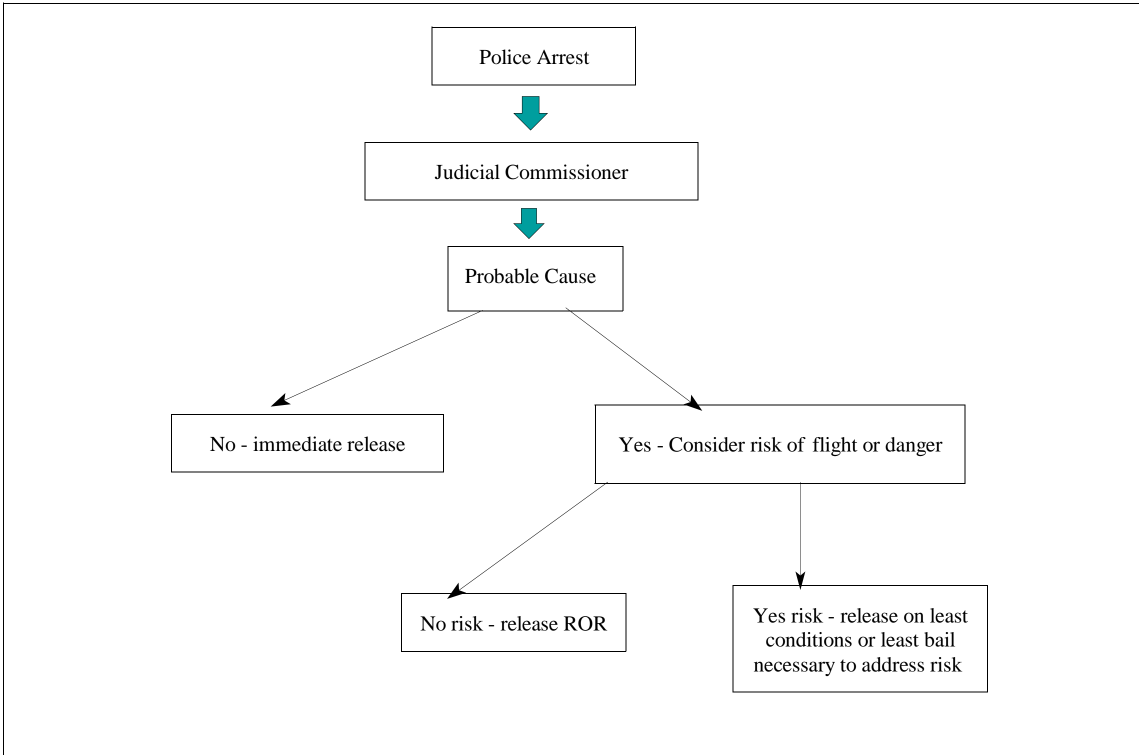

Figure 1: Process of arrest to setting of bail

Bail is excessive when it is set at a figure higher than an amount *reasonably* calculated to fulfill the purpose of assuring *that* defendant's presence at trial (*Stack v Boyle* 1951). The language of the Eighth Amendment does not guarantee bail (*Carlson v Landon* 1951) but only proscribes the impediment to pretrial liberty by imposing "excessive" bail. “Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that* defendant” (*Stack v Boyle* 1951:5) (emphasis added). Thus, the determination of whether an individual is subject to pretrial release on bail and the character of that bail is to be an *individualized* process. This provision of the Bill of Rights prohibiting excessive bail was made applicable to the various states through the Fourteenth Amendment (*Schilb v Kuebel* 1971; *Kennedy v Louisiana* 2008).

In Tennessee, all offenses other than capital offenses are subject to bail. [2] When a defendant is arrested, he or she is “entitled to be admitted to bail by the committing magistrate ... ” [3] Bail should be determined by taking into consideration those conditions which may *reasonably* answer the question of whether an individual will appear “as required ... ” [4] These *reasonable* conditions under the Tennessee Code include employment status and history, financial condition, family ties and relationships, reputation, character and mental condition, prior criminal record including prior releases

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[2] Tennessee Code Annotated (hereinafter “T.C.A.”) Title 40, Chapter 11, Section 102. A “capital offense” is one punishable by death. Tennessee Code Annotated is the Tennessee official reporter of legislation enacted into law and codified into categories divided by title, chapter, and section.

[3] T.C.A. 40-11-115. A “committing magistrate” includes “judicial commissioners” who are generally hired by county commissions and given the duty of determining probable cause to arrest, signing mittimuses and admitting to bail.

[4] T.C.A. 40-11-115.

on recognizance or bail, the identity of responsible members of the community who will vouch for the defendant's reliability, the nature of the offense, probability of conviction and likely sentence (insofar as these factors are relevant to the risk of nonappearance), and, finally, any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear. [5] If an individual is not eligible for release upon recognizance after consideration of these factors, the bail set must be the "least onerous .... reasonably likely to assure the defendant's appearance in court." [6] But release on recognizance is the default and bail may be required only "absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required ... " [7] If the defendant is not released on recognizance, the same considerations must be taken into account as those used to determine release on recognizance for establishing the proper conditions of release or bail. [8]

When the Tennessee Code factors which are presumptively predictive of a person's likelihood of appearance if released pretrial was first passed in 1978, the legislative record, such as it is, fails to show whether state legislators or the governor who signed the bill considered any scientific studies to support these factors. [9] It is likely that the factors were merely copied from the federal Bail Reform Act of 1966, codified at

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[5] T.C.A. 40-11-118.

[6] T.C.A. 40-11-116(a).

[7] T.C.A. 40-11-117.

[8] T.C.A. 40-11-118(b).

[9] 1978 Public Acts, Chapter 506, §18. The act was later amended in 1992, 1996, and again in 2010. The legislative record found at www.tn.gov/sos/acts only goes back to 1997.

18 United States Code (U.S.C.) §§3146-3152, which was proposed as model legislation for the states (Harris 1983). Before that, it is possible that the concept originated from the English Habeas Corpus Act of 1679 (Stephen 1883). Regardless of its actual origin, historical documents such as the Habeas Corpus Act show that the concern was a lengthy pretrial detention of an accused by the sheriff and the focus, upon review by a court, was not only the charged offense but also the character of the accused.

> An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas. WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody, any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed ..., whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation. ...... the said lord chancellor or lord keeper, or such justice or baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the **quality of the prisoner and nature of the offense**, for his or their appearance in the court ... and then shall certify the said writ with the return thereof, and the said recognizance or recognizances unto the said court where such appearance is to be made ... (Lewis 2003) (emphasis added).

In Tennessee, judicial commissioners, who are usually the first quasi-judicial officials to see a person after they have been arrested, purportedly apply these factors by questioning individuals or reviewing their criminal record for other information such as prior failures to appear and prior crimes. To follow the black letter of the law, this should be a two-step process. The first step is to consider all the statutory factors to see if the arrested person cannot be treated as one presumed to be eligible for release on his or her own recognizance because of some perceived (and prognosticated) risk of flight. If an individual is not eligible for release on recognizance, the judicial commissioner must

then reconsider the statutory factors to reach a decision on the least onerous conditions of release or bail that would address this risk and ensure the person's appearance in court. However, the custom is to merely set a monetary bail that is intended to be a deterrent to flee given the fact that the bail amount is forfeited if any condition of release is violated, such as failing to appear on a scheduled court date or committing another crime while on pretrial release. Since the monetary bail is designed to be the least amount of bail "reasonably calculated" to ensure the defendant's appearance at trial, it is, in effect, a proxy (expressed in terms of dollars) of whatever likelihood to flee was uncovered by the judicial commissioner. This process seems fairly straightforward and somewhat mathematical in nature. Yet, review of the procedures implemented by various Tennessee county judicial commissioners shows a wholly inadequate understanding or objective basis underlying the process and very little, if any, standardization across counties. Indeed, until January 1, 2010, judicial commissioners were not even required by law to undergo any training whatsoever on what was required of them or how to implement the process uniformly.

B. Extent Of Problem In Application Of Bail In Tennessee Counties.

The inability of county judicial commissioners to cogently explain the basic concepts of social bonding or deterrence or the application of the bail-setting process under the standards dictated by law becomes apparent when compelled to explain the process. In Macon County, Tennessee, one of two judicial commissioners appointed by the County Commission (Phillip Spears Sr.) was asked whether, for example, length of

residence in the community was more likely or less likely to cause a person to fail to appear in court on a criminal charge. [10]

> Q. Okay. Explain to me how a person's residence is related to whether or not they should be released ROR [on their own recognizance].
>
> A. Well, if – if there's somebody that's been here a month out of this year. They – if they've been here one month versus somebody that has been here ten years. That – that would be one way I would make part of the decision.
>
> Q. And why would that make a difference?
>
> A. Well, somebody that's been here ten years, you'd think well, they've got an established residence, and you know, they – they've been a resident here for ten years, and somebody that's just been here just a month they may be – they may have come here from somewhere else, running from trouble or something, and they may be somebody that's not going to stay here.
>
> Q. So the person that's been here for only a year is more likely, less likely or just as likely not to appear for court as the person that has been here for ten years?
>
> A. I would think that a person that's been here for a year would be more likely to – to not appear in court than the one that had been here ten years.
>
> Q. Do you have any evidence to – to back up this opinion?
>
> A. I've never had it – I've – I've never had a problem with a – a – which I don't – I don't really know if who has run and who has not run. Who – you know, who has and who has not.
>
> Q. So you're not aware of any statistical studies or anything showing who flees and who doesn't?
>
> A. No.

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[10] These deposition transcripts are of public officials subpoenaed to testify under oath pursuant to lawsuits filed against the various counties. Excerpts of these transcripts are either filed in the respective cases and available through PACER (Public Access to Court Electronic Records, www.pacer.gov) or are available in their entirety as public records with the county through the Tennessee Open Records Act. Unless otherwise noted, I am the person asking the questions as the attorney of record for the various plaintiffs.

> Q. So from where do you get that someone who has been here one year is more likely to flee than someone that has been here ten years?
>
> A. Well, I -- I feel like it using common sense. A person's got ten -- ten years established into a residence here that -- that he's -- to, you know, to stay here than a person that -- that hasn't been here over a month or so.
>
> Q. So it's just common sense?
>
> A. That's what I think it is.
>
> Q. How about employment? In regards to the different things that you said, you mentioned when you consider bail or ROR, do you consider employment status?
>
> A. Yes.
>
> Q. How does employment status have anything to do with whether or not someone is likely to flee or not?
>
> A. Well, if they've got a job established within the county, more than likely, they won't just up and leave -- you know.
>
> Q. And where do you get that from?
>
> A. Where do I get it from?
>
> Q. Yes, sir.
>
> A. I just -- it's just an assumption that I made on my own, I guess.
>
> Q. Is that common sense, also?
>
> A. Yes. (*Holman v Macon County* 2010).

The uncertainty of the responses reveals an attempt by this judicial commissioner to explain, post-hoc, a process that he has never been asked to defend before. On occasion, Mr. Spears Sr. would use circular arguments and deny making statements uttered mere minutes before.

Q. Okay. Someone who is unemployed in your mind is more likely to flee than someone who is employed; is that right?

A. Not necessarily be more likely to flee, but they – they would be more likely to – a person that's employed would be more likely to have a tie to the – to the community or to the state or and not up and leave than someone that – someone that's not employed could – could up and leave.

Q. Do – do you see the term "up and leave" different from the term "likely to flee"?

A. About the same.

Q. Okay. So that's when I say one is more likely to flee than the other and you say, no, they're whatever term you use, we're talking about the same thing, right?

A. Yes.

Q. Okay. To summarize, someone who is unemployed is more likely to flee or not appear in court than someone who is employed; is that right?

A. I feel like they would be.

Q. Okay. What if someone just lost their job yesterday? Does – does that take into account –

A. I would take it into consideration.

Q. Do you ask them how long they've been unemployed if they tell you they're not employed?

A. If they're not employed?

Q. Yes, sir.

A. How long they've been employed?

Q. Yes, sir.

A. If they're not employed I would ask them if they – if they were employed.

Q. If they're not employed, do you ask them how long they have been unemployed?

A. No.

Q. But didn't you just say if they were unemployed as of yesterday that that would be something that you should take into account?

A. That – that was your question, yes.

Q. So if it's something you should take into account, why don't you ask them that?

A. I didn't – I didn't say that it's something that should be taken into account, did I? (*Holman v Macon County* 2010).

Mr. Spears Sr. also had quite a difficult time explaining the apparent ubiquity of bail set by the charged offense or how the amount of bail would deter someone from fleeing.

Q. If we were to look at all the public intoxication charges that were presented to you for consideration of bail and find that 95 percent of them, they were all exactly $250, can you explain why all those people would have the exact bail amount?

A. No, I wouldn't – I wouldn't – I wouldn't be – I – I would – that – that's what was determined for their bail.

Q. So every one of those people had pretty much the exact same likelihood to flee?

A. Probably most of them paid cash bond out.

Q. Okay. But as far as their likelihood to flee, because that $250 represents the assurance that you feel is needed to make sure ... they don't flee. Is that right?

A. They – the $250 represents the bail. Now, if – if you – if – if you're saying that's an assurance to keep them from fleeing, like we talked about earlier, yes.

Q. Is that your understanding of what that $250 represents?

A. Well, it the – the a bond or a bail and bond is a surety that person is going to come back to court.

Q. Okay.

> A. Now, whatever you make it from that point.
>
> Q. Okay. So that $250 represents whatever amount you felt was necessary to assure that person comes back to court, right?
>
> A. If – if I signed it $250, that's what I signed it to.
>
> Q. So that $250 represents some level of your gut feeling of how likely that person is to flee?
>
> A. Yes.
>
> Q. Right. And that $250 is supposed to keep them from fleeing, right?
>
> A. Not necessarily $250. If I was going to run, I wouldn't worry about $250.
>
> Q. So why would you set a bail at $250, then?
>
> A. Well, that's just what I thought needed to be set.
>
> Q. But if the $250 is not going to keep them from running, what purpose does that $250 serve?
>
> A. Just the assurity [sic].
>
> Q. Okay. But you don't think it will necessarily keep them from running?
>
> A. Probably not, if they're going to.
>
> * * *
>
> Q. Okay. But a $250 bail, just so that we understand each other, a $250 bail represents your "assurity" [sic] that they will come for court, but that $250 will not necessarily keep them from running. Is that right?
>
> A. If I – if I was going to run it wouldn't keep me from running. (*Holman v Macon County* 2010).

The second Macon County judicial commissioner, Phillip Spears Jr., who was the son of Phillip Spears Sr., had this to say regarding some of the statutory factors to consider as predictive of likelihood to not appear for court:

> Q. Okay. So if a person is -- has a mental illness are they more likely, less likely or the same likely to flee as someone who does not have a mental illness?
>
> A. I guess same likely.
>
> Q. So if the -- if the presence of a mental illness does not increase or decrease their likelihood to flee as compared to a person that does not have a mental illness, why do you ask about mental illness?
>
> A. I don't know why (*Holman v Macon County* 2010).

As a source for his opinions, he similarly cited "common knowledge."

> Q. So we're just talking about employment. How does employment, whether they're unemployed or employed, help you decide whether that person is likely to flee?
>
> A. I guess if they don't have a job -- I mean -- you know, they wouldn't really have anything to stay around the community or you know, and they might [be] more likely to leave.
>
> Q. Okay. So someone who is unemployed is more likely to flee than someone who is employed, right?
>
> A. I feel like that. Yes, sir.
>
> Q. Okay. Likewise or -- or contrarily, if someone is employed they are less likely to flee than someone who's unemployed, right?
>
> A. That's common knowledge. Yes, sir (*Holman v Macon County* 2010).

In Trousdale County, Tennessee, the answers were substantially the same. Trousdale County Judicial Commissioner Charles Puckett, who is a barber by trade, testified about how length of residence was related to likelihood to appear in court:

> A. The longer a person has resided at a particular residence, the more likely they are to appear in court.
>
> Q. All right. What leads you to believe that?

> A. If they own their house and they have been making payments on that house, I personally do not feel that they would leave the jail, go home, pack their bags, get in their car and run.
>
> Q. Under any circumstances or is that just a broad general –
>
> A. That's just a generalization. I'm sure there are some circumstances out there that would prompt someone to do that.
>
> Q. And do you base that on any kind of evidence or statistical study or anything?
>
> A. No, sir, I'm not a statistician.
>
> Q. Do you ever follow up, for example, if someone comes and is arrested for failure to appear, do you ever enquire into what their life conditions were to see if you can make a connection between those and their failing to appear?
>
> A. No, sir, I do not (*Tate v Trousdale County* 2009).

Mr. Puckett, like Mr. Spears, had a very difficult time explaining the deterrent effect of monetary bail.

> Q. Just generally speaking, if you set the bond at $1,000, somebody has to pay a bondsman $100, right?
>
> A. Uh-huh [yes].
>
> Q. Ten percent?
>
> A. Yes, sir.
>
> Q. If you set the bond at 5,000, they have to pay a bondsman 500, right?
>
> A. Yes, sir.
>
> Q. Okay. So how does that 100, how does that 500 ... ensure that they're going to appear for court if they're out that money no matter what they do?
>
> A. I don't know (*Tate v Trousdale County* 2009).

In Wilson County, Tennessee, the amount of bail was literally pulled out of thin air by one judicial commissioner, Charles Churchwell, who was refreshingly honest about how he set bail.

Q. So, in this hypothetical the suspect is not in custody?

A. Right.

Q. How do you know how much to set the bond for?

A. Whatever the crime is. If it's a DUI then, you know, until -- until he gets there and I talk to him, I'll set the bond at maybe $1,000, $1,500. Then when he gets there and talks to me, I talk to him. And if I believe his story, then I'll lower the bond. You know, if I believe it's not as bad as the officer made it appear, then I'll lower the bond.

Q. Do you differentiate between DUI 1st/DUI 2nd?

A. Yes.

Q. So, DUI 1st would be in the range of 1,000 to 1,500?

A. Yes.

Q. DUI 2nd would be what?

A. 3,000.

Q. How about DUI 3rd?

A. Three times 1,500.

Q. 4,500?

A. Yes, sir.

Q. How about a DUI 4th?

A. Four times 1,500.

Q. 6,000?

A. Yes. If it goes above that, then I drop back to 1,000.

Q. To a DUI 5th you go back to 1,000?

A. Yes, sir, because his bond's getting up there. I think it's a little bit ridiculous.

Q. So, you would consider above 6,000 for a DUI – regardless of the sequential number that it is, you would consider that ridiculous?

A. Yes, sir, on two reasons. Because first place, the victim should have never had got that many without something being done in the system.

Q. You mean the suspect?

A. Yes, sir.

Q. How about for public intoxication?

A. Sir, I -- it varies from 750 to 1,000.

Q. How about for simple assault?

A. Simple assault, I usually -- 3,000, 2- to 3,000.

Q. How about aggravated assault?

A. 4 to 5. There again, though, after I talk to the victim.

Q. The suspect?

A. Suspect.

Q. We'll get there.

A. After I talk to the suspect, then I determine whether to lower it or not.

Q. Okay. Well, we'll get to that point. Right now we're talking about the suspect is not in custody yet.

A. Yes.

Q. Where do you get these numbers from?

A. **Out of my head, sir**.

Q. Is it based on in part where you've learned through other judicial commissioners?

A. No, sir.

Q. Just completely on your own?

A. Yes.

Q. **Out of thin air?**

A. **Yes, sir** (*Staley v Wilson County* 2006) (emphasis added).

The circular or confusing nature of these responses illustrate an attempt by the various judicial commissioners to explain a process they apparently do not understand in light of their perceived expectations related to a lawsuit where they have been accused of setting bail in an unlawful manner. It should be noted that all these judicial commissioners knew well ahead of time the topic we were going to discuss and some were coached by their defense attorneys on the kinds of questions they could expect. As Scott and Lyman (1968:46) theorized, these explanations are attempts at bridging the gap between their actions and the accusation of wrongdoing that are "employed whenever an action is subjected to a valuative inquiry." "Accounts" are "likely to be invoked when a person is accused of having done something that is 'bad, wrong, inept, unwelcome, or in some other of the numerous possible ways, untoward'" (Scott and Lyman 1968:47). These depositions of judicial commissioners in Tennessee further reveal a bail-setting system within the state that is manned by individuals who not only have an inadequate understanding of the purpose behind bail or how it should be implemented but who also may ask the required statutory questions without an adequate understanding as to why these factors are even considered. But, more importantly, they reveal another aspect that is worthy of examination, which is, the possibility that bail is broadly based on some rule of thumb such as that process described by Mr. Churchwell above. Such a "rule of

thumb" process is hardly based on an *individual's* likelihood to appear for court if released pretrial. Rather, it appears to be based on a broad-based assumption that all individuals charged under the same offense will have an equal likelihood of nonappearance without regard to any other socioeconomic factors that are mandated by law or supported by social science literature as predictive of flight (VanNostrand and Keebler 2009).

Indeed, a review of bail overall reveals a striking similarity across counties and a process that appears on its face to be consistent with that described by Mr. Churchwell in Wilson County. Contrary to Mr. Churchwell's assurance that he did not derive his figures from other judicial commissioners but only from his own head or thin air, his figures for bail associated with those charged with driving under the influence is amazingly on par with the average in other counties. For example, an examination of 2482 bail determinations for Davidson County, Tennessee over the period of April 16, 2009 to April 15, 2010 showed the following descriptives for the offense of Driving Under the Influence (DUI) where a monetary bail was actually set.

Table 1. Descriptive Statistics for DUI Bail in Davidson County, TN, 04-16-2009 to 04-15-2010

	DUI1	DUI2	DUI3	DUI4
Mean	$2,302.56	$3,660.41	$5,285.71	$12,913.04
Median	$2,000.00	$2,500.00	$5,000.00	$10,000.00
Std. Deviation	$2,001.259	$2,697.958	$4,179.409	$10,754.485
Skewness	9.043	3.220	3.141	2.076
Kurtosis	175.943	17.242	14.178	6.784
Range	$49,900	$24,000	$29,500	$57,000
Minimum	$100	$1,000	$500	$3,000
Maximum	$50,000	$25,000	$30,000	$60,000

Note: DUI1, DUI2, etc. denotes the charge for driving under the influence under T.C.A. 55-10-401. For each subsequent conviction of DUI, the minimum mandatory period of incarceration is increased. T.C.A. 55-10-403.

Recalling Wilson County Judicial Commissioner Charles Churchwell's illustration of how he would progressively increase bail for DUI offenses depending on the number of previous DUI charges (DUI 1st, DUI 2nd , DUI 3rd, and DUI 4th), this table suggests the same process is involved in setting bail in Davidson County. The average bail for DUI offenses increases progressively from about $2300 to $3700 to $5300 to $13,000 for DUI1 DUI2, DUI3, and DUI4 respectively.

This also suggests that the charged offense – in this example, DUI – may have a large effect on the monetary value of bail in each particular case. Why is this important? First, if the bail in any particular case is set via some rule of thumb based on the charged offense alone rather than the statutory factors predictive of a person's likelihood to flee, then the bail is not being set on an *individual's* likelihood to not appear for court if released as required by the U.S. Supreme Court. Second, if the charged offense is the sole or even the primary variable associated with the monetary value of bail or even if bail should be demanded (rather than release on one's own recognizance), then arresting police officers would have an inordinate influence on the ability of a person to be released from jail by inflating the charged offense or stacking charges. Since at the preliminary stages of the judicial process where the setting of bail takes place does not involve the determination of guilt or innocence, an inflated charge alone could unduly affect a person's liberty in the short term, even if ultimately acquitted of the charges. Of course, this has long term implications in that pretrial detention affects a person's ability to actively participate in their defense and may even cause other negative outcomes such as loss of employment (due to absence) and family problems. Third, if an individual remains incarcerated pending trial in spite of all other factors involved in predicting the

likelihood to flee pointing to a low flight risk, then this contributes needlessly to jail overcrowding and the associated public expense. Finally, if bail is set by a rule of thumb or based solely or predominately on the charged offense, then bail is set in contravention of the explicit instructions set out in state law. Judicial commissioners are sworn to uphold the law and a willful or a grossly negligent failure to follow the law may point to even broader societal problems not unlike the problems in 17th century England that ultimately called for a written prohibition against excessive bail through the English Bill of Rights of 1689.

An astonishing regularity of bail amounts for certain given offenses also points to the possibility that the charged offense is predominate. For example, out of 2120 arrests for Public Intoxication (PI) in Davidson County for the same time period as Table 1 above, 98.7% of the bail amounts were for *exactly* $500 or $1000. Raybin (1985:123) has noticed this trend as well by concluding that it is the “nature of the crime [that] appears to be the major consideration in present bond hearings". A “rule of thumb” bail amount for the charge of Public Intoxication also illustrates another phenomena that implicates societal concerns. Those typically arrested for public intoxication and detained due to an inability to post a preset bond suffer through a “never ending cycle of jail, release without treatment, and jail again” (Fagan and Mauss 1978:232). Although $500 may not seem like a great obstacle to securing a person’s release, especially in light of the ability to hire a commercial bail bondsman to secure the bail for a 10% fee, it still amounts to a barrier that many chronic drinkers are unable to afford repetitively. A preset bail amount based solely on the charged offense of Public Intoxication allows an unscrupulous police officer to arrest someone for having a beer on their back porch, as an examination of

public records confirms to happen on occasion, and is guaranteed that the person arrested, albeit innocent of the charge, will be forced to either pay $500 to the sheriff and forego the opportunity cost of that money or pay a bail bondsman $50 each and every time. Several cycles of this misadventure could very well bankrupt one of limited means.

III. THEORETICAL FRAMEWORK OF BAIL

It is useful to briefly explore the theoretical framework behind the concept of bail before we can hope to begin to examine it for efficacy and reform. While the original concept was rooted in the idea of pre-payment to the victim of crime in case the perpetrator fled the community without making compensation, it has since evolved into a system of formal social control of those accused of crime. This is not to say that those who were responsible for the evolution did so through a thoughtful, deliberative process that fully considered theoretical foundations. Moreover, there are powerful forces resisting any change away from a money-based system. Commercial bail bondsman can stand to generate a very comfortable income with little overhead or risk from the thousands of routine $1000 bails set for even minor crimes by judicial commissioners across the state.

The current money-based system is derived from the idea that if you fail to appear for a scheduled court hearing, you will forfeit your bail. The factors that are legislatively mandated to be considered in determining the presence of flight risk similarly have social bonding characteristics (Gottfredson and Hirschi 1990). Ties to the community, employment, financial conditions, persons who can vouch for one's reputation – are all measures of how connected the arrestee is to geographically based informal social control groups. As several judicial commissioners have testified, it is just "common

sense" that someone who owns a home, is employed in the region, or has other ties to the community are less likely to give all that up and flee the jurisdiction than someone who would suffer no loss if they left and failed to appear.

Social bond theory maintains that individuals with strong social bonds to work, family, and other institutions are less likely to engage in criminal behavior (Hirschi 1969; Laub, Sampson, and Sweeten 2011). In the context of risk of flight, judicial commissioners seem to adopt the assumption of control theories that everyone has a "relatively constant motivation for deviance... [and] will engage in deviance if some form of restraint is not present" (Gottfredson 2011). Accordingly, everyone inherently possesses a risk of nonappearance (deviance) and will fail to show up for court hearings unless some restraint is imposed. By placing sanctions for disobeying the conditions of pretrial release (showing up for court), the current system of bail establishes a "stake in conformity" (Toby 1957).

The stake, however, is not attenuation of the social bonds but rather loss of money. In the past, the individual family member who guaranteed or assured the accused's appearance at trial would suffer loss if the person failed to appear, including possibly suffering incarceration in place of the accused. Presumably, this would bring shame or guilt on the accused by his or her social connections for unjustly imposing the punishment on them and such informal severing of relationships provoked by the formal legal system would have some deterrent effect (Zimring and Hawkins 1973). However, the prevailing use of commercial bail bondsmen who will pay the bail for the accused has interfered with the stake of losing social bonds, so the deterrent factor represented by money bail is questionable. Indeed, even if the deterrent effect of losing money was

strong enough to influence the rational choice to appear or not appear for court, by paying a non-refundable 10% fee to the commercial bail bondsman, the loss of money is complete at the time of the transaction. In other words, the accused no longer faces a true risk of losing any money because whether he shows up for court or not, he will never recoup the 10% fee, and the bail bondsman will suffer the forfeiture of the bond, not the accused. On the other hand, some bail bondsman require family members to collateralize the risk by signing promissory notes to repay any forfeited bond or offering a lien on real property.

In effect, then, the use of commercial bail bondsmen has shifted the "stake in conformity" in the form of lost social bonds from imposition by a judicial authority to a third party, for-profit enterprise. In the end, money-based bail systems are no longer really designed to ensure payment of a fine, compensation to victims, or deter nonappearance but are rather designed to encourage commercial enterprises to absorb the risk of nonappearance by ensuring a profit mechanism. As we shall see, setting a bail of $250 for a misdemeanor offense where the defendant can be released from pretrial confinement upon payment of a nonrefundable $25 to a commercial enterprise who will, in turn, promise to pay the $250 in the event of his nonappearance, can hardly be seen as truly deterrent. However, multiple instances of $250 can serve as sufficient profit motive for a commercial bail bonding company to invest the energy in ensuring the defendant's appearance for a mere $25 (Toborg 1983) and incurring the expense of a private fugitive service in the event of the occasional flight.

IV. CRITIQUE OF BAIL IN THE LITERATURE

The American system of bail has been criticized as far back as 1922 (Goldkamp 1980) with the publication of *Criminal Justice in Cleveland* (Pound and Frankfurter 1922). (See also, Beeley 1927; Harris 1983; Morse and Beattie [1932]1974.) But Foote (1954) was the first to undertake a comprehensive examination of the effect of bail practices on defendants charged with a crime (Goldkamp 1980:179). In that comprehensive study of the system of bail in Philadelphia, Foote found that the large number of bail determinations necessitated the development of a system of setting bail that was applied easily and rapidly. Courts at the time had allowed consideration of such factors as the nature and circumstances of the offense charged, the weight of the evidence against the arrestee, the financial ability of the accused to post bail, his general character, the character of the surety posting bail on behalf of the accused, whether the defendant had been a fugitive from justice before or was a fugitive at the time of arrest, and even whether it would be difficult to leave the jurisdiction (such as being arrested on the island of Hawaii). But Foote (1954:1034-35) noted that all these factors, except for the nature of the offense charged, "vary so greatly in each case that they cannot be reduced to a rule of general applicability".

Nonetheless, due to the large number of cases in which bail needed to be set, the result was a system that used the nature of the offense as the basic standard for deciding how much to demand for bail. One federal judge noted that the reliance on the nature of the offense “seems to apply an abstract generality as the norm of decision, without consideration of the particular facts and circumstances disclosed” in the particular case (Foote 1954:1035). The prevalence of relying principally on the charged offense for

determining an amount to set as bail begged the question of where this amount came from.

The rationale behind this approach to bail-setting was that as the severity of the crime and possible punishment increased, the defendant, having more to fear, would become more likely to jump bail. Even if this was well founded, there was no indication of how the range of bail "usually fixed" for a given offense was established, and within Philadelphia there was a striking difference between the bail usually set in state courts and that usually set in federal courts for comparable offenses (Foote 1954:1035). Foote's study was followed up by Goldkamp (1980) in which approximately 8300 defendants who arrived for initial appearances between August and November of 1975 were examined. Goldkamp also interviewed Philadelphia bail judges and observed first appearances as part of the study. Despite substantial reform and improvements to the bail system after Foote's (1954) study, Goldkamp revealed that "the nature of the criminal charge still played the dominant role in bail determinations" (Goldkamp 1980: 188). The inability to predict the future was another significant conclusion that illustrated an ongoing recognition of the inherent problem in bail determinations. Although not entirely applicable today, Goldkamp concluded that "[t]o date no research has been able to isolate reliable predictors of either flight or dangerousness using criminal charge, past record, community ties, or any other defendant data presently available" (Goldkamp 1980:191).

Goldkamp (1983) again sought to examine predictive factors related to a person's likelihood to flee. This study also concluded that the charged offense was the predominate factor and that predictive skills were poor on the part of judges who considered the issue of bail. Importantly, "factors found to be related to pretrial failure,

however weakly, have not been found to be those necessarily relied upon by judges in making bail decisions; rather, factors actually employed in bail decisions may ignore or contradict those found to be noteworthy in predictive studies" (Goldkamp 1983:1561). The predilection to rely on the charged offense as the predominate, if not the sole, factor to consider in setting bail has led to what can be called "bond schedules" where magistrates simply look at a list of charges with preset bond amounts (Wisotsky 1970). This was the admitted practice in Rutherford County, Tennessee, which maintained such a “bond schedule” and followed it almost religiously (see Appendix A).

Maxwell (1999) published a comprehensive study of predictive factors using standard data obtained of arrested individuals and compiled in the National Pretrial Reporting Program of the Bureau of Justice Statistics, U.S. Department of Justice. The purpose was to compare the characteristics of those considered for bail and the characteristics that were predictors of failure to appear. Some reverse patterns were recognized between the characteristics that judges believed were predictive of good or low flight risk and how those same characteristics actually related to higher flight risk after analysis. For example, women and those charged with property offenses were most likely to be released on their own recognizance (ROR) by judges, suggesting their belief that they were low risk, yet had higher failure to appear rates, suggesting an incorrect assumption by the judges.

In 2009, one of the largest studies of pretrial risk assessment was conducted using data from the Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services, which included all those charged with federal criminal offenses between October 1, 2001 and September 30, 2007 (VanNostrand and Keebler 2009). In that study,

eight factors were isolated as significantly related to likelihood to appear in court if released or be a danger to society:

1. Pending felony charges
2. Prior felony convictions
3. Prior felony violent convictions
4. Prior failures to appear
5. Employment status
6. Residence status
7. Primary charge category
8. Primary charge type (VanNostrand and Keebler 2009:40). [11]

As a result of VanNostrand and Keebler's analysis, the U.S. Office of Probation implemented a program to standardize the process of bail determination and promulgated a template for judges to follow. This step-by-step process, also implemented in form by the State of Virginia and converted to a computer program, serves to address the inability of judicial officers to accurately predict a person's likelihood to flee and to address the apparent difficulty by those making bail determinations that causes a default to using only the charged offense.

My research project will examine which factors, if any, considered by Rutherford County judicial commissioners have a relationship to a determination of risk of nonappearance and to the amount of bail set.

V. DATA COLLECTION AND METHODS

The statutory factors considered in determining whether someone is eligible for ROR release or, conversely, for determining the least amount of bail necessary to ensure appearance for court, are rather broad and encompass many characteristics of the human condition that occur in society as a whole; for example, employment status, mental

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[11] Factors 5 and 6 are consistent with social bonding theory.

health, medical issues, and relationships in the community. While these factors codified in Tennessee law are not completely congruent with the statistically significant factors enumerated by VanNostrand and Keebler (2009), they are nonetheless the law in Tennessee and are required to be considered by judicial commissioners before setting bail.

On August 18, 2008, Rutherford County, Tennessee, a semi-rural county just south of Nashville-Davidson County, was sued in federal court for implementing a preset bail schedule that was used by county judicial commissioners to determine bail (*Jones v Rutherford County* 2008). The schedule (Appendix A) was based solely on the charged offense and did not allow for consideration of any other factors required by state law or found to be empirically predictive of a risk of nonappearance. Indicative of how long this preset bail schedule had been in effect, it contained charges such as "vagrancy" and "homosexual acts", both of which had been held to be unconstitutional by federal courts several decades before (*Kirkwood v Ellington* 1969 (vagrancy); *Bowers v. Hardwick* 1986 (sodomy)). [12] The county settled the case in December, 2008 and agreed, in part, to distribute a policy manual that included the applicable law regarding the setting of bail, to set conditions of bail "only after consideration of the factors enumerated in Tenn. Code Ann. 40-11-115 in a face-to-face or video conference discussion with the accused" and to provide access to bail determinations to the extent allowed by the Tennessee Open

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[12] Vagrancy statutes existed under English common law and were resurrected after the civil war during the Reconstruction period as a means to "force blacks to sign labor agreements ... " and providing a mechanism by which those convicted of the offense could be hired out (Cohen 1976:47). Tennessee passed its vagrancy statute in 1875 which allowed judges to impose fines of $5 to $25 and imprisonment for ten days to a year (Cohen 1976:48). A fine of $25 was not an insubstantial amount in 1875 to someone convicted of "having no apparent means of subsistence" or "strolling through the country without any visible means of support."

Records Act. [13] The policy manual, promulgated in December, 2008, included a document called a "mittimus" that contained space for judicial commissioners to annotate the responses arrestees gave to the listed questions (Appendix B). Thus, these questionnaires provide a ready dataset of factors actually considered by judicial commissioners, whether a risk of nonappearance was found as a result of the responses, and the amount of bail set to address the risk. The mittimuses are printed in prebound sets of approximately 200 per set and sequentially numbered on the bottom left-hand side using a Bates numbering system and archived at the Rutherford County Sheriff's Department.

A. Variable Creation and Coding

I submitted an Open Records request to the Sheriff of Rutherford County for inspection of all mittimuses for the 2012 calendar year. Examining an entire calendar year allows for examination of any variations based on month or season and would allow a comparison with other counties. In my experience of examining tens of thousands of public documents, those counties that archive such documents usually do so by calendar month and calendar year. In total, Calendar Year 2012 consisted of individual bail determinations Bates numbered 108001 to 121400 or 13,399 pages divided among approximately 67 bound volumes. These mittimuses provided a close facsimile of the statutory factors as shown in Table 2 below. [14]

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[13] The original signed settlement agreement is in my possession and available for review upon request or through a public records request with Rutherford County.

[14] The name of the person arrested was redacted although the record of his or her arrest is public information and readily obtainable. At the bottom of the page, the juridical commissioner noted what appears to be the person's medical history ("Hx") and prescriptions ("Rx"). While the Tennessee Code does require consideration of medical or mental health conditions, it does not require noting the medical history.

Table 2: Comparison of Statutory Factors and Questionnaire Factors.

Tennessee Statutory Factors	Rutherford County Questionnaire Factors
Employment status and history	Employment status, history and financial condition.
Financial Condition	Incorporated into employment questionnaire.
Family Ties and Relationships	Family ties and relationships.
Reputation	Reputation, character and mental conditions.
Character	Incorporated into reputation question.
Mental Condition	Incorporated into reputation question.
Prior Criminal Record including prior releases on bail	Prior criminal record, including prior releases on recognizance or bail.
Nature of Offense	The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance.
Probability of Conviction and Likely Sentence	Incorporated into nature of offense question.
Other Factors	Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Although the questions are not exact when compared with the statutory factors, for purposes of this study the questionnaires provide enough information to examine any relationship between factors considered (even if they differ from state law) and the determination that there is a need for bail because of a risk of flight and the bail amount necessary. Out of the numerous factors to be considered on the questionnaires, many are routinely ignored or merely summarized by judicial commissioners and often considered by the judicial commissioners as merely positive or negative (presence or absence of

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Noting this information on this form by the county judicial commissioners is possibly a violation of the Health Insurance Portability and Accountability Act (HIPAA). Moreover, there is no indication that the judicial commissioners are trained on how to consider mental health in terms of likelihood to flee nor does it appear to be a factor they actually consider.

factor). For example, to the question of “[r]eputation, character and mental conditions", the sample questionnaire in Appendix B shows a response of “Anxiety.” This note does not directly explain whether the subject has a reputation or character of anxiety or whether this was a perceived mental condition. For the question involving the "nature of the offense", the example merely shows a zero. Again, it cannot be ascertained whether this means there is no nature to the offense, whether there is zero probability of conviction, or whether the likely sentence was zero, or a combination of all three. Some written responses were unuseable, such as length of residence noting "all his life" without any reference to when the subject was born. This lack of uniformity and completeness is typical throughout the broader set of questionnaires and likely a result of lack of training in protocol for proper notations. Nonetheless, most notations do provide enough information to create nominal variables. A thorough examination of thousands of pages within the entire 2012 set showed a consistent trend as far as how commissioners noted responses by arrestees. Finally, where arrestees were charged with more than one offense, commissioners would set bail for each individual charge on the same mittimus. Thus, my independent and dependent variables and their coding are as shown in Table 3 below. [15]

The charged offenses were categorized in five general groups denoting whether the offense was a crime against a person, property, administration of justice, public health, or related to motor vehicles. The Tennessee Penal Code, generally contained under Tennessee Code Titles 39 and 55 of the Tennessee Code, categorizes most offenses

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[15] Unfortunately, the race, gender or age of those arrested was not noted in the questionnaires and so variations in bail on these variables could not be tested.

according to these groups as noted in Table 3. [16] An additional categorical variable was created out of these general groups (Classification of Crime), and the top seven charged offenses (in terms of frequency) were likewise incorporated into a categorical variable (Selected Crimes).

A random number generator (www.random.org) was used to randomly select mittimuses based on the Bates stamp. The sample size was initially selected with the goal of achieving a minimum *N* per group of independent variable equal to 30 or greater (Warner 2008:161). Power analysis shows that for nominal variables, a sample size of 26 per group is sufficient assuming á = .05, 1 df, statistical power at 80%, and large effect size (Cohen 1992:158). A random sample of 200 mittimuses resulted in a total of 272 observations of bail determinations per charged offense. (Recall that each mittimus may have more than one charged offense included in the analysis of bail.) Charges of Violation of Probation (VOP), Capias [17], Fugitive, "Return for past action", "Viol Vacc", Violation of Community Corrections (VOCC), Violation of Bond (VOB) and "BOB"

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[16] Title 39, Chapter 15, contains crimes against the family. These include crimes such as failure to pay child support, abortion, bigamy and incest, and other crimes involving children. There were no charges in the sample that belonged to this subclass of crime. Additionally, one of the top seven charged offenses (in terms of frequency) was Underage Consumption of Alcohol which is codified under Title 1, Chapter 3 (T.C.A. 1-3-113). Since this offense is most like the offenses involving possession of controlled substances and consumption of alcohol in public (Crimes involving Public Health), underage drinking was coded as a Crime involving Public Health.

[17] "Capias" is either a bench warrant issued by a criminal court judge or an arrest warrant issued after a grand jury returns an indictment. As such, the bail/bond is usually preset.

Table 3: Independent and Dependent Variable Coding

Independent Variables	Coding
Charged offense	String, denoting the charge as written and abbreviated where possible. E.g., "DUI" (Driving under the influence), "DA" (Domestic Assault), etc.
Crime involving Persons (Title 39, Chapter 13)	0 = No 1 = Yes
Crime involving Property (Title 39, Chapter 14)	0 = No 1 = Yes
Crime involving Administration of Justice (Title 39, Chapter 16)	0 = No 1 = Yes
Crime involving Public Health (Tile 39, Chapter 17)	0 = No 1 = Yes
Crime involving Motor Vehicle (Title 55)	0 = No 1 = Yes
Classification of Crime	1 = Crime involving Persons 2 = Crime involving Property 3 = Crime involving Administration of Justice 4 = Crime involving Public Health 5 = Crime involving Motor Vehicle
Selected Crimes	1 = Domestic Assault (DA) 2 = Driving Under the Influence (DUI) 3 = Implied Consent (IC) 4 = Public Intoxication (PI) 5 = Theft < $500 (Theft500) 6 = Theft > $1000 (Theft1000) 7 = Underage Consumption of Alcohol (UA)
Month of bail decision	1 = Jan, 2 = Feb, 3 = Mar, etc.
Length of residence	Numeric in years
Employed	0 = No 1 = Yes
Family ties	0 = No 1 = Yes
Prior criminal record	0 = No 1 = Yes
Dependent Variables	**Coding**
Risk of flight present	0 = No 1 = Yes
Bail Amount	Numeric, in dollars

were eliminated from the sample because they were either bail amounts set by another judge who issued the warrant, were not related to a known charge in the Tennessee Penal Code, or did not contain any responses to the questions on the form. As this is a study of

the factors considered (or not considered) by county judicial commissioners, bail determinations set by another judge are not within the scope of this study. Similarly, all offenses of Failure to Appear (FTA) had their bail set at a flat $5000, with any second offense FTA's set at double that amount, or $10,000. Therefore, these offenses obviously failed to consider any other factors and are not conducive to any type of statistical analysis. Taking into account missing entries and those mittimuses excluded for the above reasons, the total number of bail determinations was 164 with selected crimes totaling 78 and the other independent variables reporting at least 139 observations. This should be sufficient for even a medium effect size (Cohen 1992:158).

B. Descriptive Characteristics of Variables

A total of 51 different charged offenses were tabulated with subsequent charges of the same offense treated as a separate offense because that is how it was treated by the commissioners. For example, a third offense Driving Under the Influence charge (DUI3) was noted and treated as a separate offense compared to a first offense of DUI. [18] When offenses are examined according to the subgroup within the Penal Code, the data shows that alcohol- and drug-related offenses account for a plurality of cases. Crimes against the public health consist of public intoxication, simple possession, or possession with intent to resell controlled substances, underage drinking (predominately by university students), and possession of open containers of alcohol, among others. When combined with the 29 offenses under the vehicle code involving alcohol (DUI), alcohol- and drug-

[18] A third offense DUI means that the individual had been convicted of DUI twice before the instant arrest. The police officer typically runs a background check on a new arrest before presenting the case to the judicial commissioner for probable cause determination and setting of bail and will indicate prior offenses in the affidavit in support of arrest.

related offenses accounted for a majority of all the offenses in the sample (53.6%). Further, if we assume that the primary reason for revoking or suspending a driver's license is pursuant to an underlying conviction for driving under the influence, then adding all offenses of Driving with a Revoked License or Suspended License increases the total of alcohol- or drug-related offenses to 61.5% of all offenses in the sample.

Among the total study sample, 54% were employed in some capacity, 69% had some family ties to the area, and 67% had a prior criminal record. Yet, judicial commissioners found a risk of flight existed in 98% of the cases with the average bail equal to $1806 (SD = 1512). Out of the originally examined 200 mittimuses, 15 (or 7.5%) were for Failure to Appear in court on an underlying charge for which they were granted bail. This is consistent with the findings of VanNostrand and Keebler (2009:12) who found a failure rate of 7% overall in their extensive national sample.

The amount of bail set for those cases where a risk of flight was found (less the excluded cases) has a significant positive skew (2.205). An examination of the cases causing the skew shows essentially two cases, one for aggravated burglary ($10,000 bail) and one for Prescription Fraud2 ($12,000 bail) that stand out. There is only one case of Prescription Fraud in the entire sample and that case does not reveal any explanation for why the bail was set so high. Although the arrestee only reported four weeks of residence in the area, there were scores of other cases that either did not report any length of residence in the area or less than six months and did not have their bail set as high even if other factors, such as involving controlled substances or weapons, could have theoretically justified a higher bail. There were also two other cases of Aggravated Burglary in addition to the one causing the skew, and they had bail of $3000 and $6000.

Again, there is nothing to indicate why the Aggravated Burglary case in question had a bail of $10,000. Indeed, while the skewing case failed to indicate a length of residence in the area, it also noted no prior criminal record, a factor that previous studies have shown is negatively predictive of risk of flight. All three Aggravated Burglary cases reported negative for employment and positive for family ties. Because there is a lack of empirical support to explain the anomaly for these two cases, I excluded them from the dataset. The resulting frequency distribution had a more normal characteristic, although still asymmetrical (Shapiro-Wilk test rejecting null hypothesis of normality). However, the skewness (1.302) should not affect the parametric statistical tests to be performed as these tests are rather robust to a relatively slight violation of the assumption of normalcy and the nonparametric tests used do not have such an assumption. [19] The only other scale variable in the analysis, length of residence in the area, likewise showed a positive skew (1.045) with 50% of the sample reporting time in the area of 10 years or less and 2 years the most reported time frame (mean = 12.18). As with the amount of bail variable, this is not such a drastic skew as to affect the outcome of the tests.

Interestingly, while judicial commissioners have opined that a person employed is less likely to flee than one who is unemployed, the results of this study showed the opposite treatment. A full 100% of those individuals who reported being employed were found to be a flight risk by Rutherford County Judicial Commissioners while a lesser percentage (97.3) of those unemployed were considered a risk. (See Table 4, below). Similarly, 99% of those reporting family ties were found to be a flight risk compared to

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[19] Positive skewness is not unexpected with a variable, such as bail amount, that has a lower limit of zero and an unrestricted upper limit (Warner 2008:146).

97.7% who reported no family ties. Prior criminal record was also the opposite of expected, with 99% reporting prior records found to be a flight risk while only 98% of those with clean records were similarly treated. I examine the statistical significance of these differences in the Results section below. Additional descriptive statistics are shown in Table 4.

Table 4. Descriptive Statistics

	N	Min	Max	Mean (%)	Bail Mean	Bail SD
Independent Variables						
Crime against the Person	164	0	1	.12	$2447.37	$1723.17
Crime against Property	164	0	1	.13	2500.00	1669.05
Crime against the Admin of	164	0	1	.04	1857.14	899.74
Crime against the Public Health	164	0	1	.36	1601.69	1789.46
Crime involving Motor Vehicle	164	0	1	.35	1530.70	896.51
Crimes by Class						
Person	19			11.6	2447.37	1723.17
Property	22			13.4	2500.00	1669.05
Admin	7			4.3	1857.14	899.74
Public Health	59			36.0	1601.69	1789.46
Motor Vehicle	57			34.8	1530.70	896.51
Selected charged offenses	78					
Domestic Assault (DA)	12			15.4	2583.33	1635.31
Driving Under the Influence	24			30.8	1791.67	674.32
Implied Consent (IC)	8			10.3	500.00	0.00
Public Intoxication (PI)	15			19.2	246.67	12.91
Theft<500 (Theft500)	7			9.0	1857.14	556.35
Theft >1000 (Theft1000)	6			7.7	3333.33	1751.19
Underage Drinking (UA)	6			7.7	816.67	465.48
Length of residence in the community	135	0.0	50.0	12.2		
Employment status	158	0	1	.54		
Family ties and relationships	139	0	1	.69		
Prior Criminal Record	152	0	1	.67		
Dependent Variables						
Risk of Flight	164	0	1	.98		
Amount of Bail	164	0	$7000	$1806.40		$1512.22

VI. RESULTS

My overall research question involves whether there is any relationship between the factors enumerated in the Rutherford County mittimus with a conclusion that risk of flight exists and with the amount of bail set. Recall that the settlement agreement assured that Rutherford County judicial commissioners would set bail "only after" considering *all* the listed factors. This analysis will test how well they have kept their promise and whether they have followed state law. Overall, I would expect to find a lower finding of risk of flight for those arrestees who are employed, have family ties to the community, have no prior criminal record, and are charged with non-violent offenses, such as those not directed at a person. Similarly, I would expect the amount of bail to have some relationship to those same factors because the amount of bail set is required to be the lowest amount that will reasonably assure the person's presence in court. In other words, the lower the risk of nonappearance, the lower the amount of bail should be.

In this study, there are two dependent variables. The first, risk of flight, is a nominal variable indicating whether the commissioner determined there was a risk of flight after consideration of all the statutory factors, and the second, amount of bail, a continuous scale variable which is the least amount necessary to address the risk. [20] The latter, under Tennessee law, cannot exist without the former. In other words, a judicial commissioner must *first* determine and consider the statutory factors in order to conclude *if* there exists a risk the person will not appear for court if released pretrial. If a

[20] I concluded that the judicial commissioners found a risk of flight if they set a monetary bail because, by statute, they cannot set bail without first finding a risk of flight.

risk of flight is found, the commissioner must then use the same statutory factors to determine the least amount necessary to address this risk of flight and ensure that the defendant will appear for court. Accordingly, I start my analysis with considering what factors, if any, resulted in a finding that there existed a risk of flight.

Initially, I should note, that in 98.2% of the cases considered, a judicial commissioner found that there existed such a risk of nonappearance. Without any detailed analysis, one can easily conclude that Rutherford County judicial commissioners assumed that everyone was a potential flight risk regardless of any of the statutory factors. Indeed, only three cases found no risk, one each charging assault, disorderly conduct, and theft over $10,000. Interestingly, the person charged in the assault case was reportedly schizophrenic and bi-polar, had only lived in the community for six months, had a prior criminal record, was unemployed, and had no family ties. The notes are somewhat confusing, but the absence of flight risk may have been ordered by the judge (rather than the judicial commissioner) for unknown reasons. The disorderly conduct case was a high school student at a local school with no prior criminal record. The theft over $10,000 case had no annotations as to the statutory factors, but a note indicates the decision may have been made by the judge. Considering the sole ROR case decided by a commissioner, a finding of no risk is rare indeed. The bivariate analysis bears this out.

A. Nominal Variable Analysis

The nominal independent variables are employment, family ties, and prior record. The nominal dependent variable is risk of flight. I use cross tabulations to determine if there is a relationship between any of the independent variables with the

nominal dependent variable. Because several cells indicated an expected count less than five and are unequally distributed (due to the overwhelming percentage where risk of flight was found), I used Fisher's Exact Test to assess significance at the .05 level with one degree of freedom (Ritchey 2008:474). As Table 5 indicates, I conclude that there is no relationship between the finding of flight risk and employment, family ties, or prior record at the 95% confidence level. This confirms my initial observation that such was likely the case when 98% of all cases in my sample were found to have an associated risk of flight regardless of variation in these factors. The differences in percentage of employed versus unemployed (reverse of expected) noted earlier that were found to be a flight risk can be attributed to chance or sampling error and not to any significant difference between the two. The same conclusion is reached for those with family ties and prior criminal records, that is, that there is no relationship between these variables and the finding of risk of flight by judicial commissioners.

Table 5. Fisher's Exact Test of 3 x 2 IV vs DV nominal variables.

			Employment $N = 158$		Family Ties $N = 141$		Prior Record $N = 154$	
			No	Yes	No	Yes	No	Yes
Risk of Flight	No	Count	2	0	1	1	1	1
		(%)	(2.7)	(0.0)	(2.3)	(1.0)	(2.0)	(1.0)
		Exp	.9	1.1	.6	1.4	.6	1.4
	Yes	Count	71	85	42	95	49	103
		(%)	(97.3)	(100)	(97.7)	(99)	(98)	(99)
		Exp	73.1	84.9	43.4	95.6	49.4	102.6
Fisher's Exact Test (p-value)			.212		.528		.545	

Note: None of the variables were found to be significant at α =.05.

I further compared the three nominal conditions to the interval/ratio variable of amount of bail set. Using independent sample *t*-tests for each combination, I found that only prior record was significantly associated to the amount of bail. Those who appear with prior criminal conduct on their record have higher mean bail set than those who do not ($2130 and $1235, respectively). A factorial ANOVA test produced the same result with the effect size of prior record on amount of bail quite low (partial ç^{2} = .066).

Table 6. Factorial ANOVA of nominal variables.

	F Statistic	Partial ç^{2}
Employment	2.184	.017
Family Ties	0.286	.002
Prior Record	9.147**	.066
Employment*Family Ties	2.375	.018
Employment*Prior Record	0.663	.005
Family Ties*Prior Record	0.739	.006
Employment*Family Ties*Prior Record	0.232	.002

*$p<.05$, **$p<.01$, ***$p<.001$, df = 1

B. Scale variable analysis

Length of residence in the community (in years) did not show any linear relationship to the amount of bail, as Figure 2 shows. In fact, the lines are quite flat across the spectrum and no linear or curvilinear relationship is apparent between length of residence in the community and amount of bail (Pearson's r = -.021, N = 135, p = .807). I would have expected a negative relationship with greater time in the community

correlating with lower bail representing a lower risk of flight. However, even isolating the data for just one charged offense, such as DUI, does not change the result. Figure 3 shows the scatterplot for DUI charges only and amount of bail, with flat lines still prevalent (Pearson's $r = -.06$, $N = 19$, $p = .808$).

Therefore, I conclude that there is no evidence of a linear relationship between length of residence in the community and risk of flight or amount of bail as found by judicial commissioners in Rutherford County.

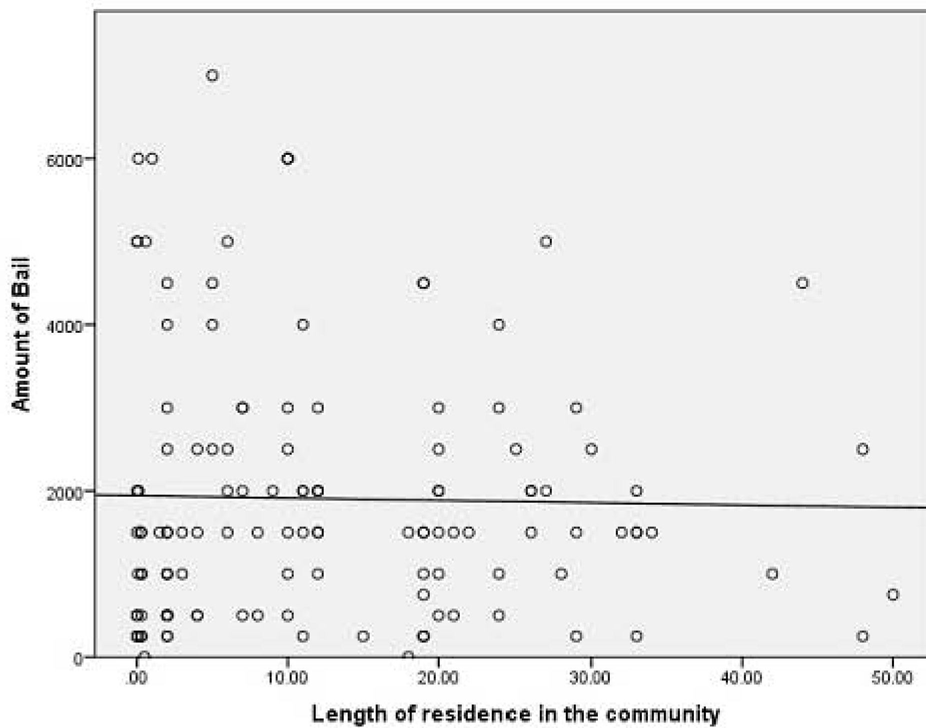

Figure 2. Scatterplot of Length of Residence to Amount of Bail with regression line.

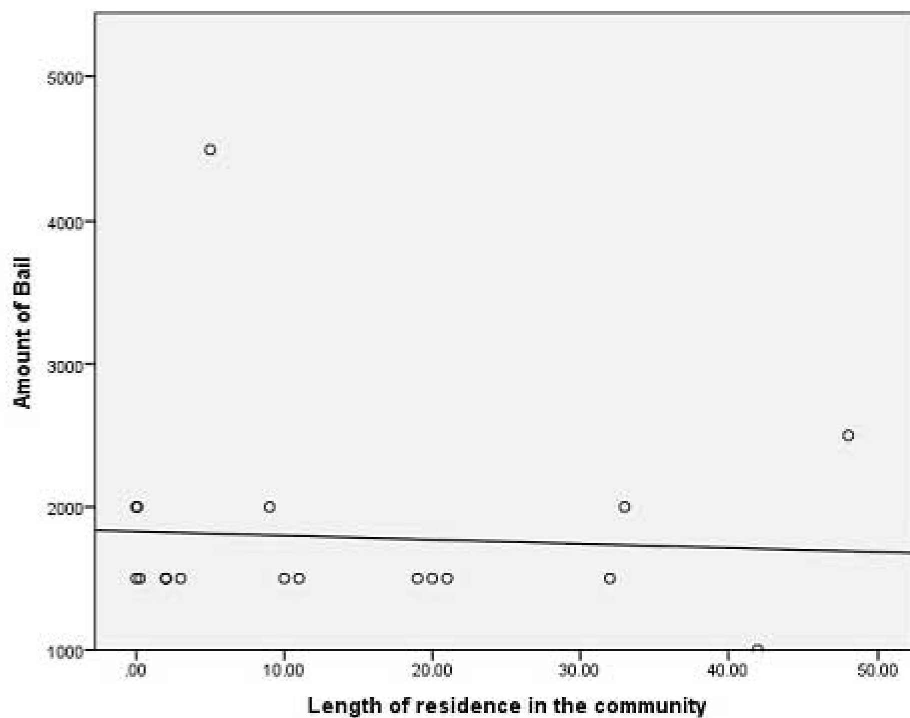

Figure 3. Scatterplot of Length of Residence to Amount of Bail with regression line - DUI only.

C. Categorical variable analysis

I recoded the nominal variables based on class of crime (person, property, admin, public health, and motor) into a categorical variable (with five groups, each representing a class of crime) to perform an omnibus test of the overall relationship with the amount of bail. Running independent *t*-tests on each nominal variable is not recommended as it increases the probability of Type I error (Warner 2008:216). I likewise recoded the top seven occurring charged offenses (in terms of frequency) into a categorical variable with seven groups. (See Table 3, p. 34, for specific coding details.) A single omnibus test involving all groups tests whether the means of the groups are equal.

I first test for assumptions of normality and equal variance before deciding on the appropriate test. While ANOVA is particularly robust to violations of these assumptions, serious violations would justify using a nonparametric test such as Kruskal-Wallis (Warner 2008:215). As I described in the section on descriptive characteristics, while the distribution of bail is asymmetric, it is close enough to normal to survive a slight violation of the assumption of normality. I use the Levene test to assess homogeneity of variance.

The Levene statistic for both class of crime and selected crimes was significant for unequal variances of amount of bail. This violation of the equal variance assumption along with the unequal sample sizes (see Table 4, above, for each group *N*) raises some concerns about the robustness of the ANOVA test on this sample (Warner 2008:219-220). To confirm robustness in the face of unequal variances, I ran a Monte Carlo

simulation of a one-way ANOVA on 1000 groups with equal variances using simulated data and compared this with one-way ANOVA using the standard deviations and sample sizes of the five class of crime groups. (See Warner 2008:187 for an explanation of Monte Carlo on examining *t* test robustness in the face of assumption violations). The proportion of trials that had a *p* value of less than 0.05 was 0.065, thereby confirming that the unequal variances of the real data did not drastically affect the probability of Type I error. However, this Monte Carlo simulation did not test the combined effect of small sample size and unequal group size which significantly increases the risk of Type I error (Warner 2008:187).

The omnibus ANOVA test for both class of crime and crime select showed significance for mean differences of amount of bail at the .05 level but failed to show any significance between groups on the selected post hoc test (Tamhane). This is not particularly unusual and can happen "because protected post hoc tests are somewhat more conservative, and thus require slightly larger between-group differences as a basis for a decision that differences are statistically significant, than the overall one-way ANOVA" (Warner 2008:241). To test these variables further, I performed the nonparametric Kruskal-Wallis *H* test.

For both variables, the independent samples Kruskal-Wallis *H* test was significant at the .05 level, indicating that at least one pair within the group had a statistically significant difference in mean bail. $X^2_{\text{Class of Crime}}$ (4, N = 164) = 15.93, p = .003, $X^2_{\text{Select Crimes}}$ (6, N = 78) = 58.92, p = .001. To examine which pairs of groups were different from each other, I conducted a pairwise comparison in SPSS using Mann-Whitney *U* for each pair and applying Bonferroni adjustment to control for Type I error.

(See Warner 2008:239 for an explanation of the Bonferroni adjustment to alpha). [21]

The results, shown in Table 7 for class of crime and Table 8 for selected crimes, show statistical significance between a number of pairwise groups at the .05 level. The significance of Crime_PubHealth is likely affected by the significance of public intoxication because public intoxication is included in that class of crime. While Table 7 shows significance, the real effect on the amount of bail is from the actual charged offense, as illustrated by the highly significant findings in Table 8.

Table 7. Mann-Whitney pairwise comparison - Class of Crime - Amount of Bail

		Test statistic (*U*)			
		1	2	3	4
1	Crime_Person				
2	Crime_Property	-1.87			
3	Crime_Admin	8.02	9.89		
4	Crime_Pub Health	**36.47***	**38.34***	28.45	
5	Crime_Motor	22.25	24.13	14.24	-14.22

$^*p<.05$, $^{**}p<.01$, $^{***}p<.001$, $ç^2 = 0.10$.

[21] The procedure for conducting this test is not immediately apparent to the casual user of SPSS. This post hoc test is only viewable if the Independent Samples dialog box is used instead of the Legacy/K Independent Samples box. After selecting the appropriate variables, select “Kruskal-Wallis 1-way ANOVA (k samples)” in the Setting Tab and choose “All pairwise” in the “Multiple comparisons” window. Double click on the output and in the bottom of the right-hand window, in the “View” window, select “Pairwise Comparisons”. The pairwise *p*-values will appear in a table. See Green and Salkind (2013).

Table 8. Mann-Whitney pairwise comparison - Selected Crimes - Amount of Bail

		Test statistic (*U*)					
		1	2	3	4	5	6
1	Domestic Assault						
2	Driving Under the Influence	8.98					
3	Implied Consent	**37.12****	**28.15***				
4	Public Intoxication	**49.12*****	**40.15*****	12.00			
5	Theft<$500	5.55	-3.43	-31.57	**-43.57*****		
6	Theft>$1000	-5.88	-14.85	**-43.00****	**-55.00*****	-11.43	
7	Underage Drinking	33.29	24.31	-3.83	-15.83	27.74	**39.17***

**p*<.05, ***p*<.01, ****p*<.001, $ç^2$ = 0.76.

VII. DISCUSSION AND CONCLUSION

The question presented in this study was if any of the factors considered by judicial commissioners as summarized on the individual mittimuses had any significant relationship to risk of flight or the amount of bail. Previous summary examinations of several county bail practices through deposition transcripts and electronic data appeared to show a practice of considering only the charged offense as the primary, if not the only, factor that affected these two outcomes. Historical studies, in particular the analysis by Foote (1954) of bail in Philadelphia, also showed the charged offense as the overriding factor and the particular history of Rutherford County showed that its

commissioners followed that same practice. A variety of statistical tests were performed on bail decisions by Rutherford County judicial commissioners to examine all possible variables, individually and as groups, and only the charged offenses and existence of a prior criminal record had a statistically significant relationship to bail. Contrary to the settlement agreement in *Jones v Rutherford County* (2008), the judicial commissioners continue to use the charged offense as the primary criteria for setting bail. While having a prior record accounted for 6% of the observed variance, the particular charged offense accounted for 76% of the variance in amount of bail. With release on recognizance a rare event, the presumption appears to be that everyone, regardless of varying socioeconomic conditions that tie them to the area, is a flight risk and only a monetary payment can reduce that risk to a acceptable level. Pretrial release on conditions, as opposed to monetary bail, is seldom, if ever, used other than the typical domestic assault order to stay away from the alleged victim. The practice in Rutherford County and, indeed, throughout the State of Tennessee, is that those arrested must pay money to get out of jail before trial. While state law does provide alternatives to paying money, such as posting unencumbered real property as collateral or having two noncommercial sureties post a bond, these alternatives are typically not explained to arrestees if they do not think to ask. Macon County Judicial Commissioner Phillip Spears Jr. explained the usual process regarding alternatives to posting money:

> Q. Do you explain to the defendants the options that they have for posting that bail amount?
>
> A. Yes, sir.
>
> Q. And what do you tell them?

> A. I just – I tell them that – well, I don't tell – I'll – I'll explain to you like this. I don't tell them anything unless they ask.
>
> Q. So let's say you decide that the bail is going to be $1000.
>
> A. Okay.
>
> Q. Do you tell them at all the options that they have to post that $1000?
>
> A. If they ask, yes.
>
> Q. If they don't ask you don't tell them?
>
> A. I don't tell them anything.
>
> Q. Is there anywhere where they would get that information – different options that they have?
>
> A. They could ask the jailer I guess and he could tell them – you know, inform them what options they will have (*Holman v. Macon County* 2010).

Of course, this begs the question: How can arrestees, who probably do not know the law, receive information about their options for posting bail if they do not know to ask? As a result of this lack of knowledge, the vast majority of those arrested use commercial bail bondsman to post a bond for their bail. There is often a vested commercial interest in not disclosing such information to arrestees. For example, public documents in Trousdale County show that the owner of Hartsville Bonding Company, Henry Linville, is the father in law of the Chief Deputy in charge of the local jail, is related to Shelvy Linville the County Mayor, and related to General Sessions Court Judge Kenny Linville who would have statutory authority to review any bail decisions made by judicial commissioners. There is also a local attorney named Sharon Linville. This type of "cozy relationship[] between bondsmen and members of the court and law enforcement community" has "produced damning reports of bondsman corruption, collusion with

criminal justice authorities, and abuses against indigent defendants" (Maruna 2012:326).

In Rutherford County, length of time in the community, employment, and family ties had no significant effect on a finding that risk of flight existed or the dollar amount of bail that would sufficiently address or deter the risk. Despite clear law that requires consideration of these and other factors and despite a written settlement agreement and amended policy manual that required the same, Rutherford County judicial commissioners appear to ask some of the required questions, annotate the responses, and then disregard everything but the charged offense. The questions and responses on the mittimuses appear to be mere window dressing that mask the more simplistic actions of the judicial commissioner. Indeed, comparing means of the seven selected offenses to the presumptive bail amount originally set by the preset bond schedule (Appendix A) that was the subject of the *Jones* lawsuit (one sample *t* test), only two – DUI and underage drinking – are statistically different from the original preset list. It appears that Rutherford County judicial commissioners continue to presume everyone is a risk of flight, that only monetary bail can deter that risk, and everyone is deterred by the same amount of money as the old list assumed.

There is an unequal power dynamic at play here as well. Not only are arrestees not informed of their legal options for posting bail but they are not informed of their right to have counsel present during questioning by judicial commissioners nor what criteria is to be considered in restricting their liberty. Those that think to question the process or amount of bail have no effective recourse. In the case of *Crowder v Marshall County* (2013), the arrestee alleged that he complained of excessive bail after the

judicial commissioner set it without asking any questions or taking any statutory factors related to risk of flight into consideration. A video recording of the encounter, obtained through a public records request, shows the judicial commissioner calmly walking around the counter to where the arrestee was standing after he complained about his bail and proceeding to punch the arrestee repeatedly in the face until subdued by corrections officers present at the scene. While the judicial commissioner was ultimately charged with assault, he was given a diversionary sentence (no jail time and option to expunge his record after a period of time) while the arrestee was convicted of his offense and sent to state prison. Arrestees who desire to challenge their bail are given a legal paradox as a choice. If they post the money, the appeal based on excessive bail is rendered moot since they were released from jail and no longer would receive a real remedy from any judicial decision. On the other hand, if they preserve their appeal by refusing to post the bail until a court with appellate jurisdiction over bail hears the case, they can sit in jail for days if not weeks waiting for the hearing.

Is this failure to consider statutory factors by Rutherford County judicial commissioners a deliberate ruse, a purposeful disregard for the law they are sworn to uphold, or is there something more complex happening here? Foote (1954) suggested that the problem was the complexity of the task we ask of these judicial officers. To be sure, attempting to quantify such esoteric factors as reputation in the community and how the effect of this on one's social bond can influence an arrestee's decision to not appear for court, can be a daunting task. To date, no one has successfully managed to do this on the front end. Kahneman (2011) theorized that when people are asked to "generate intuitive ideas on complex matters" they tend to substitute an easier, heuristic

question. In the context of expressing feelings in dollars, he suggested that we perform "intensity matching" (Kahneman 2011:99). For example, the question "How much would you contribute to save an endangered species" is substituted by "How much emotion do I feel when I think of dying dolphins". The feeling and how much to contribute are both "intensity scales" that can be matched. Judicial commissioners may be asking themselves the question of "How much money should this person be required to pay for what he has allegedly done" rather than the legally required "What least onerous conditions of release, including possibly money bail, are needed to reasonably assure this person will appear in court as ordered?"

When a new arrestee is first presented to a judicial commissioner, the officer usually performs the task of asking the questions on the form in a matter of minutes if not seconds. In observing some inquiries in person in other counties, I noticed that several bail decisions were made in less than 30 seconds. The officer does have a great deal of time to ponder the complexities of social bonding theory, deterrence theory, and mathematical probabilities. While creating a mittimus form that presents questions to be asked with room to write the responses was clearly an improvement over the old practice of not keeping a record of the exchange, the current form fails to provide a clear guide to judicial commissioners on how to apply the factors examined to the ultimate goal of setting an individualized, reasonably calculated bail to deter a direct risk of nonappearance.

The International Association of Chiefs of Police has conceded that "financial bail is not a reliable predictor of whether a defendant will appear in court or remain free of crime while out on bail" (Weinstein 2011). Even Justice Jackson, in his concurring

opinion in *Stack v Boyle* recognized that setting the same bail for everyone charged with the same offense “violate[d] the law of probabilities”. Only one other country besides the United States uses a bail system that solely revolves around the concept of paying money to get out of jail, a system so inequitable that even the American Bar Association has advocated for its elimination (Carlson 2011). So why, then, do judicial commissioners continue to rely almost exclusively on the charged offense and a preset bail schedule for setting bail? Understanding that the complexity of predicting future nonconforming behavior through examination of several social bonding factors is difficult even for social scientists to do, Rutherford County commissioners and those across the state could benefit from examining and emulating other jurisdictions that have attempted to create a system that is empirically based and easy to follow. The federal courts have wholly eliminated not only commercial bonding companies but also monetary bail (other than personal surety notes) and have designed a Pretrial Risk Assessment Tool (PTRA Tool) (Appendix C) that can be modified for the particular state jurisdictions. Simplifying the process, educating judicial commissioners, advocacy and support by elected judges, and creating an empirically based, methodological approach to setting bail could ensure a return to the constitutionally supported method of bail that is both reasonably calculated and individualized to truly address a particular individual’s risk of flight or danger to the community. But this does not end the inquiry. While the PTRA Tool does simplify the process and provides an avenue to quantify the factors, the end result of following the steps of the tool is a “Risk Score.” The task remains for judicial commissioners to convert the Risk Score to some measure where they can use it to determine what conditions of release will reasonably assure court

appearances.

As mentioned, the federal courts have eliminated money-based bail as the primary method of attempting to ensure appearance for trial and at least two state supreme courts have held that money-based bail systems that use a preset bail schedule are unconstitutional under their respective constitutions (*Clark v Hall* 2002; *Pelekai v White* 1993). Scotland eliminated its money-based bail system after recognizing that 27% of those required to post an average bail of only 20 pounds (about $40) could not pay the money and where only 6% of those released pretrial failed to appear for court (Schachter 1989). The possibility of forfeiting such a small amount "was not likely to deter any salaried person who planned to flee trial. For those accused persons who were impoverished, however, it meant incarceration" (Schachter 1989:56). Closer to home, Fignar (1978) examined a pretrial release program instituted by Davidson County (Nashville), Tennessee, from 1973 to 1978 through a federal grant that did not involve posting money. Between July 1973 and July 1978, 3705 individuals were released pretrial through the program with only a 2.2% failure rate. The relatively low failure rate in jurisdictions where bail is not based on money should raise the question of whether money can really act as a deterrent to nonappearance, most especially in a system where commercial bonding companies act as an intervening connection between the money and appearance.

In my experience of practicing law for over 15 years, I have found very few defendants fail to appear for court. Out of those that do fail to appear, it is rarely out of a true intent to flee justice. Most fail to appear for court for reasons that are not reflected in any of the literature or form questionnaires. For example, while Maxwell (1999:137)

found women were about 60% more likely to fail to appear than men when released on their own recognizance and 50% more likely than men when released on bail, she failed to posit any explanation for this "incongruent pattern." Interestingly, whether the women were released ROR or under a money bail did not seem to matter and across the board the FTA rate did not seem to match predictions based on ROR or money bail release orders. This raises serious doubts about the efficacy of money bail as a deterrent on nonappearance. If gender is a significant predictive factor of FTA, I doubt that the connection is somehow based on any inherent characteristics of being female. Rather, gender is likely a proxy for something else. Women are still the primary care givers for children in the United States (Lavee and Katz 2002) and likely more so in the South. Those who are involved in the revolving door of the criminal justice system are often at a lower socioeconomic class and cannot afford childcare. Without the family or financial resources to arrange for childcare, if faced with the choice of not going to court or leaving a child alone, a female defendant is likely to choose the former. This difficult choice can be further compelled when defendants are faced with a sign on the courtroom door, as I have seen, that no babies are allowed. Is this really something that should be punished or addressed through a requirement to pay more money in the form of bail? Or can this be addressed at the front end by judicial commissioners asking all defendants if they have small children and have access to adequate childcare on their scheduled court dates? Ironically, if such defendants had the money to pay a higher bail because they are at higher risk of nonappearance they would have the money to pay for childcare. Keeping them in jail under an excessively high bail without addressing this rather simple issue hardly serves the goals of justice or efficiency.

Similarly, no one asks defendants if they need a reminder for their court dates. Fignar (1978) found that a pretrial services program that had a trial date reminder as a component was effective in reducing FTA's. At a judicial commissioner's conference held in April, 2011, I asked 110 attending judicial commissioners from across the State of Tennessee to give their opinions of why people fail to appear for court – 40 attendees responded. Out of all the reasons provided, 34.5% fell under the category of forgetfulness or confusion/misunderstanding of the court date. Another 18% were transportation or childcare related reasons. And yet, these factors are never questioned or considered in the process of setting bail. Even the judicial commissioners themselves concluded that only 17% did so with a deliberative purpose to avoid punishment. If money bail was used for that 17% the commissioners had in mind then why did the forfeiture of such money not act as an adequate deterrent for them? No one seems to be able to explain that disconnect.

Pretrial release services have proven successful in the federal system and were an effective alternative to money bail in Davidson County from 1973 to 1978 (Fignar 1978). Amending the bail laws of Tennessee to allow payment of a flat bail fee to the court clerk instead of to a commercial bail bonding company could easily fund the cost of such a pretrial services division and allowing a fee waiver for those who are truly indigent would ensure that no one stays in jail solely because they are poor. Allowing a pilot project to update the idea behind the 1978 Davidson County experiment would allow for more current data collection and ensure that such a program could function in today's judicial climate.

Clearly, more research is needed to further refine those factors that are behind a defendant's decision to not appear for court. The Rutherford County questionnaires were limited in that many factors, such as access to childcare and transportation, court date reminders, and access to drug and alcohol treatment, that could help predict failures to appear were absent. Comparison between a money-based bail system, such as presently exists across Tennessee, and a non-money-based system with a robust pretrial services program and close supervision of those released pretrial would help resolve the debate of whether demanding money as a condition of pretrial release actually serves to reduce nonappearance.

REFERENCES

Beeley, Arthur. 1927. *The Bail System in Chicago*. University of Chicago Press.

Carlson, Lindsey. 2011. "Bail Schedules. A Violation of Judicial Discretion?" *Criminal Justice* 26(1).

Cohen, Jacob. 1992. "A Power Primer." *Psychological Bulletin* 112(1):155-59.

Cohen, William. 1976. "Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis." *The Journal of Southern History* 42:31.

Fagan, Ronald and Armand L. Mauss. 1978. "Padding the Revolving Door: An Initial Assessment of the Uniform Alcoholism and Intoxication Treatment Act in Practice." *Social Problems* 26:232.

Fignar, Richard Joseph. 1978. "A Descriptive Study of Pretrial Release on Personal Bond in Davidson County (Nashville), Tennessee." Master's Thesis, Department of Criminal Justice, Middle Tennessee State University.

Foote, Caleb. 1954. "Compelling Appearance in Court: Administration of Bail in Philadelphia." *University of Pennsylvania Law Review* 102(8):1031-79.

Goldkamp, John. 1980. "Philadelphia Revisited: An Examination of Bail and Detention Two Decades after Foote." *Crime and Delinquency* 26:179.

Goldkamp, John. 1983. "Criminology: Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia." *Journal of Criminal Law and Criminology* 74:1556.

Gottfredson, Michael and Travis Hirschi. 1990. *A General Theory of Crime*. Palo Alto, CA: Stanford University Press.

Gottfredson, Michael. 2011. "The Empirical Status of Control Theory in Criminology." Pp. 77-100 in *Taking Stock: The Status of Criminological Theory*, edited by F.T. Cullen, J.P. Wright, and K.R. Blevins. New Brunswick, NJ: Transaction Publishers.

Green, Samuel and Neil Salkind. 2013. *Using SPSS for Windows and Macintosh: Analyzing and Understanding Data*. Upper Saddle River, NJ: Pearson Prentice Hall.

Harris, Donald. 1983. "The Vested Interests of the Judge: Commentary on Flemming's Theory of Bail." *American Bar Foundation Research Journal* 8(2):490-506.

Hirschi, Travis. 1969. *Causes of Delinquency.* Berkeley, CA: University of California Press.

Kahneman, Daniel. 2011. *Thinking Fast and Slow*. New York: Farrar, Straus and Giroux.

Laub, John H., Robert J. Sampson and Gary A. Sweeten. 2011. "Assessing Sampson and Laub's Life-Course Theory of Crime." Pp. 313-33 in *Taking Stock: The Status of Criminological Theory*, edited by F.T. Cullen, J.P. Wright, and K.R. Blevins. New Brunswick, NJ: Transaction Publishers.

Lavee, Yoav and Ruth Katz. 2002. "Division of Labor, Perceived Fairness, and Marital Quality: The Effect of Gender Ideology." *Journal of Marriage and Family* 64:27-39.

Lewis, Jon. E. 2003. *A Documentary History of Human Rights*. New York. Carroll & Graf Publishers.

Maruna, Dean Dabney and Volkan Topalli. 2012. "Putting a price on prisoner release: The history of bail and a possible future of parole." *Punishment & Society* 14(3):315-337.

Maxwell, Sheila Royo. 1999. "Examining the Congruence Between Predictors of ROR and Failures to Appear." *Journal of Criminal Justice* 27:127-141.

Morse, Wayne and Ronald Beattie. 1974 [1932]. *Survey of the Administration of Criminal Justice in Oregon*. New York: Arno Press.

Pound, Roscoe and Felix Frankfurter. 1968 [1927]. *Criminal Justice in Cleveland.* Montclair, N.J.: Patterson Smith.

Raybin, David Louis. 1985. *Criminal Practice and Procedure*. 9:123 Eagan, MN: West-Thomas Reuters.

Ritchey, Ferris J.. 2008. *The Statistical Imagination: Elementary Statistics for the Social Sciences.* New York:McGraw-Hill.

Rothwell, Harry. 1996. *English Historical Documents*. Florence, KY:Routledge.

Schachter, Hindy Lauer. 1989. "Bail Reform: The Scottish Experience." *Criminal Justice Review* 14(1):54-62.

Scott, Marvin B. and Stanford M. Lyman. 1968. "Accounts." *American Sociological Review* 33(1):46-62.

Stephen, James Fitzjames. 1883. *A History of the Criminal Law of England*. University of Toronto.

Toborg, Mary. 1983. Bail Bondsman and Criminal Courts. *The Justice System Journal* 8:141.

Toby, Jackson. 1957. “Social Disorganization and Stake in Conformity: Complementary Factors in the Predatory Behavior of Hoodlums.” *Journal of Criminal Law, Criminology and Police Science* 48: 12-17.

VanNostrand, Marie and Gena Keebler. 2009. “Pretrial Risk Assessment in the Federal Court.” *Federal Probation* 73(2):3-29.

Warner, Rebecca M. 2008. *Applied Statistics*. Thousand Oaks, CA: Sage Publications.

Weinstein, Susan. 2011. “Law Enforcement’s Leadership Role in the Pretrial Release and Detention Process.” Bureau of Justice Assistance. Wash. D.C. Retrieved November 3, 2013 (https://www.ncjrs.gov).

Wisotsky, Steven. 1970. “Use of a Master Bond Schedule: Equal Justice Under Law?” *University of Miami Law Review* 24:808.

Yale Law Journal. 1961. “Bail: An Ancient Practice Reexamined.” *Yale Law Journal* 70(6):966-973.

Zimring, Franklin and Gordon Hawkins. 1973. *Deterrence.* Chicago: University of Chicago Press.

Cases Cited

Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

Carlson v. Landon, 342 U.S. 524, 545-46 (1951).

Clark v. Hall, 53 P.3d 416 (Okla. Civ. App. 2002).

Crowder v. Marshall County, Tennessee. U.S. District Court for the Middle District of Tennessee, Case No. 1:13-00003.

Holman v. Macon County, *Tennessee*, U.S. District Court for the Middle District of Tennessee, Case No. 02-10-0036, Deposition of Macon County, Tennessee Judicial Commissioner Phillip R. Spears, Jr., October 13, 2010.

Holman v. Macon County, Tennessee, U.S. District Court for the Middle District of Tennessee, Case No. 02:10-0036, Deposition of Judicial Commissioner Phillip Ray Spears, Sr., October 13, 2010. Excerpts available on PACER, Docket Report, Entry No. 40-1.

Jones v. Rutherford County, Tennessee, U.S. District Court for the Middle District of Tennessee, Case No. 3:08-00782, filed on August 14, 2008.

Kennedy v. Louisiana, 554 U.S. 407, 128 S.Ct. 2641, 2649, 171 L. Ed. 2d 525 (2008).

Kirkwood v. Ellington, 298 F.Supp. 461 (W.D. Tenn. 1969).

Olmstead v. United States, 277 U.S. 438, 479, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

Pelekai v. White, 861 P.2d 1205 (Haw. 1993).

Schilb v. Kuebel, 404 U.S. 357, 365, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971).

Stack v. Boyle, 342 U.S. 1, 96 L. Ed. 3, 72 S. Ct. 1 (1951).

Staley v. Wilson County, Tennessee, U.S. District Court for the Middle District of Tennessee, Case No. 3:04-1127, Deposition of Judicial Commissioner Charles Churchwell, March 15, 2006.

Tate v. Trousdale County, Tennessee, U.S. District Court for the Middle District of Tennessee, Case No. 03-09-0201, Deposition of Judicial Commissioner Charles Puckett, September 28, 2009.

United States v. Edwards, 430 A.2d 1321 (D.C. 1981).

APPENDICES

ADULT CHARGE CODE LISTING

A115	ABANDONMENT (CHILD-LEAVING STATE) (D/F)	D/F	2500.00	20
A110	ABANDONMENT (WIFE-LEAVING STATE) (D/F)	D/F	2500.00	20
A14	ABDUCTION (A/F)	A/F	15000.00	04E
A13	ABDUCTION (ATTEMPTED) (A/F)	A/F	15000.00	04E
A71	ABUSE OF CORPSE (E/F)	E/F	2500.00	26
N3	ABUSE:NURSING HOME PATIENT (B/M)	B/M	1500.00	04E
A7	ACCESSORY AFTER FACT (E/F)	E/F	2500.00	26
A6	ACCESSORY BEFORE THE FACT (E/F)	E/F	2500.00	26
A165	ALLOWING ANIMAL TO ROAM AT LARGE (C/M)	C/M	250.00	26
A175	ALLOWING SEWAGE TO RUN ON TOP OF GROUND	C/M	250.00	26
A95	ANIMAL/COCK FIGHTING (E/F)	E/F	2500.00	26
A96	ANINAL/COCK FIGHTING SPECTATOR (C/M)	C/M	550.00	26
C10	ANIMAL:CRUELTY TO (A/M)	A/M	1500.00	26
K18	ANIMAL:INTENT KILLING OF-$10,000-60,000 (C/F)	C/F	3000.00	26
K17	ANIMAL:INTENT KILLING OF-$1000-$10,000 (D/F)	D/F	2500.00	26
K19	ANIMAL:INTENT KILLING OF-$500 OR LESS (A/M)	A/M	1500.00	26
K16	ANIMAL:INTENT KILLING OF-$500-$1000 (E/F)	E/F	2000.00	26
A19	APPEAL BOND		PER JUDGE	26
A195	ARSON (C/F)	C/F	10000.00	09
A105	ARSON (AGGRAVATED) (A/F)	A/F	20000.00	09
A15	ARSON (ATTEMPTED) (C/F)	C/F	10000.00	09
A65	ASSAULT (A/M	A/M	2500.00	04E
A70	ASSAULT (DOMESTIC) (A/M)	A/M	2500.00	04E
A45	ASSAULT W/INTENT TO COMMIT MURDER 1ST DEG	A/F	20000.00	04C
A85	ASSAULT W/INTENT TO COMMIT RAPE (B/F)	B/F	15000.00	04C
A50	ASSAULT W/INTENT TO ROB (C/F)	C/F	10000.00	04A
A25	ASSAULT (AGGRAVATED:FIREARM) (C/F)	C/F	10000.00	04A
A185	ASSAULT (AGGRAVATED:OTHER WEAPON) (C/F)	C/F	10000.00	04A
A100	ASSAULT (AGGRAVATED:VIOLATION OF PROTECIVE	C/F	10000.00	08
A140	ASSAULT:VEHICULAR (D/F)	D/F	5000.00	04C
A130	ATTACHMENT ORDER		PER JUDGE	20
A5	ATTEMPT TO COMMIT A FELONY (E/F)	E/F	2000.00	26

EXHIBIT TO COMPLAINT

A20	ATTEMPT TO DESTROY PROPERTY W/EXPLOSIVES	D/F	2500.00	14
A150	AWOL FROM ARMED SERVICES (E/F)	E/F	HOLD/MPs	26
A155	AWOL FROM NATIONAL GUARD (C/M)	C/M	500.00	26
A210	AWOL FROM NATIONAL GUARD (MISSING MOVEMENT	C/M	500.00	26
B115	BAIL FOR STATE WITNESS		PER JUDGE	26
B65	BAIL JUMPING (FELONY CHARGE) (E/F)	E/F	10000.00	26
B60	BAIL JUMPING (MISD CHARGE) (A/M)	A/M	5000.00	26
B100	BENCH WARRANT	E/F	PER/JUDGE	26
B1	BENCH WARRANT (GENERAL SESS. MISD.)	A/M	2500.00	26
B45	BIGAMY (A/M)	A/M	2000.00	20
B120	BOATING UNDER THE INFLUENCE (A/M)	A/M	2500.00	26
B30	BOATING VIOLATION (C/M)	C/M	500.00	NA
B31	BOATING VIOLATION (B/M)	B/M	1000.00	NA
B32	BOATING VIOLATION (A/M)	A/M	1500.00	NA
B40	BOMB THREATS (E/F)	E/F	5000.00	08
B75	BONDSMAN OFF BOND (FELONY CHARGE)	E/F	PRIOR CHARGE	26
B80	BONDSMAN OFF BOND (MISD CHARGE)	A/M	PRIOR CHARGE	26
B52	BRIBERY OF A JUROR (C/F)	C/F	5000.00	26
B51	BRIBERY OF A WITNESS (C/F)	C/F	5000.00	26
B50	BRIBERY TO OFICER (C/F)	C/F	5000.00	26
B55	BRIBERY (ACCEPTING BRIBE) (C/F)	C/F	5000.00	26
B90	BURGLARY TO AUTO (E/F)	E/F	2500.00	06
B105	BURGLARY TOOLS:POSSESSION OF (AM)	A/M	1500.00	06
B35	BURGLARY W/EXPLOSIVES (D/F)	D/F	2500.00	05A
B95	BURGLARY (ATTEMPTED) (D/F)	D/F	2500.00	05C
B110	BURGLARY (COIN OPERATED MACHINES) (E/F)	E/F	2500.00	06
B11	BURGLARY (SAFECRACKING) (D/F)	D/F	4000.00	05A
A3	BURGLARY:AGGRAVATED (C/F)	C/F	5000.00	05A
A4	BURGLARY:ESPECIALLY AGGRAVATED (B/F)	B/F	10000.00	05A
A1	BURGLARY:HABITATIONAL (C/F)	C/F	5000.00	05A
A2	BURGLARY:NON-HABITATIONAL (D/F)	D/F	2500.00	05A
C54	CAPIAS AND BOND (SEALED INDICTMENT)	E/F	BY WARRANT	26
C55	CAPIAS AND BOND:FELONY	E/F	BY WARRANT	26
C56	CAPIAS AND BOND:MISD.	A/M	BY WARRANT	26

EXHIBIT TO COMPLAINT

C155	CARJACKING (B/F)	B/F	10000.00	06
C80	CARRYING WEAPON F/PURPOSE OF GOING ARMED	A/M	2000.00	15
C85	CHILD ABUSE/NEGLECT (A/M)	A/M	2500.00	15
C46	CHILD ABUSE/NEGLECT:AGGRAVATED (B/F)	B/F	10000.00	04D
C135	CHILD ABUSE/NEGLECT:AGGRAVATED (6& UNDER)	A/F	20000.00	20
C86	CHILD ABUSE/NEGLECT:UNDER 6 YOA (D/F)	D/F	5000.00	04D
C95	CHILD ABUSE:SEXUAL (RAPE/FONDLE) (B/F)	B/F	20000.00	17
E21	CHILD ENDANGERMENT (A/M)	A/M	2500.00	21
E22	CHILD ENDANGERMENT:AGGRAVATED (D/F)	D/F	5000.00	21
E45	CHILD ENDANGERMENT:ESPECIALLY AGG. (C/F)	C/F	7500.00	21
C99	COERCION OF WITNESS (E/F)	E/F	4000.00	26
C90	COMMUNICATING A THREAT (B/M)	B/M	1000.00	04E
C145	COMPOUNDING (A/M)	A/M	1000.00	11
C150	COMPOUNDING (E/F)	E/F	1500.00	11
C6	COMPUTER OFFENSE/$10,000-$60,000 (C/F)	C/F	5000.00	06
C4	COMPUTER OFFENSE/$1,000-$10,000 (D/F)	D/F	4000.00	06
C2	COMPUTER OFFENSE/$500 OR LESS (A/M)	A/M	2000.00	06
C3	COMPUTER OFFENSE/$500-$1,000. (E/F)	E/F	3000.00	06
C7	COMPUTER OFFENSE/$60,000-UP (B/F)	B/F	10000.00	06
C160	CONDUCTING BUSINESS W/OUT LICENSE (A/M)	A/M	1000.00	NA
C65	CONSPIRE TO DISTRIBUTE MARIJUANA (E/F)	E/F	4000.00	18C
C100	CONSUMING ALCOHOL UNDER 21 YOA (A/M)	A/M	1500.00	NA
P265	CONSUME ALCOHOL ON SCHOOL PROPERTY (C/M)	C/M	250.00	22
C75	CONTEMPT		PER JUDGE	26
C30	CONTRABAND (BRINGING INTO JAIL) (C/F)	C/F	5000.00	26
C120	CONTRABAND (BRINGING INTO WORKHOUSE) (C/F)	C/F	5000.00	26
C70	CONTRIBUTE TO THE DELINQUENCY OF A MINOR	A/M	1500.00	26
H30	CRASH HELMET VIOLATION (C/M)	C/M	250.00	26
C40	CRIMINAL ABORTION (C/F)	C/F	5000.00	26
C69	CRIMINAL CONSPIRACY (A/M)	A/M	1500.00	06
C66	CRIMINAL CONSPIRACY (C/F)	C/F	5000.00	06
C67	CRIMINAL CONSPIRACY (D/F)	D/F	4000.00	06
C68	CRIMINAL CONSPIRACY (E/F)	E/F	3000.00	06
C64	CRIMINAL CONSPIRACY (B/F)	B/F	10000.00	06

EXHIBIT TO COMPLAINT

C165	CRIMINAL CONTEMPT (BOND CONDITION) " " Violation of Order of Protection		20000.00 10,000.	26
C50	CRIMINAL EXPOSURE TO HIV (C/F)	C/F	5000.00	17
C17	CRIMINAL IMPERSONATION (B/M)	B/M	1500.00	26
C20	CRIMINAL RESPON FOR CONDUCT OF ANOTHER		BY WARRANT	26
C18	CRIMINAL RESPON/FACILITATION OF FELONY		BY WARRANT	26
C33	CRIMINAL SIMULATION:$10,000-$60,000 (C/F)	C/F	5000.00	06
C32	CRIMINAL SIMULATION:$1,000-$10,000 (D/F)	D/F	2500.00	06
C31	CRIMINAL SIMULATION:$1,000-LESS (E/F)	E/F	2000.00	06
C34	CRIMINAL SIMULATION:$60,000 & UP (B/F)	B/F	10000.00	06
C35	CRIMINAL TRESPASS (C/M)	C/M	500.00	26
C12	CRIMINAL TRESPASS:AGGRAVATED (B/M)	B/M	1000.00	26
C16	CUSTODIAL INTERFERENCE (A/M)	A/M	1500.00	20
C14	CUSTODIAL INTERFERENCE (E/F)	E/F	2500.00	20
D50	DECEPTIVE BUSINESS PRACTICES (B/M)	B/M	1000.00	26
D66	DELIVERY/SALE/POSS OF JIMSON WEED (A/M)	A/M	1000.00	18
D2	DESSEMINATION OF SMOKING MATERIALS (< 18)	C/M	500.00	26
D15	DESTRUCTION OF LAND MARKS (E.F)	E/F	2500.00	14
D3	DISORDERLY CONDUCT (C/M)	C/M	500.00	24
U10	DISPENSING ALCOHOLIC BEV. W/O LICENSE (B/M)	B/M	1500.00	22
D85	DISPOSING OF GOODS;SECURITY INTEREST (E/F)	E/F	2500.00	06
P91	DISTRIB/CASUAL EXCHANGE MARIJUANA (A/M)	A/M	1500.00	18F
P92	DISTRIB/CASUAL EXCHANGE MARIJUANA:3RD OFF.	E/F	2500.00	18F
D120	DRAG RACING	B/M	1000.00	26
M25	DRIVERS LICENSE/MFG/USE/BOGUS LICENSE (A/M)	A/M	1500.00	10
D135	DRIVING BY PERMIT W/O LIC DRIVER (C/M)	C/M	CIT/ROR	NA
D130	DRIVING ON CANCELLED LICENSE (B/M)	B/M	500.00	NA
D60	DRIVING ON REVOKED DRIVERS LICENSE (B/M)	B/M	1000.00	NA
D60-I	DRIVING ON REVOKED (10TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-J	DRIVING ON REVOKED (11TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-K	DRIVING ON REVOKED (12TH OFFENSE) (A/M	A/M	2500.00	NA
D60-L	DRIVING ON REVOKED (13TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-M	DRIVING ON REVOKED (14TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-N	DRIVING ON REVOKED (15TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-A	DRIVING ON REVOKED (2ND OFFENSE) (A/M)	A/M	1500.00	NA

D60-B	DRIVING ON REVOKED (3RD OFFENSE0 (A/M)	A/M	1500.00	NA
D60-C	DRIVING ON REVOKED (4TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-D	DRIVING ON REVOKED (5TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-E	DRIVING ON REVOKED (6TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-F	DRIVING ON REVOKED (7TH OFFENSE) (A/M)	A/M	2500.00	NA
D60-G	DRIVINGON REVOKED (8TH OFFENSE0 (A/M)	A/M	2500.00	NA
D60-H	DRIVING ON REVOKED (9TH OFFENSE) (A/M)	A/M	2500.00	NA
D95	DRIVING ON SUSPENDED (B/M)	B/M	500.00	NA
D205	DRIVING ON SUSPENDED (2-5TH OFFENSE)	B/M	1000.00	NA
D210	DRIVING ON SUSPENDED (6TH OFFENSE +)	B/M	1500.00	NA
D90	DRIVING W/OUT A LICENSE (C/M)	C/M	250.00	NA
D13	DRUG-FREE SCHOOL ZONE		PER WARRANT	18
D111	DUI BY ALLOWING (A/M)	A/M	2500.00	21
D65	DUI OFFENSE #1 (A/M)	A/M	2500.00	21
D138	DUI OFFENSE #10 (E/F)	E/F	4000.00	21
D139	DUI OFFENSE #11 (E/F)	E/F	4000.00	21
D140	DUI OFFENSE #12 (E/F)	E/F	4000.00	21
D141	DUI OFFENSE #13 (E/F)	E/F	4000.00	21
D142	DUI OFFENSE #14 (E/F)	E/F	4000.00	21
D143	DUI OFFENSE #15 (E/F)	E/F	4000.00	21
D70	DUI OFFENSE #2 (A.M)	A/M	2500.00	21
D75	DUI OFFENSE #3 (A/M)	A/M	3000.00	21
D80	DUI OFFENSE #4 (E/F)	E/F	4000.00	21
D100	DUI OFFENSE #5 (E/F)	E/F	4000.00	21
D105	DUI OFFENSE #6 (E/F)	E/F	4000.00	21
D110	DUI OFFENSE #7(E/F)	E/F	4000.00	21
D136	DUI OFFENSE #8 (E/F)	E/F	4000.00	21
D137	DUI OFFENSE #9 (E/F)	E/F	4000.00	21
D145	DUI:AGGRAVATED (A/M)	A/M	2500.00	21
D165	DWI:21 YOA & OVER (4TH OFFENSE) (E/F)	E/F	4000.00	21
D200	DWI:18-20 YOA (A/M)	A/M	2500.00	21
D195	DWI:21 YOA & OVER (10TH OFFENSE) (E/F)	E/F	4000.00	21
D150	DWI:21 YOA & OVER (1ST OFFENSE) (B/M)	B/M	1500.00	21
D155	DWI:21 YOA & OVER (2ND OFFENSE) (A/M	A/M	2500.00	21

D160	DWI:21 YOA & OVER (3RD OFFENSE) (A/M)	A/M	2500.00	21
.70	DWI:21 YOA & OVER (5TH OFFENSE) (E/F)	E/F	4000.00	21
D175	DWI:21 YOA & OVER (6TH OFFENSE) (E/F)	E/F	4000.00	21
D180	DWI:21 YOA & OVER (7TH OFFENSE) (E/F)	E/F	4000.00	21
D185	DWI:21 YOA & OVER (8TH OFFENSE (E/F)	E/F	4000.00	21
D190	DWI:21 YOA & OVER (9TH OFFENSE) (E/F)	E/F	4000.00	21
13	EMPLOY/ALLOW MINOR TO SELL ALCOHOL (A/M)	A/M	2500.00	22
E1	ENTICE CHILD TO PURCHASE ALCOHOL (A/M)	A/M	1500.00	22
E40	ESCAPE FELONIOUS OTHER THAN WORKHOUSE (E/F)	E/F	5000.00	26
E38	ESCAPE FROM CUSTODY OF OFFICER (FELONY) (E/F)	E/F	5000.00	26
E37	ESCAPE FROM CUSTODY OF OFFICER (MISD) (A/M)	A/M	2500.00	26
E35	ESCAPE FROM DETENTION CENTER (FELONY) (E/F)	E/F	3000.00	26
E36	ESCAPE FROM DETENTION CENTER (MISD) (A/M)	A/M	2500.00	26
E15	ESCAPE FROM WORKHOUSE (CHARGED W/FELONY)	E/F	5000.00	26
E20	ESCAPE FROM WORKHOUSE (CHARGED W/MISD)	A/M	2500.00	26
E39	ESCAPE PERMITTING OR FACILITATING (A/M)	A/M	2000.00	26
E41	ESCAPE PERMITTING OR FACILITATING (FELONY)	E/F	2500.00	26
;26	ESCAPE:ATTEMPTED (FELONY) (E/F)	E/F	3500.00	26
E25	ESCAPE:ATTEMPTED (MISD) (A/M)	A/M	2000.00	26
S5	ESPECIALLY AGG SEXUAL EXPLOIT OF MINOR (B/F)	B/F	10000.00	17
F6	EVADING ARREST (A/M)	A/M	1500.00	24
F135	EVADING ARREST (MOTOR VEHICLE) (E/F)	E/F	3000.00	24
F140	EVADING ARREST (RISK DEATH/BODILY INJURY)	D/F	4000.00	24
E2	EXTORTION (D/F)	D/F	3000.00	11
F61	FAILURE TO APPEAR IN COURT (A/M)	A/M	1500.00	26
F60	FAILURE TO APPEAR IN COURT (E/F)	E/F	2500.00	26
F50	FAILURE TO CAUSE CHILD TO GO TO SCHOOL (C/M)	C/M	250.00	20
F125	FAILURE TO ENDORSE/DELIVER TITLE (C/M)	C/M	250.00	26
F150	FAILURE TO EXHIBIT LICENSE ON DEMAND (C/M)	C/M	250.00	NA
F1	FAILURE TO GIVE INFO AND RINDER AID (A/M)	A/M	1000.00	26
F13	FAILURE TO KEEP RECORD OF PURCHASES(SCRAP)	C/M	250.00	26
F26	FAILURE TO NOTIFY OWNER OF PROP/DAMAGE (C/M)	C/M	250.00	26
F145	FAILURE TO OBEY LAWFUL ORDER (C/M)	C/M	250.00	NA
F120	FAILURE TO PAY TAXES (C/M)	C/M	250.00	26

F65	FAILURE TO PAY WAGES (C/M)	C/M	250.00	26
F67	FAILURE TO POSS MEDICAL EXAM CERTIFICATE	C/M	250.00	26
F110	FAILURE TO PROSECUTE (A/M)	A/M	PER JUDGE	26
F35	FAILURE TO PROVIDE FOR CHILD (E/F)	E/F	3000.00	20
F130	FAILURE TO RELINQUISH PHONE LINE (C/M)	C/M	250.00	26
F12	FAILURE TO RECORD TRANSACTION (PAWN) (A/M)	A/M	1500.00	26
F31	FAILURE TO RELINQ TPHONE LINE F/EMERG CALL	C/M	250.00	26
F25	FAILURE TO REPORT ACCIDENT (C/M)	C/M	250.00	NA
F70	FAILURE TO RETURN MILITARY PROPERTY (C/M)	C/M	1000.00	06
F76	FAILURE TO RETURN RENTAL VEHICLE (E/F)	E/F	3000.00	07A
F71	FAILURE TO RETURN UNIFORMS (C/M)	C/M	250.00	06
F30	FAILURE TO SUPPORT DISABLED SPOUSE (C/M)	C/M	500.00	20
F55	FAILURE TO YIELD TO EMERGENCY EQUIPMENT	C/M	500.00	NA
F3	FAILURE/REPORT HEALTH DEPT FOR TREATM (STD)	C/M	250.00	17
F10	FALSE FIRE ALARM (A/M)	A/M	2000.00	26
F8	FALSE ID/STATEMENT SHOW AGE 21+ (C/M)	C/M	250.00	26
F2	FALSE IMPRISONMENT (A/M)	A/M	2500.00	26
F62	FALSE IMPRISONMENT (E/F)	E/F	3500.00	26
F100	FALSE REPORT/INFO TO OFFICER (~~A/M~~) D/F	~~A/M~~	~~1000.00~~ 3500.00	26
F101	FALSE REPORT/INFO TO OFFICER (~~E/F~~) C/F	~~E/F~~	~~2500.00~~ 5000.00	26
F9	FLIGHT TO AVOID (FEDERAL CHARGE)		CALL FED	26
F90	FORGERY (E/F)	E/F	3000.00	10
F15	FORGERY (CREDIT CARD) (A/M)	A/M	2500.00	10
F20	FORGERY (TRANSFER OF FORGED PAPER) (A/M)	A/M	2500.00	10
F93	FORGERY:$10,000-$60,000 (C/F)	C/F	5000.00	10
F91	FORGERY:$1,000 OR LESS (E/F)	E/F	3000.00	10
F92	FORGERY:$1,000-$10,000 (D/F)	D/F	3500.00	10
F94	FORGERY:$60,000 & UP (B/F)	B/F	10000.00	10
I53	FRAUD USE OF CREDIT CARD:$10,000-$60,000 (C/F)	C/F	5000.00	06
I52	FRAUD USE OF CREDIT CARD:$1,000-$10,000 (D/F)	D/F	3000.00	06
I50	FRAUD USE OF CREDIT CARD:$500 OR LESS (A/M)	A/M	2000.00	06
I51	FRAUD USE OF CREDIT CARD:$500-$1,000 (E/F)	E/F	2500.00	06
I54	FRAUD USE OF CREDIT CARD:$60,000 & UP (B/F)	B/F	10000.00	06
F118	FRAUD/FALSE INSUR CLAIM:$10,000-$60,000 (C/F)	C/F	5000.00	06

F117	FRAUD/FALSE INSUR CLAIM:$1,000-$10,000 (D/F)	D/F	4000.00	06
F115	FRAUD/FALSE INSUR CLAIM:$500 OR LESS (A/M)	A/M	2500.00	06
F80	FRAUD/FALSE INSUR CLAIM:$500-$1,000 (E/F)	E/F	3000.00	06
F119	FRAUD/FALSE INSUR CLAIM:$60,000 & UP (B/F)	B/F	7500.00	06
F95	FRAUD;FORGE PRESCRIPTION (D/F)	D/F	4000.00	10
F105	FRAUDULENT USE/OBTAIN OF DRIVERS LICENSE	C/M	250.00	11
F45	FUGITIVE FROM JUSTICE (E/F)	E/F	NO BOND	26
G10	GAMBLING (C/M)	C/M	250.00	19
615	GAMBLING PROMOTION (B/M)	B/M	1000.00	19
G11	GAMBLING PROMOTION:AGGRAVATED (E/F)	E/F	3000.00	19
G12	GAMBLING POSS/DEVICES OR RECORD (B/M)	B/M	1000.00	19
G20	GAMING (PROMOTION) (B/M)	B/M	500.00	19
H3	HABITUAL OFFENDER:MOTOR VEHICLE (E/F)	E/F	3000.00	NA
H5	HARASSING/THREATENING PHONE CALLS (A/M)	A/M	2500.00	26
H1	HINDERING SECURED CREDITORS (E/F)	E/F	2500.00	06
H10	HITCH HIKING ON INTERSTATE (C/M)	C/M	PER TROOPER	26
M4	HOMICIDE:ATTEMPTED MURDER (A/F)	A/F	15000.00	04C
M20	HOMICIDE:CRIMINALLY NEGLIGENT (E/F)	E/F	3000.00	01B
M5	HOMICIDE:FIRST DEGREE MURDER (A/F)	A/F	25000.00	01A
M10	HOMICIDE:SECOND DEGREE MURDER (A/F)	A/F	20000.00	01A
M105	HOMICIDE:RECKLESS (E/F)	E/F	3000.00	01B
H20	HOMICIDE:VEHICULAR (C/F)	C/F	10000.00	01A
H21	HOMICIDE:VIABLE FETUS AS VICTIM		PER JUDGE	01A
M15	HOMICIDE:VOLUNTARY MANSLAUGHTER (C/F)	C/F	7500.00	01A
H25	HOMOSEXUAL ACTS (C/M)	C/M	250.00	17
H51	HUNTING IN CLOSED SEASON (C/M)	C/M	250.00	26
H50	HUNTING/FISHING W/OUT LICENSE (C/M)	C/M	CITATION	26
I100	IDENTITY THEFT (D/F)	D/F	3500.00	06
I45	ILLEGAL POSS OF CREDIT CARD (B/M)	B/M	1000.00	06
I40	IMPERSONATION OF LAW OFFICER (A/M)	A/M	2500.00	26
I05	IMPROPER DISPOSITION OF BODY (A/M)	A/M	2000.00	26
I35	IMPROPER PASSING (C/M)	C/M	CITATION	NA
`55	IMPROPERLY ON SCHOOL PROPERTY (A/M)	A/M	1000.00	26
I15	INCEST (C/F)	C/F	10000.00	17

EXHIBIT TO COMPLAINT

I25	INDECENT EXPOSURE (B/M)	B/M	1000.00	17
I27	INDECENT EXPOSURE:FELONY (E/F)	E/F	2000.00	17
I26	INDECENT EXPOSURE:VICTIM UNDER 13 YOA (A/M)	A/M	2550.00	17
I4	INHALE/SELL/GIVE/POSS/GLUE, PAINT, GAS, ETC	A/M	2500.00	NA
I3	INHALE/SELL/GIVE/POSS/GLUE, PAINT, GAS, ETC	E/F	3500.00	NA
I20	INSTANTER CAPIAS (FELONY) (C/F)	C/F	5000.00	26
I21	INSTANTER CAPIAS (MISD) (A/M)	A/M	2500.00	26
I30	INTERFERING WITH AN OFFICER (A/M)	A/M	2000.00	26
K25	KIDNAPPING (C/F)	C/F	7500.00	20
K5	KIDNAPPING:AGGRAVATED (A/F)	A/F	15000.00	20
K26	KIDNAPPING:ATTEMPTED (C/F)	C/F	7500.00	20
K30	KIDNAPPING:ESPECIALLY AGG. (A/F)	A/F	25000.00	20
V5	LASER POINTER VIOLATION (A/M)	A/M	1500.00	NA
L12	LEAVING FIRE NEAR WOODLAND UNATTENDED	B/M	1000.00	26
L40	LEAVING SCENE OF ACCIDENT (BODILY INJURY)	A/M	2500.00	08
L35	LEAVING SCENE OF ACCIDENT (PROPERTY DAMAGE)	C/M	2500.00	08
,61	LITTER HAULING (B/M)	B/M	500.00	26
L60	LITTERING (C/M)	C/M	250.00	26
L25	LOITERING (C/M)	C/M	250.00	25
L30	LOOTING (C/M)	C/M	250.00	06
L3	LOTTERIES/CHAIN LETTERS/PYRAMID CLUBS (A/M)	A/M	1500.00	19
L2	LOTTERIES/CHAIN LETTERS/PYRAMID CLUBS (B/M)	B/M	1000.00	19
L1	LOTTERIES/CHAIN LETTERS/PYRAMID CLUBS (C/M)	C/M	250.00	19
L4	LOTTERIES/CHAIN LETTERS/PYRAMID CLUBS (E/F)	E/F	3000.00	19
M7	MAILBOX TAMPERING:DAMAGE/DEFACEMENT (B/M)	B/M	1000.00	14
M95	MAINTAIN STRUCTURE F/USE OF CONTROLELD SUBST.	D/F	3000.00	18
M1	MANUFACTURE OF ALCOHOLIC BEVERAGES (A/M)	A/M	2000.00	22
M100	MANUFACTUREING MARIJUANA OVER 500 PLANTS	A/F	25000.00	18H\
P101	MFG/DELIV/POSS/SALE/CONSPI LIST LB DRUGS (A/F)	A/F	15000.00	18E
P102	MFG/DELIV/POSS/SALE/CONSPI LIST LB DRUGS (B/F)	B/F	10000.00	18E
P60	MFG/DELIV/SALE/POSS SCHEDULE I (B/F)	B/F	10000.00	18E
P65	MFG/DELIV/SALE/POSS SCHEDULE II (C/F)	C/F	5000.00	18E
70	MFG/DELIV/SALE/POSS SCHEDULE III (D/F)	D/F	5000.00	18G

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P75	MFG/DELIV/SALE/POSS SCHEDULE IV (D/F)	D/F	5000.00	18H
P80	MFG/DELIV/SALE/POSS SCHEDULE V (E/F)	E/F	5000.00	18E
P71	MFG/DELIV/SALE/POSS SCHEDULE VI (E/F)	E/F	4000.00	18H
P85	MFG/DELIV/SALE/POSS SCHEDULE VII (E/F)	E/F	3000.00	18G
P72	MFE/DELIV/SALE/POSS MARIJ. OVER 10 LB (D/F)	D/F	5000.00	18H
P150	MFG/DELIV/SALE/POSS/CONSPI SALE COCAINE (B/F)	B/F	10000.00	18E
M3	MFG/SALE/POSS OF FARM IMPLEMENT W/O SER. NO.	A/M	2000.00	06
M75	MILITARY DESERTION (E/F)	E/F	HOLD/MPs	26
M46	MISAPPLICATION OF CONTRACT PMTS (E/F)	E/F	3000.00	06
M45	MISAPPROPRIATION OF CONTRACT FUNDS (A/M)	A/M	2000.00	06
M12	MISAPPROPRIATION OF RENTAL PROPERTY (A/M)	A/M	2000.00	06
M50	MISCELLANEOUS			26
M2	MISREP MILEAGE ON USED VEHICLE ODOMETER	A/M	1000.00	11
N10	NEGLECT OF DUTY (C/M)	C/M	250.00	26
N5	NEGLIGENT BURING (C/M)	C/M	250.00	26
N2	NON-PAYMENT OF FINE BY DEFENDANT (C/M)	C/M	250.00	26
N1	NON-RESIDENT DRIVING W/SUSP/REVOK/LIC	B/M	1000.00	NA
N15	NONSUPPORT OF WIFE/CHILD (A/M)	A/M	2000.00	20
N16	NONSUPPORT OF WIFE/CHILD:FLAGRANT (E/F)	E/F	3000.00	20
O2	OBSCENE SALE/LOAN MATERIAL TO MINOR (A/M)	A/M	2500.00	17
O3	OBSTRUCTING HIGHWAY/PASSAGEWAY (C/M)	C/M	250.00	26
O15	OBTAINING NARCOTICS BY FRAUD (E/F)	E/F	3000.00	11
O20	OVERTAKING AND PASSING SCHOOL BUS (B/M)	B/M	1000.00	NA
P41	PERJURY (A/M)	A/M	1500.00	26
P210	PETITION TO ESTABLISH PATERNITY			20
P195	PORNOGRAPHY (USE OF MINORS) (B/F)	B/F	10000.00	17
P141	POSS ALCOHOL ON STATE PROPERTY (B/M)	B/M	500.00	22
W25	POSS HANDGUN WHILE UNDER THE INFLUENCE	A/M	2500.00	15
P200	POSS OF ALTERED LIC TAGS (A/M)	A/M	2000.00	26
P120	POSS OF GAMBLING DEVICE (B/M)	B/M	1500.00	19C
P76	POSS OF LEGEND DRUGS W/O PRESCRITION (C/M)	C/M	500.00	18
P142	POSS OF LOADED FIREARM ON STATE PROPERTY	B/M	1500.00	15
P90	POSS OF MARIJUANA:SIMPLE (A/M)	A/M	2500.00	18F

P95	POSS OF MARIJUANA:SIMPLE (3RD OFFENSE) (E/F)	E/F	3000.00	18F
P250	POSS OF SCHEDULE II (SIMPLE) (A/M)	A/M	2500.00	18E
P135	POSS OF WEAPON BY CONVICTED FELON (E/F)	E/F	3500.00	15
P255	POSS OF ALCOHOL W/OUT REVENUE STAMP	A/M	1500.00	22
C15	POSS/FIREARM WHERE ALC BEV SERV/SOLD/CONSUM	A/M	2500.00	15
P12	POSS/ILLEGAL TAKING/DESTRUCTION OF WILDLIFE	C/M	500.00	26
P100	POSS/SALE/DELIV MARIJUANA (1 OZ-10 LBS) (E/F)	E/F	3000.00	18B
P105	POSS/SALE/DELIV MARIJUANA (10 LBS-70 LBS) (D/F)	D/F	5000.00	18B
P106	POSS/SALE/DELIV MARIJUANA (OVER 70 LBS) (B/F)	B/F	10000.00	18B
P115	POSS/SALE/DELIV OF HASHISH (2-15 LBS) (C/F)	C/F	4000.00	18E
P110	POSS/SALE/SELIV OF HASHISH (UNDER 2 LBS) (E/F)	E/F	3000.00	18E
P160	POSS/SALE/DELIV OF MARIJUANA (E/F)	E/F	4000.00	18B
P231	POSS/TRANS ALCOH BEV BY PERSON UNDER 21 YOA	A/M	CITATION	22
P55	POSSESSION OF COCAINE:SIMPLE (A/M)	A/M	2500.00	18E
P245	POSSESSION OF SCHEDULE I (SIMPLE) (A/M)	A/M	2500.00	18H
P225	POSSESSION OF SCHEDULE III (SIMPLE) (A/M	A/M	2500.00	18H
P240	POSSESSION OF SCHEDULE IV (SIMPLE) (A/M)	A/M	2500.00	18H
P260	POSSESSION OF SCHEDULE V (SIMPLE) (A/M)	A/M	1000.00	18H
P1	POSSESSION OF STILL (B/M)	B/M	1500.00	22
P220	POSSESSION OF VALIUM (SIMPLE) (A/M)	A/M	2500.00	18H
P13	PRACTICE LAW WITHOUT LICENSE (A/M)	A/M	1500.00	11
P2	PROFANITY IN COURT (C/M)	C/M	250.00	24
P10	PROSTITUTION (B/M)	B/M	1500.00	16
P6	PROSTITUTION PATRON:W/100FT SCHOOL/CHURCH	A/M	2000.00	16
P4	PROSTITUTION PATRONIZING (B/M)	B/M	1500.00	16
P7	PROSTITUTION PROMOTING (E/F)	E/F	3000.00	16
P3	PROSTITUTION:W/100FT OF SCHOOL/CHURCH	A/M	2000.00	16
P125	PUBLIC INTOXICATION (C/M)	C/M	250.00	23
P9	PURCHASE ALCOH BEV FOR CHILD UNDER 21 (A/M)	A/M	1500.00	22
W40	POSSESSION/TRANSPORTATION OF DEER UNTAGED	B/M	1000.00	NA
F14	PURCHASE FROM MINORS (SCRAP METAL) (C/M)	C/M	250.00	26
P11	PURCHASE/REC/POSS ALCOHOL UNDER 21 (A/M)	A/M	1500.00	26
R140	RABIES ANIMAL CONTROL VIOLATION (C/M)	C/M	250.00	26
R15	RAPE (B/F)	B/F	15000.00	02A

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R51	RAPE OF CHILD (UNDER 13 YOA) (A/F)	A/F	25000.00	02A
R41	RAPE:AGGRAVATED (A/F)	A/F	25000.00	02A
R40	RAPE:AGGRAVATED (CHILD UNDER 13 YOA) (A/F)	A/F	25000.00	02A
R12	RAPE:ATTEMPTED (B/F)	B/F	12500.00	02B
R10	RAPE:FORCE ONLY (B/F)	B/F	15000.00	02A
R14	RAPE:SPOUSAL (C/F)	C/F	4000.00	17
R55	RAPE:STATUTORY (E/F)	E/F	3500.00	17
R46	RECEIV/POSS/TRANS OF ALCOH BEV (A/M)	A/M	2500.00	22
R30	RECEIVING PROPERTY U/FALSE PRETENSE (E/F)	E/F	3000.00	13
R1	RECKLESS BURING (A/M)	A/M	2500.00	26
R80	RECKLESS DRIVING (B/M)	B/M	1000.00	NA
R2	RECKLESS ENDANGERMENT (A/M)	A/M	2500.00	04E
R4	RECKLESS ENDANGERMENT (W/WEAPON) (E/F)	E/F	3000.00	04C
R100	REFUSING BLOOD ALCOHOL TEST		500.00	21
R109	Refusing to sign citation	C/m	250.00	
R95	REGISTRATION VIOLATION (C/M)	C/M	CITATION	26
R3	REPORT CREDIT CARD LOST/STOLEN/MISLAID (B/M)	B/M	1000.00	06
R86	RESIST STOP/FRISK/HALT/SEARCH OR INTERFERE	A/M	1000.00	24
R87	RESIST STOP/FRISK/HALT/SEARCH OR INTERFERE	B/M	1000.00	24
R84	RESISTING ARREST (A/M)	A/M	1500.00	24
R85	RESISTING ARREST (B/M)	B/M	10000.00	24
R25	RETALIATION FOR PAST ACTION (E/F)	E/F	1500.00	24
R18	RIOT (A/M)	A/M	1000.00	24
R20	RIOT:AGGRAVATED (E/F)	E/F	3000.00	24
R19	RIOT:INCITING TO (A/M)	A/M	1000.00	24
R22	ROBBERY (C/F)	C/F	7500.00	03D
R21	ROBBERY:AGGRAVATED (B/F)	B/F	10000.00	03C
R125	ROBBERY:ATTEMPTED (C/F)	C/F	7500.00	03C
R11	ROBBERY:ESPECIALLY AGGRAVATED (A/F)	A/F	15000.00	03A
T75	SALE OF TOBACCO PRODUCTS TO MINORS (A/M)	A/M	500.00	NA
C125	SALE/DELIV/DISTRIB/COUNTERFEIT CONTROL SUB	A/M	2500.00	18
C105	SALE/DELIV/DISTRIB/COUNTERFEIT CONTROL SUB	E/F	3000.00	18
S120	SEATBELT VIOLATION	C/M		NA
S10	SELLING BEER TO PERSON UNDER 21 (A/M)	A/M	1500.00	22
S75	SELLING INTOXICATING LIQUOR TO MINOR (A/M)	A/M	1500.00	22

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S110	SEPTIC TANK INSTALL W/O PERMIT (C/M)	C/M	500.00	26
S15	SERIAL NUMBER:ALTERATION OF (A/M)	A/M	1000.00	11
S2	SETTING FIRE TO PERSONAL PROP OR LAND (E/F)	E/F	3000.00	09
S1	SETTING FIRES AT CERTAIN TIMES W/O PERMIT	C/M	250.00	26
S05	SEX OFFENSES (BESTIALITY) (A/M)	A/M	2500.00	17
S125	SEXUAL BATTERY BY AUTHORITY FIGURE (C/F)	C/F	5000.00	17
R115	SEXUAL BATTERY (E/F)	E/F	4000.00	02A
R105	SEXUAL BATTERY:AGGRAVATED (B/F)	B/F	20000.00	02A
R13	SEXUAL BATTERY:AGGRAVATED (CHILD UNDER 13)	B/F	20000.00	02B
R110	SEXUAL BATTERY:ATTEMPTED (E/F)	E/F	4000.00	02B
R17	SEXUAL BATTERY:SPOUSAL (D/F)	D/F	5000.00	17
S7	SEXUAL EXPLOITATION OF MINOR (E/F)	E/F	3000.00	17
S6	SEXUAL EXPLOITATION OF MINOR:AGGRAVATED	C/F	7500.00	17
S13	SHOW CAUSE ORDER		PER JUDGE	26
P77	SIMPLE POSS/SALE/GIVEAWAY OF LEGEND DRUGS	C/M	500.00	18
S16	SOLICITATIONOF MINOR TO ENGAGE IN CONDUCT	E/F	3000.00	17
S85	SPEEDING (C/M)		CITATION	NA
S11	STALKING (A/M)	A/M	2500.00	04E
S12	STALKING (SUBSEQUENT) (E/F)	E/F	4000.00	04E
S115	STATE PARK VIOLATIONS (C/M)	C/M	250.00	26
S106	STATE PRISONER AWAITING TRANSFER TO PEN		NO BOND	NA
S4	STORAGE OF LIQUOR FOR SALE (A/M)	A/M	100.00	22
S90	SUICIDE			NA
S95	SUICIDE (ATTEMPTED)			NA
S96	SUICIDE (THREATENING)			NA
S100	SUPRESSION HEARING		NO BOND	26
S105	SUSPENDED SENTENCE HEARING	E/F	NO BOND	26
T1	T'PORT OF ALCOH BEV BY COMMON CARRIER	A/M	2000.00	22
T2	TAKING FISH CAUGHT BY ANOTEHR (C/M)	C/M	250.00	26
T3	TAMPERING W/CONSTRUCT SIGNS/BARRICADE (A/M)	A/M	2500.00	26
T4	TAMPERINGW/FABRICATING EVIDENCE (C/F)	C/F	3000.00	26
T50	TAMPERING WITH UTILITY DEVICES (C/M)	C/M	250.00	14
T90	THEFT OF MERCHANDISE:$500.00 OR LESS (A/M)	A/M	2000.00	06
T91	THEFT OF MERCHANDISE:$500 - $1,000 (E/F)	E/F	3000.00	06

T92	THEFT OF MERCHANDISE:$1,000-$10,000 (D/F)	D/F	3500.00	06
T93	THEFT OF MERCHANDISE:$10,000-$60,000 (C/F)	C/F	5000.00	06
T94	THEFT OF MERCHANDISE:$60,000 AND UP (B/F)	B/F	7500.00	06
T9	THEFT OF PROP:$10,000-$60,000 (C/F)	C/F	5000.00	06
T8	THEFT OF PROP:$1000-$10,000 (D/F)	D/F	3500.00	06
T6	THEFT OF PROP:$500 OR LESS (A/M)	A/M	2000.00	06
T7	THEFT OF PROP:$500-$1,000 (E/F)	E/F	3000.00	06
T11	THEFT OF PROP:$60,000 & UP (B/F)	B/F	7500.00	06
T17	THEFT OF SERVICES:$1,000-$10,000 (D/F)	D/F	3500.00	06
T14	THEFT OF SERVICES:$10,000-$60,000 (C/F)	C/F	5000.00	06
T12	THEFT OF SERVICES:$500.00 OR LESS (A/M)	A/M	2000.00	06
T13	THEFT OF SERVICES:$500-$1,000. (E/F)	E/F	3000.00	06
T16	THEFT OF SERVICES:$60,000. & UP (B/F)	B/F	7500.00	06
T69	THEFT:ATTEMPTED (A/M)	A/M	2000.00	06
E10	THEFT:EMBEZZLEMENT (FELONY) (C/F)	C/F	5000.00	12
E5	THEFT:EMBEZZLEMENT (MISD) (A/M)	A/M	2500.00	12
T25	TRAFFIC OFFENSE:MOVING VIOLATION (C/M)	C/M	CITATION	NA
T30	TRAFFIC OFFENSE:NON MOVING (C/M)	C/M	CITATION	NA
T10	TREASON (A/F)	A/F	15000.00	26
T65	TRESPASS ON RAILROAD (C/M)	C/M	250.00	26
U5	UNAUTHORIZED POSS OF EXPLOSIVES (A/M)	A/M	2500.00	26
J5	UNAUTHORIZED USE/AUTO OF OTHER VEHICLE (JUV)	A/M	1500.00	07A
J10	UNAUTHORIZED USE/AUTO OF OTHER VEHICLE (A/M)	A/M	1500.00	07A
U2	UNLAW/LICENSEE/SELL/PRO/ALCOH UNDER 21 YOA	A/M	1500.00	22
U8	UNLAWFUL ACTS:WATER & SEWAGE (C/M)	C/M	250.00	26
U1	UNLAWFUL DISPOSAL OF RAW SEWAGE (C/M)	C/M	250.00	26
U35	UNLAWFUL PHOTOGRAPHING/VIOL. OF PRIVACY	A/M	2500.00	17
P165	UNLAWFUL POSS. DRUG PARAPHERNALIA (A/M)	A/M	2000.00	26
U15	UNLAWFUL POSS OF INTOXICATING LIQUOR (C/M)	C/M	250.00	22
U45	UNLAWFUL REMOVAL OF LICENSE PLATE (A/M)	A/M	1500.00	06
U3	UNLAWFUL SALE OF ALCOHOLIC BEVERAGE (B/M)	B/M	500.00	22
T80	UNLAWFL TATTOOING OF A MINOR (A/M)	A/M	1500.00	20
U30	UNLAWFUL USE OF 911 (C/M)	C/M	250.00	26
U6	USE OF FALSE IDENTIFICATION (C/M)	C/M	250.00	26

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U25	USE OF WEAPON TO COMMIT FELONY (E/F)	E/F	3000.00	15
U12	USURY:WILLFUL COLLECT (MISD) (A/M)	A/M	2000.00	06
U40	UNLAWFUL ALLOW MINOR TO LOITER/ALCOHOL	A/M	1500.00	22
V15	VAGRANCY (C/M)	C/M	250.00	25
V48	VANDALISM:$10,000-$60,000 (C/F)	C/F	5000.00	14
V47	VANDALISM:$1,000-$10,000 (D/F)	D/F	3000.00	14
V45	VANDALISM:$500 OR LESS (A/M)	A/M	2000.00	14
V46	VANDALISM:$500-$1,000 (E/F)	E/F	2500.00	14
V49	VANDALISM:$60,000 & UP (B/F)	B/F	7500.00	14
[illegible]	[illegible] See Crim Contempt	E/F	[illegible]	26
V35	VIOL OF RESTRAINING ORDER (E/F)	E/F	3500.00	20
C140	VIOLATION OF CHILD RESTRAINT (C/M)	C/M	250.00	NA
I60	VIOLATION OF IMPLIED CONSENT LAW		500.00	26
O25	VIOLATION OF OPEN TITLE (C/M)	C/M	500.00	26
V30	VIOLATION OF PAROLE (E/F)	E/F	PER JUDGE	26
P14	VIOLATION OF PAWNBROKERS ACT (A/M)	A/M	1500.00	NA
V20	VIOLATION OF PROBATION (E/F)	E/F	PER JUDGE	26
'32	VIOLATION OF PROBATION (CIRCUIT CT/FELONY)	E/F	PER JUDGE	26
V31	VIOLATION OF PROBATION (CIRCUIT CT/MISD)	A/M	PER JUDGE	26
V1	VIOLATION OF PROBATION (GEN.SESS/MISD) (A/M)	A/M	2500.00	26
V100	VIOLATION OF VACCINATION (C/M)	C/M	500.00	NA
V50	VIOLATION OF WHEEL TAX (C/M)	C/M	CITATION	NA
V55	VIOLATION OF ZONING ORD. (C/M)	C/M	500.00	26
MSD-MISC-	Viol. of TAPA law A/m		500.00	
V56	VIOLATION:OPEN CONTAINER LAW (C/M)	C/M	500.00	22
V65	VIOLATION: FINANCIAL RESPONS.LAW	C/M	250.00	
W8	WEAPON:CARRYING DURING JUDICIAL PROCEEDING	E/F	3500.00	15
W1	WEAPON:CARRY IN PUBLIC RECREATIONAL AREA	E/F	3500.00	15
W2	WEAPON:CARRY ON SCHOOL GROUNDS (E/F)	E/F	3500.00	15
W17	WEAPON:DISCHARGE W/IN CITY LIMITS (A/M)	A/M	2500.00	15
W35	WEAPON:POSSESSION OF PROHIBITED WEAPON (E/F)	E/F	3000.00	15
W11	WEAPON:PROHIBITED (A/M)	A/M	2500.00	15
W100	WEAPON:PROVIDING TO JUVENILE (D/F)	D/F	3500.00	15
W5	WEAPON:PROVIDING TO JUVENILE (A/M)	A/M	2500.00	15
W4	WEAPON:UNLAWFUL POSS BY CONVICT FELON (E/F)	E/F	3500.00	15
12	WEAPON:UNLAW POSS COMM OF CRIME (E/F)	E/F	3500.00	15
	Violation of bond Conditions		20,000	

EXHIBIT TO COMPLAINT

W13	WEAPON:UNLAW POSS IN ESCAPE OF CRIME (E/F)	E/F	3500.00	15
W7	WEAPON:UNLAW POSS OF FIREARM (C/M)	C/M	500.00	15
W6	WEAPON:UNLAW POSS OF KNIFE (C/M)	C/M	500.00	15
W30	WEAPON:UNLAW SALE/LOAN/GIFT (A/M)	A/M	2500.00	15
W3	WEAPON:UNLAWFUL POSS IN PUBLIC (A/M)	A/M	2000.00	15
W15	WELFARE FRAUD (FELONY) (E/F)	E/F	3000.00	11
W16	WELFARE FRAUD (MISD) (A/M)	A/M	2500.00	11
W9	WILDLIFE VIOLATION (C/M)	C/M	500.00	26
W50	WILDLIFE VIOLATION (B/M)	B/M	1000.00	26
W51	WILDLIFE VIOLATION (A/M)	A/M	1500.00	26
W14	WILLFUL INJURY BY EXPLOSIVES (A/F)	A/F	1500.00	04C
W10	WORKHOUSE MITTIMUS (A/M)	A/M	NT OF FINES	26
W23	WORTHLESS CHECK:$10,000-$60,000 (C/F)	C/F	5000.00	06
W22	WORTHLESS CHECK:$1,000-$10,000 (D/F)	D/F	3500.00	06
W20	WORTHLESS CHECK:$500 OR LESS (A/M)	A/M	1000.00	06
W21	WORTHLESS CHECK:$500-$1,000 (E/F)	E/F	2000.00	06
W24	WORTHLESS CHECK:$60,000 & UP (B/F)	B/F	5000.00	06

rev. 12/01

Anexiety
Asthma
Cholesterol
Diabetes
Diuretic
Emphysema
Hypoglycemia
Hypertension
Psychotic
Schizophrenia
Seizure
Thyroid
Tuberculosis

EXHIBIT TO COMPLAINT

MITTIMUS

COPYMATTE PRINTING, INC.

10:45pm

STATE OF TENNESSEE - RUTHERFORD COUNTY

TO THE JAILER OF SAID COUNTY:

[redacted]

having been examined before me on a charge(s) of False Imprisonment $1500

Public Intox $250

Domestic $1500

and it appearing that such offense has been committed, and that there is sufficient cause to believe him guilty thereof, and he having failed to give bail as required.

You are therefore commanded to receive him into custody, and detain him until he is legally discharged.

This 3 day of November 20 12.

Length of residence in the community: 33yrs

Employment status, history and financial condition: Self employed

Family ties and relationships: Yes

Reputation, character and mental conditions: Anxiety

Prior criminal record, including prior releases on recognizance or bail: DUI, Public Intox

Identity of responsible members of the community who will vouch for defendant's reliability: ______

The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance: Ø

Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear: ______

*12 hr hold
*Out on bond

Hx [redacted]

119076

Rx [redacted]

[signature]

JUDGE OF COURT OF GENERAL SESSIONS AND JUVENILE COURT

Bond $9,750

FEDERAL PRETRIAL RISK ASSESSMENT INSTRUMENT (PTRA)

DEFENDANT'S NAME:______________________________ DATE OF ASSESSMENT: _____________________

OFFICER: ________________________________

PACTS #: ____

DISTRICT: _______________________________

1.0 CRIMINAL HISTORY & CURRENT OFFENSE:

1.1. NUMBER OF FELONY CONVICTIONS

- 0=NONE
- 1=ONE TO FOUR
- 2=FIVE OR MORE

1.2. PRIOR FTAS

- 0=NONE
- 1=ONE
- 2=TWO OR MORE

1.3. PENDING FELONIES OR MISDEMEANORS

- 0= NONE
- 1=ONE OR MORE

1.4. CURRENT OFFENSE TYPE

- 0= THEFT/FRAUD, VIOLENT, OTHER
- 1=DRUG, FIREARMS, OR IMMIGRATION

1.5. OFFENSE CLASS

- 0=MISDEMEANOR
- 1=FELONY

1.6. AGE AT INTERVIEW

- 0= 47 OR ABOVE
- 1=27 TO 46
- 2=26 OR YOUNGER

TOTAL CRIMINAL HISTORY

2.0 OTHER FACTORS:

2.1 HIGHEST EDUCATION

0=COLLEGE DEGREE
1=HIGH SCHOOL DEGREE, VOCATIONAL, SOME COLLEGE
2=LESS THAN HIGH SCHOOL OR GED

2.2 EMPLOYMENT STATUS

CIRCLE APPROPRIATE ITEM BELOW AND RECORD SCORE IN BOX
0=EMPLOYED FULL TIME
0=EMPLOYED PART TIME
0=DISABLED AND RECEIVING BENEFITS
1=STUDENT/HOMEMAKER
1=UNEMPLOYED
1=RETIRED, ABLE TO WORK

2.3 RESIDENCE

0=OWN/PURCHASING
1=RENT, NO CONTRIBUTION, OTHER, NO PLACE TO LIVE

2.4 CURRENT DRUG PROBLEMS

1=YES
0=NO

2.5 CURRENT ALCOHOL PROBLEMS

A=YES
B=NO

2.6 CITIZENSHIP STATUS

0= US CITIZEN
1=LEGAL OR ILLEGAL ALIEN

2.7 FOREIGN TIES

A= YES
B= NO

2.7 (A) DOES THE DEFENDANT HAVE ANY OF THE FOLLOWING TIES TO A FOREIGN COUNTRY?

A= YES
B= NO

CIRCLE ALL THAT APPLY
FAMILY (PARENTS, SIBLINGS, COUSINS, ETC.)
SPOUSE
CHILDREN
SIGNIFICANT OTHER
BUSINESS RELATIONS
FRIENDS
OTHER
NO FOREIGN TIES

IF YES, WHAT COUNTRY OR COUNTRIES?

2.7 (B) DOES THE DEFENDANT MAINTAIN CONTACT WITH ANY INDIVIDUAL IN QUESTION 2.7(A)?

A= YES
B= NO

2.7 (C) IS THE DEFENDANT A CITIZEN OR RESIDENT OF A FOREIGN COUNTRY? IF YES, WHICH COUNTRY OR COUNTRIES? **(PLEASE INDICATE WHAT COUNTRY.)**

A= YES
B= NO

2.7 (D) DOES THE DEFENDANT POSSESS A VALID OR EXPIRED PASSPORT (EITHER U.S. OR FOREIGN)?

A= YES
B= NO

2.7 (E) DOES THE DEFENDANT HAVE ANY FINANCIAL INTERESTS (SUCH AS, PROPERTY, BANK ACCOUNTS, ETC.) OUTSIDE OF THE U.S.?

A= YES
B= NO

2.7 (F) HAS THE DEFENDANT TRAVELED OUTSIDE OF THE U.S.?

A= YES
B= NO

CIRCLE APPROPRIATE ITEM BELOW:
WITHIN THE PAST 1–5 YEARS
WITHIN THE PAST 6-10 YEARS
NO FOREIGN TRAVEL

2.7 (G) WAS TRAVEL IN 2.7(F) FOR ANY OF THE FOLLOWING?

A= YES
B= NO

CIRCLE APPROPRIATE ITEM BELOW:
A=PLEASURE
B=BUSINESS
C=BOTH
D=NOT APPLICABLE

TOTAL OTHER

TOTAL SCORE
[ITEMS 1.1 – 2.7(G)]

Likelihood of outcomes based on event occurring during pretrial period.

Risk Category	N	%	Risk Score	FTA	NCA	FTA/NCA	TV	FTA/NCA/TV
Category 1	52,677	29	0-4	1%	1%	2%	1%	3%
Category 2	52,653	29	5-6	3%	3%	5%	4%	9%
Category 3	49,920	27	7-8	4%	5%	10%	9%	18%
Category 4	21,779	12	9-10	6%	7%	15%	15%	28%
Category 5	4,710	3	11+	6%	10%	20%	19%	35%

IRB APPROVAL

From: Emily Born [Emily.Born@mtsu.edu]
Sent: Thursday, February 23, 2012 10:07 AM
To: Jerry Gonzalez
Subject: RE: IrB

Ok- yes, as long as all info is publically available you should be fine….thanks!

Emily Born
Compliance Officer
615-494-8918

From: Jerry Gonzalez [mailto:jgonzalez@jglaw.net]
Sent: Thursday, February 23, 2012 10:06 AM
To: Emily Born
Subject: RE: IrB

Correct. One planned interview is of the head of the Pretrial Risk Assessment Program with the U.S. Administrative Office of the Courts in Wash. D.C. The other is possibly the director of a similar pretrial risk assessment program for the State of Virginia. Otherwise, all interviews (really depositions) have been done as part of prior litigation and not for the purpose of research, either of public officials or party plaintiffs.

If my committee feels that I need to interview others that are NOT public officials, then I will revisit the issue with you.

Jerry Gonzalez
Jerry Gonzalez PLC
2441-Q Old Fort Parkway
No. 381
Murfreesboro TN 37128
615-360-6060 off.
615-225-22212 alt.
615-225-2213 fax.
615-604-0520 cel.
jgonzalez@jglaw.net
gag2i@mtmail.mtsu.edu
www.jglaw.net

From: Emily Born [mailto:Emily.Born@mtsu.edu]
Sent: Thursday, February 23, 2012 9:50 AM
To: Jerry Gonzalez
Subject: RE: IrB

Now these that you "will" interview are still on public record correct??

Emily Born
Compliance Officer
615-494-8918

From: Jerry Gonzalez [mailto:jgonzalez@jglaw.net]
Sent: Thursday, February 23, 2012 9:35 AM

To: Emily Born
Subject: RE: IrB

That was fast! Excellent. I will let you know if anyone I intend to interview is NOT a public official and the interview limited to his or her official duties. Likewise if I intend to use any prior interview of a non-public official. Thanks.

Jerry Gonzalez
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615-225-2213 fax.
615-604-0520 cel.
jgonzalez@jglaw.net
gag2i@mtmail.mtsu.edu
www.jglaw.net

From: Emily Born [mailto:Emily.Born@mtsu.edu]
Sent: Wednesday, February 22, 2012 4:09 PM
To: Jerry Gonzalez
Subject: IrB

Hey Jerry-

Ok was thinking it over and spoke to our chairmen- this is all publically available info☺ NO IRB required!

Emily Born
Compliance Officer
615-494-8918

CASE NO. M2011-01865-CCA-R3-CD

In The

Court of Criminal Appeals of Tennessee

At Nashville

STATE OF TENNESSEE
***Plaintiff-Appellee*,**

VS

CAYETANO RAMIREZ
***Defendant-Appellant*.**

ON APPEAL FROM THE CRIMINAL COURT OF DAVIDSON COUNTY
DIVISION VI
CASE NO. 2008-C-2573

APPELLANT'S BRIEF

Jerry Gonzalez
Jerry Gonzalez PLC
2441-Q Old Fort Parkway, No. 381
Murfreesboro TN 37128
615-360-6060
Attorney for Defendant-Appellant Cayetano Ramirez

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying Defendant's motion to suppress on the grounds that there was a purposeful delay by the police in presenting the defendant to a judicial magistrate for the purpose of gathering more evidence against him through a hoped-for confession and on the grounds that the defendant was denied sleeps, food and water and bathroom breaks during the interrogation.
2. Whether the State committed a fatal *Brady* violation by failing to disclose discovery of the mental state and possible mental illness (autism) of the key witness-alleged victim of which the state was aware.
3. Whether the court erred by admitting Defendant's statement regarding a prior act made during police interrogation through direct questioning by the police.
4. Whether there was sufficient evidence to support a conviction of attempted child rape.

STATEMENT OF THE CASE

Nature of the Case

This was a case alleging that the defendant raped his step-son while at a camping trip to Nashville, Tennessee. There were no actual witnesses to the event and the case revolved instead primarily around the testimony of the alleged victim who was 12 years old at the time. The defendant was tried and convicted of the lesser included offense of attempted rape of a child

Course of Proceedings

Defendant was indicted on August 15, 2008 on one count of rape of a child, in violation of T.C.A. 39-13-522. Defendant was alleged to have intentionally, knowingly, or recklessly engaged in unlawful sexual penetration of a child less than thirteen years of age, that is, his stepson, while on a camping trip to Nashville from Aurora, Colorado.

At trial, the only evidence of any penetration whatsoever was by the testimony of the underage, alleged victim stating that his stepfather had "penetrated" him. Redacted parts of the defendant's statements to the police during custodial interrogation were also introduced via a proxy question-answer format where the defendant claimed that the child had instead touched him and that this had happened before in Colorado.

Disposition Below

After two days of deliberation, the jury acquitted the defendant of rape but convicted him of the lesser offense of attempted rape of a child.

On June 9, 2011, the defendant was sentenced to 10 years of incarceration as a Range I standard offender after the trial court found some enhancement factors.

Defendant filed a motion for new trial asserting that critical errors committed at trial warranted a new trial. The motion was denied.

Defendant then filed a timely Notice of Appeal to this Court.

STATEMENT OF FACTS

Defendant was arrested on August 12, 2008 (Exhibit 1 to Motion to Suppress, Arrest Warrant) and indicted on August 15, 2008 (TR 1) on one count of rape of a child in violation of T.C.A. 39-13-522. [1]

On August 11, 2008, around midnight, Officer Dylan Kinney of the Metro Nashville Police Department responded to the Seven Points Recreational Center campground on Stewarts Ferry Pike. (Trial Tran. Vol. III, 310-311). When he arrived to the lightly lit camp site, he first encountered the alleged victim's mother. (Id. 313) While the mother explained what happened, the alleged victim was seated on the stairs of a camper. (Id.) Also present were an aunt and uncle. (Id.) Although the officer only spoke "some Spanish" the mother, according to the officer, spoke "fairly good English", well enough that he could understand what she was saying. (Id. 314-315.) [2] The mother was "kind of calm but determined" as she explained what happened. (Id. 315). The officer did not question the alleged victim because once he "realized the – the nature of the situation, [he] realized this was something that]he] was not qualified to interview him for." (Id. 315) The officer also spoke to the alleged victim's uncle, Antonio Bustamante, who likewise was "not agitated". (Id. 316)

The uncle explained to the officer that he and his wife were in their camper next to a tent where the rest of the family was when e was awakened in the middle of the night. (Id). He was

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[1] References to the Technical Record are designated as "TR" and the page number. References to Exhibits are designated by the hearing where the exhibit was introduced, such as "Motion to Suppress" or "Pretrial Motions" and the exhibit number. References to transcripts are to the volume number and page number within that volume and designated, for example, as "Trial Tran. Vol III 158".

[2] The audio of the mother's 911 call was introduced at the trial and marked as Exhibit 9. From that audio recorded 911 call, it is abundantly clear that the mother did ***not*** speak "fairly good English". In fact, the mother can hardly speak any English at all and the 911 operator needed to third-party call a Spanish language interpreter to understand the mother.

awoken at the sound of Aracela Bustamante (the alleged victim's mother) saying "come quickly". (Id 320) When the uncle arrived at the tent, he told Officer Kinney that the defendant's pants were down. (Id. 321). The alleged victim's mother told Officer Kinney, purportedly in English, that she had heard some noise and felt some movement going on nearby to her inside the tent. (Id.) After she heard something, she told Officer Kinney that she pulled back some covers and "saw the – what was going on" and so she called the police. (Id. 322) Recognizing that he may need to obtain DNA evidence, he placed the defendant in the back of his patrol car. (Id.) Officer Kinney just asked the defendant some basic questions about his name and birth date before taking him into custody and then called the Sex Abuse detective. (Id. 323). Detective Jason Terry responded to the scene as the Sex Abuse detective on duty that night. (Id.) Officer Kinney then left with the alleged victim and his mother to General Hospital to have a test kit done. (Id.) The defendant was driven downtown by another officer. (Trial Tran. Vol. III, 379)

On cross-examination, Officer Kinney testified that there "wasn't a whole lot of light, but there was enough that [he] could kinda see around the area a little bit." (Id. 326) But it was "[f]airly dark". (Id) Although the defendant was not "free to leave" when he was placed in the patrol car, Officer Kinney conceded that "this would be something that would require a much more extensive interview than I would be able to do. This was something done by a Sex Abuse detective." (Id. 328) [3]

Officer Jason Terry was assigned to the Sex Crimes Unit in August of 2008. (Trial Tran. Vol. III, 335, 339) He was contacted by Officer Kinney who had received the initial call to the scene and responded to the location after he spoke with Officer Kinney. (Id. 340) Once there,

[3] Officer Kinney did not testify at the suppression hearing held on March 3, 2010. At the time, the State called him a "fugitive" and offered to track him down by Detective Terry as a member of the U.S. Marshal's Fugitive Task Force. (TR 65)

Det. Terry was told by the alleged victim's mother that she saw the defendant with his pants down and an erect penis while "spooning" behind the alleged victim, whose pants were also down. (Id. 342-343) Det. Terry then left the scene and went to the hospital where he spoke with a DCS representative. (Id. 351) He then returned to the campground where he directed some crime technicians collecting evidence. (Id.) Then he went to the Sex Crimes Office where he interviewed the defendant, some three to three and a half hours after he had responded to the scene. (Id. 351, 359) [4] He wanted to interview the defendant because it would "complete[] the investigation, or that – I can't say, 'complete'; it's a part – it's an integral part of an investigation to speak with everyone." (Id. 352) "[Y]ou wanna [sic] clarify what exactly did occur out there. And that's just – it's an integral part of completing an investigation and – and just coming full circle and – and speaking to everyone involved – directly involved." (Id.) The interview was conducted through Officer Jeff Gibson, who spoke Spanish. (Id. 352)

During the interrogation, Det. Terry deliberately mislead the defendant by telling him there would be medical proof although he knew that normally there is no such evidence. (Id. 360) According to the detective, "[m]isrepresenting the information is a – a common tactic and an accepted tactic within the courts, when conducting an interrogation or an interview of a defendant." (Id. 362) This is really "synonymous" with, or a nice word for saying he lied to the defendant. (Id. 380) Det. Terry also conceded that it was alright to lie to the defendant but that it was not okay to lie under oath. (Id. 381). After the interrogation was completed, the defendant was taken to General Hospital for an HIV test. (Id. 382) He was then returned to Metro facilities where he was turned over to the Sheriff's Department. (Id. 382) Defendant was first read his Miranda rights at 0325 in the early morning of August 12, 2008 (Exhibit 5 to Suppression

[4] Recall that Defendant had been in custody since 8 minutes after Officer Kinney first arrived.

Hearing), over three and a half hours after he was first handcuffed and placed in Officer Kinney's patrol car. Det. Terry then typed up an affidavit of complaint and proceeded to the Night Court Commissioner (Id. 383) who found probable cause at 6:37 a.m., almost seven (7) hours after Defendant had been arrested at 00:05 by Officer Kinney at the campground. (Exhibit 1 to Suppression Hearing). The affidavit included a sworn statement by Det. Terry that the alleged victim's mother "discovered the defendant and victim ... engaging in penile-anal sexual intercourse..." (Ex. 1 to Suppression hearing)

Officer Jeff Gibson testified at trial that he was the officer that actually asked the questions of the defendant at his interrogation in Spanish. He also testified that the defendant, during the interrogation, explained and demonstrated how the alleged victim had been laying on his right hand side and had reached back with his left hand to where the defendant was laying. (Id. 411-412) At this point, a transcript of the interrogation of the defendant was read to the jury, having been translated to English. During that interrogation, the defendant was questioned about and the defendant described a prior act in Colorado. (The full transcript is found as Exhibit 11 to the trial). The prior act, which had been objected to (Motion in Limine No. 5, March 24, 2010 pretrial motions, at 19-20), involved discussion where the alleged victim had tried to touch the defendant when they were in Colorado and the defendant had had a discussion with him about being homosexual and had informed his wife, the alleged victim's mother, about what had happened. (Exhibit 11 to the trial, Transcript of Interrogation, 23-25). The trial court then instructed the jury that the prior act could only be used as it relates to the defendant's state of mind on the night of August 11, 2008 and to weigh the credibility of his statement to the police. (Trial Tran. Vol. III 413-414).

The alleged victim testified at trial that the defendant used to be his stepfather. (Trial Tran. Vol. I, 11). He was born on February 24, 1996 and was 15 years of age at the time of trial. (Id. 12) On August 12 (year not mentioned) he was 12 years old when they came to Nashville to attend a Christian assembly. (Id. 14) Him and his family were sleeping in a tent. (Id. 15) In the tent were the defendant, his mother and his "two brothers". (Id. 17) [5] Sleeping next to him was the defendant, then his mother, then his brother and sister. (Id.) He testified that he was about to go to sleep when the defendant started touching him in his private area. (Id. 19) First, he touched his belly inside his shirt. (Id. 19-20) He testified that the defendant unbuttoned his pants, pulled them down, split his behind open and was "about to penetrate me". (Id. 20) "I think it was almost going in." (Id. 21) He felt and smelled urine. (Id. 22) His mother saw the blankets moving and she opened them, started yelling and then called the cops. (Id. 21-22) That was the sum total of his direct examination on the substantive issues.

On cross-examination, the alleged victim testified that the light above the tent was turned off when they went to sleep. (Id. 29) He testified that on August 11, 2008, he told a uniformed police officer what had happened. (Id. 30) [6] He also testified, first, that he had practiced his answers with the victim-witness coordinator the day before, then said that he had not. (Id. 32) Then he changed his answer again and said that he had practiced the day before. (Id.) Then he claimed it had been a "couple of months". (Id. 33) Then back to the day before. (Id.) He could not remember the color of the shirt he was wearing at the campground (Id. 34) but he remembered the color of the defendant's pants on that night.

[5] Just a few minutes before, he testified that he had a brother and a sister, not two brothers. (Trial Trans. Vol. I, 13)

[6] Recall that Officer Kinney testified that he did not question the alleged victim. See *supra*.

The alleged victim's mother testified next. The alleged victim was 12 years old in 2006. (Id. 42) Then she changed her answer to say that he was "eleven going toward twelve." (Id.) She married the defendant on September 7, 2007. (Id. 43) Her older brother, Antonio, is the pastor of the church she attends in Colorado. (Id. 46) Her and her family came to Nashville in August 2008 to attend an assembly. (Id. 49) Her brother drove in another van. (Id.) They arrived at the campground around 9:30 and put up the tent to go to sleep. (Id. 50) After they laid down, she woke up and saw the blankets moving. The defendant, according to the mother, was "touching my son he was touching skin." (Id. 54) She called her brother, screaming in a desperate manner. (Id.) She opened the blankets and the defendant's pants were all the way down, as were the alleged victim's. (Id. 54-55) The defendant's "penis was very big." (Id. 55) She asked him why he had done "this" and the defendant said that her son wanted it. (Id.) Later, however, she testified that the defendant, when asked, did not offer an explanation. (Id. 58) After a bench conference where the state explained that they needed to "fix" the confusion, the witness was asked again if the defendant said anything in reply to when she asked him why. She testified that he gave no reply. (Id. 63) After more repeated questions and coaching by the prosecutor with leading questions, she changed her answer again. (Id. 64) She then called the police. (Id. 56, 64) The police only spoke with her "a little" before they "took" the defendant. (Id. 65) She also testified that the police spoke with the alleged victim although the police testified that they had not. (Id. 65) The alleged victim's mother never testified to having seen "penile-anal sexual intercourse" as Det. Terry swore to in his affidavit in support of an arrest warrant.

Antonio Bustamante, the alleged victim's uncle, testified next. When he looked inside the tent after being summoned by his sister, the defendant was standing. (Trial Tran. Vol. II, 165) His pants were down to above mid-thigh level. (Id. 166) It was dark enough that he needed a

flashlight to see. (Id. 180) When asked about what happened, the defendant said two or three times, “nothing happened, nothing happened.” (Id. 167) He asked the alleged victim what happened and he said the defendant touched him. (Id. 167-68) When cross examined on the location of the defendant’s pants when he looked in the tent, the witness testified that it was difficult to remember due to the pain in his heart. (Id. 186) Then he changed his answer of the defendant’s position to say that he was seated, not standing. (Id.) He then testified that the defendant had on a long shirt and the bottom of the shirt fell below the top of the pants. (Id. 188) On redirect, he testified that the defendant was on his knees when he looked in the tent, not standing up or sitting like before. (Id. 195)

ARGUMENT

I. STANDARD OF REVIEW

A. Ruling on Motion to Suppress

When considering an appeal from a trial court's ruling on a motion to suppress, the trial court's findings of fact in the suppression hearing should be upheld unless the evidence preponderates to the contrary. *State v. Hanning*, 296 S.W.3d 44, 48 (Tenn. 2009). Generally, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). "But when a court's findings of fact at a suppression hearing are based solely on evidence that does not involve issues of credibility . . . , the rationale underlying a more deferential standard of review is not implicated." *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000) (analogizing the review of videotape evidence to the review of medical testimony that is given by deposition in workers' compensation cases). "In such circumstances, a trial court's findings of fact are subject to *de novo* appellate review." *State v. Payne*, 149 S.W.3d 20, 25 (Tenn. 2004). Here, because the trial court based its decision to deny the motion to suppress on facts that did not revolve around issues of credibility, the *Binette* standard applies. The scope of review on questions of law is *de novo*, *Hanning*, 296 S.W.3d at 48, and "[t]he application of the law to the facts . . . is a question of law." *State v. Turner*, 297 S.W.3d 155, 160 (Tenn. 2009).

B. Prosecutorial Withholding of Discoverable Evidence.

The decision to grant or deny a new trial on the basis of newly discovered evidence is a matter that rests in the sound discretion of the trial court. *State v. Goswick*, 656 S.W.2d 355, 358 (Tenn. 1983). However, a new trial is a matter of right when the defendant establishes (1)

reasonable diligence in seeking newly discovered evidence, (2) the materiality of the evidence, and (3) that the new evidence is likely to change the result of the trial to one more favorable for the defendant. *State v. Bowers*, 77 S.W.3d 776, 784 (Tenn. Crim. App. 2001) (citing *State v. Singleton*, 853 S.W.2d 490, 496 (Tenn. 1993)). On appeal, the standard of review is abuse of discretion. *State v. Meade*, 942 S.W.2d 561, 565 (Tenn. Crim. App. 1996).

C. Ruling on Admissibility of Defendant's Statement Regarding Prior Conduct.

A trial court's decision about the admissibility of evidence is reviewed for an abuse of discretion. *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008). "Reviewing courts will find an abuse of discretion only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party." *Id*. (citing *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth*., 249 S.W.3d 346, 358 (Tenn. 2008)).

D. Insufficiency of the Evidence

In considering the standard of review when evaluating the sufficiency of the evidence, this Court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In making this determination, the Court affords the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which maybe drawn from it. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Questions concerning the credibility of the witnesses, the weight to be given the evidence, and factual issues raised by the evidence are resolved by the trier of fact. *Id.* Because a verdict of guilt removes the presumption of innocence and imposes a presumption of guilt, the defendant upon conviction bears the burden of showing why the evidence is insufficient to support the

verdict. *State v. Rice*, 184 S.W.3d 646, 661 (Tenn. 2006); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This standard is identical whether the conviction is predicated on direct or circumstantial evidence. *State v. Casper*, 297 S.W.3d 676, 683 (Tenn. 2009); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

II. LEGAL ARGUMENT

A. The Trial Court Erred by Denying Defendant's Motion to Suppress.

A suppression hearing was held on March 3, 2010. [7] At the hearing, Officer Kinney, the first to arrive on the scene and take the defendant into custody, was not called to testify, being declared a "fugitive" by the state. (TR 65, fn 1 to Defendant's Reply brief) The State, rather, only called Detective Terry and Officer Jenkins to testify. (TR 58) However, as the State conceded in its brief (TR 58), the question at a suppression hearing on the issue of probable cause at the time of arrest revolves around the "facts and circumstances known to the officer" at the time.

The police dispatch log showed that the alleged victim's mother was trying to flag down the police at 23:57 hours with a flashlight and Officer Kinney arriving at that same time. At 00:05, only eight minutes after Officer Kinney's arrival, the log shows the defendant "in custody". (Exhibit 4 to Suppression Hearing, p. 3)

Although the State attempted to show through Officer Jenkins and Detective Terry that the mother of the alleged victim had witnessed "the defendant's groin area pressed against the victim's buttocks apparently engaging in penile-anal penetration", that she "further witnessed that the defendant's penis was erect" and that this "information [was] known to all of the officers

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[7] It appears that the transcript from this hearing was never filed as part of the record. Defendant will look into this further and file a motion to supplement the record if need be. However, the parties briefed the relevant issues with reference to the testimony after the hearing. The State filed a responsive briefing on March 8, 2010 (TR 57) and Defendant filed a reply on March 11, 2010. (TR 65)

at the scene" (TR 59), there is absolutely nothing in the record to support this summary. [8] In fact, Officer Kinney made the decision to place the defendant into custody before the dispatch log shows any other officer arriving on the scene. The dispatch log shows the defendant placed into custody and the Sex Crimes Unit notified at the exact same time (00:05) so the decision to place the defendant into custody had already been made by the time any other officer arrived.

After his arrest, the defendant was taken to the Sex Crimes Unit for questioning instead of directly to a Judicial Commissioner for a probable cause determination. The defendant was not taken to see a Commissioner until 6 ½ hours after his arrest. (TR 60-61) [9] Det. Jason Terry testified that the purpose of the delay was to "complete the circle" and, as the State conceded, to "continue the investigation and give the defendant an opportunity to 'tell his side'". (TR 61)

1. Probable Cause and Statements of a Defendant.

Whenever an officer restrains the freedom of an individual to walk away, the officer has "seized" that person for Fourth Amendment purposes. *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997). It is clear that handcuffing a defendant and transporting him to the police department constitutes a custodial seizure. An arrest of a person is complete when there is a "taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest." *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999).

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[8] In fact, at trial, Officer Kinney testified that he did not remember the alleged victim's mother telling him that the defendant had an erect penis or that she had seen penile-anal penetration. (Trial Tran. Vol. III, 329-330)

[9] "The fact is undisputed that Det. Terry brought the defendant to a judicial magistrate approximately 6 ½ hours after lawfully taken into custody..." (TR 61, State's Response to Defendant's Motion to Suppress)

An officer in Tennessee may effect a warrantless arrest "when a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed it." Tenn. Code Ann. § 40-7-103(a)(3). The dispositive issue is whether the officer at the time of Defendant's initial seizure had probable cause for believing the defendant was the person who committed the offense.

Whether probable cause exists depends upon whether the facts and circumstances and ***reliable*** information known to the police officer at the time of the arrest "were sufficient to warrant a prudent [person] in believing that the [individual] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142 (1964); *State v. Marshall*, 870 S.W.2d 532, 538 (Tenn. Crim. App. 1993). Probable cause must be more than mere suspicion. *Melson*, 638 S.W.2d at 350.

If a court determines a defendant was illegally seized without probable cause, the next inquiry becomes whether the defendant's statement was illegally obtained as a result of the illegal seizure. The analysis used to determine admissibility of such a statement is the "fruit of the poisonous tree" analysis, as opposed to a voluntariness test. *Brown v. Illinois*, 422 U.S. 590, 601, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *State v. Huddleston*, 924 S.W.2d 666, 674 (Tenn. 1996). In order to ascertain whether a statement obtained in violation of the Fourth Amendment should be suppressed, the primary inquiry is "whether [the statement] 'was sufficiently an act of free will to purge the primary taint of the unlawful invasion' "*Brown v. Illinois*, 422 U.S. at 599 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)); see also *Huddleston*, 924 S.W.2d at 674.

Although this determination is made on a case by case basis, the following four considerations are important in making this determination:

(1) the presence or absence of Miranda warnings;

(2) the temporal proximity of the arrest and the confession;

(3) the presence of intervening circumstances; and finally, of particular significance,

(4) the purpose and flagrancy of the official misconduct.

Huddleston, 924 S.W.2d at 674-75. The burden of proving admissibility by a preponderance of the evidence rests upon the state. *Id.* at 675. *Dunaway*, at 218.

Miranda warnings alone do not *per se* authorize admission of the confession. *Brown*, 422 U.S. at 603.

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted... Arrests made without a warrant or without probable cause, for questioning or "investigation", would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.

Brown v Illinios, 422 U.S. at 602. "Consequently, although a confession after proper *Miranda* warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis." *Dunaway*, at 217 (quoting *Brown v Illinois*). The determinative test is "whether [the defendant's] statements were obtained by exploitation of the illegality of his arrest." *Dunaway*, at 217. "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Id.*, at 218. See also, *State v. Ficklin*, 2001 Tenn. Crim. App. LEXIS 663 (Tenn. Crim. App. 2001) (defendant's confession was error since it was a product of his illegal arrest and prolonged illegal detention without a judicial determination of probable cause.")

2. Defendant was Lied to and Deprived of Food, Water, and Sleep.

The United States Supreme Court has held that in order for a confession to be involuntary, it must be the product of coercive state action. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 163-64, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). "The test of voluntariness for confessions under Article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." *State v. Smith*, 933 S.W.2d 450, 455 (Tenn.1996) (citing *State v. Stephenson*, 878 S.W.2d 530, 544 (Tenn.1994)). In Tennessee, for a confession to be considered voluntary, it must not be the product of "`any sort of threats or violence, . . . any direct or implied promises, however slight, nor by the exertion of any improper influence.'" *State v. Smith*, 42 S.W.3d 101, 109 (Tenn. Crim. App.2000) (quoting *Bram v. United States*, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897)). The essential question therefore is "whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined." *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn.1980) (quoting *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961)).

Defendant was placed under arrest by Officer Kinney shortly after his arrival on the scene. Despite limited English ability, the basis of the custodial arrest by Officer Kinney was nothing more that statements made by Defendant's wife regarding that she saw the defendant "spooning" and that he had an erection. No evidence of actual penetration was offered at the time nor of sexual battery. Therefore, Officer Kinney did not have probable cause to arrest the defendant on that basis alone.

After a three hour delay and one and a half hours of interrogation without sleep, food, or bathroom breaks, Defendant made some statements that the State used at his trial. The totality of

the circumstances surrounding his statements warranted suppression as fruit of the poisonous tree.

3. Purposeful Delay in Presenting Case to Impartial Magistrate

The Fourth Amendment requires that a judicial determination of probable cause be issued promptly following a warrantless arrest. *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S. Ct. 854, 43 L. Ed. 2d 54 (Tenn. 1975). A judicial determination of probable cause within 48 hours of arrest will ordinarily comply with the *Gerstein* promptness requirement. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). However, the United States Supreme Court has characterized as **unreasonable and improper *any* delay "for the purpose of gathering additional evidence to justify the arrest.**" *McLaughlin*, 500 U.S. at 56 (emphasis added). After the court has determined a *McLaughlin* violation has occurred, it must look at the same four previously discussed factors to determine whether the confession should be suppressed. *Huddleston*, 924 S.W.2d at 674-75.

In this case, Defendant was deliberately transported to the Sex Crimes Unit instead of to a judicial commissioner for the explicit purpose of obtaining a confession. A confession would be needed for the very purpose of gathering additional evidence to justify the arrest since the only evidence at the time was the statement of Defendant's wife. This is explicitly prohibited conduct under *McLaughlin* and thus a violation of Defendant's Constitutional right against unreasonable seizures. Thus, all evidence obtained after this purposeful delay should be suppressed.

B. The State Committed a Fatal Brady Violation When it Failed to Disclose in Discovery Evidence of the Alleged Victim-witness's Mental Condition.

The duty to disclose exculpatory evidence extends to all "favorable information" irrespective of whether the evidence is admissible at trial. *State v. Robinson*, 146 S.W.3d 469, 512 (Tenn. 2004); *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). The prosecution's duty to disclose *Brady* material also applies to evidence affecting the credibility of a government witness, including evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused. *Johnson*, 38 S.W.3d at 56. Although *Brady* does not require the State to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. *State v. Reynolds*, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). Impeachment evidence, as well as exculpatory evidence, falls under the *Brady* rule. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

The state also has a continuing duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose any exculpatory information to the defendant. In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. To prove a *Brady* violation, a defendant must demonstrate that 1) he requested the information (unless the evidence is obviously exculpatory, in which case the state is bound to release the information whether requested or not); 2) that the state suppressed the information; 3) that the information was favorable to the defendant; and 4) that the information was material. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). The evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). As stated by the United States Supreme Court: “[The] touchstone of materiality is a ‘reasonable probability’ of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when the government's evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Finally, the materiality of the suppressed evidence should be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436, 115 S. Ct. at 1566. This means the state's obligation to disclose the evidence is left solely to the prosecutor who has "the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Id.* at 420, 115 S. Ct. at 1558.

The defendant has the burden of proving a constitutional violation by a preponderance of the evidence. *State v. Spurlock*, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). Demonstrating a constitutional violation requires the defendant to show that without the omitted material he has been denied the right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976).

In this case, the overwhelming weight of the evidence was in the form of testimony from the alleged victim. Thus, the alleged victim’s mental state, his competence to be a witness, his ability to recall events accurately, are all central and pivotal to the case against the defendant.

At trial, the alleged victim, after several attempts to correct him, would raise his left hand to take the oath even though he was directed to raise his right hand. He made the same mistake

upon taking the oath at the sentencing hearing. (Transcript of Sentencing Hearing, p22) He also testified at the sentencing hearing that he has a problem of not remembering at school. (Id. 23)

At the hearing for a new trial, the dismissed alternate juror was called to testify. (Transcript of hearing for new trial, at 4) Mr. Mann testified that he raised two autistic sons and noticed things with the alleged victim in the case that drew his interest. (Id. 5) He noticed that the alleged victim spoke in a monotone voice and had ticks. When he walked, he walked with his hands at his side as opposed to someone without autism who would tend to stride with their hands. (Id. 6) He had to be told numerous times to raise his right hand. His overall view was very reminiscent of an autistic child. (Id. 6) According to this witness, autism is all about how one perceives things. (Id. 7) Their perception is their reality and their time frame, their time line, is not always accurate and factual. (Id.) As Mr. Mann put it, "he may have been touched at one point in time in his life and he may have been penetrated. But as far as him being a credible witness about that one point in time, he wasn't a credible witness if he had autism." (Id. 7-8) He also testified that, after he was dismissed as a juror, the trial judge asked to meet with him to thank him for his service. (Id.) He told the judge that he would have hung the jury because he did not find the alleged victim a credible witness. [10] At that point, the Court Officer approached and said that what he was saying was funny because Assistant District Attorney Reddick had told her ''don't you just love my witness, he's – I think he's mildly retarded, but he's just so sweet.' That's what the court officer said." (Id. 9)

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[10] This shows that if it turned out that the alleged victim's testimony was not credible because of a mental condition, the outcome of the trial would have been different. As Mr. Mann put it, "that was the entire prosecution's case..." (Id. 8, 17) Note also, that the witness had to pause at this point because of the unprofessional conduct of the state prosecutors laughing out loud at his testimony. (Id. 9) This type of conduct by the State attorneys took place throughout the trial. (Id. 10)

The court officer, Julian Smith, was called by the State. (Id. 23) She testified that she did not remember at all saying anything about retardation or anything else about the witness. She did recall the prosecutor saying that she had "a feeling, .. strong feelings towards the witness, because he was a nice kid." (Id. 24) [11]

Next, the State called the witness coordinator who testified that the alleged victim's mother had told her that he was undergoing therapy but she is not sure that she told Ms. Reddick. (Id. 32)

In closing arguments on the issue of a new trial, the State prosecutor, Ms. Reddick admitted that the "State was aware that [the alleged victim] was in counseling to deal with the fact that he had been sexually abused by this defendant." (Id. 41) The state also conceded that it was aware of the alleged victim's peculiar demeanor. "Now, [the alleged victim's] demeanor is peculiar, and I was aware of that by virtue of having viewed the forensic interview. Mr. Gonzalez had viewed that same interview and would have had the same opportunities to observe his manner and demeanor prior to trial as the State did. And I don't think it's incumbent upon the State to do anything other than inquire as to why a child is in mental health counseling. And in this case it was because – to deal specifically with the fact that he had been sexually abused. Nothing prior to that." (Id. 41-42)

The trial court ruled that the jury, "of everyday common sense and experience, if there was something that they felt was disconcerting about [the alleged victim's] mental state, that they wouldn't have picked up on that and evaluated that during the course of their deliberations as well." (Id. 46-47) But this misses the point. It is not so much whether a reasonable juror could

[11] Not recalling something does not refute testimony from Mr. Mann that the court officer made the statements attributed to her. Nor did Ms. Reddick ever deny having made the statement to the court officer despite ample opportunity to deny having said anything like that.

have picked up on the fact that the alleged victim had a peculiar demeanor or may have shown signs of autism, but more so that the government was aware of this possibility and failed to disclose it. The prosecutor referred to the alleged victim as "retarded" to a court officer and, despite ample opportunity to denying saying that, never refuted it. Had the government disclosed this issue to the defense, who was not skilled in recognizing signs of mental "retard[ation]" or autism, an expert could have been consulted and even called to explain to the jury that the alleged victim suffered a mental defect or disease that affected his ability to perceive reality. In a case where the entire prosecution hinges on the credibility of a single witness, this was a crucial miscarriage of justice and the State was obligated to disclose this information and failed to do so.

C. The Trial Court Erred by Allowing Evidence of the Defendant's Statement, Made During Police Interrogation, of a Prior Bad Act.

At trial, the State sought to and did introduce Defendant's statements to the police during his interrogation. A redacted version included statements by the defendant regarding prior conduct involving the same alleged victim that took place in Colorado before the date of the instant offense. [12] The statements of prior events were elicited entirely by the police interrogators.

Q: How many, how many times in the past have you awakened with Samuel touching you?
A: No, uh.
Q: How many times in the past?
A: No, there was only one other time, but a while ago, a while ago.
Q: How much time?
A: I don't know; a month, a month and a half.
Q: Where was that, was that in Aurora?
A: That was in Aurora.
* * *
Q: What, what happened?

[12] The version sought to be introduced and read to the jury had been redacted of all English statements by the interrogators pursuant to a previous court ruling after a motion in limine filed by the defendant.

A: No, he just touched me but the same (thing) I was asleep.

(Trial Exhibit No. 11, Transcript of Interrogation introduced at trial, at 8-9)

The State argued that it was admissible to show the nature of the relationship between the defendant and the victim, specifically the victim's fear of the defendant, to establish a complete factual background allowing the jurors to have a complete understanding of the facts, to allow the jurors to have a complete set of facts so as to assess the relative credibility of the defendant and to establish the defendant's opportunity, motive, intent, and scheme or plan to sexually abuse the alleged victim. (TR 29, State's Notice of Intent to Introduce 404(b) Evidence)

At the hearing, the State conceded that there was "obviously ... a 404(b) issue with the prior acts upon a child between the defendant and the victim..." (Transcript of March 24 pretrial motions, p24).

During the trial, when the issue came up, the State argued that the prior conduct "is behavior that would rise to aggravated sexual battery, that criminal conduct, if it were for purposes of sexual gratification by the adult defendant here, Mr. Ramirez." (Trial Tran. Vol. I, 109) But because the defendant was acknowledging no sexual gratification, the state argued, it was not "criminal conduct" and therefore not 404(b) material. (Id.) (This was a change from prior argument.) However, the State continued, it was relevant as to his credibility because he claims he told his wife about the prior conduct and she denied it. (Id. 110) The defendant, the State argued, tried to shift the blame to the child on August 11, 2008 just like he did the other time in Colorado when the child supposedly touched him then. "[T]hat's the way it happened then and not only that, it's happened that way before and I failed to mention it, clearly goes toward his credibility of his version of events." (Id. 110) "The purpose of bringing this material in is to show the absurdity of his version of what – his explanation for what Aracela [the alleged

victim's mother] saw, what Aracela saw with her own two eyes. He's acknowledging no criminal act, no criminal wrongdoing. Judge, one element does not a crime make." (Id. 120) "It is being offered to address the issue of Mr. Ramirez' credibility with regard to his explanation for what he can't get around; and that's the fact that two people saw him with his pants down. And so the Jury ought to have the opportunity to hear the full absurdity of his explanation so that they can evaluate the relative credibility." (Id. 121-122) "What [the defendant is] saying is, he had somehow been accused of it before and then he used that excuse before." (Id. 124) When the trial court recognized that "you're going to argue that this version of that is absolutely absurd on this occasion, that what he did on this occasion is a crime and his version of what happened in Colorado is identical to this. So the inference, even though you don't directly argue to the Jury is, this isn't the first time he's committed this and used that same excuse to commit the same crime", the other prosecutor suggested that the "court can give curative instructions." (Id. 125) The prosecutor went on:

> The way I ' m going to argue it is [the alleged victim] did not come onto him that night and pull his pants down and start touching him. That ' s the way I'm going to argue that. That's all I'm going to argue. And his version that that's how it happened is preposterous . And it 's equally preposterous , because according to him, [the alleged victim] had done something like that before and he failed to tell his mother. That's the way I'm going to argue it. And he failed to tell his mother – would a person that really had that happen to him, who supposedly loved their stepson and was concerned about his emotional well-being, allow something like that to happen and not go to his mother and say, your son is touching me, I 'm really worried, we've got to do something, we've got to get him into counseling , we've got to make sure he knows that's not okay. He doesn't say that. Because it didn't happen. And that's what the Jury can logically infer – is that he's lying.

(Id. 126).

After objection, the trial court allowed the statements to be introduced on the basis that they were not 404(b) evidence but rather relevant to the Defendant's state of mind on August 11,

2008 and for the purpose of assessing the credibility of what the defendant told the police. In support, the Court cited *State v Land*, 34 S.W.3d 516 (Tenn. Crim. App. 2000) and *State v Gomez,* 2010 WL 3538982, M2008-02737, and offered to provide a curative instruction to the jury. [13]

State v Land was a case that dealt with whether the trial court committed error in denying a motion to suppress, by telling the jury that the case had been delayed due to defense late-filed motions, by admitting statements of the defendant's mother as an excited utterance, by admitting statements of the defendant's mother told over the telephone, and whether the evidence was sufficient. The case had nothing to do with 404(b) evidence, state of mind of the defendant, nor credibility of statements made by the defendant to the police. Therefore, reliance on this case by the trial court was an error of law.

State v Gomez was a case where evidence of prior bad acts was allowed after co-defendant Lopez was cross-examined by Mr. Gomez's attorney who "'opened the door' by testifying that she had no reason to think that Defendant Gomez might hurt the victim." *Id.*, at 14. On appeal, both defendants objected to the testimony of prior bad acts under T.R.E. 404(b). The State contended that it did not seek this evidence to prove that Gomez had a violent character but rather to attack the credibility of co-defendant Lopez's testimony on cross-examination by Defendant Gomez's counsel and to demonstrate that Lopez had been warned and therefore knew that Gomez might be a danger to the victim. The Court of Criminal Appeals ruled that 404(b) was inapplicable. The court also discussed the "doctrine of curative

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[13] The jury instructions provided that, "the references in the transcript to the incident that occurred in Colorado between Defendant and Samuel Bustamante may be considered by you, if at all, only as it relates to what the defendant's mental state may have been on the night of August 11, 2008, and/or to weigh the credibility of his statement to police. You cannot consider these portions of the statement for any other purpose." Jury Instructions at 16.

admissibility". *Id.*, at 25. As the court explained, this "doctrine provides that '[w]here a defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissable evidence in order to explain or counteract a negative inference raised by the issue defendant injects.'" *Id.* In a criminal case, "'[t]he rule operates to prevent an accused from successfully gaining exclusion of inadmissible prosecution evidence and then extracting selected pieces of this evidence for his own advantage, without the Government being able to place them in their proper context.'" (Citing cases). "Only that evidence which is necessary to dispel the unfair prejudice resulting from the cross-examination is admissible." *United States v. Winston*, 447 F.2d 1236 (D.C. Cir. 1971).

Unlike *Gomez*, Mr. Ramirez did not "open the door" through cross examination of a witness or otherwise. Indeed, Mr. Ramirez sought to exclude his interrogation statements all together through a motion to suppress. The admission of what otherwise would have been inadmissible prior acts evidence under 404(b) was introduced through the police asking the defendant a question in an interrogation. The State, **not the defendant**, sought to introduce the defendant's statement made during a police interrogation. To allow it in this context is to make the "doctrine of curative admissibility" as a remedy for a defendant "unfairly" introducing what would otherwise be inadmissible by the prosecution is to make Rule 404(b) a nullity. By simply having the police ask about prior acts during an interrogation, the State, under this Court's ruling, will always be able to bypass 404(b) by introducing a defendant's statements to the police during an interrogation and then attempting to impeach the very statement introduced. A state

cannot introduce a statement and then seek to impeach the very statement it introduced through the doctrine of curative admissibility. [14]

A crucial misunderstanding of T.R.E. 404(b) by the State and the trial court is that the prior act had to have been a crime. But the rule does not address merely prior criminal acts. It specifically addresses evidence of "other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity with the character trait." The proffered evidence may involve merely an "act" that is not necessarily a crime. The State, at trial, relied heavily on the argument that the prior act – that is, that the alleged victim had previously touched the defendant in a sexual way – was not a crime without the element of sexual gratification and therefore not 404(b). Not only is this a clear misreading and misunderstanding of rule 404(b) but the convoluted reasoning of the state as to why this prior act would be relevant regardless of 404(b) belies the true purpose. In the clearest of terms, the State wanted to show that the defendant had acted the same way in the past - that is, when sexual activity between him and the child had occurred, he would claim that it was the child touching him, not the other way around – the same, or in conformity with, what he claimed during his interrogation. This is textbook 404(b) evidence and was clearly proffered to show conformity with this character trait.

The evidence of prior acts is not supported by the *Gomez* case and reliance on this case and the doctrine explained therein by this Court was an error of law. Since the evidence of the prior act, that is, prior incidents of the victim purportedly touching the defendant in Colorado, is

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[14] Indeed, in a rather circular argument, the State indicated that it wanted to introduce the statement of a prior bad act to show the jury that the defendant's statement was not to be believed. The prosecutor argued that she wanted to argue to the jury that if the prior bad act statement was true, then why would the defendant not have told the boy's mother that he had touched the defendant inappropriately. This is not a purpose behind the doctrine of curative admissibility and clearly was 404(b) evidence that should have been excluded.

so prejudicial that the presence or absence of that evidence would likely have caused a different outcome in the trial. Thus, reversal and remand for a new trial is warranted.

D. There Was Insufficient Evidence to Sustain a Conviction for Attempted Rape.

When the sufficiency of the evidence is questioned the issue is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

The only evidence to support the conviction of attempted rape of a child was the alleged victim's testimony that he was "penetrated" and that the defendant had spread his butt cheeks before the penetration. Clearly, the jury did not believe the penetration testimony but convicted the defendant of a lesser offense. That is, attempted rape of a child.

The only other evidence was testimony that the defendant's pants were down and his penis erect. There was no evidence about the defendant's intent or whether he exhibited any sexual gratification whatsoever.

Therefore, the evidence was insufficient to support a conviction of attempted rape of a child and Defendant is entitled to a new trial.

III. CONCLUSION

For the foregoing reasons, Defendant requests that his conviction be reversed and that this case be remanded for a new trial on a lesser included offense of rape of a child (for which he was necessarily acquitted).

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing via first class mail, postage prepaid, and via electronic mail, read receipt requested, to the following:

Mark Fulks
Senior Counsel
Criminal Justice Division
P.O. Box 20207
Nashville TN 37202

This the 29th day of May, 2012.

/s/ Jerry Gonzalez