Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Senior Counsel and Managing Attorney for the Memphis Office

Office of the Tennessee Attorney General.

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

October 1998 – BPR No. 19366.

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

Tennessee – Active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Office of the Tennessee Attorney General:

August 1998 – December 2001 – Assistant Attorney General – Criminal Justice Division

- Handled Criminal Appeals before the Court of Criminal Appeals and Supreme Court; Federal Habeas Corpus Challenges before the Federal District and Appellate Courts; Advising District Attorneys General; Preparing Formal and Informal Attorney General Opinions.

December 2001 – May 2004 – Team Leader for Western Grand Division – Criminal Justice Division

- Same as above with the added responsibility of mentoring new attorneys. Also, supervising the attorneys assigned to handle matters arising out of the Western Grand Division. Responsibilities included assigning cases, reviewing briefs, sitting as a judge on moot court panels and yearly evaluations.

May 2004 – Present – Manager/Supervisor – Memphis Office

- Responsible for running the Memphis office and coordinating with Nashville concerning litigation in Shelby and the surrounding counties. I continue to handle heavy criminal appellate caseload; however, I now have a percentage of my practice relating to civil litigation.

July 2007 – Named Senior Counsel.

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

Not Applicable.

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

As Senior Counsel with the Attorney General's Office, my law practice consists of representing the interest of the State in a variety of areas. I represent various State agencies and the interest of elected officials in state and federal court. I am also called on to provide written formal and informal opinions to state officials upon request.

More specifically, I spent the first seven years of my tenure with the Office representing the State in criminal appeals and post-judgment and collateral attacks. This included representing the State's interest before the 6th Circuit Court of Appeals, Federal District Courts, Tennessee Supreme Court, Tennessee Court of Criminal Appeals, and various circuit and chancery courts throughout the State. I was, and still am, called upon to advise the District Attorneys of the State. I also serve as one of three lawyers from the Attorney General's Office who review and approve extradition requests for the Department of Correction and the Governor.

Since moving back to Memphis, my practice consists of a 70/30 split between criminal appeals, post-judgment and collateral attacks and representation of various government agencies and elected officials in state and federal court (*e.g.*, Department of Commerce and Insurance, State Registry of Election, Department of Children Services, District Attorneys, etc.)

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.

Experience in Nashville with the Attorney General's Office:

As a team leader in the Criminal Justice Division, I directly supervised three attorneys who handled cases primarily in the Court of Criminal Appeals. My supervisory responsibilities included assigning cases, monitoring case management, reviewing briefs and pleadings, sitting as a judge on moot court panels, supervising oral arguments, and responding to questions concerning appellate practice and criminal law. In addition to those under my direct supervision, myself and the two other team leaders were responsible for training new attorneys in appellate practice and procedure, emphasizing oral advocacy, brief writing, and legal research.

In addition to those duties, I also maintained a heavy caseload. Including my time in Nashville and now in Memphis, I have handled well over 800 cases in the Tennessee Court of Criminal Appeals and more than 25 cases in the Tennessee Supreme Court. I have also handled cases in the United States Court of Appeals for the Sixth Circuit and the Tennessee Court of Appeals. I have researched and briefed just about every criminal law issue imaginable. As a Team Leader in Nashville and now as Senior Counsel in the Memphis office, I am often called upon to handle the high profile and complex cases.

I handle habeas corpus cases in the state trial and U. S. district courts.

I provided legal advice to District Attorneys General and their assistants. While in Nashville, I was the main contact for prosecutors in western Tennessee who wanted an appeal perfected on behalf of the State of Tennessee or when they needed assistance prior to or during trial. I also provided legal assistance when the constitutionality of a statute is challenged.

I also wrote formal and informal opinions for legislators, District Attorneys General, Public Defenders, Judges, and Justices of the state supreme court. These opinions have addressed questions of constitutional law and statutory interpretation and have addressed a wide array of topics.

Experience in Memphis with the Attorney General's Office:

Since taking the position of Managing the Memphis office, my duties have changed some. In addition to the day to day operations of the Memphis office, I am responsible for working with all the divisions of the Nashville office and assisting in their litigation in state trial and federal district courts in Memphis and West Tennessee. The degree of assistance ranges from acting as local or co-counsel to taking on the litigation as lead counsel.

As the supervising attorney for the Memphis office and Senior Counsel, I am routinely called upon to help other divisions with their high profile and complex litigation in West Tennessee. Most recently, I was asked by the Attorney General to serve as counsel in the federal lawsuit concerning the consolidation of the Memphis City and Shelby County schools systems.

In addition to the new duties required by this position, I continue to maintain a heavy criminal appellate caseload and many, if not all, of the responsibilities I had while working in the Nashville office.

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

Trial Court Matters:

Shelby County Board of Education v. Memphis City School Board, et al.
February 2011 – August 2011
Federal District Court for the Western District of Tennessee at Memphis
Case was settled

I was one of three attorneys appointed by the Attorney General to defendant the constitutionality of a recently passed statute. The basis of the dispute centered on the City of Memphis's decision to surrender it charter to run a school system. By surrendering its charter, the City of Memphis relinquished its right to run a school system within the city and, in effect, placing the responsibility of educating all the children of Shelby County upon the Shelby County government and the Shelby County Board of education. As a result of the City's actions, the Shelby County School system would have increased from 40,000 students to over 140,000

students.

Prior to the City's surrender of its charter, the State legislature passed a bill that would require a two year waiting period before the consolidation of the school system. As part of the lawsuit, several of the named defendant's challenged the constitutionality of the recently passed legislation.

Once the District Court determined that the statute was constitutional and applicable to the matter, the parties were able to reach a settlement agreement.

Mike Dunavant, District Attorney General for the 25th Judicial District v. Fayette County General Sessions Court and Judge Mike Whittaker, in his official capacity only.
July 2007 – January 2008
Circuit Court for Fayette County
Case was settled in Mediation

I was appointed by the Attorney General to represent District Attorney General Mike Dunavant in his dispute with the General Sessions Court of Fayette County and Judge Mike Whittaker. The basis of the dispute was that Judge Whittaker issued several orders concerning the number of charges the State could file in one case and that released prisoners on their own recognizance without notifying the District Attorney and/or the victims. The main issue in the case boiled down to whether or not the Judge's orders infringed upon the statutory and constitutional duties and rights of the District Attorney General.

With the aid of mediation, the parties were able to determine the true nature for Judge Whittaker's complaints and actions and, thus, reach a resolution that was favorable and agreeable to all parties.

In The Matter of: Braxton Korvacea Moore
November 2006 – March 2007
Shelby County Circuit Court – Division IV

The named juvenile was found to have committed seven aggravated assaults, was declared delinquent, and placed in the custody of the Department of Children's Services (DCS). DCS placed the child in the Wilder Youth Facility so that he could receive the counseling and educational tools he needed.

Mother of the minor sued DCS, Wilder Youth Facility, Shelby County Juvenile Court, and the Juvenile Court Judge for Shelby County claiming that the parties had violated the child's rights. The mother wanted the entire juvenile court proceeding declared void and the child returned to her custody.

After being designated as lead counsel by the Attorney General's office, the Shelby County Attorney's Office and the Shelby County District Attorney's office, I argued that it was in the best interest of the child to remain at Wilder Youth Facility so that he could receive the treatment he needed. We also argued that should the mother prevail and the juvenile matter be voided then the juvenile would likely be transferred to criminal court and tried as an adult. Under that scenario, the juvenile was facing a sentence of over 90 years.

This matter was significant in that one of the main questions was whether the mother had a remedy in the Circuit Court due to the fact that she and the child, with the aid of counsel, had agreed to this "settlement" in juvenile court.

Criminal Courts of Shelby County v. Mark Luttrell, Jr., Sheriff of Shelby County
September 2005 – October 2006
Shelby County Criminal Court and the Tennessee Court of Criminal Appeals

I was appointed by the Attorney General to represent the judges of the Shelby County Criminal Court in their dispute with the Shelby County Sheriff concerning courtroom security. The basis of the dispute was that the Sheriff planned to replace the current full-time deputies who provided courtroom security with part-time deputies. The main issue in the case boiled down to who was in charge of courtroom security.

The Shelby County Attorney's office and I were able to reach a resolution that was agreeable to all parties without major litigation.

Appellate Court Matters:

***State v. Garrett*, 331 S.W.3d 392 (Tenn. 2011)**

This case was taken by our Supreme Court to clarify the proper procedure to be used when a defendant request a severance of indictments pursuant to Tenn. R. Crim. P. 14. The Court found, as the State had conceded, that the trial court had failed to follow the Rules of Criminal Procedure in consolidating the matters for trial. In reaching this conclusion, the Court gave an in depth refresher on the procedures attorneys and judges must follow when determining whether

indictments should be consolidated or severed for trial. Also of note, while not finding an ethical violation in the instant matter, the Court noted that attorneys have an ethical duty to ensure that the rules of court are followed.

***Ward v. State*, 315 S.W.3d 461 (Tenn. 2010)**

This case was taken by our Supreme Court to analyze for the first time whether Tennessee's Sexual Offender Registry Requirement and Lifetime Supervision Requirement were punitive in nature and, thus, a direct versus a collateral consequences of a guilty plea. The Court, siding with a majority of jurisdictions, concluded that the registration requirements imposed by the sex offender registration act were non-punitive and, therefore, a collateral consequence of a guilty plea. However, the Court also held that the mandatory sentence of lifetime supervision is a direct and punitive consequence of a guilty plea and, thus, trial courts have an affirmative duty to ensure that a defendant is informed and aware of the requirements prior to accepting a guilty plea.

***State v. Brown*, 311 S.W.3d 422 (Tenn. 2010)**

This case was taken by our Supreme Court to review, among other issues, whether the defendant was entitled to jury instructions on the offenses of second degree murder, reckless homicide and criminally negligent homicide as lesser-included offenses of felony murder. After reiterating the importance of charging a lesser-included offense and noting that such a practice benefits both the prosecution and the defense, the Court determined that the trial court erred in failing to instruct the jury as to the lesser-included offenses of felony murder and concluded that such error was harmful and warranted reversal.

***State v. Hatcher*, 310 S.W. 3d 788 (Tenn. 2010)**

Our Supreme Court took this matter to resolve, among other issues, the differing interpretations of Tennessee Rule of Criminal Procedure 33 relating to the filing and hearing of a motion for new trial. The Court interpreted the rule to direct trial courts not to hold any hearing on a motion for new trial until a reasonable time after the sentencing hearing has been held, sentence has been imposed, and the judgment order entered. If the defense files a timely motion for new trial, the trial court should allow ample opportunity to amend prior to holding a hearing. However, once a hearing on the motion for new trial has been heard and an order denying has been entered, motions to make additional amendments must be denied.

***State v. Swift*, 308 S.W.3d 827 (Tenn. 2010)**

Our Supreme Court granted the defendant's appeal to clarify whether the location of the use of violence or fear is relevant in distinguishing theft from robbery. Based on the statutory language, the Court held that the temporal proximity between the taking of property and the use of violence or fear is the sole relevant factor in distinguishing the two crimes.

***State v. Ferrell*, 277 S.W.3d 372 (Tenn. 2009)**

The defendant in this matter was convicted of misdemeanor escape. At trial, the trial court denied the defendant's request to call an expert for the purpose of showing the he lacked the ability to form the required mental state for the offense. The Court of Criminal Appeals affirmed the conviction and held that the proffered testimony regarding "intent" was not relevant to the crime with which the defendant was charged and would not have benefitted him. Our Supreme Court reversed the lower courts and held that the lower courts had improperly limited its prior decisions by distinguishing between specific and general intent.

***Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008)**

In the appeal from the denial of a post-conviction petition, our Supreme Court determined that the trial court erred in striking as hearsay the testimony of witnesses presented at the hearing and in failing to assess their credibility and the potential effect of their testimony on the outcome of the petitioner's trial. Therefore, the Court remanded the matter to the trial court for a new hearing on the petition.

***Allen v. Carlton*, No. 05-5829 (6th Cir. May 24, 2007)**

Petitioner filed a petition for habeas corpus in the Federal District Court. After the District Court denied petitioner's claims, he appealed to the 6th Circuit which accepted the case on one issue concerning an erroneous jury instruction. In affirming the District Court's ruling, the appellate court recited Supreme Court precedent stating that "a jury instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." After conducting a harmless error analysis, the 6th Circuit determined that the evidence supporting the defendant's felony murder conviction was overwhelming and affirmed the District Court's findings.

***State v. Maclin*, 183 S.W.3d 335 (Tenn. 2006)**

This was our Supreme Court's first case analyzing the recent U.S. Supreme Court case of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) regarding a defendant's 6th Amendment right to confront the witnesses against him.

***State v. Lawrence*, 154 S.W.3d 71 (Tenn. 2005)**

This case was taken by our Supreme Court to review, among other issues, whether the failure to bring a defendant before a magistrate for a judicial determination of probable cause within a constitutionally reasonable time necessitates the suppression of evidence. The Court determined that the trial court properly denied the suppression motion since the evidence was obtained prior to the detention exceeding forty-eight hours in duration.

***Freshwater v. State*, 160 S.W.3d 548 (Tenn. Crim. App. Sept. 1, 2004)**

The defendant in this matter escaped from prison shortly after her conviction was affirmed. She defendant remained at large for 32 years. Upon her capture and return to Tennessee, she filed a petition for writ of error coram nobis claiming that the State failed to provide evidence that was exculpatory in nature. The trial court summarily dismissed the petition claiming it was barred by the one year statute of limitations. On appeal, the Court of Criminal Appeals reversed the trial court finding that due process allowed for the tolling of the statute and remanded the case for a determination of whether the defendant's newly discovered evidence may have resulted in different judgment and whether she was without fault in failing to discover and present the evidence at the appropriate time.

***State v. Butler*, 108 S.W.3d 845 (Tenn. 2003)**

The defendant was convicted of DUI when he was found in a Wal-Mart parking about 100 yards from his motorcycle carrying a sparkplug and a sparkplug wrench. Our Supreme Court took this case to determine whether the facts supported a finding that the defendant was in physical control of his motorcycle under Tenn. Code Ann. § 55-10-401(a). In finding the evidence sufficient to support the conviction, the Court adopted the reasonably capable of being rendered operable standard in cases where a defendant contests the element of physical control based upon alleged inoperability of the vehicle.

***State v. Cothran*, 115 S.W.3d 513 (Tenn. Crim. App. Feb. 14, 2003)**

Court ruled that defendants did not have standing to challenge the search of the car of a co-defendant. Court also reviewed *Terry* stops and plain view and inevitable discovery doctrines.

***State v. Jackson*, 60 S.W.3d 738 (Tenn. 2001)**

This was a case of first impression in which our Supreme Court determined that a defendant's history of being placed on juvenile probation allowed use of the enhancement factor that defendant had a history of unwillingness to comply with s sentence involving release in the community.

***State v. Dean*, 76 S.W.3d 352 (Tenn. Crim. App. Sept. 28, 2001)**

Court of Criminal Appeals determined that a confession given while illegally incarcerated was subject to suppression under the Fourth Amendment, but not under Tenn. R. Crim. P. 5(a). The Court also determined that because the defendant's bodily fluids were obtained pursuant to a valid search warrant it they were neither the fruit of, nor tainted by, the illegal detention.

***State v. Clever*, 70 S.W.3d 771 (Tenn. Crim. App. Sept. 14, 2001)**

Court of Criminal Appeals determined that the Tenn. Code Ann. §55-10-403(a)(3) providing for enhanced punishment for driving under the influence for a defendant with prior driving under the influence conviction(s) was not void for vagueness and did not violate ex post facto prohibitions as to a defendant who had pled guilty to the prior driving under the influence conviction before the enactment of the statute.

***State v. Lipford*, 67 S.W.3d 79 (Tenn. Crim. App. July 27, 2001)**

Court of Criminal Appeals determined that the Tennessee Supreme Court has the authority by rule to prohibit a full-time municipal judge from representing a defendant or otherwise practicing law after 180 days from assuming judicial office.

***State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001).**

Our Supreme Court took this case to determine whether Tenn. Code Ann. § 39-17-424 requires admission into evidence of a defendant's prior convictions relating to controlled substances, even when Tenn. R. Evid. 404(b) would otherwise render such evidence admissible. The Court held that the legislature did not intend for

section 39-17-424 to operate without regard to the Rules of Evidence and, thus, found that the trial court erred in admitting the evidence of the defendant's prior convictions.

***State v. Thompson*, 88 S.W.3d 611 (Tenn. Crim. App. 2000)**

Court of Criminal Appeals held that under Tennessee's statutory requirements, a nonresident whose Tennessee privilege to drive has been suspended is not extended the privilege to drive in Tennessee until the period of suspension has expired and the nonresident has complied with the reinstatement procedures even though he is in possession of a valid driver license issued by his state of residence.

***State v. Beauregard*, 32 S.W.3d 681 (Tenn. 2000)**

Supreme Court held that, under *State v. Denton*, 938 S.W.2d 373 (Tenn. 1996), the defendant's convictions for incest and rape did not violate double jeopardy principles under the United States Constitution or article I, section 10 of the Tennessee Constitution. The Court also concluded that the convictions did not violate due process under the United States Constitution or article I, section 8 of the Tennessee Constitution.

***State v. Lindsey*, 1999 WL 1095679 (Tenn. Crim. App. Oct. 28, 1999)**

Court of Criminal Appeals affirmed a defendant's murder conviction despite the fact that the State was not able to locate or produce the body of the victim.

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

Not Applicable.

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

I currently serve as the Vice Chairman for the Board of Directors for Christ Community Health Services. As a board, we have a fiduciary duty to two groups. First, we serve in a fiduciary capacity to the donors to ensure that the intent of their donations is fulfilled. Second, we also have a fiduciary duty to those we serve to ensure that they receive the best medical service possible and that it is delivered in a compassionate manner. As one of my duties as Vice Chairman, I also serve on the Board's Finance Committee.

I also serve as the Vice Chairman for the Board of Trustee's for Christ United Methodist Church. The Board of Trustee's supervises and maintains all property belonging to the congregation so that the ministries of the church can be effective. The committee is entrusted to see to the proper keeping of the property, equipment, investments, and resources as a way to facilitate the ministry of the local church. The Board is also reports annually to the charge conference on the state of the church's property, equipment, investments, and resources. Therefore, we owe a fiduciary duty to the charge conference, the church membership, and the donors.

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

As a team leader in Nashville and now as Senior Counsel, I am called on to mentor new lawyers. This includes reviewing briefs, sitting on moot court panels, observing and critiquing oral arguments, and providing general guidance and advice to new lawyers.

For several years, I have been selected to serve as a judge for the University of Memphis, Cecil C. Humphreys School of Law moot court competitions. Also, when I was in Nashville I was selected to serve as a judge for the Middle Tennessee State University, Regional Trial Advocacy Competition. More recently, I was selected to review and grade briefs for the regional portion of the New York City Bar's National Moot Court Competition which was held in Memphis.

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

July, 2007 – Applied for Criminal Court Judge for the 30th Judicial District. My name was not submitted to the Governor as a nominee.

May, 2008 – Applied for Judge of the Court of Criminal Appeals for the Western Grand Division. My name was not submitted to the Governor as a nominee.

EDUCATION

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

College:

Millsaps College – August, 1991 – May, 1995.
Degree – Bachelor of Business Administration
Major – Business Administration; Minor – Economics

University of Memphis – Summer, 1992.
(I attended the University of Memphis that summer to take one course.)

Law School:

Samford University – Cumberland School of Law – August, 1995 – May, 1998.
Degree – Juris Doctor

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 39 Date of Birth: August 30, 1972

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

Though I attended college in Jackson, Mississippi (Millsaps College) and law school in Birmingham, Alabama (Cumberland School of Law), the State of Tennessee has always been my legal residence.

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

Seven Years – I returned to Shelby County from Davidson County in 2004.

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

Shelby 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.

Not Applicable.

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

No.

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

No.

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

Not Applicable.

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

No.

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

No.

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

No.

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

Christ United Methodist Church – Life-long member – Board of Trustees, 2010; Vice-Chairman of Board of Trustees, 2011; Congregational Elder, 2011

Christ Community Health Services – Board Member, 2005 to Present; Vice-Chairman, 2009 to Present; Finance Committee, 2009 to Present.

American Inns of Court, Leo Bearman Chapter, Member, 2008/2009 and 2009/2010.

NEXUS – A New Experience in Leadership - 2006
Nexus is comprised of a diverse group of Memphians consisting of all races, incomes and faiths who desire to make an impact in the Memphis and Shelby County area. NEXUS is sponsored by IMPACT Memphis and 2nd Presbyterian Church.

Impact Memphis – Member – 2004 to 2006.

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

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

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

No.

ACHIEVEMENTS

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

National Association of Extradition Officials – 2000 to Present.

Tennessee Bar Association – 2004 to Present.

Memphis Bar Association – 2004 to Present.

Criminal Law Section – Chair - 2007 to Present; Vice Chair – 2006; Secretary – 2005.
Helped restart the section including planning monthly lunch programs for defense attorneys and prosecutors. We also provide CLE seminars and conducted a candidate forum for the 2006 elections (District Attorney, Criminal Court Judges, Juvenile Court Judge and General Sessions Court Judges).

House of Delegates – 2008, 2006.
The House of Delegates reviews policy and issues facing the Memphis Bar and makes recommendations concerning those matters to the Board of Directors.

Mentoring Program – Criminal and Appellate Issues – 2006 to Present.
Assist new lawyers from both the private bar and prosecutors in civil, criminal and appellate matters.

Served on Host Committee for June 2006 Tennessee Bar Association Annual Meeting in conjunction with Judicial Conference and TLAW.

S.C.A.L.E.S. Committee – 2006
Helped plan and organize for the Supreme Court's visit to Memphis as part of the Supreme Court's Advancing Legal Education program. As a committee, we were responsible for finding local high schools to participate and securing attorneys to meet with and discuss the cases with the students.

Chair of Juvenile Court Ad Hoc Committee – 2007
The committee's mission was to review the current make-up of juvenile court along with the recommendations made by the Shelby County Commission and determine how to increase the effectiveness of juvenile court.

Tennessee Lawyers Assistance Program – Appointed to the Regional Assistance and Monitoring Team – 2005 to Present.
TLAP provides consultation, assessment, referral, intervention, education, advocacy and peer support services for lawyers, judges, bar applicants, law students and their families.

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

Tennessee Attorney General's Office:
After three years of service with the Criminal Justice Division of the Attorney General's Office, I was promoted to Team Leader for the Western Grand Division.
After another three years, I was promoted to Manager of the Memphis Office.
In 2007, I was named Senior Counsel.

On four occasions, I have been selected to present CLE training for the Tennessee Judicial Conference.

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

J. Ross Dyer and Garland Ergüden, *Tennessee's Application of Crawford v. Washington's Confrontation Clause Analysis* – Memphis Lawyer – The Magazine of the Memphis Bar Association – March/April, 2006.

Dyer, J.R. and Fulks, M.A., eds. *Tennessee's Manual on Extradition and Interstate Rendition* (2004).

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.

LAW SCHOOL:

Cecil C. Humphreys School of Law
University of Memphis
Course:

Guest Lecturer for Professor Barbara Kritchevsky's *Appellate Practice* Class – *Things All Appellate Lawyers Should Know* – Spring, 2011.

Guest Lecturer for Professor Barbara Kritchevsky's *Appellate Practice* Class – *Things All Appellate Lawyers Should Know* – Spring, 2010.

Guest Lecturer for Professor Barbara Kritchevsky's *Appellate Practice* Class – *Things All Appellate Lawyers Should Know* – Spring, 2009.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2008.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2007.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2006.

Guest Lecturer for Judge Mark Ward's *Criminal Procedure II* Class – Post-judgment motions and appeals - Fall 2005.

CLE SEMINARS:

Ethics and Professionalism in Legal Writing – Tennessee Bar Association's Court Square Series in Jackson, Tennessee – September, 2011.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Appellate Practice Primer – Tennessee Bar Association's Court Square Series in Dyersburg, Tennessee – September, 2011.

- Presented overview of appellate practice and how the appellate process must be considered from the beginning of the trial.

Joinder, Consolidation, and Severance in Light of State v. Garrett – Tennessee Judicial Conference – June, 2011.

- Presented program covering the rules of joinder, consolidation, and severance and the Supreme Court's recent opinion on the topics.

Ethics and Professionalism in Legal Writing – Tennessee Bar Association's Court Square Series in Jackson, Tennessee – October, 2010.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Ethics and Professionalism in Legal Writing – Tennessee Bar Association's Court Square Series in Dyersburg, Tennessee – September, 2010.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Standards and Burdens of Proof – Tennessee Judicial Conference – June, 2010.

- Presented program covering several standards of review and burdens of proof that

Ethics and Legal Writing – Memphis Bar Association – December, 2009.

- Co-presenter of program discussing the interplay of the rules of ethics and professionalism and legal writing.

Appellate Advocacy – Tennessee Judicial Conference – April, 2009.

- Member of panel discussion concerning appeals. Topics ranged from standards of review, burdens of proof, making a record, to opinion writing.

Extradition and Detainers – Memphis Bar Association – December, 2007.

- Presented an overview of the procedures for properly extraditing prisoners. Also, reviewed the procedures for handling a prisoner's untried cases under the Interstate Compact on Detainers.

Collateral Attacks – Tennessee Judicial Conference – March, 2007.

- Served as the only non-judicial member on a panel discussion concerning the various post-judgment attacks and forms of collateral review. Was asked to serve on the panel to give the perspective of an appellate practitioner.

Case Law Update – Memphis Bar Association – December, 2006.

- Presented summary of recent Tennessee Supreme Court opinions and significant opinions of the United States Supreme Court and the Tennessee Court of Criminal Appeals.

Criminal Appeals – Memphis Bar Association – December, 2005.

- Member of panel discussion concerning criminal appellate practice. Topics ranged from preserving the record at trial, motions for new trial, compiling the record for appeal, issue selection and presentation, brief writing and oral argument.

Extradition and Detainers – Tennessee District Attorneys General Conference – March, 2004.

- Panel discussion reviewing the procedures for properly extraditing prisoners. Also, reviewed the procedures for handling a prisoner's untried cases under the Interstate Compact on Detainers.

Ramifications of State v. Burns – Tennessee District Attorneys General Conference – March, 2004.

- Member of panel discussion concerning the charging of lesser-included offenses.

OTHER COURSES:

Assessing Transcripts – Annual Tennessee Court Reporters Conference – June, 2004.

- Panel discussion for court reporters across the State. The discussion centered on problems we have found with transcripts on appeal and how to make sure that the transcripts are an accurate reflection of the trial.

Search and Seizure – Tennessee Highway Patrol Cadet School – December, 2002.

- Along with another member of the Criminal Justice Division of the Attorney General's Office, I taught a class to new cadets concerning the law on search and seizure. We also prepared a reference "book" for them on the topic.

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

Not Applicable.

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

Not Applicable.

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

I have attached copies of the State's briefs in ***Torian Benson v. State*** and ***State v. Shawn Hatcher***. With the exception of some minor editing by the Solicitor General's office, the work is ninety-nine percent my own.

ESSAYS/PERSONAL STATEMENTS

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

Coming from three generations of lawyers and judges, you either wanted to go into law or you wanted nothing to do with it. Obviously, I choose the former and, thus, have wanted to be a lawyer and, one day a judge, since I can remember. I have crafted and directed my career to reach this point and believe that the Court of Criminal Appeals is the next logical step in my career.

Furthermore, one of the many lessons passed down and taught in our family was the importance of giving back and service to your community. After graduating from law school, I took a job with the State Attorney General's office mainly because I saw this as a way to serve my home state. I cannot think of a better way to follow the lessons I was taught and fulfill a life-long dream than to give back to the citizens of Tennessee by serving as a judge.

Finally, I have a great respect for appellate judges that serve to find a balance between protecting the rights of a defendant and bringing a matter to finality.

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

For most of my tenure with the State Attorney General's Office, I have been statutorily prohibited from participating in direct pro bono work. Therefore, I have committed myself to indirect forms of pro bono by giving of my time and service to the Memphis Bar Association and other legal groups to help improve the quality of the representation offered by both defense attorneys and prosecutors. As an officer in the Criminal Law Section of the Memphis Bar, I have helped organize and host luncheon programs and CLEs. Also I am part of the mentoring program of the Memphis Bar and regularly receive calls from and give advice to both prosecutors and defense attorneys concerning criminal law and appellate questions. As part of my job, I also field questions from and give advice to District Attorneys General. Finally, I have recently started working with the moot court board at the Cecil C. Humphreys School of Law to help law students be better prepared to provide appellate services upon graduation.

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

The Court of Criminal Appeals hears trial court appeals in felony and misdemeanor cases, as well as post-conviction petitions, and other post-judgment collateral attacks. The Western Grand Division is comprised of 21 counties and sits in Jackson. While this position is from the Western Grand Division, the 12 members of this Court still "ride the circuit" sitting monthly in panels of three in Jackson, Nashville, and Knoxville.

I intend to bring the judicial temperament and professionalism that the citizens of Tennessee deserve and which I have seen modeled by my grandfather and the judges before whom I have appeared. Having handled well over 800 different matters before the Court of Criminal Appeals, I have noticed that the number of appeals increases every year. Based on my experience in handling criminal appeals, I can and will be able to take on these growing numbers and produce a quality product in a timely fashion without much of a learning curve. My work ethic and commitment to fair treatment has been rewarded by my supervisors within the Attorney General's Office. Furthermore, I believe that my experience as an appellate practitioner brings a new and different perspective to the Court.

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

I currently serve as the Vice Chairman of the Board of Directors for Christ Community Health Services. Christ Community is a non-denominational organization whose mission is to provide the highest quality healthcare, both medical and dental, to the poor, underprivileged, and medically unserved population of the community. Christ Community has an operating budget over $12 million and has over 100,000 patient visits a year. Our Board of Directors mirrors the diversity of those we serve.

I also serve as Vice Chairman of the Board of Trustees for Christ United Methodist Church. In addition to the church's global missions programs, Christ United Methodist Church supports numerous inner-city missions and ministries, including

Service Over Self, an urban home repair ministry, Binghampton Development Corporation, a housing and economic development organization, Eikon Ministries, building urban leaders from within the community, and recently opening Cornerstone Preparatory School whose mission is to provide low-income children the quality education, skills and character necessary to succeed in college and to become life-changing leaders in their community.

I believe that it is the responsibility of our elected and appointed officials to be involved in and give back to the community in which they live. Therefore, should I be appointed, I plan to continue my work with Christ Community Health Services and Christ United Methodist Church as well as seek other opportunities to serve within my community and throughout the State. I would also look for speaking engagements, especially in local schools and other youth programs. It is important that we continue to reach out to the children of our community and support them. Furthermore, I believe it is important to remain involved in and supportive of the bar associations.

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)***

Since moving back to Memphis, one of my missions was to increase the presence of the Attorney General's Office in Memphis and the surrounding counties. It is important for the people we serve to know that we do have a presence in west Tennessee, including Shelby County, and are not just a group of government lawyers sitting in Nashville and concerned only with matters in Middle Tennessee. Therefore, I have made a concerted effort to get to know both the criminal and civil judges in Shelby County and the members of the bar, including prosecutors, defense attorneys and other governmental attorneys. One way I have accomplished this goal is by my involvement with the Memphis Bar Association. As a member of the Bar Association, I have volunteered for and/or been appointed to numerous committees such as the SCALES committee, the planning committee for the Tennessee Bar, Judicial Conference and TLAW annual meeting, a member of the House of Delegates, Chairman of the Ad Hoc committee concerning Juvenile Court and an officer for the Criminal Law section of the Bar Association.

It is clear that these efforts have not gone unnoticed. Over the past few years, the Memphis office receives more phone calls each month from citizens, elected officials, and members of the bar. I have yet to meet either a judge or a member of the bar who is not appreciative of the Attorney General's Office presence in Memphis.

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

Yes. As an attorney for the State, I have, on occasion, disagreed with the decisions of our trial and appellate courts. However, as long as the decision was within the bounds of the law, my obligation has been to defend the judgment regardless of my personal feelings. As an Assistant Attorney General I took an oath to defend the laws and constitutions of the State of Tennessee and the United States. As a judge, I will be asked to take a similar oath. I have, and intend to continue, to honor this oath.

A recent case provides another illustration. In *State v. Kevin Swift,* the defendant was convicted of aggravated robbery after pulling a box cutter on two store employees as he tried to exit the store with stolen merchandise. I argued that aggravated robbery was the correct charge because the defendant used violence to effectuate the completion of the theft. However, the Tennessee Supreme Court determined that the defendant's actions constituted the separate offenses of theft and assault and did not meet the statutory definition of aggravated robbery. Despite my disagreement with the Court's conclusion, I have since then had to advise district attorneys that certain factual scenarios do not support a charge of aggravated robbery based on the precedent established in *State v. Kevin Swift.*

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. Robert E. Copper, Jr., Attorney General & Reporter, 425 Fifth Avenue North, Nashville, TN 37243; (615) 741-3491
B. Mike Dunavant, District Attorney General for the 25th Judicial District, 121 North Main Street, Ripley, TN 38063; (731) 635-5163
C. Knox Walkup, Attorney, Wyatt, Tarrant & Combs, 2525 West End Avenue, Suite 1500, Nashville, TN 37203; (615) 251-6713
D. Burt Waller, Executive Director, Christ Community Health Services, 2595 Central Avenue, Memphis, TN 38104; (901) 260-8550
E. Jackson W. Moore, Moore Management, LLC, 5872 Ridge Bend Road, Memphis, TN 38120; (901) 763-2288

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals for the Western Grand Division 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: September 20, 2011.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including 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, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

J. Ross Dyer
Type or Printed Name

Signature

9/20/2011
Date

19366
BPR #

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TORIAN BENSON, a/k/a MARCUS TERRY, a/k/a MARCUS BENSON, Appellant, v. STATE OF TENNESSEE, Appellee.	)))))))))))	LAKE COUNTY NO. W2002-02756-SC-R11-CO

ON APPEAL BY PERMISSION FROM THE JUDGMENT OF
THE COURT OF CRIMINAL APPEALS

BRIEF OF THE STATE OF TENNESSEE

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STATUTES

MISCELLANEOUS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

Whether the petitioner is currently being "restrained" by his prior convictions, and, therefore, has standing to challenge those convictions;

II.

Whether the petitioner's underlying convictions are void, thereby entitling him to habeas corpus relief.

STATEMENT OF THE CASE AND FACTS

On March 11, 1986, the petitioner pled guilty in the Criminal Court for Shelby County to four counts of larceny (Information Nos. I-00095 - 98) and six counts of robbery (Information Nos. I-00099 - 00104). (TR, 9-27). As a result of these convictions, the petitioner received a three-year sentence for each count of larceny and a five-year sentence for each count of robbery. (TR, 18-27).[1] These sentences were ordered to be served concurrently. (TR, 18-27).

On March 6, 1989, the petitioner pled guilty to two counts of grand larceny (Indictments Nos. 89-01445 and 47) and one count of aggravated assault (Indictment No. 89-01446). (TR, 35-43). As a result of these convictions, the petitioner was sentenced to three years on each count in the local workhouse, with the sentences to be served concurrently. (TR, 37, 40, 43).

The petitioner pled guilty to theft of property over $10,000 (Indictment No. 92-07948) on January 4, 1993, for which he received a four-year sentence. (TR, 54). The trial court ordered the petitioner's sentence to be served concurrently with his prior convictions. (TR, 54). On April 23, 1993, the petitioner pled guilty to possession of a controlled substance with the intent to sell over .5 grams of cocaine (Indictment No. 92-07535). (TR, 55-56, 58). As a result of this conviction, the

[1] The record in this case consists of one volume of technical record ("TR"), one volume of transcript ("II"), and one volume of supplemental record ("III"). The appellant will be referred to as "Benson" or the "petitioner." The appellee will be referred to as the "State."

petitioner was sentenced to eight years with the Tennessee Department of Correction. (TR, 58). Again, the trial court ordered the petitioner's sentence to be served concurrently with his prior convictions. (TR, 58).

On September 3, 1993, the petitioner pled guilty to two counts of possession of a controlled substance with the intent to sell (Indictment Nos. 92-07386 and 92-10300). (TR, 59-62, 63-66). The trial court sentenced the petitioner to eight years for Indictment No. 92-07386 and three years for Indictment No. 92-10300 to ber served concurrently. (TR, 62, 66).

On April 17, 1997, a Shelby County Criminal Court jury found the petitioner guilty of two counts of vehicular homicide (Indictment Nos. 95-08630 - 31). (III, 1-2). The trial court sentenced the petitioner to 15 years on each count and ordered the sentences to be served consecutively to each other and to "to all sentences he is serving on probation." (TR, 1-2; II, 83).

On August 27, 1999, the petitioner filed two petitions for writ of habeas corpus. In the first petition he challenged the judgment under Indictment No. 92-07386, and in the second petition, he challenged the judgment under Indictment No. 92-07535. (TR, 67-76; 77-84). The petitioner claimed that the judgments were void because his sentences should have been consecutive. The petitioner contended that he was released on bond at the time he committed these offenses and,

therefore, his sentences should have been consecutive rather then concurrent. (TR, 67-76, 77-84). The trial court dismissed both petitions. (TR, 88-89, 90-91).

On August 26, 2002, the petitioner filed three more petitions for writ of habeas corpus. (TR, 1-8, 28-34, 44-49). In the first petition, the petitioner claimed that the 1986 judgments are all void because of defects in the indictments. (TR, 1-8). In the second, the petitioner claimed that the 1989 judgments are void based on defects in the indictment. (TR, 28-34). In the third petition, the petitioner again challenged the 1992 judgements, contending they are void because they were ordered to be served concurrently rather than consecutively. (TR, 44-49).

On October 29, 2002, the trial court dismissed all three petitions. (TR, 106-07). The court held that the petitioner was not entitled to habeas relief because he was not currently restrained and/or imprisoned by the challenged convictions and that his current sentence has not expired. (TR, 106-107). The petitioner appealed to the Tennessee Court of Criminal Appeals. (TR, 108).

On April 23, 2003, the Court of Criminal Appeals entered an order affirming the trial Court's dismissal of the three petitions. (Copy attached). In affirming the trial court, the Court of Criminal Appeals held:

> [I]t is uncontested that the Petitioner is currently being confined on convictions unrelated to those challenged in the three petitions. It is obvious, therefore, that the writ of habeas corpus is not available to him at this time because if released for confinement on the petitions filed herein, the Petitioner would still remain confined for, at least, an additional sixteen years on the unrelated convictions. Thus, the

> Petitioner has no standing to complain that he is being illegally restrained for the reasons contained in the petitions. *See State v. Bomar*, 381 S.W.2d 287, 289 (Tenn. 1964).

The Court granted the petitioner's application for permission to appeal on December 15, 2003.

ARGUMENT

I. THE PETITIONER IS NOT CURRENTLY "RESTRAINED" BY HIS PRIOR CONVICTIONS AND DOES NOT HAVE STANDING TO CHALLENGE THOSE CONVICTIONS.

The petitioner contends that the Court of Criminal Appeals erred in finding that he did not have "standing to complain that he is being illegally restrained for the reasons contained in the petitions." (Petitioner's brief, 7). He argues that the Court's reliance on *State v. Bomar*, 214 Tenn. 493, 381 S.W.2d 287 (Tenn. 1964), is misplaced. However, for the reasons that follow, the Court of Criminal Appeals determination was correct.

This Court has held that the writ of habeas corpus will issue in Tennessee to release a person imprisoned or restrained of liberty ""only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment has expired."" *State v. Ritchie*, 20 S.W.3d 624, 630 (Tenn. 2000)(quoting *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993)(quoting *State v. Galloway*, 45 Tenn. (5 Cold.) 326, 336-37 (1868))). A petitioner "'cannot collaterally attack a facially valid conviction in a habeas corpus proceeding.'" *Ritchie*, 20 S.W.3d at 630 (quoting *State ex rel. Holbrook v. Bomar*, 211 Tenn. 243, 247-48, 346 S.W.2d 887, 888 (1963)). A habeas petitioner can only attack a judgment void on its face and not one that is merely voidable.

Ritchie, 20 S.W.3d at 630. "'[A] void judgment is one in which the judgment is *facially invalid* because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.'" *Id.* (quoting *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999)). In contrast, "'[a] voidable conviction or sentence is one which is *facially valid and requires proof beyond the face of the record or judgment to establish its invalidity.*'" *Id.* (emphasis added). "In all cases where a petitioner must introduce proof beyond the record to establish the invalidity of his conviction, then that conviction by definition is merely voidable, and a Tennessee court cannot issue the writ of habeas corpus under such circumstances." *Id.* at 633. On the other hand, the Post-Conviction Procedure Act is available to collaterally attack either void or voidable judgments, *see* Tenn. Code Ann. § 40-30-103 (2003), and, if the petitioner states a colorable claim, he may obtain an evidentiary hearing. *See* Tenn. Code Ann. § 40-30-109 (2003).

Section 29-21-101, Tennessee Code Annotated, provides that "[a]ny person *imprisoned or restrained of liberty*, under any pretense whatsoever, except in cases specified in § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint." (emphasis added). Because Benson is neither "imprisoned" nor "restrained of liberty" by the 1986, 1989 or 1993 judgments, he is not entitled to habeas relief.[2] Benson is currently imprisoned solely

[2] Being in "custody" is not a prerequisite for habeas corpus relief under § 29-21-101; rather, it

on his two 1997 convictions for vehicular homicide for which he received two consecutive 15 year sentences. (III, 1-2).

The statute permits use of the writ of habeas corpus by either a person "imprisoned" or a person "restrained of liberty." "Imprisoned" is clearly defined term with a plain meaning. To "imprison" is "to put in prison, confine in a jail," or "to limit, restrain or confine as if by imprisoning." Webster's Third New International

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is a requirement for filing a petition for post-conviction relief under Tenn. Code Ann. § 40-30-102(a) ("a person in custody under sentence of a court of this state"). Linguistic differences aside, the two statutory procedures are dissimilar in scope. The reach of our habeas corpus statute, regulating the practice in this state at least since 1858, *Ritchie*, 20 S.W.3d at 629, is "severely restricted." *Archer v. State*, 851 S.W.2d 157, 158 (Tenn. 1993). Indeed, for that reason the first post-conviction statute was enacted in 1967. *Luttrell v. State*, 644 S.W.2d 408, 409 (Tenn. Crim. App. 1982). Unlike the habeas corpus procedure, the post-conviction act permits attacks on "voidable" judgments. § 40-30-109(a). A post-conviction petition, filed against the State, must be filed in the county of conviction, § 40-30-104(a), while a habeas petition, directed against the individual allegedly depriving the person of liberty, is to be filed in the county (or nearest county) of detention. § 29-21-105. And the post-conviction remedy is vacation of the judgment, § 40-30-111(a), while the habeas remedy is immediate release. § 29-21-122. Indeed, only the lawfulness of the detention can be reached by a writ of habeas corpus:

> There is no warrant in either the statute or writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.

McNally v. Hill, 293 U.S. 131, 137-38, 55 S.Ct. 24, 79 L.Ed. 238 (1934), *overruled on other grounds by Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968).

Under this Court's decisions, a petitioner is in "custody" for the purpose of the Post-conviction Procedure Act if he suffers from any collateral consequences of the Tennessee judgment. *See McCraw v. State*, 551 S.W.2d 692, 694 (Tenn. 1977); *Albert v. State*, 813 S.W.2d 426, 427 (Tenn. 1991). Under this definition, petitioner is in "custody" for purposes of the Post-Conviction Procedure Act. But, for the reason set forth herein, he is niether "imprisoned" nor "restrained of liberty" for the purposes of § 29-1-101.

Dictionary 1137 (1986). Thus, a person "imprisoned" is a person actually confined in a prison or jail or otherwise physically restrained. In order to determine whether a person is "restrained of liberty," the courts have generally looked to common law usages and the history of habeas corpus both in England and in this country. *Jones v. Cunningham*, 371 U.S.236, 238, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

> English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. The test used was simply whether she was "at her liberty to go where she please(d)." So also, habeas corpus was used in 1793 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes." Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." And more than a century ago an English court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind." These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car. II, c. 2 — the forerunner of all habeas corpus acts — as permitting relief only to those in jail or like physical confinement.
>
> Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. [The Supreme] Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world. "(H)is movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into military service . . . . Again, in the state courts, as in England, habeas corpus

> has been widely used by parents disputing over which is the fit and proper person to have custody of their child . . . . History, usage and precedent can leave no doubt that besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

Id., 371 U.S. at 238-40 (footnotes omitted). Therefore, it is clear that, besides physical imprisonment, a person can be otherwise "restrained of liberty;" but under the traditional usage of the writ of habeas corpus, "[t]here must be a duress or restraint of the person whereby he is prevented from exercising the liberty of going when and where he please." 39 Am.Jur.2d *Habeas Corpus* §17 (1999). In short, there must be a significant restraint on physical movement. *Jones*, 371 U.S. at 243 ("While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom . . . .") *Wales v. Whitney*, 114 U.S. 564, 572, 5 S.Ct. 1050, 29 L.Ed. 277 (1885) ("there must be [either] actual confinement or the present means of enforcing it").

Like the United States Supreme Court, this Court has held that a person may be restrained of liberty even when not confined in jail. In *State ex rel. Dillehay v. White*, 217 Tenn. 524, 398 S.W.2d 737 (1966), Dillehay filed a petition for writ of habeas corpus to challenge the legality of her restraint under a judgment committing her to the Maury County jail to work off the fine and costs imposed in her criminal case. *Id.*, 217 Tenn. at 526. The trial judge dismissed the petition but allowed Dillehay to be released on her own recognizance pending appeal. *Id.*, 217 Tenn. at

527. Under the terms of this bond, however, she was not permitted to leave Maury County. *Id.* In this Court, the State contended that, because Dillehay was no longer confined in jail, her appeal and the denial of her petition were moot. *Id.* But this Court state:

> With this reasoning we cannot agree. Although she is not being held in jail, she is, nevertheless, restricted in her liberty to Maury County pending this appeal and is subject to immediate confinement should her appeal be dismissed. By grace of the trial judge she is now at liberty, but upon her violation of her confinement to Maury County she could be placed in jail again. Habeas corpus, if otherwise proper, can reach this constructive confinement.

Id., 217 Tenn. at 527-28 (citing *Jones*). As in *Jones*, the petitioner was not in jail, but nevertheless suffered from a restraint of liberty; yet the restraint was not merely a collateral consequence of the judgment but an actual, significant restraint on physical movement. "Any restraint that precludes freedom of action in this respect is sufficient, notwithstanding lack of confinement in a jail or prison, as, for example, a restraint that consists in forbidding a man to leave the city and keeping him under the surveillance of an officer, or the restraint that exists by virtue of the conditions of parole or probation." 39 Am.Jur.2d *Habeas Corpus* §17 (1999).[3] But a collateral consequence, such as the use of a prior expired sentence to enhance a current sentence, will not suffice, because the person "suffers no present restraint" from the

[3] But "[i]f there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of the detention, it has been held that there is no habeas corpus jurisdiction." *Carafas v. Lavallee*, 391 U.S. 234, 239 n.12, 88 S.Ct. 1556, 20 L.ed.2d 554 (1968)(citations omitted).

prior sentence. *Maleng v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

Benson has not alleged, nor does it appear, that he has not served (or that he is presently serving) the effective five year sentence from his 1986 conviction, the effective three year sentence from his 1989 convictions or the effective eight year sentence from his 1993 conviction. Thus, he is not "imprisoned" under those judgments. Nor, does it appear that he is suffering from any restraint of physical movement by virtue of those judgments. Thus, he is not being "restrained of liberty" under those judgments. The collateral consequence he may be suffering because of his prior convictions, *i.e.,* enhancement of his current sentence, is not proper for habeas corpus because Benson "suffers no present restraint" from the prior sentences. *Maleng v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

II. THE PETITIONER'S UNDERLYING CONVICTIONS ARE NOT VOID.

A. 1986 Convictions:

The petitioner contends that his 1986 convictions for robbery and grand larceny are void. He argues that the larceny convictions do not allege an amount and, therefore, do not allege a crime. As for his robbery convictions, the petitioner argues that the robbery indictments do not allege that anything was "taken against the victim's will." However, the law does not support the petitioner's claims.

On March 11, 1986, the petitioner pled guilty to four counts of larceny and six counts of grand larceny. (TR, 18-27). By pleading guilty to the offenses, the petitioner essentially admitted the facts required to support his convictions. *See State v. Pettus,* 986 S.W.2d 540, 542 (Tenn.1999) ("The principle is well-settled in Tennessee jurisprudence that the voluntary entry of an informed and counseled guilty plea constitutes an admission of all facts necessary to convict and waives all non-jurisdictional defects and constitutional irregularities which may have existed prior to the entry of the guilty plea."). In *Pettus,* this Supreme Court concluded that a defendant who pled guilty to a Class B felony of possession of cocaine with intent to sell waived the right to challenge the conviction and sentence on the basis that the indictment failed to specify the amount of cocaine possessed. *Id.* In reaching this conclusion, the *Pettus* court noted the "give and take" process involved in plea bargain negotiations:

> The nature of the plea-bargain process in general, and the trial court's order in particular, supports this conclusion. First, it is commonly known that the plea-bargain process involves a certain amount of "give and take" so as to reach a resolution that is acceptable to both the State and the defendant. *Often, this process includes exaggeration or understatement of the facts and circumstances of the offense.*

Id. at 543 (emphasis added).

In accordance with the above referenced case law, the petitioner waived his right to challenge the 1986 informations and convictions when he pled guilty to these charges. Therefore, his challenge in the instant matter is without merit.

B. 1989 Convictions:

The petitioner also contends that his 1989 conviction for attempt to commit a felony as a lesser included offense of aggravated assault is void. He argues that "such an offense does not exist in Tennessee." However, the record and the law do not support this claim.

Habeas corpus relief is available in Tennessee only if it appears on the *face of the judgment* or the record that the trial court was without jurisdiction to convict or sentence the defendant, or that the defendant's sentence of imprisonment has expired. *Archer v. State,* 851 S.W.2d 157, 164 (Tenn.1993)(emphasis added). If a petitioner's allegation of an illegal conviction is dependent upon the introduction of extrinsic evidence, then the conviction is by definition merely voidable, "and a Tennessee court cannot issue the writ of habeas corpus under such circumstances." *State v. Ritchie,* 20 S.W.3d 624, 633 (Tenn. 2000).

The judgment in the instant case shows that the petitioner was indicted for and convicted of aggravated assault. (TR, 40). The judgment form clearly states that "the defendant is convicted of aggravated assault." (TR, 40). Also, the top right-hand side of the judgment form states the indicted charge is "AA" and the convicted offense is "AA." (TR, 40). Contrary to the petitioner's claim, the petitioner pled guilty to the offense of aggravated assault and not attempted aggravated assault. The face of the judgment proves that the trial court had jurisdiction to convict and sentence the petitioner. Therefore, the petitioner's claim is without merit and does not entitle him to relief.

C. 1993 Convictions:

Finally, the petitioner contends that his 1993 convictions are void. He claims that he was out on bail when he committed some of these offenses. Therefore, he argues that these judgments are void because his sentences should have been served consecutively. Because the petitioner's 1993 sentences have expired, his claim is moot.

As relevant here, our Supreme Court has recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal. *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978). Therefore, if it is true that the defendant was on bond when he committed other felonies to which he pled guilty, concurrent

sentences would be in direct contravention of Tennessee Code Annotated §40-28-123, which provides in pertinent part the following:

> [a]ny prisoner who is convicted in this state of a felony, *committed while on parole* from a state prison, jail or workhouse, shall serve the remainder of the sentence under which the prisoner was paroled, or such part of that sentence, as the board may determine before the prisoner commences serving the sentence received for the felony committed while on parole.

Tenn. Code Ann. §40-28-123(a) (1997) (emphasis added); *see also* Tenn. R. Crim. P. 32(c)(3)(A).

As this Court recently held in *McLaney v. Bell*, 59 S.W.3d 90 (Tenn. 2001), "if the face of the judgment or the record of the underlying proceedings shows that the concurrent sentence is illegal, such sentence creates a void judgment for which habeas corpus relief is available." *Id.* at 91.

The petitioner's 1993 sentences have expired, however. Any claim under *Burkhart* and *McLaney* is therefore moot. "If there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of the detention, it has been held that there is no habeas corpus jurisdiction." *Carafas v. Lavallee*, 391 U.S. 234, 239 n.12, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968)(citations omitted).

Furthermore, under *McLaney*, only the sentence would be deemed void. The actual conviction remains intact. Specifically, the Supreme Court in *McLaney* held:

> If [the petitioner's] allegations that the latter offenses were committed while he was on bail are proven in the record of the underlying convictions, then the sentence is void and the habeas corpus court is mandated by statute to declare it so. If the sentence is void, then either the plea may be withdrawn or the conviction remains intact. If the plea is withdrawn, then [the petitioner] would be ordered held to bail pending prosecution for the offense; if the conviction remained intact, then he would be committed to custody pending re-sentencing. Thus, there is legal cause for continued detention pending further proceedings. Therefore, the habeas corpus court would be required, after voiding the judgment, to remand the case to the trial court ... for further appropriate action.

Id. at 94-95 (citations omitted). Thus, even if the petitioner is correct that his 1993 concurrent sentences were illegal, the use of the 1993 *convictions* to enhance the petitioner's sentences in his vehicular homicide cases was nevertheless proper.

Finally, should this Court find that the petitioner's 1993 convictions are void and not proper for the purpose of establishing the petitioner as a career offender, such classification is still be proper. A "career offender" is a defendant who has received any combination of six (6) or more Class A, B or C prior felony convictions, and the defendant's conviction offense is a Class A, B or C felony. Tenn. Code Ann. § 40-35-108(a)(1). The petitioner was convicted of two counts of vehicular homicide, a Class C felony. (III, 1-2). During the sentencing hearing, the trial court reviewed the petitioner's criminal history and determined that the petitioner has convictions for 2 Class B felonies and 9 Class C felonies. (II, 71).[4] Even if this

[4] The record does not contain a pre-sentence report or a full listing of all the petitioner's prior convictions.

Court were to find the petitioner's 1993 convictions void (2 Class C felonies and 2 Class B felonies), the petitioner still qualifies as a career offender with seven prior Class C felony convictions.

CONCLUSION

For the reasons stated, the judgment should be affirmed in all respects.

Respectfully submitted,

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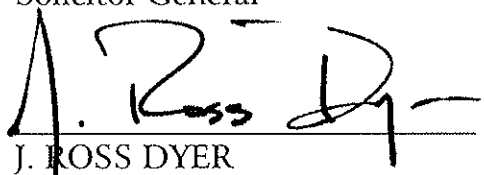

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The undersigned hereby certifies that a true copy of the foregoing brief has been served upon counsel for the appellant, by U.S. mail, postage prepaid, addressed as follows:

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On this the 28th day of June, 2004.

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IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	SHELBY COUNTY
v.	)	NO. W2006-01853-SC-R11-CD
	)	
SHAWN HATCHER,	)	
	)	
Appellant.	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT
OF THE COURT OF CRIMINAL APPEALS

BRIEF OF THE STATE OF TENNESSEE

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V.

Whether the trial court erred in not instructing the jury on the defense of voluntary intoxication despite the fact that the defendant never requested or objected to the omission of the instruction. (Defendant's Issue No. V.)

STATEMENT OF THE CASE

On August 14, 2001, the Shelby County Grand Jury returned indictments charging the defendant with felony murder, premeditated first degree murder, and two counts of criminal attempt to commit first degree murder. (TR, 1-6.)[1]

The case was tried by jury on January 25-28, 2005, in the Criminal Court for Shelby County, the Honorable W. Otis Higgs, Jr., Judge. (V – VII.) The jury found the defendant guilty on all the charges. (TR, 31.)

A sentencing hearing was held on May 18, 2005, and October 3-4, 2005. (X – XI.) At the conclusion of the hearing, the trial court sentenced the defendant to 15 years for each conviction of criminal attempt, with the sentences to be served concurrently. (TR, 43-44.) After merging the defendant's convictions for felony murder and premeditated first degree murder, the trial court sentenced the defendant to life in prison. (TR, 45.) The trial court also ordered the defendant's life sentence to be served consecutive to his 15-year sentence. (TR, 43-45.)

The defendant filed a motion for new trial on February 22, 2005. (TR, 51-52.) After a hearing, the trial court entered an order on denying the defendant's motion on October 3, 2005. (TR, 89.) On October 3, 2005, the trial court also allowed trial counsel, Brett Stein, to withdraw and appointed Lance Chism to

[1] The record in this case consists of one volume of technical record ("TR"), one volume containing the jury charge ("IV"), eight volumes of transcript ("V-XII"), and one volume of a supplemental record ("XIII"). The appellant will be referred to as "Hatcher" or the "defendant." The appellee will be referred to as the "State."

represent the defendant on appeal. (XI, 18.) On November 2, 2005, the defendant filed a "Motion Requesting Trial Court to Enter Order Permitting Counsel to File an Amended Motion for New Trial." (XIII, 4-10.) The trial court granted the defendant's motion that day. (XIII, 11.)

On May 10, 2006, the defendant filed an amended motion for new trial. (TR, 53-80.) A hearing was held on July 31, 2006. (XII.) At the conclusion of the hearing, the trial court denied the defendant's amended motion. (TR, 90.) Notice of appeal was filed on August 30, 2006. (TR, 92.)

On August 29, 2008, the Court of Criminal Appeals issued an opinion affirming the defendant's convictions. *State v. Hatcher*, No. W2006-01853-CCA-R3-CD, 2008 WL 4071829 (Tenn. Crim. App. Aug. 29, 2008) (app. granted Feb. 17, 2009) (copy attached). This Court granted the defendant's application for permission to appeal on February 17, 2009.

STATEMENT OF THE FACTS

On April 3, 2001, the defendant, who had just been released from juvenile custody, called his friend, Cornelius Jefferson, to tell him that he was out and to invite him over to his house. (V, 42, 62.) After arriving at the defendant's house, Jefferson and the defendant spent the afternoon "hanging out," drinking, and smoking marijuana. (V, 42, 62.) Later that evening, the defendant's brother, Chris Hatcher, arrived at the house. (V, 42.) According to Jefferson, Chris Hatcher "had some guns with him." (V, 42.)

Chris Hatcher then asked the defendant and Jefferson to aid him in "taking care of some business." (V, 43; VI, 276.) According to the defendant's statement, Chris told him that Randall Moore, a.k.a. Red, was trying to kill him. (VI, 276.) The defendant believed that his brother was planning on killing Mr. Moore. (VI, 276.) When the group left the defendant's house, the defendant and Jefferson were armed with a shotgun, Chris Hatcher was armed with an SKS assault rifle, and Dan Smith, a friend of Chris Hatcher, was armed with a .22 pistol and a .38 pistol. (VI, 277.)

Upon arriving at the Raintree Apartment complex where Mr. Moore lived, the defendant and his friends came across a group of residents. (V, 44; VI, 169.) Chris Hatcher approached Timothy Jackson and asked where "Red" was. (VI, 169.) When Mr. Jackson said that he did not know, Chris Hatcher pulled a gun and held it to Mr. Jackson's side. (VI, 169.) At this point, the defendant told his brother, "Come on, man, let's go take care of this business." (VI, 169.) As the group continued towards

Mr. Moore's apartment, Chris Hatcher threatened the group stating, "I know how ya'll look so don't — if ya'll snitch, I'm going to kill ya'll." (V, 261.)

Ashanti Pinkins testified that she was with Timothy Jackson's group when they were stopped by the defendant and his brother. (VI, 256-58.) According to Ms. Pinkins, after threatening her and her friends, the defendant and his friends headed towards Mr. Moore's residence. (VI, 261.) She then saw the defendant and an individual she did not know go to the back of the residence, while Chris Hatcher and another individual went to the front door. (VI, 262.) Within moments of witnessing these events, Ms. Pinkins heard gunshots. (VI, 263.)

As these events were unfolding outside, Marcel Mackey, Athena Cartwright, Randall Moore, and Anitra Flowers were finishing their dinner at Ms. Flowers' residence. (V, 75-76, 90-92.)[2] Ms. Flowers' children were also present at this dinner. (V, 76.) When they heard a knock at the door, Randall Moore and Marcel Mackey went to answer it. (V, 76-77.) As they opened the door, Ms. Cartwright and Ms. Flowers heard shots ring out. (V, 76-77.) By the time the shooting stopped, Ms. Flowers had been shot three times in the leg, Mr. Randall had been shot 6 times, and Marcel Mackey was dead. (V, 87-88, 92.)

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[2] Ms. Flowers and the victim both lived at the Raintree Apartments and were neighbors. Specifically, the defendant's apartment was three apartments down the hall from Ms. Flowers's apartment. (V, 73-75.) However, it is unclear from the record how the defendant and his friends learned that Mr. Moore was eating dinner at Ms. Flowers' apartment the night of the murder.

According to Dr. Teresa Campbell, the medical examiner, Mr. Mackey died as a result of multiple gunshot wounds. (VI, 297.) Dr. Campbell testified that Mr. Mackey had 15 entrance wounds and a total of 24 wounds to his body as a result of this incident. (VI, 298.) The crime scene officers testified that their search of the scene produced several shell casings from an SKS assault rifle and a .22 caliber pistol, as well as shotgun shells. (V, 180-83, 196-205.)

A few days after the shooting, the defendant called Cornelius Jefferson and admitted to Jefferson that on the night of the murder he had a pistol, entered the residence, and shot at a female occupant. (V, 53-56.)

ARGUMENT

I. THE COURT OF CRIMINAL APPEALS PROPERLY DETERMINED THAT THE DEFENDANT'S AMENDED MOTION FOR NEW TRIAL WAS UNTIMELY; THUS, ALL ISSUES PRESENTED IN THE AMENDED MOTION WERE NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

The defendant contends that the Court of Criminal Appeals erred in determining that the amended motion for new trial filed on May 10, 2006, was untimely. He argues that the trial court still had jurisdiction and properly granted him an extension of time to file the amended motion. However, the record and the law do not support the defendant's claim.

On January 28, 2005, the defendant was found guilty of first degree murder, which carries a mandatory life sentence, and two counts of attempted murder. (TR, 31.) On February 22, 2005, the defendant filed a motion for new trial. (TR, 51-52.) A sentencing hearing and hearing on a motion for new trial were heard jointly on October 4, 2005. (XI.) At the conclusion of the hearing on the motion for new trial, the trial court denied the motion and appointed new counsel for the defendant. (XI, 17-18.) The trial court stated that newly appointed counsel would be allowed to file an amended motion for new trial. (XI, 17-18.) On November 2, 2005, the defendant, through newly appointed counsel, filed a "Motion Requesting Trial Court to Enter Order Permitting Counsel to File an Amended Motion for New Trial." (XIII, 4-10.) In his motion, the defendant raised no new issues but claimed that the trial court still had jurisdiction over his case because he had yet to file his notice of

appeal. (XIII, 4-10.) That day, the trial court entered an order granting the filing of an amended motion for new trial. (XIII, 11.) The defendant did not file anything else until May 2, 2006, when he filed an amended motion for new trial. (TR, 53-80.) A hearing was held on July 31, 2006, after which the trial court entered an order denying the amended motion. (TR, 90.)

Rule 33 of the Tennessee Rules of Criminal Procedure states: "A motion for a new trial shall be in writing, or if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered." Tenn. R. Crim. P. 33(b). In *State v. Martin,* 940 S.W.2d 567 (Tenn. 1997), this Court held that the thirty-day limit for filing a motion for new trial is mandatory and that a trial court is without jurisdiction to hear a late-filed motion for new trial. *Martin,* 940 S.W.2d at 569. In addition, "[t]he trial judge's erroneous consideration of ruling on a motion for new trial not timely filed . . . does not validate the motion." *Id.* (citing *State v. Dodson,* 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989)).

This Court revisited this issue in *State v. Bough,* 152 S.W.3d 453 (Tenn. 2004). In *Bough,* the defendant was found guilty of felony first degree murder and especially aggravated robbery on June 12, 2001. *Id.* at 459. The trial court imposed the mandatory life sentence for the first degree murder conviction on the same day. *Id.* On August 3, 2001, the trial court held a sentencing hearing. *Id.* The same date, the defendant filed a motion for new trial. *Id.* On September 27, 2001, the trial court held a hearing on the motion for new trial. At the conclusion of the hearing, the trial

court denied the motion orally and appointed new counsel for the defendant. *Id.* On October 11, 2001, newly appointed counsel filed an amended motion for new trial asking the trial court to order the preparation of a transcript. *Id.* The amended motion did not allege any new grounds. On March 6, 2002, the newly appointed attorney filed a second amended motion that alleged new grounds. *Id.* On March 21, 2002, the trial court overruled the second amended motion for new trial, and the defendant filed a notice of appeal on the same date. *Id.*

On appeal, this Court held that the amended motion for new trial was not prohibited. *Id.* at 461-62. Specifically, this Court held that:

> In this case, the trial judge denied the defendant's original motion for new trial on September 27, 2001. However, on October 11, 2001, fourteen days after that denial, the defendant filed an amended motion for new trial. The trial court still had jurisdiction over the case at that time as no notice of appeal had yet been filed. *See State v. Pendergrass,* 937 S.W.2d 834, 837 (Tenn.1996) (noting that a trial court loses jurisdiction with the filing of a notice of appeal). Because the trial judge retained jurisdiction, it was within his discretion to hear and determine the amended motion.

Id. As recognized by the Court of Criminal Appeals, while there are some similarities between *Bough* and the instant matter, the differences are significant and preclude the defendant from appellate review of those issues raised in his amended motion for new trial.

As in *Bough,* a jury found the defendant guilty of one count of first degree felony murder, as well as an underlying felony. The trial courts in both cases imposed the mandatory life sentence at the conclusion of the trial. In both cases at the

conclusion of the hearings on the motions for new trial, the trial court denied the motions and appointed new counsel. However, unlike *Bough,* the trial court in this case also filed a written order denying the motion for new trial on October 3, 2005.

At this point in the procedural history the similarities end. On November 2, 2005, newly appointed counsel in the case at hand filed a motion entitled "Motion Requesting Trial Court to Enter Order Permitting Counsel to File an Amended Motion for New Trial." This motion was filed within thirty days of the trial court's denial of the motion for new trial. On the same date, the trial court granted the motion. An amended motion for new trial was not filed until May 2, 2005, well over thirty days after the trial court's denial of the motion for new trial. In *Bough,* newly appointed counsel filed an amended motion for new trial within thirty days of the trial court's denial of the original motion for new trial.

Under Rule 4(a) of the Tennessee Rules of Appellate Procedure and Rule 37(d) of the Tennessee Rules of Criminal Procedure, a defendant has thirty days to file a notice of appeal from the entry of the judgment from which the defendant intends to appeal. Rule 4(c) of the Tennessee Rules of Appellate Procedure specifically states that if a defendant files a timely motion for new trial, the date of the trial court's denial of the motion for new trial is the date from which the thirty days will run.

In *Bough,* newly appointed counsel filed an amended motion for new trial on October 11, 2001. The amended motion for new trial was filed within thirty days of September 27, 2001, the date the trial court denied the original motion for new trial.

This Court held that the trial court still had jurisdiction because a notice of appeal had not been entered. As stated above, under Rule 4 of the Tennessee Rules of Appellate Procedure, a defendant has thirty days within which to file his notice of appeal. At the conclusion of the thirty days, if a notice of appeal has not been filed, a defendant waives any issues on appeal. Tenn. R. App. P. 4(a). Therefore, thirty days after the denial of the motion for new trial, the trial court loses jurisdiction because either a notice of appeal is filed transferring jurisdiction to the appellate courts or no notice of appeal is filed, and the case is finalized.

In finding the defendant's amended motion for new trial untimely, the Court of Criminal Appeals properly interpreted this Court's opinion in *Bough*, as follows: after a trial court has ruled on an original motion for new trial, an amended motion is permissible if and only if the amended motion is filed within the thirty-day period between the ruling on a motion for new trial and either (a) the filing of a notice of appeal as required under Rule 4(a) or (b) the finalization of the case by the lapse of the thirty-day period without the filing of a notice of appeal. Slip op. at 6. In support of that conclusion, the State would also note that this Court has held that the thirty-day time requirement of Rule 33 is mandatory and jurisdictional and that the trial court has no authority to extend the time for filing. *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997); *see also* Tenn. R. Crim. P. 45(b)(3) (prohibiting court from extending time for filing particular motions, including motion for new trial).

Unlike in *Bough,* the defendant in this case did not file an amended motion for new trial within the thirty-day period. Instead, newly appointed counsel filed a motion asking to file an amended motion for new trial at a later date, a request that the trial court was without jurisdiction to grant. *See* Tenn. R. Crim. P. 45(b)(3). The defendant then did not file his amended motion for new trial until May 2, 2005, well outside thirty days after the trial court's denial of the motion for new trial. At this point, the thirty days for the filing of a notice of appeal had already expired.

Based on this Court's opinion in *Bough,* other precedent, and the Rules of Criminal Procedure, the trial court was without authority to extend the time during which the defendant could file a motion for new trial. Thus, the defendant's amended motion for new trial was untimely, and the issues presented in that motion are not entitled to appellate review.

II. THE DEFENDANT WAIVED THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN ADMITTING SABRINA HATCHER'S STATEMENT AS AN EXHIBIT, AND THE TRIAL COURT'S RULING WAS NOT PLAIN ERROR. (Defendant's Issue No. IV.)

The defendant contends that the trial court erred in allowing Sabrina Hatcher's statement to be admitted as an exhibit. He argues that her statement amounted to inadmissible hearsay and that the State should only have been allowed to use it as an impeachment tool and not substantive evidence. However, by failing to include this issue in his original motion for new trial, the defendant has waived[3] his right to present this issue on appeal. Furthermore, he has not demonstrated that the trial court's ruling was plain error.

A. Waiver:[4]

Though the defendant raised this claim in his amended motion for new trial, the State, as argued in the previous issue, maintains that the defendant's amended motion for new trial was untimely. Thus, those issues included in the amended motion for new trial which were not raised in the original motion for new trial are not properly before this Court and should be deemed waived. *See* Tenn. R. App. P. 3(e).

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[3] The issue in this case is more accurately described as one of forfeiture rather than waiver. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Court of Criminal Appeals used the term "waiver" to describe the defendant's forfeiture of the right to raise the issue on appeal. This brief simply retains the terminology.

[4] Should this Court find that the Court of Criminal Appeals erred in determining that the defendant's amended motion for new trial was untimely, the State's waiver and plain error arguments would not apply. The defendant did object at trial to the admission of the statement as an exhibit and included the issue in his amended motion for new trial.

B. Plain Error:[5]

Generally, appellate review is limited to issues that are (a) preserved for review in the trial court; (b) included in the motion for a new trial after a jury verdict; or (c) presented as an issue on appeal. *See* Tenn. R. App. P. 3(e), 13(b), 27(a)(4), 36(a); *State v. Yoreck* 133 S.W.3d 606, 610-11 (Tenn.2004). Under Rule 13(b) of the Tennessee Rules of Appellate Procedure however, appellate courts may, in the exercise of their discretionary authority, consider issues not otherwise preserved for review.

Rule 13(b) of the Tennessee Rules of Appellate Procedure provides as follows:

> Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.

Tenn. R. App. P. 13(b). Rule 36(b) of the Tennessee Rules of Appellate Procedure provides that "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. 36(b).

[5] See footnote no. 4.

In *State v. Adkisson,* 899 S.W.2d 626 (Tenn. Crim. App.1994), the Court of Criminal Appeals performed an extensive analysis of the plain-error doctrine, and, after a careful consideration of the state and federal cases addressing this issue, established the following five factors for determining whether an error in the absence of an objection qualifies as "plain":

a) the record must clearly establish what occurred in the trial court;
b) a clear and unequivocal rule of law must have been breached;
c) a substantial right of the accused must have been adversely affected;
d) the accused did not waive the issue for tactical reasons; and
e) consideration of the error is "necessary to do substantial justice."

Id. at 642 (footnotes omitted).

In *State v. Smith,* this Court formally adopted the *Adkisson* test as "a clear and meaningful standard for considering whether a trial error rises to the level of plain error in the absence of an objection." 24 S.W.3d 274, 282-83 (Tenn. 2000). Moreover, this Court specifically held that the record must establish all of the five factors as present for a declaration of plain error. *Id.*

The Advisory Commission Comments to Tennessee Rule of Appellate Procedure 13(b) suggest that the discretionary authority for the declaration of plain error "be sparingly exercised." Tenn. R. App. P. 13(b), Advisory Comm'n Comments. Moreover, an error "may be so plain as to be reviewable . . ., yet the error may be harmless and therefore not justify a reversal." *United States v. Lopez,* 575 F.2d 681, 685 (9th Cir.1978); *see Adkisson,* 899 S.W.2d at 642. The magnitude of the error must have been so significant "'that it probably changed the outcome of the trial.'"

Adkisson, 899 S.W.2d at 642 (quoting *United States v. Kerley,* 838 F.2d 932, 937 (7th Cir.1988)); *see also United States v. Douglas,* 818 F.2d 1317, 1320 (7th Cir.1987).

It is the accused's burden to persuade an appellate court that the trial court committed plain error. *See Olano,* 507 U.S. at 734. Further, this Court's complete consideration of all five factors is not necessary when it is clear from the record that at least one of them cannot be satisfied. *Smith,* 24 S.W.3d at 283. Based on the overwhelming proof of the defendant's guilt and the fact that the witness was questioned about her statement, consideration of the error is not "necessary to do substantial justice." Thus, the defendant cannot meet the "plain error" standard and is not entitled to relief.

In Tennessee, admissibility of evidence is within the sound discretion of the trial judge. *State v. Saylor,* 117 S.W.3d 239, 247 (Tenn. 2003). In making these decisions, the trial court must consider "the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial." *State v. Williamson,* 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). This Court can only disturb an evidentiary ruling on appeal when it appears that the trial judge arbitrarily exercised his discretion. *State v. Baker,* 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989).

Tennessee Rules of Evidence 612 and 613 establish the circumstances and procedures for refreshing the memory of a witness using a prior statement of the

witness. Tennessee Rule of Evidence 612 explains the procedures when a witness uses a writing to refresh his or her memory:

> If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires; in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

The Advisory Commission Comment to Rule 612 explains the foundation necessary and the procedure to be used when the memory of a witness is refreshed by a writing:

> Only if a witness's memory requires refreshing should a writing be used by the witness. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory.

Tenn. R. Evid. 612, Advisory Comm'n Cmt. Tennessee Rule of Evidence 612 only applies if a witness uses a writing while testifying. "By its express terms, Rule 612 pertains only when a witness uses a writing 'while testifying' to refresh memory for the purpose of testifying. Rule 612 does not apply to a writing read before trial if the writing is not also used while the witness is on the stand." Neil P. Cohen, et al., *Tennessee Law of Evidence,* § 6.12[3][b] (4th ed.2000).

Tennessee Rule of Evidence 613 governs the use and admissibility of the prior statement of a witness. Rule 613 provides in pertinent part:

> (a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Tennessee Rule of Evidence 803(5), an exception to the hearsay rule, explains the limited circumstances under which the prior statement may be entered as an exhibit in a trial:

> Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge *but now has insufficient recollection to enable the witness to testify fully and accurately*, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(emphasis added).

The Advisory Commission Comment to Tennessee Rule of Evidence 803(5) explains the showing which must be made before the prior statement of a witness may be used to refresh the recollection of the witness at trial:

> The proposed rule recognizes the traditional Tennessee hearsay exception for past recollection recorded, but it expands common law in two respects. *It allows the admissibility of the contents of a document reflecting*

> *past recollection recorded even though the witness has some recollection of the recorded facts but not enough to testify "fully and accurately."* Second, it permits the witness to adopt a record made by another not acting under the witness's supervision. The safeguard is the requirement of adoption at the time when the witness could vouch for the document's correctness.

Tenn. R. Evid. 803(5), Advisory Comm'n Cmt. (emphasis added). For past recollection recorded under Rule 803(5), "the witness's memory is effectively useless; the witness does not remember the event and, accordingly, cannot testify from present memory." Neil P. Cohen, *supra,* § 8 .10[2][c]. In such cases, "Rule 803(5) establishes a hearsay exception which admits into evidence a writing made or adopted by the witness when the matter was fresh in the witness's memory and that describes the event at issue." *Id.*

After the murder, Sabrina Hatcher, the defendant's sister, was interviewed by the police. In her statement, Ms. Hatcher informed the police that the defendant called her on the night of the murder and told her that he and Chris were going to take care of some business involving Randall Moore. Prior to hanging up with Ms. Hatcher, the defendant admitted to his sister that "we gunna go kill him." (V, 112-116.)

When the State questioned Ms. Hatcher about her statement, she admitted that she talked to the defendant that night. She also stated that the defendant told her he was going to take care of some business, but she could not remember what kind of business he was taking care of. (V, 106-107.) Based on her inability to recall

what she had told police, the State provided her with a copy of her statement to refresh her recollection. (V, 107.) When she reviewed her statement, Ms. Hatcher testified that she did not recall telling the police what was in her statement. (V, 108.) However, Ms. Hatcher did admit that she told the police the truth when she gave her statement and signed the statement. (V, 100, 101, 104-05, 108-09.) Ms. Hatcher also agreed that her memory about the phone call that evening would have been better the night she gave her statement to police than it was at trial. (V, 110.) At that point, the State requested to introduce Ms. Hatcher's statement as an exhibit. (V, 111.) The trial court denied the State's original request. (V, 112.)

As the State continued to question Ms. Hatcher, the prosecutor asked if she remembered telling the police that the defendant told her they were going to kill Randall Moore. (V, 113.) Ms. Hatcher claimed that she did not remember telling the police that. (V, 113.) After Ms. Hatcher again testified that she told the truth to the police and that her memory would have been better at the time the statement was given, the State renewed its request to have the statement introduced into evidence. (V, 116.) The trial court then allowed the introduction of the statement. (V, 116.) While the trial court may have erred in allowing Ms. Hatcher's statement to be admitted as an exhibit, any error on the part of the trial court was harmless.

Because Ms. Hatcher testified that she gave a statement to police, told the police the truth, that her memory would have been better at the time of the statement and acknowledged her signature on the statement but her recollection was

insufficient to enable her to testify fully and accurately, the State was allowed to read Ms. Hatcher's statement into the record. *See* Tenn. R. Evid. 803(5). However, pursuant to the rule, the State should not have been allowed to introduce the actual statement as an exhibit. Despite this error, the defendant has not shown that consideration of the error is "necessary to do substantial justice."

First, the proof contained within Ms. Hatcher's statement was already before the jury based on the State's questioning. When interviewed, Ms. Hatcher informed the police that the defendant called her that night and told her he and Chris were going to "take care of some business." (V, 107.) Though she denied it at trial, the State pointed out that Ms. Hatcher also told police that the defendant told her that he and Chris were "fixing to go kill him [Randall Moore]." (V, 115.) Therefore, the admission of the actual statement as an exhibit was cumulative at worst. Also, the remainder of the proof presented at trial overwhelmingly established the defendant's guilt.

Cornelius Jefferson testified that he and the defendant went with Chris Hatcher to look for Randall Moore. (V, 42.) Jefferson also testified that a few days after the shooting the defendant admitted to him that he had a pistol that night, entered the apartment and shot at a female. (V, 53-56.)

Timothy Jackson who had a run-in with the Chris Hatcher and the defendant prior to the shooting testified that the defendant was armed that evening. (VI, 171.) Mr. Jackson also testified that after the defendant and his brother left him they

headed towards Mr. Moore's house. Within moments, Mr. Jackson heard gunshots. (VI, 169.) Ashanti Pinkins, who was with Mr. Jackson that evening and corroborated his testimony, also testified that the defendant and another man went to the backdoor of Mr. Moore's home while Chris Hatcher and another individual went to the front door. (VI, 262.) The next thing she knew Ms. Pinkins heard gunshots. (VI, 263.)

Finally, while denying that he shot anyone, the defendant admitted to the police that he was present during the shooting. He also admitted that he knew his brother was going to kill Mr. Moore. (VI, 276.) Finally, the defendant admitted that all of the men present were armed. (VI, 277.)

The defendant admitted to police that he was present and admitted to his friend that he personally entered the apartment and fired a pistol. Furthermore, several people saw the defendant that evening and noticed that he was armed. Based on the testimony presented at trial, the proof of the defendant's guilt is overwhelming. Thus, the admission of Ms. Hatcher's statement did not affect the outcome of the trial. Because consideration of the error is not necessary to do substantial justice, the defendant is not entitled to plain-error relief on this issue.

C. Timely Amended Motion for New Trial:

Should this Court determine that the defendant's amended motion for new trial was timely, the State concedes that this issue would have been properly preserved for appellate review. However, while recognizing the that trial court erred

in allowing Ms. Hatcher's statement to be submitted as an exhibit, the State maintains that any error on the part of the trial court was harmless. Not all errors in admitting evidence require reversal. The defendant must show that the error probably affected the judgment before reversal is appropriate. *See State v. Moore,* 6 S.W.3d 235, 242 (Tenn. 1999). In assessing whether erroneously admitted evidence caused unfair prejudice to the defendant or was harmless error, this Court looks to the "degree . . . by which the proof exceeds the standard required to convict. . . ." *Delk v. State,* 590 S.W.2d 435, 442 (Tenn. 1979); *see also Moore,* 6 S.W.3d at 243 (holding evidentiary error harmless where evidence supporting count of child rape was more than sufficient to support verdict of guilty beyond a reasonable doubt). Where proof is more than sufficient to convict, harmless error is appropriate. Based on the proof presented at trial, the defendant cannot show that the admission of his sister's statement affected the judgment.

III. THE DEFENDANT HAS WAIVED THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE THEORY OF CRIMINAL RESPONSIBILITY, AND THE TRIAL COURT'S ACTION DID NOT AMOUNT TO PLAIN ERROR. (Defendant's Issue No. II.)

The defendant contends that the trial court erred by instructing the jury on subsections (1) and (3) of the criminal responsibility statute. *See* Tenn. Code Ann. § 39-11-402(1) (acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense); and § 39-11-402(3) (having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense). He argues that neither section is supported by the evidence and that the charge did not assist the trier of fact and only served to confuse the jury. However, for the same reasons advanced in the argument in issue no. I, the State submits that the defendant has waived his right to present this issue on appeal. Thus, the defendant is only entitled to relief if he can establish plain error. Initially, the State submits that the trial court's inclusion of subsections (1) and (3) amounted to nothing more than surplusage and did not prejudice the defendant. Regardless, based on the overwhelming proof of his guilt, defendant has not and cannot meet the plain error standard and, thus, is not entitled to relief.

A) Waiver:

The defendant failed to object at trial to the instruction concerning criminal responsibility. He also failed to include this claim in his original motion for new trial. Therefore, as properly concluded by the Court of Criminal Appeals, the defendant has failed to preserve this claim for appellate review, and the issue should be deemed waived. *See* Tenn. R. App. P. 3(e).

B) *Plain Error*:[6]

While some of the five factors necessary to establish plain error are present, the defendant cannot establish that "consideration of the issue is necessary to do substantial justice." Based on the overwhelming proof of the defendant's guilt, any error on the part of the trial court in instructing the jury on the inapplicable subsections of the criminal responsibility statue was not "so significant that it probably changed the outcome of the trial." *Adkisson*, 899 S.W.2d at 642. Thus, the defendant is not entitled to relief.

At trial, Cornelius Jefferson testified that he and the defendant went with Chris Hatcher to look for Randall Moore. (V, 42.) Jefferson also testified that a few days after the shooting the defendant admitted to him that he had a pistol that night, that he went into the apartment, and that he shot at a female occupant. (V, 53-56.)

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[6] As noted in footnote no. 4, should this Court determine that the defendant's amended motion for new trial was timely filed, the instant claim would be proper for appellate review since the defendant raised this claim in his amended motion for new trial.

When interviewed by the police, the defendant's sister informed them that the defendant called her the night of the murder and admitted that he and Chris were going to take care of some business. (V, 107.) Though she denied it at trial, Ms. Hatcher told police that the defendant also admitted that he and Chris were "fixing to go kill him [Randall Moore]." (V, 115.)

Timothy Jackson, who had a run-in with the Chris Hatcher and the defendant prior to the shooting, testified that the defendant was armed. (VI, 171.) Mr. Jackson also testified that shortly after his confrontation with the defendant and Chris Hatcher, he heard gunshots. (VI, 169.) Ashanti Pinkins was with Mr. Jackson that evening and corroborated his testimony. Ms. Pinkins testified that she witnessed the defendant and another man go to the backdoor of Mr. Moore's home while Chris Hatcher and another individual went to the front door. (VI, 262.) Shortly after witnessing these events, Ms. Pinkins heard gunshots. (VI, 263.)

Finally, the defendant admitted he was present during the shooting. He also admitted that he knew his brother was going to kill Mr. Moore and that everyone in his group was armed. (VI, 276-77.)

Based on the testimony presented at trial, the proof of the defendant's guilt either as a principal or as criminally responsible for the actions of his compatriots, is overwhelming. The defendant admitted to police that he was present and admitted to his friend that he personally entered the apartment and shot at a woman. Furthermore, several people saw the defendant that evening, knew he was looking for

Mr. Moore, noticed he was armed, and saw him outside Mr. Moore's residence. Therefore, the defendant cannot establish that "consideration of the issue is necessary to do substantial justice." Thus, the defendant is not entitled to plain-error relief.

C. Timely Amended Motion for New Trial:

Should this Court find that the defendant's amended motion for new trial was timely filed, the State submits that, while the evidence did not support an instruction on subsections (1) and (3) of the criminal responsibility statute, any error on the part of the trial court in charging the jury on those sections was harmless beyond a reasonable doubt.

As the State argued in the preceding section, the proof of the defendant's guilt was overwhelming and legally sufficient to sustain the jury's verdict beyond a reasonable doubt. According to the proof, the defendant knew his brother wanted to kill Mr. Moore. The defendant even admitted this fact to his sister. Also, the defendant informed his sister that he was going to help their brother "take care of some business." Several witnesses saw the defendant the night of the shooting and testified that the defendant was armed, was looking for Mr. Moore and was outside Mr. Moore's residence immediately prior to hearing gunshots. Finally, the defendant admitted to police that he knew his brother wanted to kill Mr. Moore and was present at the murder scene. He also admitted to a friend that he was present, was armed and fired shots at a female occupant.

Though the record does not support an instruction on sections (1) and (3) of the criminal responsibility statute, the overwhelming proof of the defendant's guilt renders any error on the part of the trial court harmless beyond a reasonable doubt. Thus, even if this Court were to determine that the defendant's amended motion for new trial was timely and that this issue was properly preserved, the defendant is not entitled to relief.

IV. THE DEFENDANT WAIVED THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN OMITTING AN INSTRUCTION ON THE DEFENSE OF DURESS, AND THE TRIAL COURT'S ACTION DID NOT CONSTITUTE PLAIN ERROR. (Defendant's Issue No. III.)

While admitting that he did not request an instruction on duress, object to its omission, or include the issue in his original motion for new trial, the defendant contends that the trial court erred in failing to instruct the jury on the defense of duress. He argues that the proof presented at trial was sufficient to establish duress as a defense and, thus, the trial court should have instructed the jury on duress despite his failure to request the instruction. However, a review of the record reveals that the evidence did not support a defense of duress and was properly excluded by the trial court. Thus, the defendant is not entitled to relief.

A. Waiver:

As the State has argued throughout its brief, the instant claim is not properly before this Court because the defendant failed to request the instruction, an instruction on duress, failed to object to the omission of the instruction and failed to include this claim in his original motion for new trial. *See* Tenn. R. App. P. 3(e), 13(b), 27(a)(4), 36(a); *State v. Yoreck* 133 S.W.3d 606, 610-11 (Tenn.2004). While the defendant did raise this issue in his amended motion for new trial, his amended motion was untimely and the trial court was without jurisdiction to hear that motion. Thus, the defendant is limited to only those issues raised in his original motion for new trial.

B. Plain Error:[7]

The statutory defense of duress is codified as a "general defense." *See* Tenn. Code Ann. § 39-11-504 (1997). Since it is not an affirmative defense, a defendant need not prove duress by a preponderance of the evidence in order to merit a jury instruction. *State v. Culp,* 900 S.W.2d 707, 710 (Tenn. Crim. App. 1994). Rather, if admissible evidence fairly raises its applicability, the trial court is required to submit the defense to the jury. *Id.; see also* Tenn. Code Ann. § 39-11-203(c) (1997). To determine if a defense has been fairly raised by the proof, a court must consider the evidence in the light most favorable to the defendant, including all reasonable inferences that may be drawn therefrom. *State v. Bult,* 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998). Once proof of a defense is sufficient to merit a jury instruction, the burden shifts to the prosecution to "prove beyond a reasonable doubt that the defense does not apply." Tenn. Code Ann. § 39-11-203 Sentencing Comm'n Comments (1997); *see also Culp,* 900 S.W.2d at 710. If the jury retains any reasonable doubt about the applicability of the defense, it must acquit the accused of the relevant charge. *See* Tenn. Code Ann. § 39-11-203(d) (1997).

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[7] As the State has argued in issues I – III, the defendant's failure to timely file his amended motion for new trial has resulted in waiver of certain claims on appeal. Thus, an appellate court can only review these issues under the theory of plain error. Because the State has recited the "plain error" standard in both issues II and III, the State, in the interest of the page limitations and in an attempt to avoid unnecessary repetitiveness, will not recite the "plain error" standard in addressing the instant issue.

Our criminal code provides that the general defense of duress is a defense to prosecution

> where the person or a third person is threatened with harm which is *present, imminent, impending and of such a nature to induce a well-grounded apprehension of death or serious bodily injury* if the [criminal] act [being prosecuted] is not done. *The threatened harm must be continuous throughout the time the [criminal] act is being committed, and must be one from which the person cannot withdraw in safety*. Further, the desirability and urgency of avoiding the harm must clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the [criminal] conduct.

Tenn. Code Ann. § 39-11-504(a) (1997) (emphasis added). The defense of duress is not available "to a person who intentionally, knowingly, or recklessly becomes involved in a situation in which it was probable that the person would be subjected to compulsion." *Id.* at (b). The Sentencing Commission Comments to section 504 advise that "[t]his rare defense is present when a defendant commits an offense because another person threatens death or serious bodily injury if the offense is not committed." The Comments further point out that, in order for the defense of duress to be available, "there must be no reasonable opportunity to escape the compulsion without committing an offense." Tenn. Code Ann. § 39-11-504 Sentencing Comm'n Comments; *see also State v. Robinson,* 622 S.W.2d 62, 73 (Tenn. Crim. App. 1980).

While the defendant may have presented proof that he and his brother fought while growing up, there is no proof in the record to support a finding by a rational

trier of fact that Chris Hatcher threatened the defendant on the night of the murder with harm that was "present, imminent, impending and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the [criminal] act [being prosecuted] is not done." *See* Tenn. Code Ann. § 39-11-504(a). Furthermore, there is no proof in the record that the alleged threatened harm was continuous throughout the time the act was being committed. *Id.* Rather, the evidence at trial actually revealed that the defendant was a willing participant. The defendant told his sister that he was going to help Chris take care of some business and that they were going to kill Mr. Moore. At no point, did the defendant tell his sister that Chris was forcing him to participate in the crime. Moreover, there was testimony from more than one witness that the defendant told Chris Hatcher to leave Timothy Jackson alone so they "could take care of business." As noted by the Court of Criminal Appeals, "this action belies the contention that Chris Hatcher was threatening him with death or serious bodily injury in the time leading up to the shooting."

The defense of duress also requires proof that the threat was continuous throughout the action and that the defendant did not have an opportunity to escape. Yet, Ashanti Pinkins testified that she saw the defendant go to the back door of the residence while Chris Hatcher went to the front door. At that point, any alleged threat would have terminated. Furthermore, Jefferson testified that he ran away from the shooting. As the Court of Criminal Appeals noted, Jefferson's actions reveal that the defendant "had an opportunity to run away in the confusion of the shooting.

Therefore, the defendant, even if he was threatened into participating had the ability to withdraw in safety. *Id.*

Based on a review of the record, the defense of duress was not adequately raised by the evidence. Thus, the trial court did not err in failing to instruct the jury. Because no rule of law was breached by the trial court's action, the defendant has failed to demonstrated plain error. Furthermore, even if the issue was properly preserved on appeal, for the same reasons the issue is meritless.

V. THE DEFENDANT WAIVED THE ISSUE OF WHETHER THE TRIAL COURT ERRERIN OMITTING AN IN STRUCTION ON THE DEFENSE OF VOLUNTARY INTOXICATION, AND THE TRIAL COURT'S ACTION DID NOT AMOUNT TO PLAIN ERROR. (Defendant's Issue No. V.)

The defendant contends that the trial court erred in failing to instruct the jury on the defense of voluntary intoxication. Though he admits that trial counsel did not rely on the defense of voluntary intoxication, the defendant argues that there is sufficient evidence in the record to support an instruction on the defense. However, the defendant failed to request an instruction on voluntary intoxication and did not object to its omission. Also, the defendant did not include this claim in his original motion for new trial. Thus, the defendant has waived his right to present this issue on appeal. Despite the defendant's waiver of this claim, a review of the complete record reveals that the evidence does not support such an instruction. Thus, the defendant is not entitled to relief.

A. Waiver:

The State submits that the instant claim is not properly before this Court because the defendant failed to request the instruction and failed to include it in his motion for new trial. *See* Tenn. R. App. P. 3(e), 13(b), 27(a)(4), 36(a); *State v. Yoreck* 133 S.W.3d 606, 610-11 (Tenn.2004). While the defendant did raise it in his amended motion for new trial, the State submits that his amended motion was untimely, and the trial court was without jurisdiction to hear that motion. Thus, the

defendant is limited to only those issues raised in his original motion for new trial. Furthermore, as the State has argued, the defendant's notice of appeal was untimely.

B. Plain Error:[8]

After careful review of the record in the present case, the State submits that plain error is not evident with regard to the lack of an instruction on voluntary intoxication. Although voluntary intoxication is not a defense, voluntary intoxication "is admissible in evidence if it is relevant to negate a culpable mental state." Tenn. Code Ann. § 39-11-503(a). In the present case, the only proof concerning the defendant's "intoxication" came from a witness who said she thought the defendant and his brother were drunk and from a co-defendant who stated that he and the defendant had been drinking and smoking marijuana. Despite this unscientific proof, the defendant did not rely on the defense of voluntary intoxication in his opening or closing argument to the jury. Rather, the defense appeared to be that, while he was present, the defendant did not fire any shots.

Based on the lack of proof concerning the defendant's level of intoxication, the trial court did not err in omitting an instruction on the defense of voluntary intoxication. Thus, no rule of law was breached. Furthermore, based on the lack of proof, the fact that the defendant did not rely on intoxication as a defense during his opening or closing argument, and the fact that counsel did not request the instruction

[8] See footnote no. 7.

or object to the lack of the instruction, the State submits that the defendant has not demonstrated that his substantial rights were affected by the omission of this instruction. Therefore, the record does not support a finding of plain error. Even if the issue were deemed properly preserved, for the same reasons the issue is meritless.

CONCLUSION

For the reasons stated, the judgment of the Court of Criminal Appeals should be affirmed.

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CERTIFICATE OF SERVICE

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