The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. 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 Council 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.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Delius & McKenzie, PLLC, Member.

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

2008, BPR No. 027415.

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.

I have not been admitted in any other state other than on a *pro hac vice* basis. I have been licensed in the following federal courts:

U.S. District Court for the Eastern District of Tennessee – October 22, 2010 – Active

U.S. District Court for the Western District of Tennessee – June 13, 2018 – Active

United States Court of Appeals for the Sixth Circuit – December 19, 2011 – 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).

2008-2010 – Judicial Law Clerk, Honorable J. Curwood Witt, Tennessee Court of Criminal Appeals, Knoxville, Tennessee

2010-2017 – Associate Attorney, Law Office of Bryan Delius

2018-present – Member, Delius & McKenzie, PLLC

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.

I have been employed continuously since completion of my legal education.

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

I currently practice law at Delius & McKenzie, PLLC. We are a small firm consisting of two lawyers and two support staff members. Despite our small size, we manage a large and diverse caseload with approximately 300 active cases. I typically appear in court three to five days of the week. While in the office, I meet with clients, draft legal pleadings, negotiate cases, and perform administrative tasks.

Approximately 70 percent of my practice involves criminal defense in state and federal courts. Our criminal practice ranges from general sessions to appellate level.

Approximately 30 percent of my practice is focused on civil litigation. The majority of these cases are personal injury matters; however, like any small firm, I handle business disputes and other general litigation.

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 Council 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 Council. Please provide detailed information that will allow the Council 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.

In my first job after law school, I served as a law clerk for Judge J. Curwood Witt, Jr., on the Court of Criminal Appeals. This position entailed reviewing trial court records, reading the briefs of the parties, observing oral arguments, researching legal issues, and preparing drafts of judicial opinions. Judge Witt was a tremendous teacher, and working with him taught me how to effectively understand legal issues and communicate them through writing. The ability to quickly produce legal pleadings would become invaluable once I entered private practice.

For the last 14 years, I have worked in private practice in Sevierville, Tennessee. With the guidance of my senior law partner, Bryan Delius, I learned to manage an extensive caseload. While my clerkship prepared me for the intellectual rigors of the practice of law, being in a small but busy law practice prepared me for the practical application of the law. My workload includes

everything from initial consultation with clients, spotting potential legal issues, developing litigation strategy, and advocating for those clients both in and out of court.

Because of my background as an appellate clerk, I often represent clients in criminal or civil appeals, sometimes taking over cases for other lawyers who are less comfortable with the appellate courts. Since working as a judicial law clerk, I have continually practiced appellate law. These cases include not only direct appeals, but questions of certified law and interlocutory appeals. Over my private practice career, I have briefed and argued more than thirty appellate cases before the Tennessee Court of Criminal Appeals, Tennessee Court of Appeals, Tennessee Supreme Court.

I defend clients in federal and state criminal cases, and I spend much of my workweeks in various courts advocating for my clients. I represent criminal defendants in cases ranging from DUI and misdemeanor domestic charges up through first degree murder and serious drug crimes. My practice includes cases in general sessions courts in which I am constantly preparing for and conducting preliminary hearings. My criminal court practice often involves research and drafting suppression motions and other legal arguments in preparation for trial. Effectively advocating for my clients requires extensive knowledge of the Fourth and Fifth Amendments of the United States Constitution and their counterparts under the Tennessee Constitution's Declaration of Rights.

My federal criminal practice is focused in the United States District Court for the Eastern District of Tennessee, Greeneville Division. I have been active with the Criminal Justice Act panel since 2011, and I have represented nearly 100 defendants in federal courts. Many of these cases involve complex conspiracy allegations with voluminous discovery. Defending these cases requires robust motion practice and mastery of the complex sentencing guidelines. I have also represented clients before the Sixth Circuit on appeal from jury trial and post-conviction relief hearings. While many federal cases involve illegal drug and gun charges, I have also represented defendants in tax fraud and theft cases. I have represented defendants facing charges stemming from the Great Smoky Mountains National Park and Cherokee National Forest, ranging from DUI charges to illegal hunting allegations.

Although the great majority of my criminal defense practice consists of privately retained clients, I still represent several indigent clients when requested by the courts. The representation of indigent clients comes with different challenges and rewards. Many of these clients feel disillusioned by the legal system, and building trust with them by advocating with professionalism is important. Representing indigent clients has provided me with perspective regarding the importance of equal access to justice that I would not have gained through my private practice.

I also maintain a personal injury practice where I represent mostly plaintiffs. Pursuing tort claims involves heavy document collection and review and extensive discovery. I have conducted countless depositions involving both lay and expert witnesses. Successful advocacy in these cases involves not only obtaining recovery from the tortfeasor, but also negotiating the myriad of complex insurance laws governing subrogation of medical payments. Litigating tort claims often requires extensive motion practice regarding evidentiary issues and summary judgment. I have handled several large settlements for my clients, often taking cases with contested liability and unique legal issues. Personal injury practice is rife with procedural pitfalls, and successful practice requires a comprehensive knowledge of statutory and common

law and evidentiary rules.

Lastly, I represent people and businesses in disputes. I have represented businesses against local governments based upon governmental overreaches via declaratory judgments and petitions for writ of certiorari. I have also represented disputing business partners and litigated contractual issues.

Overall, my legal practice has included a broad range of legal conflicts, requiring me to be agile and disciplined to manage the workload. My practice focuses exclusively on litigation. I recognize that often the cases that I handle represent a significant life event for my clients. This is especially true in my criminal practice where my client's liberty is at stake. Because I practice in a tourism-based area, I often represent clients who were arrested while on vacation with no prior interaction with the legal system. The outcome of a case could have a large bearing on my client's employment and family. Representing clients on such a personal level has provided me with a holistic view of the practice of law.

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

Appellate Court Cases

The following appellate cases were litigated by my firm. On appeal, I was primarily responsible for the briefing and argument.

Gordon v. Tennessee Department of Homeland Security, No. E2022-01175-COA-R3-CV, 2023 WL 8401853 (Tenn. Ct. App. Dec. 5, 2023)

We represented a trooper who was wrongly dismissed from his position when he participated in a breathalyzer training in which he blew a positive sample. After the Tennessee Board of Appeals upheld his termination, the Chancery Court reversed the Board's hearing determination because breathalyzer tests were not properly administered and therefore could not be introduced as competent evidence. We argued that the breathalyzer tests should be excluded as inadmissible pursuant to *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992). The Department argued that *Sensing* was only applicable to criminal cases; however, the Court of Appeals rejected this argument and applied the *Sensing* requirements to the case. As a result, the Court of Appeals upheld the Chancery Court's reinstatement of the trooper to his employment.

Kherani v. Patel, No. E2022-00983-COA-R3-CV, 2023 WL 6307502 (Tenn. Ct. App. Sept. 28, 2023)

This case involved a reversal of summary judgment in a real estate contract; however, the Court of Appeals also determined whether subject matter jurisdiction was appropriate when a party moved to amend a complaint to add a party but did nothing further. The court held that the plaintiffs abandoned their motion to amend parties by failing to attach an amended complaint or litigate the issue prior to a damages hearing, and therefore the order on summary judgment was a final order appealable under Tennessee Rule of Appellate Procedure 3. The Court of Appeals determined that it had subject matter jurisdiction and reversed the finding for the plaintiffs.

Burns v. State, 601 S.W.3d 601 (Tenn. Ct. App. 2019)

We represented a detective who filed a defamation action with the Claims Commission against a district attorney general based upon statements made to the media about the detective's credibility. The State filed a motion to dismiss, alleging that absolute immunity applied to district attorneys general. The Commission denied the State's motion, and the State filed an interlocutory appeal arguing that the Executive Official Privilege applicable to "cabinet-level executive officials" should extend to district attorneys general. The Court of Appeals found, as a matter of first impression, that the Executive Privilege did not extend to district attorneys general and remanded the case to the Commission.

State v. Wascher, No. E2015-00961-CCA-R3-CD, 2016 WL 3251548 (Tenn. Crim. App. June 6, 2016)

We represented the defendant on a certified question of law challenging the denial of her motion to suppress alleging an unconstitutional seizure. The defendant was seized based upon an anonymous tip, and the State argued that pursuant to *State v. Hanning*, 296 S.W.3d 44 (Tenn. 2009), the tip—which did not describe the defendant's driving with any specificity—was sufficient to provide reasonable suspicion for the seizure. The defendant argued that a 2014 United States Supreme Court decision required that such an anonymous tip must convey specific information about the alleged drunken driving in order to provide reasonable suspicion. *See Navarette v. California*, 572 U.S. 393 (2014). The Court of Criminal Appeals agreed with the defendant, finding that the tip, although accurately describing the defendant's vehicle and location, did not adequately allege criminal conduct. The defendant's conviction was dismissed.

State v. Eayrs, No. E2014-02072-CCA-R3-CD, 2015 WL 9311865 (Tenn. Crim. App. Aug. 18, 2015)

In this certified question of law, we challenged the trial court's finding that the officer had probable cause or reasonable suspicion to stop a motorist in a DUI case. The trial court found that, because the officer had seen a vehicle stopped in a turn lane, he had a "duty" to stop the vehicle. The Court of Criminal Appeals found that, because the trial court effectively cut the proof short and cited no legal violation in its denial of the motion to suppress, the record failed to support the trial court's finding. The judgment was reversed, and the defendant's conviction was dismissed.

Eden W. ex rel. Evans v. Tarr, 517 S.W.3d 691 (Tenn. Ct. App. 2015)

A mother brought a negligence action against a motorist when her child was hit by a truck; however, the trial court dismissed the case on summary judgment, and the Nashville-based trial counsel retained our firm for appeal. The trial court had ruled that a five-year-old child's act of running into the street in-and-of-itself eliminated the heightened standard of care a motorist should use around children. The Court of Appeals held that the trial court misapplied the appropriate standard of care and that the law imposed a heightened duty of care to take into account the childish instincts of the children on the street. The appellate court held that a jury could conclude that the motorist failed to maintain a sufficient lookout and take reasonable precautions and reversed the trial court.

State v. Bell, 429 S.W.3d 524 (Tenn. 2014)

The Defendant won his suppression motion at trial, which was affirmed on appeal to the Court of Criminal Appeals. *See State v. Bell*, No. E2011-01241-CCA-R3-CD, 2012 WL 3776695 (Tenn. Crim. App. Aug. 31, 2012). The Supreme Court granted the State's application for permission to appeal. This case closely evaluated the definition of probable cause in a DUI stop, and this case is often referenced in a reviewing court's analysis in such cases.

State v. Price, No. E2011-01050-CCA-R3-CD, 2013 WL 5371679 (Tenn. Crim. App. Sept. 26, 2013)

The defendant challenged a maximum-length sentence in an attempted first-degree murder case, arguing that the trial court erroneously submitted enhancement factors to the jury and allowed the prosecutor to give the instructions. The Court of Criminal Appeals agreed, finding that the unauthorized sentencing procedure constituted an abuse of discretion by the trial court. The appellate court found that such a fundamental procedural error could not be deemed "harmless error" and vacated the sentence.

State v. Shell, No. E2011-01599-CCA-R3-CD, 2012 WL 3029566 (Tenn. Crim. App. 2012)

I was appointed by the Court of Criminal Appeals to represent Mr. Shell on his appeal of his probation revocation. The appellate court reversed the trial court's order because the defendant was not given an appropriate hearing prior to the violation.

Trial Court Cases

Reagan v. City of Pigeon Forge, Sevier County Chancery Court, No. 17-4-115 (2021)

In this declaratory judgment action, we represented a property owner in Pigeon Forge challenging the constitutionality of the City's billboard restrictions. In a motion for summary judgment, we argued that the City's use of on-premises and off-premises signs as defined in the former Tennessee Billboard Act was unconstitutional pursuant to Sixth Circuit precedent. Because the legal issues implicated the validity of Tennessee's statute, the Attorney General's office participated in the litigation. The Chancery Court granted our motion for summary judgment, finding that Pigeon Forge's sign ordinance was unconstitutional. As a result, the City later changed its sign ordinance, and Mr. Reagan was able to construct his billboard.

Cutter et al. v. 2302 Parkway, LLC, Sevier County Circuit Court, No. 20-CV-299 (2021)

We represented the next of kin of a restaurant worker who was murdered by a coworker. We alleged negligent hiring, retention, and supervision based upon evidence that the deceased had made several complaints to management about this coworker, reporting that he had exhibited stalking behavior and made aggressive remarks about the deceased. This case involved complex issues regarding whether workers' compensation exclusivity barred the claim. The case resolved after mediation.

State v. Burns, Hamilton County Criminal Court, Div. II, No. 298396 (2017)

The defendant, a Gatlinburg detective, was charged with perjury for his testimony in a juvenile court proceeding in Hamilton County. The defendant moved to dismiss because the juvenile court hearing was unauthorized and therefore illegal. As a result, the defendant argued that as a matter of law any testimony in the unsanctioned hearing could not serve as a basis for a perjury charge. The trial court judge, Tom Greenholtz, issued a written memorandum opinion finding

that the juvenile court did not have statutory or constitutional authority to hold the hearing, and therefore, as a matter of law any testimony in the hearing could not form the basis of any prosecution for perjury.

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

I have not served as a mediator, arbitrator, or judicial officer.

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

I have served in role of a limited financial conservator in a highly contested matter in which I was tasked with determining the ward's rights in his late wife's testamentary trust and amending prior years' tax returns to account for unreported income.

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

While in law school, I spent a semester as a legal extern for the District Attorney General's Office for the Sixth Judicial District where I aided criminal court prosecutors in research and drafting projects. I was also allowed to practice under supervision of the assistant district attorneys general in court, and I participated in my first jury trial during that externship. I also clerked at the Knoxville firm of Butler, Vines & Babb, where I worked on both civil defense and plaintiff cases.

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

I have never submitted an application for a judgeship.

EDUCATION

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

University of Tennessee School of Law (J.D., *magna cum laude*, 2008)

Honors and Activities: Order of the Barristers; Tennessee Law Review, Student Materials Editor; National Mock Trial Team; Howard Baker Journal of Applied Public Policy

University of Tennessee, College of Business (B.S. 2005)

Majors: Accounting and Political Science

Honors and Activities: Whittle Scholar (full-tuition merit scholarship); Honors College; Chairman Undergraduate Student Senate; Howard Baker Scholars Program

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]

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

I have continuously lived in the State of Tennessee for my whole life.

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

I have lived in Sevier County since 2012.

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

Sevier 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.

I have not served in the military.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

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

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I have responded to two complaints with the Board of Professional Responsibility: one filed in 2012 (2012-13234-COMP) and one in 2015 (2015-13053-COMP). Both complaints were dismissed upon the Board's investigation. (35458-1-ES(B) and 42504-1-ES).

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 that you have held in such organizations.

The Love Kitchen, Knoxville, Tennessee. Secretary (2022-present); Member, Board of Directors (2010-present)

Immaculate Conception Catholic Church, Knoxville, Tennessee, Member

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

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

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

I was a member of the Pi Kappa Phi fraternity in undergraduate school, which limits membership to men. I have not been active with the organization for several years.

ACHIEVEMENTS

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

House of Delegates, Young Lawyers Delegate, Tennessee Bar Association (2015-2020). As a House of Delegates member, I had the ability to vote and participate in policy recommendations concerning the legal profession. I represented the interest of the young lawyers in the Eastern Division of Tennessee.

District 4 Representative, Young Lawyers Division, Tennessee Bar Association (2012-2015). As a district representative, I represented my judicial district for the YLD board. I conducted legal clinics in my district including Wills for Heroes events for local law enforcement.

Sevier County Bar Association, Secretary/Treasurer (2024-present). As secretary/treasurer of the Sevier County Bar, I am responsible for all communication and financial records for the association.

Young Lawyers Division Fellows, Tennessee Bar Association (2023-present)

Southern States Police Benevolent Association, Member Attorney (2011-present). As a PBA attorney, I represent officers who need legal representation due to work-related issues. My firm

has represented several officers who were involved in justified use-of-force scenarios. We have often had to respond to the scene, and we work with other law enforcement to protect the officers' rights and guide them through investigations.

Other Memberships: Knoxville Bar Association, Tennessee Association of Criminal Defense Lawyers, Tennessee Association of Trial Lawyers, National Association of Criminal Defense Lawyers, Criminal Justice Act Panel, United States District Court for the Eastern District of Tennessee, Greeneville.

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

President's Award, Tennessee Bar Association's Young Lawyers Division (2019)

Recognition Award for Response to Sevier County Wildfires, Star of the Quarter, Tennessee Bar Association's Young Lawyers Division (2016)

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

Sending the Record Straight, Dicta, Knoxville Bar Association (Mar. 2011).

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

I have not given any seminars or taught classes within the last five years.

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

I have not held any public office.

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

No.

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

reflects your own personal effort.

I have attached the following writing samples for review. In each case, I personally drafted the pleading, however, other attorneys and staff participated in making minor edits.

1) Brief of Petitioner/Appellee in *Tennessee Department of Safety and Homeland Security v. Erick Gordon*, No. E2022-01175-COA-R3-CV, in the Court of Appeals of Tennessee, Eastern Division, filed June 7, 2023.
2) Brief of Defendant/Appellant in *State of Tennessee v. June Ann Wascher*, No.: E2015-00961-CCA-R3-CD, in the Court of Criminal Appeals of Tennessee, Eastern Division, filed September 17, 2015.

ESSAYS/PERSONAL STATEMENTS

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

I spent two formative years clerking for Judge Witt, and his example showed me exactly who I wanted to be as a practicing lawyer. He was intelligent, thoughtful, and diligent. Since then, I have tried to practice law with the same zeal and integrity that I learned from Judge Witt. I hope to combine the intellectual rigor required from an appellate judge with an experience-based understanding of what happens at the trial level. The right to appeal is a valuable mechanism for ensuring the constitutional integrity of the trial process, and I will give litigants the respect they deserve in considering their arguments.

The Tennessee Court of Criminal Appeals produces the majority of opinions relied upon by practitioners in the day-to-day practice of criminal law in Tennessee. I believe that through my experiences and work ethic, I can help create carefully crafted opinions that will help guide judges and practitioners at the trial level.

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

For approximately 10 years, I was involved heavily with the Tennessee Bar Association's Young Lawyer Division, which is dedicated to public service. When I was the District 4 representative, I conducted "Wills for Heroes" clinics where volunteers put together estate planning documents for first responders. In November 2016, a historic wildfire swept through Sevier County, destroying hundreds of homes. I worked with the Tennessee Bar Association to conduct free legal clinics for the victims of the fires.

The Sevier County Bar Association runs a program in which attorneys volunteer on order of protection dockets, and I have worked pro bono for multiple litigants in domestic matters.

As a criminal defense lawyer, I am often asked to provide services to indigent clients in unique cases. These clients often feel like the deck is stacked against them, so I always want to treat them with dignity and advocate for them zealously.

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

I am applying to be a Judge on the Court of Criminal Appeals, Eastern Division. I would serve with 11 total judges statewide. The intermediate appellate court is responsible for drafting appellate opinions for all appeals from criminal cases in the State of Tennessee, ranging from appeals as of right from defendants convicted after trial, certified questions of law, appeals of post-conviction and habeas corpus cases, interlocutory appeals, and appellate motion practice. My extensive private practice experience will help me effectively handle the workload, and my familiarity with several of the trial courts and practitioners in East Tennessee will help me be impactful as an appellate judge. If selected, I would be the only judge in the Eastern Division from a rural county, and I would be the only judge with extensive experience in representation of both retained and indigent criminal defendants.

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)***

Since graduating law school, I have been involved with the Love Kitchen in Knoxville. The Love Kitchen is a soup kitchen and meal delivery service dedicated to the homeless, homebound, and hungry. It was founded by twin sisters Helen Turner and Ellen Ashe, who were beloved throughout Knoxville for their kindness and generosity. I was honored to be asked to serve on the board of directors by the sisters in 2010. Sadly, both Helen and Ellen have passed away, but the board has been focused on continuing their legacy. We have continued their mission, serving more than 3,000 meals per week to the homeless and homebound in Knoxville and serving surrounding counties. The Love Kitchen provides this service with an army of volunteers and is funded only with private donations. My appointment as an appellate judge would not interfere with my continued service on the executive board.

I also would stay engaged with the Tennessee Bar Association's Young Lawyer Division as a part of the Fellows Program. The YLD does excellent public service work, and I benefited as a young lawyer by participating in these programs. As a judge, I would continue to support access to justice initiatives. I recall during a clinic for the Sevier County Wildfires, Justice Bivins personally travelled to Gatlinburg to help. This leadership from the court system was impactful, and I would similarly support pro bono efforts.

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

Practicing in a small firm for the last 14 years has given me exposure to a wide range of legal experience. I mostly practice in rural areas, and I understand how rural court systems function with limited resources. Many of the issues considered by the Court of Criminal Appeals are issues I have seen first-hand at the trial court level. I have then litigated those issues in the appellate courts, and I always enjoyed the opportunity to participate in oral argument before the

appellate judges.

When not at the office, I spend most of my time with my family. We have a 7-year-old son with autism, and his ability to communicate is very limited. Raising a special-needs child is a very humbling experience, and it has taught me patience and empathy beyond that which I knew I was capable. At times our family feels lost in a complex world of psychiatrist, therapists, and individualized educational plans. I am sure that most people feel similarly overwhelmed with the legal system—especially the appellate courts.

My experiences in working with the homeless, representing indigent defendants, and dealing my own special-needs child at home has provided me with important perspective on the many mental health issues and challenges that defendants face while navigating the justice system, and it has impressed upon me the importance of equal access to justice for defendants at the trial level and the importance of the consistent and strict adherence to Constitutional standards.

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)***

The job of a judge is to dutifully apply the law to the facts in each case. Judges are not legislators—judges do not make law. In the private practice of law, I am constantly faced with situations in which I must advise clients that we cannot ethically pursue a cause of action or a defense because it does not comport with the law. As a recent example, our firm currently represents a pastor who was defamed by his religious organization and lost his employment. We filed a claim for defamation. The legislature recently passed the Tennessee Public Protection Act, which creates a unique burden shifting structure requiring a plaintiff to set forth a prima facie case of defamation if the speech can be broadly linked to a public concern. Further, the TPPA provides for an appeal as of right for the defendant if the trial court overrules the initial petition to dismiss. While personally I believe this law places an unfair burden on people who have been defamed, I nevertheless diligently worked to append affidavits supporting a prima facie case and developed the case knowing that we would face an appeal as of right prior to any civil discovery.

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

Norma McGee Ogle, Judge (Retired), Court of Criminal Appeals, [redacted]
Representative Andrew E. Farmer, Tennessee House of Representatives, Chair of the House Civil Justice Subcommittee, 103 Commerce Street, Sevierville, Tennessee, 37862. Phone: [redacted]
Ernie Roberts, President, Love Kitchen, [redacted]
James L. Gass, Judge, Fourth Judicial District, 125 Court Avenue, Suite 303-E, Sevierville, Tennessee 37862. Phone: [redacted]
Dr. Marianne H. Wanamaker, Dean of the Howard H. Baker Jr. School of Public Policy and Public Affairs, University of Tennessee, 1640 Cumberland Avenue, Knoxville, Tennessee, 37996. Phone: [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, 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 application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: November 11, 2024.

Signature

When completed, return this application to John Jefferson at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

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

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

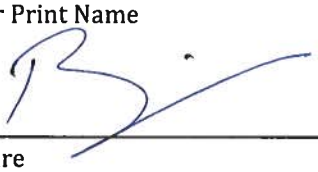
TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

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

Bryce William McKenzie

Type or Print Name



Signature

November 11, 2024

Date

027415

BPR #

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

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

TENNESSEE DEPARTMENT OF
SAFETY AND HOMELAND SECURITY,

Respondent-Appellant,

v. No.: E2022-01175-COA-R3-CV

ERICK GORDON,

Petitioner-Appellee.

BRIEF OF PETITIONER-APPELLEE

ATTORNEY FOR
PETITIONER-APPELLEE
ON APPEAL

BRYCE W. MCKENZIE (BPR# 027415)
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STATEMENT OF THE CASE

On January 17, 2020, the Petitioner attended a training course at the Cocke County Tennessee Highway Patrol post which required he submit to a breathalyzer machine. (T.R., Vol. 1, at 27.) Based upon those readings, the Petitioner was suspended, and he was dismissed on March 30, 2020. (T.R., Vol. I, at 54-55.)[1] He receive a "Notice of Disciplinary Action – Termination" dated March 18, 2020. (T.R., Vol. I, at 46-54.) The Petitioner filed a Step I Appeal Form on March 30, 2020. (T.R., Vol. I, at 44-45.) The Commissioner issued a Step I decision upholding the dismissal on April 7, 2020. (T.R. at 18-25.) On April 27, 2020, the Petitioner filed his Step II Appeal, which was denied on May 15, 2020, by Commissioner Juan Williams. (T.R., Vol. I, at 25-32.) On May 28, 2020, the Petitioner filed for a Step III appeal. (T.R., Vol. I, at 21-22). Prior to his hearing, the Petitioner filed a Motion in Limine to exclude the readings from the Intoximeter Alco-Sensor V XL and Intoximeter EC/IR-II. (T.R., Vol. I, at 73-77.) The Tennessee Board of Appeals denied the motion in an Order dated August 31, 2020. (T.R., Vol. I, at 96-98.) After a hearing on September 25, 2020, the Board of Appeals for the State of Tennessee upheld the dismissal, and it entered a final order on October 9, 2020. (T.R., Vol. II, at 208-17.) The Petitioner filed a Petition for Judicial Review pursuant to Tennessee Code Section 4-5-322. (T.R., Vol. II, at 219-23.)

After submitting written appeals and oral argument, the Chancery Court reversed and modified the Board's decision, finding that the termination of Mr. Gordon was improper and that he should be reinstated with back pay for all but one year. (T.R., Vol. VIII, at 1104-09.) Specifically, the Chancery Court found that the Board impermissibly considered breath test results and that "once the unreliable

[1] The Separation Notice filed in this case was unintentionally not given a page in the Technical Record. It is located between pages 54 and 55, and the notice was originally page 38 of the APD Technical Record.

objective date from the breathalyzer results is excluded, there is no substantial or material evidence that Mr. Gordon was 'under the influence' on the morning of January 17, 2020, in fact, the evidence preponderates otherwise." (T.R., Vol. VIII, at 1108.)

The State appealed.

STATEMENT OF FACTS

The Petitioner, Erick Gordon, served as active duty Army from 1998 to 2001, when he joined the Army Reserve in which he serves until this day. (T.R., Vol. II, at 252-53.) He began in law enforcement as a jailer with the Greene County Sheriff's Department in 2002. (T.R., Vol. II, at 253.) In 2006, the Army deployed him to Baghdad, Iraq, in support of Operation Iraqi Freedom, and when he returned, he started with the Tennessee Highway Patrol. (T.R., Vol. II at 254.) As part of his application to the THP, Mr. Gordon submitted a DD 214 that showed that he had been in combat and earned both a Bronze Star and an Army Commendation for Valor. (T.R., Vol. II at 258.) A copy of the Commendation and Bronze Star were admitted into evidence. (T.R., Vol. II, at 259.) The Commendation specifically noted that Mr. Gordon led a dismount of National Police element in complete disregard for his own personal safety. (T.R., Vol. II, at 259.)

Mr. Gordon was hired as a trooper and eventually was an adjunct trainer for the Tennessee Highway Patrol Training Academy, the State Honor Guard, and was a federally deputized DEA Task Force officer. (T.R., Vol. II, at 261.) He had two additional active deployments while serving with the THP. (T.R., Vol. II, at 262.) He had excellent NCO Evaluation reports. (T.R., Vol. II, at 263.) He also had excellent performance reviews from the THP and no disciplinary issues. (T.R., Vol. II, at 264.)

On January 17, 2020, Mr. Gordon was scheduled for a training on a portable intoximeter machine called the Alco-Sensor V. (T.R., Vol. II, at 264-65.) He

explained that he had not been trained to use the portable machine for testing blood alcohol content through a suspect's breath. (T.R., Vol. II, at 265.) Mr. Gordon explained that certification was required in order to operate the breathalyzer, and that none of the troopers at his post had been certified on the Alco-Sensor V. (T.R., Vol. II, at 265.) Without certification the test is "not going to account for anything." (T.R., Vol. II, at 266.) Further, Mr. Gordon explained that if he does not do the test correctly, it will not be admissible in court. (T.R., Vol. II, at 266.)

Mr. Gordon testified that he woke up with a headache and was running late to his shift on January 17, 2020. (T.R., Vol. II, at 266-67.) He called Sergeant Keith Lawson and told him he had a headache and was considering calling in sick. (T.R., Vol. II, at 267.) Mr. Gordon did not believe that he was "hungover," and he was not exhibiting any other signs of a hangover. (T.R., Vol. II, at 267-68.) Mr. Gordon arrived at his post and went to a filing cabinet to obtain Goody's headache powder and a bottle of water. (T.R., Vol. II, at 268.) He spoke with all of the troopers at the training as well as with Agent Dave Ferguson from the Tennessee Bureau of Investigation, who was conducting the training. (T.R., Vol. II, at 269.) He and agent Ferguson had a follow-up conversation about alcohol metabolization rates. (T.R., Vol. II, at 269.) All of the troopers at the post had obtained extensive training on alcohol detection; however, none noted to Mr. Gordon that they believed him to be impaired by alcohol or "hungover." (T.R., Vol. II, at 270.)

Mr. Gordon stated that, once the training began, Agent Ferguson began to lecture on the equipment being used. (T.R., Vol. II, at 271.) He had both an Intoximeter EC/IR-II, a stand-alone station that is generally kept in the police departments, and several Alco-Sensor V portable breath machines. (T.R., Vol. II, at 271.) Mr. Gordon explained that the machines have a mandatory 20-minute waiting period before they can test a breath sample. (T.R., Vol. II, at 272.) He explained that, when using these machines for law enforcement purposes, he is trained to

observe the suspect with physical eye contact during this period to make sure they do not put anything in their mouth, regurgitate, or burp. (T.R., Vol. II, at 272.) In contrast, during the training on January 17, 2021, Agent Ferguson utilized the 20-minute waiting period for classroom instruction, and the participating troopers were allowed to eat and drink at will during this period. (T.R., Vol. II, at 273.) Mr. Gordon had snuff tobacco in his mouth during this time. (T.R., Vol. II, at 273.) He also explained that he had used mouth tobacco for more than 20 years and that it irritates his gums and causes them to bleed. (T.R., Vol. II, at 274.) Mr. Gordon also drank water during the 20-minute period. (T.R., Vol. II, at 274.)

During the training, Mr. Gordon and Sergeant Lawson were instructed to take turns blowing samples into the Alco-Sensor V. (T.R., Vol. II, at 275.) He explained that neither he nor Sergeant Lawson were certified to use that machine. (T.R., Vol. II, at 275.) Sergeant Lawson blew the first sample and then Mr. Gordon submitted the second sample. (T.R., Vol. II, at 276.) During this time, Mr. Gordon had tobacco in his mouth. (T.R., Vol. II, at 276.) The machine made a noise and showed an alcohol sample of .037, which Mr. Gordon did not believe was accurate. (T.R., Vol. II, at 277.) Agent Ferguson then had Mr. Gordon spit out the tobacco and take a test on another machine (again without resetting the 20-minute wait period). (T.R., Vol. II, at 277-78.) The second test was approximately two minutes after the first, and it displayed a numeric value of ".034" to which Mr. Gordon responded, "That ain't freaking right." (T.R., Vol. II, at 278.) Mr. Gordon further explained that the breath machines utilized a two-test protocol which requires that two samples be obtained in order to be used in any proceeding or hearing. (T.R., Vol. II, at 279.) He did not provide two samples in either of the machines used. (T.R., Vol. II, at 280.)

At the conclusion of the training, Mr. Gordon was asked to stay behind and was taken to LabCorp in Knoxville, Tennessee, for a blood test. (T.R., Vol. II, at 281.) He tested negative. (T.R., Vol. II, at 281.)

Mr. Gordon explained that he did drink vodka the night before, but he denied the Department's characterization of his drinking. (T.R., Vol. II, at 282-83.) He said that he had been on the phone discussing National Guard business and had four to five drinks over a six-hour period. (T.R., Vol. II, at 283-84). He testified that he never drank in excess of his ability to metabolize alcohol and that he did not feel intoxicated during that time. (T.R., Vol. II, at 285.) Mr. Gordon stated that he went to bed at approximately 11:30 p.m. and then awoke in the middle of the night in a "panic." (T.R., Vol. II, at 285.) He explained, "I woke up wondering why I was still in Iraq. What was going on. Why this is happening." (T.R., Vol. II, at 286.) He stated that in his mind he was in a firefight, "PAP had exploded, gunfire, and we can't win." (T.R., Vol. II, at 286.) He explained that he had a flashback to the date for which he earned his Army Commendation Medal, and that he was under sniper fire again with his friends dying around him. (T.R., Vol. II, at 288.) He explained, "It was like the same point as when I was there. The point of defecating on yourself." (T.R., Vol. II, pp. 288-89.) He said he made it to the kitchen and drank some vodka poured in a coffee cup to try to calm down and stop shaking. (T.R., Vol. II, at 288-89.) He explained this episode was different from the others because he did not know it was coming. (T.R., Vol. II, at 289.) He gradually started coming out of his episode and laid back in a chair and fell asleep. (T.R., Vol. II, at 289.) Because of that he did not hear his alarm clock and woke up late. (T.R., Vol. II, at 290.) He explained that since this episode he sought Veterans Affairs counseling and that he informed the investigators at the THP that he was in counseling for PTSD. (T.R., Vol. II, at 291.) He testified that, prior to this incident, he never officially reported his PTSD issues to the THP, however, he had conversations with Sergeant Lawson and Lieutenant Robbie Greer about his difficult times in the service. (T.R., Vol. II, at 296.)

Mr. Gordon explained that the breath test to which he was subject to on January 17, 2020, was contrary to the entirety of his training. (T.R., Vol. III, at 306.) He said that he was taught through his certification process that in order to have any evidentiary value, either through criminal court or administrative proceedings, he would have to follow the proper protocols. (T.R., Vol. III, at 306.) He also acknowledged that the law required the operator of a breath testing device to be certified in order to be admissible in any judicial or administrative proceedings. (T.R., Vol. III, at 307.)

Mr. Gordon also told the Board that, since this incident, he has learned "quite a bit" from the 12-week process at the PTSD clinic with Veterans Affairs. (T.R., Vol. III, at 314.) He said, "I've gotten to a place that I feel more comfortable at least getting it out there in a certain capacity." (T.R., Vol. III, at 315.)

Sergeant Keith Lawson testified that he had been with the Tennessee Highway Patrol for 10 years and had been through advanced training such as Advanced Roadside Impaired Driving Education (ARIDE) and Drug Recognition Expert (DRE) training. (T.R., Vol. V, at 710-11.) He met Mr. Gordon in 2010 when he was an instructor at the THP Training Center, and in January 2020 Sergeant Lawson was Mr. Gordon's immediate supervisor. (T.R., Vol. V, at 712.) He and Mr. Gordon were both veterans and talked about his experience in the military. (T.R., Vol. V, at 713.) He knew that Mr. Gordon was in some "heated stuff." (T.R., Vol. V, at 713.) He said that Mr. Gordon was a good employee and prior to January 17, 2020, he had never had any disciplinary issues with him. (T.R., Vol. V, at 714.)

Sergeant Lawson testified that on January 17, 2020, he was involved in a training for a portable breathalyzer machine called the Alco-Sensor V. (T.R., Vol. V, at 714.) He explained that he and Mr. Gordon, Trooper Ethan Shultz, and Trooper Michael Cameron were taking the training to become certified on the machine. (T.R., Vol. V, at 715.) Special Agent Dave Ferguson of the Tennessee Bureau of

Investigation was conducting the training, and Mr. Gordon called stating that he was running late and that he had a headache and almost called in sick. (T.R., Vol. V, at 716.) Mr. Gordon arrived at approximately 9:15 a.m. and, before the training started, Mr. Gordon spoke with Agent Ferguson. (T.R., Vol. V, at 716-17.) Sergeant Lawson also spoke with Mr. Gordon, and he did not believe him to be under the influence of alcohol. (T.R., Vol. V, at 718.) Nobody else at the training indicated that they believed Mr. Gordon was impaired. (T.R., Vol. V, at 718.) There was nothing about his smell, his eyes, his speech, or his dexterity that indicated impairment. (T.R., Vol. V, at 718.) He said that Agent Ferguson also brought a stationary EC/IR machine to make sure all troopers were trained on the "two-test" protocol. (T.R., Vol. V, at 719.)

Sergeant Lawson said that Agent Ferguson started the training and entered the data needed to start the machines, which have a 20-minute countdown period. (T.R., Vol. V, at 720-21.) He explained that the purpose of the 20-minute wait time is to watch the suspect and make sure the suspect doesn't put anything in his or her mouth. (T.R., Vol. V, at 722.) This is important as to not alter the results of the test. (Hr'g, p. 491.) During the training, Agent Ferguson used this time to teach instead of having everyone watch each other. (T.R., Vol. V, at 722.) He said generally, before the 20 minute period, the operator is supposed to check the suspect's mouth, but for the purposes of training all of the participants were allowed to eat and drink before and during the countdown period. (T.R., Vol. V, at 723.)

Sergeant Lawson and Mr. Gordon were paired on an Alco-Sensor V machine for the training, and Agent Ferguson had them alternate samples. (T.R., Vol. V, at 724.) He said that he gave the first sample, and then Mr. Gordon gave the second sample. (T.R., Vol. V, at 724.) After giving the sample, Mr. Gordon said that "the machine wasn't right." (T.R., Vol. V, at 724.) After that, Agent Ferguson wanted Mr. Gordon to produce a second sample, and he blew into the EC/IR machine. (T.R.,

Vol. V, at 725.) After the training, he took Mr. Gordon to LabCorp for a blood test. (T.R., Vol. V, at 727.) He said that prior to the breath tests, he had "zero suspicion that [Mr. Gordon] was under the influence of alcohol." (T.R., Vol. V, at 727.) He said that the incident of January 17, 2020, was not reported to anybody outside of the Tennessee Highway Patrol and the Department of Safety. (T.R., Vol. V, at 727.)

Sergeant Lawson stated that the manner of administration of Mr. Gordon's breath test was not the proper way to conduct the test because he was not observed for 20 minutes, and they did not follow the two-test protocol. (T.R., Vol. V, at 736.)

The Department called Agent Dave Ferguson, a scientist with the Knoxville Regional Crime Laboratory. (T.R., Vol. III, at 321-22.) He explained that he maintains the breath alcohol instruments and certifies the instruments, and that he also trains law enforcement officers for certification. (T.R., Vol. III, at 322.) He explained that the "majority" of his classroom training is going over *State v. Sensing* that "tests for six requirements. All six of these requirements must be met for any breath test to be admissible in a court of law here in the state of Tennessee." (T.R., Vol. III, at 326.) He explained that during his trainings he has students blow into the breathalyzers "just to give them an idea of how the flow-rate of a subject who is going to have to blow on the instrument." (T.R., Vol. III, at 327.)

Agent Ferguson testified that on January 17, 2020, he was conducting a class for the THP in Cocke County to train them on the Alco-Sensor V, which was a mobile testing unit, and that he was also certifying them on the Intoximeter EC/IR-II's two-test protocols. (T.R., Vol. III, at 328.) He explained at the training he would go over the *Sensing* requirements and give each trooper his operating card. (T.R., Vol. III, at 331.) He tells the students that he is required under the law to come every 90 days to certify the machines. (T.R., Vol. III, at 331.) He said during this training Mr. Gordon and Sergeant Lawson were on one of the Alco-Sensor V machines. (T.R., Vol. III, at 332.) He explained that the machine, once started, must count

down 20 minutes. (T.R., Vol. III, at 333.) Agent Ferguson said he would have one trooper blow for the first of the two-test protocol and then have the other blow. (T.R., Vol. III, at 333.) He said that Mr. Gordon blew a .037, and because Mr. Gordon had a dip in his mouth, he told him to take it out. (T.R., Vol. III, at 333.) He also asked Mr. Gordon if he had mouth wash or cough syrup. (T.R., Vol. III, at 333.) He then had him blow a single sample on the stationary breathalyzer, the Intoximeter EC/IR-II, and he blew a .033. (T.R., Vol. III, at 334.)

Agent Ferguson testified that he had certified the Alco-Sensor V on January 14, 2020, and then recertified the machine on March 4, 2020. (T.R., Vol. III, at 334-35.) Agent Ferguson explained, however, that the Intoximeter EC/IR-II was used for training and had not been certified or calibrated. (T.R., Vol. III, at 336-37.)

On cross-examination Agent Ferguson explained that an officer operating a breathalyzer machine must be "eye to eye" observing the subject for 20 minutes before the test. (T.R., Vol. III, at 352.) He admitted he used that 20 minute wait period during training to teach about *Sensing* and that he did not observe the participants. (T.R., Vol. III, at 353.) He also stated that the first *Sensing* factor requires the machine be in the TBI program; however, the Intoximeter EC/IR-II he used was not certified. (T.R., Vol. III, at 357-59.)

Agent Ferguson testified that the second *Sensing* factor required that the operator of the machines be certified, and admitted that none of the troopers operating the machines that day were certified on the Alco-Sensor V because the purpose of the class was to obtain certification. (T.R., Vol. III, at 360-61.)

Agent Ferguson testified that Mr. Gordon finished and indeed passed the class that day. (T.R., Vol. III, at 361.) He said that, prior to the class, he had a sophisticated conversation with him regarding alcohol metabolization and that, during this extended conversation he had no indication that Mr. Gordon was under the influence of alcohol in any way. (T.R., Vol. III, at 363.) He did not smell the

odor of alcohol about Mr. Gordon's person, and Mr. Gordon did not have slurred speech. (T.R., Vol. III, at 363-65.)

Agent Ferguson testified that the third factor in *Sensing* was that the machine had to be working properly and certified by the TBI. (T.R., Vol. III, at 366.) Agent Ferguson testified that although the Alco-Sensor V was certified, the EC/IR-II was not and it had no internal standard to test itself. (T.R., Vol. III, at 368.) He further explained that unlike the Alco-Sensor V, the EC/IR-II had safety protocols to detect mouth alcohol through infrared technology. (T.R., Vol. III, at 368.) He explained that the 20-minute observation period for the Alco-Sensor V was especially important to eliminate any mouth alcohol because it cannot detect and discern between mouth alcohol. (T.R., Vol. III, at 369.) During his training he stressed to officers to watch the subject and not do paperwork. (T.R., Vol. III, at 370.) He also explained that the manufacturer's protocols provide that no foreign materials shall be present in the subject's mouth when blowing into the machine. (T.R., Vol. III, at 371.)

He stated that the EC/IR II has a two-test protocol and that "[i]t was probably an error" to ignore that protocol when he asked Mr. Gordon to provide a single test in the machine. (T.R., Vol. III, at 376.) He agreed that he teaches his students that, if there is a foreign substance in the subject's mouth, they must abort the test and restart the 20 minute waiting period. (T.R., Vol. III, at 379-80.) He testified that if there is foreign material in the subject's mouth it is "thrown out" in court. (T.R., Vol. III, at 381.)

Agent Ferguson admitted that the test results on the machine conflicted with his observations of Mr. Gordon because he did not believe Mr. Gordon to be impaired and he did not smell of alcohol. (T.R., Vol. III, at 383.) He unequivocally admitted that Mr. Gordon's breath tests would not come into court pursuant to *Sensing*. (T.R., Vol. III, at 385.)

Sergeant Chad Smith from the Tennessee Department of Safety and Homeland Security testified that he was with the Office of Professional Accountability. (T.R., Vol. III, at 389-90.) He explained that pursuant to Department of Human Resources Rule 1120-10-.02, this incident was cause for disciplinary action because "it was found to be under the influence of alcohol," which related to this performance of Mr. Gordon's job duties. (T.R., Vol. III, at 391.) Further, he found that due to this finding, Mr. Gordon violated DHR Rule 1120-10.03, State of Tennessee Code of Conduct for Standard 1 and 2, Tennessee Department of Safety and Homeland Security General Order 216-2, and Tennessee Department of Safety and Homeland Security General Order 221. (T.R., Vol. III, at 391-397.) He noted that during his investigation Mr. Gordon spoke about possible symptoms of PTSD and that he was considering treatment. (T.R., Vol. III, at 398.)

On cross-examination, Sergeant Smith admitted he did absolutely no investigation except for an interview with Agent Ferguson and Mr. Gordon. (T.R., Vol. III, at 401.) Sergeant Smith was not a very accomplished officer—he had no ARIDE or DRE training admitted. (T.R., Vol. III, at 402-3.) He did not know that other troopers such as Sergeant Lawson had obtained superior training. (T.R., Vol. III, at 404.) He did not interview Trooper Lawson, who never suspected or believed that Mr. Gordon was under the influence. (T.R., Vol. III, at 404-5.) Sergeant Smith had obviously prepared to deny that the *Sensing* factors were important to the admissibility of breath test evidence, so although he acknowledged that for a test to be admissible and reliable, it had to be conducted properly, he restricted his answer to only criminal court. (T.R., Vol. III, at 406.)

On cross-examination, Sergeant Smith admitted that he had no independent evidence that Mr. Gordon was impaired. (T.R., Vol. III, at 408-9.) He admitted that he essentially wholly relied on the breath test in his findings. (T.R., Vol. III, at 410.) He could not point to any media attention regarding this incident that would bring

disrepute on the department. (T.R., Vol. III, at 412.) Sergeant Smith was asked about other high-profile situations that brough disrepute on the THP, such as Lieutenant Stacy Heatherly who while drunk at a football game with other troopers used an on-duty trooper to act as a taxi and drive them. (T.R., Vol. III, at 414-15.)

Lieutenant Kevin Kimbrough testified that he was in Mr. Gordon's chain of command. (T.R., Vol. III, at 430.) He testified that he advised the troopers under him about the Employee Assistance Program administered by the Tennessee Department of Human Resources. (T.R., Vol. III, at 431.) He said that he offered Mr. Gordon EAP following the January 17, 2020 incident. (T.R., Vol. III, at 431.) He said that he had talked to Mr. Gordon about his service, "But Erick really just wasn't the kind of person that would open up and share those types of intimate details. I wanted to hear it. I was hearing it from other people about some of his actions and heroisms in combat." (T.R., Vol. III, at 432.)

Lieutenant Kimbrough testified that Mr. Gordon had a stellar reputation in the THP, and he was not aware of any other discipline issue. (T.R., Vol. III, at 438.) He said he never believed Mr. Gordon had any issues with alcohol. (T.R., Vol. III, at 439.) He said that Mr. Gordon's immediate supervisor, Sergeant Lawson, never indicated that Mr. Gordon had caused any problems or brought any disrepute to the Highway Patrol. (T.R., Vol. III, at 442.) He explained that Sergeant Lawson is a highly qualified trooper and Drug Recognition Expert and that he reported that he did not observe anything indicating that Mr. Gordon was impaired. (T.R., Vol. III, at 445-46.) He further explained that, although Mr. Gordon was late to his shift, such a violation is "basically a sit-down and talking-to the first time around" and not a terminable offense. (T.R., Vol. IV, at 451.)

Lieutenant Kimbrough testified that he is trained that he cannot give a breath test to a suspect with foreign matter in their mouth, such as chewing gum or tobacco. (T.R., Vol. IV, at 453.) He said that the manner in which the breath test was

conducted on Mr. Gordon would not be admissible in evidence in any court of law. (T.R., Vol. IV, at 454.) Lieutenant Kimbrough testified that, had he had input on the decision, he would not have favored termination of Mr. Gordon and would instead recommend a suspension. (T.R., Vol. IV, at 456.)

Captain Stephen Street testified that the termination of Mr. Gordon was necessary because he was not fit for duty when he came to work on January 17, 2020. (T.R., Vol. IV, at 459.) He reasoned that the alcohol found through the breathalyzer machines "vanished" his credibility with the court. (T.R., Vol. IV, at 460.) He was asked to explain this on cross-examination, as he had laid absolutely no basis for the allegation. (T.R., Vol. IV, at 463.) Captain Street was unable to name the criminal court judge in the district. (T.R., Vol. IV, at 463.) He also admitted that he had not talked to any of the prosecutors about the credibility of Mr. Gordon. (T.R., Vol. IV, at 464.) Captain Street was then asked about widely publicized stories regarding other troopers, including Trooper Howard Greenlee, who was "on a recording with another officer" and "offered to destroy evidence against a Knoxville police officer." (T.R., Vol. IV, at 466-67.) He admitted such stories would affect their credibility and could not explain the different treatment of these trooper from Mr. Gordon. (T.R., Vol. IV, at 468.)

Captain Street admitted that his finding against Trooper Gordon was based only upon the breath alcohol test because no witness at the scene believed Mr. Gordon to be under the influence of alcohol. (T.R., Vol. IV, at 469.) He admitted that he knew nothing about whether the breath tests were done with proper procedural safeguards. (T.R., Vol. IV, at 470.)

Corporal Karl Stewart further testified that he approved of the recommendation that Mr. Gordon be terminated and that no lesser punishment was appropriate. (T.R., Vol. IV, at 487.) He explained his decision was based upon Mr. Gordon arriving at work with "a measurable amount of alcohol" in his system which

he considered a "zero-tolerance" offense. (T.R., Vol. IV, at 492.) On cross-examination, however, Corporal Stewart agreed that he "wouldn't discipline [a] trooper for unreliable evidence." (T.R., Vol. IV, at 497.)

ARGUMENT

The trial court correctly reversed the Board of Appeals decision because the Petitioner ably showed that his rights were prejudiced by the unsubstantiated administrative findings.

I. The Petitioner Proved that the Department's Termination of his Employment was Unsupported by Evidence and In Violation of Department of Homeland Security Rules

On appeal, the State avers that the Board found "plenty of cause to terminate Petitioner" due to violation of "several departmental rules and policies on January 17, 2020. (App. Br., p. 16.) The State ignores, however, that the only basis of the dismissal was the breathalyzer results. The evidence adduced at hearing clearly showed that, absent the admission of the blood alcohol content readings, no witness present on January 17, 2020, believed that Mr. Gordon was impaired whatsoever by alcohol. The State now seems to realize the legal error of presenting the unreliable breathalyzer result, and instead focuses on misinterpreting Mr. Gordon's testimony at hearing.

a. The Department failed to establish that the Petitioner had Alcohol in his System, as Correctly Found by the Chancery Court

At the Stage III hearing, Mr. Gordon denied that he was "hungover," and he testified that he was not exhibiting any other signs of a hangover. (T.R., Vol. II, at 267-68.) As noted by the Chancellor, none of the other highly-trained THP officers at the scene believed the Mr. Gordon was under the influence of any alcohol. Even TBI's Special Agent in charge of blood alcohol testing had an in-depth conversation face-to-face with Mr. Gordon and had no indication that Mr. Gordon was under the

influence of alcohol in any way. (T.R., Vol. III, at 363.) Mr. Gordon was clear in his testimony that his headache and late arrival at work were caused by a terrible PTSD episode he had the previous evening that woke him up in the middle of the night. (T.R., Vol. II, at 286-89.) The State, however, wholly ignores Mr. Gordon's unimaginable agony and instead insists that he should have been fired based upon improperly admitted evidence.

The Department Incorrectly Considered a Breath Test that Did not Comply with the Standards set forth in State v. Sensing

Pursuant to Tenn. Code Ann. § 4-5-322(h)(5)(A), the rights of the Petitioner have been prejudiced because the administrative findings are unsupported by evidence that is both substantial and material in light of the entire record. Every one of the State's witnesses admitted that the only evidence that supported the allegation that Mr. Gordon had any trace of alcohol in his system was the breath tests taken during the training on January 17, 2020. The Board of Appeals found that "Petitioner submitted a sample into the Sensor VXL machine at 9:55 AM and the result was .037. Petitioner submitted a second breath sample into the Intox EC/IR-II machine at 9:56:44 AM and the result was .033. Both machines had been properly certified prior to class." (T.R., Vol. II, at 209.) However, this finding is not only inaccurate but based upon impermissible evidence. Without this finding, the Board had no evidence to support the Petitioner's termination.

Every witness at the hearing testified that the breath tests provided by Mr. Gordon violated their training, protocol, and procedures and subsequently would not be admissible in court. As noted by Agent Ferguson, every law enforcement officer must abide by the factors set forth in *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992). *Sensing* remains the standard for whether breath alcohol test results are admissible at trial. Prior to *Sensing*, Tennessee courts had stringent qualifications for admitting breathalyzer test results into evidence. "Whatever the device used, qualified experts

must operate the machine, and they, or someone else qualified, must interpret these test results in evidence before a trial court." *Fortune v. State*, 299 S.W.2d 381 (Tenn. 1955). Our courts have found that the failure to qualify an expert on the operation and result of an intoxication test with scientific devices was reversible error. *See Pruitt v. State*, 393 S.W.2d 747 (Tenn. 1985).

In *Sensing*, Tennessee's Supreme Court eased these requirements, holding that it was "no longer necessary for a certified operator of an evidentiary breath testing instrument to know the scientific technology involved in the function of the machine." *Sensing*, 843 S.W.2d at 416. However, in exchange the following protocol was established for the admission of breathalyzer results:

> (1) The test must be performed in accordance with the standards and operating procedure promulgated by the forensic services division of the Tennessee Bureau of Investigation;
> (2) The operator must be properly certified in accordance with those standards;
> (3) The evidentiary breath testing instrument used was certified by the forensic services division, was tested regularly for accuracy and was working properly when the breath test was performed;
> (4) That the subject was observed for 20 minutes prior to the test, and during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate;
> (5) Evidence that that operator followed the prescribed operational procedure; and
> (6) A printout record must be identified and offered into evidence as a result of the test given to the person tested.

Id. at 263-64. In the case *sub judice*, several of the *Sensing* requirements were ignored during the training. The first breath sample being used against Mr. Gordon, which was recorded on the Alco-Sensor V, was provided at 9:55 a.m. This test was not provided in accordance with the standards and operating procedures required by the TBI as multiple troopers submitted breath samples in the same test. The 20-

minute testing period was not followed, as Mr. Gordon had tobacco in his mouth at the time that he submitted a sample into the machine.

Mr. Gordon then was instructed to submit to an Intox EC/IR-II test one minute later. Apparently, this was done on a different machine to circumvent the 20-minute wait period. Again, he had a foreign object in his mouth within what should have been the 20-minute wait period. Further, he only submitted one sample, as opposed to two samples in compliance with TBI procedures. Agent Ferguson admitted this was an error on his part. In both instances, the printout record notes a "Final Result .000."

It seems ironic that, during a training course on how to properly use breathalyzers so that they may be admitted into court, THP wholly ignored their training in trying to obtain evidence against Mr. Gordon. Mr. Gordon's tests would never be admitted into a court of law, and they should not have been admitted before the Tennessee Board of Appeals. The Department consistently made a disingenuous argument that, for no apparent reason, *Sensing* applies only to criminal cases. This is nonsense, as a close reading of *Sensing* shows that it is based on the Tennessee Supreme Court's interpretation of Tennessee's evidentiary procedures and not based upon constitutional rights applicable only to criminal defendants. Indeed, the opinion called upon statutory law regarding the TBI forensic services division (which was violated in this case as discussed below) and the Tennessee Rules of Evidence. Further, Trooper Gordon and Sergeant Lawson noted that same protocol was needed for administrative forfeiture hearings, which are civil in nature.

The Department cannot overcome the fact that the breath test at issue were improperly admitted pursuant to *Sensing*. Further, the Department did not seek to introduce Agent Ferguson as an expert witness in attempt to overcome these failures. "The admissibility and use of expert testimony is governed by Article VII of the Tennessee Rules of Evidence, specifically Rule 702. These rules apply in

administrative hearings brought under the UAPA." *Morgan v. Tenn. Civ. Serv. Comm'n*, No. M2016-00034-COA-R3-CV, 2017 WL 781702, at *5 (Tenn. Ct. App. Feb. 28, 2017) (citing *Martin v. Sizemore*, 78 S.W.3d 249, 273 (Tenn. Ct. App. 2001)). The Department failed to follow this protocol, just as it failed to observe the clearly established *Sensing* factors.

"Although the UAPA does not clearly specify the standard to be used to review decisions regarding the admission or exclusion of evidence, [Tennessee courts] have previously determined that they should be reviewed using the same standard used to review similar decisions by trial judges—the abuse of discretion standard." *Feldman v. Tenn. Bd. of Med. Examiners*, No. M2010-00831-COA-R3-CV, 2011 WL 2536471, at *13 n. 3 (Tenn. Ct. App. June 27, 2011). The Administrative Law Judge found that "[n]o reasonable basis has been provided to apply the factors set forth in *Sensing* to this matter." (T.R., Vol. I, at 97.) The Judge cited no law or reasoning for this contention. This was a clear abuse of discretion, as the ALJ essentially ignored 28 years of established law and training to allow unreliable evidence into the record. It further ignores clear statutory law, as explained below.

In *Dickson v. City of Memphis Civil Serv. Comm'n*, 194 S.W.3d 457 (Tenn. Ct. App. 2005), a firefighter appealed his termination for violation of a substance abuse policy when the drug test at issue failed to comply with applicable federal regulations. The Chancery Court, hearing this case pursuant to the same UAPA statutory construct as the case *sub judice*, found that the use of the illegally disclosed drug results in the underlying hearing was error, and because the City had no other proof of violation of the substance abuse policy, reversed the City's employment decision. *Id.* at 462. The Court of Appeals upheld the Chancellor's reversal, noting that the City violated federal law in disclosing the drug results at the hearing. *Id.* at 465. Because the improperly-admitted positive drug test was "the sole basis for Mr.

Dickson's termination" the appellate court agreed with the employee's reinstatement." *Id.*

The same reasoning should apply in the instant case—all of the Department's witnesses admitted that the breath tests were the sole proof of Mr. Gordon's alleged intoxication. These tests were admitted in contravention of well-settled Tennessee Supreme Court law and various statutes, as argued below. The State's argument that *Sensing* is only applicable to criminal cases is nonsensical and shows the lack of understanding possessed by the Board. A close review of *Sensing* reveals that the opinion is based upon evidence rules and not criminal procedure rules. *See Sensing*, 843 S.W.2d at 416. Further, as set forth below, regardless of the *Sensing* requirement, the State also improperly considered evidence that is, by statute, inadmissible in the Board's proceedings.

The Board Violated Statutory Law by Considering the Breath Test

Tenn. Code Ann. § 24-7-124(b) explicitly states that "[i]n any judicial or *administrative proceedin*g in which the results of a breathalyzer or similar device used to measure the alcohol content in a person's blood are being introduced for the purpose of proving the alcohol content in a person's blood or the intoxication of such person, such results shall not be admissible for such purposes unless the law enforcement officer operating the device has been trained by a recognized organization in the field as qualified to operate the device used." Neither Mr. Gordon nor Trooper Lawson, who operated the Alco Sensor V machine, were qualified to operate the device, and as a matter of statutory law, the result therefore cannot be used in "any judicial or administrative proceeding." This is clear and unambiguous and certainly applies to the hearing at issue. The Board of Appeals abused its discretion in allowing the sample provided in the Alco Sensor V into evidence.

The Board further abused its discretion in allowing the subsequent sample provided in the Intoximeter EC/IR-II into evidence, as the operator of that machine, Agent Ferguson, certainly was not certified to operate that specific device because it was not a certified device within the TBI program. Contrary to the findings of the Board, the Intox EC/IR-II was never certified by Agent Ferguson. He admitted that he did not certify the machine because it was used merely as a training machine and that the machine was not scheduled to self-calibrate. Pursuant to Tenn. Code Ann. § 38-6-103(g), the TBI's forensic services division shall "establish, authorize, approve and certify techniques, methods, procedures and instruments for the scientific examination and analysis of evidence, including blood urine, breath or other bodily substances, and teach and certify qualifying personnel in the operation of such instruments to meet the requirements of the law for the admissibility of evidence. When examinations, tests, and analyses have been performed in compliance with these standards and procedures, the results shall be prima facie admissible into evidence in any judicial or *quasi-judicial proceeding*, subject to the rules of evidence as administered by the courts."

The machine at issue was never certified to meet the requirements of law for the admissibility of evidence. Agent Ferguson clearly testified that the machine was only used for training, so he never calibrated or certified the machine. Thus, falling short of these standards, the second test was also inadmissible pursuant to clear statutory law. Permitting a test on an uncertified machine in a quasi-judicial proceeding, such as the administrative hearing at issue, violated State law and constituted an abuse of discretion. Pursuant to Code section 4-5-322(2)(1), considering such evidence violated statutory provisions of law.

The breath tests were the sole and exclusive evidence supporting the termination of Mr. Gordon. The Respondent claims that despite the case and statutory laws prohibiting the admission of the breath tests in the case *sub judice*, the

breathalyzer tests should be admitted under Tennessee Rule of Evidence 402 as relevant evidence. In attempt to work around its legal issues, the State argues that admission of the breath results are applicable and appropriate because said tests were not sought for the purpose of obtaining evidence to be used against the petitioner but obtained solely in a training exercise. More incredulously, the State claims that it merely introduced breathalyzer results at the Board hearing *not* for the purpose of proving alcohol content, but only for the purpose of rebutting Petition's lack-of-cause claim for termination. This argument lacks merit as the State clearly relied upon the breathalyzer results almost exclusively in terminating Mr. Gordon and repeatedly introduced them at every level of the administrative review.

Because the tests were admitted in violation of the laws of the Tennessee Supreme Court and Tennessee Code Annotated, the Board abused its discretion in considering the test as competent evidence. Thankfully, the Chancery Court was able to comprehend these clear legal rules and correctly held that the breathalyzer results with unreliable and inadmissible. The State repeats its same arguments trying to ignore these clear mandates; however, this Court should affirm the Chancery Court's decision.

b. Petitioner's Conduct Did Not Violate Department Rules and Polices; however, the Department Violated Several Policies in Firing the Petitioner

Pursuant to Tenn. Code Ann. § 4-5-322(h)(5)(A), the rights of the Petitioner have been prejudiced because the administrative findings are unsupported by evidence that is both substantial and material in light of the entire record. The hearing panel seemed to have a hard time grasping the above-stated concepts regarding the inadmissibility and unreliability of the breath test, and certain panel members seemed to pay little to no attention to the hearing. There was zero competent evidence that the Petitioner was under the influence. The only properly

performed test, conducted at LabCorp, was negative. The Petitioner was illegally subjected to improper, inadmissible tests, and as a result, his employment was terminated without substantial and material evidence. The use of statutorily inadmissible test further constitutes a violation of the Petitioner's rights because the administrative findings and decisions were made in violation of statutory provisions. Tenn. Code Ann. § 4-5-322(h)(2).

As relevant to this case, pursuant to DOSHS General Order 220(V)(B), an employee may only be tested for drugs and alcohol upon reasonable suspicion. The witnesses present on January 17, 2020, unanimously testified that they did not have any reason to think that Mr. Gordon under the influence of alcohol in any way. Trooper Lawson, a Drug Recognition Expert, testified unwaveringly that he had no reason to believe that Mr. Gordon was affected by alcohol. He did not smell alcohol about his person, notice bloodshot eyes, or notice slurred speech. Agent Ferguson had an in-depth conversation with Mr. Gordon and did not believe him to be under the effects of alcohol or any other drug. At that point, no reasonable suspicion existed to subject him to such testing, and by doing so the Department violated DOSHS General Order 220(V)(B). As a result of this improper testing, the Department obtained the evidence that it used in order to support his termination. The Board of Appeals allowed the improperly obtained evidence acquired in contravention of Department standard, and for that reason should be reversed. At most, DOSHS General Order 220(V)(B) permitted the substance testing that took place in Knoxville, Tennessee at LabCorp. (T.R., Vol. II, at 281.) That testing was negative for any and all substances and may not serve as a basis for termination.

Lastly, throughout the hearing, evidence concerning other troopers' involvement in conduct that was more publicized and egregious were presented to the Department's witnesses, who simply could not explain the disparate treatment between Mr. Gordon's case and others. While Mr. Gordon's issue was never

publicized, during the hearing, newspaper articles of other troopers were presented showing the following:

(1) A case of a trooper getting overly intoxicated with her husband, who was also a trooper, and utilizing their power to summon an on-duty trooper to drive them home;

(2) A trooper secretly recording underage girls on his camera and sharing it with other troopers and further improperly obtaining documents while on duty;

(3) A trooper offering to destroy evidence to help another officer.

In all of these cases the troopers continued to work despite the disrepute brought on the department and the publicity. Comparing these unfathomable events to a war veteran suffering with PTSD registering blood alcohol on an improperly-administered breathalyzer test is wholly unmoored to logic and reason.

A decision unsupported by substantial and material evidence is arbitrary and capricious. *Pittman v. City of Memphis*, 360 S.W.3d 382, 389 (Tenn. Ct. App. 2011) (citing *City of Memphis v. Civil Service Comm'n*, 216 S.W.3d 311, 315 (Tenn. 2007)). Further, "a clear error of judgment can also render a decision arbitrary and capricious notwithstanding adequate evidentiary support." *Id.* A decision is arbitrary or capricious if it is "not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. *Id.*

As argued above, the only evidence that Mr. Gordon was under the influence of alcohol while on duty on January 17, 2020 were the breathalyzer tests—and as argued above those tests were done without proper protocol and procedure and in violation of law. It is uncontested that the breathalyzer test was not taken pursuant to the protocol required by the equipment manufactures or TBI training. The Board clearly could not understand these concepts—or chose to ignore them. The Board

further ignored the disparate treatment between this case and others. Mr. Gordon's condition resulted from having to relive a violent flashback associated with PTSD for which he is receiving treatment. He had no prior disciplinary issues and was considered an excellent trooper. His lieutenant would not have supported termination—that decision was made by people higher up the chain of command who did little to no actual investigation. Mr. Gordon's termination is arbitrary and capricious in light of these facts.

c. The Chancery Court Correctly Reversed and Modified the Board

The State's appeal curiously downplays the Board's focus on the improperly admitted breathalyzer test, arguing that "the Board's decision to uphold that [sic] termination is not dependent on the breathalyzer test results." (App. Br., p. 23.) This intellectually dishonest argument is wholly combatted by the record. The Board relied heavily on the invalid blood alcohol readings when makings its findings of facts in the Final Order. (T.R., Vol. II, at 208-09.) The Chancellor further found that the Board's findings that the Petitioner was under the influence pursuant to the department's definitions was not only unfounded but that, without the improper breathalyzer reading, the evidence instead preponderated *against* the Board's findings. (T.R., Vol. VIII, at 1108.)

The State spends much of its brief listing alleged violations of Departmental rules; however, a close look indicates that every single violation is linked back to alleging that Mr. Gordon had alcohol in his system while on duty. (App. Br., pp. 18-21.) As noted by the Chancellor's order, "Respondent *concedes* lack of suspicion of alcohol use before blowing into the breathalyzer on January 17, 2020. It seems unlikely that Petitioner was 'under the influence' of alcohol at the time by even the department definition." (T.R., Vol. VIII, at 1108.)

CONCLUSION AND REQUEST FOR RELIEF

The Board of Appeals violated Mr. Gordon's rights under the TEAMS act by utilizing improper, unreliable evidence to dismiss him from his employment. The Chancellor correctly reversed the Board and found that the termination was improper and not supported by the evidence. This Court, after considering the above-stated argument, should AFFIRM the Chancery Court.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the requirements set forth in Supreme Court Rule 46, Section 3, Rule 3.02. Based upon the word count of the word processing system used to prepare the brief, the word count is 8,839.

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CERTIFICATE OF SERVICE

I hereby certify on this 7th day of June, 2023, pursuant to Rules 5(a) and 20(e) of the Tennessee Rules of Appellate Procedure a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via the court's electronic filing system and forwarded via first class U.S. Mail, postage prepaid to:

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
EASTERN DIVISION

STATE OF TENNESSEE,

v.

JUNE ANN WASCHER

No.: E2015-00961-CCA-R3-CD
Sevier County Circuit Court#AP-11-006-II

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. **Whether the trial court erred in denying the Defendant's motion to suppress when, at the time a law enforcement officer seized the Defendant by confiscating her drivers' license, no exception to the warrant requirement existed in that there was no probable cause or reasonable suspicion of criminal activity, and no consensual encounter as required by Article I, Section 7 of the Tennessee Constitution and the Fourth and Fourteenth Amendments to the Constitution of the United States.**

STATEMENT OF THE CASE

On October 19, 2010, the Defendant was arrested for driving under the influence in violation of Tennessee Code Annotated section 55-10-401 and violation of implied consent law as set forth in Code section 55-10-406. (T.R. at 1,3.) On March 29, 2011, the Defendant was convicted by the General Sessions Court on both charges. (T.R. at 2,4.) On March 31, 2011, the Defendant filed a timely appeal from the judgment of the General Sessions Court. (T.R. at. 7-8.)

On July 10, 2014, the Defendant filed a Motion to Suppress alleging that all evidence in the case resulted from an illegal seizure of the Defendant when law enforcement confiscated her driver's license without reasonable suspicion or probable cause. (T.R. at 11-14.) After an evidentiary hearing on September 22, 2014, the trial court denied the Defendant's suppression motion. On January 20, 2015, the Defendant entered into a guilty plea pursuant to Tennessee Rule of Criminal Procedure 37(b)(2). (T.R. at 15-20.) The Certified Question of Law was specifically referenced by the judgment entered on March 13, 2015. (T.R. at 21.) The Defendant filed a timey notice of appeal on April 10, 2015. (T.R. at 22.)

STATEMENT OF FACTS

Motion for Summary Judgment

The Defendant filed a motion to suppress all evidence that resulted from Officer Brad Lowe's illegal stop of the Defendant which led to a warrantless arrest. The motion set forth the following facts:

> 1. On October 19, 2010, Officer Brad Lowe received a "be on the lookout" regarding a black Chevrolet Truck with Tennessee tag number 014 XXD.
> 2. The BOLO reported "an intoxicated person driving" without any further mention of whether the vehicle had made any driving errors or what exactly was observed to support the tip of intoxicated driving.
> 3. Officer Lowe identified a vehicle matching the description in a parking spot at a Pilot convenience store. A male was standing outside the vehicle, which had its driver side door open.
> 4. Officer Lowe asked who was driving the vehicle and commented that he had received a report of driving under the influence. He told the male standing outside the vehicle, "Well we have a report of an impaired driver behind the wheel, and if it was you I can see that." The Defendant was inside the vehicle's driver seat at this time.
> 5. Officer Lowe then took both people's driver's licenses despite the fact that he only suspected the male of being intoxicated. The male repeatedly said that the Defendant had nothing to drink.
> 6. Officer Lowe further investigated the male and accused the Defendant of lying about [] being the driver of the vehicle. When he could not obtain security footage to show whether the male was driving, he instead started investigating whether the Defendant was driving under the influence. This was the first suspicion he had that the Defendant had committed DUI.
> 7. Officer Lowe's investigation led to the arrest of the Defendant for DUI.
> 8. Officer Lowe's confiscating [of] the Defendant's license with no suspicion that she had committed DUI was an illegal seizure.

(T.R. at 11-12.) Based on these facts the Defendant's motion to suppress argued that "Officer Lowe's initial consensual contact with the Defendant raised to the level of a seizure at the time that he took possession of the Defendant's driver's license." (T.R. at 12) (citing *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000)). The Defendant argued that Officer Lowe seized the Defendant without having any reasonable suspicion that she was intoxicated or had committed any crime. (T.R. at 12-13.)

The Defendant's motion to suppress further anticipated that the State would rely on *State v. Hanning*, 296 S.W.3d 44 (Tenn. 2009), and that the State would argue that the BOLO provided in-and-of-itself requisite probable cause to seize the Defendant. (T.R. at 13.) The Defendant's motion to suppress alleged that her case was distinguishable from *Hanning* because (1) the seizure at issue was not a traffic stop but rather a traditional *Terry* stop where Officer Lowe did not suspect the Defendant was driving or under the influence, and (2) the call of "intoxicated" driving did not specifically allege what reckless driving was observed by the anonymous caller. (T.R. at 14.)

Motion Hearing

Officer Brad Lowe of the Pigeon Forge Police Department testified that at approximately 12:45 a.m. on October 19, 2010, he "was advised by our Pigeon Forge Police Department Dispatch to be on the lookout for a black Chevrolet truck with the tag . . . 014XXD." (Hr'g Tr., pp. 6-7.) Officer Lowe testified, "I was told to be on the lookout for that vehicle possibly a 1049 driver, which is an impaired driver." (Hr'g Tr., p. 6-7.) He said that the vehicle was coming from Gatlinburg toward Pigeon Forge. (Hr'g Tr., p. 7.) Officer Lowe testified that he located a vehicle matching that description at a Pilot gas station at 12:49 a.m. (Hr'g Tr., p. 7.) Officer Lowe testified that he pulled into the parking lot and observed a male standing outside the driver's door. (Hr'g Tr., p. 8.) He testified that the Defendant was in the driver's seat of the vehicle. (Hr'g Tr., p. 8.) Officer Lowe then manually pressed his "record button" and walked up to the male toward the driver's side of the vehicle. (Hr'g Tr., p. 8.)

Officer Lowe testified that the male "appeared to be impaired." (Hr'g Tr., p. 8.) The prosecutor asked Officer Lowe whether he could make any observations regarding the Defendant and he responded, "The only thing I could tell about her was her eyes were watery, but no, because

she was facing the building." (Hr'g Tr., pp. 8-9.) The prosecutor asked, "Who appeared to be - - who was obviously intoxicated, if anyone?," and Officer Lowe responded that the male was "obviously intoxicated from the point of view [Officer Lowe] was at." (Hr'g Tr., p. 9.)

Officer Lowe asked the male whether he had driven the vehicle and "[h]e had made a comment to the effect of, since we got here she has." (Hr'g Tr., pp. 9-10.) He then asked the Defendant whether she had been driving the vehicle and she said that she had driven it from Gatlinburg. (Hr'g Tr, p. 10.) Officer Lowe then took both the Defendant's and the male's driver's licenses. (Hr'g Tr., p. 10.) He testified that he took them "[i]n case one of them ran off." (Hr'g Tr., p. 10.) Officer Lowe then went into the convenience store to "see if [he] could watch a video to see if in fact [the male] was driving and see if they had in fact switched seats." (Hr'g Tr., p. 11.) Officer Lowe stated that he was unable to find any evidence regarding whether or not the Defendant was the driver of the vehicle aside from the statements of the male and the Defendant. (Hr'g Tr., p. 11.)

The video recording from Officer Lowe's cruiser was admitted into evidence. (Tr. Hr'g, p. 12.) The video shows Officer Lowe pulling into the Pilot gas station at approximately 12:53:18 a.m. (Hr'g Tr., Ex. 1.) A male is standing outside of the black truck with an open driver's side door. (Hr'g Tr., Ex. 1). At approximately 12:53:50 a.m. the man closes the door. (Hr'g Tr., Ex. 1.) Officer Lowe repeatedly asked whether the man was driving the truck. (Hr'g Tr., Ex. 1.) The man responds that he has not been driving and that the Defendant was driving. (Hr'g Tr., Ex. 1.) At approximately 12:54:41 the officer asked for the identification of both the Defendant and the male. (Hr'g Tr., Ex. 1.) While the male is looking for his license he states "She ain't been drinking, I have." (Hr'g Tr., Ex. 1, 12:55:06 a.m.) The officer then verbally reports the license numbers

through dispatch. (Hr'g Tr., Ex. 1, 12:55:30 a.m.) At 12:56:20 a.m., the male again states, "She ain't been drinking, she drove the whole time." (Hr'g Tr., Ex. 1.)

On cross-examination, Officer Lowe again confirmed that he took the Defendant's license so that she could not leave. (Hr'g Tr., p. 13.) Officer Lowe further admitted that he took the licenses with him into the Pilot store. (Hr'g Tr., p. 13.) Further he indicated that he verbally used his microphone to check the individual's licenses with dispatch and that he received communication back from dispatch. (Hr'g Tr., pp. 16-17.) Officer Lowe admitted that he then told the two individuals that, if they were lying to him, they were "in trouble." (Hr'g Tr., p. 17.) He explained that, at that time, he did not believe that the Defendant was the driver of the vehicle. (Hr'g Tr., p. 18.) He again admitted that he did not believe that the Defendant was under the influence of alcohol at that time. (Hr'g Tr., p. 18.) He also admitted that he did not suspect of her of driving under the influence. (Hr'g Tr., p. 19.) He agreed that, at the time that he had taken the Defendant's driver's license and went inside the Pilot store, he did not suspect her of being under the influence. (Hr'g, p. 20.)

On redirect examination, the prosecutor asked whether Officer Lowe had concluded his investigation at the time he took the Defendant' driver's license. (Hr'g Tr., p. 20.) He answered that after further investigation he arrested the Defendant for driving under the influence. (Hr'g Tr, p. 21.)

Argument of Defense Counsel

Defense counsel argued that the BOLO call received by Officer Lowe did not indicate any information regarding the validity of the alleged call of drunken driving. (Hr'g Tr., p. 21.) Counsel argued "[i]t's an anonymous call . . . [t]here's nothing supporting any ifnromation that's provided by it." (Hr'g Tr, p. 22.) Counsel explained that Officer Lowe spoke with the male suspect and the

Defendant and specifically did not believe that she was intoxicated. (Hr'g Tr., p. 22.) Defense counsel further argued, to the good credit of Officer Lowe, he admitted that upon taking her driver's license the Defendant was not free to leave. (Hr'g Tr., p. 22.) Further Defense counsel argued that the video recording showed that Officer Lowe indicated that dispatch checked the Defendant's license but that, despite no license issues or outstanding warrants, he retained the driver's license over a long period of time. (Hr'g Tr, p. 22-23.)

Argument of Prosecutor

The prosecutor argued that pursuant to *State v. Hanning* and *Navarette v. California*, that Officer Lowe would have had the ability to seize the vehicle based only on the "corroboration of the anonymous tip." (Hr'g Tr., p. 24.) The State argued that "we've got a possible 1049 or intoxicated driver" with the "color model, make, we have a driver's license." (Hr'g Tr., p. 24.) The State argued that Officer Lowe located the vehicle within five minutes of the BOLO. (Hr'g Tr., p. 24.) The State conceded that Officer Lowe "obviously detain[ed]" the Defendant upon taking her license but argued that he "had a duty to investigate this drunk driving call and that part of that investigation is going to be determining who was actually driving." (Hr'g Tr., p. 25.)

Ruling of the Court

The Court held that, "[u]nder the facts of this case, the Court believes that the officer acted reasonably with minimally, minimally intrusive actions to determine the driver of the vehicle that he had had a report on his radio of an intoxicated driver." (Hr'g Tr., p. 26.) The Court found that Officer Lowe had a description of the vehicle with a tag number. (Hr'g Tr., p. 26.) The Court continued:

> In this case he didn't have to pull the car over. He didn't have to activate his lights. He didn't have to put on his siren. The vehicle was already stopped. At that moment he approached the vehicle, found this defendant in the driver's seat, the door open,

> the passenger standing outside whom the officer observed to be noticeably under the influence of an intoxicant.
>
> Given those facts, the officer had an obligation to ask for identification, to find out who this person is in the driver's seat. She produced her driver's license. It took a little while to determine, for him to make observations to determine that she was also under the influence. His initial impression, as he candidly told us, was that she did not appear to be under the influence but he had an obligation to ascertain who was driving this vehicle, to sort it out, so to speak, between these two individuals.

(Hr'g Tr., pp. 26-27.)

The trial court then expressed its opinion that the *Daniel* case "troubled" it because it stood for the proposition that an individual's handing his license to an officer meant that he was "arrested because he's holding my driver's license." (Hr'g Tr., p. 27.) The trial court concluded that "it's a stretch to say that taking and holding the license for a temporary period of time to run her record, coupled with all the other information, was a violation of her rights." (Hr'g Tr., p. 27.) The trial court found that Officer Lowe had "reasonable grounds to temporarily intervene to conduct his investigation." (Hr'g Tr., p. 27.) The trial court stated that "no attempts were made to leave" and that the officer used "no physical force." (Hr'g Tr., pp. 27-28.) The court said, "He didn't tell anybody not to leave. He didn't tell anybody they were under arrest. So under that set of facts I deny the motion to suppress." (Hr'g Tr., p. 28.)

Defense counsel asked for clarification in light of the fact that the officer never returned the Defendant's driver's license. (Hr'g Tr., p. 28.) The court responded, "[H]e did hold the license temporarily but he had made no other steps whatsoever to detain, to restrict, to interfere with their freedom to move. So I find that under the facts of this case distinguishing from the facts of *Daniel* that it was not at the moment in time a warrantless arrest." (Hr'g Tr., p. 28.)

ARGUMENT

I. Whether the trial court erred in denying the Defendant's motion to suppress when, at the time a law enforcement officer seized the Defendant by confiscating her drivers' license, no exception to the warrant requirement existed in that there was no probable cause or reasonable suspicion of criminal activity, and no consensual encounter as required by Article I, Section 7 of the Tennessee Constitution and the Fourth and Fourteenth Amendments to the Constitution of the United States.

The United States and Tennessee Constitutions prohibit unreasonable searches and seizures of persons. U.S. Const. amend. IV; Tenn. Const. art. 1, § 7. These protections apply to "all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *State v. Berrios*, 235 S.W.2d 99, 104 (Tenn. 2007). A warrantless seizure is presumed unreasonable, and evidence discovered as a result is subject to suppression unless the State demonstrates that the seizure was conducted pursuant to one of the narrowly-defined exceptions to the warrant requirement. *Id.* (quoting *State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn. 2006)). Among these narrowly-defined exceptions are investigatory stops conducted by law enforcement officers based upon reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed. *Id.* (quoting *State v. Williams*, 185 S.W.3d 311, 318 (Tenn. 2006)).

In the instant case the Defendant argued to the trial court that Officer Lowe had no reasonable suspicion supporting his seizure of the Defendant by confiscating her driver's license. The trial court, however, ruled that Officer Lowe's "taking and holding" of the Defendant's driver's license to "run her record" and not a violation of the Defendant's rights. (Hr'g Tr., p. 27.) When appealing a trial court's ruling in a motion to suppress, the trial court's factual determinations are presumptively correct on appeal, *see State v. Stephenson*, 878 S.W.2d 530, 544 (Tenn. 1994), and the findings are binding upon the appellate court unless the evidence in the

record preponderates against them, *see State v. Odom*, 928 S.W.2d 18, 22 (Tenn. 1996); *Stephenson*, 878 S.W.2d at 544; *State v. Aucoin*, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988). The prevailing party at the trial level is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Odom*, 928 S.W.2d at 23. Under this standard, matters regarding the credibility of witnesses, the weight and value to be afforded the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial court. *Id.*, 928 S.W.2d at 23. Further, findings of fact made by the trial judge after an evidentiary hearing of a motion to suppress are afforded the weight of a jury verdict, *see id.* (quoting *State v. Adams*, 859 S.W.2d 359, 362 (Tenn. Crim. App. 1992), and the trial court's ruling on suppression motion should resolve all conflicts of testimony in favor of the prevailing party's theory, *see State v. Berry*, 141 S.W.3d 549, 564 (Tenn. 2004) (explaining that jury verdict resolves all conflicts in testimony and credits prevailing party's theory of the case). The application of law to fact, however, is reviewed by an appellate court *de novo*. *See Garcia*, 123 S.W.3d at 342 (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)).

A. The Defendant was seized under the Article I, Section 7 of the Tennessee Constitution and the Fourth and Fourteenth Amendments to the Constitution of the United States when Officer Lowe took and retained her Driver's License

At the criminal court level, the Defendant averred, and the State conceded, that Officer Lowe's confiscation of the Defendant's driver's license constituted a seizure. The trial court, however, concluded that "it's a stretch to say that taking and holding the license for a temporary period of time to run her record, coupled with all the other information, was a violation of her rights." (Hr'g Tr., p. 27.) An otherwise consensual police encounter becomes a seizure when, "in the view of all the circumstances surrounding the incident, a reasonable person would have

believed that he or she was not free to leave." *State v. Daniel*, 12 S.W.3d 420, 425 (Tenn. 2000). In the instant case, Officer Lowe's initial consensual contact with the Defendant raised to the level of a seizure at the time that he took possession of the Defendant's driver's license. These facts are similar to those examined by our supreme court in *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000). In *Daniel*, a Knox County Sherriff's Department deputy approached two men standing around an automobile parked in an unlighted area. *Id.* at 423. The deputy asked what the men were doing and asked for identification. Id. He then "retained the identification to run a computer check for outstanding warrants." *Id.* While the deputy was running the computer check, the two men asked for and received permission to go into a convenience store to use the restroom and buy a drink. *Id.*

Our state's Supreme Court found that the retaining of the men's identification constituted a seizure that required reasonable suspicion. *Id.* at 427. Specifically the court found that the retention of identification "to run a computer warrants check" reflected a "distinct departure from the typical consensual encounter." *Id.* The court explained, "Without his identification, Daniel was effectively immobilized. Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society." *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 501-02 (1983)). The court concluded that "no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification." *Id.* (citing *State v. Butler*, 795 S.W.2d 680, 685 (Tenn. Crim. App. 1990)).

In the case *sub judice*, Officer Lowe's initial consensual encounter clearly evolved into a seizure pursuant to the Tennessee and United States Constitutions. He admittedly took the Defendant's license and verbally had dispatch run a warrant check. Further, he admitted that he did not return her license because he did not want the Defendant to go anywhere. The trial court

apparently found that taking the Defendant's license did not constitute a full-scale arrest; however, such a finding misses the issue. The Defendant avers that, although the confiscation of her license was not a full-scale arrest, it did constitute as a seizure which required that law enforcement have articulable reasonable suspicion. *Daniel*, 12 S.W.3d at 427. As argued later in this brief, because Officer Lowe did not have any articulable, reasonable suspicion that the Defendant had committed DUI or any other crime, his confiscation of her license constituted an illegal seizure and all resulting evidence must be suppressed.

B. The Information Relayed by Dispatch from a Citizen Informant did not provide Reasonable Suspicion to Stop the Defendant because *Hanning* was Overruled by the United States Supreme Court's opinion in *Navarette*

The Defendant notes a growing trend of prosecutors citing *Hanning* for that proposition that "be on the lookout" or "BOLOS" that allege reckless or drunken driving provide an investigating officer with reasonable suspicion *per se* so long at the suspect vehicle is sufficiently identified. Further, prosecutors have noted that the United States Supreme Court's ruling in *Navarette v. California*, 134 S. Ct. 1683 (2014) essentially affirms *Hanning*. However, a closer review of these cases show that the United States Supreme Court's ruling in *Navarette* provides a more restrictive analysis regarding whether citizen informant tips provide investigating officers with reasonable suspicion or probable cause of criminal activity and, in fact, modifies *Hanning*'s overbroad holdings.

In *Hanning*, a law enforcement officer received "a radio dispatch that an anonymous caller had reported a recklessly driven truck headed north on Interstate 75. The caller identified the vehicle as a black '18-wheeler' with '1-800-GoSmith' or 'Go Smith Brothers' on the back and stated that the truck had exited at the Highway 72 exit ramp." 296 S.W.3d at 46. Based on this dispatch the officer found a truck matching this description near the exit ramp parked in the

emergency lane. *Id.* at 46-47. The officer activated his blue lights and asked the driver to step out of the truck. *Id.* at 47. His subsequent investigation led to the driver's arrest for driving under the influence and possession of an open container of an alcoholic beverage. *Id.* The driver filed a motion to suppress, arguing that the investigating officer had no articulable reasonable suspicion to support the warrantless detention of the driver. *Id.* at 48.

Our Supreme Court noted that in cases involving anonymous informants "there is an enhanced concern as to whether the information is reliable or whether it was fabricated." *Id.* (citing *State v. Wilhoit*, 962 S.W.2d 482, 487 (Tenn. Crim. App. 1997)). Thus, the court noted, before a vehicle may be detained, "there must be a showing of both 1) the basis of the informant's knowledge of the conveyed information and 2) the informant's credibility." *Id.* (citing *Day*, 263 S.W.3d at 903). The court then noted that deficiencies in demonstrating the reliability of the informant can be "cured" by the investigating officer's independent corroboration of the anonymously provided information. *Id.* (citing *Wilhoit*, 962 S.W.2d at 487).

The Tennessee Supreme Court then reasoned that, because the law enforcement officer observed a truck matching the general description given by the caller near the location described by the caller, such corroboration provided adequate reliability of the caller's report that said truck was driving recklessly. *Id.* at 49-50. The court noted that " a report of readily observable evidence of reckless driving carries a high[] degree of inherent reliability" and that the likelihood of a private citizen using anonymous reports of reckless driving to subject someone to police harassment is "highly unlikely." *Id.* at 51.

The court concluded, "In summary, we hold that in this case the anonymous tip reporting reckless driving suggested a sufficiently high risk of imminent injury or death to members of the public to warrant immediate intervention by law enforcement officials and justified the brief

investigatory stop by Sergeant Russell because the offense was reported at or near the time of its occurrence, and the report indicated that the caller was witnessing an ongoing offense; the report provided a detailed description of Mr. Hanning's truck, its direction of travel and location; and Sergeant Russell verified these details within moments of the dispatch reporting the tip." *Id.* at 54. The impact of *Hanning* was clear: an anonymous call to dispatch of reckless driving that sufficiently describes a suspect vehicle provides reasonable suspicion for warrantless detention of said vehicle.

Five years later, the United State Supreme Court faced a similar situation in *Navarette v. California*, 134 S. Ct. 1683 (2014). In that case a 911 caller reported a vehicle had "run her off the road." *Id.* at 1686. The caller provided dispatch with the direction of the vehicle, the area where the alleged reckless driving occurred, and a description of the vehicle with license number. *Id.* at 1686-87. Based upon this information law enforcement pulled over a truck matching the description which led to an investigation and seizure of a large amount of marijuana. *Id.* at 1687. The suspects filed a motion to suppress the stop alleging that "the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity." *Id.*

Unlike *Hanning*, however, the United States Supreme Court relied specifically on the information contained in the 911 call—that the defendant's vehicle "ran the [caller] off the roadway" in determining whether the tip could be considered sufficiently credible. *Id.* at 1688. The court specifically noted that "[a] driver's claim that another vehicle ran her off the road . . . necessarily implies that the informant knows the other car was driven dangerously." *Id.* at 1689.

Also unlike *Hanning*, the United States Supreme Court determined whether or not the anonymous report actually supported reasonable suspicion that "criminal activity may be afoot." *Id.* at 1690 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The United States Supreme Court noted that

a reliable tip only justifies an investigative stop "if it creates reasonable suspicion that 'criminal activity may be afoot.'" *Id.* In making this determination, the High Court considered "whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness." *Id.* (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)). The Supreme Court found that the content of the tip, e.g., the specific driving behavior reported, is important in determining whether a tip of errant driving amounts to reasonable suspicion supporting a stop. *Id.* at 1690-91 (citing several cases noting that "weaving all over the roadway," "crossing over the center line . . . almost caus[ing] several head-on collisions," "weaving back and forth," and "driving in the median" as examples of dangerous behavior that would generally justify a traffic stop on suspicion of drunk driving).

Contrary to *Hanning*, the Supreme Court noted that "[t]he 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car of the highway." *Id.* at 1691. Thus, in determining whether the tip provided reasonable suspicion of drunken driving, the Court looked to the specific dangerous nature of the conduct. *Hanning* does no such thing, instead permitting generic "conclusory allegations" of reckless driving to support warrantless seizures.

Hanning's reasoning can no longer be supported under the law set forth by the United States Supreme Court in *Navarette*. The United States Supreme Court made very clear that the actual content of anonymous tips must be evaluated in determining whether the tip in-and-of-itself provides reasonable articulable suspicion supporting a traffic stop. In the case *sub judice*, Officer Lowe only received from dispatch a report of "possibly a 1049 driver, which is an impaired driver."

(Mot. Hr'g, p. 7.) No information regarding the identity of the informant, the facts leading the informant to conclude that the vehicle was being driven by an intoxicated person, or any other description regarding the driving was introduced into evidence by the State. What an anonymous caller deems as "impaired" driving is a matter of that caller's subjective opinion and by no means confers to law enforcement whether a suspect driver objectively drove in an inappropriate matter. Nothing about the anonymous tip suggested why the caller believed that the vehicle was "possibly a 1049." Nothing about the tip provided detailed information that the driver ran the caller off the road or weaved among lanes of traffic or almost caused an accident. In short, the anonymous tip to dispatch cannot serve as the basis for reasonable suspicion supporting the seizure of the Defendant by taking her driver's license.

C. Officer Lowe Lacked Reasonable Suspicion to Detain the Defendant

Officer Lowe admittedly had no reasonable suspicion supporting his detention of the Defendant. During the hearing, Officer Lowe testified that, at the time that he took the Defendant's driver's license, he did not suspect that she was under the influence. He also testified that he did not suspect that the Defendant was driving the truck in the circumstances reported by dispatch and that the male was driving instead. In other words, at the time that Officer Lowe took the Defendant's driver's license, he admittedly had no articulable reasonable suspicion that she had engaged in criminal activity.

It is well-settled that a seizure, even if temporary, must be supported by "articulable and reasonable suspicion" that the seized person had committed or was about to commit a criminal action. *See Day*, 263 S.W.3d at 908 ("As it has developed over the years, the "reasonable suspicion" standard is a common sense standard that permits an officer to make a brief investigatory stop when he or she reasonably suspects that a specific person has engaged in, is engaging in, or is about to engage in criminal activity."). In the instant case Officer Lowe

admittedly did not have any suspicion that the Defendant was involved in criminal conduct at the time that he seized the Defendant. As a result, the seizure is illegal and all evidence adduced therefrom should be excluded from evidence and the case against the Defendant should be dismissed.

CONCLUSION

The trial court erred in finding that the confiscation of the Defendant's license did not constitute a seizure requiring at least articulable, reasonable suspicion of criminal activity. Further, the trial court erred in determining that the anonymous tip from dispatch permitted Officer Lowe to seize the Defendant for investigation. Contrary to the assertion of the trial court, the Defendant's constitutional rights were violated when she was seized by Officer Lowe, who admittedly had no suspicion that the Defendant had violated any laws. For the above-argued reasons, the order of the trial court should be REVERSED and the criminal charges against the Defendant should be DISMISSED.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rules 5(a) and 20(e) of the Tennessee Rules of Appellate Procedure a true and correct copy of the foregoing **BRIEF OF APPELLANT** has been served on the following persons by placing a copy of the same in the U.S. Mail, postage prepaid, properly addressed as follows, and/or by hand

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This 17th day of Sept, 2015.

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