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.

Criminal Court Judge, Division I, Sixth Judicial District, Knox County, State of Tennessee.

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

1995 017580

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

Tennessee, 017580, November 2, 1995. 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).

- Criminal Court Judge, Division I, Sixth Judicial District, State of Tennessee - August 2011 to Present.
    - I have served as the Senior Criminal Court Judge for the Sixth Judicial District since 2020. I have also served as the Presiding Judge for the Sixth Judicial District for two terms.

- Assistant District Attorney, Sixth Judicial District, State of Tennessee - December 1995 to August 2011.
    - I served as a prosecutor in Knox County with assignments in juvenile court

matters, general criminal court prosecutions, and the child abuse unit.

- Associate Attorney, Law Offices of James S. Evans - May 1995 to December 1995.
  - I briefly served as an attorney in a small firm handling criminal defense, domestic relations, and personal injury matters.

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.

N/A

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 serve as Criminal Court Judge, Division I, for the Sixth Judicial District. I am the senior Criminal Court Judge for our district. This position has a number of important responsibilities, including the following:

- overseeing a docket with approximately six-hundred (600) pending matters at any given time;
- presiding over criminal indictments, presentments, and post-conviction matters from misdemeanor offenses to first-degree murder;
- reviewing law enforcement applications for search warrants, subpoenas, installation of tracking devices, and wiretaps;
- setting bonds for all cases proceeding from the grand jury by presentment; and
- handling appeals from Knox County General Sessions Courts and the Knox County Juvenile Court.

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.

My experience as a licensed attorney can primarily be divided into two careers, Criminal Court Judge and Assistant District Attorney. Since my experience as a judge will be addressed in question 10, I will only address my experience as an attorney prior to taking the bench in this section. My most significant professional experience related to this application has been as a Criminal Court Judge as discussed under question 10.

I believe that a review of my work history as both a judge and an attorney reveals that I am dedicated to my profession, that I see myself as a public servant, and that I am willing to work at all hours in the performance of my duties. I also enjoy my role as a leader in my profession, as will be further addressed in this application.

ASSISTANT DISTRICT ATTORNEY

My primary career as a practicing attorney has been as an Assistant District Attorney in the Sixth Judicial District of Tennessee. I had three primary assignments as a prosecutor: Juvenile Court, Criminal Court, and the Child Abuse Unit.

- **Knox County Juvenile Court.**

I began my career as a prosecutor in the Knox County Juvenile Court. I spent nine years handling prosecutions of juvenile delinquent offenses. I was the supervising prosecutor for seven of those years.

I prosecuted well over twenty-five thousand (25,000) cases during my tenure from minor infractions to first-degree murder. I sought transfer to adult court pursuant to TCA 37-1-134 in approximately 50 cases for juvenile offenders who committed serious offenses. The majority of these cases involved allegations of homicide. I was successful in these requests in almost every hearing. I was only denied transfer to the adult court on two occasions by the juvenile court judge .

I remained in juvenile court for approximately nine years. I stayed for such a lengthy period because I enjoyed the opportunity to be a leader in the juvenile court system. I helped develop multiple programs to assist the community in the context of juvenile justice including Project Safe Neighborhoods, Common Ground (a faith-based organization and governmental agency collaborative), SHOCAP (serious habitual offenders) program, Knox County Truancy Initiative, Restorative Justice Community Service Project, GOCAP (gang offenders), the Committee for Disproportionate Minority Confinement, and the KBA Committee for Unmet Legal Needs of Children.

It was my responsibility to decide what, if any, charges should be brought against the

juveniles. I did this every morning for seven years. I developed new court procedures establishing a process for the initiation of delinquent prosecutions and initial appearances of minors before a magistrate. Prior to this, juveniles would often go weeks before being brought before a magistrate or receiving legal counsel. I was on-call to law enforcement at all hours to address the unique circumstances that would often develop when dealing with juveniles in the field.

- **Lead Prosecutor in Knox County Criminal Court**

In 2004, I began prosecuting various criminal offenses in the Knox County Criminal Court. I was lead counsel in the prosecution of offenses including DUIs, assaults, sex offenses, white collar crimes, and homicides. I estimate that I was lead counsel in approximately five-hundred (500) prosecutions.

During this tenure, I practiced almost exclusively before Judge Mary Beth Leibowitz in Division III. I also handled some class A felonies and first-degree murders in Knox County General Sessions Court. The multiple jury trials I participated in as a prosecutor taught me how to understand and apply the rules of evidence, statutes, and constitutional principles.

- **Prosecutor in the Child Abuse Unit**

In 2007, I changed assignments to prosecute cases in the Child Abuse Unit. Along with my team partner, Charme Allen, we instituted many new policies to more effectively handle these very serious matters.

Once again, I made sure that all the child abuse investigators had my personal phone number and could call me any hour of the day. I drafted and helped serve many search warrants, sometimes into the late evening. I met every week with detectives and DCS investigators to review cases and decide the direction for investigations and prosecutions.

I was the lead prosecutor in about 15-20 jury trials in the Child Abuse Unit. I sat as the second chair in another 15-20 jury trials. The trials all involved either the sexual abuse of a minor or severe physical abuse of a minor, including multiple child murder trials.

During this time, I was led by a tremendous dedication to the victims in my cases. In one unusual case, I had the honor to hold a small baby who had suffered severe brain damage from abuse before she died. I felt an obligation to be present during every step of the investigation and prosecution including attending her autopsy. Her abuser was convicted and received a life sentence.

My experience in the Child Abuse Unit taught me the importance of respect for victims, how to handle confidential matters in the court system, and how to deal with complex legal issues when dealing with human beings on both sides of the podium.

PRIVATE PRACTICE

Upon completion of law school, I immediately began working in a small firm as a student attorney under the supervision of a licensed attorney and then as an associate attorney after I received my law license.

My experience in this firm was brief but enjoyable and very educational. I assisted in multiple domestic relations cases, criminal defense matters, and a few personal injury cases.

STUDENT ATTORNEY

I focused my law school education on a clinical experience. Even then, I was interested in working in the criminal courts dealing with people and applying the law in real-world situations. I served in both the civil division and the criminal defense division of the University of Tennessee Legal Clinic. I had the opportunity under the guidance of a supervisor to represent multiple defendants charged with various offenses in both General Sessions Courts and Criminal Court. After I completed my year in the Clinic, I continued as a student attorney to represent a young defendant in a jury trial. Although my client was convicted by the jury, we were able to assist him in improving his life.

I also served in the first Mediation Clinic at the University of Tennessee College of Law in 1994. I mediated multiple cases pending in the Knox County General Sessions Court including, assaults, vandalism, and harassment.

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

WORK IN CRIMINAL JUSTICE IMPROVEMENT AND COMMUNITY SAFETY

I outlined above under question 8 a number of projects in which I was involved to improve the justice system and assist the community. One of the more significant ones was the Gang Offender Community Action Program. Knox County experienced a significant increase in gang-related crime between 1995 and 2000. In response, I helped spearhead the approach in dealing with juvenile members of gangs, which included identification, monitoring, and the use of transfer hearings to the adult court. Although we have recently seen a resurgence in our area of serious juvenile crime, our efforts resulted in a significant decrease in juvenile gang activity for a number of years.

SPECIAL CASES OF NOTE AS AN ASSISTANT DISTRICT ATTORNEY

All the cases I have handled as an attorney or a judge were of the utmost significance to the people involved in those cases. I will mention a few matters of special note that I handled as an attorney here and as a judge under question 10.

- *State v. Burns,* 205 S.W.3d 412 (Tenn. 2006). I prosecuted a juvenile for aggravated robbery. He was adjudicated delinquent and appealed to the Knox County Criminal Court. A precedent which had stood for over 30 years (*Arwood v. State,* 463 S.W.2d 943 (Tenn. App. 1970)), held that a juvenile had a right to a trial by jury on appeal to the Criminal Court. I argued that the precedent should be overturned based upon a 1971 United States Supreme Court case, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), which held that the Fourteenth Amendment did not require a jury trial for juvenile offenders. Although *McKeiver* was announced decades earlier, Tennessee courts continued to follow the *Arwood* case. The trial court agreed with me; however, the Court of Appeals reversed that decision and said the *Arwood* holding should stand, ruling that juveniles were entitled to a trial by jury on appeal from juvenile courts. In *Burns*, the Tennessee Supreme Court accepted the legal argument I originally made in Criminal Court and reversed *Arwood*. This significant case set a new precedent that has been followed since.

- *State v. Porter*, No. E2010–01014–CCA–R3–CD, 2011 WL 2766581 (Tenn. Crim. App. Nov. 17, 2011). This was a highly technical case dealing with the controversial theory of shaken baby syndrome. Multiple expert witnesses were used to establish that the child did not die from an accidental injury, and I was able to obtain a conviction for first-degree murder which was upheld on appeal.

PROTECTION OF CHILDREN

Child abuse cases are traditionally difficult to investigate and prosecute. Relatively few cases were prosecuted in Knox County prior to 2008. Doctors working at East Tennessee Children's Hospital were often frustrated by the lack of criminal charges against offenders in some of the children they treated. To address this, we created a unit dedicated solely to these difficult matters. My partner and I worked for several years to make the Knox County DA's office a leader in the prosecution of crimes against children in Tennessee.

One of the homicide cases I handled in the Child Abuse Unit was *State of Tennessee v. Paul Jerome Johnson*. After I completed a full investigation of the case of an 18-month old, murdered child, I determined that we had wrongly charged the victim's mother as a co-defendant. I dismissed the charge against her without any requirements on her part to testify against the offender. It was the right thing to do. I was able to obtain a conviction after a jury trial of the offender. However, the conviction was reversed due to out-of-court issues with the trial judge. The defendant was convicted again during retrial by my successor in the Child Abuse Unit after I became a judge. See *State v. Johnson*, No. E2013–02437–CCA–R3–CD, 2015 WL 1579873 (Tenn. Crim. App. April 6, 2015).

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 had the honor to serve as Criminal Court Judge for Division I of the Sixth Judicial District of Tennessee since being appointed on August 1, 2011 and being reelected without opposition in three subsequent elections. As a judge, I do not have a defined set of work hours. I am a judge 365 days of the year, on duty for 24 hours a day. The following is a description of some of my duties in this important office.

JURY TRIAL EXPERIENCE

The primary legal device established by both the United States Constitution and the Constitution for the State of Tennessee to protect the rights of our citizens in criminal prosecutions is a trial by a jury of peers. It is through jury trials that judges and attorneys gain a true understanding of how our statutes, rules of evidence, rules of procedure, and constitutional protections work together in real-life experiences. I am one of the most experienced trial judges in the State. I see my extensive experience presiding over jury trials as both a great privilege and strength.

As of October 1, 2024, I have presided over more than three-hundred fifty (350) jury trials as a criminal court judge since taking the bench in August 2011. Over forty of those trials have been for first-degree murder, nine for second-degree murder, eighteen for attempted first-degree murder, six for vehicular homicide, and thirty-five for sexual offenses, including sexual abuse of minors. The other jury trials covered primarily felony offenses involving controlled substances, thefts, burglaries, kidnappings, robberies, and assaults.

There simply is no substitute for understanding the hundreds of decisions a trial judge must make during a trial than to serve in that capacity. I will not say I have seen "it all." Every time I think that I have seen it all, something new happens in court. But I have gained much knowledge through experience as to what a trial judge faces when a legal decision must be made quickly. That experience will assist me greatly as an appellate judge in reviewing actions taken by other criminal court judges.

OTHER DUTIES AS A TRIAL JUDGE

Knox County Criminal Courts are in session virtually every working day of the calendar. When not in trial, my daily dockets involve motions hearings, pleas, case status updates, probation revocations, bond motions, sentencing hearings, and post-conviction matters such as petitions for writs of habeas corpus, petitions for writ of error coram nobis, and petitions for post-conviction relief. There are generally around 250 to 350 active indictments waiting to be resolved on the Division I calendar at any given time. A rough estimate of all indictments, violations, and post-conviction issues that I have concluded as a judge is well over 30,000

matters in the last thirteen years.

I truly enjoy the motion practice of the court. It is through hearing various motions and petitions, such as motions to suppress evidence and motions in limine addressing evidentiary matters, that I get to spend time studying and applying the law and the rules of evidence. Although the court may enter oral rulings after such motions, it is my practice to take the matters under advisement and issue written findings of fact and conclusions of law. There are very few such matters that I have not addressed in writing after the hearing. I have issued over two thousand such written rulings. This experience and practice have provided me with a sound basis for the practice of appellate jurisprudence. It also leads me to believe that I would enjoy the work of being an appellate court judge.

On March 15, 2024, I was appointed by the Tennessee Supreme Court to serve on a Three - Judge Panel pursuant to TCA Sec. 20-18-101 to rule upon the constitutionality of a civil statute currently being challenged by a plaintiff in the Chancery Court for Davidson County. This is a pending matter, and it would be improper to comment further.

WORK WITH LAW ENFORCEMENT

One of the great privileges of my job is to assist law enforcement at all hours of the day and night by reviewing applications for search warrants, trap and trace devices, GPS tracking devices, and wiretaps. The availability of a judge to review such requests by law enforcement to pierce an individual's important constitutional rights to privacy and liberty is essential for the just and efficient investigation of crimes and the safety of the community. I have shared my personal cell phone number with many detectives in our jurisdiction. If they are working in the middle of the night, the least I can do is be available to ensure that they can get the instruments they need to conduct their investigation and that the citizens' rights are being protected. Our clerk began keeping track of the number of search warrants being issued beginning in 2020. I have approved over 800 search warrants since 2020 and reviewed even more that required additional investigation and were not approved. We do not keep track of other instruments, such as trap and trace devices, but I have issued well over four hundred (400) of those during the same time frame.

NOTEWORTHY CASES

I will describe a few noteworthy cases I have presided over as Criminal Court Judge between 2011 and the present which proceeded to the appellate courts. The dates of the appellate opinions are listed in the citations.

- *State v. Harbison*, 539 S.W.3d 149 (Tenn. 2018). This case was a complex attempted homicide trial involving four defendants from two rival gangs who engaged in a shoot-out in front of a local high school at the end of the school day. There were multiple legal issues to address before and during the trial. One of the more difficult issues involved a motion to sever the defendants. I issued a written ruling explaining why the motion to sever should be denied. After conviction, the Court of Criminal Appeals reversed based upon my denial of the severance motion. On further appeal, the Tennessee Supreme upheld my ruling and reinstated most of the convictions. This case has been cited over

87 times in appellate opinions in the last six years.

- *State v. Guy*, 679 S.W.3d 632 (Tenn. Crim. App. 2023). This extremely gruesome case where the defendant murdered and mutilated his parents' bodies received national media attention. There were many constitutional issues to be addressed by the court and are discussed in the appellate opinion cited above which upheld the convictions. The most significant aspect of this case is that it was tried during the height of the COVID pandemic. It was one of the few cases tried in Tennessee between April and December of 2020. I created a very detailed plan to ensure due process for the defendant, protect the health of the jurors, media, and trial participants, and provide a speedy resolution of an old case I inherited from another division.

- *State v. Williams, Colbert, and Bassett*, No. E2019-02236-CCA-R3-CD; 2022 WL 152516 (Tenn. Crim. App. Jan. 18, 2022). This was another trial that received national media attention where a young football star was killed in a gang related shooting while he was innocently standing on a porch. The most significant legal issues involved a motion to suppress a statement, admission of other bad acts under Rule 404(b) of the Tennessee Rules of Evidence, change of venue, and admission of a rap video. The Court of Criminal Appeals upheld my rulings on each of these matters and affirmed the convictions. The victim was honored by both President Obama and ESPN.

- *State v. Berkebile*, No. E2022-01700-CCA-R3-CD; 2024 WL 2881089 (Tenn. Crim. App. June 7, 2024) perm. app. filed (Tenn. Aug. 2, 2024). This was a case of first impression in the State of Tennessee and one of the first such cases prosecuted in the nation where a defendant was held criminally responsible for an act of suicide by the victim. The main legal issues in this case involved jurisdiction (the defendant was in another state during the homicide) and the sufficiency of the evidence to support the conviction. The State alleged that the defendant was criminally responsible for the victim's death by making statements on-line encouraging the victim to engage in dangerous conduct and kill herself. The Court of Criminal Appeals upheld my rulings and affirmed the convictions. Although only a few months old, this opinion has already been cited in Wharton's Criminal Law, Section 6:3 Proximate cause.

- *State v. Black*, No. E2022-01741-CCA-R3-CD, 2024 WL 2320284 (Tenn. Crim. App. May 22, 2024). This case involved a claim of self-defense and the "stand your ground" law. It was tried after *State v. Perrier*, 536 S.W.3d 388 (Tenn. 2017) but before any appellate court had addressed whether the court should instruct the jury that a defendant had a duty to retreat. I departed from the pattern jury instruction in this case and told the jury that the defendant had a duty to retreat under the facts of this case. This instruction was approved by the Court of Criminal Appeals and will be included in the next publication of the Tennessee Pattern Jury Instructions (Criminal).

- *State v. Enix*, No. E2020-00231-CCA-R3-CD; 2021 WL 2138928 (Tenn. Crim App. May 26, 2021); *State v. Enix*, 653 S.W.3d 692 (Tenn. 2022). This was a high-profile homicide case where the defense sought a change of venue. The court denied this request and the Court of Criminal Appeals stated, "The record reflects that the trial court carefully and meticulously led the jury selection process to ensure that Defendant received a fair trial," and affirmed the court's ruling. (The Tennessee Supreme Court used this case to announce that plain error review is the standard to apply to claims of prosecutorial misconduct during closing arguments when not objected to at trial.)

- *State v. Abdelnabi*, No. E2017-00237-CCA-R3-CD; 2018 WL 3148003 (Tenn. Crim. App. June 26, 2018). This especially aggravated kidnapping case was a retrial. In the first trial, I ruled that the State's final witness in the trial violated Rule 404(b) by discussing other bad acts of the defendant and declared a mistrial. Prior to the second trial, the defense argued that a re-trial would violate double jeopardy protections. The court denied this motion and was affirmed on appeal after the conviction.

- *State v. Shackleford*, 673 S.W.3d 243 (Tenn. 2023). This aggravated robbery case involved difficult constitutional issues regarding Tennessee's Criminal Gang Offense Statute. I denied multiple defense challenges to the constitutionality of the statute and the sufficiency of the evidence. The Court of Criminal Appeals reversed the convictions on fatal variance grounds. The Tennessee Supreme Court held that I properly ruled that the evidence was sufficient and reinstated the convictions.

- *State v. Ivey*, No. E2017-02278-CCA-R3-CD, 2018 WL 5279375 (Tenn. Crim. App. Oct. 23, 2018). This case involved a new practice by the Knox County District Attorney's Office to prosecute shoplifters who had previously been banned from a store under the burglary statute. The defendant argued that this practice violated due process in that the statute was unconstitutionally vague. I denied the motion. The Court of Criminal Appeals affirmed. It is now routine for the State to prosecute repeat shoplifters from the same store under the burglary statute.

FIRST DEGREE MURDER CASES

As stated above, every case carries with it significance to the parties involved. It is worth at least citing here to a representative sample of other first degree murder convictions of cases I have presided over which resulted in convictions and proceeded to appeal. Each of these cases had unique factual and legal issues which were addressed by the appellate courts in the cited opinions.

- *State v. Locke*, No. E2022-01676-CCA-R3-CD, 2024 WL 1880813 (Tenn. Crim. App. April 30, 2024).

- *State v. Longmire*, No. E2022-01436-CCA-R3-CD, 2023 WL 5500658 (Tenn. Crim. App. Aug. 25, 2023).

- *State v. Atkins*, No. E2022-01027-CCA-R3-CD, 2023 WL 5348790 (Tenn. Crim. App. Aug. 21, 2023).

- *State v. Johnson*, No. E2022-00302-CCA-R3-CD, 2023 WL 2567645 (Tenn. Crim. App. March 20, 2023).

- *State v. Hansard*, No. E2021-01380-CCA-R3-CD, 2022 WL 17574357 (Tenn. Crim. App. Dec. 12, 2022).

- *State v. Holmes*, No. E2021-01489-CCA-R3-CD, 2022 WL 16736968 (Tenn. Crim. App. Nov. 7, 2022).

- *State v. Hickman*, No. E2021-00662-CCA-R3-CD, 2022 WL 13693116 (Tenn. Crim. App. Oct. 24, 2022).

- *State v. Hardy*, No. E2021-00616-CCA-R3-CD, 2022 WL 2070267 (Tenn. Crim. App. June 9, 2022).

- *State v. Donaldson*, No. E2020-01561-CCA-R3-CD, 2022 WL 1183466 (Tenn. Crim. App. April 21, 2022).

- *State v. Cox*, No. E2021-00621-CCA-R3-CD, 2022 WL 984330 (Tenn. Crim. App. April 1, 2022).

- *State v. Cook*, No. E2020-01494-CCA-R3-CD, 2022 WL 353701 (Tenn. Crim. App. Feb. 7, 2022).

- *State v. Wright*, No. E2019-01290-CCA-R3-CD, 2020 WL 4218841 (Tenn. Crim. App. July 23, 2020).

- *State v. Wooten*, No. E2018-01338-CCA-R3-CD, 2020 WL 211543 (Tenn. Crim. App. Jan. 13, 2020).

- *State v. Freeman*, No. E2018-00778-CCA-R3-CD, 2019 WL 2244759 (Tenn. Crim. App. May 24, 2019).

- *State v. Hopkins*, No. E2016–02192–CCA–R3–CD; 2017 WL 4221148 (Tenn. Crim. App. Sep. 22, 2017).

- *State v. King*, No. E2016–01043–CCA–R3–CD, 2017 WL 2242295 (Tenn. Crim. App. May 22, 2017).

- *State v. Reynolds*, No. E2015–00499–CCA–R3–CD, 2017 WL 936521 (Tenn. Crim. App. Mar. 9, 2017).

- *State v. Hill*, No. E2015–00811–CCA–R3–CD, 2017 WL 532481 (Tenn. Crim. App. Feb. 9, 2017).

- *State v. Rivera*, No. E2014–01832–CCA–R3–CD, 2016 WL 2642635 (Tenn. Crim. App. May 6, 2016).

DEDICATION TO THE CONSTITUTION

My work history as a judge demonstrates my high respect for the rule of law and our constitutions. Since taking the bench in 2011, I have opened each morning's docket with a reading from the constitution, either the federal constitution or our state constitution. This has resulted in my publicly reading the entirety of the constitutions multiple times over the years. I estimate that I have read through the United States Constitution in open court approximately 25 times over the last thirteen years and the Tennessee Constitution approximately 24 times. I do this not just to respect the constitutions, but to remind myself of the principles our country and state are founded upon.

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.

- Trustee, King University Board of Trustees, Bristol, Tennessee. King currently has an endowment of approximately $40 million and an annual budget over $25 million.

- Administrative Board and Elder, Fellowship Evangelical Free Church, Knoxville, Tennessee. I served for over three years on the Administrative Board of Fellowship Church in Knoxville, Tennessee and as an elder for nine years. As a voting board member, I assisted in the church's budget (annual budget of approximately $7 million) and spending decisions.

- Board of Directors, Knoxville Leadership Foundation. I served for three years as a member of the Board of Directors for KLF. Part of my responsibilities as a board member was to oversee a large budget involving multiple faith based charities.

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

I am a strong advocate for specialty treatment courts. I currently serve on the Advisory Board for the Knox County Drug Court Program and I am one of the founding board members of the newly established Mental Health Court.

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 applied for my current position as Criminal Court Judge, Division I, Sixth Judicial District following the resignation of the sitting judge.

I was selected by the Judicial Nominating Commission from a group of nine applicants on April 26, 2011, and I received the appointment from Governor Bill Haslam. I took office on August 1, 2011.

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 College of Law, Knoxville, Tennessee. Doctorate of Jurisprudence. 1992-1995.

- I concentrated my focus in law school on a clinical experience by serving in the Knox County courts through the Mediation Clinic as a trained and certified mediator and in the Legal Clinic as a criminal defense student attorney and civil student attorney.

- King College, Bristol, Tennessee. Bachelor of Arts, Magna Cum Laude 1988 - 1992 Major — History, Minor — Bible and Religion.
  - Completed summer term study in Israel, 1990.

- The Judge Advocate General Legal Center Charlottesville, Virginia. 2004 - 2005 Judge Advocate Officer Basic Course Graduate Diploma.
  - This course is designed to prepare JAG Officers to represent the Army in legal matters and leadership positions.

- The Judge Advocate General Legal Center Charlottesville, Virginia. 2010 - 2011 Judge Advocate Officer Advanced Course Graduate Diploma.
  - This course is designed as an advanced legal course of study covering military law issues including fiscal law, contract law, administrative law, criminal law, and legal writing.

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]

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

34 years

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

32 years

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

Knox

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 served for 10 years in the United States Army Reserves. I received a direct commission to the rank of First Lieutenant in March 2004. In May 2006, I was promoted to the rank of Captain. I was assigned to the 139th Legal Services Organization in Nashville, Tennessee for eight years and the 3397th Garrison Support Unit in Chattanooga, Tennessee for two years. My position in each unit was Judge Advocate General, MOS 27A (attorney).

I received the Army Commendation Medal with two oak leaf clusters and the Army Achievement Medal with one oak leaf cluster for my work as a JAG officer.

In 2005, I received a written commendation from Major General Gregory Hunt for my legal assistance to the 100th Training Division in support of the Global War on Terror. I received an Army Commendation medal and was presented a coin by Brigadier General Gil Beck for my work at Fort McCoy as the Officer in Charge of the 2010 Midwest Legal On-site.

I was appointed to be the Investigating Officer for multiple command directed (Article 15-6) investigations and performed legal reviews of many other investigations involving criminal behavior, property loss, and ethical violations.

I served as the S2, Staff Security and Intelligence Officer, for the 139th LSO. My duties in this staff position included developing measures and policies to ensure all unit facilities and activities maintain strict security.

I completed three temporary assignments in Germany and one in Korea. I was named Most Outstanding Attorney by the commander of the JAG unit at Army Garrison Yongsan in Seoul, Korea for my work in support of Operation Ulchi Freedom by maintaining operations in the JAG office.

I received secret level security clearance from the United States Government in 2005 and maintained this clearance while serving. I qualified as a sharpshooter with the M-16 rifle and as a marksman with the M-9 handgun. I was honorably discharged on March 24, 2014.

I now serve as Chaplain for the American Legion, Post 2 in Knoxville, Tennessee.

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 received one notice from the Board of Judicial Conduct filed by a defendant in 2017 in which I was directed to respond to a complaint that I had not ruled on a pending motion. I submitted a copy of the order which had been prepared by me in a timely manner. The complaint was then dismissed. No. B17-6895.

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

No

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

No

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

I was named as a defendant in a civil suit in Knox County Circuit Court filed pro se by a defendant who had a pending criminal case before me. He was asking the Circuit Court to order me to reverse my denial of his petition for post-conviction relief. The Circuit Court promptly dismissed the suit and the defendant appealed. The Tennessee Court of Appeals upheld the dismissal of the suit. *Nehad S. Abdelnabi, v. Steven Wayne Sword, Judge*, No. E2023-00557-COA-R3-CV (Tenn. App. April 26, 2024).

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.

- King University Board of Trustees, Bristol, Tennessee. I have served as the Chair of the

Governance Committee since 2021.

- Elder, Fellowship Evangelical Free Church, Knoxville, Tennessee. 2011-2018, 2020-2023. I served as the Secretary around 2014-2015.
- American Legion, Post 2, Knoxville, Tennessee. I have served as Chaplain from 2012 to present.
- Knoxville Leadership Foundation, member of the Board of Directors.

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

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

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

No

ACHIEVEMENTS

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

- Tennessee Trial Judges Association, 2011 to present.
- Knoxville Bar Association, 1995 to present. Member of the Board of Governors 2016.
- Knoxville Bar Foundation, 2019 to present.

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.

- Award for Judicial Excellence, Knoxville Bar Association.
    - I received this award in 2022. This award is not given every year. Only one other currently sitting State Court judge has received this award (Hon. John Weaver). Part of the basis for this recognition was for my leadership during the

COVID pandemic. In order to find a way to conduct court in the middle of the pandemic, all of the stakeholders in the criminal justice system for Knox County formed a committee to meet weekly to discuss issues and find solutions. I led this committee. The work of the committee was so valuable, we decided to continue to meet quarterly to discuss issues concerning the justice system. I continue to chair this committee.

- Inducted into the Knoxville Bar Foundation in 2019.
- Leadership Knoxville, Class of 2013.

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

- Local Rules for Knox County Criminal Courts, 2014. Revised, April 2023.
- The Art of Mental Bicycle Maintenance, June 2023, Dicta, Knoxville Bar Association Magazine.
- The Lautenberg Amendment to the Gun Control Act of 1968, July 2008, Fort Detrick Post Newsletter, Fort Dietrick, Maryland.
- I was recently selected to chair the Tennessee Pattern Jury Instruction Committee (Criminal) which is responsible for editing the book Tennessee Pattern Jury Instructions (Criminal) published annually by Thomson Reuters.

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.

- Unanimous Verdicts, Multiplicity, Duplicity, Election, and Merger: Indictment Killers and Fixes, CLE, Tennessee Judicial Conference, 2022.
- The Art of Stress Free Productivity, CLE, Knoxville Bar Association, 2023.
- Social Media presentation (panel member), CLE, Tennessee Judicial Conference, 2020.
- Ethical Standards for Prosecutors, CLE, Knox County District Attorney's Office, 2019.
- Using Prior Inconsistent Statements in Impeachment, Knoxville Bar Association. 2019.
- Ain't Behavin, A View from the Bench, CLE, Knoxville Bar Association. (Scheduled Nov. 1, 2024.)

- As indicated above, I currently serve as the Chairman of the Tennessee Pattern Jury Instruction (Criminal) Committee. In this position, I am responsible for leading CLE's for the members of the committee three times a year.

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.

Knox County Criminal Court Judge, Division I, Sixth Judicial District. I was originally appointed, but was elected to the position three consecutive times.

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 write all of my own opinions and rulings. The three examples attached were submitted to a fellow attorney for grammatical editing only prior to submission with this application.

1) *State v. McMillan* – Order Regarding Motion to Dismiss the Indictment.

2) *State v. Guy* – Order Regarding Motion to Dismiss Counts Six and Seven on the Basis of Unconstitutional Vagueness.

3) *State v. Briceno* – Omnibus Findings of Facts and Conclusions of Law Regarding Motions to Suppress Evidence from Unlawful Seizure, Statements, and Unlawfully Performed Breath Testing.

ESSAYS/PERSONAL STATEMENTS

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

I open each day of court by reading a portion of the Constitution. Our constitutional principles are the civil foundation of our society. The Court of Criminal Appeals has a unique role in ensuring that our criminal courts afford those rights for all citizens and to render legal opinions that not only address that specific case, but which will shape the rulings of judges across the State going forward. My extensive experience in criminal trials, knowledge of the law, and gift of leadership have provided me with the necessary skill set to perform this duty well.

I have developed a strong passion for the intellectual challenge of applying the law in the

criminal jurisprudence setting. This is reflected in the large number of written opinions I have issued as a Criminal Court judge. I'm excited about the opportunity to focus my professional efforts in this realm throughout our state.

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

As a judge, I am tasked with ensuring that all persons receive equal justice under the law every day. This is never truer than when I have authority over the liberty of another human being. My commitment to equal justice is demonstrated by treating everyone I encounter with respect and honor, regardless of their station in life. I am limited in providing pro bono legal work as a judge, but I have used my position to assist those individuals in great need. I assisted indigent defendants in obtaining their driver's licenses by providing relief from court costs obligations, sought treatment rather than incarceration for defendants suffering from substance abuse or mental health issues, and addressed victims and their families in open court in acknowledging their role in the system. I also served as a member of a review board to examine disproportionate confinement of minority youth in Knox County.

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 seeking appointment to the Court of Criminal Appeals, Eastern Division. The court is comprised of 12 judges representing the three grand divisions of the State of Tennessee. I believe my selection would provide a great wealth of trial experience to the Court. Understanding the context and experience of a trial judge who had to make a decision in sixty seconds to later be reviewed by a panel of judges over months, provides valuable perspective to the court. I would also bring a great hunger and intellectual curiosity regarding the developmental history of criminal jurisprudence in both our state and our nation. It is important that appellate opinions clearly explain the historical legal background of the decisions reached by the Court. I would also provide leadership to the many judges across the state who are wrestling with the challenges of criminal justice.

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)***

The Bible says, "Every one to whom much is given, of him will much be required." Luke 12:48 I have been given much and have attempted to give much to my community.

I serve as a Trustee of King University, and I am the chair of the Governance Committee. I plan to continue in this capacity to advance Christian higher education in our state.

I serve as an elder of a large church, Fellowship Evangelical Free Church. One of my primary responsibilities has been to provide care and guidance to individuals in crisis through the Congregational Care Committee. I have chaired this committee for several years. I plan to continue as a lay leader in my church and to participate in our numerous charitable activities.

I have served on many charitable boards such as Knoxville Leadership Foundation, Compassion Coalition, and the Knox Area Pregnancy Prevention Initiative. My work as a trial judge has curtailed the amount of time I have available to serve on such committees. I anticipate continuing to look for opportunities on similar boards in the future.

I am an active member of the Knoxville Bar Association and have held several leadership positions with KBA. I plan on continuing to participate with KBA to continue building community among attorneys in Knox County.

I am a member and serve as the Chaplain for Post 2 of the American Legion. We are a group of veterans serving other veterans and the community. I plan on continuing in this role.

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)***

I outlined above my level of experience in the Criminal Justice System and my leadership gifts. I will use this section to explain my involvement in developing the next generation of attorneys and community leaders. One of the great joys of my professional experience has been the opportunity to guide and mentor interns, lawyers, and new judges. I served as the supervising attorney for many law students who interned in the Knox County District Attorney's Office. Many of those students have gone on to be outstanding attorneys in our state practicing as prosecutors, defense attorneys, and civil attorneys. I have also served as the supervising judge for many interns and externs from the University of Tennessee College of Law, Lincoln Memorial Law School, and other law schools across the country. These students have also become outstanding lawyers. (One was a finalist on Survivor!). I am currently engaged in a mentoring role for new judges in our area.

I have also had the privilege of hosting international judges from Timor Leste and the Republic of Georgia as they sought to learn about the American criminal justice system.

These numerous experiences as a mentor demonstrate my love for teaching and guiding future attorneys and judges. Appellate judges serve as examples and mentors for trial judges and attorneys across the state. My involvement in the lives of upcoming attorneys would continue and be broadened by serving in the Court of Criminal Appeals.

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

Yes. Justice Antonin Scalia said, "The judge who always likes the results he reaches is a bad judge." His point was that it is the role of the judge to render decisions based on the law, not the judge's personal opinions or desired outcome. I not only agree with this, but I have lived it at personal cost. In 2019, I sentenced a defendant for committing sexual assault on his adopted daughter. The case was legally and factually complex. Despite the court's great sympathy for the victim, the court had to sentence the defendant in accordance with the sentencing laws in effect at the time and consider mitigation in sentencing. I could have sentenced him to serve as little as 3 years in prison and placed him on probation. I followed the sentencing guidelines and pronounced a sentence of 12 years to serve in prison with partial consecutive sentences, which was less than the State was seeking. This sentence garnered extreme vitriol from certain individuals in other states and resulted in multiple death threats, social media attacks, and obscene mailings and packages. Although I may have personally wished to have given him a harsher sentence, I was bound to follow the sentencing laws. The Court of Criminal Appeals recently upheld the conviction and sentence in a 72-page opinion. *State v. Richards*, No. E2022-01468-CCA-R3-CD; 2024 WL 4142596 (Tenn. Crim. App. Sept. 11, 2024).

The motto of the Tennessee Judiciary is "Fiat Justitia, Ruat Coelum", or "Let justice be done though the heavens may fall." I could not agree more.

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.

A. Tim Burchett, United States Representative

[redacted]

B. Becky Duncan Massey, State Senator

425 Rep. John Lewis Way, N., Suite 776, Cordell Hull Bldg.
Nashville, TN 37243
[redacted]

C. Jason Mumpower, Comptroller of the Treasury

425 Rep. John Lewis Way, N., Cordell Hull Bldg.
Nashville, TN 37243
[redacted]

D. Glenn Jacobs, Knox County Mayor

400 W. Main Street, Suite 615
Knoxville, TN 37902
[redacted]

E. Dr. Richard Dunn, White Horse Leadership Initiative, Founder and President

[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] 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: Oct. 21, 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.

STEVEN SWORD
Type or Print Name

Signature

10/21/24
Date

017580
BPR #

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

N/A

WRITING SAMPLES

STATE V. MCMILLAN

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE	}	
	}	
VS	}	**NO. 126807**
	}	
CHARLES MONROE MCMILLAN, ALIAS	}	

ORDER REGARDING MOTION TO DISMISS THE INDICTMENT

This cause came on to be heard by motion of the Defendant seeking an order from this Court dismissing the indictment on the grounds that the charging statute is facially unconstitutional, or in the alternative, unconstitutional as applied to the Defendant. The basis of his motion is that Tenn. Code Ann. § 39-17-1307(c) violates the Second and Fourteenth Amendments[1] to the United States Constitution. The State argues the statute is constitutionally valid. This is a matter of first impression in the State of Tennessee. This Court heard oral argument on the 6th day of September 2024 and took the matter under advisement. This Court now rules as follows.

FACTUAL FINDINGS

The relevant facts are not in dispute for the purposes of this motion. The defendant was convicted in the Superior Court of Whitfield County, Georgia, of forgery in the third degree, an offense which was classified as a felony in Georgia and which would

[1] The individual right to bear arms guaranteed by the Second Amendment is incorporated to the States pursuant to the Fourteenth Amendment. *McDonald v City of Chicago,* 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010).

also be classified as a felony in Tennessee. This Georgia conviction occurred on September 28, 2020. Subsequently, investigators with the Knoxville Fire Department investigated a fire in December 2022 in which they interviewed potential witnesses in homeless camps around the area. During the investigation at one location, they heard a gunshot from the area where the Defendant was standing. They approached him and observed the Defendant with a gun in his pocket. The Defendant was arrested and charged with unlawfully possessing a handgun on December 9, 2022, in Knox County, Tennessee, in violation of Tenn. Code Ann. § 39-17-1307.

Although the indictment does not cite to a specific subsection of Tenn. Code Ann. § 39-17-1307, it is clear from the context of the indictment that the defendant is being prosecuted under subsection (c)(1). The indictment does not allege the defendant was carrying a weapon with the intent to go armed, as prohibited by subsections (a)[2] and (h). Nor does the indictment specifically allege any convictions for a prior crime of violence, a felony involving the use of a deadly weapon, or a felony drug offense, as prohibited by subsection (b). The indictment does not allege an intent to employ a deadly weapon as prohibited in subsection (d). Nor does the indictment specifically allege any convictions for domestic violence as prohibited by subsection (f). The indictment, however, specifies the weapon was a "handgun," rather than a firearm; importantly, the term "handgun" is only specifically referred to and prohibited by subsection (c)(1). Thus, the relevant portion of Tenn. Code Ann. § 39-17-1307 states,

(c)(1) A person commits an offense who possesses a handgun and has been

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[2] Subsections (e) and (g) address exceptions to subsection (a) which are not applicable here.

convicted of a felony unless:
(A) The person has been pardoned for the offense;
(B) The felony conviction has been expunged; or
(C) The person's civil rights have been restored ....
(2) An offense under subdivision (c)(1) is a Class E felony.

None of the exceptions under subdivision (c)(1)(A)-(C) were argued as applying to the defendant here.

STANDARD OF REVIEW

Generally speaking, courts are obligated to uphold the constitutionality of statutes where possible. *Dykes v. Hamilton County*, 183 Tenn. 71, 191 S.W.2d 155, 159 (Tenn. 1945); *State v. Joyner*, 759 S.W.2d 422, 425 (Tenn. Crim. App. 1987). As stated by the Tennessee Supreme Court, "[I]n evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) (citing *State v. Robinson*, 29 S.W.3d 476, 479-80 (Tenn. 2000)); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). This leads a court to "'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.'" *Id.* (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)).

In making an evaluation of a statute's constitutionality, a court must "'ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). "Legislative intent is determined 'from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.'" *Osborn v. Marr*, 127

S.W.3d 737, 740 (Tenn. 2004) (quoting *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)). *See also State v. Pickett,* 211 S.W.3d 696, 702 (Tenn. 2007).

As previously stated, the defendant challenges the statute both on its face and as applied to the defendant himself. When a statute is challenged as being facially unconstitutional, the defendant must show that no set of circumstances exists under which the statute would be valid. *Lynch v. City of Jellico,* 205 S.W.3d 384, 390 (Tenn. 2006) (quoting *Davis–Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)); *see also United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987).

Citing *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022), the Defendant argues the State has the burden of affirmatively proving the firearm regulation in question is part of the historical tradition which delimits the outer bounds of the Second Amendment right. The Supreme Court stated in *Bruen*,

> … [w]e reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. 597 U.S. at 24 (citation omitted). Thus, if the Defendant can show his conduct is protected by the Second Amendment, the burden then shifts to the State to demonstrate the regulation against the Defendant's conduct was consistent with the Nation's historical tradition of firearms regulation. If the statute's regulations are inconsistent with this tradition, it fails to meet constitutional muster and must be struck down.

The Court in *Bruen* gave further direction as to the standard to be applied in

statutory review. The court stated,

> … On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." *Drummond v. Robinson*, 9 F.4th 217, 226 (3rd Cir. 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Bruen, at 30. If reason identifies a well-established and representative analogue from our historical tradition in the regulation of firearms to the current regulation created by the statute in question, the statute will not offend the Second Amendment. As stated by the Supreme Court in *Bruen* and later in *Rahimi*, a court need not find a "historical twin" or "dead ringer" to the regulation. *United States v. Rahimi*, 602 U.S. ---; 144 S. Ct. 1889, 1902-1903 (2024); *Bruen*, 597 U.S. at 30.

ANALYSIS

A review of recent developments in post-*Bruen* Second Amendment jurisprudence is necessary to understand the defendant's challenge. The first significant case related to this issue was *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 3783 (2008). In *Heller*, the Supreme Court held the Second Amendment protected a person's "individual right" unconnected to service in a militia and not a collective right. *Id.* at 579–81. However, the Court in *Heller* maintained this right is not unlimited. It is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Significantly, the Court made clear its ruling should not be taken "to cast doubt on longstanding prohibitions on the possession of firearms by felons ...." *Id.* at 627.

The statute in question in *Heller* was a Washington, D.C., ordinance which prohibited persons from carrying unregistered firearms and also prohibited registering handguns. However, there is a federal code very similar to Tenn. Code Ann. § 39-17-1307. Title 18 U.S.C. 922(g) states in relevant part,

> (g) It shall be unlawful for any person--
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> ...
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The federal regulation is more restrictive than Tennessee's regulation in that the federal regulation prohibits the possession of any firearm by a convicted felon, while Tenn. Code Ann. § 39-17-1307(c) only prohibits the possession of handguns by convicted felons.

The *Heller* Court did not address the historical justifications for regulating the possession of firearms by convicted felons because the issue was not before that court. *Heller,* at 627. This resulted in a number of challenges to the federal statute on Second Amendment grounds resulting in a generally accepted two-part test where the court would first determine whether the challenged regulation burdened conduct that was historically protected by the Second Amendment. *See United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012). If the conduct was protected, then the court engaged in a balancing test between the government's asserted interest against the burden imposed by its regulation. If the ends of the regulation justified the means being used, then the regulation did not run afoul of the Second Amendment. *Id.*

This "means-ends" test resulted in consistent findings by federal courts that the

prohibition against felons possessing firearms was constitutionally sound. *See e.g. Kanter v. Barr,* 919 F.3d 437 (7th Cir. 2019); *United States v. Woolsey*, 759 F.3d 905 (8th Cir. 2014); *United States v. Scroggins*, 599 F.3d 433 (5th Cir. 2010); *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010). The test remained the appropriate legal standard in reviewing Second Amendment challenges to firearms restrictions until 2022.

The United States Supreme Court, however, rejected the means-ends second part of the post-*Heller* test and created a new historical traditions standard in *New York State Rifle & Pistol Association v. Bruen*. 597 U.S. 1, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022). *Bruen* clarified the analytical framework which applies to Second Amendment challenges. Now, under *Bruen*, the government must show that a regulation's infringement on a particular citizen's Second Amendment right was "consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17. Although several concurring and dissenting opinions indicated prohibitions against felons were constitutionally permissible, the majority opinion did not make that premise part of the holding.

The *Bruen* standard was more recently clarified in *United States v. Rahimi*. 602 U.S. ---, 144 S. Ct. 1889 (2024). In *Rahimi*, the Court explained the relevant inquiry is whether the challenged regulation is consistent with the "principles that underpin our regulatory tradition." *Id.* at 1898 (citing *Bruen,* 597 U.S. at 26-31). The Court held the prohibition of firearms possession by that specific defendant was consistent with founding-era regimes because he posed a threat to the safety of others. *Rahimi*, 602 U.S. at 1899. The Court indicated once again that statutes prohibiting felons from possessing firearms were "presumptively lawful." *Id.* at 1902.

Rahimi may have resolved the matter for defendants with prior convictions for offenses which indicate they pose a threat to the safety of others, but it clearly did not resolve the issue for all felons. Since *Heller, Bruen,* and *Rahimi*, there have been hundreds, if not thousands, of challenges to the federal statute and similar state statutes across the nation. These cases have addressed a plethora of factual circumstances under the *Bruen* test and raised many questions. However, the case before this Court only involves one question: is the prohibition against possession of a handgun by a person with a felony forgery conviction consistent with the nation's historical traditions of firearms regulations? That is what must be decided here.

NON-VIOLENT OFFENDERS

As stated above, this is a matter of first impression in Tennessee. Therefore, the Court will continue to examine federal precedent. Unfortunately, there does not seem to be consistency among the United States Circuit or District courts regarding the application of *Bruen* to felon-in-possession laws for either violent or non-violent offenders. Several of the rulings which have been reached have been abrogated and remanded to be reconsidered in light of *Rahimi*. *See e.g. Range v. Attorney General United States of America*, 60 F.4th 96 (3rd Cir. 2023), and *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). The Ninth Circuit ordered a factually similar case be reconsidered en banc post-*Rahimi*. *United States v. Duarte*, 108 F.4th 786 (9th Cir. 2024). Because there are no authoritative cases upon which the Court must rely, the Court will conduct a *Bruen* test on Tenn. Code Ann. § 39-17-1307(c) under both a facial and as-applied challenge with the little guidance provided by lower federal courts.

FACIAL CHALLENGE

As stated above, when a statute is challenged as being facially unconstitutional, the Defendant must show no set of circumstances exists under which the statute would be valid. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (quoting *Davis--Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)); *see also United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). This is a much more difficult hurdle for the Defendant to overcome.

Assuming the Defendant's conduct falls under the protections of the Second Amendment, as the Court discusses below, there is very strong evidence the regulation of

firearms involving people who are violent or pose a threat to the community is consistent with the Nation's historical traditions. The Supreme Court stated in *Rahimi*,

> In short, we have no trouble concluding that Section 922(g)(8)[3] survives Rahimi's facial challenge. Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others. Section 922(g)(8) can be applied lawfully to Rahimi.

Rahimi, 602 U.S. at 1902 (footnote added). The Court went on to hold, "An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.*

It is certainly possible a set of facts could exist in which a person in Tennessee possessed a handgun after being convicted of a felony of such a nature that they would reasonably be deemed a credible threat to the safety of others. Under *Rahimi*, such a prohibition would be in accordance with the Second Amendment. Thus, Tenn. Code Ann. § 39-17-1307 is constitutional on its face and the Defendant's facial challenge fails.

AS APPLIED CHALLENGE

The Court will now examine the Defendant's "as-applied" challenge. In considering an "as applied" challenge to the constitutionality of a statute, the Court must consider how the statute operates in practice against that particular defendant and under the facts of the instant case, not hypothetical facts in other situations. *City of Memphis v. Hargett*, 414 S.W.3d 88, 107 (Tenn. 2013). Therefore, the Court will apply the *Bruen* analysis to the Defendant's case.

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[3] This section of 18 U.S.C.A. 922 prohibits possession of a firearm by someone who is under a restraining order and is found to pose a threat to the physical safety of the other party.

Bruen Test Part 1: Protected Conduct

The first step in the Court's evaluation is to determine if the Defendant's conduct is protected by the Second Amendment. The Second Amendment to the United States Constitution states,

> A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The crux of the State's argument is that the defendant's conduct is not protected by the Second Amendment because his felony conviction places him outside "the people" who have the right to keep and bear arms.

Federal courts have reached different conclusions on this initial step in the *Bruen* analysis. The State's position is succinctly stated by the United States District Court for the District of Massachusetts in *United States v. Johnson,* No. 23-cr-10043-ADB; 2024 WL 199885 (U.S. Dist. Ct. Mass. Jan. 18, 2024). The District Court in *Johnson* found,

> The Second Amendment guarantees "the right of the people to keep and bear Arms." U.S. Const. amend. II. Johnson argues that the Second Amendment's reference to "the people" necessarily protects individuals who have been convicted of felonies, [Mot. at 9], claiming that "[j]ust as the text of the Second Amendment does not 'draw a home/public distinction with respect to the right to keep and bear arms,' it also does not draw a distinction between felons and non-felons." *Id.* (quoting *Bruen*, 597 U.S. at 32). The Supreme Court in *Bruen*, however, repeatedly used the phrase "law-abiding citizens" to refer to those who hold the Second Amendment right. *See* 597 U.S. at 9, 15, 26, 29–31, 33 n.8, 38 & n.9, 60, 70–71. Although the Supreme Court did not elaborate upon the implications of its repeated use of the qualifier "law-abiding citizens" in its discussion concerning the reach of *Heller, McDonald, and Bruen*, it seems clear that the distinction was meant to differentiate convicted felons from "law-abiding citizens." [citations omitted] Accordingly, the Court finds that the Second Amendment's text does not plainly cover Johnson's conduct.

Id. at 2. Under this reasoning, the State argues that since the Defendant has been convicted

of a felony, albeit it a non-violent property crime, he is no longer in the category of persons protected by the Second Amendment. Also see *United States v. Dubois,* 94 F.4th 1284, 1293 (11th Cir. 2024); *United States v. Gay*, 98 F.4th 843, 846–47 (7th Cir. 2024); and *Vincent v. Garland*, 80 F.4th 1197, 1200–02 (10th Cir. 2023).

On the other hand, the Ninth Circuit reached a different conclusion in *Duarte*. That court held,

> The Government argues only that "the people" in the Second Amendment excludes felons like Duarte because they are not members of the "virtuous" citizenry. We do not share that view. *Bruen* and *Heller* foreclose that argument because both recognized the "strong presumption" that the text of the Second Amendment confers an individual right to keep and bear arms that belongs to "all Americans," not an "unspecified subset." Our own analysis of the Second Amendment's publicly understood meaning also confirms that the right to keep and bear arms was every citizen's fundamental right. Because Duarte is an American citizen, he is "part of 'the people' whom the Second Amendment protects.

Duarte, 101 F.4th at 662 (citations omitted). This argument is strengthened by the Supreme Court's holding in *Heller* that the Second Amendment right is an individual right. *Heller*, 554 U.S. at 581. Justice Scalia wrote in *Heller*, "What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580.

This Court finds *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024), a federal felon-in-possession case originating in Memphis, to be persuasive. In *Williams*, the defendant was stopped by an officer with the Memphis Police Department for speeding and driving erratically. A pistol was discovered after a search of his vehicle. It was determined the defendant had a prior conviction for aggravated robbery, and he was charged in federal court as being a felon-in-possession of a firearm under 18 U.S.C.

922(g)(1).

In discussing whether the defendant in *Williams* was excluded from "the people" as defined by the Second Amendment, the Sixth Circuit examined the historical distinction between removing someone's civic rights, such as the right to vote, as opposed to a personal right, the court stated,

> This civic and political distinction is both critical and self-evident. Consider a few obvious examples. A felon might lose the right to vote. But that does not mean the government can strip them of their right to speak freely, practice the religion of their choice, or to a jury trial.

113 F.4th at 647. This Court finds the reasoning of the Sixth Circuit to be sound.

After consideration of the conflicting views by the various federal courts, this Court holds the defendant is not automatically excluded from the protections of the Second Amendment simply because of his prior conviction for forgery. Under an historical analysis, he is a member of the "people." Possession of a handgun is conduct which falls under the protections of the Second Amendment right to bear arms. The Court will next examine the second part of the *Bruen* analysis.

Bruen Test Part 2: Historical Tradition of Regulation

As the Court has found the Defendant's conduct is covered by the plain text of the Second Amendment, the burden now shifts to the State to demonstrate the regulation is consistent with our Nation's historical tradition of firearm regulation. *Bruen*, at 2130. The Tennessee law in question prohibits any convicted felon from possessing a handgun. Under this "as applied" challenge, the Court must examine whether prohibiting a person from possessing a handgun who has been convicted of a non-violent offense, such as forgery, is consistent with our regulatory history.

As stated above, the State is not required to show an identical regulation, but must identify "a well-established and representative historical analogue" of the challenged law, "not a historical twin." *Bruen*, at 2123. Again, the Sixth Circuit in *Williams* provides a highly informative and exhaustive discussion on this question. The *Williams* court summed up its historical analysis stating,

> This historical study reveals that governments in England and colonial America long disarmed groups that they deemed to be dangerous. Such populations, the logic went, posed a fundamental threat to peace and thus had to be kept away from arms. For that reason, governments labeled whole classes as presumptively dangerous. This evaluation was not always elegant. And even though some of those classifications would offend both modern mores and our current Constitution, there is no doubt that governments have made such determinations for centuries. Each time, however, individuals could demonstrate that their particular possession of a weapon posed no danger to peace.

Williams, 113 F.4th at 657. In summation, the court found that our history supports the proposition that weapons possession may be regulated by whole groups if those groups were classified as dangerous.

The court in *Williams* went further and explained that a determination that a person within the class was not a danger may be determined by a magistrate or judge. The court stated,

> The relevant principle from our tradition of firearms regulation is that, when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization. That principle is satisfied whether the official is an executive agent or a court addressing an as-applied challenge.

Id. at 661. This Court finds the conclusion of the federal circuit court in *Williams* to be consistent with the historical tradition of our nation.

Prior convictions for many felony offenses will, by their nature, sufficiently

establish that a convicted felon is a dangerous person, e.g. murder, aggravated assault, robbery, etc. There is no evidence before the Court that the defendant has previously engaged in such conduct. Under the historical analysis referenced above, a member of the restricted class must have an opportunity to demonstrate they are not a dangerous person. Such an opportunity is not afforded by Tenn. Code Ann. §39-17-1307(c). However, under the logic of *Williams*, that does not end the enquiry.

A court may also make this determination independent of the predicate conviction. Because the statute does not distinguish between felons who are dangerous and those who are not, the burden is upon the State to show the Defendant is in the class that would historically be prohibited from possessing weapons in accordance with *Bruen*. If the State fails in this burden, then the Defendant will have established that Tenn. Code Ann. § 39-17-1307(c) violates his Second Amendment rights as applied to him.

This Court will follow the guidance given by the Sixth Circuit in *Williams* in making this determination. The *Williams* court noted,

> When evaluating a defendant's dangerousness, a court may consider a defendant's entire criminal record—not just the specific felony underlying his [felon-in-possession] conviction. After all, nothing in the Second Amendment's text or history limits "dangerousness" to the particular felony (if any) listed in an indictment or plea agreement. … Courts may consider any evidence of past convictions in the record, as well as other judicially noticeable information—such as prior convictions—when assessing a defendant's dangerousness.
>
> Additionally, in determining whether a defendant's past convictions are dangerous, we don't mean to suggest that courts facing as-applied challenges must find "categorical" matches to show a defendant is dangerous. We only make the commonsense point that certain categories of offenses—like historical crimes against the person—will more strongly suggest that an individual is dangerous. But rather than draw bright categorical lines, district courts may make "an informed judgment about how criminals commonly operate." The dangerousness determination will be fact-specific, depending on the unique circumstances of the

individual defendant. And in many instances—prior murders, rapes, or assaults—the dangerousness will be self-evident. District courts are well-versed in addressing challenges like these.

Williams, 113 F.4th at 657-58 (citations omitted). The *Williams* court went on to clarify,

> [a] person convicted of a crime is "dangerous," and can thus be disarmed, if he has committed (1) a crime "against the body of another human being," including (but not limited to) murder, rape, assault, and robbery, or (2) a crime that inherently poses a significant threat of danger, including (but not limited to) drug trafficking and burglary. An individual in either of those categories will have a very difficult time, to say the least, of showing he is not dangerous.
> A more difficult category involves crimes that pose no threat of physical danger, like mail fraud, tax fraud, or making false statements. But such a case is not before us today.

Id. at 663.

Pursuant to these findings, this matter is continued for further hearing on the issue of whether the Defendant is a dangerous offender who is in the class of persons properly prohibited from exercising the right to bear arms under the Second Amendment.

CONCLUSION

This Court finds Tenn. Code Ann. § 39-17-1307(c) is not unconstitutional on its face. Accordingly, the Defendant's Motion to Dismiss is DENIED IN PART. However, this Court further finds the Second Amendment permits the government to regulate the possession of firearms by classes of people who pose a threat to the community. As a result, this matter is continued for further hearing to determine if the law is unconstitutional as applied to the Defendant.

It is **SO ORDERED**.

ENTER this 2nd day of September 2024.

JUDGE STEVEN W. SWORD
SIXTH JUDICIAL DISTRICT
CRIMINAL COURT, DIVISION I

STATE V. GUY

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE	}	
	}	
VS	}	**NO. 110145**
	}	
JOEL MICHAEL GUY, ALIAS	}	

ORDER REGARDING MOTION TO DISMISS COUNTS SIX AND SEVEN ON THE BASIS OF UNCONSTITUTIONAL VAGUENESS

This cause came on to be heard by motion of the defendant seeking to dismiss counts 6 and 7 charging the defendant with abuse of a corpse. The basis of his motion is that the language of the statute, "in a manner offensive to the sensibilities of an ordinary person," is unconstitutionally vague on its face. The State filed a written response arguing that the statute is constitutionally valid. This Court heard oral argument on this issue on the 2nd day of June 2020, took the matter under advisement, and now rules as follows.

INTRODUCTION

Generally speaking, courts are obligated to uphold the constitutionality of statutes where possible. *Dykes v. Hamilton County*, 183 Tenn. 71, 80, 191 S.W.2d 155, 159 (Tenn. 1945); *State v. Joyner,* 759 S.W.2d 422, 425 (Tenn. Crim. App. 1987). As stated by the Tennessee Supreme Court, "[I]n evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) (citing *State v. Robinson*, 29 S.W.3d 476, 479-80 (Tenn. 2000), and *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997)). This leads a court

to "'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.'" *Id.* (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)).

In making an evaluation of a statute's constitutionality, a court must "'ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). "Legislative intent is determined 'from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.'" *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (quoting *State v. Flemming,* 19 S.W.3d 195, 197 (Tenn. 2000)). *See also State v. Pickett*, 211 S.W.3d 696, 702 (Tenn. 2007).

STANDARD

The United States Supreme Court has stated, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The Tennessee Supreme Court has said, "[a] criminal statute that forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Leech v. Am. Booksellers Ass'n,* 582 S.W.2d 738, 746 (Tenn. 1979) (citing U.S. Const. amend. XIV, § 1 and Tenn. Const., art. 1, §8). In other words, due process demands that the law give sufficient warning so that citizens may avoid conduct which is forbidden. *See also Rose v. Locke*, 423 U.S. 48, 49-50; 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975).

In the context of a child pornography statute, the Tennessee Supreme Court has held that, "a vague statute is vulnerable to a constitutional challenge because it (1) fails to provide fair notice that certain activities are unlawful; and (2) fails to establish reasonably clear guidelines for law enforcement officials and courts, which, in turn, invites arbitrary and discriminatory enforcement." *State v. Pickett*, 211 S.W.3d 696, 702 (Tenn. 2007). The test for vagueness has also been defined in a case involving fabrication of evidence as: whether a statute's "prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed." *State v. Forbes*, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995). Or, as defined by the Tennessee Supreme Court regarding a gambling device law, a statute providing no legally fixed standards, leaving to the personal predilections of an officer the determination of the illegality of conduct, is unconstitutionally vague on its face. *State v. Burkhart*, 58 S.W.3d 694, 699 (Tenn.2001).

The State argues that this case is not subject to the heightened scrutiny expressed by the United States Supreme Court in *United States v. Williams*, 553 U.S. 285 (2008), in that *Williams* and similar cases were addressing statutes that involved constitutionally protected behavior. This Court agrees with the State. This case does not involve behavior that could possibly involve constitutionally protected speech or other behavior and is not subject to a heightened scrutiny analysis. However, the concern for vagueness is still the same: did the person subject to the statute receive fair notice that his conduct was prohibited, and does the statute provide a sufficiently clear fixed legal standard? The difference in evaluating a statute that does not implicate constitutionally protected conduct is that the statute must be impermissibly vague in all its applications to be found

unconstitutional. *Burkhart*, at 699 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982)).

In the present case, this Court must examine the conduct of the defendant before analyzing other hypothetical applications of the law. As stated in *Hoffman Estates*, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, at 495. With this standard in mind, this Court will now evaluate the statute in accordance with the alleged conduct of the defendant.

TENN. CODE ANN. §39-17-312

The defendant argues the language in Tenn. Code Ann. §39-17-312, stating that it is a crime for someone without legal privilege to physically mistreat a corpse *in a manner offensive to the sensibilities of an ordinary person*, is so subjective that a person of ordinary intelligence could not understand what conduct falls within the statutory prohibition. He also argues the standard is too subjective to survive constitutional scrutiny. This is a case of first impression in the State of Tennessee. However, similar statutes have been challenged on constitutional vagueness grounds in Ohio and Arkansas.

OHIO STATUTE

In *Ohio v. Glover*, 17 Ohio App. 3d 256 (Ohio Ct. App. 1984), the State of Ohio appealed the trial court's dismissal of an abuse of a corpse charge on the grounds that the statute was unconstitutionally vague. The Ohio statute stated, "No person, except as authorized by law, shall treat a human corpse *in a way that he knows would outrage reasonable family sensibilities*." Ohio Rev. Code § 2927.01 (emphasis added). The

appellate court reversed the trial court's findings and stated, "A statute is not void for vagueness simply because it requires a person to conform to an imprecise but comprehensible standard. A statute is vague because it specifies no standard of conduct at all." *Id.* at 258. The appellate court also referenced obscenity laws that had been upheld which used a "contemporary community standards" application by a judge or jury. *Id.*

The Ohio statute was subject to a subsequent vagueness challenge in *Ohio v. Gardner*, 65 Ohio App. 3d 24 (Ohio Ct. App. 1989). In relying on the reasoning of *Glover*, the appellate court in *Gardner* found that the terms of the statute were sufficiently explicit so as to provide notice of what conduct was prohibited without a person having to guess. *Gardner*, at 28. In comparison, the language in the Tennessee statute, "in a manner offensive to the sensibilities of an ordinary person," is even more precise. This Court finds the Ohio reasoning to be persuasive. The sensibilities of "an ordinary person" is easier for a judge or juror to ascertain than what "would outrage reasonable family sensibilities."

ARKANSAS STATUTE

The Arkansas Supreme Court evaluated a challenge to the Arkansas abuse of a corpse law in *Dougan v. Arkansas*, 322 Ark. 384 (Ark. 1995). Ark. Code Ann. §5-60-101(a) states in relevant part, "A person commits abuse of a corpse if, except as authorized by law, he knowingly … physically mistreats a corpse in a manner offensive to a person of reasonable sensibilities." This language is strikingly similar to the Tennessee language being challenged here.

In its evaluation of the statute, the Arkansas court referred to Model Penal Code §250.10 which contains the language "outrage ordinary family sensibilities." In a

comment to the Model Penal Code, the drafters focused on the mens rea of "knowing." The offender must "know" that his conduct would outrage ordinary family sensibilities. The drafters stated that this language creates an objective standard that cures any problems of indeterminacy. *Id.* at 390 (citing Comment 2 of Model Penal Code §250.10). Relying on this reasoning, the Arkansas court found the statute to be constitutional. The court explained the commonly understood meaning of "physically" and "mistreat." Then, the court stated, "As recognized by the drafters of the Model Penal Code offense, any possible problems of indeterminacy and lack of notice to Dougan and others similarly charged are resolved by the requirement of knowledge with respect to the outrageous character of her conduct." *Id.* at 392.

As with the Ohio cases, this court finds the reasoning of the Arkansas court to be persuasive. The Tennessee and Arkansas statutes are virtually identical. Like Arkansas, the Tennessee law requires that the complained of behavior be done "knowingly." The indictment in this case states the defendant acted, "unlawfully, knowingly, and without legal privilege." The judge and jury are required to understand "physically," "mistreat," "manner," "offensive to the sensibilities," and "ordinary person." Like the terms of the Arkansas statute, these terms have common meaning and provide an objective standard.

LEGAL APPLICATION

Our statute prohibits knowing physical mistreatment without legal privilege to the degree that the sensibilities of an ordinary person would be offended. In this case, the defendant is accused of dismembering the corpses of his parents and attempting to destroy them in different ways including chemical dissolution and boiling. Under the standard of

this case, such conduct would clearly be proscribed by the law. Since the alleged conduct would clearly fall within the proscription and the behavior being proscribed does not involve constitutionally protected conduct, the defendant's vagueness challenge fails.

Furthermore, this Court finds that the statute is not unconstitutionally vague even under the higher level of constitutional scrutiny. The language of the law is sufficiently clear and precise such that the defendant received fair notice of what was being prohibited, and the law provides a sufficiently clear fixed legal standard. The allegations involve physical mistreatment of two bodies. The standard of "offensive to the sensibilities of an ordinary person" is a sufficiently objective standard to avoid arbitrary differences in the application of the law as to what conduct is actually proscribed. As stated above, use of contemporary community standards has been upheld under vagueness challenges. The law requires that a judge or juror find that the accused knew his behavior would be offensive to the sensibilities of an ordinary person. Such a standard is not vague.

CONCLUSION

This Court finds Tenn. Code Ann. §39-17-312 is not void for vagueness, neither as applied to the defendant nor on its face. The language of the statute is clear and uses terms that are commonly understood. Furthermore, the statute provides a reasonably legally fixed objective standard relying upon the frequent legal touchstone of an "ordinary person." Therefore, the motion to dismiss counts 6 and 7 is DENIED.

ENTER this 5th day of June 2020.

JUDGE STEVEN W. SWORD
SIXTH JUDICIAL DISTRICT
CRIMINAL COURT, DIVISION I

STATE V. BRICENO

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE	}	
	}	
VS	}	**NO. 115160**
	}	
LUIS BRICENO, ALIAS	}	

OMNIBUS FINDINGS OF FACTS AND CONCLUSIONS OF LAW REGARDING MOTIONS TO SUPPRESS EVIDENCE FROM UNLAWFUL SEIZURE, STATEMENTS, AND UNLAWFULLY PERFORMED BREATH TESTING

This cause came to be heard on defendant's Motion to Suppress Evidence Obtained From Unlawful Seizure, Motion to Suppress Statements, and Motion to Suppress Results of Unlawfully Performed Breath Testing. The Court held an evidentiary hearing on the 12th day of April 2021, at which time it heard testimony; admitted exhibits; and heard oral arguments from counsel for both the State and Defense. After consideration of all of the above, the Court took the matters under advisement and now makes the following omnibus findings of facts and conclusions of law in denying the motions to suppress.

FINDINGS OF FACTS

The relevant facts, as more fully contained in the record of this cause, establish that on May 9, 2018, officers from the Knoxville Police Department (KPD) were dispatched to the intersection of Kingston Pike and Morrell Road in response to a 911 call from a civilian who reported a person asleep or passed out at the stoplight. Officers Hayden Cochran and Colin McCleod arrived at the scene at 6:12:45 A.M. Cruiser video shows that the defendant was seated behind the wheel of his car with the door open. He

was speaking with EMTs who arrived prior to the officers.

When the officers approached, the defendant stepped out of his car and was quickly frisked by Officer Cochran. The officers asked him what happened and where he was going. The defendant's answers about where he had been and where he was going seemed confused. In fact, the defendant made several statements to the police throughout the stop that seemed to indicate the defendant was confused. (See for example his response about his revoked driver's license at 6:16 A.M. on the cruiser video). Officer Cochran testified he smelled the odor of alcohol coming from the defendant's breath. This is supported by the officer's statement to the defendant as he was arresting the defendant that he smelled a strong odor of alcohol from the defendant. The officer also testified the defendant had bloodshot/watery eyes, and his speech was slurred. The Court finds the officer to be credible. Additionally, the defendant testified he had consumed "a few" beers the evening before.

The officers received a report from dispatch at 6:15:55 A.M. that the defendant's driver's license had been revoked. Officer Cochran then asked the defendant if he would be willing to perform some tests due to the officer's suspicion that the defendant was unfit to be behind the wheel. The civilian who was parked behind the defendant's car with his hazard lights on had reported to the officers that he was concerned there may have been an "OD situation" and that the defendant had been parked there for about 10 minutes. This civilian and the EMTs were released from the scene by the police.

Officer Cochran conducted the Horizontal Gaze Nystagmus (HGN), walk and turn, and 1-leg stand field sobriety tests. Before the tests were conducted, Officer Cochran told the defendant he was going to empty the defendant's pockets. He proceeded to

remove the defendant's personal items from his pockets. The first field sobriety test occurred at 6:19 A.M, approximately 7 minutes after the officers arrived. The defendant was aware enough to state that he did not think the line was completely straight for the walk and turn. He elected to use the other turn lane line as his guide. The Court finds this supports a finding that the defendant was not overwhelmed by the situation, as he stated during his testimony. The Court does not find the defendant credible in his testimony that he was so anxious and stressed he did not think he had any choice but to consent to the field sobriety tests. Nor does the Court find the defendant credible when he testified the officers made him feel like he did not have any rights.

The encounter between the defendant and the officers was cordial throughout. In fact, when he was placed in the cruiser after being arrested and asked about the disposition of his car, the defendant said, "Thank you for your cooperation." Contrary to the defendant's declaration, the Court finds the defendant demonstrated a calm demeanor. He showed concern for his rights and asked appropriate questions about his options. As stated above, he even exercised his option to use a different line for the walk and turn after he expressed concerns about the first line. Furthermore, the record reflects the defendant had recently experienced a DUI arrest and prosecution in Knox County where he was represented by counsel. Also, his driver's license was revoked after being convicted of DUI by consent. The Court finds the defendant had an understanding of what was occurring at the scene beyond that of many other citizens and was not overwhelmed by the circumstances.

The darkness of the video made the walk and turn difficult to observe. However, one of the officers narrated a number of clues during the test. When asked if he had any

health issues that might affect his ability to do the tests, the defendant stated that he had been having heel problems for a couple of weeks. The Court finds this is another example of the defendant's ability to understand what was happening and have the wherewithal to take steps to protect his interests. The video shows the defendant performed poorly on the 1-leg stand. He swayed, put his foot down multiple times, and stumbled several times.

At this point, the officers told the defendant he was under arrest for DUI and cuffed him. Officer Cochran testified he believed the defendant was "not fit" to drive. The Court finds the evidence presented supports this officer's conclusion.

Officer Cochran read the defendant his *Miranda* rights from a card. The defendant immediately said, "Can I have my lawyer here right now?" Officer Cochran replied that he could not have his attorney there at that moment, but if he wanted an attorney, the officer would not ask him any questions.

At 6:31:35 A.M., Officer Cochran read the implied consent form to the defendant which concludes with asking the defendant if he will consent to a breath test or refuse the test. The defendant stated he consented and signed the form. The defendant mentioned that he might have acid reflux. He was told that it would not affect the test. The Court finds this statement shows, again, that the defendant understood the gravity of the situation and had enough understanding that he was sharing potential concerns which might unfairly and negatively affect his test results.

The officer arrived at the KPD for the breath test at 6:49:38 A.M. They entered the building around 6:56 A.M. The defendant was cooperative throughout the test. Additional findings of facts may be contained in the conclusions of law section below.

CONCLUSIONS OF LAW

The defendant filed three motions seeking exclusion of evidence. The Court will address each motion in this omnibus order. The first motion is a motion to suppress evidence on the grounds that the defendant was unlawfully seized and, in the alternative, that if the initial seizure was valid, the seizure exceeded the scope, manner, and duration of the initial permissible seizure. The second motion seeks to suppress any statements made by the defendant on the grounds he was subjected to custodial interrogation prior to receiving *Miranda* warnings. The third motion seeks to suppress the results of the breath test on due process grounds.

I. UNLAWFUL SEIZURE

The court will first address the defendant's motion to suppress based upon unlawful seizure and exceeding the scope of any initial lawful seizure. The defendant argues the officers did not have a valid basis for seizing the defendant when they first surrounded (? Maybe encountered instead based upon later discussion) him and conducted a frisk of his person. In the alternative, he argues the frisk of the defendant transformed the traffic stop into an unlawful detention of the defendant in accordance with *State v. Duncan*, 846 S.E.2d 315 (N.C. Ct. App. 2020).

A. Initial Seizure

The United States and Tennessee constitutions protect individuals from unreasonable searches and seizures. U.S. Const. Amend. IV; Tenn. Const. Art I, § 7. The general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered is subject to suppression. *Coolidge v. New Hampshire*, 403 U.S. 443,

454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). However, there are a few carefully defined exceptions to the warrant requirement. *See State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997). *See also Maryland v. Dyson,* 527 U.S. 465, 119 S. Ct. 2013, 2014, 144 L. Ed. 2d 442 (1999). Therefore, when the State seeks to introduce in a criminal trial, evidence obtained as a result of a warrantless seizure, the State must show by a preponderance of the evidence the applicability of an exception to the warrant requirement. *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998); *Yeargan*, 958 S.W.2d at 629.

There are three types of police-citizen interactions: (1) a full scale arrest which must be supported by probable cause; (2) a brief investigatory detention which must be supported by reasonable suspicion; and (3) a brief police-citizen encounter which requires no objective justification. *See Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L.Ed.2d 389 (1991); *United States v. Berry*, 670 F.2d 583 (5th Cir.1982).

In this case, the officers were dispatched to the scene based upon a 911 call from a private citizen reporting a person was stopped at a traffic light and was not moving when the light was green. The caller was still at the scene when the officers arrived, parked behind the defendant's car with his hazard lights on. EMTs were already on the scene and were speaking with the defendant when the officers approached. The officers did not block the defendant's car in. The only physical contact they had with him was when Officer Cochran conducted a brief frisk of the defendant. There were two officers present initially. They did not have their weapons drawn nor did they take any aggressive positions.

Significantly, the defendant was already stopped and was speaking with medical

personnel when the police arrived. The defendant was not removed by the officers to any location. The defendant was at the location where he apparently drove himself. The officers did not make any commands of the defendant initially. They simply inquired about what was going on with him. During this encounter, Officer Cochran smelled alcohol coming from the defendant's breath and was able to observe his speech. Officer Cochran then asked the defendant to perform field sobriety tests.

The Court finds the defendant was seized when the officer asked him to perform the field sobriety tests. It was clear at that point, the defendant was not free to leave. The Court further finds this seizure was a brief investigatory stop supported by reasonable suspicion that the defendant was driving under the influence. When the officers arrived, they encountered a scene consistent with the 911 call. The facts relayed in the 911 call are sufficient in themselves to provide the officers with reasonable suspicion. The caller was present and gave them his name and contact information. The car was located where the caller said it was. The defendant was behind the wheel and was speaking with the EMTs. Once they smelled alcohol on his breath, the officers clearly had reasonable suspicion to conduct a DUI investigation.

B. Exceeded scope, manner, and duration

The defendant also argues that, if the initial seizure was justified, the officers converted the stop into an illegal seizure by their subsequent actions. It appears from the written motion the basis of the defendant's argument is that the officer should not have conducted a frisk of the defendant. He relies on an appellate case from North Carolina, *State v. Duncan*, 846 S.E.2d 315 (N.C. Ct. App. 2020). The Court notes this case has no precedential value in Tennessee. Although the defendant failed to include a copy of the

North Carolina case, the Court was able to find the case through Westlaw.

Not only is *Duncan* not authoritative, but it is also not informative to the present case. The facts and issues in *Duncan* share nothing in common with this case. *Duncan* involved the discovery of contraband during an unlawful pat-down search. The defense seems to have conflated the legality of a *Terry* frisk with the concerns addressed about police exceeding the reasonableness of traffic stops as discussed in *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002); and *State v. Simpson,* 968 S.W.2d 776, 783 (Tenn. 1998).

Likewise, the defense's reliance on *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007), is misplaced. In *Berrios*, the police officer engaged in a practice referred to as "frisk and sit." The court found the officer did not have a constitutional basis for the frisk or placing the defendant in the back of the cruiser which created a delay leading to a subsequent search of the defendant's vehicle. The frisk, although unjustified, did not create the delay. Rather, putting the defendant in the police cruiser without justification is what created the illegality.

The test for assessing whether a detention is too long to be justified as an investigative stop is whether, during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605 (1985); *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007). The facts of this case show the officers pursued an efficient line of investigation to determine if the defendant was driving under the influence. They discovered he was driving on a revoked license within four minutes of the encounter. At that point, the encounter was clearly going to be more than just a safety

check for a possible overdose. The officers also began conducting field sobriety tests around 7 minutes after the beginning of the encounter.

Assuming Officer Cochran did not have a valid basis to conduct a *Terry* pat down, and he very well may not have, the frisk did not delay or expand the investigation in any way. The Court finds that the initial seizure of the defendant was justified as a brief investigatory detention supported by reasonable suspicion for DUI and that the officers pursued a reasonable investigation of that suspicion. Had the officers found contraband on the defendant's person during one of the first two frisks, that contraband would likely have been inadmissible. However, the frisks do not affect the validity of the seizure. The frisks created no additional delay in the seizure of the defendant. Therefore, the defendant's first motion is DENIED.

II. SUPPRESSION OF STATEMENTS

The second motion to consider is the defendant's motion to suppress statements of the defendant due to failure to comply with the *Miranda* rule. He argues the police subjected him to custodial interrogation prior to ever reading the defendant his *Miranda* rights.

Statements "made during the course of custodial police interrogation are inadmissible as evidence in a criminal case unless the State establishes that the defendant was advised of certain constitutional rights and waived those rights." *State v. Anderson*, 937 S.W.2d 851, 853 (Tenn.1996) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)). This applies to the questioning of an individual "who has been taken into custody or otherwise deprived of his freedom by the authorities in any significant way." *State v. Dailey*, 273 S.W.3d 94, 102 (Tenn. 2009). However, a police

action which would constitute a Fourth Amendment seizure of an individual does not automatically equate to that individual having been placed "in custody" for purposes of a *Miranda* analysis. For instance, the United States Supreme Court has held that persons temporarily detained pursuant to a traffic stop are not "in custody" for the purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984).

The test for determining whether a person is in custody to a degree that he would be entitled to *Miranda* warnings is "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." *Anderson*, 937 S.W.2d at 855. The Tennessee Supreme Court has listed the following non-exclusive factors in making this determination:

> "[T]he time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id.

In this case, the defendant was located on a public street, where he drove himself. He was not removed from that area until after being cuffed and arrested. The encounter began with EMTs because of concern for the defendant's health. The police arrived in the process of the defendant being checked by the paramedics. The questioning began with

concerns about the defendant's health condition. The officers asked him what happened. They asked where he had been and where he was going. The purpose of those questions was not to try to incriminate the defendant on possible illegal locations, but to determine why the defendant was asleep or passed out in the middle of the road behind the wheel of his car.

The encounter began with two officers. At least one additional officer arrived later. The tone and demeanor of the officers were not aggressive. Both the officers and the defendant were cordial throughout. The officers treated the defendant with respect and politely asked him if he would be willing to perform field sobriety tests to determine if the defendant was fit to drive. The officers clearly expressed their concern that he was driving under the influence of an intoxicant; however, they did not aggressively question him or accuse him regarding their suspicions.

The question asked by the officers most likely to elicit an incriminating response was whether he had consumed any alcohol or taken any medications. However, they also asked him if he had any medical conditions. These questions were just as likely to help the officers determine if the defendant was having a medical episode as to whether he was driving impaired. The two frisks of the defendant come the closest to creating an impression of being under arrest; but the officer did tell the defendant that he was doing it for the officers' and the defendant's safety. The defendant was not physically restrained during these encounters, although the officer did put his hands on the defendant's body to conduct the pat downs.

Under these circumstances, the Court finds the defendant was seized for purposes of Fourth Amendment seizure. However, a reasonable person in the defendant's position

would not have considered himself deprived of freedom of movement to a degree associated with a formal arrest until the officers actually told him he was under arrest and cuffed him. The defendant had recently been through field sobriety tests in another case. It was clear the officers were investigating whether he was driving under the influence, not that they were arresting him for the offense. Therefore, the Court does not find the pre-*Miranda* statements of the defendant should be suppressed.

The officers did not conduct any interrogation of the defendant after the *Miranda* warnings were given. The request for the breath test did not constitute interrogation intended to produce an incriminating response from the defendant. Therefore, his motion to suppress his statements is DENIED.

III. SUPPRESSION OF BREATH TEST

The defendant's third motion seeks to suppress the results of his breath test on the grounds that it was without a warrant, without his consent, and violated due process in that he was not given an opportunity to consult with counsel before deciding whether to submit to the test. Similar issues were addressed in *State v. Fraiser*, 914 S.W. 2d 467 (Tenn. 1996) by the Tennessee Supreme Court. The defense is requesting the Court revisit the reasoning in *Fraiser*.

The facts in *Frasier* are significantly distinguishable from this case. In *Frasier,* the defendant was never advised of his *Miranda* rights. He specifically asked to speak to an attorney before deciding on whether to give a breath test. He then refused to give a breath test but offered to give a blood test, instead. The issue during the trial became whether or not his refusal to give a breath test should be admissible. The Tennessee Supreme Court held, in citing to previous due process reasoning, "that a person arrested without a warrant

on a reasonable suspicion of DUI does not have a due process right under the Tennessee Constitution to consult with an attorney before making the decision [to provide a breath test for alcohol levels]." *Id.* at 471

In this case, the defendant was advised of his *Miranda* rights. He did not make an unequivocal request for counsel. When told he had the right to an attorney, he said, "Can I have my attorney here right now?" The officer told him that he could not have his attorney at the scene but that he would not ask him any questions if he wanted an attorney. Although, the Court finds this was not an unequivocal request for counsel, but rather an inquiry about the timing of counsel's availability, the officer treated his statement as a request for counsel. More importantly, the defendant in this case consented to provide a breath test after being advised of the implied consent law as outlined in the implied consent form.

The proliferation of cell phones in the last 24 years since *Frasier* was decided and the 24 hour availability of counsel, does not change the legal reasoning behind *Frasier.* Nor does the ruling by the United States Supreme Court in *Missouri v. McNeely,* 569 U.S. 141 (2013). The dissipation of alcohol in blood is still an issue which creates an exigency for timely testing. The officers did not seize his blood or test his breath without consent. The defendant, who had been arrested before for DUI, voluntarily consented to take the breath test. He was made aware of the consequences for refusal and made his decision.

This Court does not have the authority to overrule the holding by the Tennessee Supreme Court. If the Court did have such authority, it would not exercise it in this case. The defendant's due process rights were not offended by the officers' behavior, which was reasonable throughout. Therefore, this third motion is DENIED.

CONCLUSION

Based upon the reasoning outlined above, the Court finds: the seizure and investigation of the defendant was lawful; he was not subjected to improper custodial interrogation; and he gave a valid (actual) consent for the breath test. Therefore, the defendant's motions to suppress are hereby **DENIED**.

It is so **ORDERED.**

The Clerk shall provide a copy of this order to the defense attorney, and a copy to the Knox County District Attorney General.

ENTER this 19th day of April 2021.

JUDGE STEVEN W. SWORD
SIXTH JUDICIAL DISTRICT
CRIMINAL COURT, DIVISION I