The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Willie Santana

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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.

I currently serve as an assistant federal defender with Federal Defender Services of Eastern Tennessee (FDSET).

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

I was licensed in 2014. My BPR number is 033522.

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

I am not licensed in any other state.

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).

January 2023 to Present, Assistant Federal Defender, Federal Defender Services of Eastern Tennessee, Greeneville, Tennessee.

July 2021 to December 2022, Visiting Assistant Professor of Law, Lincoln Memorial University, Duncan School of Law, Knoxville, Tennessee.

September 2018 to June 2021, Assistant Public Defender, Third Judicial District of Tennessee, Morristown, Tennessee.

October 2015 to September 2018, Assistant District Attorney General, Sixth Judicial District of Tennessee, Knoxville, Tennessee.

August 2014 to October 2015, Associate Attorney, Capps, Cantwell, Capps, & Byrd, Morristown, Tennessee.

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.

In my current role, I represent indigent individuals accused of crimes in the Eastern District of Tennessee. I appear mainly in the Greeneville Division. I represent clients at all stages of a criminal case from initial appearance through resolution of their case.

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 first position after completing law school was serving as an associate attorney at Capps, Cantwell, Capps, & Byrd in Morristown, Tennessee. The firm is a small general practice firm, and I was the only associate. I accepted appointments in are juvenile and criminal courts and was retained in a variety of matters including family law, general civil litigation, and transactional matters. Due to the nature of small rural general practice, I had the opportunity to appear in court quickly and often. For instance, I tried cases in juvenile and general sessions courts within my first six months of practice. My experience accepting criminal appointments led me to focus my career in the area of criminal law.

I then accepted an appointment as an assistant district attorney general in Knoxville. Because of my previous experience in the banking industry, I was assigned as the second lawyer in Tennessee's first dedicated elder abuse prosecution unit and to the white-collar crime prosecution unit. In my role as an elder abuse prosecutor, I attended the National Institute on

the Prosecution of Elder Abuse and was engaged in a project to train all Knox County sheriff's deputies as well as Knoxville police officers on recognizing, responding to, and investigating elder abuse. Our unit was also instrumental in modernizing Tennessee's elder abuse laws and in establishing the first Vulnerable Adult Protective Investigation Team and the expansion of these teams throughout the state.

In my role as a white-collar crime prosecutor, I worked with Knox County's organized retail crime unit to apply techniques used in drug prosecutions to investigate, prosecute, and convict various "fences" (middlemen who systematically purchased stolen goods) in Knox County. These cases resulted in the seizure of hundreds of thousands of dollars' worth of stolen merchandise from Knox County merchants and similar restitution amounts. I also worked with the Tennessee Department of Revenue to prosecute individuals evading state taxes. In that role, I developed a method of indicting organizational defendants (corporations, LLCs, etc.) to ensure that these organizations could not simply continue engaging in fraud with different ownership. I believe I was the first prosecutor to indict an organizational defendant in Knox County. I also helped draft and later revise the Tennessee Organized Retail Crime Prevention Act.

While working as a public defender in Morristown, I served in the misdemeanor recovery court treatment team. I immersed myself in problem solving courts in general and recovery courts in particular as part of that process. I was also part of the initial treatment team that launched Hamblen County's felony recovery court. Finally, I was involved in an effort to address pretrial detention issues in Hamblen County. Through my efforts I was able to bring attention to the issue and this resulted in two nonprofit groups, and a prominent Tennessee law firm, bringing a successful suit against bail setters in federal court.

I then accepted a visiting professorship at Lincoln Memorial University's Duncan School of Law. I taught all of LMU's legal writing courses and also taught criminal procedure. During my tenure I wrote and published an article on the *Insular Cases*. I also sponsored and assisted in re-chartering the student chapter of the Federalist Society and the Veterans Law Society. In my role as a faculty advisor for the Federalist Society, I facilitated an event featuring my TBALL Classmate and newly appointed Tennessee Supreme Court Justice Sarah Campbell. I also assisted the LMU Law Review with securing speakers for its 2022 symposium and scheduled a tour of the Tennessee Department of Corrections' Day Reporting Center for the Criminal Law Society. I also served on the Lincoln Scholars steering committee. The Lincoln Scholars was a then-new a group of diverse and first-generation students at LMU Law.

Since January of 2023, I have served as an Assistant Federal Defender with Federal Defender Services of East Tennessee (FDSET) in Greeneville, Tennessee. My time in federal practice has been engaging and intellectually stimulating, presenting challenges that have pushed me to grow as an attorney in the best possible ways.

The stakes in criminal defense are always high, but the consequences of federal crimes can be particularly severe, often involving lengthy sentences and complex legal issues. FDSET's commitment to providing first-rate representation to its clients and holding its lawyers to the highest standards has allowed me to quickly immerse myself in the intricacies of federal criminal defense. I've rapidly developed expertise in areas crucial to effective federal representation, including the nuances of the sentencing guidelines, statutory federal criminal law, and complex legal analyses such as the "categorical approach" used in determining whether prior convictions qualify as predicate offenses.

In addition to casework, I've embraced opportunities for professional development and community engagement. I attended the Federal CJA Trial Skills Academy, further refining my litigation skills in the federal context. As a member of the Court's Civic Engagement committee, I've been actively involved in several initiatives aimed at fostering better understanding and trust between the federal justice system and the communities we serve. In 2023, we organized a successful Constitution Day event, where students and community members came together to read the Constitution. Early in 2024, we hosted a well-received civics bowl, and we are currently planning a teachers' law school. These activities reflect our commitment to enhancing civic education and engagement in our community.

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

State v. Demetrius Jamal Gunn, et al. (2018) in Knox County Criminal Court: This case centered on dismantling a cell of individuals engaged in a complex, multi-jurisdictional criminal scheme known as the "Felony Lane Gang" operation. The prosecution required coordinating efforts across multiple law enforcement agencies and jurisdictions. We had to grapple with a sophisticated form of organized crime that doesn't fit traditional definitions of gang activity. The "Felony Lane Gang" scheme involves a specific modus operandi of vehicle break-ins, identity theft, and fraudulent banking transactions, often crossing state lines. These schemes are hard to detect, investigate, and prosecute. However, working closely with several law enforcement agencies, we were able to dismantle an entire "cell" running the scam in Knox County and surrounding areas.

References:

1. https://dag.knoxcountytn.gov/press-release/felony-lane-gang-operation-dismantled/
2. https://www.knoxnews.com/story/news/2018/08/13/knoxville-area-felony-lane-gang-cell-dismantled-florida-members-convicted/976421002/
3. https://www.oakridger.com/story/news/2018/08/13/clinton-ac-officers-help-knox/11053266007/

State v. Matthew Keith Gard, et al. (2017), in Knox County Criminal Court: Exemplifies how prosecutors can adapt to combat organized retail crime (ORC). In this case, we coordinated with multiple agencies, including the Knox County Sheriff's Organized Retail Crime Unit and the Tennessee Department of Revenue, to build a complex case against a pawn shop operating as an ORC "fencing" operation. Our prosecutorial strategy involved employing techniques typically used in narcotics cases, such as controlled transactions, to gather evidence. This approach led to the recovery of stolen merchandise worth hundreds of thousands of dollars and the seizure of significant criminal proceeds. The successful prosecution of this case, part of a series I worked on, demonstrated the effectiveness of novel investigative methods in addressing ORC. Moreover, our prosecutorial efforts contributed to legislative change, influencing bills by Sen. Richard Briggs and Rep. Jason Zachary that became the Tennessee Organized Retail Crime

Prevention Act. This case underscores how prosecutors can drive innovation in trial courts and impact broader policy to address evolving forms of organized crime.

References:

1. https://www.knoxnews.com/story/news/crime/2017/04/25/raid-underway-western-avenue-pawn-shop/100883578/
2. https://www.wbir.com/article/news/local/knoxville-pawn-shop-raid-targets-stolen-goods-store-owners-charged-with-theft/51-434009156
3. https://www.wate.com/news/local-news/2-knox-county-pawn-shop-owners-arrested-accused-of-selling-stolen-goods-2//

State v. Greene, (2018), in Hamblen County Criminal Court: This case underscored the critical importance of considering a defendant's financial capacity when determining restitution, particularly for elderly individuals like the 76-year-old Mr. Greene. The Court of Criminal Appeals' decision to reverse and remand highlighted several key issues: the necessity for trial courts to thoroughly evaluate a defendant's current and future ability to pay, the requirement for definitive rather than contingent restitution orders, and the mandatory establishment of a specific payment schedule. The court's scrutiny of unsupported factual findings in the trial court's decision further emphasized the need for fact-based determinations in sentencing. This ruling not only potentially benefits Mr. Greene by ensuring a more equitable restitution judgment but also serves as a crucial precedent, reminding trial courts to adhere strictly to statutory requirements in restitution cases.

References:

1. *State v. Greene*, No. E201901877CCAR3CD, 2020 WL 6744084 (Tenn. Crim. App. Nov. 17, 2020).

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

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

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

N/A

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

attention of the Council.

In Spring 2014, during law school, I served as a Judicial Extern (Law Clerk) for The Honorable Norma Ogle of the Tennessee Court of Criminal Appeals in Knoxville, Tennessee. This externship provided valuable insight into the appellate process and improved my legal research and writing skills. My responsibilities included:

- Drafting initial drafts of judicial opinions
- Reviewing and editing other judges' opinions
- Researching and drafting bench memos and bench briefs
- Editing judicial opinions for circulation

Through this experience, I learned how appellate courts operate and how judges make decisions. I also improved my ability to analyze complex legal issues and write clear, reasoned arguments. This externship was instrumental in developing my understanding of appellate court procedures and the intricacies of judicial decision-making. These skills have proved invaluable throughout my legal career and is particularly relevant to the position I'm seeking on the Court of Criminal Appeals.

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

I have not previously submitted an application.

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
Dates of Attendance: August 2011 to May 2014
Degree Awarded: J.D. (Juris Doctor), cum laude
Major: Law
Recognition and Relevant Aspects:

- Managing Editor, Tennessee Journal of Law and Policy
- Student Member, American Inns of Court, Burnett Chapter
- Member & Student Coach, Phi Alpha Delta Trial Team
- Finalist, Advocacy Idol Competition

- Treasurer, Federalist Society
- Member, Moot Court Board
- Member, Military Law Society
- UT College of Law Student Ambassador

University of Florida
Dates of Attendance: August 2009 to August 2011
Degree Awarded: B.S. (Bachelor of Science)
Major: Business Administration
Recognition:

- Scored in the top 10% of business students nationally on the ETS® Major Field Test for the Bachelor's Degree in Business
- Selected for Delta Epsilon Iota, Professional Honor Society

Valencia College
Dates of Attendance: January 2007 to August 2009
Degree Awarded: A.A. (Associate of Arts)
Major: Business Administration

Florida College
Dates of Attendance: January 2009 to May 2009
Degree Awarded: None, enrolled as a transient student.
Major: Business Administration.

University of Central Florida
Dates of Attendance: January 1999 to May 1999
Degree Awarded: None
Major: Marketing
Reason for Leaving: Withdrew to pursue military service

It is important to note that throughout my undergraduate education, I was working full time and supporting a growing family, which demonstrates my ability to balance multiple responsibilities while pursuing academic goals.

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]

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

I have lived in Morristown, Tennessee for 13 years since August of 2011.

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

I have lived in Hamblen County for 13 years.

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

Hamblen County.

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

I served in the United States Army reserve from October 2000 until August 2005 and was discharged under general honorable conditions from my reserve component as a sergeant (promotable). My reserve unit was disbanded after our active-duty service, and I was unable to find a substitute unit that would allow me to remain close to my mentally ill mother. After law school, I attempted to join the Tennessee National Guard and was selected after an initial interview but could not obtain the requisite medical waivers. During my reserve service time I served two periods of Active Duty from February 2001 to January 2002 and from February 2002 to September 2003 earning an honorable discharge from active duty. During my terms of service I was awarded the National Defense Service Medal, Armed Forces Reserve Medal with "M" device, Army Service Ribbon, and the Global War on Terrorism Service Medal. I was also a member of a unit that received a meritorious unit citation from the Central Intelligence Agency.

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.

No formal complaints have been filed against me.

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

No.

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

No.

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

No.

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

Director, HOLA Lakeway, April 2020-Present.

Community Advisor, WSCC RHiTA, July 2019-July 2022.

Director, Federal Defender Services of East Tennessee, January 2019-November 2022.

Director, Morristown-Hamblen Humane Society, September 2015-May 2023.

Youth Ministry Leader, St. Patrick Catholic Church, August 2014-Present.

Founder & Chairman, HOLA Lakeway, October 2014-October 2016.

27. Have you ever belonged to any organization, association, club or society that limits its

membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

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

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

I have never belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender.

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.

Federalist Society, August 2011 to Present; member, UT Law Chapter treasurer, 2013-2014, LMU Chapter faculty advisor, 2021-2022.

Knoxville Latino Bar Association, December 2022 to Present; membership director, founder/organizing committee member.

Tennessee Bar Association, 2020 to Present; member.

Knoxville Bar Association, 2015-2018 and 2021 to 2024; member.

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.

Claudia Jack Award (for outstanding public defense) Tennessee Bar Association, June 2021.

Tennessee Bar Association Leadership Law Class of 2020.

MLK Jr. Award (for service and advocacy) Morristown Task Force on Diversity, January 2016.

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

Law Journals

- *The New Insular Cases*, 29 Wm. & Mary J. Race, Gender & Soc. Just. 435 (2023).
- *How to Make Better Sessions Judges: Appellate Review. A Proposal to Reform Tennessee's General Sessions Courts for the 21st Century,* 8 Lincoln Mem'l Univ. L. Rev. 208 (2020).

- *Incorporating the Lonely Star: How Puerto Rico Became Incorporated & Earned a Place in the Sisterhood of States,* 9 Tenn. J.L. & Pol'y 433 (2014).

Bar Journals

- *What's in a Name? Una Rosa by any other name would smell as sweet. Cultural competence, naming conventions, client representation, and the ethics of what lawyers (and courts) call our clients*, Tenn. Bar J. Sept. 1, 2024.
- *Chaos Theory: Independent State Legislatures Get Their Day in Court,* Knoxville Bar Ass'n Dicta, Jan. 2023.
- *Good Counsel: A call, and a guide, to appeal more General Sessions bail decisions,* Tenn. Bar J. Select, Nov. 23, 2021.
- *Whose Burden is it Anyway? Bail Hearings Post-Torres v. Collins*, Tenn. Bar J., Sept. 1, 2021.
- *Cash on the Barrelhead. Money Bail, Law and Practice,* Tenn. Bar J., July 1, 2020.
- *Deliberation: Incorporating the Lonely Star,* Tenn. L. Mag., Fall 2014.
- *Inaugural State AG Externship Challenges and Rewards,* Advocate*,* Feb. 2014.

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

Law School Courses:

- Legal Communication I, Professor, Lincoln Memorial University Duncan School of Law, August 2021 to November 2021.
- Legal Communication III, Professor, Lincoln Memorial University Duncan School of Law, August 2021 to November 2021.
- Legal Communication II, Professor, Lincoln Memorial University Duncan School of Law, January 2022 to April 2022.
- Criminal Practice Skills (Adjudicatory Criminal Procedure), Lincoln Memorial University Duncan School of Law, January 2022 to April 2022.
- Legal Communication III, Professor, Lincoln Memorial University Duncan School of Law, May 2022 to July 2022.
- Legal Communication I, Professor, Lincoln Memorial University Duncan School of Law, August 2022 to November 2022.
- Legal Communication III, Professor, Lincoln Memorial University Duncan School of Law, August 2022 to November 2022.

CLE seminars:

- "Representing Non-Citizen Clients," Presenter, Federal Defender Services, June 2024.
- "What's in a name? [Una Rosa] by any other name would smell as sweet[?] Cultural competence, naming conventions, client representation, and the ethics of what lawyers (and courts) call our clients," Presenter, Knoxville Latino Bar Association, June 2024.
- "Crimmigration Basics," Presenter, Smoky Mountain Paralegal Association, July 2023.
- "Torres v. Collins, What the Preliminary Injunction Order in Hamblen County Means

for Your Representation," Presenter, Criminal Law Basics 2021, Tennessee Bar Association, July 2021.

- "Better Right Now: Personal Experiences: Who Does It Hurt?" Panelist, Tennessee Bar Association, June 2021.
- "Torres v. Collins, What the Preliminary Injunction Order in Hamblen County Means for Your Representation," Presenter, American Inns of Court, Hamilton Burnett Chapter, May 2021.
- "Leadership Development for Lawyers," Increasing Our Impact: Student and Alumni Roundtable, University of Tennessee College of Law, April 2019.

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

I was appointed an assistant district attorney general from October 2015 until September 2018 and as an assistant district public defender from September 2018 until June 2021.

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.

The following writing samples are attached to my application:

1. A redacted motion to dismiss filed in the United States District Court for the Eastern District of Tennessee in August 2024. This motion has been redacted as the matter is still pending. It reflects at least 95% of my own personal effort. I drafted the entire motion, but implemented some direction and suggestions from FDSET's appellate division lawyers. Colleagues in the Federal Defender's office provided feedback and proofreading. The exhibits to this motion are omitted for brevity.
2. A trial brief regarding restitution filed in the Criminal Court for Hamblen County, Tennessee in *State v. Greene*, No. 18-CR-363, in 2019. This brief reflects my own personal effort. I drafted the entire brief, with minimal input from colleagues. Notably, the appeal in this case was successful, as reflected in *State v. Greene*, No. E201901877CCAR3CD, 2020 WL 6744084 (Tenn. Crim. App. Nov. 17, 2020).
3. A motion to disqualify counsel filed in the Criminal Court for Knox County, Tennessee in *State v. Spears*, No. 108694, in 2017. This motion reflects my own personal effort. I drafted the entire motion, with colleagues in the District Attorney's office offering feedback and proofreading. This motion was successful, and the disqualification was

affirmed on appeal in *State v. Spears*, No. E201701836CCAR9CD, 2018 WL 3528315 (Tenn. Crim. App. July 23, 2018).

4. A redacted response to a motion *in limine* filed in the Criminal Court for Knox County, in 2017. This response was successful, and it led to resolution of the case. It reflects my own personal effort. I drafted the entire response, with colleagues in the District Attorney's office offering feedback and proofreading. This response has been redacted as the matter ended in a dismissal after payment of restitution.

These writing samples demonstrate my ability to analyze complex legal issues, craft persuasive arguments, and communicate effectively in writing across different areas of criminal law and procedure. They also showcase my experience in both prosecution and defense roles, as well as my capacity for independent legal research and writing.

ESSAYS/PERSONAL STATEMENTS

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

I seek this position on the Court of Criminal Appeals because it combines my passion for the rule of law with my love for legal writing and analysis. My diverse experience as a prosecutor, public defender, and federal defender has given me a comprehensive understanding of our criminal justice system, uniquely preparing me for this role. I believe I would excel in it, applying my knowledge to navigate complex legal questions effectively.

This position allows me to continue my career of public service in a capacity that fully utilizes my skills and experience. The Court plays a vital role in ensuring justice and maintaining the integrity of our legal system, and I'm eager to contribute to this important work. I'm committed to the fair and consistent application of the law, and I see this role as an opportunity to uphold justice while continuing to grow professionally in a field I deeply love.

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)***

My commitment to equal justice under the law has been a guiding principle throughout my career. As a law student, I was recognized as by the Tennessee Supreme Court in 2014 for my pro bono work during law school. While my roles as assistant public defender and district attorney general limited my ability to engage in traditional pro bono service, I have consistently sought ways to improve the law and serve the community. As a public defender, I worked to address pretrial detention issues, was involved in problem-solving courts, including recovery courts, to promote rehabilitation. As a prosecutor, I worked to modernize elder abuse laws and establish Vulnerable Adult Protective Investigation Teams. Currently, I serve on the District Court's Civic Engagement committee, organizing events to enhance public understanding of the legal system. These activities reflect my ongoing commitment to equal justice and community service.

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

The Court of Criminal Appeals is a statewide intermediate appellate court with 12 judges who review trial court appeals in criminal and post-conviction petitions. I seek a position in the Eastern division, one of three regional panels that collectively handle approximately 800 cases per year. It is the court of last resort for 97% of criminal cases in Tennessee and its decisions profoundly impact Tennessee's criminal justice system.

My selection would bring a unique perspective, combining experience as a prosecutor, public defender, and federal defender. Moreover, my personal experiences as a crime victim and the son of a criminal defendant provide firsthand insight into our justice system's human impact. This diverse background would contribute to balanced, well-rounded decision-making.

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)***

Throughout my career, I've been committed to community service and civic engagement, serving on boards of local organizations and as a youth ministry leader. If appointed to the Court of Criminal Appeals, I would continue this involvement as permitted by the Code of Judicial Conduct. As a member of the District Court's Civic Engagement committee, I've promoted civics education through various events and would seek to engage in similar efforts if appointed.

Leveraging my unique perspective as a former prosecutor, public defender, federal defender, crime victim, and son of a former criminal defendant, I would strive to offer a comprehensive view of our legal system to students and the public. I would support programs that bring the court closer to the communities, especially rural communities like mine in Morristown, including through the SCALES program.

I would also seek opportunities to mentor aspiring lawyers and collaborate with legal organizations to address gaps in legal services. These activities would allow me to contribute positively to the community while maintaining judicial impartiality and integrity.

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)***

My journey begins with my family story. Born to a paranoid-schizophrenic single mother from Puerto Rico, I was raised in challenging circumstances that shaped my worldview and instilled in me deep empathy and resilience. My grandmother, who left school in 4th grade to work in a button factory, remains the wisest person I've known, teaching me the value of hard work and perseverance. My faith, while personal, has been a guiding force, teaching me the importance of charity and service. This ethos has been integral to my legal career, from prosecutor to public defender and federal defender.

My path has been unconventional. I served in the military, worked various jobs to support my

family, and pursued law as a non-traditional student. Each experience has broadened my perspective and ability to relate to diverse individuals. As an attorney, I've seen the justice system from multiple angles. My work with civics engagement and organizations like HOLA Lakeway reflects my commitment to public service and education. These life experiences, combined with my legal expertise, have prepared me to serve on the Court of Criminal Appeals with restraint, wisdom, and a deep commitment to justice for all Tennesseans.

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

Absolutely. My experiences in the justice system have reinforced the importance of upholding the law as written, regardless of personal opinions. Having experienced both sides of the criminal justice system, I've developed a deep appreciation for the rule of law. This background has taught me that justice must be applied equally and consistently, based on the law as it stands, not on personal beliefs or circumstances.

Throughout my career, I have encountered situations where I may have disagreed with the substance of a law but recognized my duty to work within its confines. One example from my time as a prosecutor illustrates this commitment. I faced a heartbreaking case of financial exploitation where the statute of limitations had expired on the charges we could prove. Despite my desire to seek justice for the victim, and after exhaustive discussions with colleagues and supervisors, I had to decline prosecution. The law, as written, left no avenue to file charges. That difficult conversation with the victim was one of the most challenging in my career, but it was necessary and meaningful. The victim appreciated our thorough efforts, even if they were fruitless.

Commitment to the rule of law means that the law must be interpreted and applied faithfully, not reshaped based on personal preferences. Especially in difficult situations. If appointed to the Court of Criminal Appeals, I would ensure my rulings are grounded in the law as enacted by the legislature and interpreted by higher courts, regardless of my personal views.

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. Hon. Hector Sanchez, Criminal Court Judge, Knox County, Tennessee, [redacted], hector.sanchez@knoxcounty.org.

B. Douglas Blaze, Dean Emeritus, University of Tennessee College of Law, [redacted], douglasblaze@comcast.net.

C. Matthew Lyon, Dean of LMU's Duncan School of Law, [redacted],

matthew.lyon@lmunet.edu.
D. Jennifer Little, retired, former Vice Chairwoman, Tennessee Republican Party, [redacted].
E. Hon. Bill Brittain, Hamblen County Mayor (retired 2024), [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: October 21, 20 24.

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.

Willie Santana
Type or Print Name

Signature

October 21, 2024
Date

033522
BPR #

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**No.** [redacted]
	)	**WYRICK/ CORKER**
[redacted]	)	

MOTION TO DISMISS COUNT THREE OF THE INDICTMENT

[redacted] moves this Court to dismiss Count Three of the Indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). This Court should dismiss Count Three because at least two of the alleged Armed Career Criminal Act (ACCA) predicate offenses do not qualify as "violent felonies" under 18 U.S.C. § 924(e). In support of this motion, counsel shows:

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2023, the government charged [redacted] in a four-count indictment. Count Three charges him with being a felon in possession of a firearm in violation of 18 United States Code Sections 922(g)(1) and 924(e)(1). The indictment alleges [redacted] has four prior convictions that qualify as ACCA predicates:

1. Burglary of a Building, in Ellis County, Texas, with an offense date of [redacted], and a conviction date of on or about [redacted];
2. Burglary of a Habitation, in Ellis County, Texas, with an offense date of [redacted], and a conviction date of [redacted];
3. Robbery, Dallas County, Texas, with an offense date of [redacted], and a conviction date of [redacted]; and
4. Burglary of a Habitation, Dallas County, Texas, with an offense date of [redacted], and a conviction date of [redacted].

[redacted]

II. ARGUMENT

[redacted] contends his Texas burglary convictions do not qualify as ACCA predicates. This leaves him without the requisite three qualifying predicate offenses for three broad reasons. First, the Texas burglary statute under which [redacted] was convicted, Tex. Penal Code 30.02(a)(3), is broader than generic burglary because it criminalizes conduct that does not require proof that the person formed the specific intent to commit a crime at any time during the course of the burglary. Second, [redacted] provides definitive proof that Texas courts interpret and apply the statute in this manner, rendering unpersuasive the Fifth Circuit's non-binding discussion of the statute. Finally, without these non-qualifying convictions, [redacted] lacks the three predicate offenses required for an ACCA enhancement.

A. Texas "burglary" under Tex. Penal Code § 30.02(a)(3) does not qualify as an ACCA predicate because it criminalizes conduct broader than generic burglary.

1. Specific intent to commit a crime is an essential element of generic burglary.

Under the ACCA, "burglary" qualifies as an enumerated offense if it constitutes "generic" burglary. *Taylor v. United States*, 495 U.S. 575, 598 (1990). The Supreme Court defines "the generic, contemporary meaning of burglary" as the crime defined by the majority of jurisdictions in 1986 when Congress enacted the ACCA in its current form. *Id*. Drawing from a contemporary survey of modern statutes, the Supreme Court identified the generic meaning of burglary as having three elements: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id*. (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 8.13(a), (c), (e), at 466, 471, 474 (1986)).

The third element, "with intent to commit a crime," corresponds to the common law definition of burglary and its status as a specific intent crime. *Taylor*, 495 U.S. at 580 n.3; see 1 Wayne R. LaFave, Substantive Criminal Law § 5.2(e) (3d ed. 2017). The difference between the

common-law intent element and the third element of generic burglary is that by 1986, modern statutes had expanded the element to cover intent to commit any crime, not just intent to commit a felony. LaFave & Scott, supra, § 8.13(e), at 474 ("The prevailing view in the modern codes is that an intent to commit any offense will do.").

By 1986, every state had included in its primary burglary statute a requirement for specific intent (or purpose) to commit a crime. Only two states, Texas, and North Carolina, had a single variant of a lesser degree of burglary missing the element of specific intent. In all, over one hundred burglary statutes across all fifty states required proof of the specific intent to commit a crime, as did several federal burglary-type statutes. *E.g.*, 18 U.S.C. § 2113(a) (defining bank burglary as "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank").

Burglary is the quintessential specific intent crime. Without the element of intent to commit a crime inside the building, burglary becomes mere trespass. 4 William Blackstone, Commentaries on the Laws of England 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass."). In 1974, Texas adopted a version of burglary that eliminates the need to prove a person's specific intent to commit a crime, permitting instead conviction when the person unlawfully enters or remains in the building and commits any felony, theft, or assault—including those that are merely reckless, negligent, or strict liability. Tex. Penal Code Ann. § 30.02(a)(3) (West 2021); *see* 1974 Tex. Gen. Laws 975, 976-77. This variant of burglary is known as "trespass-plus-crime." *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018).

Just four states today define burglary to include trespass-plus-crime—Michigan, Minnesota, Tennessee, and Texas. In these states, prosecutors can convict a person for burglary by

proving that they committed a reckless, negligent, or strict liability crime while trespassing. By overwhelming measure, then, a burglary statute lacking the element of specific intent deviates sharply from the majority rule, both in 1986 and now. *Cf. Descamps v. United States*, 570 U.S. 254, 259 (2013) (holding that Cal. Penal Code § 459 does not constitute generic burglary because it "does not require the entry to have been unlawful in the way most burglary laws do"). Such a statute, which diverges significantly from the norm, reflects no "modest . . . deviation[] from generic burglary." *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019). Rather, it creates an entirely different crime, equivalent to eliminating "unlawful" from the entry element or allowing conviction for burglarizing a vending machine. *Descamps*, 570 U.S. at 259; *Taylor*, 495 U.S. at 599. A state "burglary" offense lacking the element of specific intent to commit a crime "goes beyond the normal, 'generic' definition of burglary," and therefore does not qualify as a violent felony under the ACCA. *Descamps*, 570 U.S. at 259.

2. Courts uniformly recognize that a state burglary statute lacking the element of specific intent does not qualify as generic burglary, including after Quarles.

The Supreme Court's 2019 decision in *Quarles* does not undermine this conclusion. There, the Court rejected the petitioner's argument that for so-called "remaining-in" burglary to qualify as generic burglary, the state must prove the person formed the specific intent to commit a crime at the exact moment of the unlawful entry or remaining in. *Quarles*, 139 S. Ct. at 1877-79. Rather, the Court held, the person could form the intent to commit a crime at any time while unlawfully remaining in the structure. *Id.* at 1878. But, crucially, the Court still presumed that the person must form the specific intent at some point. *Id*. at 1878-79. For this reason, both before and after *Quarles*, the Seventh Circuit has easily recognized that Minnesota's trespass-plus-crime statute does not constitute generic burglary.

Minnesota's burglary statute defines burglary to include when a person "enters a building without consent and commits a crime while in the building." Minn. Stat. § 609.582(2)(a) (2020). Before *Quarles*, the Seventh Circuit held that this statute does not qualify as generic burglary because it "doesn't require proof of intent to commit a crime at *all*—not at *any* point during the offense conduct." *Van Cannon*, 890 F.3d at 664 (emphases in original). In reaching this conclusion, the court rejected the government's contention that the required intent to commit a crime is implicit in the proof of a completed crime, reasoning that "not all crimes are intentional; some require only recklessness or criminal negligence." *Id*.

After *Quarles*, the Seventh Circuit confirmed that *Van Cannon* remains good law. In *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019), the court held "with confidence" that "*Quarles* did not abrogate *Van Cannon*'s conclusion that Minnesota burglary is broader than generic burglary because the state statute does not require proof of any intent at *any point*." *Id*. at 860 (noting that this court expressly declined to address the question) (emphasis in original); *id*. at 865-66 (Barrett, J., concurring) (accepting without question the continued correctness of *Van Cannon* after *Quarles*). Since then, at least four district courts in the Eighth Circuit have independently considered the question after *Quarles* and likewise concluded that Minnesota's trespass-plus-crime statute, because it requires no specific intent to commit a crime at all, does not constitute generic burglary. *See United States v. Raymond*, 466 F. Supp. 3d 1008, 1014-15 (D. Minn. 2020); *United States v. Bugh*, 459 F. Supp. 3d 1184, 1198-1200 (D. Minn. 2020); *United States v. Sims*, No. 13-cr-109, 2020 WL 7181265, at *2 (D. Minn. Dec. 8, 2020); *United States v. Isaacson*, No. 07-cr-320, 2020 WL 6545892, at *3 (D. Minn. Nov. 9, 2020).

Like Minnesota, Texas is one of the handful of states that have adopted a burglary statute dispensing on its face with the element of specific intent to commit a crime in addition to the

trespass. In Texas, a person commits burglary if, "without the effective consent of the owner," the person:

> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Penal Code Ann. § 30.02(a) (West 2021). The burglary offenses defined under subsections (a)(1) and (a)(2) are specific intent crimes, while the (a)(3) variant is not.

The most obvious evidence that subsection (a)(3) departs from the generic definition of burglary is that it covers unlawful entry plus commission of any form of assault, which in Texas can be committed recklessly. Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02(a)(1) (West 2021). Reading the statute for what it says, Texas courts have instructed juries that they can convict a defendant for burglary based on the theory that they entered a residence and committed reckless assault. See, e.g., *Daniel v. State*, No. 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App. Dec. 13, 2018).

Numerous Texas appellate opinions acknowledge that proof of commission of a reckless assault suffices to prove burglary under § 30.02(a)(3). For instance, in *Daniel v. State*, No. 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App. Dec. 13, 2018) the court stated: "All the State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault Phillips and Schwab." The court further noted that "a person commits assault when he intentionally, knowingly, or *recklessly* causes bodily injury to

another." *Id*. at *2 (emphasis added). Several other Texas appellate courts have recognized that assault, as an element of burglary under § 30.02(a)(3), can be committed recklessly. *See Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App. 2009) (noting assault can be committed "intentionally, knowingly, or recklessly"); *Alacan v. State*, No. 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App. Jan. 21, 2016) (same); *Crawford v. State*, No. 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App. Mar. 16, 2015) (same); *Johnson v. State,* No. 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App. July 14, 2011) (same); *Torrez v. State*, No. 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App. July 19, 2006) (same); *Guzman v. State*, No. 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App. Mar. 23, 2006) (same); *Brooks v. State*, No. 08-15-00208-CR, 2017 WL 6350260, at *2 (Tex. App. Dec. 13, 2017) (same).

As concrete proof, [redacted] submits here court documents from an actual case definitively showing that Texas courts have convicted people for burglary under § 30.02(a)(3) for conduct that falls outside the scope of generic burglary. In *State v. Gonzalez*, No. F23-12554 (Crim. Dist. Ct. No. 4, Dallas Cnty., Tex. Feb. 12, 2024) (documents attached here as Exhibit A), a person was convicted of burglary under § 30.02(a)(3) based on a trespass plus a reckless assault. In that case, the defendant pled guilty to "enter[ing] a building without the effective consent of the owner, Glenn Kitts" and "commit[ting] the offense of assault against Glenn Kitts by recklessly causing bodily injury to Glenn Kitts." *See* Ex. A, "Defendant's Plea of Guilty" Tr., at 8. The court found this sufficient to sustain a burglary conviction under § 30.02(a)(3), despite the absence any evidence that the defendant intended to commit a crime upon entry. Indeed, the parties specifically clarified for the record that Gonzalez was "entering this plea to the offense of burglary of a building, with the specific circumstances of having entered into the building without the expressed consent of the owner of the building, and then committing assault by recklessly causing bodily

injury." *See* Ex. A, "Agreed Plea" Tr., at 5. The court accepted this plea and explanation without any indication that specific intent was required.

This real-world application of the statute demonstrates unequivocally that § 30.02(a)(3) criminalizes conduct broader than generic burglary. It shows that Texas courts do, in fact, convict defendants of burglary in situations where the defendant lacked the specific intent to commit a crime upon entry –a critical element of generic burglary as defined by the Supreme Court in *Taylor*.

3. The Fifth Circuit's interpretation of Texas Penal Code section 30.02(a)(2) is neither binding nor persuasive.

Finally, the government will likely point out that the Fifth Circuit has held that burglary of a habitation under Texas Penal Code § 30.02 falls within the generic definition of burglary for purposes of the categorical approach. *United States v. Herrold II*, 941 F.3d 173, 178-80 (5th Cir. 2019) (en banc). But the Fifth Circuit's decision in *Herrold* does not control here, and should not. Its conclusion was driven first by the fact that the defendant in that case did not point to any Texas cases proving that a person could be convicted of trespass plus a truly reckless offense. *Id.* at 178-79. The defendant in a later case, *United States v. Wallace*, 964 F.3d 386 (5th Cir. 2020), presented a panel of the Fifth Circuit with a small collection of Texas cases upholding convictions under section 33.02(a)(3) on the basis of post-entry offenses requiring only recklessness, but the panel said it was bound by *Herrold II* and declined to revisit the holding. Even if the Texas cases showed that *Herrold II* was mistaken in its holding, the *Wallace* panel concluded it was bound by the *en banc* court's analysis in *Herrold II*, which was premised on a published Texas decision discussing no-intent burglary under § 30.02(a)(3) predicated on a completed or attempted felony or theft, with no mention of the potential for reckless assault. *Id.* at 388-89 (referring to *DeVaughn v. State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988)). The *Wallace* panel concluded that under Fifth Circuit law regarding the binding nature of its holding in *Herrold II*, it "must adhere to that." *Id.* at 389-90.

Notably, the panel did not opine on whether the court in *Herrold II* was right. Instead, it said only this: "*If* the Texas burglary statute is generic, Wallace's prior burglary convictions qualify him for the ACCA enhancement. Our *en banc* court says that it is. We must adhere to that." *Id.* at 390 (emphasis added).

The Sixth Circuit has not addressed the question whether Texas burglary under § 30.02(a)(3) qualifies as generic burglary. Having been presented with irrefutable evidence that the statute encompasses conduct lacking the formation of specific intent at any time, and in the absence of binding precedent to the contrary, this Court can come to one conclusion: subsection (a)(3) of Texas's burglary statute plainly criminalizes burglary premised on the commission of a trespass plus a reckless assault. Just as with the Minnesota statute at issue in *Van Cannon* and *Chazen*, the commission of the crime itself does not necessarily supply the proof of intent to commit a crime required for generic burglary. Because the statute eliminates the element of specific intent, it does not constitute generic burglary. With the three Texas burglary convictions not qualifying as ACCA predicates, [redacted] lacks the three qualifying predicate offenses required for an ACCA conviction.

B. The determination of whether a prior conviction qualifies as an ACCA predicate is a question of law for the Court.

While the Supreme Court recently held in *Erlinger v. United States*, 598 U.S. ___ (2024), that the question of whether prior offenses occurred on "occasions different from one another" under the ACCA is a fact that must be found by a jury beyond a reasonable doubt, the determination of whether a prior conviction qualifies as an ACCA predicate remains a question of law for the court to decide.

The Supreme Court has consistently held that the categorical approach used to determine whether a prior conviction qualifies as a predicate offense under the ACCA is a legal question for

the court. *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Mathis v. United States*, 579 U.S. 500, 517-18 (2016). This approach requires courts to compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

The categorical approach focuses solely on the statutory elements of the offense, not the particular facts underlying the conviction. *Taylor*, 495 U.S. at 600. This element-based inquiry does not require resolution of any disputed facts about what actually happened in the defendant's prior case. Instead, it involves statutory interpretation and legal analysis to determine whether the state statute categorically fits within the generic federal definition of a corresponding ACCA predicate offense. *Mathis*, 579 U.S. at 517-18.

In *Erlinger*, the Court distinguished between this legal determination and the factual inquiry into whether offenses occurred on different occasions. The Court explained that while the separate occasions inquiry often involves resolving disputed facts about the circumstances of prior offenses, the categorical approach used to determine whether an offense qualifies as an ACCA predicate does not involve such factual determinations. *Erlinger*, 598 U.S. at ___ (slip op. at 15-16).

Therefore, while a jury must now determine whether prior offenses occurred on different occasions, it remains the court's role to determine as a matter of law whether [redacted] prior convictions qualify as ACCA predicates. Doing so by way of Federal Rule of Criminal Procedure 12(b)(1) is consistent with existing practice. Pretrial motions on legal issues that can be decided "without a trial on the merits" are already regularly made to determine whether prior convictions meet various statutory requirements—for instance, whether a prior conviction constitutes a "crime punishable by imprisonment for a term exceeding one year" or a "misdemeanor crime of domestic violence" for purposes of triggering 18 U.S.C. § 922(g)(1) or (9). *See, e.g.*, *United States v. Del*

[redacted]

Valle-Fuentes, 143 F. Supp. 3d 24, 27 (D.P.R. 2015) (§ 922(g)(1)); *United States v. Steffes*, No. CR15-3019-LTS, 2016 WL 1175205, at *2 (N.D. Iowa Mar. 23, 2016) (§ 922(g)(9)).

C. Without the Texas burglary convictions, [redacted] does not have three qualifying ACCA predicates.

The ACCA requires three prior convictions for violent felonies or serious drug offenses, committed on occasions different from one another, to trigger the enhanced 15-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). A "violent felony" is defined as any crime punishable by imprisonment for a term exceeding one year that:

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

As demonstrated above, [redacted] Texas burglary convictions do not qualify as "violent felonies" under the ACCA because they do not meet the definition of generic burglary. This leaves only one potentially qualifying predicate: the robbery conviction from Dallas County, Texas. Even if we assume, for the sake of argument, that the robbery conviction qualifies as a violent felony under the ACCA, it remains the only qualifying conviction. One qualifying predicate falls far short of the three required by the statute. 18 U.S.C. § 924(e)(1).

The Supreme Court has emphasized that courts must be certain of the nature of a prior conviction before imposing ACCA's significant aggravated penalties. *Mathis v. United States*, 579 U.S. 500, 509 (2016). Given the clarity with which the ACCA specifies the need for three qualifying predicates, and the rule of lenity that requires ambiguities in criminal statutes to be resolved in favor of the defendant, *see United States v. Santos*, 553 U.S. 507, 514 (2008). The

[redacted]

consequences of an ACCA enhancement are severe, increasing the statutory maximum sentence from 15 years to life imprisonment and imposing a 15-year mandatory minimum. 18 U.S.C. § 924(a)(2), (e)(1). Such a drastic increase in punishment should not be imposed unless the requirements of the statute are clearly met. Here, they are not.

Therefore, without the Texas burglary convictions, [redacted] lacks the three qualifying predicate offenses required for an ACCA enhancement. The Court should dismiss Count Three of the Indictment to the extent it alleges [redacted] eligibility for an enhanced ACCA sentence.

III. CONCLUSION

For these reasons, [redacted] respectfully moves this Court to dismiss Count Three of the Indictment to the extent it alleges his eligibility for an enhanced sentence under the Armed Career Criminal Act.

RESPECTFULLY SUBMITTED:

FEDERAL DEFENDER SERVICES OF
EASTERN TENNESSEE, INC.

BY: s/ *Willie Santana*
Willie Santana
BPR No. 033522
Federal Defender Services
219 West Depot Street, Suite 2
Greeneville, TN 37743
(423) 636-1301

IN THE CRIMINAL COURT FOR HAMBLEN COUNTY, TENNESSSEE
AT MORRISTOWN

STATE OF TENNESSEE

VS. NO. **18-CR-363**

CARL R. GREENE

TRIAL BRIEF REGARDING THE LAW ON RESTITUTION

I. INTRODUCTION

Comes now, Mr. Greene, and files this TRIAL BRIEF for this Honorable Court's convenience, outlining the current state of the law regarding restitution. Mr. Greene respectfully contends that this Honorable Court must consider not only the amount of the victim's pecuniary loss, but Mr. Greene's financial resources and future ability to pay or perform.

II. LAW & ARGUMENT

A. Criminal restitution serves a different purpose than do civil damages

The Criminal Sentencing Reform Act of 1989 grants to sentencing judges the authority to order a defendant to pay restitution to the victim or victims as a part of the judgment and encourages the use of restitution as an alternative sentencing option. Tenn. Code Ann. § 40-35-102(3)(D); Tenn. Code Ann. § 40-35-104(c)(2); Tenn. Code Ann. § 40-35-103(6). The purpose of criminal restitution is not to make the victim whole, as it would be in a civil matter, but also to "punish and rehabilitate the guilty." *State v. Johnson*, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997); *see also* T.C.A. § 39-11-118 (restitution is punishment); T.C.A. § 40-35-104(c)(2); *State v. Johnson*, 2007 WL 4116485 (Tenn. Crim. App. 2007) (this form of restitution is part of the punishment) (a copy of this unreported case is attached by rule).

B. Criminal restitution must be reasonable.

When, like here, a trial court is setting the amount of restitution, the court must "order the presentence service officer to include in the presentence report documentation regarding the nature

and amount of the victim's pecuniary loss." Tenn. Code Ann. § 40-35-304(b). But see *State v. Lewis*, 917 S.W.2d 251, 256 (Tenn. Crim. App. 1995) (finding failure to require documentation in presentence report to be harmless where a hearing is conducted to determine the amount of restitution). Any order of restitution must be set at an amount supported by the record. Tenn. Code Ann § 40-35-304(e)(1).

There is no set formula or method for determining the amount of restitution as a condition of probation. *Johnson*, 968 S.W.2d at 886. It is paramount that the amount be "reasonable." *State v. Smith,* 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). Because the purpose of restitution is correction, not compensation, the amount of restitution does not have to equal the victim's precise pecuniary loss. *State v. Mathes*, 114 S.W.3d 915, 919 (Tenn. 2003). "The trial court simply should have set the restitution at an amount it believed [the defendant] could reasonably pay."

C. Criminal restitution must take into account a person's ability to pay.

In determining the amount of restitution and the manner of payment, the sentencing judge must also consider "the financial resources and future ability of the defendant to pay or perform." Tenn. Code Ann. § 40-35-304(d). In other words, the Court must consider what the defendant can reasonably pay because a futile order serves no purpose for the victim or the defendant and reflects the common law principle of *lex nil facit frustra, nil jubet frustra* (the law does nothing vainly; commands nothing vainly). *State v. Webb*, 130 S.W.3d 799, 837 (Tenn. Crim. App. 2003) (quoting *Smith*, 898 S.W.2d at 747). As such, the Court must set a restitution amount that the defendant can reasonably pay within the time the defendant will be within the jurisdiction of the trial court. *Webb*, 130 S.W.3d at 837; see also *State v. Comer*, 278 S.W.3d 758, 761–62 (Tenn. Crim. App. 2008). There is even a recent case from this judicial district reaffirming this principle. *State v. Burkes*, 2018 WL 2194013, at *17 (Tenn. Crim. App. May 14, 2018) (holding that on remand the

trial court "specifically consider the defendant's ability to pay.") a copy of this unreported case is attached by rule). In addition, the court should not impose an unreasonably long term of probation merely for aiding the collection of a judgment. *State v. Irick*, 861 S.W.2d 375 (Tenn. Crim. App. 1993), judgment aff'd, 906 S.W.2d 440 (Tenn. 1995).

III. CONCLUSION

The law regarding the setting of restitution is fairly settled. Restitution does not serve the same function as civil compensatory damages. It is punishment. Like all punishments, it must be fair. Thus, for restitution to be reasonable, it must take into account not just the victim's pecuniary loss but the defendant's ability to pay.

Respectfully submitted,

CARL R. GREENE
[redacted]
3522)
ASSISTANT PUBLIC DEFENDER
407 West Fifth North Street
Morristown, Tennessee 37814

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

STATE OF TENNESSEE

VS. **NO. 108694**

REBECCA SPEARS, ALIAS

MOTION TO DISQUALIFY COUNSEL

Comes now the State of Tennessee, by and through the Knox County District Attorney General Charme P. Allen, and moves this Honorable Court to disqualify Mr. Gregory H. Harrison and Valliant, Harrison, & Schwartz, P.A. (hereinafter collectively referred to as "Defense Counsel") from continuing to represent the Defendant in this case.

I. INTRODUCTION

The Defendant currently stands charged in a presentment alleging exploitation of an adult in violation of T.C.A. §39-14-111. The Defendant retained Defense Counsel after dismissing Mr. Jimmy Kyle Davis who was initially retained to represent both the Defendant and her co-defendant. The State contends that Defense Counsel has a conflict of interest that disqualifies him from representing the Defendant because Defense Counsel is a necessary witness in this matter.

II. RELEVANT FACTS

A. General Background

On August 9, 2016, the Knox County Grand Jury issued a Presentment charging the Defendant with a single count of exploitation of an adult. The victim in this case is Virginia Wilson who is the Defendant's mother and the co-defendant's grandmother. The victim currently

lives in Kentucky and has been placed under the guardianship of another relative by the courts of Kentucky. During the offense period, the Defendant and the co-defendant served as the victim's caretakers. The Defendant is a licensed nurse. To prove exploitation of an adult, the State must show the following elements: (1) the defendant was a *caretaker*; (2) the victim was a vulnerable *adult;* (3) the defendant improperly used funds paid to the victim or paid to the caretaker for the use or care of the victim; and (4) the defendant acted knowingly.

B. Evidence from Defense Counsel

At trial, the State expects to establish that the Defendant, in her role as the victim's caretaker, used the victim's resources, funds, and property to benefit herself and the co-defendant to the victim's detriment. The State intends to show that events and circumstances surrounding the misuse of the victim's property, funds, and resources support the reasonable inference that it was the defendants, and not the victim, who benefited from the Defendant's improper use of the victim's funds and property. This evidence would serve not only as circumstantial evidence of the Defendant's acts, but also as rebuttal evidence to a possible defense theory of *consent*.

The State expects to offer into evidence a *Quit Claim Deed* that was prepared by Defense Counsel in 2011. This *Deed* states on its face that it was prepared by Defense Counsel and is attached as Exhibit 1. At trial, the State intends to subpoena Defense Counsel to obtain non-privileged testimony regarding the preparation, execution, transfer and filing of the Quit *Claim Deed.* Specifically, the State will ask Defense Counsel whether the victim or the Defendant asked for the document to be prepared. The State will also seek testimony about who was Defense Counsel's client; whether Defense Counsel was paid by the victim or the Defendant; and whether Defense Counsel has any records or personal recollection of seeing, meeting, or otherwise having any contact with the victim in connection with this transaction.

Another piece of evidence that the State expects to offer at trial is a *Durable Power of Attorney with Healthcare* that was prepared by Defense Counsel in 2012. This *Durable Power of Attorney with Healthcare* states on its face that it was prepared by Defense Counsel and is attached as Exhibit 2. At trial, the State intends to subpoena Defense Counsel to obtain non-privileged testimony regarding the *Durable Power of Attorney with Healthcare.* Specifically, the State will ask Defense Counsel whether it was the victim or the Defendant who asked for the document to be prepared; who was Defense Counsel's client; whether Defense Counsel was paid by the victim or the Defendant; and whether Defense Counsel has any records or recollection of ever seeing, meeting, or otherwise having any contact with the victim in connection with this transaction.

The State also expects to offer into evidence a statement from a *Discover Card* in the victim's name for the month of February 2011 that shows a charge dated January 11, 2011 for $1,000 from "VHSG Attorneys" in Knoxville. The State has a reasonable basis to believe that this transaction was to pay for the Defendant's divorce retainer. A copy of this statement is attached as Exhibit 3. At trial, the State expects to subpoena Defense Counsel to obtain non-privileged testimony regarding the $1000 charge. Specifically, the State expects to call Defense Counsel to explain to the trier of fact what the purpose of this transaction was; whether it was for services rendered to victim or the Defendant; and whether Defense Counsel has any records or personal recollection of ever seeing, meeting, or otherwise having any contact with the victim in connection with this transaction.

The foregoing evidence will join a body of other evidence at trial in the form of testimony from the victim's family, copies of checks written by the Defendant to pay for co-defendant's child support, a copy of an envelope of the Defendant's former employer used to

mail the checks for the co-defendants payments, and testimony by the Defendant's former sister-in-law individual who notarized these documents. This evidence will establish a pattern of conduct that will allow a trier of fact to draw a reasonable inference that the Defendant was improperly using the victim's funds for the benefit of herself and her co-defendant. This pattern will also show that these transactions were not conducted under the authority of the victim or that she was even aware of them.

MEMORANDUM OF LAW

DEFENSE COUNSEL IS A NECESSARY WITNESS IN THE STATE'S CASE AND SHOULD BE DISQUALIFIED FROM REPRESENTING DEFENDANT.

The State contends that Defense Counsel has a conflict that disqualifies him from representing the Defendant because Defense Counsel is a necessary witness in this matter. The decision to disqualify counsel is in the discretion of the trial court. *State v. Phillips*, 672 S.W.2d 427 (Tenn. Crim. App. 1984). The Tennessee Supreme Court has exclusive authority to regulate attorneys in this state. *In re Petition of Burson*, 909 S.W.2d 768, 773 (Tenn.1995). The Court has adopted and issued the "Tennessee Rules of Professional Conduct" to govern the practice of law in our state. See generally Tenn. R. S. Ct. Rule 8.

Pursuant to this authority, the Tennessee Supreme Court has directed that "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." Tenn. R. S. Ct. Rule 8, RPC 3.7(a). Comments to Rule 8 indicate that when there is "substantial conflict between the testimony of the client and that of the lawyer", a lawyer may not serve as both advocate and witness. Tenn. R. S. Ct. Rule 8, RPC 3.7 comment 6.

There are only three exceptions to the absolute prohibition against a lawyer acting as legal advocate and witness. None of the exceptions are applicable here. Pursuant to RPC 3.7, a lawyer will not be disqualified at trial if (1) the lawyer's testimony relates to an uncontested

issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client. Tenn. R. S. Ct. Rule 8, RPC 3.7. Exception (2) does not apply because the anticipated testimony of Defense Counsel does not relate to the nature and value of legal services rendered in this case. This is not a civil case concerning a dispute over fees. Exception (3) does not apply because there is ample time for the Defendant to hire another lawyer before trial. The trial in this matter has not been scheduled yet. If the Defendant cannot afford to hire another lawyer, she can obtain appointed counsel.

Most importantly, Exception (1) does not apply because the anticipated testimony of Mr. Harrison relates directly to a highly contested issue in this case – whether the victim's funds were used to benefit the Defendant and whether the victim consented to it. Defense Counsel is a necessary witness on a contested issue because Defense Counsel has (1) accepted payments from the victim, (2) prepared a document that involved the victim's property, and (3) prepared a document that purported to give the Defendant certain authority to conduct affairs for the victim. The existence of these events, and the extent of the victim's and the Defendant's involvement in the same, is evidence in the State's case-in-chief against the Defendant. Because the Defendant has an absolute right against self-incrimination, the State can rely only on Defense Counsel to establish these facts. The State further avers that whether these events occurred with the victim's knowledge, authority, or consent is a matter in dispute for the trier of fact to resolve and will be a highly contested issue in the instant case. Because it is a central issue to this case, any offer to stipulate to Defense Counsel's testimony must be rejected.[1]

[1] During a Status Hearing on March 24, 2017, Defense Counsel offered to Stipulate to these facts. The State does not rely on this because the Defendant was not present in Court, and in criminal cases defendants have an absolute constitutional right against compelled self-incrimination that only a defendant can waive. *Rigger v. State*, 341

Furthermore, because Mr. Harrison's anticipated testimony relates to a highly contested issue that will be directly adverse to his client's interest, he and his firm must be disqualified. A lawyer has a duty to exercise "loyalty and independent judgment" in his relationship with a client. Tenn. R. S. Ct. Rule 8, RPC 1.7, comment 1. Another lawyer cannot step in at trial where there is a conflict of interest presented by the testifying lawyer and the client. Tenn. R. S.Ct. Rule 8, RPC 3.7(b) ("A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9."). In this case, Mr. Harrison's testimony will help establish that the Defendant was improperly using the victim's funds for the benefit of herself and her co-defendant. His testimony will also help show that these transactions were not conducted under the authority of the victim or that she was even aware of them. This is clearly prejudicial to the Defendant's interests and presents an unavoidable conflict under RPC 1.7 between Mr. Harrison's entire firm and the Defendant.

Finally, "[o]nce a party seeking disqualification establishes a prima facie case, the burden shifts to the lawyer and the firm whose disqualification is sought to demonstrate why they should not be disqualified [and] [a]ny doubts regarding the existence of an asserted conflict should be resolved in favor of disqualification." *State v. Bryan*, No. M199900854CCAR9CD, 2000 WL 1131890, at *3 (Tenn. Crim. App. Aug. 4, 2000) citing *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 WL 976582, at *13 (Tenn. Ct. App. Oct. 28, 1999), aff'd, 46 S.W.3d 177 (Tenn. 2001).

The facts outlined above establish a *prima facie case* for the existence of a conflict and the disqualification of Defense Counsel from further representation of the Defendant in this

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S.W.3d 299, 308 (Tenn. Crim. App. 2010) (noting that waivers of this type are "an intentional relinquishment or abandonment of a known right or privilege).

matter. Therefore, the burden is shifted upon Defense Counsel to demonstrate that disqualification in this matter is not proper. The State believes that Defense Counsel cannot meet this burden.

To be clear, the State is not alleging any improper conduct in these events on the part of Defense Counsel; rather the State alleges that these previous events disqualify Defense Counsel from participating as an advocate in the instant case because he is a necessary witness for the State.

III. CONCLUSION

Based on the foregoing, the State contends that Defense Counsel has a conflict of interest that disqualifies him from representing the Defendant because Defense Counsel is a necessary witness in this matter and asks this Honorable Court to grant its motion.

RESPECTFULLY SUBMITTED,

CHARME P. ALLEN
DISTRICT ATTORNEY GENERAL

BY: [redacted]
WILLIE SANTANA
ASSISTANT DISTRICT ATTORNEY

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

STATE OF TENNESSEE

VS. **NO.** [redacted]

[redacted], **ALIAS**

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE

Comes now the State of Tennessee, by and through the Knox County District Attorney General Charme P. Allen, and moves this Honorable Court to Deny the Defendant's *Motion in Limine* Regarding Ownership of Property.

INTRODUCTION

The Defendant currently stands charged in a two-count Presentment with Forgery and Theft. The Defendant contends, *inter alia*, that the State's legal position that the property at issue in this matter belonged to the Victim is flawed and asks this Court to bar any "statement or argument" that would reflect the State's legal position on the grounds that it is irrelevant and unfairly prejudicial. As more clearly stated below, the State submits that "evidence and argument" on whether the Victim is an "owner" of the property alleged to have been taken by the Defendant is a highly relevant, and not unfairly prejudicial, factual issue that must be submitted to the jury. Therefore, the Defendant's motion must fail.

STATEMENT OF FACTS

The Defendant was charged by Presentment in the present case on October 18, 2016. Count One of the Presentment charges the Defendant with Forgery over $10,000. Count 2 of the Presentment charges that the Defendant with Theft over $10,000.

At the trial of this cause, the State expects that the following facts will be proven:

A. Family Background:

The Defendant is the biological grandmother of the Victim, [redacted]. Ms. [redacted]n was born [redacted] on [redacted], 1993. The Defendant is the mother of [redacted], who is the Victim's biological father. [redacted] voluntarily surrendered his parental rights over the Victim on [redacted]. The Victim and the Defendant have been estranged for a significant period of time. The Defendant is retired from a long career in [redacted], most recently at [redacted].

B. The Property:

On or about October 12, 1994, the Defendant purchased securities through J.C. Bradford & Company, which is now UBS Financial Services, Inc. These securities were registered as follows:

[redacted] CUST
[redacted]
UTNUTMA
[redacted] Drive
Knoxville, TN 37923

The taxpayer ID number listed in the securities matches the Victim's with the exception of the last number. Nothing in any of the account's documentation is in the Defendant's name.

On May 5, 2014, nearly twenty years after opening the account in the Victim's name, UBS Financial Services, Inc. issued a check with the funds contained in the account; a total of $15,046.64. The check was made payable to:

[redacted]
[redacted]
TNUTMA

This check was endorsed [redacted] and deposited into the Defendant's [redacted] checking account on May 5, 2014. Law Enforcement interviewed [redacted] on August 19, 2016. He was represented by

counsel and executed a written waiver of his *Miranda* rights. [redacted] denies ever seeing the check in question. He further denied giving his mother authorization to sign his name. Finally, [redacted] offered a sample of his signature, which did not match the signature of the check.

In the spring of 2016, the Victim received a notice from the Internal Revenue Service. The notice informed the Victim that the service had received additional "income information" that did not match the information in her "tax return." Specifically, the Internal Revenue Service adjusted the Victim's income to reflect $14,066 in *securities* and $148 in *dividends*. This income information was further identified as coming from *UBS Financial Services, Inc.* The service asked the Victim to pay $1,924 in back taxes, interest, and penalties. The Victim would testify that she previously asked the Defendant about these funds and the Defendant denied the existence of the same.

LEGAL ARGUMENT

THE EVIDENCE SOUGHT TO BE EXCLUDED BY THE MOTION IN LIMINE IS HIGHLY RELEVANT AN NOT UNFAIRLY PREJUDICIAL.

The State contends that the "evidence and argument" that the Defendant seeks to exclude is relevant, highly probative, and not unfairly prejudicial and are matters for the jury to determine. In Tennessee, trial courts have the inherent power to entertain and rule on motions *in limine. Pullum v. Robinette*, 174 S.W.3d 124, 135 (Tenn. Ct. App. 2004). However, "a motion *in limine* should not be used as a substitute for a dispositive motion such as a motion for summary judgment." See *Duran v. Hyundai Motor America, Inc.*, 271 S.W.3d 178 (Tenn. Ct. App. 2008). Summary judgment does not exist in criminal law. *State v. Burrow*, 769 S.W.2d 510 (Tenn. Crim. App. 1989). Ownership and fair market value of stolen property are questions of fact for the jury. *State v. Eads*, No. E2010-01518-CCA-R3CD, 2011 WL 4436628, at *6 (Tenn. Crim. App. Sept. 26, 2011).

Tenn. R. Evid. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See *State v. Adkisson*, 899 S.W.2d 626, 645–46 (Tenn. Crim. App. 1994) ("[E]vidence is relevant if it tends to prove a material issue."). The Rules of Evidence favor admissibility of relevant evidence. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 227 (Tenn. Ct. App. 1999). "All relevant evidence is admissible" unless otherwise excluded by the rules of evidence "or other rules or laws of general application". Tenn. R. Evid. 402. Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. However, such exclusions are "an extraordinary remedy that should be used sparingly" and a party seeking exclusion under rule 403 has "a significant burden of persuasion." *White v. Vanderbilt Univ.*, 21 S.W.3d at 227 (citing Neil P. Cohen et al., Tennessee Law of Evidence § 403.3, at 152 (3d ed.1995)).

The jury is the ultimate trier of fact, but the trial judge has the duty to instruct the jury on the relevant law based on the issues raised during the proceedings. *State v. Dorantes*, 331 S.W.3d 370, 390 (Tenn. 2011). After the jury is instructed on the law, then jurors are "presumed to follow the instructions of the trial court." *State v. Stout*, 46 S.W.3d 689, 715 (Tenn. 2001).

The State believes, given the facts as outlined above and in the Defendant's motion, that the central issue at trial will be whether the Victim was the "owner" of the property that the State avers was taken by the Defendant. The question of ownership will require the jury to be instructed on the definition of "Owner" in Tenn. Code Ann. § 39-11-106 (26):

> [A] person, other than the defendant, who has possession of or any interest other than a mortgage, deed of trust or security interest in property, even though that possession or

interest is unlawful and without whose consent the defendant has no authority to exert control over the property.

Therefore, the jury will have to decide whether the Victim possessed "any interest" in the property stolen by the Defendant. Given the unique facts in this case, then, the jury will be called to determine whether the Defendant made a "transfer by irrevocable gift" pursuant to the Uniform Transfers to Minors Act (hereinafter "UTMA") when she opened a brokerage account was opened in the Victim's name back in 1994. *See* Tenn. Code Ann. § 35-7-105. The Defendant's motion thus argues that the jury must find that the Defendant had the (1) present intent to gift the property to the Victim and that the Defendant (2) delivered the property to the Victim when the transfer was made.[1]

The State contends that the same evidence and argument the Defendant seeks to exclude is relevant evidence for a jury to find that the Defendant did make such an irrevocable transfer. The account was funded in 1994 in the Victim's name. The account was titled as an UTMA account. The Defendant was not a signer in the account; and she was not the custodian of the account. The account was opened using the Victim's tax identification number; the Internal Revenue Service attributed the income from the account to the Victim, not the Defendant. The Defendant liquidated the account *after* the Victim asked about the funds. The brokerage firm made the check payable to the Victim and the custodian of the UTMA account, the Defendant's son; not to the Defendant. Finally, the Defendant is a sophisticated party with knowledge of the banking industry and banking laws and regulations. A jury can conclude from her experience that she knew of the significance of titling the account as an UTMA account.

[1] The Defendant contends in several of her motions that the UTMA does not supplant the common law of gratuitous transfers; the State disagrees. Because Tenn. Code Ann. § 35-7-103 states that it applies to transfers made "on or after October 1, 1992, that refers to this chapter in the designation by which the transfer is made." However, the question of whether the common law applies need not be answered to dispose of the instant motion.

A jury could also infer from the Defendant's actions surrounding the liquidation of the account, namely the forgery of her son's signature and the Defendant's denial that the account existed, that she intended to conceal her actions. Such concealment is evidence that the Defendant knew that these funds did not belong to her and a jury would be within its purview to draw such inferences from the evidence.

The State's evidence regarding the UTMA account, as outlined, is highly relevant to the issue of ownership of the Victim's property. Likewise, the evidence is not likely to confuse or mislead a properly instructed jury. Finally, the evidence is not unfairly prejudicial. The Defendant does not deny opening the account in the Victim's name. The Defendant does not deny titling the account as an UTMA account. The Defendant does not deny naming her son as the account's custodian. The Defendant does not even deny liquidating the Victim's UTMA account and depositing the funds into her account. The significance of the titling of the account is a matter that the jury must understand and excluding evidence and argument on the matter would amount to the improper use of a motion *in limine* as dispositive motion for summary judgment in a criminal matter. The appropriate remedy is to properly instruct the jury on the law regarding transfers under the UTMA, not to exclude evidence and argument of the same.

CONCLUSION

Based upon the forgoing grounds and reasons, the Defendants' Motion *in Limine* should be denied.

Respectfully submitted this _ [redacted] 2017.

CHARME P. ALLEN
DISTRICT ATTORNEY GENERAL

BY: [redacted]
WILLIE SANTANA
ASSISTANT DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and exact copy of the attached and foregoing document was delivered to Mr. [redacted] 2017.

[redacted]
WILLIE SANTANA
ASSISTANT DISTRICT ATTORNEY