# The Governor's Council for Judicial Appointments

## State of Tennessee

## *Application for Nomination to Judicial Office*


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### ***INTRODUCTION***

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

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

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

## ***PROFESSIONAL BACKGROUND AND WORK EXPERIENCE***

1. State your present employment.

I serve as a judge on the Tennessee Court of Criminal Appeals.

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

2008 – BPR #27306

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

Tennessee is the only state in which I have been licensed to practice law. In addition, I am admitted to practice in the following federal courts:

Supreme Court of the United States – June 2, 2014 – Active

United States Court of Appeals for the Sixth Circuit – September 16, 2013 – Active

U.S. District Court for the Eastern District of Tennessee – October 18, 2013 – Active

U.S. District Court for the Middle District of Tennessee – September 9, 2013 – Active

U.S. District Court for the Western District of Tennessee – October 24, 2013 – Active

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

No.

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

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| September 2022 – Present: | **Judge, Tennessee Court of Criminal Appeals**, Eastern Section |
| January 2020 – August 2022: | **Judge, Criminal Court, Division II**, for the Sixth Judicial District, Knox County, Tennessee |

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| August 2014 – December 2019: | **Deputy District Attorney General** for the Sixth Judicial District, Knox County, Tennessee |
| August 2012 – August 2014: | **Assistant Attorney General**, Office of the Tennessee Attorney General and Reporter, Nashville, Tennessee |
| November 2008 – July 2012: | **Assistant District Attorney General** for the Sixth Judicial District, Knox County, Tennessee |

Experience other than the Practice of Law

I was raised in my family's business. During my early childhood, my parents operated M.A. Hixson's Grocery, a small, family-owned grocery store outside of Crossville. The store was open Monday through Saturday, 7 a.m. to 8 p.m., without the assistance of hired employees. I would go with my father to open the store in the mornings, until it was time for me to go to school. After school, I rode the bus back to the store, where we stayed until closing. By my teenage years, my father had transitioned into operating a small chain of convenience stores in the Crossville area. I worked in these stores after school and in the summers as a teenager.

In high school, I developed an interest in broadcast communications. I gained employment at WOWF-FM, a country radio station in Crossville. Initially, I worked as a statistician for the station's coverage of high school football and basketball broadcasts. When I obtained my driver's license, I began working afternoons and weekends at the station, providing on-air news, weather, and obituary reports.

After enrolling at the University of Tennessee as an undergraduate, I volunteered at WUTK-FM, the University's student-operated radio station. I became the station's sports director and hosted a daily sports talk show. In the spring of 2003, I began broadcasting UT baseball games on WUTK. That fall, I reached an agreement with Bearden High School to broadcast their football games. I sold underwriting packages to local businesses and used the proceeds of these sales to purchase the equipment needed to broadcast from away-game sites and to pay my broadcast staff, which included a color commentator and a studio host.

Also in the fall of 2003, I worked as an associate producer for Titans Radio broadcasts. I produced a pregame show and served as a broadcast booth assistant during home games. I was quite busy this particular season: In addition to carrying a full class schedule, I broadcast Bearden games on Friday nights, covered UT football for WUTK on Saturdays, and then drove to Nashville to spend the night and report to work for the Titans at 7 a.m. on Sundays. Following the conclusion of the Titans' season, I worked as a producer on Sunday Sports Extra on WBIR-TV in Knoxville.

Additionally in 2003, I began an eight-year employment with the Vol Network as an announcer, reporter, and producer for University of Tennessee athletic broadcasts. I reported during Tennessee football and basketball broadcasts and served as a producer/studio host for midweek programming. My primary responsibility for the Vol Network was providing play-by-play and color commentary for Tennessee baseball broadcasts. I worked on the baseball

broadcast team beginning in 2005, my senior year at UT, throughout my time in law school, and through my first three years as an Assistant District Attorney General. The broadcast schedule during this time was strenuous. College baseball plays a 56-game regular season, which generally results in four to five games a week from February through May or June.

In 2017, the faculty at the University of Tennessee Winston College of Law approved my appointment as Adjunct Professor of Law. I have taught seven semesters, including the current fall semester, as an adjunct professor of trial practice. I teach students the proper techniques and practice of trial litigation, with a focus on the practical application of evidentiary and procedural rules.

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

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

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

As a judge on the Tennessee Court of Criminal Appeals, my work consists entirely of hearing and adjudicating criminal appellate cases that arise from the trial courts across the state. The Court of Criminal Appeals is comprised of twelve judges, four from each Grand Division. We hear appeals in three-judge panels that rotate monthly between Jackson, Nashville, and Knoxville. This Court serves as the intermediate appellate court for criminal cases in Tennessee, and our decisions may be appealed by permission only to the Tennessee Supreme Court. Since taking the appellate bench in 2022, I have participated in the adjudication of more than 350 cases, and I have authored more than 125 appellate opinions.

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.

**Assistant District Attorney General, November 2008 to July 2012**: I began my career as a DUI prosecutor assigned to Knox County's Second General Sessions Court. After a period in General Sessions Court, I was assigned to prosecute DUI cases in Criminal Court, where I tried many cases before a jury. With any spare time, I volunteered to assist other units within the office such as the Major Crimes Unit and the Drug Unit, so that I might gain even more knowledge and experience. During one of these volunteer stints, I served as co-counsel for the State on my first jury trial involving a first degree murder charge. I also served as co-counsel in the prosecution of a disgruntled teacher who shot a principal and an assistant principal at a local elementary school.

By the summer of 2011, District Attorney General Randy Nichols asked me to transfer to the Child Abuse Unit. While in this unit, I investigated and prosecuted hundreds of cases of physical and sexual abuse of children, as well as cases of child exploitation. I worked closely with law enforcement officers, advising on investigatory tactics, assisting in the drafting of search warrants and investigative subpoenas, and approving or declining the filing of charges. I also served as a member of the Knox County Child Protective Investigation Team, a multidisciplinary group of prosecutors, doctors, law enforcement officers, and social workers tasked with investigating all reported child abuse cases in Knox County. Finally, I served on Knox County's Child Fatality Review Team, a multidisciplinary panel that reviews every non-natural child death in the county.

I consider my time in the Child Abuse Unit as one of the most difficult yet rewarding periods of my career. When I first transferred to this unit, the late Bill Crabtree—then Deputy DA and, along with General Nichols and Special Counsel John Gill, one of the most influential mentors in my career—told me that there was no greater achievement than convicting a child abuser, yet no graver injustice than wrongfully accusing an individual of such a crime. I took this advice to heart and always sought to zealously advance the State's case while, at the same time, diligently protecting the integrity and thoroughness of our investigations and prosecutions. During this time, I was on-call 24/7 and often received calls from our investigators in the field as they conducted their investigations. Whenever possible, I attended and observed forensic interviews of child-complainants at Childhelp, our local child advocacy center. Per the custom of our office, I met personally with every child victim before I presented a case to the grand jury. These investigative practices were strenuous, and some of my efforts focused on cases that never met the threshold of warranting a charge. But the most momentous decision a prosecutor can make is whether to charge in the first instance. I am confident that our thorough efforts safeguarded the innocent and ensured that the guilty received the appropriate judgment under the law.

**Assistant Attorney General, August 2012 to August 2014**: My practice at the Office of the Attorney General and Reporter in Nashville was voluminous and wide-ranging, including criminal and civil litigation at both the state and federal levels. I served in two divisions during my time at the Attorney General's Office: first, in the Criminal Justice Division, and second, in the Law Enforcement and Special Prosecutions Division.

My service in the Criminal Justice Division focused entirely on representing the State in

appellate matters before the Court of Criminal Appeals and the Tennessee Supreme Court. The subject matter of my work here was highly specialized, but the volume of my caseload was extensive. I represented the State in over eighty cases before the Court of Criminal Appeals, which included my participation in eighteen oral arguments before this body. I filed a number of responses opposing permission to appeal to the Supreme Court. While my caseload was large, it was not unlike the large caseloads I experienced during my tenure as a prosecutor. I found that my prior experience in the trial courts was somewhat unique for a state appellate attorney and ultimately provided me with valuable perspective in my assigned cases. My time in the Criminal Justice Division reignited my interest in legal research and writing, an insight that eventually guided me to pursue a career in the judiciary.

After a year in the Criminal Justice Division, the supervisor of the Law Enforcement and Special Prosecutions Division asked me to transfer to that unit. Unlike the focused and specialized work of the Criminal Justice Division, the cases assigned to the Law Enforcement and Special Prosecutions Division could not have been more diverse in scope. I can generally categorize the assigned cases in this division into three groups: 1) defense of state criminal convictions, including those involving capital punishment, against habeas corpus challenges in federal court; 2) representing state agencies and officeholders in civil actions in state and federal court; and 3) assisting local district attorneys general with the investigation and prosecution of white collar and public corruption cases.

Regarding my federal habeas corpus responsibilities, I served as counsel of record in over sixty habeas corpus actions in all three federal districts in Tennessee, as well as the United States Court of Appeals for the Sixth Circuit. A number of these suits involved capital cases. To represent the State in these cases, I had to quickly become proficient in federal habeas corpus jurisprudence, a rather complex and highly specialized area of the law. Furthermore, habeas corpus law was undergoing significant changes during that period, as the United States Supreme Court had recently issued its opinions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). These cases entirely changed the landscape of habeas corpus law as it related to the exhaustion requirements of federal claims in state court, which led to increased litigation in cases that would have been procedurally defaulted under former law.

Aside from habeas corpus cases, our division was also tasked with representing state agencies and officials in various state and federal civil suits. These cases were often complex and novel, as they did not qualify for assignment to any of the other divisions that typically represented the State in civil litigation. Perhaps our most notable work in this domain was our defense of Tennessee's single-drug lethal injection protocol against a challenge for declaratory and injunctive relief in the Chancery Court for Davidson County and later on appeal before the Tennessee Court of Appeals. I also worked extensively defending declaratory judgment lawsuits brought by death-row inmates who sought to enjoin their executions by having themselves declared intellectually disabled. In other arenas, I represented the director of the Alcoholic Beverage Commission in a federal lawsuit brought by the largest liquor manufacturer in the world, alleging that Tennessee's liquor storage statute violated both the dormant Commerce Clause and equal protection principles. I represented the Department of Commerce and Insurance in a Hamilton County action against a company that was alleged to

have committed securities fraud. I traveled statewide to defend against civil actions in circuit and chancery courts involving asset forfeitures, handgun permit appeals, and sex offender registry appeals. I regularly represented state officials, including judges and district attorneys general, to quash subpoenas filed in civil and criminal actions. I briefed and orally argued to the Tennessee Supreme Court in defense of a statute authorizing the State to seize and forfeit real property used in the commission of child exploitation offenses.

Lastly, the Law Enforcement and Special Prosecutions Division worked with local district attorneys general, upon their request, to assist in the investigation and prosecution of white collar and public corruption cases. My work in this area was mostly limited to investigatory aid, although I regularly consulted with prosecutors across the state regarding active prosecutions.

In addition to the division's work in these three main areas, I also assisted in many other miscellaneous tasks during this assignment. For instance, I reviewed the legality and constitutionality of administrative rules promulgated by state agencies prior to their approval by the Attorney General. *See* Tenn. Code Ann. § 4-5-211. Also, on the request of two members of the General Assembly, I authored Attorney General Opinion No. 14-13, "Pedestrian and Vehicular Use of Marked Bicycle Lanes," and No. 14-61, "Constitutionality of Payment Requirement for Liquor-by-the-Drink Licensees."

My work with the Attorney General and Reporter was invaluable in shaping the direction of my career. I gained a wealth of experience in civil and criminal matters, both at the state and federal levels. Importantly, I was exposed to myriad legal issues at the statewide level and gained a unique perspective that prepared me well for my return to the Knox County District Attorney's Office.

**Deputy District Attorney General, August 2014 to December 2019**: In August 2014, I returned to Knoxville to serve as Deputy District Attorney General to newly elected DA Charme P. Allen. In my capacity as Deputy DA, I was part of an executive team including one to two other Deputy DAs, a Chief Deputy DA, and General Allen. The executive team supervised criminal prosecutions in three divisions of the Criminal Court, four divisions of the General Sessions Court, the Grand Jury, and the Juvenile Court. To staff these courts, the office employed almost eighty people, including forty assistant district attorneys general.

My supervisory duties included setting the parameters of plea negotiations, reviewing and approving cases bound over from the General Sessions Court to the Grand Jury, granting or rejecting approval of cases presented for direct review by the Grand Jury, conducting regular meetings with personnel to ensure compliance with office policy and ethical standards, and evaluating cases for possible appeal to the Court of Criminal Appeals.

I dedicated considerable effort to formulating and advising General Allen on office policy, training prosecutors and law enforcement officers, reviewing and promoting criminal legislative proposals, and supervising our office's interaction with the media. I conducted numerous non-CLE training sessions for the staff, as well as outside entities such as the Knoxville Police

Department, the Knox County Sheriff's Office, Knoxville's Police Advisory and Review Committee, and participants in the DA's Citizens Academy. I assisted in drafting and reviewing the office's legislative proposals and traveled to Nashville yearly to promote the legislative package of the Tennessee District Attorneys General Conference.

I served as office spokesman, coordinating and supervising the office's interaction with the media. My goal in this area was to strike the correct balance between properly advising the citizenry about the work of a public office while simultaneously adhering to the ethical rules regarding extrajudicial statements. I coordinated the office's responses to requests made pursuant to the Tennessee Public Records Act. I worked closely with other public officials—including law enforcement agency chiefs, judges, clerks, magistrates, and other elected officials—to ensure the efficient and proper operation of the Knox County criminal justice system.

In addition to these various duties, I voluntarily maintained my own caseload during my time as Deputy DA. I prosecuted multiple cases before a jury, including crimes of first degree murder, second degree murder, voluntary manslaughter, vehicular homicide, aggravated rape, felony drug charges, aggravated assault, simple assault, and resisting arrest. I likewise prosecuted countless other cases that did not culminate in a jury trial, and I regularly worked with law enforcement officers to coordinate investigative efforts prior to making a charging decision.

On two occasions during my time as Deputy DA, I received a special appointment from the Attorney General and Reporter to argue on behalf of the State of Tennessee in appellate oral arguments. I acted on behalf of the Department of Safety and Homeland Security in appeals concerning denials of handgun permits in the Civil Division of the General Sessions Court for Knox County. I appeared in the Chancery Court for Knox County on behalf of the State in an action to recover seized personal property. I collaborated closely with the Office of the Attorney General and Reporter to discuss legal strategy and to identify cases that were appropriate for appeal.

The responsibilities of a prosecutor's office are broad and expand far beyond the traditional role of litigating cases in court. This is particularly true in a jurisdiction the size of Knox County. Among the multitude of participants involved in the criminal justice system, the District Attorney General sits at the center and must constantly coordinate among multiple agencies and organizations to ensure the efficient operation of the system. In my role as Deputy DA, I was frequently called upon to assist with these administrative duties. Below, I have highlighted a few areas in which I helped General Allen lead the office's approach and formulation of policy.

<u>Vivitrol: A Shot at Life</u>

My time in the criminal justice system has been profoundly impacted by the opioid epidemic and the flood of criminal activity and accidental overdose deaths it has caused. In 2016, General Allen spearheaded an effort led by local law enforcement and the Helen Ross McNabb Center to obtain grant funding from the Trinity Foundation. This funding was aimed at implementing a medication-assisted treatment program for incarcerated individuals in Knox County suffering

from drug addiction. Instead of using opioid substitutes such as Methadone or Suboxone, the program relied on an opioid antagonist known as Vivitrol that blocks the body's ability to feel the effects of drugs and alcohol and is not itself addictive.

The program, known as A Shot at Life, was designed for low-level offenders whose criminal activity was fueled primarily by their addiction to opioids. I worked closely with our executive team to identify suitable individuals for selection into the program. Accepted candidates would be released from custody and transported directly to the Helen Ross McNabb Center to receive an injection and begin a year of outpatient treatment followed by six months of aftercare.

The opioid epidemic is an ongoing crisis and will be for the foreseeable future. Thanks to the hard work of so many people spanning multiple disciplines, the overdose death numbers in Knox County began falling in 2019. Unfortunately, this progress was short-lived as those numbers skyrocketed during the COVID pandemic. While overdose deaths are again decreasing, their prevalence demonstrates the toll these drugs have taken on our community.

The Advent of Body Cameras

In the late 2010s, multiple law enforcement agencies within Knox County began equipping their officers with body cameras. This marked a significant transformation in the way evidence was gathered in every type of criminal case. Within a short period, we transitioned from receiving dashboard-camera footage on VHS tapes to accessing body camera footage stored digitally in the cloud. The transition was positively received and represented a step forward for the quality, integrity, and transparency of our criminal investigations and prosecutions, but it also created many practical issues that needed to be addressed immediately by way of policy.

At General Allen's request, I worked with members of the judiciary, the defense bar, and our law enforcement agencies to create an office policy that would allow for body camera footage in most investigations to be released directly from the investigative agency to a defendant's attorney. This policy allowed all parties to access critical evidence at the earliest stage of the criminal process—without having to rely strictly on the provisions of Tennessee Rule of Criminal Procedure 16—and aligned with our longstanding practice in Knox County of providing certain discovery materials to the defense in General Sessions Court. Of course, exceptions to this early-discovery policy existed when necessary to protect the safety of witnesses or victims or to protect the integrity of investigations that had not yet culminated in charges.

The policy was adopted by General Allen and is still in effect today. The policy accomplished our goals of being as transparent and efficient as possible while protecting the rights of all involved in a criminal case, including crime victims and cooperating witnesses.

Officer-Involved Shootings

For years, law enforcement agencies in Knox County conducted their own investigations—both from a criminal and internal affairs perspective—when one of their officers used lethal force while on duty. General Allen saw the need to provide independent criminal investigations

of officer-involved shootings and asked me to help her work with the agencies and the medical examiner's office to formulate such a policy. After much discussion and the implementation of an interim policy, General Allen eventually reached a memorandum of understanding with all stakeholders that she would request the Tennessee Bureau of Investigation investigate all officer-involved shootings and most other in-custody deaths. This may seem like a simple transition, but it was not. A change of this nature required cooperation between multiple state and local authorities, and it demanded their field representatives adhere to the policy even under the most stressful of circumstances. The policy is still in effect today and, in my opinion, has increased the public's trust in the legal system's ability to handle these tragic situations.

Intelligence-Driven Prosecution Symposium

Continuing education has always been a priority of mine. In 2018, I traveled with General Allen and Chief Deputy Sam Lee to the Manhattan District Attorney's Intelligence-Driven Prosecution Symposium, hosted by New York University in New York City. The focus of the program was collecting and using data to attack crime in a targeted way that ultimately lessens the justice system's footprint on our communities. We heard from members of the NYPD, including former commissioner Bill Bratton, about the "broken windows" policing theory and how it led to the public safety renaissance of New York City in the 1980s. We also learned a great deal about CompStat, NYPD's system of gathering and comparing statistics to more effectively allocate their resources to combat street crime. We returned to Knoxville with a renewed focus on inter-agency coordination and utilizing a data-driven approach to controlling crime.

Cold Case Justice Unit

In 2018, I approached General Allen with a proposed model to assist in the investigation and potential prosecution of cold case homicides and sexual assaults. After receiving her approval, I worked with the faculty at the Lincoln Memorial Duncan School of Law and the UT College of Law to implement an externship for the investigation of Knox County cold cases. The model utilized law students to give a fresh look to cases that had remained unsolved for years. It also provided students with a better opportunity to study and understand the pre-charge responsibilities of a prosecutor. When I left the office in 2019, we were preparing to begin our third semester of work in the Cold Case Justice Unit.

Jail Overcrowding

In 2019, Knox County stakeholders began implementation of an expanded pretrial release program utilizing a scoring matrix specifically created for our jurisdiction. This matrix measured an arrestee's propensity to reoffend and that arrestee's likelihood to appear in court. As part of this initiative, General Allen led a statistical study of incarcerated individuals to ascertain the reasons behind their continued custody. As we expected, the analysis revealed that most incarcerated individuals, especially those who were held long-term, were either accused of committing serious offenses or had violated the terms of their probation. The study rebutted some criticisms at the time suggesting that the jail was full of low-level offenders who could not afford to post bail. To be clear, there were areas for improvement in dealing with non-violent,

pretrial detainees. Nevertheless, this study allowed us to approach the issue with data instead of misconceptions.

I served on the supervision workgroup for this pretrial release project, along with judges, court clerks, defense attorneys, consultants, and pretrial officers. In this workgroup, I contributed to the development of the supervisory requirements for individuals who were released to the program. My primary objective throughout this process was to protect public safety and to ensure the program only applied to those individuals who did not pose a threat to the community. Additionally, I advocated strongly to preserve the judges' statutory authority to oversee pretrial releasees and to revoke such release when deemed necessary. Through our collaborative efforts, the program was successfully launched and, within only a few months, supervised hundreds of non-violent defendants who were released to supervision in lieu of posting a cash bail.

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In the fall of 2019, Judge Bob R. McGee announced his upcoming retirement from Knox County Criminal Court, Division II. At this point in my career, I had been fortunate to have gained valuable experience in the trial and appellate courts at both the state and federal levels. Further, I had worked extensively both as a frontline prosecutor and as a member of the DA's executive team. I was honored to receive Governor Lee's appointment to the bench, effective January 1, 2020.

**Criminal Court Judge, January 2020 to August 2022**: One of my main focuses upon taking the bench was to ensure the expeditious resolution of cases. Frequent continuances in any case, especially continuances of trial dates, serve to erode the public's confidence in the proper administration of justice. Such delays also have the effect of inhibiting the pretrial resolution of other pending cases. Defendants and crime victims alike are constitutionally entitled to speedy trials. These constitutional guarantees are only given effect, however, through the diligence and hard work of our trial judges and litigating attorneys. To this end, I implemented a system that combined scheduling orders, status hearing dates, plea deadline dates, and pretrial conference dates to ensure that cases were staying on-schedule and proceeding to a timely disposition.

In this regard, I placed a high emphasis on conducting jury trials on a regular basis and, ideally, upon their first scheduled setting. In a little over two-and-a-half years on the trial bench, I presided over thirty-four jury trials. We accomplished this while dealing with two separate COVID-related suspensions of jury trials, as well as the many other operational complications presented by the pandemic.

Upon taking the bench, post-conviction petitions were a category of cases that had become especially problematic in terms of timely dispositions. My previous experience in federal habeas corpus cases taught me about the potential pitfalls of inhibiting a petitioner's ability to raise and litigate constitutional claims in state court. I recognized that post-conviction proceedings are an essential tool in ensuring that a petitioner's trial or plea hearing conformed

with constitutional requirements, particularly the petitioner's right to the effective assistance of counsel. If there was any silver lining to the two suspensions of jury trials during the pandemic, it was that I was able to use this time to work with court staff and attorneys to clear a backlog of post-conviction petitions, a handful of which had been pending for more than a decade. I will discuss my experiences during the pandemic in more detail in Question 12 below.

During my time as criminal court judge, I firmly believed that it was incumbent upon the judge to set the tone for the culture of the courtroom. The courtroom culture I sought to provide was one of respect when dealing with counsel, litigants, and witnesses, and one of diligence and hard work when managing the docket. In addition to presiding over thirty-four jury trials, I concluded 2,877 cases during my tenure. Pending homicide cases in my division reached a post-pandemic high of twenty-nine, but through our combined efforts, this number had fallen to eleven by the time I left the trial bench.

**Court of Criminal Appeals Judge, September 2022 to Present**: Having argued numerous times before the Court of Criminal Appeals, I was honored to become a member of this Court in September 2022. The transition from working as a solitary judge on the trial bench to working on a collegial court such as this one has been a welcome and rewarding experience. I have detailed my judicial experience while on the Court of Criminal Appeals elsewhere in this application. In this section, I will share a few of my non-adjudicative roles since my appointment.

Online Availability of Court Orders

Transparency and access to information are key aspects of maintaining the public's trust in our system. While CCA opinions have been posted on the Administrative Office of the Courts website for many years, I perceived a need for expansion and improvement in this area. Aside from formal opinions, our Court issues a multitude of orders on a monthly basis. Many of these orders are procedural in nature and pertain only to record management and briefing schedules. However, some of these orders are quite substantive, and in some instances, dispose of an appeal entirely. Examples of these substantive filings include orders on bail review or orders granting or denying interlocutory review, under Tennessee Rules of Appellate Procedure 8, 9, and 10. These orders have always been available online, but they were difficult to locate, especially without information such as the party's name or the case number.

Earlier this year, I brought a proposal to our Court to disseminate orders of this nature in the same manner that we post our opinions. The Court unanimously approved my proposal, and I worked with the Appellate Clerk's Office and the AOC to bring this project to fruition. Now, as of July 1, attorneys and judges across the state have much easier access to this Court's orders on important issues such as bail review, interlocutory appeals, and petitions to reopen post-conviction proceedings.

Knoxville Building Commission

I currently serve as the CCA's representative on the building commission for the Knoxville Supreme Court building. *See* Tenn. Code Ann. § 16-3-702. As part of the commission, I

volunteered to serve as the point-person for our in-house maintenance staff. In this role, I work with our maintenance staff and our property manager to resolve any operational issues that arise in the building.

History of the Court of Criminal Appeals

In 2007, Justice Gary Wade compiled a document containing the history of the Court of Criminal Appeals. Along with a narrative history of the Court, the document contained a linear history of every judge and presiding judge to serve on the Court. Shortly after my appointment in 2022, I noticed that the document had not been updated since 2017. With Justice Wade's blessing, I undertook the task of bringing the document up to date. This is similar to a document I compiled—based on the previous work of Circuit Court Judge Dale Workman—while on the trial bench that included Knox County judges on the Circuit, Criminal, and General Sessions Courts.

NYU School of Law's Institute of Judicial Administration

This summer I was honored to attend the New Appellate Judges Seminar hosted by the NYU School of Law's Institute of Judicial Administration. This week-long course featured faculty from appellate courts across the nation, including multiple federal circuit court judges and state supreme court justices. The curriculum touched on various aspects of being an appellate judge and included courses on judicial writing, legal research, office management, and working effectively on a collegial court. Although I had served as an appellate judge for almost three years at the time of my attendance, I found the seminar's teaching to be extremely helpful, and I have already applied much of what I learned there to my work on the CCA.

The Federalist Society's State Court Judges Summit

This summer I also attended the Federalist Society's State Court Judges Summit in Austin, Texas. The summit was a gathering of state court judges at the trial and appellate levels from across the nation. The curriculum included classes on the interpretation of state constitutions, recent developments in First Amendment jurisprudence, and an introduction to corpus linguistics as a tool to determine the original meaning of legal texts.

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In summary, I have had the privilege of serving the people of Tennessee throughout my entire legal career, and I have truly loved every job I have held along the way. This love enabled me to approach each job with enthusiasm and diligence. The assignments, though, were rarely easy. I have sat in the living rooms of families who have lost loved ones to violence. In some cases, I have been able to prosecute the offenders, and in others, I have had the difficult task of informing the family that prosecution was not possible. I have listened to countless children recount stories of abuse. From the trial bench, I have urged—in some cases, almost begged—drug-addicted defendants to overcome their addictions for the sake of themselves, their families, and their children. I have sentenced multiple people to spend the rest of their lives in prison, and I have also seen defendants walk out of the courtroom after being acquitted by a jury,

including one young man who had been charged with first degree murder. In each case, regardless of the outcome, I rest easy in knowing that justice was served and that the rule of law dictated every result.

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

I am limiting my response to this question to cases that I litigated as a practicing attorney. I will address cases of special note from my time on the bench in Question 10.

**Assistant District Attorney General, 2008-2012**

***State v. Herbert Michael Merritt*, No. 91370 (Knox Crim. Ct. Div. III).** I served as co-counsel in the State's prosecution of the defendant for the first degree murder of a bar patron in the Halls community of Knox County in 2008. The defendant shot the random victim multiple times and then barricaded himself inside the bar and mutilated the victim's body before officers were able to negotiate his peaceful surrender. One of the main issues at trial involved the admission of expert mental health testimony and how it related to the defendant's ability to form the requisite mental state of premeditation. Following a seven-day trial, the defendant was convicted as charged, and his conviction was affirmed on appeal. *See Merritt*, No. E2011-01348-CCA-R3-CD, 2013 WL 1189092 (Tenn. Crim. App. Mar. 22, 2013), *perm. app. denied* (Tenn. Aug. 13, 2013).

***State v. Mark Stephen Foster*, No. 94077 (Knox Crim. Ct. Div. II).** In February 2010, the defendant, a disgruntled teacher at Knoxville's Inskip Elementary School, went to school on a snow day and shot the principal and assistant principal, seriously wounding both victims. I served as co-counsel during the prosecution of the defendant for attempted first degree murder and other firearms charges. The defendant ultimately pled guilty and received a sentence of fifty-six years following a contested sentencing hearing.

**Assistant Attorney General, 2012-2014**

***West v. Schofield*, No. 13-1627-I (Davidson Ch. Part I); No. M2014-00320-COA-R9-CV, 2014 WL 4815957 (Tenn. Ct. App. Sept. 29, 2014).** A group of state inmates sued multiple state officials and employees seeking to have Tennessee's one-drug lethal injection protocol declared unconstitutional and to have their executions enjoined. I worked on a three-attorney team charged with formulating a litigation strategy and defending the protocol before the Chancery Court of Davidson County. We sought interlocutory appeal after the chancellor ordered the State, as part of its discovery obligation, to disclose the identity of those people directly involved in the execution process. I briefed the case and received a special appointment to argue before the Tennessee Court of Appeals that the identities sought were confidential and not subject to discovery. The Tennessee Supreme Court later adopted our argument and ruled in the State's favor in a case argued by the Office of Solicitor General. *See West v. Schofield*,

460 S.W.3d 113 (Tenn. 2015); *see also West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017) (ultimately upholding Tennessee's one-drug lethal injection protocol).

***Jonathan Wesley Stephenson v. State*, No. E2012-01339-CCA-R3-PD, 2014 WL 108137 (Tenn. Crim. App. Jan. 13, 2014), *perm. app. denied*, (Tenn. Sept. 19, 2014).** In a complex capital case originating from Cocke County, I served as lead counsel on appeal before the Court of Criminal Appeals and on the petitioner's application for permission to appeal to the Tennessee Supreme Court. The petitioner was convicted for the 1989 murder of his wife and sentenced to death based upon Tennessee's "murder for remuneration" aggravating circumstance. After his initial death sentence was reversed in 1994 for an instructional error, the petitioner agreed to serve a sentence of life without the possibility of parole. In 2000, however, the petitioner obtained state habeas corpus relief because life without parole was not an available sentence for murder at the time of the crime. He was resentenced to death by a jury in 2002. Against this procedural backdrop, the petitioner raised nineteen issues in his post-conviction appeal. The State prevailed in the Court of Criminal Appeals, and the Tennessee Supreme Court declined to grant permission to appeal.

***Miqwon Leach v. Jerry Lester, Warden*, No. 14-5005 (6th Cir. Sept. 17, 2014).** I represented the state prison warden in this federal habeas corpus appeal and successfully argued on brief to the Court of Appeals for the Sixth Circuit that the district court properly dismissed the petition in this case due to lack of subject-matter jurisdiction and for the failure to state a claim upon which relief could be granted. The petitioner currently is serving a sentence of life without the possibility of parole for a 1999 murder in Obion County.

***State v. Sprunger*, 458 S.W.3d 482 (Tenn. 2015).** I represented the State on brief and in oral argument before the Tennessee Supreme Court in this case involving forfeiture of real property pursuant to Tennessee Code Annotated section 39-17-1008, which allows for the forfeiture of such property used in the commission of child exploitation offenses. The appellant challenged the sufficiency of the evidence supporting the Chancery Court's finding of forfeiture and argued for an interpretation of the law that, if adopted, would have prevented future forfeitures under this statute as a practical matter. The Supreme Court instead held that the district attorney general seeking forfeiture in this case did not strictly comply with the mandatory procedural requirements in the statute and, on this basis, returned the remaining proceeds from the sale of the real property to the appellant.

***State v. Aguilar*, 437 S.W.3d 889 (Tenn. Crim. App. 2013).** I served as counsel for the State on the appellant's direct appeal of his convictions for sexual exploitation of a minor. I argued on appeal that the appellant had no reasonable expectation of privacy in the contents of a file-sharing program on his computer. The Court of Criminal Appeals agreed with my standing argument and, for the first time in a reported case, found that the 2005 amendment to Tennessee Code Annotated section 39-17-1003 expressly authorizes the aggregation of exploitative images to increase the offender's punishment.

***State v. Jessica Kennedy*, No. E2013-00260-CCA-R3-CD, 2014 WL 3764178 (Tenn. Crim. App. July 30, 2014), *perm. app. denied* (Tenn. Dec. 16, 2014).** The defendant was charged in Monroe County for her role in the 2010 murder of the victim, who was shot, his body placed in the trunk of his car, and his car set on fire. A jury convicted the defendant of facilitation of first degree murder, and she received a sentence of twenty-two years. I represented the State before the Court of Criminal Appeals, where she raised ten issues on direct appeal. The judgments of the trial court were affirmed.

***Diageo Americas Supply, Inc. v. Bell*, No. 3:14-cv-873 (M.D. Tenn.).** Diageo, doing business as George A. Dickel & Co., sued the director of the Tennessee Alcoholic Beverages Commission pursuant to 42 United States Code section 1983, seeking declaratory and injunctive relief regarding the enforcement of Tennessee Code Annotated section 57-2-104. Section -104, a part of Tennessee's three-tiered system of alcoholic beverage regulation, required manufacturers of intoxicating liquors to store their products in the county where they were manufactured, or in a county adjacent thereto. Diageo stored Dickel's product in Louisville, Kentucky, even though it was manufactured in Coffee County, Tennessee. Diageo alleged section -104 violated both the dormant Commerce Clause and equal protection principles. I represented the director of the ABC in this case, which involved the intersection of the Commerce Clause, the Eleventh, Fourteenth, and Twenty-First Amendments.

**Deputy District Attorney General, 2014-2019**

***State v. Timothy Dwayne Ison*, No. 106155 (Knox Crim. Ct. Div. III).** I served as lead counsel in the prosecution of the defendant for the 2015 stabbing of a stranger on a Knoxville greenway. The jury convicted the defendant of first degree murder in a 2017 trial. In the sentencing phase, the jury imposed a sentence of life without the possibility of parole based, in part, upon the aggravating circumstance that the murder "was committed at random and the reasons for the offense are not obvious or easily understood[,]" the first time that this aggravator had been used in a Knox County court since its enactment in 2011. *See* Tenn. Code Ann. § 39-13-204(i)(17). The judgment was affirmed on direct appeal. *See Ison*, No. E2018-02122-CCA-R3-CD, 2020 WL 3263384 (Tenn. Crim. App. June 17, 2020), *no perm. app. filed*.

***State v. Norman Eugene Clark*, No. 103548 (Knox Crim. Ct. Div. I).** A Knoxville man was accused of two counts of first degree murder in the brutal home-invasion homicides of his ex-girlfriend and her unborn child. His first trial resulted in a hung jury and a mistrial. Following his first trial but prior to his retrial, the defendant gave an interview to Dateline NBC. The news agency indicated that it would not air the contents of his interview until after his second trial. I led the State's efforts to obtain this unaired interview from NBC News via judicial process for potential use in the retrial. I worked closely with the Solicitor General's Office in Nashville as well as the Manhattan District Attorney's Office in our attempt to divest NBC News of its protections under the press shield laws of Tennessee and New York (State's motion to divest attached as a writing sample). Our efforts were ultimately unsuccessful. *See Clark*, No. E2016-01629-COA-R3-CV, 2017 WL 564888 (Tenn. Ct. App. Feb. 13, 2017), *designated not for citation* (Tenn. June 7, 2017). The State dismissed the charges against the defendant

following a second hung jury and mistrial.

***State v. William Grant Morgan*, No. 97487 (Knox Crim. Ct. Div. III).** The defendant was accused of stabbing his eighty-four-year-old grandmother to death as she slept in her bed. I served as co-counsel on the defendant's prosecution for first degree murder and possession of drug paraphernalia. The defendant was convicted as charged, and the convictions were affirmed on appeal. *Morgan*, No. E2018-02245-CCA-R3-CD, 2020 WL 3032878 (Tenn. Crim. App. June 5, 2020), *perm. app. denied* (Tenn. Oct. 7, 2020).

***State v. Johnson and Williams*, Nos. 104964A-B, (Knox Crim. Ct. Div. II).** Two University of Tennessee football players were accused of the aggravated rape of a female student-athlete. I served as co-counsel during this litigation, which included an interlocutory appeal to the Court of Criminal Appeals regarding the defendants' attempts to access via subpoena the cellular telephones and social media accounts belonging to the alleged victim and other witnesses. *See State v. Johnson and Williams*, 538 S.W.3d 32 (Tenn. Crim. App. 2017). Following a ten-day jury trial in July 2018, the defendants were acquitted. The trial served as the culmination of over three-and-a-half years of heated litigation. The case received intense public scrutiny, and I consider it one of the most challenging cases to which I have been assigned. While we did not receive the result we had hoped for, I fully respect the jury's verdict. I look back at the case with a deep sense of pride in the way our team conducted itself throughout the proceedings by zealously advocating the State's case under difficult circumstances.

***State v. Ralpheal Cameron Coffey*, No. 110330 (Knox Crim. Ct. Div. III).** In 2016, the defendant led authorities on a two-county high speed chase that resulted in a fatal crash at a Knox County intersection. A Knoxville man who was engaged to be married the next weekend was killed, as was the defendant's passenger. I served as lead counsel in the prosecution of the defendant, which culminated in a jury trial in January 2019. The jury convicted the defendant of reckless vehicular homicide, reckless homicide, and numerous felony drug charges, including possession with intent to sell cocaine in a drug-free zone. He was sentenced to forty-eight years in prison. The judgments were affirmed on direct appeal. *See Coffey*, No. E2019-01764-CCA-R3-CD, 2021 WL 2834620 (Tenn. Crim. App. July 8, 2021), *perm. app. denied* (Tenn. Nov. 19, 2021).

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.

**Criminal Court Judge, 2020-2022**

***State v. Neal Scott Daniels*, No. 112763 (Knox Crim. Ct. Div. II).** I presided over this felony DUI jury trial in July 2020, just over a week after the Supreme Court lifted its initial statewide suspension of jury trials during the COVID-19 pandemic. This was the first jury trial in Knox County following the end of the suspension and, to my knowledge, the second in the state. I overruled strenuous objections from the defense and ordered the trial to proceed as scheduled, following the implementation of extensive safety procedures given the public health situation at the time. After extensive pretrial litigation, *see, e.g.*, *State v. Neal Scott Daniels*, No. E2020-00966-SC-R10-CD, Order (Tenn. July 21, 2020) (on the morning of trial, denying extraordinary appeal by the defendant seeking a continuance), the trial proceeded in an orderly and uneventful fashion. The *Daniels* case demonstrated that we could safely try cases before a Knox County jury in the COVID era and helped to pave the way for multiple jury trials in our jurisdiction in the days and months that followed. The defendant's judgments were affirmed on appeal. *See State v. Daniels*, 656 S.W.3d 378 (Tenn. Crim. App. 2022).

***State v. Raffell Griffin, et al*., Nos. 114931-114939 and 114942-114943 (Knox Crim. Ct. Div. II).** These cases involved eleven co-defendants alleged to have been involved in a year-long, gang-related cocaine conspiracy. Four of the co-defendants were charged with first degree murder related to the conspiracy. Pretrial litigation in this case was extensive, including multiple lengthy hearings on motions to dismiss, motions to suppress, motions to sever, and a motion to recuse me as judge based upon my prior employment with the prosecutor's office, an issue that went to the Tennessee Supreme Court on interlocutory appeal and resulted in that Court's affirmation of my decision not to recuse. *See State v. Griffin, et al.*, 610 S.W.3d 752 (Tenn. 2020); *see also State v. Clark*, 610 S.W.3d 739 (Tenn. 2020). The defendants' cases were severed for trial. Two of the defendants proceeded to trial and were convicted of first degree murder, along with drug and gun charges. One of the co-defendants pled guilty to first degree murder, and another proceeded to trial and was convicted of the drug and gun charges. The remaining defendants' cases were resolved by plea agreements with the State. These cases were arraigned before I took the bench, and the last trial was conducted in January 2022. These cases are significant because we were able to litigate a complex conspiracy case and bring all cases to resolution all while working around two pandemic-related jury trial suspensions and a stay of the proceedings pending interlocutory appeal. The judgments of the defendants who proceeded to trial were affirmed on appeal. *See State v. Sidarius Jackson*, No. E2022-01384-CCA-R3-CD, 2024 WL 4441507 (Tenn. Crim. App. Oct. 8, 2024), *perm. app. denied* (Tenn. Mar. 12, 2025); *State v. Robert L. Cody, III*, No. E2022-00947-CCA-R3-CD, 2023 WL 9006670 (Tenn. Crim. App. Dec. 28, 2023), *no perm. app. filed*; *State v. Raffell M. Griffin, Jr.*, No. E2022-00659-CCA-R3-CD, 2023 WL 5934651 (Tenn. Crim. App. Sept. 12, 2023), *perm. app. denied* (Tenn. Mar. 6, 2024).

***State v. Jacquiz McBee*, No. 113585 (Knox Crim. Ct. Div. II).** The defendant was charged with the 2018 first degree murder of his ex-girlfriend after she suffered a fatal gunshot wound to her head. The trial commenced in November of 2020, during the interim period between the two pandemic jury-trial suspensions. The defendant argued at trial that the victim procured the weapon during the incident and that she was accidentally shot as he tried to take the weapon

from her. After raising numerous evidentiary issues at trial, the defendant was convicted as charged. I imposed a life sentence to run consecutively to previous a three-year sentence for aggravated assault against the same victim. The Court of Criminal Appeals affirmed the judgment on appeal. *See McBee*, No. E2021-01048-CCA-R3-CD, 2022 WL 16833562 (Tenn. Crim. App. Nov. 9, 2022), *perm. app. denied* (Tenn. Mar. 9, 2023).

***Cumecus R. Cates v. State*, Nos. 79375 and 79764 (Knox Crim. Ct. Div. II).** These post-conviction petitions were filed in 2004 and were continued without a hearing until I took the bench in 2020. Following an exhaustive review of pending post-conviction petitions in Division II, I highlighted this case as one that must be brought to hearing as soon as possible. An evidentiary hearing was held on November 23, 2020. On December 16, 2020, I issued an order granting partial relief to the petitioner. The petitioner subsequently reached an agreement with the State that resolved all of his pending cases.

***State v. Robert Vernon Gouge*, No. 116839 (Knox Crim. Ct. Div. II).** I presided over this trial in April of 2021 where the defendant was convicted of three counts of rape of a child, one count of attempted rape of a child, and one count of aggravated sexual battery. The case involved the long-term abuse of the defendant's ex-girlfriend's daughter, who had known the defendant her whole life and viewed him as a father figure. The abuse spanned from 2012 to 2016. After a sentencing hearing, given the severity of the abuse, its duration, and the relationship between the defendant and the victim, I sentenced the defendant to serve ninety-nine years in prison. The Court of Criminal Appeals affirmed the defendant's convictions and sentence. *See Gouge*, No. E2022-01001-CCA-R3-CD, 2023 WL 3454702 (Tenn. Crim. App. May 15, 2023), *perm. app. denied* (Tenn. Sept. 11, 2023).

***State v. Geoffrey Ian Paschel*, No. 116806 (Knox Crim. Ct. Div. II).** The defendant was charged with aggravated kidnapping, domestic assault, and interference with emergency communications following a 2019 altercation between the defendant and his then-fiancée. In October of 2021, a jury convicted the defendant as charged. At a subsequent sentencing hearing, I conducted an extensive analysis to determine whether the defendant's prior federal convictions could be used to enhance the sentences on his convictions in these cases. After concluding that such enhancement was permissible, I imposed an effective sentence of eighteen years to serve in the penitentiary. All proceedings related to this case were televised on Court TV, which was a unique experience for me as a trial judge because of the coordinated effort involved to effectively allow access to the public and the press while still maintaining courtroom decorum and ensuring the fairness of the proceedings. The defendant's judgments were affirmed on direct appeal. *See Paschel*, No. E2022-00900-CCA-R3-CD, 2023 WL 5975223 (Tenn. Crim. App. Sept. 14, 2023), *perm. app. denied* (Tenn. Mar. 7, 2024).

***State v. Roger Earl England*, No. 117643 (Knox Crim. Ct. Div. II).** The defendant was charged with first degree murder after shooting his girlfriend in the back of the head when he learned that she was leaving him. I presided over the trial, where the main factual issue was whether the defendant had formed the requisite mens rea of premeditation. The jury convicted the defendant as charged. The defendant raised multiple issues on appeal, including my decision

to admit certain evidence and my decision not to instruct the jury on the lesser-included offense of voluntary manslaughter. On this point, I ruled that the victim's decision to leave the defendant could not serve as an "adequate provocation" to support a voluntary manslaughter instruction. The judgment was affirmed on appeal. *See England*, No. 2022-01392-CCA-R3-CD, 2024 WL 2151813 (Tenn. Crim. App. May 14, 2024), *perm. app. denied* (Tenn. Oct. 24, 2024).

***State v. Timothy Dion Wells*, No. 116128 (Knox Crim. Ct. Div. II).** The defendant was charged with second degree murder after his girlfriend was shot in the head in her kitchen in 2019. The defendant first claimed that the victim had committed suicide but later said that he accidentally fired the fatal shot. I presided over the jury trial in March of 2022, where I resolved multiple evidentiary issues. The defendant was convicted as charged, and I sentenced him to twenty-two years in prison. On appeal, the defendant challenged my evidentiary rulings, including my decision to exclude certain testimony offered by the defense's expert witness. The Court of Criminal Appeals found no error and affirmed the judgment. *See Wells*, E2023-00516-CCA-R3-CD, 2024 WL 4891772 (Tenn. Crim. App. Nov. 26, 2024), *perm. app. denied* (Tenn. Apr. 17, 2025).

***State v. Horace Andrew Tyler Nunez*, No. 118599 (Knox Crim. Ct. Div. II).** I presided over this first degree murder trial during my last week on the trial bench in August of 2022. The jury convicted the defendant of first degree murder and four counts of reckless endangerment after the proof showed he fired a gun multiple times towards his wife, their three children, and the defendant's stepson. The defendant's wife died as a result of the attack. Following a sentencing hearing, the jury imposed the sentence of life without the possibility of parole. The defendant raised multiple issues on appeal, including my decision to not instruct the jury on the lesser-included defense of voluntary manslaughter. The defendant's judgments were affirmed. *See Nunez*, No. E2023-00193-CCA-R3-CD, 2024 WL 2151651 (Tenn. Crim. App. May 14, 2024), *perm. app. denied* (Tenn. Oct. 24, 2024).

**Court of Criminal Appeals Judge, 2022-Present**

As stated, I have authored over 125 opinions as a judge on the Court of Criminal Appeals. All of them are significant to the parties involved, and they serve as persuasive authority in other cases in the trial and appellate courts. For the purposes of this application, I have set forth below six opinions I authored that I presented to my colleagues for publication pursuant to Tennessee Supreme Court Rule 4 and Court of Criminal Appeals Rule 19. My colleagues voted to publish all of these opinions, meaning they now represent binding, precedential Tennessee law. *See* Tenn. Sup. Ct. R. 4(G)(2).

***State v. Hardison*, 680 S.W.3d 282 (Tenn. Crim. App. 2023) (opinion attached as a writing sample).** The defendant was convicted of first degree murder after shooting a man whom the defendant suspected had stolen construction supplies from him. At trial, the State admitted evidence obtained via the execution of a search warrant at the defendant's residence, which was miles away from the murder scene. On appeal, the defendant challenged the search warrant, in part, by relying upon a different Fourth Amendment theory than he had relied upon

in the trial court. For instance, the defendant on appeal attempted to challenge the sufficiency of the search warrant affidavit based upon a lack of probable cause, particularly in regard to the required nexus between the crime and place to be searched. We concluded that he had not presented this theory to the trial court and that he had thus waived this particular issue for appellate review. We further concluded the defendant had raised a particular-description claim on appeal that had not been raised in the trial court. We ultimately reviewed the merits of the two suppression theories that had been properly presented to the trial court and preserved for appeal: (1) the alleged reckless inclusion of false facts, as well as the reckless omission of relevant facts, in the search warrant affidavit, *see Franks v. Delaware*, 438 U.S. 154 (1978), and (2) the alleged overbreadth of the search warrant—*i.e.*, the defendant's contention that the search warrant, while partially supported by probable cause, authorized the seizure of additional items that were not so supported.

We denied relief on the defendant's *Franks* claim in a fairly straightforward manner, but the overbreadth claim required us to clarify important points of Fourth Amendment law. Our opinion describes the analytical difference between a claim under the probable cause requirement versus a claim under the Particularity Clause. While the defendant referred to his overbreadth issue as one involving particularity, his argument demonstrated that it actually pertained to the lack of probable cause supporting the seizure of some, but not all, of the items listed in the warrant.

We agreed with the defendant that the affidavit lacked probable cause to support the seizure of many of the items listed in the warrant. The question then became the applicable remedy. The defendant sought to have all seized evidence suppressed as a result of this infirmity. We disagreed, noting that our law allowed for the severance of the valid portions of the warrant. While this severance principle had been applied in the particularity context, *see State v. Meeks*, 867 S.W.2d 361 (Tenn. Crim. App. 1993), it had never been applied in a probable cause context such as this in a reported case.

On this basis, we determined the defendant was not entitled to relief. After reviewing several other issues raised by the defendant, we affirmed his conviction.

***State v. Kibodeaux*, 680 S.W.3d 320 (Tenn. Crim. App. 2023) (opinion attached as a writing sample).** This interlocutory appeal arose from the defendant's prosecution for a number of offenses, including first degree murder and attempted first degree murder. The State moved pretrial to admit the preliminary hearing testimony of the alleged victim of the attempted first degree murder, who by that time had been killed in an unrelated shooting. The defendant filed a cross-motion to exclude the same, arguing the State had withheld certain exculpatory evidence prior to the preliminary hearing in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court agreed with the defendant and excluded the preliminary hearing testimony.

Resolution of this appeal required us to analyze the history of *Brady* and its progeny, the purposes of a preliminary hearing in Tennessee, and the interplay and application of Confrontation Clause principles. Ultimately, we reversed the order of the trial court, holding

that *Brady* had no applicability in the context of a preliminary hearing and that the sole question was, under a traditional confrontation analysis, whether the defendant had the same motive and opportunity to cross-examine the witness at the preliminary hearing that he would have at trial, given the nondisclosure of the exculpatory evidence at the prior proceeding.

***State v. Guy*, 683 S.W.3d 763 (Tenn. Crim. App. 2023).** The trial court in this case revoked a probationary sentence that was comprised of three different types of consecutively-aligned sentences: a misdemeanor, a felony, and a misdemeanor with an extended probationary period pursuant to Tennessee Code Annotated section 40-35-303(c)(2). The trial court's authority to revoke the entirety of the defendant's sentence in this case depended on the amount of pretrial jail credit the defendant had accrued on each judgment. The answer to this question would determine whether any or all of the probationary periods had expired prior to the issuance of the probation violation warrant. This appeal presented a unique opportunity to explain and clarify in one opinion the pretrial jail credit rules as to different types of criminal sentences.

***State v. King*, 703 S.W.3d 738 (Tenn. Crim. App. 2024).** In the defendant's trial for multiple counts of child sexual abuse, the parties informed the trial court midtrial that defense counsel was the political campaign treasurer for the trial prosecutor in the prosecutor's upcoming campaign for a general sessions judgeship. The trial court discussed this issue on the record with the defendant, who expressed no dissatisfaction with either the prosecutor or his counsel and, in fact, complimented their conduct during the trial. The trial proceeded, and the defendant was convicted as charged of all counts. At a later sentencing hearing, the defendant expressed displeasure with the prosecutor over the aforementioned circumstances. Defense counsel then moved to withdraw, and successor counsel was appointed for the motion for new trial and direct appeal proceedings.

On appeal, the defendant argued that he was deprived of his constitutional right to conflict-free counsel. After reviewing the applicable law and ethical considerations, we concluded that a conflict of interest existed and that the trial court's conversation with the defendant during trial did not satisfy the requirements of valid waiver of a constitutional right. As to the question of prejudice, we held, after an exhaustive review of Sixth Amendment jurisprudence, that the defendant must show that "an actual conflict of interest adversely affected his lawyer's performance" in order to obtain relief. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). We concluded that the defendant had made no such showing and affirmed his convictions.

***State v. Shaw*, 715 S.W.3d 340 (Tenn. Crim. App. 2024).** Under prior law, the Court of Criminal Appeals had held that double jeopardy did not bar dual convictions for especially aggravated kidnapping and aggravated assault where both convictions relied on the presence of serious bodily injury. In 2013, however, the General Assembly amended the aggravated assault statute, removing the requirement that an offender "cause" serious bodily injury and instead requiring only that the assault "resulted" in serious bodily injury. This appeal raised the question of whether this textual change implicated double jeopardy principles where the prior version did not. We held that the underlying rationale of prior decisions remained applicable due to the aggravated assault statute's incorporation of the simple assault statute, which still required a

showing that the offender "caused" bodily injury. Finding no double jeopardy violation, we affirmed.

***State v. Kim*, 716 S.W.3d 78 (Tenn. Crim. App. 2025).** In a 2014 bench trial, the petitioner was found not guilty by reason of insanity for the first degree murder of his mother. The petitioner was committed to inpatient mental health treatment until 2017, when he was discharged to a facility for mandatory outpatient treatment. In 2023, the trial court denied the petitioner's request to terminate his treatment program. The petitioner appealed.

This was the first appellate case to address the merits of a treatment-discharge denial arising from the 2017 enactment of Tennessee Code Annotated section 33-7-303(g), which created a new discharge procedure for defendants found not guilty by reason of insanity after having been charged with first degree murder. *See* 2017 Tenn. Pub. Acts, ch. 342. As a matter of first impression, we applied an abuse of discretion standard to the trial court's findings and conclusions. Ultimately, we determined the trial court did not err by denying the petitioner's request to terminate his mandatory outpatient treatment program.

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.

On April 1, 2020, I was appointed by the General Sessions Court for Rutherford County, Probate Division, to serve as the personal representative of the estate of my grandmother-in-law, Elois Snow. I was appointed pursuant to my nomination in the decedent's will. Following the administration of her will, the estate was closed on November 20, 2020. *In re: The Estate of Elois Snow*, No. 75PR1-2020-PR-140.

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

When I was sworn in to the trial bench on January 1, 2020, I could never have anticipated the challenges that the COVID-19 pandemic would bring to the administration of the criminal justice system just two-and-a-half months later. I cannot say enough about the extraordinary efforts of so many people in Knox County who came together to find a way to help our system function during this difficult time.

When the Supreme Court issued its first suspension of jury trials and in-person proceedings on March 13, 2020, I was in Murfreesboro for the last day of our spring judicial conference. I left the conference early so I could get back to Knoxville to attend a meeting that afternoon that had been called to address the situation. In less than an hour, the stakeholders—judges, court clerks, prosecutors, defense attorneys, public health officials, and law enforcement officers—

had formulated a working plan to continue limited court operations for the weeks to come. Within days, I was holding court for Division II from a laptop in the basement of my home.

The March 13 meeting was the first of many that occurred regularly throughout the pandemic. For months, all stakeholders met at least biweekly on a virtual platform to discuss issues that we were facing and explore possible solutions. The sheriff quickly created video-conferencing rooms at our downtown jail and at our offsite detention facility to accommodate the large number of proceedings that were now taking place via video in lieu of transporting the inmates into the courtrooms. This level of cooperation by everyone involved in our local system allowed our courts to remain open, albeit virtually, and allowed us to hear hundreds, if not thousands, of cases that otherwise would have gone unheard. This constant line of communication and cooperation was essential as we collectively strived to maintain the functionality of our system during the pandemic.

By July, the first wave of the virus had waned, and we faced the end of the first suspension of jury trials. While we were not required to resume jury trials at the local level, my two criminal court colleagues and I, following consultation with our system partners and local health officials, decided that jury trials should resume in Knox County. The decision was not an easy one, and it was met with no small amount of resistance. However, we felt then, and I still feel to this day, that it was absolutely imperative for Knox County's courts to be open and fully functioning, so long as we took the appropriate precautions to protect those participating in the process. Our jury system was too important, I believed, to be placed on hold indefinitely for the duration of a pandemic with no known end in sight.

The *Daniels* case, mentioned above, was the first case to proceed to trial in Knox County following the resumption of jury trials. It took a great deal of hard work and ingenuity by many people to allow the case to be heard. Scanning stations at the front entrance of the courthouse and at the juror check-in desk at the clerk's office ensured that no jurors with high temperatures were admitted. Jurors completed questionnaires to ensure that they were not experiencing COVID symptoms. In the courtroom, plexiglass was installed around the witness stand to allow witnesses to testify without masks in order to protect the confrontation rights of the accused and to allow the jurors to properly assess the witnesses' credibility. Exhibits were presented via a projector instead of passing them hand-to-hand through the jury box. Jury deliberations occurred in an unused courtroom, as opposed to our jury rooms, to allow for appropriate distancing. Exhibits were spread over tables by court officers prior to deliberations to allow the jurors to remain distanced while viewing the exhibits and to prevent the need for the jurors to touch the exhibits.

We learned much from our experience in *Daniels*. We were able to build on this experience and try a number of jury trials in all three divisions before they were again suspended in November 2020. I personally presided over five jury trials during this interim period, including a case of first degree murder. That is much fewer than I would normally try in a regular five-month period, but it was five cases that were brought to resolution that otherwise would not have been.

I write to say how proud I am of everyone involved in our justice system who came together and devised creative ways to deal with a situation that was unprecedented in our time. The guidance and leadership that we received from the Supreme Court and the Administrative Office of the Courts were invaluable. Our local leaders focused on ways to make the system work, instead of finding excuses for why it could not work. I am honored to have played a very small role in our combined effort.

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.

On October 18, 2019, I applied to the Tennessee Trial Court Vacancy Commission to fill the upcoming vacancy in the Criminal Court, Division II, Sixth Judicial District, created by the retirement of the Hon. Bob R. McGee. Because there were only two applicants for the position, the Commission did not hold a public hearing but instead forwarded the two applications to Governor Lee for his consideration. On December 10, 2019, Governor Lee appointed me to this position. I was sworn in on January 1, 2020.

On February 17, 2022, I applied to the Governor's Council for Judicial Appointments to fill the upcoming vacancies in the Eastern Section of the Tennessee Court of Criminal Appeals created by the retirements of the Hon. Norma McGee Ogle and the Hon. D. Kelly Thomas, Jr. The Council met virtually on March 3, 2022, and I was one of the four names submitted to the Governor. Governor Lee appointed me to fill the seat of Judge Thomas on March 28, 2022, and I was unanimously confirmed by the General Assembly on April 29, 2022. I took office on September 1, 2022.

## ***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.

**The University of Tennessee College of Law, 2005-2008**

-Doctor of Jurisprudence, *summa cum laude*

-Order of the Coif

-Concentration in Advocacy and Dispute Resolution

-Recipient of the Robert E. Pryor Award for Excellence in Advocacy

-Constitutional Law Award, the Trial Practice Award, and the Interviewing and Counseling Award

-Howard Baker Memorial Scholar, Robert A. Finley Scholar, and College of Law Scholar

**The University of Tennessee, Knoxville, 2001-2005**

-Bachelor of Science in Communication, *summa cum laude*

-Major in Broadcasting and Political Science

-Bicentennial Scholar

## ***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 Tennessee my entire life.

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

I have lived in Knox County continuously since 2001, with the exception of 2012 through 2014, when we lived in Rutherford County during my employment at the Office of the Attorney General and Reporter in Nashville.

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

Knox County, Tennessee

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

Not applicable

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

No.

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

No.

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

I have never been required to respond to an ethical complaint. In 2021, an attorney filed a complaint with the Board of Judicial Conduct against me after I disqualified that attorney from a criminal case based upon evidence that she had engaged in unethical conduct during her representation of the defendant. Earlier this year, a defendant filed a complaint with the Board against me and the other two judges who heard his unsuccessful appeal. The Board dismissed both complaints on the recommendation of Disciplinary Counsel without requiring my response.

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

No.

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

No.

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

I have never filed a lawsuit, nor have I ever been sued personally. However, in September 2021, I was sued in my official capacity in the U.S. District Court for the Eastern District of Tennessee by a criminal defendant who had a pending case in Criminal Court, Division II. My co-defendants in the lawsuit included the prosecutor on the defendant's criminal case, the elected District Attorney General, and the defendant's court-appointed defense attorney. The plaintiff claimed damages and injunctive and declaratory relief for alleged violations of treaties of the United States, the Holy Bible, and various sections of the United States Code. The case was dismissed with prejudice on February 13, 2023, pursuant to Federal Rule of Civil Procedure 41(b). *See Elliott v. Criminal Court for Knox County, et al.*, No. 3:21-cv-00327-KAC-JEM (E.D. Tenn.).

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.

Sevier Heights Church, Member

Leadership Tennessee, Class XII, August 2025 to June 2026

The University of Tennessee Winston College of Law Alumni Council

Sertoma Center, Board of Directors, 2016 to 2022

National Rifle Association, Life Member

Tennessee Farm Bureau, Member

Friend of the Great Smoky Mountains National Park

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

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

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

No.

## ***ACHIEVEMENTS***

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

Tennessee Judicial Conference, 2020 to present

-Member of the Compensation and Retirement Committee, 2022 to present

-Member of the Executive Committee, 2021 to 2022

-Co-Chairman of the Hospitality Committee, 2021 to 2022

-Member of the Committee on Criminal Pattern Jury Instructions, 2020 to 2022

-Member of the Legislative Committee, 2020 to present

Tennessee Trial Judges Association, 2020 to 2022

Knoxville Bar Association, 2008-2012, 2014 to present

-Member of the Criminal Justice Section

The Federalist Society, Knoxville Lawyers Chapter, 2017 to present

Hamilton Burnett American Inn of Court, 2010 to present

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

The University of Tennessee Volunteer 40 Under 40, 2023 Honoree

Knoxbiz.com 40 Under 40, 2019 Honoree

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

I have not published a book or any scholarly legal articles. I have published the following articles in DICTA, the monthly publication of the Knoxville Bar Association:

-The Public Safety Act of 2016: Points of Litigation, May 2017 (available online at https://issuu.com/knoxvillebarassociation/docs/dicta_may_2017?e=29223189/52425290).

-When a True Man Acts Unlawfully: *State v. Perrier* Reshapes Self-Defense Law in Tennessee, April 2018
(available online at https://issuu.com/knoxvillebarassociation/docs/dicta.april2018).

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

-I have taught a course on trial practice as an adjunct professor at the University of Tennessee Winston College of Law in the fall semesters of 2017 to 2020 and 2023 to present.

-In October 2024, I presented a CLE to the Tennessee District Attorneys General Conference on the topic of alternative sentencing. This class was a survey of all alternative sentencing options available under Tennessee law, with emphasis on their statutory sources and practical applications.

-I co-presented a CLE at the Spring 2022 meeting of the Tennessee Judicial Conference on the topic of unanimous jury verdicts. My portion of the presentation focused on the historical development of the right to a jury trial and the distinctions of the right between the United States and Tennessee constitutions.

-On November 6, 2020, I co-presented a CLE as part of the Knoxville Bar Association's Views from the Bench program on the topic of Pandemic Practice: Applying Rules and Precedent in Unprecedented Times.

-On August 21, 2020, I co-presented a CLE as part of the Tennessee Bar Association's FastTrack Knoxville program on the topic of Criminal Court and Jury Trials in the Age of COVID.

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.

As stated, I currently serve as a judge on the Tennessee Court of Criminal Appeals. I was appointed in 2022 by the Governor and am scheduled for a retention election in 2030.

Effective January 1, 2020, I was appointed as Criminal Court Judge for the Sixth Judicial District by the Governor. Thereafter, I won a contested Republican primary election on March 3, 2020, and was uncontested in the general election that August. I was uncontested in both the Republican primary and general elections in May and August of 2022.

In March 2017, I applied to the Merit Selection Panel for the position of United States Magistrate Judge for the Eastern District of Tennessee at Knoxville. I was not one of the five finalists submitted to the district judges for consideration.

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.

From *State v. Clark*, No. 103548 (Knox Crim. Ct. Div. I), I have attached my motion as Deputy District Attorney General seeking to divest NBC News of its press shield law protections under Tennessee and New York law. I drafted the motion in its entirety. I forwarded the motion to the Office of the Solicitor General, who provided minor edits prior to its filing.

From *State v. Hardison*, 680 S.W.3d 282 (Tenn. Crim. App. 2023), I have attached the opinion I delivered on behalf of the Court of Criminal Appeals. I personally researched and drafted this opinion, with editorial assistance from my law clerks. I also incorporated suggestions from the other two judges on this panel.

From *State v. Kibodeaux*, 680 S.W.3d 320 (Tenn. Crim. App. 2023), I have attached the opinion from the Court of Criminal Appeals. Unlike *Hardison*, this represents an opinion that was primarily drafted by one of my law clerks. In cases such as this, I read the parties' briefs and conduct my own research before compiling and providing an outline to my clerks to assist in their drafting. Once they complete an initial draft, I engage in an intensive review and editing process with the drafting clerk. Then, I receive suggestions from the other clerks in my chambers before circulating the opinion to the other two judges on the panel.

## ***ESSAYS/PERSONAL STATEMENTS***

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

I am a seventh-generation Tennessean who has dedicated my entire career to public service in our state's justice system. I love our state—its history, its culture, and its people. I gained unique perspectives spending the first half of my life growing up in the rural Upper Cumberlands and spending the other half working in the urban areas of Knoxville and Nashville. Our history attests—and my personal experiences confirm—that Tennessee is an exceptional state. This is because, in my view, Tennesseans are exceptional people.

For these reasons, I would be honored to serve my fellow citizens as a justice on our Supreme Court. I believe my prior public service has prepared me well for this enormous responsibility. I would bring the same principles of hard work and servant leadership to this position that I have sought to follow in every step of my career and personal life.

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)***

Judges have a responsibility to demonstrate a commitment to equal justice under the law both inside and outside of the courtroom. While I have been prevented from providing pro bono legal services during my career due to my status as either a prosecutor or judge, I have otherwise committed myself to actively seeking ways to improve our system and help citizens understand the importance of the judiciary. I have been a frequent participant in the KBA's Buddy Match diversity initiative. For years, I volunteered as a judge at the Jenkins Trial Competition at UT. I have also served as a volunteer judge for the TBA's Mock Trial Competition in Nashville. I am a regular participant in KBA's Constitution Day outreach and have worked with local students as part of this program to gain a better understanding of our founding documents.

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

I seek a judgeship on the Tennessee Supreme Court, our state's highest court. The next member of this five-person court must reside in either the East or West Grand Division. If chosen, I believe my prior experience as a prosecutor, an appellate advocate, a trial judge, and an appellate judge provides an important diversity of experience and unique perspective to the Court. I would also bring the perspective of having lived extensively in both the rural and urban parts of our state.

To my knowledge, a former prosecutor has not served on the court since Justice Adolpho A. Birch—almost twenty years ago. My experience as a prosecutor taught me to treat each person I encounter with respect and compassion, whether they be crime victims or defendants. This experience has been invaluable to my work as a jurist and would serve me well if I am selected

for this position.

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

I have served on the board of directors for CASA of East Tennessee and the Sertoma Center, non-profit organizations that provide services to vulnerable populations. I have frequently participated in KBA's open service projects, volunteering for designated causes or organizations. In my various roles, I have spoken regularly to civic groups and community organizations on contemporary topics in the justice system and would maintain this practice if appointed to this position. In addition to my community involvement, I support my wife, Rachel, in her service on the board of the Sequoyah Foundation and as an ally at Restoration House, a non-profit organization providing housing, education, and employment opportunities for single mothers who are transitioning into stable housing. Rachel and I, along with our three daughters, are active members of our church, attending services and small groups and regularly participating in service activities as part of the congregation.

I am currently a member of the University of Tennessee Winston College of Law Alumni Council. Councilmembers serve as ambassadors for the law school and convene bi-yearly with the Dean and faculty to discuss issues in legal education. These issues are especially important now, as the Supreme Court is working to improve our indigent defense system and increase the number of lawyers serving rural communities. I am also currently a member of Class XII of Leadership Tennessee. My family and I are committed to being active members of our community and would continue to be if I am appointed to the Court.

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

I consider the time that I spent in my family's business as a child extremely important to the development of skills I needed to become a lawyer and later a judge. Our grocery store operated from Monday through Saturday, from 7 a.m. to 8 p.m. We hired no outside employees, which meant that the store was operated during these hours mostly by my father, with occasional help from my mother and grandmother. In the afternoons, the school bus dropped me off at the store, and I stayed there until it closed every evening. The first lesson I learned from this experience was the importance of a strong work ethic to any successful endeavor. An equally important lesson came from my interactions with customers from all backgrounds and walks of life. These interactions taught me the importance, at a very young age, of treating all people with courtesy and respect, regardless of their age, educational level, wealth, gender, or race.

I also credit my education at the University of Tennessee and my involvement in broadcasting for helping me develop communication skills that have been essential to my work as a lawyer and judge. Judges must not only be able to reach the correct legal conclusions; they must be able to communicate their reasoning in a way that is effective and leaves all parties with the

belief that they received a fair hearing, even if they might disagree with the result reached. When I changed my career focus from broadcasting to law as an undergraduate, I had no way of knowing how valuable the skills I developed in the communications field would be in my future profession.

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)***

A judge must uphold and enforce the law irrespective of any personal opinions concerning the law's content. As an Assistant Attorney General, I often represented the Department of Safety and Homeland Security in appeals from civil asset forfeiture cases. At the time, the venue for appealing the decision of an administrative law judge—no matter where the seizure occurred in the state—was in the Chancery Court for Davidson County. While I do not generally oppose asset forfeiture laws, I found that this venue sometimes created a hardship on seemingly innocent third-party property owners. For instance, imagine an innocent property owner whose vehicle was seized in an outlying county based upon the criminal conduct of a family member, and the innocent property owner, acting pro se, inadvertently misses a filing deadline with the administrative agency. He would then have to incur the expense of travel to Nashville to appeal the dismissal of his claim. In appeals that had been filed incorrectly in local venues, I was compelled to advance the position of my client—that the appeal should be dismissed—even though I personally believed that this statutory scheme created an unfair hardship on truly innocent third-party property owners.

In 2017, the General Assembly amended this law to create appellate venue closer to the county of seizure. Additionally, third-party owners now have a statutory right to be heard prior to the issuance of a forfeiture warrant.

## ***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. Charme P. Allen

[redacted]

B. Joan Berry

[redacted]

C. Lonnie T. Brown, Jr.

[redacted]

D. J. Ford Little

[redacted]

E. Tim Miller

[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 Supreme Court 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 16, 2025.

Signature

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

Kyle A. Hixson Writing Sample One

*State v. Norman Eugene Clark*

Motion to Divest Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group of the Protections of the Tennessee and New York Shield Laws and Supporting Memorandum of Law

Filed June 21, 2016

**IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE**
**DIVISION I**

| | | |
|---|---|---|
| **STATE OF TENNESSEE** | ) | |
| | ) | |
| **v.** | ) | **No. 103548** |
| | ) | |
| **NORMAN EUGENE CLARK** | ) | |

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**MOTION TO DIVEST ANDREA CANNING, TIM BEACHAM, AND THE CUSTODIAN OF RECORDS FOR DATELINE NBC AND NBCUNIVERSAL NEWS GROUP OF THE PROTECTIONS OF THE TENNESSEE AND NEW YORK SHIELD LAWS AND SUPPORTING MEMORANDUM OF LAW**

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COMES NOW the State of Tennessee, by and through Charme P. Allen, the District Attorney General for the Sixth Judicial District, pursuant to Tenn. Code Ann. § 24-1-208(c), and moves this Court for an order divesting necessary and material witnesses Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group of the "Shield Law" protections codified at Tenn. Code Ann. § 24-1-208 and N.Y. Civil Rights Law § 79-h(c). The State incorporates a supporting Memorandum of Law into this Motion. The State would show the following at the hearing on this matter:

1. Witnesses Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group should be divested of the qualified protection of Tenn. Code Ann. § 24-1-208 because the State will show by clear and convincing evidence that:

(A) There is probable cause to believe that these persons have information which is clearly relevant to a specific probable violation of law, to-wit: First Degree Murder, Tenn. Code Ann. § 39-13-202;

(B) The information sought cannot reasonably be obtained by alternative means; and

(C) There is a compelling and overriding public interest of the people of the State of Tennessee in the information.

*See* Tenn. Code Ann. § 24-1-208(c)(2).

2. Witnesses Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group should be divested of the qualified protection of N.Y. Civil Rights Law § 79-h(c) because the State will make a clear and specific showing that the information sought from these witnesses:

(A) Is highly material and relevant;

(B) Is critical or necessary to the maintenance of the State's claim or proof of an issue material thereto; and

(C) Is not obtainable from any alternative source.

*See* N.Y. Civil Rights Law § 79-h(c).

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State of Tennessee seeks a copy of the recorded interview of Norman Eugene Clark by employees of Dateline NBC (the "Interview") to use as evidence against the Defendant in his upcoming double-murder trial. On April 5, 2016, the State filed a petition in accordance with the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings asking the State of New York to issue subpoenas *duces tecum* to Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group (the "Witnesses"). On April 8, 2016, the Court granted the State's Petition and issued the Certificate, finding that the Witnesses were "necessary and material" for the upcoming murder trial of Norman Eugene Clark and that the State "cannot reasonably obtain the Interview by alternative means." *See* Certificate at ¶¶ 5, 6. The Certificate indicated that the Witnesses may raise any applicable statutory or constitutional privilege before the Court. *See id*. at ¶ 11.

Prosecutors in the New York County District Attorney's Office filed the Certificate in the Supreme Court of the County of New York, Part 1. The Witnesses were ordered to appear before the Honorable Justice Larry R.C. Stephen on May 4, 2016, to show cause why the requested summons should not issue. The Witnesses responded to the Order to Show Cause by asserting the qualified privilege of N.Y. Civil Rights Law § 79-h(c) and by claiming that their testimony is not material and necessary and that appearing in Tennessee would cause them undue hardship.

At the hearing on May 4, 2016, Justice Stephen ordered the parties to appear before this Court to decide "whether the items should be turned over or not." *See* Transcript of May 4, 2016, hearing, at p. 3, ll. 5-8, attached hereto and incorporated by reference as Exhibit 1. Justice Stephen determined that this Court should "hold a hearing [in Tennessee] and make a determination whether this material should be disclosed, and, depending on the outcome of that proceeding, then the parties can come back [to New York] to ask that New York Shield Law be imposed if the [Tennessee Court] rules against NBC. . . ." *Id*. at p. 4, ll. 17-23.

On May 20, 2016, the Witnesses filed a Motion to Quash and supporting Memorandum of Law in this Court. The State files this Motion to Divest pursuant to Tenn. Code Ann. § 24-1-208.

ARGUMENT

The Witnesses possess information that is clearly and highly relevant to the State's prosecution of Norman Eugene Clark for double-murder. They are not entitled to the qualified newsgathering protections of Tennessee or New York law.

## I. THE WITNESSES SHOULD BE DIVESTED OF THE QUALIFIED PROTECTION OF TENN. CODE ANN. § 24-1-208.

Tennessee law mandates that a member of the news media or press "shall not be required by a court . . . to disclose before . . . any Tennessee court . . . any information or the source of any information procured for publication or broadcast." Tenn. Code Ann. § 24-1-208(a). This reporter's privilege is qualified. A person seeking information protected by Section 208(a) may apply to the court having jurisdiction over the pending matter for an order divesting such protection. *See id.*

§ 24-1-208(c)(1). The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:

> (A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;
>
> (B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
>
> (C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

Tenn. Code Ann. § 24-1-208(c)(2). The General Assembly enacted Section 208 in 1973 following the United States Supreme Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972) that requiring a reporter to testify before a grand jury did not abridge that reporter's freedom of speech and press guaranteed by the First Amendment. *See Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 149 (Tenn. 1983). Unlike New York's Shield Law, Section 208 draws no distinction between confidential and non-confidential news information. *See id.* at 150.

### A. There Is Probable Cause to Believe that the Witnesses Have Information which is Clearly Relevant to a Specific Probable Violation of Law, to-wit: First Degree Murder, in Violation of Tenn. Code Ann. § 39-13-202.

The Knox County Grand Jury has found that, more probably than not, Norman Eugene Clark murdered Brittany Eldridge and her unborn son, in violation of Tenn. Code Ann. § 39-13-202. The Witnesses concede that in September 2015, Andrea Canning and Tim Beacham interviewed the Defendant for the NBC News

television news magazine Dateline NBC. *See* Witnesses Memorandum of Law in Support of Motion to Quash, at p. 1; *see also* Affidavits of Andrea Canning and Tim Beacham, attached to the Memorandum. The Witnesses describe Dateline NBC as a "documentary-style news program that reports on matters of public interest and concern, including criminal prosecutions such as Clark's." *Id*. at pp. 1-2. Thus, the Witnesses concede that they recorded the Defendant for the purpose of documenting information concerning his criminal prosecution. This Interview is clearly relevant to his upcoming murder trial.

"Relevant evidence" means 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. Tenn. R. Evid. 401 (emphasis supplied). "The theoretical test for admissibility is a lenient one, as it should be[.] . . ." *Id*., *Advisory Comm'n Cmt.* Simply put, "evidence is relevant if it helps the trier of fact resolve an issue of fact." Neil P. Cohen, *et al*., *Tennessee Law of Evidence* § 4.01[4] at 4—8 (4th ed. 2000).

The Defendant's statements in the Interview, while hearsay, qualify as admissions by a party opponent, Tenn. R. Evid. 803(1.2), and are therefore admissible upon their authentication in the trial of this matter. Tennessee has adopted an expansive view of what qualifies as an admissible admission by a party opponent. Tennessee Rule of Evidence 803(1.2) provides that "[a] statement offered against a party that is . . . the party's own statement in either an individual or representative capacity" is "not excluded by the hearsay rule." Under Tennessee

law, it is irrelevant under Rule 803(1.2) whether the statement is against the declarant's interest or whether the statement was self-serving when made. "Contrary to some common misconceptions, it does not matter that the statement was self-serving when made but turns out to be harmful by the time of trial. . . . *If the opponent wants to use it, the statement comes in as evidence.*" *State v. Lewis*, 235 S.W.3d 136, 145 (Tenn. 2007) (quoting Neil P. Cohen, *et al.*, *Tennessee Law of Evidence* § 8.06[3][a] at 8—47 to 8—48 (5th ed. 2005)) (emphasis supplied). "*Anything the opposing party said or wrote out of court is admissible in court against that party*. Whether the statement was disserving or self-serving when made is immaterial." *Id.* (quoting Donald F. Paine, *Paine on Procedure: Admissions 'against interest'*, 43 Tenn. B.J. 32 (April 2007)) (emphasis supplied).

Tennessee courts recognize that a declarant's demeanor while making a statement—aside from any factual assertion made in the statement—can be an important consideration for the trier of fact. The Tennessee Supreme Court has quoted approvingly a federal court's definition of demeanor as

> embrac[ing] such facts as the tone of the voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity.

*State v. Ellis*, 453 S.W.3d 889, 905 (Tenn. 2015) (quoting *Norng v. Shalala*, 885 F. Supp. 1199, 1221 (N.D. Iowa 1995) (quoting *Black's Law Dictionary* 430 (6th ed. 1990))). Indeed, "the carriage, behavior, bearing, manner and appearance of a

witness—in short, his 'demeanor'—is a part of the evidence." *Id*. (quoting *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952)).

The case against the Defendant is purely a circumstantial one, based partly on the Defendant being the only person with a motive to kill Ms. Eldridge and her unborn son, whom the Defendant had fathered. Thus, any statements or admissions given by the Defendant concerning the case other than those statements already in the State's possession are clearly relevant to the State's case. Aside from any factual admissions made by the Defendant, his video-recorded demeanor while discussing the brutal murder of his girlfriend and unborn son and the resulting trial will shed light to the trier of fact on the Defendant's attitude towards the victims and help the jury determine whether it is "more probable or less probable" that the Defendant had the motive to kill or the willingness to act to satisfy this motive. *See* Tenn. R. Evid 401.

Tennessee law is replete with instances where a party's admissions are used against that party in a criminal trial. If the Shield Law considerations were removed from this issue, it is inconceivable to think that a murder defendant's recorded statements regarding the case would be excluded on relevancy grounds. The presence of the Shield Law issue, however, does not alter the "lenient" standard of relevancy; Section 208 merely requires that that the sought information be "clearly" relevant to a specific violation of the law. The Witnesses possess a video-recording of the Defendant discussing this case a mere month after he personally viewed the State's case against him. His statements, along with his reactions and

his demeanor recorded so soon after seeing graphic evidence of the brutal killing of Ms. Eldridge, are clearly relevant to the State's case.

**B. The Information Sought Cannot Reasonably Be Obtained by Alternative Means.**

The requested process is necessary because the State in good faith has tried repeatedly and unsuccessfully to obtain the Interview without judicial assistance. On December 3, 2015, Assistant District Attorney General Sean F. McDermott requested a copy of the Interview from Mr. Beacham via telephone; Mr. Beacham respectfully denied. On January 7, 2016, Mr. McDermott requested a copy of the Interview from Mason Scherer, a producer for Dateline NBC who was in Knoxville to cover the case. Mr. Scherer indicated that he did not have the authority to provide the interview.

Mr. McDermott sent two certified letters to NBC News requesting a copy of the Interview. The first letter, mailed on February 1, 2016, and addressed to the Editor-in-Chief of NBC News at 30 Rockefeller Plaza, New York, NY 10112, the address provided on NBC News' website at http://www.nbcnews.com/pages/contact-us for legal notices, was marked as 'Return to Sender'.

On February 10, 2016, Mr. Scherer informed Mr. McDermott via telephone that only David Corvo, Executive Producer of Dateline NBC, had the authority to release the Interview to the State. On February 11, 2016, Mr. McDermott sent a second certified letter and addressed it to Mr. Corvo. In a letter dated February 22, 2016, Beth R. Lobel, Senior Vice President NBCUniversal News Group Legal, informed Mr. McDermott that her organization refused to release the Interview.

In a voicemail to Mr. McDermott by Mr. Beacham on December 3, 2015, Mr. Beacham informed Mr. McDermott that if the State chose to try the Defendant's case again, Dateline NBC would not broadcast the Interview until after the retrial. In their Motion to Quash, the Witnesses affirm that they do not plan to air any Dateline NBC episode about the Defendant's prosecution until after the retrial. Thus, the State will be unable to obtain a copy of the Interview from a broadcast medium prior to the trial of September 26, 2016. In Mrs. Canning's and Mr. Beacham's affidavits, they both declare that no part of the Interview "has been broadcast or otherwise released to the public." Based upon these facts, the State will show at hearing that the Interview cannot reasonably be obtained by alternative means.[1]

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[1] The Witnesses cite a string of cases where divesture was not granted, all of which are unpersuasive when considering the proof that the State is prepared to present in this case. In *State ex rel. Gerbitz v. Curridan*, 738 S.W.2d 192 (Tenn. 1987), for instance, Hamilton County prosecutors sought a radio reporter's interview of "a man who committed a murder and has never been arrested." *See id.* at 193. This vague reference to a possible criminal offense in an unknown jurisdiction obviously did not serve to divest the reporter of his privilege. The high court detailed the lack of specificity underlying the State's request in that case as it related to the second element of Section 208:

> There is no explanation of what information was sought from appellee or what other efforts, if any, the Attorney General or other law enforcement agencies had made to determine the identity of the criminal offense, the offender himself, or the site of the offense. It does not appear whether the alleged crime occurred in Hamilton County or was subject to the jurisdiction of the Hamilton County grand jury. No investigation or inquiry by Hamilton County officials with officials from surrounding counties appears to have been made, nor has any check of prison or parole records been shown.

*Id*. at 193. While the prosecutors' efforts to obtain this interview were laudable, they clearly did not possess enough information about the underlying crime—if one even existed—to overcome the hurdle of Section 208.

*State v. Shaffer*, an unreported case from the Court of Appeals, is likewise distinguishable from the instant case. No. 89-208-II, 1990 WL 3347 (Tenn. Ct. App. Jan. 19, 1990). In *Shaffer*, the issue presented was whether a court could order an *in camera* review of requested material if a party has not first met the burden of Section 208. The court answered that question in the negative. The State is not requesting an *in camera* review in this case, so *Shaffer* does not apply.

### C. The People of the State of Tennessee Have a Compelling and Overriding Public Interest in Obtaining the Interview.

The Shield Law of Section 208 applies to the entire spectrum of lawsuits available to litigants in Tennessee, both civil and criminal. Indeed, the Shield Law has been utilized in wrongful termination lawsuits in chancery court, *see Dingman v. Harvell, et al.*, 814 S.W.2d 362 (Tenn. Ct. App. 1991), in federal bankruptcy proceedings, *see In re Copeland*, 291 B.R. 740 (Bankr. E.D. Tenn. 2003), in civil rights proceedings against pizza-delivery companies, *see Moore v. Domino's Pizza, L.L.C.*, 199 F.R.D. 598 (W.D. Tenn. Oct. 13, 2000), in civil wrongful death suits in circuit court, *see Austin*, 655 S.W.2d 146, and, of course in criminal actions. Even in the context of criminal cases, however, a witness ostensibly could invoke the protection during the litigation of any type of case, from a minor traffic offense to murder.

The high interest of the people in prosecuting criminal offenders is underscored by the people's presence as a party to these actions. Among the

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*State v. Franklin*, an unreported case from the Court of Criminal Appeals, did not even involve the application of Section 208. No. 01C01-9510-CR-00348, 1997 WL 83772 (Tenn. Crim. App. Feb. 28, 1997). The defendant in that case insisted that the State should have sought the entire video of his interview with a news reporter to show the context of his broadcast statement. In dicta, the court merely noted that had the State pursued the material, "it might well have been fruitless" due to the television station's plan to invoke the Shield Law. This hypothetical tangent is not a legal analysis that would be persuasive as to this case.

Finally, the Witnesses rely upon *In re Copeland*, 291 B.R. 740 (Bankr. E.D. Tenn. 2003), a case where the District Court applied Section 208 to quash a subpoena seeking the testimony of a reporter with the *Knoxville News-Sentinel* that was intended to impeach the credibility of a debtor in a bankruptcy proceeding. The court found that the party seeking the subpoena had not proven the "compelling and overriding public interest" prong of Section 208(c)(2)(C). The State wholeheartedly agrees with the Witnesses and the District Court that it is not a compelling and overriding public interest of the people of the state of Tennessee to impeach the credibility of a debtor in a bankruptcy case. The difference between *Copeland* and the instant murder case requires no elaboration.

spectrum of criminal cases, the people's interest in prosecution can be no higher and no more compelling than in cases of First Degree Murder. The people of this State have reserved the three most serious punishments available at law for offenders convicted of First Degree Murder; if convicted, an offender will be sentenced to life imprisonment, life imprisonment without the possibility of parole, or death. Tenn. Code Ann. § 39-13-204. Along the spectrum of types of lawsuits to which Section 208 could apply, First Degree Murder prosecutions hold an indisputable position as the type of case where the State's interest will be most compelling and most likely to override any other interest.

The Witnesses have asserted an interest in protecting the freedom of the press and promoting the free flow of information involving matters of public concern. These interests are important, and the State in no way means to denigrate the essential role that the media play in the criminal justice system or in our society in general. But, contrary to the Witnesses assertion in their pleadings, there exists no privilege under the First Amendment to protect reporters with knowledge of criminal conduct from becoming participants in criminal litigation. *See Branzburg*, 408 U.S. at 693 ("we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it"). The people's well-recognized interest in prosecuting an

accused murderer clearly overrides a reporter's nebulous interest in not disclosing evidence that is relevant to a criminal action.[2]

Anyone who interjects oneself into the midst of a pending criminal prosecution runs the risk of becoming a witness for either party in that prosecution. Prosecutors, for instance, go to great lengths during the course of a criminal investigation to ensure that they do not become fact witnesses and thus disqualify themselves from participating in the trial. Reporters play an important role in our society, but they do not hold an exalted position that prevents them from being witnesses in a criminal case when they obtain evidence that is relevant to that proceeding.

The people of Tennessee have a compelling and overriding interest in obtaining the recorded statements of an accused murderer to use as evidence in his prosecution for First Degree Murder.

## II. THE WITNESSES SHOULD BE DIVESTED OF THE QUALIFIED PROTECTION OF N.Y. CIVIL RIGHTS LAW § 79-h(c).

### INTRODUCTION

A threshold question regarding the application of New York's qualified protection is whether this Court, the demanding court in the out-of-state subpoena context, should analyze a privilege that exists in the laws of the sending state. An

[2] The Witnesses' concerns of creating a "chilling effect" are overblown. To the State's knowledge, this case has received little or no notoriety outside the Knoxville media market. Dateline NBC reports on topics at the international level. It cannot seriously be argued that a single ruling from a criminal case in Knoxville, Tennessee will have a chilling effect on potential interview subjects around the world. Based upon the prior media coverage that this case has received, the only way that potential interviewees outside of the Knoxville market would learn of the Court's ruling would be if Dateline NBC reported it.

analysis of New York decisional law, which predictably contains more instances of the interstate application of media privileges, answers that question affirmatively.

During the May 4, 2016, hearing in New York City, counsel for the Witnesses stated that New York's Shield Law "is generally deemed to be much stronger than Tennessee['s.]" Ex. 1, at p. 3, ll. 16-17. This is only partially true, and it is only true in a way that is entirely irrelevant to this case. New York's statute, unlike Tennessee's, contains an absolute protection for confidential news. If this case involved the disclosure of confidential news or a confidential news source, it could undoubtedly be said that New York law provided a much stronger protection than Tennessee's Section 208.

The parties agree, however, that this case involves nonconfidential news, and thus only invokes the qualified privilege of New York's Shield Law. Upon comparison of the two states' qualified privileges, it is clear that Tennessee's Section 208 is at least on par with New York's Section 79-h(c) and arguably provides a greater protection than its New York counterpart.[3] This point is important when determining the proper venue for litigating the application of New York's Shield Law.

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[3] The standard of proof in Tennessee is "clear and convincing", while in New York it is "clear and specific". In Tennessee, a party must show that the sought information is "clearly relevant", while New York requires proof that the information is "highly material and relevant". Both states require a showing that the information cannot be obtained by alternative means. New York requires the information to be "critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto." This requirement does not explicitly exist at Tennessee law, but Section 208, unlike the New York statute, requires the demanding party to demonstrate "a compelling and overriding public interest of the people of the state. . . ." Tennessee law, therefore, exceeds the protection of New York law in that Tennessee requires its courts to look beyond the nature of the evidence sought and examine the varying interests at play when determining whether to apply the privilege.

The New York Court of Appeals set forth the general rule for determining the venue of privilege determinations in *Matter of Codey v. Capital Cities, Am. Broadcasting Corp.*, 82 N.Y.2d 521 (1993) by holding that New York courts adjudicating out-of-state subpoena applications should decline to resolve admissibility issues, including privilege claims, so that they can be decided in the demanding state. In arriving at this general rule, the *Codey* court noted:

> It would be inefficient and inconsistent with the over-all purpose and design of this reciprocal statutory scheme to permit the sending State's courts to resolve questions of privilege on a[n out-of-state subpoena] application. The purpose of the Uniform Act was to establish a simple and consistent method for compelling the attendance of out-of-State witnesses. This goal would be frustrated if the [subpoena application] hearings conducted by the sending State were to become forums for the litigation of questions of admissibility and evidentiary privilege, most of which will inevitably have to be litigated again anyway during the course of the demanding State's criminal proceeding.

*Id.* at 529-30 (internal citations omitted). The *Codey* decision represented the formal adoption of what had been a practice in New York courts for years prior to its filing. *See, e.g., Matter of Superior Court of New Jersey v. Farber*, 405 N.Y. Supp. 2d 989, 991 (1978) (held New York Times reporter could assert his privileges under New York law in the demanding court in New Jersey); *In re Pitman*, 25 Misc. 2d 332, 334 (1960) (questions of privilege are to be raised in the demanding court in New Jersey); *see also In re Summons of Director, Women Organized Against Rape*, 30 Pa. D. & C. 3d 295, 297 (1984) (applying *Farber*, Pennsylvania court finds that subpoenaed party will be able to raise issues of privilege in the demanding state of New York).

In 2013, an issue involving the case of the Aurora, Colorado, theater shooter, James Holmes, prompted the New York Court of Appeals to carve out a thin exception to the general rule of *Codey*. In *Matter of Holmes v. Winter*, 22 N.Y.3d 300 (2013), defendant Holmes sought to subpoena Fox News reporter Jana Winter from New York for the purpose of disclosing the identity of the confidential law enforcement sources who had leaked the contents of defendant Holmes' journal to her. *Id.* at 303-05. New York's intermediate appellate court, applying *Codey*, held that the privilege issue should be litigated in Colorado. *Id*. at 306.

The Court of Appeals reversed the Appellate Division and denied the issuance of Winter's subpoena. Stating that the protection of the identity of confidential news informants is a "New York public policy of the highest order", *id*. at 320, the court held that denial of relief under an out-of-state subpoena petition is in order when it is justified by a strong public policy of New York. *Id*. at 314. The court noted that *Holmes*, unlike *Codey*, involved a disparity between the privileges present in the two states—*i.e.* New York absolutely protects the identity of confidential news informants while Colorado provided only a qualified immunity. *Id*. at 314. The court stated that "perhaps the most important factual distinction between [*Holmes*] and *Codey*[,]" is that *Holmes* involved the compelled disclosure of a confidential source, while *Codey* involved the disclosure of nonconfidential, nonpublished material. *Id*. at 315. The *Holmes* court noted that the exception it created involved a high standard that will "seldom be met." *Id*. at 320. It reaffirmed the rule from *Codey*: "absent a threatened violation of an extremely

strong and clear public policy of [New York] such as is present [in *Holmes*], New York courts adjudicating [out-of-state subpoena] applications should decline to resolve admissibility issues, including privilege claims, so that they can be decided in the demanding state." *Id*. at 319.

Applying *Codey* and *Holmes* to the instant case, it is clear that the general rule of *Codey* applies and the issue of New York's privilege should be adjudicated in this Court. First, as shown *supra*, there exists no disparity between the qualified privileges in New York and Tennessee; Tennessee's is arguably stronger. Second and most importantly, this case does not involve the compelled disclosure of a confidential news informant—a practice that would contravene a New York public policy of the highest order. This case, like *Codey*, involves the disclosure of nonconfidential, nonpublished news information. The rule of *Codey* applies, and this Court should adjudicate both the Tennessee and New York privilege issues on the merits.

### A. The Interview is Highly Material and Relevant.

New York law recognizes that a defendant's own statements are highly material and relevant to a criminal prosecution. *People v. Combest*, 4 N.Y.3d 341, 347 (2005); *People v. Craver*, 150 Misc. 2d 631, 632 (1990). New York, like Tennessee, also recognizes the importance of a defendant's demeanor while speaking—particularly in the context of a video-recorded interview:

> The People seek to introduce evidence of defendant's actual words. No other source of the exact words possibly can exist other than the News 12 footage. And, this is not merely an audio recording—this is a videotape, which shows defendant's demeanor as he spoke the words,

> which is, of course, an aid to the jury in assessing the credibility of the communicator as well as the content of the communication.

*In re Subpoena Duces Tecum to News 12*, 50 Misc. 3d 1206(A), at *5 (Sup. Ct. Bronx Co. Dec. 7, 2015) (citing *Combest*, 4 N.Y.3d at 349-50). "[U]nlike [the statement of] a potential witness, a defendant's statement in a criminal case is always relevant." *People v. Mercereau*, 24 Misc. 3d 366 (2009).

The State otherwise restates its arguments and rationale as set forth *supra*, in section I. A.

### B. The Interview Is Critical or Necessary to the Maintenance of the State's Claim or Proof of an Issue Material Thereto.

The case against the Defendant is purely circumstantial.[4] New York Courts have recognized the critical or necessary nature of a criminal defendant's statement in the context of a circumstantial case. "When dealing with a criminal prosecution based on circumstantial evidence, an admission made by a defendant is always a critical piece of evidence." *News 12*, 50 Misc. 3d at *6; *see also Mercereau*, 24 Misc. 3d at 369 ("[h]ere, particularly in a circumstantial case, evidence of both the defendant's allegedly inconsistent statements and motive is highly probative").

The court in *News 12* elaborated regarding the critical or necessary nature of a defendant's statement in a purely circumstantial case:

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[4] The only piece of arguably "direct" evidence are the Defendant's fingerprints, which were lifted from a television inside Ms. Eldridge's apartment, the scene of the crime. The fingerprints' presence as direct evidence is not at all helpful to the State's case; one would expect to find the Defendant's fingerprints in Ms. Eldridge's apartment, as he had been there many times previously. The incriminating aspect of these fingerprints arises from *how* they were situated on Ms. Eldridge's television—*i.e.*, the *circumstances* of how the fingerprints were found. The fingerprints were located on the top edge of the front screen of the television, with the fingers pointing in a downward direction (assuming the set was upright). This circumstance—the placement of the fingerprints—supported the State's theory that the Defendant placed the television screen-down on the floor following the murders in an attempt to stage a burglary scene.

> [T]he People argue that their case is wholly circumstantial. There is no smoking gun. They have evidence of motive, opportunity, and a witness who saw the defendant carrying things out of the home after Ms. Moore was last seen alive. They have evidence that Ms. Moore and the defendant did not get along and fought about her rent payments. . . . Where only circumstantial evidence exists, a conviction "rises or falls" based on all of the circumstances, including a defendant's admission.

*News 12*, 50 Misc. 3d at *6. In other words, a circumstantial case cannot exist by only showing the jury *some* of the circumstances; the jury must see all relevant circumstances in order to decide whether these circumstances indicate that an accused is guilty beyond a reasonable doubt.

The timing of the interview in question makes it especially critical or necessary to the State's circumstantial case. It is the only known recording of the Defendant speaking about the murders *after* hearing the State's case against him. While an accused's statement is always relevant when offered by a party opponent, *see Mercereau*, 24 Misc. 3d at 368-69, and while an accused's demeanor is an aid to the jury in determining his credibility, *see News 12*, 50 Misc. 3d at *5, the value of this recording is greatly enhanced by the fact that it occurred a month after the Defendant's first trial. The recording is the only evidence of the Defendant's post-trial "tone of [ ] voice", "the hestitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity." *Ellis*, 453 S.W.3d at 905. Indeed, the mere fact that the Defendant agreed to give an interview to a national

news agency while his criminal case was still pending is a circumstance for the jury to consider.

In a purely circumstantial First Degree Murder case, any statement made by the accused is critical or necessary to the prosecution.

**C. The Interview Is Not Obtainable from Any Alternative Source.**

The State restates its arguments and rationale as set forth *supra*, in section I. B.

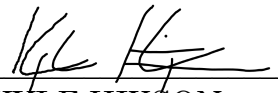
CONCLUSION

The Witnesses should be divested of their qualified privilege under Tenn. Code Ann. § 24-1-208. The Court should apply the general rule of *Codey* and adjudicate the issue of New York's qualified privilege under N.Y. Civil Rights Law § 79-h(c). The Witnesses should likewise be divested of their qualified privilege under New York law.

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests that this Court, after considering the pleadings of the parties and the evidence presented at hearing, enter an order divesting the Witnesses of their qualified privileges under Tenn. Code Ann. § 24-1-208 and N.Y. Civil Rights Law § 79-h(c). The order should reiterate the Court's request to issue the summonses requested in the previously-issued Certificate and that performance on said summonses should occur as early as practicable in advance of the trial of this matter, presently scheduled for September 26, 2016.

RESPECTFULLY SUBMITTED, this 21st day of June, 2016.

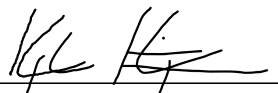
CHARME P. ALLEN
District Attorney General



KYLE HIXSON
Assistant District Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that an exact copy of the foregoing and attached documents were transmitted to counsel for the Defendant and counsel for the Witnesses electronically and by First Class U.S. Mail, postage prepaid, on this the 21st day of June, 2016.



KYLE HIXSON
Assistant District Attorney General

Kyle A. Hixson Writing Sample Two

*State v. Hardison*, 680 S.W.3d 282 (Tenn. Crim. App. 2023)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2023 Session

**STATE OF TENNESSEE v. JEREMY JEROME HARDISON**

**Appeal from the Criminal Court for Knox County**
**No. 114655 G. Scott Green, Judge**

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**No. E2022-00207-CCA-R3-CD**

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A Knox County jury convicted the Defendant, Jeremy Jerome Hardison, of first degree premeditated murder. The Defendant appeals, contending that (1) the trial court erred by denying the Defendant's motion to recuse the trial judge; (2) the trial court erred by denying the Defendant's motion to suppress evidence obtained from the execution of a search warrant on his residence; (3) the trial court unconstitutionally limited the Defendant's ability to cross-examine a witness; (4) the trial court erred by admitting expert ballistics testimony at trial; and (5) the evidence was insufficient to prove the Defendant's identity as the perpetrator. After review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JILL BARTEE AYERS, JJ., joined.

Joshua D. Hedrick (on appeal) and Gregory P. Isaacs and J. Franklin Ammons (at trial), Knoxville, Tennessee, for the appellant, Jeremy Jerome Hardison.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Charme P. Allen, District Attorney General; and Hector I. Sanchez and Joanie Stallard Stewart, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

### I. FACTUAL AND PROCEDURAL HISTORY

On the afternoon of September 24, 2017, Jonathan Stewart was shot in the back on Selma Avenue in Knoxville and died as a result of his injuries. The shooting occurred near a home-renovation site that was owned by the Defendant and his brother. Workers present at the renovation site gave initial statements to investigators with the Knoxville Police

Department ("KPD") but denied having any information as to the identity of the shooter. On October 14, 2018, however, a KPD investigator spoke with some of these witnesses again, and three of them provided statements implicating the Defendant. On January 16, 2019, a Knox County grand jury returned a presentment against the Defendant charging him with the first degree premeditated murder of the victim and two alternative counts of possession of a firearm by a convicted felon. *See* Tenn. Code Ann. §§ 39-13-202, -17-1307(b)(1)(A), (B). The next day, KPD officers executed a search warrant on the Defendant's residence on Upland Avenue and seized, among other items, a firearm that was consistent with the description provided by the witnesses. The trial court severed the firearm counts prior to trial, and the Defendant proceeded to trial on the first degree murder charge on September 13, 2021.

## A. Defense Motions

### 1. Recusal of the Trial Judge

On January 9, 2020, the Defendant filed a motion to recuse the trial judge. According to his motion, the trial judge had previously informed the parties that during his prior employment as a Knox County prosecutor, "he participated in investigations concerning allegations against [the Defendant]." This circumstance, the Defendant argued, could cause a reasonable person to perceive that a conflict of interests existed and that the trial judge could not impartially preside over the Defendant's proceedings.

The trial court heard the motion on January 17, 2020. During the hearing, the trial judge indicated that he had not worked as a prosecutor since 2002. The trial judge further explained that he did not remember personally prosecuting the Defendant but had "been involved in several investigations that [the Defendant] was a suspect in[.]" The trial judge recalled that the Defendant's previous prosecutions occurred in the late 1990s and early 2000s and were conducted by another prosecutor. The trial judge continued,

> I don't remember anything about . . . [the Defendant] other than his nickname, Big Country, and we looked at some things in Austin Homes that involved him. Beyond that, I couldn't tell you anything about it. I mean, that's all I remember.

With this explanation, the trial judge stated, "I'm not inclined to get out of it. . . . [I]t's not going to affect my impartiality." The trial judge agreed with the prosecutor's argument that the trial judge's prior knowledge of the Defendant, which consisted of knowledge of the Defendant's nickname and his prior place of residence, did not create a conflict of interests.

## 2. Suppression

Prior to trial, the Defendant filed a motion seeking to suppress all evidence obtained during the execution of the search warrant at his residence on Upland Avenue. The Defendant set forth two theories supporting suppression of the evidence in his motion. First, the Defendant argued that the warrant constituted an overbroad, general warrant because it authorized law enforcement to search for numerous items that were not supported by probable cause in the affidavit. Second, citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), and *State v. Little*, 560 S.W.2d 403, 407 (Tenn. 1978), the Defendant argued that the affidavit supporting the search warrant contained false statements, thus rendering the warrant invalid. The trial court heard the motion on September 9, 2021.

### a. The Witnesses' Statements of October 14, 2018

KPD officers spoke with Daniel Rudd, Robert Daugherty, Jody Richards, and Chris Equitani immediately after the shooting on September 24, 2017. These witnesses were working at the renovation site at the time of the shooting, but all four men denied any knowledge of the identity of the shooter at that time. On October 14, 2018, KPD Investigator Robert Cook separately interviewed these four men again at KPD headquarters based upon new information that he had recently received. Recordings of these interviews were received as exhibits to the suppression hearing. Our summaries of these statements are limited to the facts pertinent to this appeal.

In the October 14 interview, Daniel Rudd maintained that he did not know who owned the house under renovation and stated that he had never seen the owner. He heard two "big bangs" on the day in question, but he denied knowing the identity of the shooter. Mr. Rudd admitted that "Sonny" asked him to work on the house, but he was unable to identify "Sonny" in multiple photographs that were presented to him by the investigator.

In his statement, Robert Daugherty told Inv. Cook that the Defendant and his brother[1] owned the Selma Avenue house under renovation. Mr. Daugherty identified the Defendant in a photographic lineup. Mr. Daugherty said that he was installing plywood on the house on the day of the shooting when he heard two shots. He then saw the Defendant exit the woodline next to the street with a firearm that Mr. Daugherty described as an "AR."

[1] The various witnesses knew the Defendant as "Sonny" or "Big Country." They knew the Defendant's brother, Bryan Hardison, as "Country." For clarity, we will refer to the Defendant simply as "the Defendant." Because the brothers share a surname, we will refer to the Defendant's brother by his first name. We intend no disrespect in so doing.

Up to this point, Mr. Daugherty was unaware that the Defendant had been at the scene. He saw the Defendant place the gun in the trunk of a black, two-door coupe with tinted windows that was parked on the renovation property. As this happened, Mr. Daugherty heard the Defendant say, "Well, he won't f--- with our s--- no more." The driver of the car, who was unknown to Mr. Daugherty, then backed out of the driveway and left the property. The Defendant walked away from the property, causing Mr. Daugherty to assume that his vehicle was parked elsewhere. Mr. Daugherty clarified that no one at the scene actually saw the shots being fired but that "everyone kn[ew] who did it."

Jody Richards told Inv. Cook that his friend, Will Inklebarger,[2] picked him and his co-workers up around 7:00 a.m. on the morning of the shooting in a black Chevrolet king cab truck to drive them to the worksite. The Defendant drove a black Honda with tinted windows to the property and arrived approximately forty-five minutes after the crew. When the Defendant arrived, Mr. Richards saw the Defendant go into the woodline next to Selma Avenue with a "long gun" in a black duffel bag. He said the Defendant stayed "camped out" in the woodline all day. Mr. Richards understood that the victim had stolen lumber from the property on the previous night. Later in the day, Mr. Richards heard four or five gunshots. Mr. Richards then saw the Defendant bring the gun back to his car and place it inside. He also saw Mr. Inklebarger back his truck out of the driveway to allow the Defendant to exit in his car.

Toward the end of the interview, Inv. Cook and Mr. Richards discussed Mr. Richards' pending driving on a revoked license charge in Humphreys County. Mr. Richards expressed frustration that he had traveled to Humphreys County multiple times but had been unable to resolve the charge. Inv. Cook offered to call the Humphreys County authorities to inform them that Mr. Richards was assisting him in this investigation.

Chris Equitani told Inv. Cook that, on the morning of the shooting, he got a ride to the worksite from Bryan in his black truck. Mr. Equitani said that the Defendant was also driving a truck on that day. Mr. Equitani saw the victim walking down the street later that afternoon. Mr. Equitani had been told that the victim had stolen lumber from their worksite. Mr. Equitani heard gunshots and saw the victim hit the ground. He then saw the Defendant run out of the woods and place a gun in the back of his truck, which Mr. Equitani described as being a "black, step-side." Mr. Equitani described the gun as looking like "a machine gun" or an "AR-15." The Defendant left the scene in his truck. Mr. Equitani said that Mr. Inklebarger also left the scene in the other black truck, which had been backed into the driveway along with the Defendant's. Mr. Equitani said that the Defendant

[2] Many of the witnesses knew Will Inklebarger and Brenda Carroll only by their first names. Because the identities of these individuals are not in dispute and for the sake of clarity, we will refer to them by their surnames throughout this opinion.

mentioned something about the victim's stealing a two-by-four board. He said that the Defendant stated that "he was going to do what he had to, because if [the victim] would steal a board, he would steal anything else there."

b. The Search Warrant and Supporting Affidavit

On January 17, 2019, Inv. Cook presented to the trial court an affidavit in support of a search warrant for the Defendant's residence on Upland Avenue. Copies of the search warrant and its supporting affidavit were entered as exhibits to the suppression hearing. The affidavit of Inv. Cook contained the following facts supporting the issuance of the warrant:

> 1. On September 24th 2017, at about 13:30 hours, your affiant, Investigator R. Cook, with the [KPD] responded to Ben Hur and Selma Avenue on a homicide investigation. There, your affiant observed the victim, Jonathan Stewart, (hereafter referred to as "victim") deceased on Selma Avenue. Stewart had been shot one time in the upper left back area . . . .
>
> 2. On 09/24/2017, at about 13:36 hours, 911 received a call that a white male had been shot and was laying on Selma Avenue near Ben Hur Avenue. Witnesses stated that they had heard between 5-8 gun shots and then observed the "victim" fall down on the corner of Ben Hur Avenue and Selma Avenue. It appeared the "victim" had been shot one time in the upper part of his back. Witnesses stated that they did not hear any arguing before the shots.
>
> 3. Your affiant, along with other officers, observed that the home located [on] Ben Hur Avenue had what appeared to be a bullet strike in the concrete block of the home. That bullet strike left a bullet fragment inside the block and was confiscated by [KPD] crime lab.
>
> 4. During the course of the investigation, the affiant spoke to four witnesses that were outside working on a house located [on] Selma Avenue at the time of the shooting. At that time, those witnesses stated that they heard gun shots and lay [*sic*] down on the ground. At that time, those witnesses stated that they did not see anyone shooting.
>
> 5. Your affiant, on 09/25/2017, attended the autopsy for the victim. The medical examiner removed small bullet fragments from the

victim. The medical examiner found that the shot that killed the victim appeared to travel from left to right at a slightly upward angle.

6. On 10/09/2018, your affiant received information from another investigator that he was currently working on a missing person's case that involved three missing persons. That investigator informed your affiant that they had spoken to a female that informed him that there were two other witnesses that were working on the house located [on] Selma Avenue the day of the shooting. That investigator informed your affiant that one of the missing persons had told her that the person responsible for killing the victim was [the Defendant]. The investigator stated to your affiant that the missing person told the female that all of the people working on the house that day witnessed the suspect shooting the victim.

7. On 10/14/2018, your affiant re-interviewed the four witnesses that were working on the home located [on] Selma Avenue the day of the shooting. Witnesses stated to your affiant that the [Defendant] shot and killed the victim. Witnesses stated to your affiant that two of the missing persons were working on the home with them the day of the shooting. Witnesses stated to your affiant that the [Defendant] was angry because one of the missing persons had informed him that the victim had stolen wood from the work site the day before the shooting. Witnesses stated to your affiant that on the day of the shooting the [Defendant] arrived at the home with a black bag. Witnesses stated to your affiant that inside of the bag was what they described as a "long gun." Witnesses stated to your affiant that the "long gun" was like an AR type of gun. Witnesses described to your affiant that the gun was long and black. All the witnesses stated to your affiant that the Defendant removed the gun from the black bag and walked into a small wood line just to the east of the home. Witnesses stated to your affiant that as the victim was walking south on Selma towards Ben Hur Avenue, the [Defendant] shot and killed the victim from the wood line that would have been to the left of the victim. Witnesses stated to your affiant that the suspect then placed the "long gun" back inside of the black bag and left prior to officer's arrival. Witnesses stated to your affiant the reason they did not tell your affiant the day of the homicide was because they were afraid of the suspect.

8. Your affiant had sent the bullet fragment from the block wall of the house located [on] Ben Hur Avenue along with the bullet fragments from the victim to the Tennessee Bureau of Investigation ["TBI"] to have

> ballistics examination conducted. The [TBI] found that both sets of fragments were consistent with .223 caliber boat tail bullets. The [TBI] found that both bullets could have been fired through the same barrel of a firearm.
>
> 9. Your affiant believes that based on experience of witness, victim and suspect interviews during the course of being an investigator, the description of the "long gun" that was provided by witnesses, the [Defendant] used a rifle that was capable of firing a .223 caliber bullet. Your affiant believes that the [Defendant] still has in his possession the gun that was used to kill the victim on 09/24/2017.
>
> 10. Your affiant confirmed using a police data base that the [Defendant] is living at the residence located [on] Upland Avenue. The police data base shows the [Defendant] lived at the residence months prior to the shooting and is still residing at the residence. Officers with the [KPD] observed the [Defendant] leaving the residence.

The trial court issued the search warrant for the Defendant's Upland Avenue residence on January 17, 2019. Based upon a request made in the affidavit, the search warrant authorized the seizure of the following items:

> [A]rticles of identification (e.g. credit/debit cards), mail, correspondence, receipts, newspaper clippings, recordings, writings, cell phones, computers, hard drives or other digital media that may contain evidence of motive, planning, preparation, and evidence of dominion, ownership and/or control of the residence, and blood, seminal fluid, soiled bed clothes, soiled sheets, prophylactics, DNA, hair, fibers, cleaning supplies, latent prints, edged weapons or items that can be used as a weapon, hand guns, long guns, rifles, items used to transport[,] conceal[,] or store hand guns, long guns, rifles and microscopic particles, [and] possible drug paraphernalia . . . .

The return on the search warrant indicated that the following items had been seized pursuant to the warrant:

> Various Paper Work
> (1) Ruger SR 40C #34387274
> (1) Springfield XD 9mm XD957706
> (1) Ruger 4[illegible] REV

(1) 223 AR Long gun
(1) Black Wallet
(1) Various Ammo
(1) Black suitcase containing (1) drum for Glock (1) Spikes TACT. ST15 60280
(1) Smith Wesson [illegible] CP31583 Gun Case under Bed
(1) AERO [illegible] X15 scope. Light AR23729
(1) EBT Jennifer Presuttio [illegible] Sierra Lowry
[illegible] I Pads
(9) Cell Phones
[illegible] Bag of Marijuana

The return was executed by Inv. Cook on January 17, 2019.

c. Inv. Cook's Testimony

Inv. Cook was the sole witness to testify at the suppression hearing. He testified that he had worked at KPD since 2008 and that he had been assigned to the violent crimes department for almost seven years. He acknowledged that he was the lead investigator on this case.

Inv. Cook testified that, immediately following the shooting, KPD investigators interviewed four people who were working on the house at the time of the shooting: Mr. Rudd, Mr. Daugherty, Mr. Richards, and Mr. Equitani. He maintained that paragraph four of his affidavit was correct in that all of these witnesses told police at that time that they "did not see anyone shooting."

Inv. Cook acknowledged that, while paragraph seven of the affidavit initially refers to four witnesses' being interviewed in October 2018, only three of the witnesses gave statements that implicated the Defendant. He conceded that his affidavit did not inform the trial court that Mr. Rudd had persisted in his claim of not knowing the identity of the shooter.

Inv. Cook acknowledged that he did not include in his affidavit the fact that both Mr. Daugherty and Mr. Richards described the Defendant as placing the gun in a car, while Mr. Equitani stated that the Defendant had placed it in a truck. Inv. Cook testified, however, that the three witnesses were consistent as to the facts of the actual shooting and that their description of the Defendant's vehicle was the only inconsistency among their three accounts. He believed that one or more of the witnesses were simply "mistaken" as to the description of the Defendant's vehicle.

Inv. Cook acknowledged that paragraph seven of his affidavit provided that "[w]itnesses stated to your affiant that the [Defendant] shot and killed the victim[,]" but that the affidavit failed to explicitly state that none of the witnesses actually saw the Defendant fire the shots. Inv. Cook explained repeatedly throughout his testimony that this conclusion was based upon a "reasonable inference" drawn from the information provided to him by the witnesses.

d. The Trial Court's Ruling

Regarding the Defendant's *Franks* issue, the trial court acknowledged that the affidavit did not "contain every single fact that every single" witness stated about the incident. The trial court found, however, that any excluded information went to the credibility of the witnesses and that "[t]heir credibility is called as directly into question as possible in paragraph [four]" of the affidavit. The trial court explained that the affidavit alerted the court that the witnesses had "committed a class D felony" after the incident when they falsely told police that they "didn't see anything." The trial court concluded that the issue did not "rise[] to the level of *Franks*" and denied relief on this basis.

Regarding the Defendant's overbreadth argument, the trial court asked the parties what the remedy should be were the trial court to find that the search warrant authorized the seizure of items that were not supported by probable cause in the affidavit. The Defendant asked for the exclusion of all evidence seized from his residence. The State argued for a "line-strike" exclusion of only those items not supported by probable cause in the affidavit. Counsel for the Defendant responded by contending that, if the trial court accepted the State's argument, "anything other than a long gun or ammunition should be excluded." The State then informed the trial court that it only intended to introduce at trial "the long gun and ammunition" and "a black face mask[.]" The trial court suppressed the black face mask but denied suppression as to the "long gun" and ammunition.

3. The Cross-Examination of Jody Richards

In the months prior to trial, Mr. Richards incurred criminal charges in Knox County that were still pending at the time of trial. These charges included "drug possession charges," introduction of contraband into a penal facility, simple possession, and evading arrest. Prior to Mr. Richards' trial testimony, the parties addressed with the trial court the admissibility of these cases. When asked by the trial court what questions the defense sought to ask Mr. Richards, defense counsel responded,

> I'm going to ask him everything about his pending charges [be]cause it goes to whether he was on meth that day, whether he got a deal. There was a conversation with [Inv.] Cook about his drug charges. He had some trepidation.
>
> I mean, I think it's fair game on his perception.
>
> Why aren't they prosecuting him, etcetera? I mean, you're—you're here with pending charges. You got a [failure to appear] and you're not in jail.

The trial court stated that the defense could ask Mr. Richards about his potential bias or expectation of favoritism as a result of his testimony but added that "it gets tricky" if the defense sought to inquire as to the factual details of his pending charges. Defense counsel responded that the details of these offenses were probative of Mr. Richards' credibility because it was important for the jury to see Mr. Richards' "body language" if he decided to invoke his Fifth Amendment right in response to this line of questioning.

The trial court ruled that the defense could ask Mr. Richards about "what he's got pending on the table . . . ; the fact that he[] hasn't been prosecuted yet, he's not been held to account, [and] the State's not pushed [his] cases to trial[,]" adding that it was "fair game" to impeach Mr. Richards on these topics in any way the defense saw fit. As to inquiry into the details of these pending charges, the trial court noted that a jury-out hearing with Mr. Richards' counsel present would be necessary to determine if Mr. Richards planned to invoke his Fifth Amendment right to these questions. If Mr. Richards did not invoke his right to silence at this hearing, the trial court noted, the defense could then proceed to ask about the facts of his pending cases during his testimony. The trial court indicated that it would not allow the defense to inquire about the underlying facts of Mr. Richards' pending charges if he chose to invoke his right to silence as to those questions at the jury-out hearing.

4. The Defendant's Motion to Exclude the TBI Firearms Reports

Prior to trial, the Defendant filed a motion to exclude the TBI firearms reports related to his case prepared by Special Agent Teri Arney. Citing Tennessee Rules of Evidence 401, 403, and 703, the Defendant argued in his motion that the findings in the reports were "inconclusive and speculative" because they could not definitively link the bullet fragments collected to the weapon confiscated from the Defendant's home. The Defendant contended that the findings merely stated that the bullet fragments collected "could have been fired through the barrel of the same firearm." The Defendant argued that

the findings in the report were irrelevant because they did not make a fact of consequence more or less probable. Even if relevant, the Defendant argued that the admission of the reports would be unfairly prejudicial because "the jury [would] likely presume that the .223 caliber rifle s[e]ized during the execution of the search was the same weapon that discharged the bullet even though there [was] no evidence to support that conclusion." The Defendant noted that, in finding that the weapon seized from his residence "could have discharged" the bullet fragments collected in the case, the forensic scientist relied upon weapon characteristics that were also found in other .223 Remington caliber weapons. At the pretrial hearing on his motion, the Defendant added that the inconclusive nature of the findings prevented those findings from substantially assisting the trier of fact, as required by Tennessee Rule of Evidence 702 for the admission of expert testimony.

Following the argument of the parties at hearing, the trial court compared the findings in the instant reports to the probability findings generally admitted by forensic scientists in DNA cases. After reviewing the reports in question, the trial court summarized the findings therein as follows: "I can't say within a reasonable degree of . . . certainty that this is the gun that fired it. But by the same token, I can't exclude this gun." The trial court found that such a finding "assists the trier of fact in a substantial fashion." The trial court intimated that any argument surrounding the reports should "go to the weight, not the admissibility[.]" The trial court noted that Ms. Arney's findings were not speculative because they were based on observable characteristics from both the bullet fragments and the firearm. The trial court informed the parties that the reports would likely be admissible at trial but left open the possibility of a jury-out hearing prior to Ms. Arney's testimony to address the issue further if necessary.

## B. Trial

### 1. The Testimony of Jeffrey Stewart

Jeffrey Stewart testified that the victim was the youngest of his two children. The victim had been living with Mr. Stewart and his family in South Carolina until about five weeks before the shooting, when the victim moved to Sevierville to be with his girlfriend, Desiree Yon, and their three children. The victim called Mr. Stewart the day before the shooting and asked Mr. Stewart "to come get him [be]cause he was in a bad area." The victim gave his father no details but indicated that he would explain later.

2. The Testimony of Robert Daugherty

Mr. Daugherty testified that he had a "significant" crack cocaine problem at the time of the shooting but that he had been sober for almost nine months at the time of the trial. Prior to this period of sobriety, Mr. Daugherty used methamphetamine and cocaine. He had attended drug treatment twice but maintained that he had never "blacked out" when using drugs. At the time of trial, he was participating in a Day Reporting Center program as part of his probation and was employed at a local fast-food restaurant. He acknowledged having criminal convictions for robbery in 2018, burglary in 2019, and theft in 2020 and 2021. He maintained that he had not been offered nor had he received any benefit in exchange for his testimony.

Mr. Daugherty met the Defendant and Bryan through his friend, Mr. Equitani. At the time of the shooting, Mr. Daugherty had known the Defendant for about three months. For the two weeks leading up to the shooting, Mr. Daugherty had been working for the Hardisons' business, Namtaf, renovating a house on Selma Avenue.

Around 8:00 a.m. on September 24, 2017, Mr. Daugherty arrived at the Selma Avenue property in the Defendant's gray Silverado, along with Mr. Richards, Mr. Equitani, Mr. Inklebarger, and Ms. Carroll. Mr. Equitani's father was also working at the house that day. Mr. Daugherty had planned to work with Mr. Equitani to patch the roof on the house. Mr. Daugherty had smoked approximately forty-dollars' worth of crack cocaine—which he had obtained from Bryan's girlfriend, Casey—that morning but maintained that he was not "high."

While at the house, Mr. Daugherty observed that Mr. Inklebarger had placed a phone call to an unknown recipient concerning "this guy [that was] walking up and down the street[.]" Within thirty minutes of this phone call, sometime in the "midmorning," Mr. Daugherty and Mr. Equitani were inside the house retrieving a ladder for the roof work. Mr. Daugherty then heard two loud shots that sounded as though they came from an automatic weapon. Mr. Daugherty went to the ground because he did not know the source of the gunfire. After about ten to fifteen seconds, Mr. Daugherty looked down Selma Avenue and saw the victim—the same person who had been walking up and down the road earlier—staggering in the street and reaching for his back. The victim fell in the street and "was motioning" for help. Mr. Daugherty did not render aid because he was afraid and still did not know the source of the gunfire. None of the other workers attempted to help the victim.

Mr. Daugherty had, to this point, been unaware that the Defendant was on the property. But Mr. Daugherty exited the house through a door to the left and saw the

Defendant calmly walking out of the woods next to the house holding a black AR-15 rifle at his side. Mr. Daugherty knew the gun to be an AR-15 because he "know[s] guns." The Defendant was wearing "all black" clothing, with a black gaiter over his face. Even though Mr. Daugherty could only see the Defendant's eyes, he testified, "I work for him. I knew it was him."

A black Honda with an unknown driver arrived at the property within ten minutes of the shooting. The driver "popped" the trunk. The Defendant placed the gun inside, closed the trunk, and looked at the workers. The Defendant then walked back into the woods, and Mr. Daugherty did not see him again at the scene that day.

An ambulance arrived at the scene approximately eight to ten minutes after the victim became motionless. Mr. Daugherty and the other workers gathered at the side of the house and spoke to two or three police officers. Mr. Daugherty acknowledged that he lied to these officers when he told them that he did not know who shot the victim. The other workers told the officers the same. Mr. Daugherty acknowledged that it was a felony to lie to the police and could lead to a penitentiary sentence. Mr. Daugherty explained that he lied because he was under the influence of drugs and because he was afraid of the Defendant. He explained, "We all knew who the person was that shot the guy and what would happen if we did say something to law enforcement."

Mr. Daugherty stayed at the scene for about thirty to forty minutes after the police left before returning to Bryan's apartment with Mr. Richards, Mr. Equitani, Mr. Inklebarger, and Ms. Carroll. The Defendant was at the apartment when they arrived. The Defendant spoke to each of the workers individually in the presence of his brother. The Defendant asked Mr. Daugherty what he had seen that day, and Mr. Daugherty told him that he "didn't see anything." "That's a good answer," the Defendant responded, "because . . . the same f---ing thing could happen to you that just happened to him."

Over a year had passed when, on October 14, 2018, KPD officers arrived at Mr. Daugherty's residence and told him that he needed to speak with an investigator at police headquarters. Mr. Daugherty had not used drugs that day but also would not describe himself as being "clean" at that time. "Clean," Mr. Daugherty explained, means that "you've not used drugs over a period of time." The officers did not tell Mr. Daugherty why the investigator needed to speak with him, nor did Mr. Daugherty see Mr. Rudd, Mr. Richards, or Mr. Equitani at the police station. Mr. Daugherty had cut ties with these individuals a few months after the shooting, and Mr. Daugherty denied that they had collectively agreed to change their stories prior to the October 2018 interviews.

Mr. Daugherty told the investigator that the Defendant was responsible for the victim's death and identified the Defendant in a photographic lineup, which was received as an exhibit to his testimony. Mr. Daugherty testified that he changed his story in the October 2018 interview because he "came to the conclusion that it was probably the right thing for [him] to do." Mr. Daugherty acknowledged that he did not mention the Defendant's black clothes or gaiter to Inv. Cook in October 2018 but surmised that he might not have been asked those details. Mr. Daugherty denied that his prior drug use had impaired his ability to recall these events. Mr. Daugherty reiterated that he was sober at the time of his testimony and had been for almost nine months.

3. The Testimony of Chris Equitani

Mr. Equitani testified that he was a friend of the Defendant in September 2017 and that he worked for the Defendant as a carpenter at the Selma Avenue property. On September 24, 2017, Mr. Equitani was working at the property with Mr. Rudd—his father, as well as Mr. Daugherty, Mr. Richards, Mr. Inklebarger, Ms. Carroll, and the Defendant. Mr. Equitani received crack cocaine in exchange for his work, and he and the other workers, with the exception of his father, had smoked crack cocaine frequently throughout the day on September 24. Mr. Equitani stated that his cocaine usage did not affect his memory of the events of that day, nor did it affect his trial testimony, as he had quit using cocaine at some point after the shooting.

Between 1:30 and 3:00 that afternoon, Mr. Equitani was hanging plywood in the back of the house when he heard ten to fifteen gunshots in rapid succession. He believed that the shots were fired from the front of the house, not from the rear of the house from the trees. He walked around the side of the house and saw the victim fall in the street. The victim asked for help, but Mr. Equitani did not render aid due to fear. He then saw the Defendant, wearing black clothing, run from the woods holding a black gun that looked like a "machine gun." The Defendant entered a "little black Honda" and left the scene.

Mr. Equitani denied that the Defendant fled in a truck, indicating that the truck at the scene was driven by Mr. Richards and used to transport the workers. He further denied that he had told Inv. Cook in October 2018 that he saw the Defendant place the gun in a truck. No one else was in the car when the Defendant fled, according to Mr. Equitani, and Bryan was not at the worksite that day.

Police officers arrived shortly after the shooting and spoke to all of the workers present as a group. Mr. Equitani acknowledged that the workers were all using cocaine at the time and that they lied to the police, but that they had not agreed to be untruthful beforehand. He stated, "I didn't want to put myself in jeopardy[,]" and further explained,

"I was afraid to tell the truth at the time." Mr. Equitani and the others continued working and later packed their equipment into a truck and returned to Bryan's apartment to receive their pay.

Mr. Equitani testified that the Defendant was not present at Bryan's apartment when they arrived, but he stated that the Defendant visited him at his house on occasion after the shooting. During these visits, the Defendant asked Mr. Equitani if he had "heard anything" or if "anybody's been coming to [him] trying to talk to [him] about anything that'd be[en] going on." Mr. Equitani described that he and the Defendant were friends at one point, "so [the Defendant] would come and talk to [him] all the time about it." Mr. Equitani was afraid during these discussions. He feared that if he "said something wrong, . . . [he] didn't know how [the Defendant] was going to react towards [him]." Eventually, Mr. Equitani stopped working for the Hardisons and "backed off everybody[.]" He explained, "I didn't want to be that much involved[.]"

In October 2018, Mr. Equitani was incarcerated due to a child support arrearage. He had quit using cocaine "cold turkey" by this time. While in custody, he was transported to the police station to speak with Inv. Cook. He did not see or speak to Mr. Daugherty or Mr. Richards during this trip, nor had he spoken to them since the shooting, owing this to his abstinence from cocaine. Mr. Equitani testified that he was truthful when he spoke to Inv. Cook on October 14, 2018. Mr. Equitani identified the Defendant in a photographic lineup during this interview.

Mr. Equitani testified that no benefit had been offered to him in exchange for his testimony at trial. He acknowledged that he had met with prosecutors prior to his testimony but maintained that he had not reviewed his prior recorded statement to Inv. Cook.

4. The Direct Examination of Jody Richards

Mr. Richards testified that he had worked in construction for twenty-eight years. He was employed by the Defendant in September 2017 to work on the foundation of the Selma Avenue house. On the morning of September 24, 2017, he gathered at an apartment with the work crew to load their equipment into a car. He testified that someone loaded "the gun" into the car and that a few of the workers also carried pistols. When they arrived at the worksite, Mr. Richards began working on the foundation at the front corner of the house. He saw the Defendant take an "army type assault rifle" from the hatchback of a black Honda and walk into the woodline next to the house.

While he worked, Mr. Richards noticed the victim walking down the street. A few minutes later, he heard three or four gunshots. He saw the victim spin and fall in the street.

He then saw the Defendant return from the woodline and place the gun back into the car. The Defendant then exited the property by walking through an alley. Mr. Richards did not help the victim because he was afraid to go into the street.

Mr. Richards denied that he was dishonest to officers when they questioned him at the scene. He maintained that they did not ask him who shot the victim and that he did not volunteer any responses due to his fear. He told the officers that he heard gunshots but offered no further details.

He spoke with Inv. Cook approximately a year later. He testified that his account to Inv. Cook was the same as his trial testimony. He identified the Defendant in a photographic lineup presented by Inv. Cook, which was entered as an exhibit.

5. The Cross-Examination of Jody Richards

Following Mr. Richards' direct examination, attorney Adam Elrod, Mr. Richards' attorney in his pending criminal matters, joined counsel for a bench conference outside the hearing of the jury. At this conference, the trial court asked Mr. Elrod if he had instructed Mr. Richards to assert his Fifth Amendment privilege "if he [was] questioned about any of the . . . facts related to any pending charge[.]" Mr. Elrod responded that he had instructed Mr. Richards to assert his Fifth Amendment right "on those specific questions" related to his arrests occurring on April 17, August 14, and August 18.

On cross-examination, Mr. Richards testified that he was a drug addict. At the time of his testimony, he was incarcerated for pending charges in Knox County, which included introduction of contraband into a penal facility. He admitted that he smoked crack cocaine on September 24, 2017, but not until after work and after the shooting. He denied that he smoked crack cocaine before work with the other crewmembers.

Counsel for the Defendant referenced Mr. Richards' pending charge for introduction of contraband into a penal facility from August 18 and asked Mr. Richards to "tell the [j]ury how that happened." Mr. Richards responded, "I didn't smuggle it." At this point, the trial court interjected, "Mr. Isaacs, the [c]ourt has ruled." The trial court then asked Mr. Richards, "Were you charged with that offense? Were you charged?" Mr. Richards answered, "Yes[,] I was charged with it." The trial court then stated, "That's the end of it." Upon further questioning by defense counsel, Mr. Richards acknowledged that he had been charged with possession of methamphetamine on April 17 and with evading arrest on August 14 and that these charges were still pending.

Later in the cross-examination, counsel for the Defendant asked Mr. Richards if his lawyer had informed him of the degree of his charged felony and his potential jail time, to which Mr. Richards responded negatively. In the midst of a colloquy between defense counsel and the trial court regarding the felony classification of Mr. Richards' charge, Mr. Richards interjected, "And they also wrote on my statement that it was . . . heroin that they busted me with, but it wasn't." The following then occurred:

> [Defense counsel:] What'd you have up your buttocks?
>
> [Mr. Richards:] Huh?
>
> [Defense counsel:] What'd you have up your buttocks?
>
> [Trial court:] Mr. Isaacs—
>
> [Mr. Richards:] They wrote that on my paper.
>
> [Trial court:] –stop.
>
> [Defense counsel:] Okay. I thought he[—] Okay.
>
> [Trial court:] Do not inquire into the facts. He has a Fifth Amendment privilege not to discuss pending charges. You know that.

The trial court then ordered defense counsel to continue the cross-examination.

Mr. Richards acknowledged that he had a pending driving on a revoked license charge in Humphreys County and that, during his October 2018 interview, Inv. Cook offered to "help [him] out" with that charge. Mr. Richards explained, however, that Inv. Cook "couldn't help [him] out" with that charge. While Inv. Cook offered to call Humphreys County authorities on his behalf, Mr. Richards was unsure if Inv. Cook actually made this call.

Mr. Richards denied changing his story for Inv. Cook in order to gain assistance with his Humphreys County charge. Instead, he explained, "I've always been on the wrong side of the fence on things. And for once I'm standing up for what I know . . . is right." Mr. Richards continued, "I don't care about Humphreys County. I don't care one bit about Humphreys County. I'll go today and serve my time up there. It ain't but maybe six months. Who cares? Six months here, six months there; same difference." Mr. Richards

later stated that he could serve his time in Humphreys County "standing on [his] head." Nevertheless, Mr. Richards acknowledged that he had asked Inv. Cook to tell the Humphreys County authorities that he was helping with this case, but he explained that he did this because "[he] was serving time already, and [he] didn't want to have another warrant." Mr. Richards testified that the Humphreys County charge was not affecting his ability to post bail on his Knox County charges. He explained that he had not posted bail on his Knox County charges only because he had no one to post it for him. "I'm by myself," he stated, "pretty much homeless now."

Mr. Richards reiterated that he did not change his story in his October 2018 interview because the officers at the scene had never asked him directly if he had seen the shooter. He testified that the initial questioning in September 2017 was brief and consisted of only one question. He later acknowledged, however, that he had been untruthful with the investigators at the scene. While admitting that all witnesses at the scene claimed no knowledge regarding who shot the victim, Mr. Richards explained, "You'd say it too if you'd been there." He insisted that he was now telling the truth and stated, "I didn't have to . . . testify, but I did it because I thought . . . I needed to do what was right because that guy . . . had a father, had a mother, or he was a father or a son or something to that nature, and he deserves . . . what's right." He admitted that, even though he wanted to do the "right thing," he did not call law enforcement on his own volition to provide a statement. He explained that, at the time, he was trying his "best to stay away from it all."

Mr. Richards testified that he quit working for the Defendant a day or so after the shooting. Following his departure, Mr. Richards stated that he never again spoke with the other crewmembers. He explained that he broke ties with the group because no one had heard from Mr. Inklebarger or Mr. Inklebarger's girlfriend, "Bonnie." Mr. Richards was afraid that "something bad" might happen to him if "something bad" also happened to Mr. Inklebarger and Bonnie.

Mr. Richards admitted that he was struggling with a heroin addiction at the time of trial. However, at the time of the shooting, he was only addicted to crack cocaine. His drug abuse had caused "blackouts," and he had overdosed on more than one occasion. His drug abuse had impacted his ability to remember things and make good decisions, but his drug abuse had never caused him to hallucinate. He described the event in question as being "dramatic" and something "that sticks to you."

He stated that Bryan was at the worksite that day for a few minutes but that he only saw the Defendant walking to and from the woodline. Mr. Richards reiterated that he heard three to four gunshots and denied that fifteen shots were fired. He said it was possible that there was a pause between the gunshots. Upon hearing the shots, Mr. Richards crawled

underneath the house briefly and then exited to see the Defendant leaving the woodline. He witnessed the Defendant place the gun in a soft duffle bag in the back "hatch" of the Honda. Mr. Richards remembered that there were definitely two vehicles at the worksite that day—the Honda and the truck—but stated that there could have been a third vehicle present at some point. Mr. Richards described the truck as being a black GMC extended cab and denied that it was gray in color.

Mr. Richards stated that the victim walked down the street in front of the worksite almost every day. Mr. Richards heard that the victim had stolen items from the worksite. When asked why all of the crewmembers told "the exact same lie at the exact same time," Mr. Richards responded, "Because they were threatened that morning not to say a word or else." When asked if this threat occurred "[b]efore anything happened[,]" Mr. Richards replied, "Yes. It'd already been planned out."

6. Testimony Regarding the Investigation

A caller informed Knox County 911 at 1:26 p.m. on September 24, 2017, that a man had been shot in the street outside of her home. KPD Officer Jason Boston was one of the first responding officers and arrived to find the victim unresponsive on Selma Avenue. Officer Boston established a crime scene in the immediate area around the victim's body, which, based upon the information law enforcement had at the time, did not include the renovation site or the woodline behind it. Although Officer Boston did not measure the scene, he estimated the distance between the victim's body and the woodline to be 100 to 150 feet.

Bethany Simmons was dispatched from KPD's Forensic Unit to process the scene. She collected items from the victim's clothing, including a plastic baggie and fourteen dollars in currency from his pocket. Photographs of the victim indicated that he was wearing a black t-shirt and plaid shorts at the time of his death. Ms. Simmons then focused on the carport area of the residence immediately next to the victim's body. This residence sat on the corner of Ben Hur Avenue and Selma Avenue and was located diagonally—across Selma and one lot to the south—from the renovation site. While in the carport of this residence, Ms. Simmons noticed two bullet defects in the north-facing wall adjacent to the carport, as well as another bullet defect in the HVAC unit located in the carport. Ms. Simmons collected three bullet fragments from the carport: two from the ground underneath the wall defects and one from inside the HVAC unit. After collecting the bullet fragments from the carport, Ms. Simmons moved to an area behind this house—opposite of Ben Hur Avenue but still across Selma from the renovation site—and located a spent

rifle cartridge casing.[3] The casing contained the manufacturer's markings of "F-C" and ".223 Remington." Ms. Simmons testified that "F-C" indicated that the casing was manufactured by "Federal" and that ".223 Remington" denoted the caliber of the casing.

During his trial testimony, Inv. Cook described his investigation of the victim's death, including the investigation of leads that suggested a shooter other than the Defendant. When Inv. Cook arrived on the scene the day of the shooting, the workers at the renovation site had told officers that they had seen a gray van around the time of the shooting and that the shots sounded as though they had come from across Selma Avenue. This, coupled with information that Inv. Cook would soon receive from another purported witness, described below, caused Inv. Cook initially to discount the renovation property as part of the crime scene. He instead focused his efforts at that time on the alleyway across Selma Avenue from the renovation property where the spent cartridge casing was later found.

Prior to Inv. Cook's arrival on the scene, Ms. Yon[4] approached officers and informed them that the victim was her boyfriend. Inv. Cook recounted for the jury the information that Ms. Yon provided to law enforcement, which included her suspicion that Thakelyn Tate, also known as "T.K." or "Ears," murdered the victim. Ms. Yon explained to officers that she and the victim had been buying crack cocaine and marijuana from Robert Cody, or "Ville," at a nearby apartment in Walter P. Taylor Homes for the past month and one-half. A few weeks before the shooting, Mr. Tate started selling the drugs in Mr. Cody's absence. At that time, Mr. Tate had "fronted" forty-dollars' worth of crack cocaine to Ms. Yon, which meant that he had given her the drugs on the promise that she would later repay him.

According to Inv. Cook, Ms. Yon told officers that, on the night before the shooting, she went to Mr. Tate's apartment. As soon as Mr. Tate saw Ms. Yon, he started demanding his money, which she did not have. Mr. Tate told Ms. Yon that the victim "had better not come back without his money" or Mr. Tate would kill the victim and Ms. Yon. Ms. Yon told officers that Mr. Tate chased her back to her vehicle with a baseball bat.

[3] Inv. Cook later testified that this casing was found next to a fence in the alleyway that ran between Selma and Wilson Avenues.

[4] Near the end of the State's proof, the jury was informed that the parties had stipulated that Ms. Yon, Mr. Inklebarger, Mr. Rudd, Donna Cummings, and Casey Yates "could not be located and personally served with compulsory process." The stipulation indicated that the jury "should give no consideration to the fact that these witnesses were not presented in either side's case-in-chief."

Inv. Cook testified that Ms. Yon told the officers that the last time she saw the victim was on the morning of the day of the shooting. The victim had told Ms. Yon that he had "ten or [fourteen dollars]" and that he was going to Mr. Tate's apartment to "pick something up." Ms. Yon had decided to approach the police after learning that someone had been shot on Selma Avenue.

Inv. Cook also described to the jury information that had been provided to law enforcement by Donna Cummings in early October 2017. According to Inv. Cook, Ms. Cummings had told law enforcement that, on the day of the shooting, she had seen Dexvon McDaniel, also known as Dexvon Johnson or "Lil Red," arguing with the victim on Olive Street, which was a street over from Ben Hur Avenue in Walter P. Taylor Homes. Ms. Cummings told police that Mr. McDaniel had confronted the victim over the forty dollars that Ms. Yon owed Mr. Tate. A few minutes later, as she walked back from a market that she had visited, Ms. Cummings said that she saw the victim walking away from Mr. McDaniel on Selma Avenue, while Mr. McDaniel was near the corner of Ben Hur Avenue—across from its intersection with Selma Avenue—outside a small house that had been converted into a restaurant. Ms. Cummings told the police that she saw Mr. McDaniel produce a black pistol and shoot the victim. Ms. Cummings stated that Mr. McDaniel fired the pistol about six times. Ms. Cummings said that she observed the victim "take a deep breath and fall." Ms. Cummings told the police that, after the shooting, Mr. McDaniel ran to a car that was being driven by Mr. Tate, but Mr. Tate would not allow him inside and drove away without him. Ms. Cummings identified Mr. McDaniel in a photographic lineup, which was entered as an exhibit.

Inv. Cook noted that the victim was wearing a black shirt when he was shot, while Ms. Cummings told police that he was shirtless. Ms. Cummings also told police that her son, Jordan Tolson, was with her and witnessed the shooting. Mr. Tolson, however, later spoke to police and denied being present. While Mr. Tolson did not think that his mother was lying about witnessing the shooting, he surmised that Ms. Cummings told police that he was present to add credibility to her story. The State introduced judgments related to Ms. Cummings' nine previous criminal convictions: four for theft and five for forgery. Investigators used a metal detector to search the area where Ms. Cummings said that Mr. McDaniel was standing during the shooting, but they were unable to find any spent shell casings. Inv. Cook ultimately discredited Ms. Cummings' account, based in part upon inconsistencies between her account and the evidence at the scene. Inv. Cook speculated that Ms. Cummings had obtained basic information about the shooting from a Facebook Live broadcast.[5]

[5] Mr. McDaniel had informed Inv. Cook that the shooting was broadcast on Facebook Live.

Inv. Cook also discredited Ms. Cummings' information based upon his independent investigation into the leads she provided. Inv. Cook requested to speak with Mr. Tate, Mr. McDaniel, and Mr. Cody, and all three voluntarily complied. Additionally, Inv. Cook obtained consent to search their apartment in Walter P. Taylor Homes. The three men denied involvement in the death of the victim. Mr. Cody produced a bus ticket indicating that he was out of town on the day of the shooting. Mr. Tate initially told Inv. Cook that he had been at his house until the evening of the day of the shooting. Mr. Tate later admitted, however, that he was in the area of the shooting earlier that day, sometime between 11:00 a.m. and 1:00 p.m. Inv. Cook obtained search warrants for Mr. McDaniel's and Mr. Tate's Facebook accounts, as well as the records related to Mr. Tate's two phones. Nothing in these records indicated that the men were involved in the shooting, other than confirming that Mr. Tate was in the area of the shooting on September 24, as he had previously disclosed. The affidavits supporting these search warrants were received in evidence on motion from the defense.[6] After speaking with these men and reviewing the information received from their Facebook accounts and phone records, Inv. Cook eliminated Mr. Tate, Mr. McDaniel, and Mr. Cody as suspects in the victim's murder.

Inv. Cook's testimony detailed his investigation of the adjoined restaurant and house referenced by Ms. Cummings. During the initial canvass of the neighborhood, Inv. Cook had noticed that the restaurant/house property was outfitted with surveillance cameras. When he approached the house as part of his initial investigation, Inv. Cook encountered William Martin, III. Inv. Cook knew Mr. Martin and testified that, at the time of trial, Mr. Martin was incarcerated for attempted second degree murder. As Inv. Cook spoke with Mr. Martin, William Martin, Sr., the owner of the property and the younger Mr. Martin's grandfather, arrived at the scene. The younger Mr. Martin told his grandfather not to allow the police to look at the surveillance cameras and to tell the police that "the cameras are fake." The elder Mr. Martin told Inv. Cook that the cameras were not operational because "someone had come by and gotten the box" a few weeks earlier.

In order to verify this information, Inv. Cook obtained search warrants for the Martins' home and restaurant. Inv. Cook was unable to locate any surveillance footage during his search of the property. While searching an upstairs closet, however, Inv. Cook located a Mohawk Armory AR-15 that had been stored in a golf bag. Inv. Cook testified that the gun was dirty and dusty, similar to the rest of the closet, and "appeared that it had been there a while." Police records indicated that the gun had been stolen, so Inv. Cook confiscated it and sent it to TBI for forensic testing.[7]

[6] The defense also moved into evidence at trial the affidavits supporting the search warrants for the Defendant's car, residence, and phone.

[7] The record does not include reference to the results of any forensic testing regarding this firearm.

Inv. Cook also confiscated forty-nine rounds of .223 Remington ammunition from the Martin residence. Though Inv. Cook took the ammunition, it was never forensically compared to the spent rifle casing that had been found in the alleyway next to Selma Avenue.

KPD Inv. Philip Jinks testified that he assisted in the arrest of the Defendant in January 2019. The Defendant was arrested on the presentment after Inv. Jinks saw him driving a black, older model Honda. Following the Defendant's arrest, Inv. Jinks assisted in executing the search warrant on the Defendant's residence on Upland Avenue in northeast Knoxville. Inside a black, hard-sided case on the floor of the Defendant's bedroom, Inv. Jinks located a black Smith and Wesson AR-15 rifle with a magazine of ammunition. The magazine contained thirty-one rounds of ammunition. Thirty of these rounds were marked "F-C" and "Remington [.223]." Inv. Jinks testified that AR-15s are relatively common in the Knoxville area and that Remington is a major manufacturer of ammunition.

Retired TBI Special Agent Teri Arney testified as an expert in firearms and toolmark identification. Ms. Arney had examined, among other items, the rifle confiscated from the Defendant's residence, the bullet fragments collected from the carport area, the bullet fragment from the victim's body, and the spent cartridge casing collected from the alleyway. Ms. Arney issued two official reports related to this case, both of which were entered into evidence. Ms. Arney testified that the rifle from the Defendant's residence was capable of firing .223 Remington caliber rounds. She noted that the rifle's barrel had five lands and grooves with a right-hand twist, similar to the characteristics found on the bullet fragment from the victim's body and one of the bullet fragments found in the carport.[8] Thus, the rifle and these bullet fragments had the same "class characteristics" of one another, meaning that the bullet fragments could have been fired from the Defendant's firearm. She noted, however, that these class characteristics were "very general features" and that she could not conclusively determine that these bullet fragments were fired from this firearm. Similarly, she found that these bullet fragments had "similar individual characteristics and could have been fired through the barrel of the same firearm[,]" however, "due to the damaged condition [of the bullet fragments], these similarities [were] insufficient for a more conclusive determination."

Regarding the spent casing found in the alleyway, Ms. Arney confirmed that it was a Federal brand .223 Remington caliber casing. One of Ms. Arney's reports indicates that the casing shared the same class characteristics as test fires from the Defendant's rifle but

[8] According to one of Ms. Arney's reports, the two other bullet fragments found in the carport bore "no markings of comparison value."

that no individual characteristics were found to establish a definitive link. Her other report indicated that "[r]epresentative images of this cartridge case were entered into the Regional NIBIN system[,]" but that "[n]o associations were made at this time[.]"

On cross-examination, Ms. Arney testified that the class characteristics from this firearm would be the same as every model of this weapon that was manufactured by Smith and Wesson, which would include a large number of weapons. She acknowledged that the bullet fragments contained no individual characteristics that allowed her to link them definitively to the Defendant's firearm.

Dr. Darinka Mileusnic-Polchan conducted the victim's autopsy and testified as an expert in forensic pathology. Dr. Mileusnic-Polchan testified that the victim's death was caused by a single, distant gunshot wound to his upper left back. The bullet traveled back to front, left to right, and slightly upward through the victim's body. The upward trajectory of the bullet could have been affected by the orientation of the victim's body when the bullet struck him. The wound was not survivable, would have immediately paralyzed the victim's lower body, and would have caused his death within minutes. The victim's injury would have been consistent with a witness's account of him immediately falling to the ground. According to toxicology reports, the victim's bloodstream contained cocaine and marijuana at the time of his death.

Following Dr. Mileusnic-Polchan's testimony, the State introduced redacted recordings of the October 2018 statements of Mr. Daugherty, Mr. Equitani, and Mr. Richards, summarized above, as prior consistent statements. The trial court instructed the jury that they could not consider the statements as substantive evidence but could use the statements only to assess the credibility of the witnesses' testimony at trial.

Thereupon, the State rested. The Defendant elected not to testify at trial but admitted into evidence the judgments of two of Mr. McDaniel's prior felony drug convictions.

On this proof, the jury convicted the Defendant of first degree murder, and he was sentenced to life imprisonment. The Defendant filed a motion for new trial, which was denied. This timely appeal followed.

## II. ANALYSIS

### A. Recusal of the Trial Judge

The Defendant argues that the trial judge erred in denying the Defendant's motion to recuse the trial judge from this case. The Defendant argues that recusal was appropriate because the trial judge was familiar with the Defendant from the trial judge's tenure as an assistant district attorney general. The State contends that the trial judge appropriately denied recusal because the trial judge's limited knowledge of the Defendant would not cause an ordinarily prudent person in the judge's position to question the judge's impartiality. We agree with the State.

"No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested . . . ." Tenn. Const. art. VI, § 11. "Litigants in Tennessee have a fundamental right to a 'fair trial before an impartial tribunal.'" *Holsclaw v. Ivy Hall Nursing Home, Inc.*, 530 S.W.3d 65, 69 (Tenn. 2017) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)). Tennessee judges are required to perform the duties of judicial office "fairly and impartially." Tenn. Sup. Ct. R. 10, § 2.2. The Supreme Court Rules define "impartial" and "impartially" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Tenn. Sup. Ct. R. 10, Terminology.

Tennessee Supreme Court Rule 10, section 2.11(A) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" Circumstances requiring recusal include situations where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding"; the judge "served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association"; or the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding[.]" Tenn. Sup. Ct. R. 10, § 2.11(A)(1), (6)(a), (b).

The test for recusal requires a judge to disqualify himself or herself in any proceeding in which "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001)). The test is an objective one "because the appearance of bias is just as injurious to the integrity of the courts as actual bias." *State v. Griffin*, 610 S.W.3d 752, 758 (Tenn. 2020) (quoting *Cannon*, 254 S.W.3d at 307). This court reviews a trial court's denial of a motion to recuse de novo. Tenn. Sup. Ct. R. 10B, § 2.01.

The victim's murder occurred approximately fifteen years after the trial judge had left employment at the district attorney's office. Thus, the Supreme Court Rules referencing "the matter in controversy" and "the proceeding" are inapplicable here. *See* Tenn. Sup. Ct. R. 10, § 2.11(A)(6)(a), (b); *see also State v. Smith*, 906 S.W.2d 6, 12 (Tenn. Crim. App. 1995) (quoting *State v. Warner*, 649 S.W.2d 580, 581 (Tenn. 1983), for the proposition that the disqualifying provision in article 6, section 11 of the Tennessee Constitution is limited to "the cause on trial . . . and not . . . prior concluded trials").

The record shows that the trial judge did not prosecute the Defendant for previous crimes during the trial judge's tenure as a prosecutor. While the trial judge conceded that he had "been involved in several investigations" in which the Defendant was a suspect, the trial judge could remember no details about the Defendant other than his nickname and that the investigations concerned activity in Austin Homes. The question is whether, under these circumstances, a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality, including whether the trial judge had "a personal bias or prejudice concerning" the Defendant. *See* Tenn. Sup. Ct. R. 10, § 2.11(A)(1).

Our courts have had numerous opportunities to review recusal decisions based upon a trial judge's prior employment as a prosecutor. In *Moultrie v. State*, for example, this court held that recusal was not required where "the trial judge had at some time in the past been an assistant attorney general who had issued a subpoena in an unrelated trial of [the defendant]." 584 S.W.2d 217, 219 (Tenn. Crim. App. 1978). The *Moultrie* court noted, "It would have been almost an impossibility for the trial judge, who had served in one capacity or another in [the criminal courts of Shelby County], to have not come into contact with the defendant in some matter or other." *Id*. Recusal was not required because the defendant had "failed to show in any manner whatsoever that he was prejudiced in any way by the fact that the judge presiding at his trial had been involved with some of his previous cases." *Id*.

In *State v. Warner*, our supreme court held that a judge who served as the district attorney general for a judicial district during the time a defendant was indicted and convicted on other charges need not recuse himself in a later, unrelated criminal matter involving the same defendant. 649 S.W.2d at 581. In *State v. Conway*, this court held that recusal of the trial judge was not required for a defendant's DUI trial, even though the trial judge previously prosecuted the defendant and obtained a conviction that was used to enhance his sentence in the subsequent case. 77 S.W.3d 213, 224-25 (Tenn. Crim. App. 2001). Finally, in *State v. Byington*, the trial judge "was not precluded from presiding over the [d]efendant's case merely because she had prosecuted him in the past[,]" where the defendant did not otherwise show that the trial judge "had a personal prejudice or bias

against him." No. E2008-01762-CCA-R3-CD, 2009 WL 5173773, at *4 (Tenn. Crim. App. Dec. 30, 2009).

The case at bar is a further step removed from the cases outlined above in that the trial judge here never personally prosecuted the Defendant. While the trial judge had previously investigated the Defendant during the trial judge's tenure as a prosecutor, the investigations occurred approximately twenty years before the Defendant's trial, and the trial judge could remember nothing about those investigations other than the Defendant's nickname and the location of the suspected offenses. The trial judge explicitly stated that his prior knowledge of the Defendant would not affect his impartiality, and like *Moultrie* and *Byington*, the Defendant cannot otherwise show that the trial judge harbored a personal bias or prejudice against him. Under these circumstances, a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would not find a reasonable basis for questioning the judge's impartiality. *See Cannon*, 254 S.W.3d at 307. The trial court did not err in denying the recusal motion.

B. Suppression

The Defendant argues on appeal that the trial court erred by denying the Defendant's motion to suppress evidence obtained from the execution of the search warrant on his residence. Specifically, the Defendant contends that the search warrant was invalid because it was not supported by probable cause at the time it was issued. The Defendant also argues that the search warrant was invalid because Inv. Cook recklessly included false statements and recklessly omitted other relevant facts in his affidavit supporting the issuance of the warrant. Finally, the Defendant argues that the search warrant was invalid because it was overly broad and thus constituted a general warrant.

In response, the State argues that the affidavit established probable cause at the time of its issuance. The State also argues that Inv. Cook did not recklessly include false statements, nor did he recklessly omit other relevant facts in the search warrant affidavit. The State further contends that the search warrant did not constitute a general warrant. Alternatively, the State avers that the Defendant's AR-15 rifle was the only piece of evidence admitted at trial that was seized pursuant to the warrant; because this rifle was "a relatively minor piece of evidence in this case[,]" the State argues, any error in its admission was harmless beyond a reasonable doubt.

At a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Therefore, we will uphold the trial court's findings of fact at a suppression hearing unless

the evidence preponderates against them. *State v. Bell*, 429 S.W.3d 524, 528 (Tenn. 2014) (citations omitted). The party prevailing in the trial court "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from [the] evidence." *Id*. at 529 (citations omitted). The lower court's application of law to the facts is reviewed de novo with no presumption of correctness. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted). Moreover, an appellate court on review may consider the evidence presented at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. *State v. Henning*, 975 S.W.2d 290, 297-99 (Tenn. 1998).

The Defendant's suppression issues implicate the protections against unreasonable searches and seizures found in our federal and state constitutions. The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment applies to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Additionally, the Tennessee Constitution guarantees

> [t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Tenn. Const. art. I, § 7. Article I, section 7 "is identical in intent and purpose with the Fourth Amendment." *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968). Therefore, our courts generally interpret article I, section 7 consistently with the Fourth Amendment. *See State v. Reynolds*, 504 S.W.3d 283, 303 n.16 (Tenn. 2016).

"Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *Henning*, 975 S.W.2d at 294 (citation omitted). "A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to

be searched." Tenn. Code Ann. § 40-6-103; *see* Tenn. R. Crim. P. 41(c). Thus, "[a] sworn and written affidavit containing allegations from which a magistrate may determine whether probable cause exists is an 'indispensable prerequisite' to the issuance of a search warrant." *State v. Saine*, 297 S.W.3d 199, 205 (Tenn. 2009) (quoting *Henning*, 975 S.W.2d at 294). To establish probable cause, the affidavit must show a nexus among the criminal activity, the place to be searched, and the items to be seized. *State v. Reid*, 91 S.W.3d 247, 273 (Tenn. 2002); *State v. Smith*, 868 S.W.2d 561, 572 (Tenn. 1993). A defendant seeking to suppress evidence obtained pursuant to a search warrant bears the burden of establishing by a preponderance of the evidence "the existence of a constitutional or statutory defect in the search warrant or the search conducted pursuant to the warrant." *Henning*, 975 S.W.2d at 298. Determining the existence of probable cause is a mixed question of law and fact that we review de novo. *Reynolds*, 504 S.W.3d at 298.

1. Probable Cause Supporting the Search Warrant

Relative to the establishment of probable cause, the Defendant generally states, "The search warrant executed at . . . Upland Avenue is invalid because the search warrant was not supported by probable cause at the time it was issued." The subsequent argument portion of his brief deals mainly with the *Franks* issue discussed below but also seems to indicate that the Defendant is more broadly challenging the probable cause supporting the issuance of the search warrant. The next section of the Defendant's brief pertains mostly to his overbreadth argument but also contains argument challenging the validity of the warrant in toto due to a lack of probable cause. There, the Defendant argues,

> [T]he search warrant was not executed until nearly one-and-a-half years after the incident took place. Absent facts to the contrary, there exists no reasonable connection between the Upland Avenue residence and the shooting of [the victim]. Without such a connection, there is no meaningful connection between [the Defendant] and the offense, much less the Upland Avenue residence and the offense for which he was charged and convicted.

For its part, the State acknowledges that the Defendant raises on appeal a facial challenge to the sufficiency of the probable cause in the affidavit and submits that such an argument does not merit the Defendant relief. However, before we address this challenge on the merits, we must first determine if it has been properly preserved for appeal.

Motions to suppress evidence must be filed pretrial, and the failure to do so results in waiver of the issue. *See* Tenn. R. Crim. P. 12(b)(2)(C), (f)(1). "A motion to suppress, like any other motion, is required to state the grounds upon which it is predicated with particularity," and the motion "must be sufficiently definite, specific, detailed and non-

conjectural, to enable the court to conclude a substantial claim . . . [is] presented." *State v. Burton*, 751 S.W.2d 440, 445 (Tenn. Crim. App. 1988) (citing Tenn. R. Crim. P. 47). An appellant cannot raise an issue for the first time on appeal nor can they change their arguments on appeal. *See Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983); *see also* Tenn. R. App. P. 36(a). In other words, "a party may not take one position regarding an issue in the trial court, change his strategy or position in mid-stream, and advocate a different ground or reason" on appeal. *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988).

In the Defendant's motion to suppress filed in the trial court, he averred generally that the search warrant for his residence "was not supported by probable cause and was invalid." A close reading of the argument that follows in the motion, however, indicates that the Defendant was referencing the overbreadth of the items authorized for seizure, not the probable cause supporting the warrant in general. The Defendant conceded in his motion that the affidavit "describe[d] the allegations with specificity[,]" and continued,

> Despite the apparent focus on *evidence related to the shooting, specifically an AR-15 or other firearm that could be described as a "long gun" and .223 caliber boat tail bullets*, the [s]earch [w]arrant was authorized for a significantly more expansive search and authorized law enforcement to search for items despite an absence of probable cause.

(Emphasis added). The Defendant then listed the thirty items authorized for search and seizure and contended that probable cause did not exist to support the seizure of a "majority" of these items. In arguing that a search for handguns was improperly authorized in the warrant because handguns were not mentioned in the affidavit, the Defendant acknowledged that the "affidavit specifically references a 'long gun[,]'" thus implying that the search warrant appropriately authorized the search and seizure of a "long gun." The suppression motion contained no reference to the lapse of time between the shooting and the issuance of the search warrant, nor did it contain any other argument regarding the nexus between the shooting and the Defendant's residence.

At the suppression hearing, the Defendant similarly focused on the two specific issues raised in his suppression motion: the *Franks* issue and the overbreadth argument. Again, the Defendant made no argument, temporal or otherwise, regarding the probable cause nexus between the shooting and his residence. The trial court's ruling was thus limited to the two issues argued in the Defendant's motion and presented by the Defendant at the suppression hearing. At the motion for new trial hearing, the trial court reiterated its understanding, without objection or clarification by the Defendant, that the Defendant had only raised two suppression issues: the *Franks* issue and the "general warrant" issue.

After a careful review of the record, we conclude that the Defendant has waived for appellate purposes any general attack on the validity of the search warrant due to a lack of probable cause or a nexus between the shooting and his residence. The Defendant did not properly raise or argue this issue before the trial court. To the contrary, the Defendant implicitly conceded in his suppression motion that some items were properly authorized for search and seizure in the search warrant, specifically the "long gun." At the motion for new trial hearing, the trial court stated its understanding, without objection by the Defendant, that the suppression motion was limited to two issues: the *Franks* issue and the "general warrant" issue. We agree and now turn to analyze the two issues that are properly preserved for appellate review.

2. The *Franks* Issue

The Defendant argues that the search warrant for his residence was invalid due to "the reckless inclusion [of] some statements and the reckless exclusion of other relevant facts" in the supporting affidavit. The Defendant contends that the affiant placed a reckless falsehood in the affidavit by stating that four witnesses implicated the Defendant in the shooting when, in fact, only three witnesses had done so. The Defendant also argues that the affiant recklessly omitted (1) the fact that one witness had informed law enforcement that he did not see anyone fire a gun; and (2) the fact that Mr. Equitani told law enforcement that the shooter placed the gun in a truck rather than a car. The State counters that the affidavit did not contain reckless falsehoods and that any omissions of fact in the affidavit do not rise to the level of invalidating the warrant. We agree with the State.

The fruits of a search warrant should be excluded when the affidavit in support of the search warrant includes deliberately or recklessly false statements by the affiant, which are material to the establishment of probable cause. *Franks*, 438 U.S. at 155-56. An affidavit, sufficient on its face, may be impeached only by showing "(1) a false statement made with intent to deceive the [c]ourt, whether material or immaterial to the issue of probable cause," or "(2) a false statement, essential to the establishment of probable cause, recklessly made." *Little*, 560 S.W.2d at 407. In the context of recklessly false statements, a defendant must show that the reckless statements were necessary to the finding of probable cause in order to be entitled to relief. *Franks*, 438 U.S. at 155-56; *see State v. Smith*, 867 S.W.2d 343, 350 (Tenn. Crim. App. 1993). Allegations of negligence or innocent mistakes are insufficient to invalidate a search warrant. *Franks*, 438 U.S. at 171. While some courts have recognized that the rationale of *Franks* and *Little* should extend to material omissions in the affidavit, "an affidavit omitting potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information." *State v. Yeomans*, 10 S.W.3d 293, 297

(Tenn. Crim. App. 1999) (citing 2 LaFave, *Search and Seizure* § 4.4(b) (3d ed. 1996), and *United States v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997)). The burden is on the defendant to establish the allegation of an intentionally or recklessly false statement by a preponderance of the evidence. *Yeomans*, 10 S.W.3d at 297 (citing *Franks*, 438 U.S. at 156).

In the affidavit, Inv. Cook described his October 2018 interviews of the four witnesses from the scene. After indicating that he spoke with four witnesses, Inv. Cook went on to state that "witnesses," without specifying a number, implicated the Defendant in the shooting. The proof at the suppression hearing demonstrated that only three of the witnesses actually implicated the Defendant and that a fourth, Mr. Rudd, maintained his original account that he had not seen anything. When read strictly, it can be said that the affidavit does not necessarily include a falsehood on this point; Inv. Cook did not swear that all of the witnesses that he interviewed implicated the Defendant, only that "witnesses"—*i.e.*, more than one—did. However, to the extent that the affidavit created the impression that all four witnesses implicated the Defendant, this was at most the result of negligent drafting and not a reckless misstatement of fact. In any event, the statement was not necessary to the finding of probable cause regarding the Defendant's involvement in the shooting. *See Franks*, 438 U.S. at 155-56; *Smith*, 867 S.W.2d at 350. The affidavit sufficiently established probable cause as to the Defendant's identity as the shooter, regardless of whether three or four witnesses implicated him. *See State v. Willis*, 496 S.W.3d 653, 721 (Tenn. 2016) (quoting *State v. Norris*, 47 S.W.3d 457, 469 n.4 (Tenn. Crim. App. 2000), for the proposition that "[i]n order to be 'essential to the establishment of probable cause,' the false or reckless statement must be the only basis for probable cause or if not, the other bases, standing alone, must not be sufficient to establish probable cause"); *see also State v. Tidmore*, 604 S.W.2d 879, 882 (Tenn. Crim. App. 1980).

The Defendant also claims that the search warrant is fatally flawed because Inv. Cook recklessly omitted from the affidavit the fact that Mr. Rudd did not see the shooting. We fail to see how Mr. Rudd's stated lack of knowledge detracts in any way from the statements of three other individuals who implicated the Defendant. Mr. Rudd's lack of knowledge was not necessary to a finding of probable cause, nor did it affect the credibility of the three witnesses who had knowledge of the crime. As such, the omission of this fact from the affidavit is not of constitutional moment.

Finally, the Defendant contends Inv. Cook recklessly omitted the fact that Mr. Equitani saw the shooter place the gun in a truck rather than a car, contrary to the accounts of two other witnesses. We note that the description of this vehicle is a relatively minor point when viewing the totality of the witnesses' statements. Regardless of whether the Defendant placed the gun in a car or a truck after the fact, the three witnesses provided a

generally consistent account identifying the Defendant as the victim's shooter. This truck/car discrepancy would have been only marginally relevant to assess the credibility of the witness-informants, but as the trial court noted, their credibility had already been placed into question in the affidavit by the inclusion of their initial accounts where they disclaimed any knowledge of the shooter's identity. We conclude that the omission of this relatively minor detail does not meet the standard of a reckless omission as contemplated by *Franks* and *Little* and their progenies.

The Defendant has failed to demonstrate that the affidavit supporting the search warrant of his residence contained reckless falsehoods or reckless omissions of potentially exculpatory information. His *Franks* argument does not entitle him to relief.

3. The Overbreadth of the Search Warrant

The Defendant argues on appeal that the search warrant for his residence was invalid because it "was overbroad, constituting a general warrant." The State counters that the search warrant was not general. Alternatively, the State argues that any error in the admission of the Defendant's AR-15 at trial was harmless beyond a reasonable doubt.

The Fourth Amendment requires a search warrant to contain a particular description of the items to be seized. U.S. Const. amend. IV; *Henning*, 975 S.W.2d at 296 (citing *Marron v. United States*, 275 U.S. 192, 196 (1927)). Further, article I, section 7 of the Tennessee Constitution specifically prohibits general warrants, and Tennessee Code Annotated section 40-6-103 requires search warrants to describe particularly the place and property to be searched. *See State v. Bostic*, 898 S.W.2d 242, 245 (Tenn. Crim. App. 1994). To satisfy the particularity requirement, a warrant "must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *Henning*, 975 S.W.2d at 296 (internal quotations and citations omitted). The particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another." *Marron*, 275 U.S. at 196. In other words, "where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other." *Lea v. State*, 181 S.W.2d 351, 352-53 (Tenn. 1944). In a search warrant that complies with the particularity requirement, "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196.

With these particularity tenets in mind, we observe that constitutional law thus provides two distinct requirements for search warrants that are relevant to this case: (1) that probable cause supports the issuance of the warrant; and (2) that the items authorized for seizure are particularly described in the warrant. The United States Supreme Court has

highlighted the separate nature of these analyses by outlining "the two distinct constitutional protections served by the warrant requirement":

> First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. . . . The second distinct objective is that *those searches deemed necessary* should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

*Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (emphasis added and internal citations omitted). Viewed in this way, a particularity analysis sets aside the question of probable cause and focuses instead on whether the items authorized for seizure have been described so as to leave "nothing . . . to the discretion of the officer executing the warrant." *See Marron*, 275 U.S. at 196.

Clarification is required at this point to identify which of these distinct constitutional questions is before this court. We must determine whether the Defendant is raising a probable cause claim—that the warrant was overbroad in the sense that it authorized the seizure of items not supported by probable cause in the affidavit—or whether he is raising a particular description claim—that the warrant was overbroad in the sense that items were authorized for seizure but not particularly described in the warrant so as to "prevent[] the seizure of one thing under a warrant describing another." *Marron*, 275 U.S. at 196.

As we have stated, in his motion to suppress, the Defendant argued that, despite specific references in the affidavit to an "AR-15 or other firearm that could be described as a 'long gun' and .223 caliber boat tail bullets, the [s]earch [w]arrant was authorized for a significantly more expansive search and authorized law enforcement to search for items despite an absence of probable cause." The Defendant's argument in the trial court—that the search warrant was "overbroad" and "tantamount to an invalid general warrant"—centered on the warrant's authorization to seize items that were not supported by probable cause in the affidavit.

On appeal, however, the Defendant argues, at least in part, that the overbreadth of the warrant is due to a violation of the constitutional and statutory particularity requirement. Notably, the Defendant did not mention the particularity requirement—"a distinct constitutional protection[,]" *Coolidge*, 403 U.S. at 467—in his motion to suppress or at the suppression hearing before the trial court. As stated, his argument below focused on overbreadth due to the inclusion of items in the warrant not supported by probable cause, not a failure to particularly describe the items in the warrant so as to "prevent[] the seizure

of one thing under a warrant describing another." *Marron*, 275 U.S. at 196. Given the distinct nature of these constitutional provisions, we determine that the Defendant has waived any argument regarding the particularity requirement on appeal. *See Dobbins*, 754 S.W.2d at 641; *Lawrence*, 655 S.W.2d at 929; Tenn. R. App. P. 36(a).

The Defendant's argument on appeal, however, is broad enough in our view to encompass the suppression theory that he advanced in the trial court—*i.e.*, that the search warrant authorized the search and seizure of certain items that were not supported by probable cause in the affidavit. We will therefore address this argument on the merits.

The search warrant in this case undoubtedly authorized the search and seizure of numerous items that were not supported by probable cause in the affidavit. To name a few, the warrant authorized the search and seizure of "blood, seminal fluid, soiled bed clothes, soiled sheets, prophylactics, . . . hair, fibers, cleaning supplies, . . . edged weapons or items that can be used as a weapon, [and] hand guns[.]" None of these items were mentioned in the affidavit, nor did the affidavit establish any nexus between these items and the suspected criminal activity.

In implicitly reaching this conclusion, the trial court suggested to the parties at the suppression hearing that the remedy would be suppression of those items not supported by probable cause in the affidavit. Defense counsel resisted this suggestion and asked for the suppression of all fruits of the search warrant, arguing, "[T]he search warrant is overly broad, and the remedy would be to exclude [all evidence]."

It is important to note here that defense counsel's argument in the trial court cannot be read as calling for complete suppression of the fruits of the search because it was *entirely* unsupported by probable cause; the Defendant had previously pled that only a "majority" of the items were unsupported by probable cause and had implicitly conceded that probable cause had been established in the affidavit for the "long gun" and the ammunition. Rather, the record dictates that the Defendant's argument before the trial court must be read as calling for the suppression of *all* evidence as a remedy for the lack of probable cause to seize *some* evidence.

This position, however, is not supported by decisional law. "Once it is established that a search warrant is partially valid, the reasonableness of the search and seizure which takes place should be measured by the scope provided in the warrant's valid portion." *State v. Meeks*, 867 S.W.2d 361, 373 (Tenn. Crim. App. 1993). "The reasoning is that if a warrant is partially valid and the invalid portion may be severed, the executing officers still have lawful access to the property to be searched." *Id.* While *Meeks* involved a particularity challenge—an issue that we have determined not to be properly before the

court in this case—we see no reason why the severance principle it enunciated should not also be extended to search warrants that are partially invalid due to a lack of probable cause in the affidavit. *See State v. Partin*, No. E2004-02998-CCA-R3-CD, 2006 WL 709200, at *12 (Tenn. Crim. App. Mar. 21, 2006) (noting in dicta that, where the search warrant authorized the seizure of items that were not supported by probable cause in the affidavit, officers were legally on the defendant's property to search for items that were supported by probable cause), *vacated on other grounds by Partin v. Tennessee*, 549 U.S. 1196 (Feb. 20, 2007); *see also United States v. Riggs*, 690 F.2d 298, 300-01 (1st Cir. 1982) (accepting partial suppression as a remedy for items not supported by probable cause); *United States v. Christine*, 687 F.2d 749, 759-60 (3rd Cir. 1982) (adopting severance and holding that only the portions of the warrant unsupported by probable cause should be invalidated); *United States v. Cardwell*, 680 F.2d 75, 78-79 (9th Cir. 1982) (accepting partial suppression but finding that no portion of the warrant could withstand particularity and probable cause challenges). We agree that "'it would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and the magistrate erred in seeking and permitting a search for other items as well.'" *United States v. Cook*, 657 F.2d 730, 735 (5th Cir. 1981) (quoting 2 LaFave, *Search and Seizure* § 4.6(f) (1978)).

Once it became clear that the trial court was rejecting the Defendant's all-or-nothing remedy to the probable cause violation in favor of a severance approach, defense counsel allowed that "anything other than a long gun or ammunition should be excluded."[9] In light of this concession, the trial court ruled that the long gun and ammunition would be admissible at trial but suppressed a black face mask that had been seized from the Defendant's residence because it was not included in the affidavit. We conclude that the trial court, viewing the issue as it was presented, appropriately severed and suppressed the evidence that was not supported by probable cause in the affidavit and admitted the evidence that was unchallenged by the Defendant on a probable cause basis. The Defendant is not entitled to relief.

C. The Cross-Examination of Jody Richards

The Defendant argues that the trial court erred by limiting his cross-examination of Mr. Richards in contravention of the Defendant's rights to cross-examination and a fair trial. The Defendant contends that he should have been able to ask Mr. Richards about his pending criminal charges in order to have Mr. Richards invoke his Fifth Amendment rights in the jury's presence. The Defendant also argues that he should have been able to cross-examine Mr. Richards regarding Inv. Cook's offer to "help him out" with his pending

[9] This bolsters our previous determination that the Defendant did not argue in the trial court that all items authorized for search and seizure in the warrant were unsupported by probable cause.

charges. The State counters that the trial court properly limited the Defendant's cross-examination of Mr. Richards or, alternatively, that any error was harmless beyond a reasonable doubt.

A defendant's constitutional right to confront witnesses includes the right to conduct meaningful cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *State v. Brown*, 29 S.W.3d 427, 430-31 (Tenn. 2000). The denial of a defendant's right to effective cross-examination is "constitutional error of the first magnitude" and may violate the defendant's right to a fair trial. *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). However, "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Davis*, 466 S.W.3d 49, 68 (Tenn. 2015) (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988)). Thus, a defendant's right to confront witnesses does not preclude a trial court from imposing limits upon the cross-examination of witnesses, taking into account such factors as "harassment, prejudice, issue confusion, witness safety, or merely repetitive or marginally relevant interrogation." *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994); *see also* Tenn. R. Evid. 611(a) (stating that the trial court has authority to "exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel").

The propriety, scope, manner, and control of the cross-examination of witnesses rests within the sound discretion of the trial court. *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995) (citing *Coffee v. State*, 216 S.W.2d 702, 703 (Tenn. 1948), and *Davis v. State*, 212 S.W.2d 374, 375 (Tenn. 1948)). Absent a clear abuse of discretion that results in manifest prejudice to the defendant, this court will not interfere with the trial court's exercise of its discretion on matters pertaining to the examination of witnesses. *State v. Johnson*, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984) (citing *Monts v. State*, 379 S.W.2d 34 (Tenn. 1964)).

In *State v. Dicks*, our supreme court ruled that a trial court did not err by refusing to force a codefendant witness to testify only to assert his Fifth Amendment privilege in the presence of the jury. 615 S.W.2d 126, 129 (Tenn. 1981). The court noted that "a jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege against self-incrimination, whether those inferences be favorable to the prosecution or the defense." *Id*. (citations omitted). "'If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand.'" *Id*. (quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)); *see State v. Rollins*, 188 S.W.3d 553, 567-71 (Tenn. 2006)

(reaffirming *Dicks* and applying it in the context of an incarcerated witness whom the defendant sought to implicate in his case).

In *State v. Dunn*, this court applied the rule of *Dicks* and held that a trial court properly prevented a defendant from cross-examining a victim, who had asserted her right against self-incrimination, regarding pending criminal charges that could have reflected upon her character for untruthfulness. No. E2021-00343-CCA-R3-CD, 2022 WL 2433687, at *13 (Tenn. Crim. App. July 5, 2022), *perm. app. denied* (Tenn. Dec. 14, 2022). If a witness can offer other, non-incriminating testimony, however, a defendant is not prohibited from eliciting that testimony on cross-examination. *See, e.g., State v. Lakins*, No. 03C01-9703-CR-00085, 1998 WL 128842, at *4 (Tenn. Crim. App. Mar. 24, 1998) (affirming a trial court's limiting the examination of a witness on issues where the witness would assert his Fifth Amendment privilege but permitting examination on other issues).

Prior to Mr. Richards' testimony in this case, the trial court ruled that the Defendant could properly cross-examine Mr. Richards on "what he's got pending on the table . . . ; the fact that he[] hasn't been prosecuted yet, he's not been held to account, [and] the State's not pushed [his] cases to trial." The trial court also ruled that the Defendant would not be permitted to ask about the underlying facts of Mr. Richards' pending cases if Mr. Richards invoked his right against self-incrimination, which he subsequently did through counsel prior to his testimony. The trial court correctly applied the rule of *Dicks* in limiting Mr. Richards' cross-examination in this regard.

Despite the trial court's ruling, defense counsel nevertheless asked Mr. Richards to "tell the [j]ury how that happened[,]" referring to his pending charge for introduction of contraband into a penal facility. When the trial court stopped this line of questioning, defense counsel elicited from Mr. Richards that he had been charged with this offense, along with other offenses, and that these offenses were still pending prosecution. The trial court did not prevent defense counsel from asking these questions, nor did the trial court prevent defense counsel from engaging in a subsequent line of questioning regarding Mr. Richards' potential jail time or Inv. Cook's offer of assistance related to Mr. Richards' pending charge in Humphreys County.

The Defendant asks us to rely on *State v. Washington* and hold that the trial court should have forced the Defendant to invoke his Fifth Amendment right in the presence of the jury. No. 01-C-01-9301-CC00012, 1993 WL 393428 (Tenn. Crim. App. Oct. 7, 1993). In *Washington*, this court held that a trial court erred by not forcing a victim to assert her Fifth Amendment privilege in the presence of the jury where the defendant was attempting to impeach her with two pending theft charges pursuant to Tennessee Rule of Evidence 608(b). *Id*. at *2. The Defendant's reliance on *Washington* is misplaced. First, the ruling

in *Washington* was based in large part upon the language of Rule 608(b), which is not implicated in this case. Second, this case is factually distinguishable from *Washington* in that the witness in *Washington* was also the victim and the only witness to testify for the State as to the event in question. *See id*. at *1. In this case, Mr. Richards was not the victim but was one of numerous eyewitnesses to testify on behalf of the State. Finally, even if *Washington* was not factually and legally distinguishable, we are bound by the controlling precedent of *Dicks*. *See Dunn*, 2022 WL 2433687 at *13 (declining to extend *Washington*).

Our review of the record indicates that the trial court appropriately prevented cross-examination that would infringe upon Mr. Richards' right against self-incrimination but freely allowed cross-examination into areas that would not elicit incriminating evidence against him. Even though the trial court had to repeatedly stop defense counsel from asking about the underlying facts of Mr. Richards' charges, the trial court allowed defense counsel to ask subsequent questions that were within the bounds of the court's prior ruling. The trial court did not err.

D. The Defendant's Motion to Exclude the TBI Firearms Report

The Defendant argues that the trial court improperly admitted the expert testimony of TBI Special Agent Teri Arney. Specifically, the Defendant contends that Ms. Arney's testimony did not substantially assist the trier of fact because she could not conclusively link the Defendant's firearm with the bullet that killed the victim. The Defendant posits that her testimony did not meet the general relevancy requirements of Tennessee Rules of Evidence 401 and 403, nor did it meet the requirements for the admission of expert testimony found in Rules 702 and 703. The State counters that Ms. Arney's testimony was relevant and that it substantially assisted the jury because it confirmed that it was possible that the Defendant's firearm could have fired the fatal bullet. We agree with the State.

"'Relevant evidence' means 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." Tenn. R. Evid. 401. In general, relevant evidence is admissible, and irrelevant evidence is inadmissible. Tenn. R. Evid. 402. The court may, however, exclude relevant evidence 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.

The admission of expert testimony is governed by Tennessee Rules of Evidence 702 and 703. *State v. Copeland*, 226 S.W.3d 287, 301 (Tenn. 2007) (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005)). Rule 702 provides, "If scientific,

technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702. Rule 703 provides,

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703. Determinations regarding the qualifications, admissibility, relevance, and competence of expert testimony fall within the broad discretion of the trial court and will be overturned only for an arbitrary exercise or abuse of that discretion. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-64 (Tenn. 1997).

In *State v. Davidson*, our supreme court addressed a similar challenge to the admission of expert ballistics testimony. 509 S.W.3d 156, 204-09 (Tenn. 2016). In *Davidson*, the ballistics expert could not state with certainty that the defendant's revolver was the murder weapon, but she testified that it shared common class characteristics with the bullets found in the victim's body and therefore could have been used to fire the bullets. *Id*. at 207. The court explained,

> [The expert's] testimony, while not highly probative, was sufficiently probative on whether the bullets found in [the victim's] body were fired from Mr. Davidson's High Standard revolver and thus material to the issue of Mr. Davidson's guilt or innocence. The jury could infer from [the expert's] testimony that the High Standard revolver was the weapon used to shoot [the victim] because test bullets and the bullets from [the victim's] body shared class characteristics and that the cartridge cases found in Mr. Davidson's house were associated with the murder. It was up to the jury to decide how much weight to give this testimony. Mr. Davidson's counsel effectively cross-examined [the expert] and had the option of calling his own expert ballistics witness.

*Id*. Under these circumstances, the court held that the trial court did not abuse its discretion by admitting the evidence. *Id*.

The instant case falls squarely within the precedent of *Davidson*. While Ms. Arney's testimony was not "highly probative," it was sufficiently probative to allow the jury to infer that the Defendant's weapon fired the bullet that killed the victim and was thus material to the Defendant's guilt or innocence. The Defendant vigorously cross-examined Ms. Arney, eliciting an admission that the class characteristics of the Defendant's firearm would be the same as every model of that gun made by the same manufacturer, which would include a large number of rifles. *See McDaniel*, 955 S.W.2d at 265 (noting that once expert testimony is properly admitted, "it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof"). The Defendant highlighted this point in both his opening statement and closing argument and urged the jury to attach little weight to Ms. Arney's testimony. Ultimately, the question here is one of weight and not admissibility. The trial court properly admitted Ms. Arney's testimony. The Defendant is not entitled to relief.

E. The Sufficiency of the Evidence Establishing the Defendant's Identity

The Defendant argues that the evidence is insufficient to establish his identity as the shooter. The State contends the opposite. We agree with the State.

The United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

"Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not "reweigh

or reevaluate the evidence." *Id*. (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The law provides this deference to the jury's verdict because

> [t]he jury and the [t]rial [j]udge saw the witnesses face to face, heard them testify, and observed their demeanor on the stand, and were in much better position than we are, to determine the weight to be given their testimony. The human atmosphere of the trial and the totality of the evidence before the court below cannot be reproduced in an appellate court, which sees only the written record.

*Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963) (internal quotations and citations omitted). Therefore, on appellate review, "the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *Cabbage*, 571 S.W.2d at 835.

The identity of the perpetrator is an essential element of any crime. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). The State has the burden of proving the identity of the defendant as the perpetrator beyond a reasonable doubt. *State v. Sneed*, 908 S.W.2d 408, 410 (Tenn. Crim. App. 1995) (citing *White v. State*, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975)). Identity is a question of fact for the jury's determination upon consideration of all competent proof. *State v. Thomas*, 158 S.W.3d 361, 388 (Tenn. 2005). As with any sufficiency analysis, the State is entitled to the strongest legitimate view of the evidence concerning identity contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *See id*. (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992)); *see also State v. Miller*, 638 S.W.3d 136, 158-59 (Tenn. 2021).

The proof at trial established that the Defendant believed the victim had stolen lumber from the Defendant's renovation site. Three of the workers at the renovation site testified that they heard gunfire and saw the Defendant, with whom they were all familiar, immediately emerge from a wooded area with a firearm before placing the firearm in a vehicle and leaving the scene. It is true, as the Defendant contends, that no witness actually saw the Defendant pull the trigger, but the jury could properly infer his identity as the shooter from the witnesses' testimony. While there were certainly inconsistencies in the witnesses' accounts, these inconsistencies bore on the credibility of the witnesses, and the resolution of their credibility is solely the prerogative of the jury. *See Bland*, 958 S.W.2d at 659. After the shooting, the Defendant threatened Mr. Daugherty by warning him that

"the same f---ing thing could happen to [Mr. Daugherty] that just happened to [the victim]." Months after the shooting, authorities recovered a firearm from the Defendant's residence that was similar to one described by the witnesses at the scene and that was at least ballistically consistent with having fired the bullet that killed the victim. The jury heard proof regarding purported gaps in the investigation and the possibility of other suspects but nevertheless resolved all factual issues in favor of the State and convicted the Defendant. When viewing the evidence at trial in the light most favorable to the State, the evidence was abundantly sufficient to establish the Defendant's identity as the perpetrator. The Defendant is not entitled to relief.

## III. CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

_____
KYLE A. HIXSON, JUDGE

Kyle A. Hixson Writing Sample Three

*State v. Kibodeaux*, 680 S.W.3d 320 (Tenn. Crim. App. 2023)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2023 Session

# STATE OF TENNESSEE v. JOSEPH Z. KIBODEAUX

**Appeal from the Criminal Court for McMinn County**
**No. 20-CR-227 Andrew Mark Freiberg, Judge**

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**No. E2022-01445-CCA-R9-CD**

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We granted this interlocutory appeal to review the trial court's order denying the State's motion to admit the preliminary hearing testimony of one of the victims who had subsequently, and unrelatedly, been killed, and granting the Defendant's motion to exclude said testimony. The Defendant argued that the trial court should exclude the victim's former testimony because the State withheld exculpatory information prior to the preliminary hearing in violation of the Defendant's rights to confrontation, due process, and a fair trial. The trial court agreed with the Defendant, and the State appeals. Following our review, we reverse the trial court's order and remand the case for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Order of the Criminal Court Reversed; Case Remanded**

KYLE A. HIXSON, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Stephen D. Crump, District Attorney General; and Matthew L. Dunn, Assistant District Attorney General, for the appellant, State of Tennessee.

Derek T. Green, Madisonville, Tennessee, for the appellee, Joseph Z. Kibodeaux.

## OPINION

### I. FACTUAL AND PROCEDURAL HISTORY

A. Affidavit of Complaint

On May 7, 2020, Athens Police Department ("APD") Detective Blake Witt filed an affidavit of complaint seeking the Defendant's arrest for the first degree murder of Layla Long and the attempted first degree murder of Tremon Hall. The affidavit of complaint reflected that on May 5, 2020, at approximately 12:17 a.m., APD officers were dispatched to a "shots fired" call at an apartment on Walker Street in Athens. Upon arrival, officers were led into the apartment by Mr. Frank Jeffreys, who advised that the two individuals inside had been shot. Mr. Hall, who was responsive, was found lying in the living room floor suffering from a gunshot wound to his lower extremities. Ms. Long, Mr. Hall's girlfriend, was observed lying in the hallway of the apartment and appeared to be deceased from an apparent gunshot wound to the chest.

While rendering aid and securing the scene, Corporal Justin Weir spoke with both Messrs. Hall and Jeffreys. They advised Corporal Weir that a man named "Johnny" came to the door and fired a weapon inside the apartment. Both men mentioned the name Johnathan Clayton as a possible shooting suspect. When Corporal Weir asked Mr. Hall if Mr. Clayton was the one who shot him, Mr. Hall replied "yeah." Mr. Hall advised that he had a history with Mr. Clayton but thought that the issues had been resolved. Mr. Hall could not describe the type of firearm that was used.

According to Det. Witt, Lieutenant Fred Schultz further spoke with Mr. Jeffreys on the scene. Mr. Jeffreys indicated to Lt. Schultz that he was sitting on the couch with Ms. Long and that Mr. Hall was in the kitchen cooking when someone knocked on the door. According to Mr. Jeffreys, when Mr. Hall asked who was at the door, someone on the other side of the door said "Johnny." After Mr. Hall opened the door, Mr. Jeffreys heard two gunshots and saw the victims fall to the ground. Mr. Jeffreys jumped up, closed and locked the door, and called 911. Mr. Jeffreys also could not describe the gun that was used.

Officers collected statements from neighbors, and a number of those neighbors described hearing two gunshots and noticing a dark, possibly black, pickup truck drive away from the scene. Officers also recovered video footage from one of the neighbor's surveillance cameras. The neighbor advised that the time on the camera was off by ten minutes or so. According to Det. Witt, the footage showed that at around 12:18 a.m., a black-colored Dodge pickup truck appeared and parked in a parking spot near the corner of a next-door neighbor's apartment. The truck lights "black[ed]-out" before two subjects wearing hoodies and dark-colored clothing exited and walked toward Mr. Hall's apartment. After thirty to forty seconds passed, the two subjects ran back toward the truck and sped away.

The following day, on May 6, 2020, Det. Witt, along with Detective Nick Purkey, spoke with the victim, Mr. Hall, at the police station. According to Det. Witt, Mr. Hall relayed the following information:

> Tremon stated he was in the kitchen cooking when he heard one knock on the door but didn't pay it any mind, he advised he then heard a second knock and asked who it was and the person replied Johnny. Tremon advised he opened the door and when he did, he saw a gun and heard the shot. He stated the first shot must have hit Layla because she screamed and then the second one hit him and he fell to the side.
>
> I asked Tremon if he recognized the voice and he stated yes that it was Johnny Clayton, he stated Joseph Kibodeaux was the other shooter. I asked how he knew that and he stated he [had] seen Joseph standing behind Johnny before the shots started. He described Johnny Clayton as having glasses and that they both had on dark colored hoodies.
>
> I asked what would be the motive behind this and Tremon stated a month and a half ago he "whooped" Johnny Clayton outside of his apartment over claims of his dope being short. Tremon stated that Joseph Kibodeaux is Johnny's cousin and during that altercation Joseph kept reaching in his waist band then threatening him.

That same day, Det. Witt received information that Mr. Clayton was staying at the residence of Savannah Epps in Sweetwater. Upon observing the same truck from the surveillance footage parked at Ms. Epps' home, Det. Witt obtained a search warrant for the truck and residence. When the warrant was executed, Mr. Clayton was present inside the home. The residence was searched, and the truck was impounded. Mr. Clayton invoked his right to remain silent and did not give a statement.

Based upon the information in the affidavit of complaint, a magistrate determined that probable cause existed and issued an arrest warrant. The Defendant was subsequently arrested on May 10, 2020.

B. Preliminary Hearings

Mr. Hall testified at Mr. Clayton's preliminary hearing on May 20, 2020.[1] Seven days later, on May 27, 2020, Mr. Hall testified at the Defendant's preliminary hearing in McMinn County general sessions court. At the outset of the preliminary hearing, the general sessions court stated, "I know you gentlemen were here last week. So, this is going to be basically a recitation of the same thing."

Mr. Hall testified that on the night of the offenses, he was in his apartment with Ms. Long and Mr. Jeffreys.[2] While Mr. Hall was in the kitchen of his apartment cooking, he heard a knock on the door. He went to the door and asked for the person(s) to identify themselves, and someone on the other side of the door said his name was "Johnny." As soon as he opened the door, "the shooting started." Mr. Hall only heard two shots, but he thought that there actually could have been as many as five. The second shot struck him in the buttocks and exited the front side of his body. As he tried to close the door, he fell to the ground. He heard Ms. Long scream and "mak[e] a sound like she couldn't breathe" before she fell to the ground.

Mr. Hall said that he saw both the Defendant and Mr. Clayton at the door, that they were both wearing hoodies, and that they were both armed. Mr. Hall testified that the next-door neighbor's light was on and that he could see "pretty well." Ms. Long had been shot, and she died from her injuries. Mr. Hall was treated for his injuries at Erlanger Hospital in Chattanooga.

Mr. Hall explained that about a month prior to May 5, 2020, he had been involved in a physical altercation with Mr. Clayton after Mr. Clayton had demanded money relative to a drug transaction. Mr. Hall further stated that on the day after this fight with Mr. Clayton, he "had some words" with the Defendant. According to Mr. Hall, the Defendant and Mr. Clayton were cousins, and the Defendant was mad that Mr. Hall had beaten up Mr. Clayton. Following this exchange, the Defendant went to his truck and, before driving away, said to Mr. Hall that he would "be back."

The Defendant was present at the preliminary hearing and represented by counsel, who cross-examined Mr. Hall. On cross-examination, Mr. Hall admitted to smoking marijuana on the night of the shooting. Mr. Hall indicated that the door was not open "all

[1] The trial judge stated this fact at the hearing that occurred on June 10, 2022.

[2] Sometimes in these proceedings, Mr. Jeffreys last name is spelled Jeffries. For consistency, we will spell his name as spelled in the affidavit of complaint.

the way" when the shooting started, being open approximately eighteen inches in his estimation. He described that he saw the two armed individuals standing side-by-side when he opened the door and that he thought one of the guns was a .40 caliber. He explained that after hearing the first shot, he turned to close the door but was then hit by the second shot.

Regarding his statement to the police officers on the night of the shooting, Mr. Hall said that he told "Officer Jamie" that "Johnny" was the shooter, and he confirmed that he did not mention the Defendant at that time. When asked why he did not mention the Defendant, Mr. Hall explained, "Man, I just watched someone – my girlfriend pass away. I was so – I don't know. It was just crazy. I was – there was so much going on. I was just glad to be alive." When Mr. Hall was asked if he told anyone else about the shooting, Mr. Hall indicated that he had spoken with his mother the next day following his release from the hospital and that he told her he "got shot by two n------." Mr. Hall also recalled later speaking with a detective about the incident.

Defense counsel indicated that "last week," Mr. Hall had testified about "a bag of dope" and asked Mr. Hall about his prior altercation with Mr. Clayton in relation to the drugs. Mr. Hall said that Mr. Clayton had claimed he sent a friend with money to obtain "a bag of dope" from Mr. Hall but that Mr. Clayton believed "something wasn't right." Mr. Hall denied being involved in any sort of drug transaction.

In determining that there was sufficient proof to bind the case over to the grand jury, the general sessions court commented,

> There's been some probative questions asked which are similar . . . to the ones that were asked last week. So that may be part of the strategy that's being developed. But as far as what we've got today quite frankly even if there was some issue of retribution involved, it still wouldn't necessarily be a defense.

### C. Subsequent Trial Court Proceedings

On September 15, 2020, the McMinn County grand jury indicted the Defendant, along with Johnathan Clayton, for conspiracy to commit first degree murder, premeditated first degree murder, attempted first degree murder, and possession of a firearm by a convicted felon. *See* Tenn. Code Ann. §§ 39-12-101, -12-103, -13-202, -17-1307.

On August 13, 2021, the Defendant filed a discovery request, and subsequently, on August 23, 2021, the State provided discovery to the Defendant, to wit: Corporal Weir's body camera footage from the scene, and police statements from Mr. Hall and Mr. Jeffreys.[3] Mr. Hall was killed in an unrelated homicide on September 25, 2021. Thereafter, the State provided Mr. Hall's hospital records from Erlanger pertaining to his May 2020 treatment for his gunshot wound in this case that indicated Mr. Hall reported being shot by "someone . . . through the door" and that he did not see the type of gun used.

On February 24, 2022, the State filed a motion to declare Mr. Hall an unavailable witness and to introduce his preliminary hearing testimony at trial pursuant to Tennessee Rule of Evidence 804. The State argued that the preliminary hearing testimony was admissible under Rule 804(b)(1), which explicitly authorizes the introduction of former testimony by an unavailable witness "at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." The State cited *State v. Bowman*, 327 S.W.3d 69, 88-89 (Tenn. Crim. App. 2009) (quotation and alteration omitted), for the proposition that "[a] preliminary hearing transcript is precisely the type of former testimony contemplated under Rule 804(b)(1)." Citing *State v. Clayton*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *12 (Tenn. Crim. App. July 31, 2019), the State further noted, "Courts of this state have consistently upheld the admission of testimony from a preliminary hearing when the defendant had an opportunity to cross-examine a witness who was subsequently deemed unavailable."

In response, the Defendant filed a motion to exclude the preliminary hearing testimony of Mr. Hall under Tennessee Rules of Evidence 403 and 804 and the confrontation clauses of both the United States and Tennessee Constitutions. The Defendant agreed that Mr. Hall was now unavailable, but he noted that Mr. Hall's unavailability was through "no fault of the defendant or codefendant." In the motion, the Defendant asserted that Mr. Hall's preliminary hearing testimony was inadmissible because he did not have an opportunity and similar motive to develop the testimony at that hearing, which was limited to a probable cause finding and did not require proof beyond a reasonable doubt. The Defendant noted that he was not provided with any discovery prior to the preliminary hearing other than the affidavit of complaint and that he was not provided with a written statement of the proof to be presented at the preliminary hearing, nor notice of which witnesses were to be called. According to the Defendant, he was not given enough time to prepare for cross-examination or develop witnesses of his own. The Defendant also noted that additional charges were added by the indictment. He concluded that the

[3] We glean this information regarding discovery from the facts provided in the trial court's order excluding the preliminary hearing testimony. There is no discovery motion in the record on appeal.

admission of Mr. Hall's preliminary hearing testimony would violate his confrontation rights, would be misleading to the jury and produce unfair prejudice under Tennessee Rule of Evidence 403, and would not satisfy the requirements of Tennessee Rule of Evidence 804.

On June 9, 2022, codefendant Clayton filed a motion to exclude Mr. Hall's preliminary hearing testimony under Tennessee Rules of Evidence 403 and 804, the Confrontation Clause, and *State v. Allen*, No. M2019-00667-CCA-R3-CD, 2020 WL 7252538, at *1 (Tenn. Crim. App. Dec. 10, 2020), *no perm. app. filed*.[4] Codefendant Clayton asserted that under *Allen*, the admission of Mr. Hall's preliminary hearing testimony would deprive him of his due process rights because Mr. Hall gave statements to Corporal Weir, hospital staff, and the police that were inconsistent with his preliminary hearing testimony, were exculpatory, and were not disclosed by the State until after the preliminary hearing. Codefendant Clayton also claimed that the State failed to disclose Mr. Jeffreys' interview prior to the preliminary hearing and that this interview was consistent with Mr. Hall's statements from the body camera footage and inconsistent with Mr. Hall's preliminary hearing testimony. Codefendant Clayton asserted that he could have better cross-examined Mr. Hall had he received Mr. Hall's previous statements prior to the preliminary hearing. Codefendant Clayton also contended that under *Allen*, preliminary hearing testimony should not be admitted at a trial where *Brady*[5] material was withheld prior to the preliminary hearing.

A hearing on the motion was held on June 10, 2022, at which time the Defendant adopted codefendant Clayton's motion. The Defendant's preliminary hearing transcript, recordings of the Defendant's and Mr. Jeffrey's police interviews, and a recording of Corporal Weir's body camera footage were entered as exhibits to this hearing. The trial court granted the State additional time to review and respond to the recently filed supplemental pleading. Also, at this hearing, the trial court, by agreement of the parties, severed the codefendants' cases for trial.

On July 7, 2022, the State filed a response arguing that the Defendant was not entitled to relief, reasoning that the Defendant had a sufficient opportunity to cross-examine Mr. Hall regarding his inconsistent statements on the scene and during the subsequent police interview. The State noted that defense counsel's questions at the preliminary hearing indicated actual knowledge of Mr. Hall's prior statements; that the

[4] Again, we are forced to compile this information from the trial court's order excluding the preliminary hearing testimony. Codefendant Clayton's motion is not included in the record on appeal.

[5] *See Brady v. Maryland*, 373 U.S. 83 (1963).

primary issue was the Defendant's identity, which would be the same issue at trial; and that the later-disclosed discovery did not substantially change that issue. The State contended that the Defendant's right to confrontation was satisfied because he had a similar motive and a prior opportunity to confront Mr. Hall at the preliminary hearing; that Mr. Hall's former testimony was admissible under the hearsay exception of Tennessee Rule of Evidence 804(b)(1); that Mr. Hall's former testimony was not unfairly prejudicial under Tennessee Rule of Evidence 403 because the Defendant would still be permitted at trial to attack the inconsistencies in Mr. Hall's statements; that *Brady* was historically inapplicable at preliminary hearings and that, regardless, no violation occurred because the exculpatory information was not suppressed and no prejudice resulted from the delayed disclosure; and that *Allen* was distinguishable on its facts.

A second hearing was held on July 11, 2022, where the trial court heard arguments from the parties. Corporal Weir also testified. He stated that when he arrived on the scene of the Walker Street apartment, Mr. Hall seemed to be in extreme pain from his gunshot wound. According to Corporal Weir, the Defendant was likely in "shock," and though he was able to "hit some highlights," he could not provide specifics. Corporal Weir noted that Mr. Hall only identified codefendant Clayton on the scene and that, at that time, Mr. Hall indicated codefendant Clayton was by himself. Corporal Weir then advised that the neighbor's video surveillance footage indicated two individuals approached Mr. Hall's apartment, which was inconsistent with Mr. Hall's singular identification. Corporal Weir did not place any "great significance" on Mr. Hall's omission of the presence of this second individual given Mr. Hall's state at the time. The surveillance footage that Corporal Weir obtained from the neighbor's apartment was admitted as an exhibit. Based on the footage, Corporal Weir proceeded with the investigation looking for two individuals.

Thereafter, the trial court entered a written order on October 3, 2022, denying the State's motion to introduce the preliminary hearing testimony of Mr. Hall and granting the Defendant's motion to exclude the testimony.[6] The trial court determined that Mr. Hall, because of his death, was an unavailable witness under Tennessee Rule of Evidence 804(a)(4). The trial court further found that Corporal Weir's body camera footage, Mr. Hall's statement to hospital staff, Mr. Hall's police interview, and Mr. Jeffreys' police interview constituted exculpatory evidence because these pieces of evidence "indicate only a singular perpetrator of the shootings," codefendant Clayton. The trial court noted, however, that the medical records were not yet in possession of the State at the time of the preliminary hearing.

[6] At the July 11, 2022 hearing, the trial court ruled orally that Mr. Hall's preliminary hearing testimony was admissible in codefendant Clayton's case.

According to the trial court, the Defendant did not know about these exculpatory statements prior to the preliminary hearing and, therefore, did not have the same motive and opportunity to question Mr. Hall at the preliminary hearing. The trial court determined that the State's failure to disclose this evidence, coupled with Mr. Hall's death, deprived the Defendant of "a meaningful opportunity to impeach Mr. Hall with patently exculpatory evidence in an effort to potentially negate the presence of probable cause of his alleged involvement in this case." The trial court concluded that pursuant to *Allen*, the State violated *Brady* because the exculpatory evidence was known to the State prior to the preliminary hearing, but not disclosed, and the Defendant was prejudiced by the delayed disclosure. The trial court reasoned that it could not "speculate as to what Mr. Hall's testimony would have been in response to significant impeaching and exculpatory evidence in this case." In addition, the trial court also noted that there was "a cornucopia of other impeaching and exculpatory statements known to police" given Mr. Hall's differing accounts in his statements and preliminary hearing testimony—how far the apartment door was open, if Mr. Hall saw a gun and whether he could describe the gun, and the level of Mr. Hall's involvement in the prior illegal drug sale. Ultimately, the trial court concluded that the Defendant's constitutional rights to confrontation, due process, and a fair trial were violated under the facts of this case.

The State sought an interlocutory appeal, which the trial court granted based upon the need to prevent irreparable injury and the need to develop a uniform body of law. The State filed a timely application for interlocutory appeal to this court, which we likewise granted. After receiving the parties' briefs and oral arguments, the case is now before us for review.

## II. ANALYSIS

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is generally not admissible. Tenn. R. Evid. 802. However, under Tennessee Rule of Evidence 804, former testimony of an unavailable witness may be admissible under some circumstances. A witness is unavailable when, as pertinent here, the witness "is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity." Tenn. R. Evid. 804(a)(4). When the declarant is unavailable, the Rule against hearsay does not exclude former testimony, which is "[t]estimony given as a witness at another hearing of the same or a different proceeding . . . , if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect

examination." Tenn. R. Evid. 804(b)(1). Subsection (b)(1) of Rule 804 applies to preliminary hearing transcripts. Tenn. R. Evid. 804, Advisory Comm'n Cmt.

Trial courts must conduct layered inquiries when determining the admissibility of evidence objected to on the grounds of hearsay, and our standard of review varies accordingly. *State v. Jones*, 568 S.W.3d 101, 128 (Tenn. 2019). A trial court's factual findings and credibility determinations regarding a ruling on hearsay are binding on the appellate court unless the evidence preponderates against them. *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015) (citation omitted). Because a witness's unavailability pursuant to Rule 804(a) involves questions of fact, a trial court's determination regarding whether that witness is unavailable is reviewed for abuse of discretion. *Jones*, 568 S.W.3d at 129 (citation omitted). "Once the trial court has made its factual findings, the next questions—whether the facts prove that the statement (1) was hearsay and (2) fits under one [of] the exceptions to the hearsay rule—are questions of law subject to de novo review." *Kendrick*, 454 S.W.3d at 479 (citations omitted).

"Intertwined with the rules on the admissibility of hearsay is the constitutional right to confront witnesses." *Jones*, 568 S.W.3d at 128. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause essentially ensures the right to physically face witnesses and the right to cross-examine witnesses. *State v. Lewis*, 235 S.W.3d 136, 142 (Tenn. 2007) (citation omitted). The Tennessee Constitution likewise guarantees the accused the opportunity "to meet the witnesses face to face." Tenn. Const. art. I, § 9.

The Confrontation Clause governs only testimonial hearsay, and it applies only to testimonial statements offered for the truth of the matter asserted. *State v. Dotson*, 450 S.W.3d 1, 63-64 (Tenn. 2014). Statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 64 (quotation omitted). The primary purpose is evaluated not from the subjective or actual intent of the persons involved but from the purpose reasonable participants would have had. *Id.* Whether the admission of hearsay statements violated a defendant's confrontation rights is a question of law subject to de novo review. *State v. Davis*, 466 S.W.3d 49, 68 (Tenn. 2015) (citation omitted).

In order to protect a defendant's right to confrontation, before the prior testimony of a witness will be admitted pursuant to the hearsay exception of Rule 804(b)(1), the State must establish two prerequisites. First, the State must show that the declarant is truly unavailable after good faith efforts to obtain his presence and, second, that the evidence

carries its own indicia of reliability. *State v. Summers*, 159 S.W.3d 586, 597 (Tenn. Crim. App. 2004) (citation omitted). With respect to the latter requirement, the United States Supreme Court has mandated that the reliability of a prior testimonial statement is established exclusively through cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 54-56 (2004). However, "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish[.]" *United States v. Owens*, 484 U.S. 554, 559-60 (1988)).

A preliminary hearing, while not constitutionally required, is a critical stage in a criminal prosecution. *State v. Willoughby*, 594 S.W.2d 388, 390 (Tenn. 1980). A preliminary hearing is of an "adversarial nature," a "safeguard for the defendant, protecting him from unfounded charges," thereby serving a "screening function." *Waugh v. State*, 564 S.W.2d 654, 658 (Tenn. 1978). A preliminary hearing is intended "to determine whether there exists probable cause to believe that a crime has been committed and that the accused committed the crime." *State v. Lee*, 693 S.W.2d 361, 363 (Tenn. Crim. App. 1985). "The primary responsibility of the magistrate at a preliminary hearing is to determine whether the accused should be bound over to the grand jury," or phrasing it another way, "whether there is evidence sufficient to justify the continued detention of the defendant[.]" *Waugh*, 564 S.W.2d at 659. Testimony from a preliminary hearing is testimonial for the purposes of the Confrontation Clause. *State v. McGowen*, No. M2004-00109-CCA-R3-CD, 2005 WL 2008183, at *12 (Tenn. Crim. App. Aug. 18, 2005) (citing *Crawford*, 541 U.S. at 68).

While a preliminary hearing is not intended to be a discovery device, "there are inevitable discovery aspects to every preliminary hearing." *Willoughby*, 594 S.W.2d at 390. The aim of a defendant's right to cross-examination at the preliminary hearing stage is to rebut the government's assertion that it has probable cause to bring charges, not to compel discovery of elements of the prosecution's case on the merits. *See id.* ("To our knowledge no court has ever held that a preliminary hearing is a discovery device."); *see also United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997) (stating that a probable cause hearing is not a mini-trial); *Madrid v. State*, 910 P.2d 1340, 1343 (Wyo. 1996) ("[A]lthough some discovery is the inevitable by-product of a preliminary hearing, discovery is not the purpose of the hearing."). The State is not required to produce all of its witnesses, or even its best witnesses, at a preliminary hearing. *Willoughby*, 594 S.W.2d at 390. In this vein, the Tennessee Supreme Court has specifically held that Rule 16 of the Tennessee Rules of Criminal Procedure, the rule governing discovery, does not apply in general sessions court. *Id.*

Numerous Tennessee cases have addressed issues similar to the one at bar. These cases have consistently analyzed the hearsay and confrontation principles set forth above to uphold the admission of testimony from a preliminary hearing when the defendant had a similar motive and opportunity to cross-examine a witness who was subsequently deemed unavailable. *See Davis*, 466 S.W.3d at 69 (affirming the admission of preliminary hearing testimony and a prior statement of a testifying witness as substantive evidence where that witness testified at trial that he could not remember giving the statement or testifying at the preliminary hearing, so he was declared to be "unavailable," and the defendant had the opportunity to cross-examine the witness on the subject); *State v. Howell*, 868 S.W.2d 238, 252 (Tenn. 1993) (concluding that because previous counsel at an out-of-state preliminary hearing had "similar motive" to cross-examine a witness, the admission of the testimony did not violate the defendant's right to confront witnesses); *Bowman*, 327 S.W.3d at 89 (concluding that "preliminary hearing testimony was admissible under the 'former testimony' hearsay exception of Rule 804(b)(1) and . . . did not violate the defendant's rights under the Confrontation Clause"); *see also State v. Jackson*, No. M2020-01098-CCA-R3-CD, 2022 WL 1836930, at *17-18 (Tenn. Crim. App. June 3, 2022); *State v. Sorrell*, No. E2018-00831-CCA-R3-CD, 2019 WL 3974098, at *11-12 (Tenn. Crim. App. Aug. 22, 2019); *Clayton*, 2019 WL 3453288, at *12; *State v. Warner*, No. M2016-02075-CCA-R3-CD, 2018 WL 2129509, at *16-18 (Tenn. Crim. App. Oct. 18, 2017); *State v. Roberson*, No. E2013-00376-CCA-R3-CD, 2014 WL 1017143, at *7 (Tenn. Crim. App. Mar. 14, 2014); *State v. Wise*, No. M2012-02129-CCA-R3-CD, 2013 WL 4007787, at *6 (Tenn. Crim. App. Aug. 6, 2013); *State v. Chapman*, No. W2004-02404-CCA-R3-CD, 2005 WL 2878162, at *5 (Tenn. Crim. App. Nov. 2, 2005); *McGowen*, 2005 WL 2008183, at *12.

Likewise, Tennessee courts have rejected the claim that cross-examination at the preliminary hearing was insufficient due to differences in the nature of the proceedings, including the burden of proof. *See Howell*, 868 S.W.2d at 251 (holding that a preliminary hearing testimony of a declarant could be introduced at trial under the former testimony exception based primarily on a finding that "at both the [preliminary] hearing and the subsequent trial, the testimony was addressed to the same issue of '[w]hether or not the defendant[] had committed the offense' charged"); *State v. Grubb*, No. E2005-01555-CCA-R3-CD, 2006 WL 1005136, at *5-7 (Tenn. Crim. App. Apr. 18, 2006) (rejecting a claim that "the type of cross-examination conducted at a preliminary hearing is different from that conducted at trial" and concluding that the defendant had the opportunity to cross-examine the witness "at the preliminary hearing with the same motives that would have guided his cross-examination of the declarant had he been available at trial").

In *State v. Echols*, the defendant asserted that because discovery was not mandated and identification standards were more "lax" at the preliminary hearing, admission of the victim's testimony at trial violated his right to confront witnesses. No. W2013-02044-CCA-R3-CD, 2014 WL 6680669, at *13 (Tenn. Crim. App. Nov. 26, 2014). This court rejected the defendant's argument under a plain error analysis, concluding that the defendant's motive for cross-examining the victim at the preliminary hearing was "similar" to the motive for cross-examining him at trial, i.e., "to negate the [d]efendant's culpability for the offense charged," and that the defendant's counsel in fact effectively challenged the victim's identification in various ways on cross-examination. *Id.* at *15; *see also Roberson*, 2014 WL 1017143, at *7 (rejecting an argument that cross-examination at the preliminary hearing was insufficient to meet the requirements of the Confrontation Clause). Similarly, in *State v. Shipp*, this court rejected the defendant's argument that he did not have a similar motive or adequate opportunity to cross-examine the witness because he did not have access to her prior statement—wherein she stated that the perpetrator had a facial tattoo when, in fact, he did not—at the time of the preliminary hearing. No. M2016-01397-CCA-R3-CD, 2017 WL 4457595, *5-7 (Tenn. Crim. App. Oct. 5, 2017).

However, in *State v. Allen*, 2020 WL 7252538, the case relied upon by the trial court here to exclude Mr. Hall's preliminary hearing testimony, this court applied due process principles to reverse the defendant's conviction which was based, in large part, upon admission of the transcript of the victim's testimony at the preliminary hearing. In *Allen*, the defendant was arrested on June 18, 2015, for aggravated rape and domestic assault of his wife based primarily upon her allegations to the investigating detective. 2020 WL 7252538, at *1. Approximately nine months later, at the defendant's preliminary hearing on March 18, 2016, the defendant's wife again identified the defendant as the perpetrator of her rape and assault. *Id.* A few days after the hearing, the defendant's wife was murdered in an event unrelated to the Defendant or the case. *Id.* When the State provided discovery materials on December 21, 2017, it included two emails sent on June 22, 2015, which was before the preliminary hearing, from the defendant's wife to the investigating detective. *Id.* In one of the emails, the defendant's wife stated that the defendant did not rape her, and she claimed that she had a consensual sexual encounter with an unknown man in his vehicle outside a bar in Nashville during the early morning hours of June 18, 2015. *Id.* Both the defendant's wife and the investigating detective testified at the preliminary hearing and were cross-examined by defense counsel, but neither witness mentioned the defendant's wife's emails nor her recantation of the allegations. *Id.*

On appeal, the defendant in *Allen* claimed that the State "violated his due process rights pursuant to *Brady* by failing to disclose the existence of exculpatory emails prior to the preliminary hearing and that the trial court violated his due process rights by improperly

admitting Ms. Allen's preliminary hearing testimony." *Allen*, 2020 WL 7252538, at *9. The *Allen* court noted that "[t]he denial or significant diminution of the right to cross-examine a witness calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Id.* at *11 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)) (internal quotation omitted). The *Allen* court observed that the rights guaranteed by the Confrontation Clause and the Due Process Clause are sometimes interlaced, and the right of confrontation is sometimes subsumed by the right to due process. *Id.* (citing *Chambers*, 410 U.S. at 294) ("The rights to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process.")). Drawing on these statements from *Chambers*, the *Allen* court went on to apply due process principles and analyze *Brady* in the preliminary hearing context. *Id.* at *11-17.

The *Allen* court first determined that the recantation email was "obviously exculpatory" and that the State was "bound to release the information whether requested or not." *Allen*, 2020 WL 7252538, at *12. Next, addressing whether the State suppressed the evidence, the *Allen* court concluded that the State's duty to disclose exculpable information is governed by *Brady* and its progeny, not by Tennessee Rule of Criminal Procedure 16. *Id*. at *13. The *Allen* court, noting that it was dealing with the delayed disclosure of the defendant's wife's first email, observed that "the government's delayed disclosure of obviously exculpatory information in its possession can result in a *Brady* violation requiring a reversal of a conviction if the delay itself causes prejudice to the defendant by putting 'the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at *14 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Concluding that the second *Brady* factor—whether the State suppressed the information—was satisfied, the *Allen* court reasoned that, "[a]lthough the State provided the emails in discovery before trial, it suppressed the emails for over two years during which time Ms. Allen died." *Id.* at *15. Addressing the favorability of the evidence, the third *Brady* factor, the *Allen* Court found that "[a]n alleged victim recanting and saying that the person accused of an offense did not commit the offense and that another person did is certainly favorable." *Id.* In determining that the fourth *Brady* factor was satisfied, i.e., whether the information was material, the *Allen* court stated that the evidence was "obviously exculpatory" and reasoned that the jury was deprived of the defendant's wife's testimony concerning the emails because the State delayed disclosure of the emails until after her death, that the defendant's wife was the key witness for the State, and that her testimony was essential to the State's case. *Id.* at *16. The *Allen* court held that the State's failure to disclose an obviously exculpatory email before the witness testified at the preliminary hearing, coupled with her death before trial, deprived the defendant of the opportunity to cross-examine the

witness about the veracity of the emails, violated *Brady*, and deprived the defendant of his constitutional rights to due process of law and a fair trial. *Id.* at *17.

The *Allen* court in reaching its ultimate conclusion, distinguished two cases from this court that addressed similar facts utilizing a confrontation analysis: *State v. Shipp*, 2017 WL 4457595, and *State v. Chapman*, 2005 WL 2878162. *See Allen*, 2020 WL 7252538, at *13-14. In *State v. Chapman*, after the preliminary hearing but before trial, the State disclosed that the defendant's five-year-old-son made a statement to the police "indicating that the shooting of the victim was accidental." 2005 WL 2878162, at *5. The defendant sought dismissal of the indictment, arguing that he did not have his son's "statement at the preliminary hearing in order to refute the State's presentation of probable cause evidence; therefore, he was denied the right to have a meaningful preliminary hearing." *Id.* The trial court ruled that the defendant was not prejudiced by the State's failure to disclose the statement prior to the preliminary hearing. *Id.* The court further determined that the defendant had received the statement approximately two months before trial and was, thus, able to utilize the statement as part of his defense. *Id.* Ultimately, the State called the defendant's son to testify at trial; the prior statement was admitted as an excited utterance; and defense counsel was allowed to cross-examine the defendant's son about his statement. *Id.* at *19-20.

On appeal to this court, the defendant in *Chapman* framed the issue as

> whether the prosecution may withhold and conceal highly material, exculpatory evidence, which directly refutes probable cause to believe the offense of murder in the second degree is established, for eight months during which time it obtains a bindover by the general sessions court, a prohibitive bond of one million dollars, and an indictment charging murder in the second degree.

*Chapman*, 2005 WL 2878162, at *5. The *Chapman* court, after discussing the purpose of a preliminary hearing—stating similar principles to those cited above—and observing that Rule 16 of the Tennessee Rules of Criminal Procedure does not apply in general sessions court, held that the defendant was not entitled to receive the five-year-old's statement prior to the preliminary hearing or the convening of the grand jury and that, therefore, the trial court did not err by failing to dismiss the indictment. *Id.* The *Chapman* court did not discuss *Brady*, and the *Allen* court distinguished *Chapman* for confrontation purposes, reasoning that the facts there were distinguishable because the defendant's son, unlike the defendant's wife in *Allen*, was available to testify and be cross-examined at the trial about his prior statement. *Allen*, 2020 WL 7252538, at *13. However, the holding of *Chapman*

regarding the general rules of discovery, including the production of exculpatory evidence at the preliminary hearing phase, was not conditioned upon the availability or unavailability of the witness for admission of the preliminary hearing testimony under Rule 804.

*State v. Shipp*, the other case distinguished by the *Allen* court, involved the State's failure to disclose the statement of a victim that contained exculpable information prior to the victim's testifying at the preliminary hearing; the State was permitted to introduce the preliminary hearing testimony at trial because this victim had died after the hearing. *Shipp*, 2017 WL 4457595, at *1. In *Shipp*, the surviving victim, in both a photographic lineup, and at the preliminary hearing, identified the defendant as the perpetrator of a robbery during which she was wounded and her boyfriend killed. *Id*. Included in the discovery provided to the defendant after the preliminary hearing was a police report which stated that the victim had described the defendant as having "a facial tattoo." *Id.* The defendant objected to the use of the victim's preliminary hearing testimony on the basis that the surviving victim had made a statement to a law enforcement officer that the defendant had a facial tattoo, though he did not have such a tattoo, and that this information had not been available to defense counsel at the preliminary hearing. *Id.* The defendant argued that he did not have an adequate opportunity at the preliminary hearing to cross-examine the victim about her statement regarding the tattoo. *Id.* The trial court denied the defendant's motion. *Id.*

On appeal to this court, the defendant in *Shipp* argued that the victim's preliminary hearing testimony "should have been excluded under Tennessee Rule of Evidence 804 and the Confrontation Clause of the United States and Tennessee Constitutions" because he did not have an adequate opportunity to cross-examine the victim about her statement regarding the tattoo. *Shipp*, 2017 WL 4457595, at *5. This court noted that "the primary issue at the preliminary hearing was the same as the primary issue at trial: the identity of the [d]efendant as the perpetrator" and that the defendant's counsel extensively cross-examined the victim at the preliminary hearing. *Id.* at *7. This court concluded that the defendant "had a similar motive and a prior opportunity to confront the witness" and "that his right to confrontation was not violated." *Id.* This court reasoned,

> However, "[c]omplete identity of the issues is not necessary" in order for a statement to be admissible under Rule 804. [*Howell*, 868 S.W.2d at 251]. As long as the issues at the previous hearing are "sufficiently similar," the statement may be admissible. *Id.* Although a party may decide not to engage in rigorous or even any cross-examination, "'there is no unfairness in requiring the party against whom the testimony is now offered to accept [a] prior decision to develop or not develop the testimony fully.'" *Id.* at 252

> (quoting *United States v. Salerno*, 505 U.S. 317, 329, n.6 (1992) (Stevens, J., dissenting)) (emphasis omitted).

*Id.* at *5.

The *Allen* court stated that the confrontation analysis of *Shipp* still had precedential value to the due process issue presented in *Allen* because "[t]he right[] to confront and cross-examine witnesses [has] long been recognized as essential to due process." *Allen*, 2020 WL 7252538, at *14 (citing *Chambers*, 410 U.S. at 294). The *Allen* court then distinguished the facts of *Shipp*, stating that the exculpatory information concerning the defendant's facial tattoo was one detail in the identification of the defendant as the perpetrator. *Id*. The *Allen* court further observed that the jury could consider the victim's statement concerning the facial tattoo and the detective's testimony that the defendant did not have a facial tattoo in determining whether the victim was lying or simply mistaken; thus, the jury had evidence it could use in determining the credibility of the victim. *Id.* The *Allen* court, citing this factual difference from *Shipp*, determined that, because the prosecution in *Allen* suppressed the obviously exculpatory first email until after the defendant's wife's death, the defendant was never able to question his wife about its veracity. *Id.*

In this case, the State asks us to depart from *Allen* and its application of *Brady* in the context of a preliminary hearing. The State argues,

> There is no clearly established United States Supreme Court law which requires the State to provide exculpatory evidence to a defendant prior to or at a preliminary examination. Indeed, the language from *Brady* and other Supreme Court decisions indicates that the right to exculpatory evidence is a trial right.

The State, as it did in *Allen*, cites two federal cases in support of his argument: *Gov't of Virgin Islands in Interest of N.G*., 34 F. App'x 417, 419 (3d Cir. 2002) (stating that "*Brady* itself was never intended to apply to pre-trial proceedings"); and *Jaffe v. Brown*, 473 F. App'x 557, 559 (9th Cir. 2012) (stating that, while there was some merit to the petitioner's *Brady* claim, "existing Supreme Court case law does not clearly establish that the prosecution was required to disclose the impeachment information about [a witness who testified at the preliminary hearing] before, rather than after, [the] preliminary hearing"). The *Allen* court discounted the State's reliance on *Gov't of Virgin Islands in Interest of N.G*. and *Jaffe*, noting that they were not selected for publication in the Federal Reporter and concluding that "[n]either of these federal cases h[e]ld that *Brady* can never apply to

pretrial proceedings or a preliminary hearing." *Allen*, 2020 WL 7252538, at *13. We respectfully disagree and conclude that these cases, while unpublished, accurately state the law as it relates to *Brady*'s application to preliminary hearings.

The Defendant cites no federal or Tennessee authority, other than *Allen*, which would indicate that the *Brady* requirement extends to a preliminary hearing. A reading of *Brady* and the leading cases in its progeny demonstrates that the right it enunciated was intended to protect a defendant's due process rights by requiring the disclosure of exculpatory evidence for the defendant's use *at trial*. *See Brady*, 373 U.S. at 90-91 (ordering a retrial of the punishment phase only of a bifurcated trial); *United States v. Agurs*, 427 U.S. 97, 99 (1976) (involving a defendant's post-trial discovery of evidence which would have tended to support her argument that she acted in self-defense); *United States v. Bagley*, 473 U.S. 667, 669 (1985) (applying *Brady* where a prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses at trial); *Kyles*, 514 U.S. at 434 (noting that the question in a *Brady* analysis is whether, given the nondisclosure of materially exculpatory evidence, a defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence"); *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (noting that a defendant's right to receive from prosecutors exculpatory impeachment material is "a right that the Constitution provides as part of its basic 'fair trial' guarantee"). In this vein, the United States Supreme Court has declined to extend the *Brady* requirement to grand jury proceedings, *see United States v. Williams*, 504 U.S. at 51, 55 (1992), and to material impeachment information in pre-plea proceedings, *see Ruiz*, 536 U.S. at 629. *See also In re Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163*, 582 S.W.3d 200, 210-11 (Tenn. 2019) (relying on *Ruiz* to vacate an ethics opinion that would have required *Brady* disclosures to occur "as soon as reasonably practicable" as opposed to "timely"). With these principles in mind, we do not read *Gov't of Virgin Islands in Interest of N.G.* and *Jaffe* to imply that *Brady* could ostensibly apply to preliminary hearings. Instead, we read these cases to accurately state the true scope of *Brady*'s applicability—i.e., as the Third Circuit succinctly put it, that "*Brady* itself was never intended to apply to pre-trial proceedings." *Gov't of Virgin Islands in Interest of N.G.*, 34 F. App'x at 419.

We are mindful that the panel in *Allen* attempted to limit its holding by clarifying that it was not *requiring* the State to disclose obviously exculpatory information prior to a preliminary hearing:

> To be clear, we are not holding that obviously exculpatory information *must* be provided before the preliminary hearing or before trial. However, when the State delays disclosure of obviously exculpatory

> information in its possession, the State risks violating *Brady* when the delay itself causes prejudice by preventing the defense from using the disclosed material effectively in preparing and presenting the defendant's case.

*Allen*, 2020 WL 7252538, at *17 (quotation omitted). Despite this attempt to limit its holding, the *Allen* court, in all practical effect, held that obviously exculpatory information must be disclosed prior to the preliminary hearing if the requirements of *Brady* are satisfied. The United States District Court for the Middle District of Tennessee has made such an acknowledgment. *See Ward v. Reynolds*, No. 3:20-cv-00981, 2021 WL 3912803, at *8 n.8 (M.D. Tenn. Sept. 1, 2021) (memorandum opinion).

The District Court, in discussing the training required of police officers, stated,

> Probable cause is a concept that can (not to say must or even should) be considered (and likewise discussed) without reference to the existence of exculpatory evidence; for example, a federal grand jury can return a true bill in the event it finds probable cause, and yet there is no requirement that the grand jury be presented with available exculpatory evidence before making its probable cause determination. *See* [*Williams*, 504 U.S. at 55] (holding that there is no "require[ement] for [a federal] prosecutor to disclose exculpatory evidence to the grand jury").

*Ward*, 2021 WL 3912803, at *8. The District Court, then, in a footnote citing *Allen*, observed,

> The [c]ourt is aware that the Tennessee rule may be different, and that exculpatory evidence may need to be provided to a grand jury prior to its deliberations, and indeed to a defendant even prior to the preliminary hearing. [*Allen*, 2020 WL 7252538, at *21] (holding that "[t]he State's failure to furnish obviously exculpatory information before the preliminary hearing, coupled with the death of . . . the State's key witness, before [d]efendant had an opportunity to cross-examine . . . violated [d]efendant's right to a fair trial."). . . . [I]t is not to say that probable cause cannot be conceptualized—and discussed in training or a manual—without reference to exculpatory evidence.

*Id.* n.8.

Under *Allen*'s guidance, prosecutors would be well-advised to fully comply with *Brady* prior to every preliminary hearing, lest they risk committing a *Brady* violation should one of their witnesses subsequently become unavailable for trial. While laudable in theory, this approach is unworkable in reality.

Unless arrested pursuant to an indictment or a presentment, Tennessee criminal defendants are entitled to a preliminary hearing within fourteen days of their initial appearance if they are in custody and within thirty days if they are released. Tenn. R. Crim. P. 5(c)(2)(A). Prosecutors, in the context of *Brady*, are responsible for exculpatory evidence in their possession as well as any exculpatory evidence in the possession of other governmental agencies. *See Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). While it *might* be feasible in some cases for prosecutors to review and disclose exculpatory evidence in their own possession prior to a preliminary hearing, it would be an onerous burden to expect them to gather, review, identify, and disclose exculpatory evidence in the possession of any of the governmental agencies involved in the case prior to a preliminary hearing like the one at bar, which took place a mere twenty-two days after the alleged offense. Imposing such a burden on the prosecution would undoubtedly have the effect of delaying preliminary hearings, a consequence that would defeat the hearing's purpose as a "screening function," designed to quickly determine "whether there is evidence sufficient to justify the continued detention of the defendant." *See Waugh*, 564 S.W.2d at 658-59; *see also Ruiz*, 536 U.S. at 633 (in the pre-plea context, noting that the "added burden imposed upon the Government by requiring [the provision of 'affirmative defense' information] well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process").

We note that even if *Brady* were to apply, this case is factually distinguishable from *Allen*. The affidavit of complaint here included all of the essential information that the Defendant claims he did not receive until the post-indictment discovery provision. For instance, the affidavit included information that both Messrs. Hall and Jeffreys, in speaking with Corporal Weir on the scene, only indicated that a man named "Johnny" knocked on the door and fired some sort of firearm inside the apartment and that both men mentioned Johnathan Clayton, but neither referred to the Defendant; it included information that the Defendant told Corporal Weir that he could not identify the weapon used; and it included portions of Mr. Hall's police statement made the following day wherein he identified the Defendant as a second perpetrator. Importantly, the Defendant, armed with this information, was able to cross-examine Mr. Hall at the preliminary hearing about these inconsistencies. Mr. Hall's medical records were not in the State's possession at the time

of the preliminary hearing and were therefore not subject to *Brady* disclosure. Finally, none of this information was "obviously exculpatory" as was the defendant's wife's recantation in *Allen*. The potentially exculpatory evidence here simply confirmed what the Defendant already knew, i.e., that Mr. Hall and Mr. Jeffreys only identified the codefendant on the scene. It was, therefore, corroborative, but its deprivation at the preliminary hearing phase was certainly not of a similar character as the complete recantation by the defendant's wife in *Allen*.

For the reasons stated, however, we hold that *Brady* does not apply to preliminary hearings and that a *Brady* analysis is, therefore, not the appropriate vehicle to address a situation such as the one at bar. Where the prosecution seeks to admit at trial the preliminary hearing testimony of an unavailable witness, and the defense did not possess the full plethora of exculpatory information at the preliminary hearing that it would have had at trial, the admission of that witness's prior testimony should be governed by the well-established principles concerning confrontation and hearsay. In these cases, the question will be whether the defendant had a similar motive and opportunity to cross-examine the witness at the preliminary hearing given the lack of the exculpatory information.

Here, the Defendant had a similar motive and opportunity at the preliminary hearing to develop Mr. Hall's testimony through cross-examination. *See Summers*, 159 S.W.3d at 598. As noted above, "[c]omplete identity of the issues is not necessary," so long as the issues are sufficiently similar to give a similar motive for cross-examination. *Howell*, 868 S.W.2d at 251. Though gun charges were added after the preliminary hearing, there was no dispute that a gun was used to commit these crimes. The primary issues at the preliminary hearing were the same as they will be at trial: whether there was a single shooter and the identity of the Defendant as one of the perpetrators. *See Shipp*, 2017 WL 4457595, at *7. The Defendant had all of the relevant information from the affidavit of complaint to provide him a sufficient opportunity to cross-examine Mr. Hall at the preliminary hearing. In fact, the record showed that defense counsel did just that by questioning Mr. Hall about his on-the-scene identification of only one perpetrator and inquiring about the inconsistency of his later police statement identifying a second perpetrator, the Defendant. The Defendant was aware from the affidavit of complaint that Mr. Hall was previously unable to identify the gun used, though Mr. Hall stated at the preliminary hearing that the gun was likely a .40 caliber. Furthermore, on cross-examination, Mr. Hall admitted to smoking marijuana on the night of the shooting and testified that the door was not open "all the way" when the shooting started. It also appeared from questioning at the Defendant's preliminary hearing that defense counsel had knowledge of the contents of Mr. Hall's testimony given the week prior at codefendant Clayton's preliminary hearing. As noted above, "the Confrontation Clause guarantees only

an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish[.]" *Owens*, 484 U.S. at 559-60.

We conclude that the lack of discovery materials in this case did not significantly impede the Defendant's motive and opportunity to cross-examine Mr. Hall at the preliminary hearing. *See Jackson*, 2022 WL 1836930, at *18 (rejecting the argument that preliminary hearing testimony was improperly admitted because the defendant did not have access to certain discovery materials and was not able to impeach the witness with her prior statements to law enforcement, her failure to identify the defendant from a photographic lineup, her statement that she believed the defendant was running after her trying to shoot her, or her failure to call 911 in the hotel lobby); *Warner*, 2018 WL 2129509, at *17 (rejecting the argument that lack of discovery at the preliminary hearing violated the defendant's right to confrontation because he could not meaningfully cross-examine the witness); *Shipp*, 2017 WL 4457595, at *5-7 (rejecting the argument that the defendant did not have a similar motive or adequate opportunity to cross-examine the witness because he did not have access to her prior statement regarding the facial tattoo at the time of the preliminary hearing); *Echols*, 2014 WL 6680669, at *13 (rejecting the argument, under a plain error analysis, that testimony from the preliminary hearing was not admissible due in part to lack of discovery and concluding that the defendant had an opportunity and similar motive to cross-examine the witness); *Chapman*, 2005 WL 2878162, at *5 (rejecting the argument that the defendant was entitled to receive the witness's statement prior to the preliminary or the convening of the grand jury). We reiterate that both this court and the Tennessee Supreme Court have rejected the claim that cross-examination at the preliminary hearing was insufficient for Confrontation purposes due to differences in the nature of the proceedings, including the burden of proof. *See Howell,* 868 S.W.2d at 251; *Grubb*, 2006 WL 1005136, at *5-7. Accordingly, we conclude that the requirements of confrontation were satisfied in this case and that the trial court erred by refusing to admit Mr. Hall's preliminary hearing testimony.

## III. CONCLUSION

In consideration of the foregoing, the order of the trial court excluding Mr. Hall's preliminary hearing testimony is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

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KYLE A. HIXSON, JUDGE