

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Gingeree Smith

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Rutherford County

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) 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.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain 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. In addition, 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 hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am in private practice.

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

I was accepted into the Tennessee Bar by waiver in 1994 and my BPR number is 016541.

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

I took and passed the Missouri bar exam and my bar number is 34591. The Missouri license is in non-resident status and I was admitted in May of 1987.

I also took and passed the Illinois bar exam and my bar number is 6200755. I was admitted to the Illinois bar in May of 1989. The Illinois license is currently non-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).

I have been temporarily suspended for non-payment of enrollment fees in Missouri in the past. My license was reactivated once the bar dues were completely paid. Further, I was retroactively reinstated after the fees were paid each time. Additionally, I continued to make payments on the dues until they were paid. When I worked in Missouri, my bar dues were always paid on time because I had a significant income stream. All bar dues, in the three states, have been paid throughout the more than 34 years that I have been practicing law. There were no issues with the Illinois bar, as that state's bar dues are significantly less than other states.

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).

Private practice - 1989 through present – St. Louis, Missouri, (1989-1994) and Nashville (1994-present). The areas of practice include: state and federal criminal law (I represented a defendant in a six week federal, multiple defendant jury trial – St. Louis), personal injury and worker’s compensation.

St. Louis County Public Defender’s Office – Assistant Public Defender, 1986 through 1989. Handled numerous felony/misdemeanor jury and bench trials, pleas, preliminary hearings, traffic, domestic violence and trafficking cases.

UAW Chrysler Legal Services – Law Clerk – Summer 1986, drafted motions and conducted legal research for staff attorneys.

Law Offices of Forriss Elliott – pre-licensed observatory position – 1986.

Law Offices of Bussey and Jordan – pre-licensed observatory position - 1985.

Iowa Civil Rights Commission – law student – trained mediator position - 1984-1985.

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 always been ready and willing to take cases.

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

I practice personal injury, traffic, worker’s compensation, juvenile and adult criminal law. Additionally, I have also represented a client in an adoption matter in Tennessee. The Tennessee practice has consisted mostly of criminal law cases (99 percent). However, I am an experienced personal injury and worker’s compensation attorney.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the

evaluation of your application.

My private Missouri practice consisted mostly (75 percent) of personal injury and worker's compensation law cases. As a solo practitioner, I handled fewer criminal law cases in my private practice in Missouri than here in Tennessee. Guilty verdicts were appealed and some were argued in the appellate courts when I worked in the St. Louis County Public Defender's Office. Consequently, I wrote some appeals as a public defender before an appellate attorney was designated in the office. From that point, appeals were directed to the appellate attorney. I am enclosing an appeal, as a writing sample, from my early days as a public defender. I handled many cases as an indigent defense lawyer, including numerous docket calls, preliminary hearings, probation violations, jury, bench trials and pleas. Additionally, I worked as a trained mediator with the Iowa Civil Rights Commission while I was in law school.

Other than the income earned from the unsolicited federal criminal appointment, my income was solely generated from a private repeat and referred client base. Hence, I was appointed to this lengthy federal matter shortly after I left the public defender's office.

As a solo practitioner, I was constantly saving money for the quarterly tax bills. As a result, I was not able to accumulate a savings portfolio. I still have the McBee bookkeeping system that I utilized to track income and expenses during that time. Though I was not being paid fully by the criminal clients, I never took losses on my tax statements. These clients also referred business to the office.

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

When I worked in the St. Louis County Public Defender's Office, I wrote and argued appeals for cases that resulted in guilty verdicts. Additionally, I tried a multiple defendant, criminal case in the St. Louis federal court system for six and a half weeks. Some defendants were from other countries and required court interpreters. My client was from Medellin, Colombia, South America. There were many jury trials but I remember a case where the client bought a soft drink for me after the closing argument, as a gesture of appreciation. Another client followed me into private practice after he picked up a new case.

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

I worked as a trained mediator for the Iowa Civil Rights Commission when I was in law school.

Cases were assigned to mediators for early resolution and settlement. One of my clients received the largest mediation settlement awarded, at that particular time, years ago. Mediators contacted various employers about whether they were interested in early resolution of the particular matter before the commission. Most companies were not interested in this opportunity, but some businesses wanted to work towards a settlement. When I worked as a public defender in St. Louis County, I had a drawer full of about 200 cases. The mediation cases that I handled cannot be recounted as I worked there decades ago in 1984 and 1985. However, I do remember getting the largest mediation settlement, to date, on one particular case. This case involved a white female and her employer was willing to settle the matter and offered the position back.

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.

When I lived in St. Louis, I dispensed money from a personal injury claim to my client as he had severe mental and physical disabilities. After the settlement was dispersed, I gave an accounting to the court. He received money from his settlement on a monthly basis until the funds were exhausted. While I received a contingency fee from his settlement, I did not receive any additional fees/interest for the administration of his funds.

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

I have worked in the Nashville criminal court system as well. Additionally, I had a limited practice in Illinois. Thus, I have practiced law in three different states.

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.

Last year, I have applied for one trial court judicial position in Rutherford County.

EDUCATION

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

University of Missouri - Columbia – Bachelor of Journalism - 1980

Drake University - JD – 1985

PERSONAL INFORMATION

15. State your age and date of birth.

I am 63 years old and my date of birth is [REDACTED], 1958.

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

I have lived in Tennessee for almost 28 years. My father and his family were from Denmark, Tennessee. The family name is Williamson. The Williamson family has been traced back to Isaac Williamson, who born in 1818, in North Carolina, to a 13 year old mother named Fanny. Isaac Williamson came to Tennessee at some point during his life because he passed away in 1876 in Madison, Tennessee. The generational line is as follows: Isaac Williamson, Sam D. Williamson (born in Tennessee in 1864), Isaac Williamson (born in Tennessee), Bethel Williamson (born in Tennessee) and Gingeree Williamson-Smith. The Williamson's, including my father, were farmers. We have some unsubstantiated information about Isaac Williamson's father during this pre-Civil War era. However, these are the confirmed Tennessee pioneers and ancestors.

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

I have lived at this address for 28 years.

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

I am registered in Rutherford County.

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

N/A - My father, who was born in Denmark, Tennessee, served in the Korean War for two years.

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.

N/A

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.

N/A

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.

N/A

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

No

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

I was divorced in 1982.

About ten years ago, my husband was in a car wreck and I was named in the Davidson County proceedings though I was not in the vehicle at the time of the collision. Our insurance company

resolved the matter with the petitioner's lawyer.

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.

I have been a member of Born Again Church in Nashville for 27 years. When I was in college, I pledged and became a member of Zeta Phi Beta Sorority (1978). Additionally, I was a girl scout troop leader in 1997 at Born Again Church. I recently helped with a Covid vaccination effort at Walgreens, sponsored by the church and other community based organizations. Also, I was a math competition proctor at Pope John Paul II High School for two competitions from 2017-2018. Before that, I worked concessions and in the library at Overbrook School. I participated in the parent group, sold football game programs and worked in the textbook dispensary at Montgomery Bell Academy from 2010 – 2012. Throughout this time, I also drove children to various math competitions.

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

I have sometimes belonged to the American Bar Association.

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.

I was the board chairperson of the Lutheran Hilltop Day Care Center, for preschool children, in St. Louis, Missouri.

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

I have not published any legal articles but as a journalism student and graduate, I have written numerous articles which have been published in newspapers.

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.

N/A

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.

In 2018, I ran for state senator for the 13th District of Rutherford County, Tennessee. This position is filled by voters and I was unsuccessful in this bid. In my run for this position, I gathered petition signatures, met constituents, participated in a radio interview, attended debates and social functions.

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

N/A

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

I am enclosing an appellate brief that I wrote as a public defender.

ESSAYS/PERSONAL STATEMENTS

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

I would like to offer my personal, legal and writing skills to the bench. This application is also a small tribute to my family's legacy in Tennessee. Essentially, this is an opportunity to be of service to the court and the citizens of the state of Tennessee. I have always respected and revered the law. Hence, I believe that such an appointment to the Supreme Court of Tennessee

would be an honorable calling that I would answer with dedication, reverence and humility. My father left Tennessee looking for opportunity, even though his family had farmed the land in this state for generations. Ironically, I now find myself looking for the same opportunity. As I have gotten older, I have come to appreciate the challenges that he must have endured during that time period. Apart from my deeply rooted connections to this state, I believe that my purpose is to serve others from within the confines and structure of the law.

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)*

Most of the criminal cases that I handle now are court appointed cases for indigent defendants. Thus, I have significant criminal law expertise, having worked as public defender. The commitment is that my clients should receive the best defense possible - regardless of the ability to pay. I have been committed to this principle throughout my career. My experience has enabled me to quickly analyze and evaluate cases. Basically, I have already handled most of the cases several times over during my career - though there have been a few outlier fact patterns. Additionally, I resolved more serious cases when I worked in the public defender's office. When I was in private practice in Missouri, most of my criminal law clients were unable to pay the entire fee. Usually, only a portion of the fee was paid. However, I never withdrew from anyone's case because of an inability to pay. A steady and increasing client base supported the business with repeat and referral cases.

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

I am seeking an appointment to the Tennessee Supreme Court, which has five positions. Each member serves an eight year term, which can be extended. My personal and professional experience would be an asset to this body of law. I have handled both personal injury and worker's compensation cases. Further, I have an extensive criminal law background.

Self-study is another asset that I could offer the Supreme Court as reading is my favorite pastime. So, I try to make time for reading every day. Usually, I am reading at least two or three books at a time. For instance, I just finished reading A Lesson Before Dying, Beowulf and Things Fall Apart. Also, I have a stash of books that I plan to read. Currently, I am reading Brave New World along with a political science book. Some of my favorite books include Handmaid's Tale, Grapes of Wrath, Scarlett Letter, Antigone, Les Miserables and the Bible. Hence, I would bring an appreciation of literature to the court.

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

As someone who has run for political office, I hope to maintain a relationship with the public. My social skills are warm and approachable. I am confident that this area is intact. I enjoy talking and relating to most everyone. Further, my communication skills are genuine and authentic. An example of my networking skills occurred during my first jury trial in St. Louis County. Incidentally, I had my first jury trial just two and a half months after starting in the office. Needless to say, I was unsuccessful in my efforts to get a continuance, even after my office partner, who was supposed to be the second seat, called in sick on the day of trial. Consequently, I went to the first assistant in the office and he became the on the spot second seat. He helped me tremendously as he gave a brilliant, short, note less closing argument after my closing argument. From the corner of my eye, I could see him calming my client down after I informed the jury that this was my first trial during void dire. That first trial resulted in a not guilty verdict as did the second and third trials. Oftentimes co-workers would support each other during jury verdict readings. As a new attorney, I often sought help from co-workers and other private lawyers. Additionally, I observed other trials that were not mine own for added experience. I watched other lawyers try various cases including death penalty cases, as well. Further, I also sat as a second seat for someone else's trial during my time as a public defender. These experiences have prepared me to relate to the community.

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)*

The life experience that has had the most significant impact on my growth and development has been my time as a mother. As a result of being a mom, I gained patience, long suffering and wisdom. For example, I relate to the younger clients because I understand their developmental mind set, perspective and perception. Hence, I am better able to communicate with them. I know where they are developmentally because of the experiences that I have had with my children. Before I had children, I relied on training (trial college) and collaborations. Now that I have raised three children, I combine training with experience for a complete package. Consequently, most parents are also involved with other children. Often parents are somewhat involved with other children and families as well as their own children. For example, there were times when I transported children to school events, music and dance lessons. I also worked in the library. This provides an extended and expanded view of parenthood, from which I gleaned. I can relate to the clients because I understand the maturation process. I had a long career as an attorney before I ever had children so these experiences with infants, children and young adults have been valuable and useful.

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)

As a criminal defense attorney, I have had many instances where I have not understood my client's choices. Yet, I manage to set my personal feelings aside and continue to relate and represent clients in spite of differing opinions. This is a natural instinct and talent that I have been graced with and developed throughout the years. This sense of fairness was inherent but was professionally undertaken when I began work as a mediator at the Iowa Civil Rights Commission. The intense training and concentrated experience that I received as a public defender in St. Louis County prepared me to handle most legal issues. During that time, I met many different clients with an array of problems. I have disagreed with choices that my clients made. However, I treat everyone with relational compassion, respect and dignity. Therefore, I review the legal aspects and intimacies of each case with neutrality. Then, I exam the legal consequences of a given fact pattern. Also, I focus on the legal issues of a given scenario. For example, when handling search and seizure matters, I weigh the probable cause implications of the intrusion. The law should uphold a measured standard of review without implicit/explicit bias or prejudice. Further, the system fails when laws are not protected or respected. Upholding established, well-grounded law is essential to due process and public confidence in the judicial process. Embracing these principles of fairness and justice would be my goal as a judicial officer.

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.Pastor Horace and Kiwanis Hockett [REDACTED], Nashville, TN 37207 [REDACTED] [REDACTED]
B.Elder Brian Hocket [REDACTED], Nashville, TN 37207 [REDACTED]
C.Rod McDaniel, [REDACTED], Hermitage, TN 37076 [REDACTED]
D.Wanda McGowan, [REDACTED], Memphis TN 37214 [REDACTED]
E.Karynthia Phillips, [REDACTED], Nashville, TN [REDACTED]

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: November 17, 2021

Gingeree Smith

Signature

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



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

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

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

WAIVER OF CONFIDENTIALITY

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

Gingereee Smith

Gingereee Smith
Signature

November 17, 2021

016541
BPR #

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

_____ My Missouri bar number is 34591 and my
_____ Illinois bar number is 6200755.

matB

REC'D FEB 18 1988

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
FEB 18 1988

DEIRDRE O'MEARA AHR
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.)
)
 GREGORY WALKER,)
)
 Appellant.)

Cause No. 53618

Michelle

Appeal from the Circuit Court of the
County of St. Louis, State of Missouri

Division No. 6

The Honorable Robert W. Saitz, Judge

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

GINGEREE E. WILLIAMSON
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[Handwritten signature]

I N D E X

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JURISDICTIONAL STATEMENT

The Missouri Court of Appeals, Eastern District, has jurisdiction of this appeal for the reason that appellant was convicted after trial by jury, in St. Louis County Circuit Court, of the offenses of stealing, third offense, a class C felony, and property damage second degree, a class B misdemeanor.

Appellant's motion for a new trial was timely filed and overruled on June 26, 1987. Appellant was sentenced to serve a term of ten (10) years imprisonment for the offense of stealing, third offense, and a concurrent term of five (5) months imprisonment for the offense of property damage second degree.

This appeal does not involve any construction of the United States Constitution, or the Constitution of the State of Missouri, or any other matter within the exclusive appellate jurisdiction of the Missouri Supreme Court and therefore jurisdiction lies in the Missouri Court of Appeals, Eastern District by virtue of Article V, Section III of the Missouri Constitution.

STATEMENT OF FACTS

On January 12, 1987, Gregory Walker was charged by way of information with stealing, third offense, and property damage second (L.F. 1). This cause was tried by a jury on June 3rd and 4th, 1987. The jury returned verdicts of guilty on both counts (L.F. 33, 34). On July 24, 1987, the court assessed punishment at ten (10) years imprisonment for the offense of stealing, third offense and a concurrent term of five (5) months imprisonment for the offense of property damage second. Appellant's motion for a new trial was overruled at this time (L.F. 40).

Officer Gary Thompson of the Des Peres Police Department testified that he stopped appellant at about 3:15 p.m. on January 3, 1987, on Manchester Road for a broken tail light lens (T. 132). Appellant was driving a truck registered to Terry Johnson (T. 151).

Officer Thompson testified that the truck was towed to the police station and searched by Officer William Gleason who did not testify. Officer Thompson testified that Officer Gleason recovered a white coat from the truck (T. 143). Officer Thompson did not participate in this phase of the investigation, and was not present when Officer Gleason seized the jacket from the truck. Officer Thompson also testified that a necklace was recovered from the appellant's person during the booking procedure (T. 133).

Dorothy Edscorn testified that she parked her car on the lot of a West County Shopping Center and went into the J.C. Penny store (T. 87). When she returned, she noticed that the left front window on the drivers side of her car was broken out and a necklace and white coat were removed from her vehicle (T. 88).

Cynthia Olsen testified that she heard glass shattering while appellant was standing near Edscorn's vehicle (T. 97). On January 4, 1987, she viewed a photo lineup and chose appellant's photograph from a group of six (6) mug shots (T. 101). She also testified that the person she saw on January 3, 1987 had no beard (T. 101).

William Bradford, a St. Louis County Correctional Officer, testified on behalf of the defendant. Officer Bradford said Cynthia Olsen gave conflicting testimony at a preliminary hearing conducted on January 28, 1987. According to Bradford, Olsen testified that the subject she saw standing near Edscorn's vehicle on January 3, 1987, had a beard (T. 170). Ann Walker, appellant's mother, and Bonnie Walker, appellant's sister, both testified that appellant was clean shaven on the day in question (T. 175, 180).

There were no blacks on the 34 member jury panel. Therefore, appellant was tried by an all white jury (T. 63). The jury convicted appellant of stealing third offense, and property damage in the second degree (L.F. 33, 34). Further facts relevant to legal issues appear in the text of this brief as necessary.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE HEARSAY TESTIMONY OF OFFICER GARY THOMPSON ON THE SEIZURE OF THE JACKET FROM THE TRUCK AS OFFICER WILLIAM GLEASON, WHO CONDUCTED THE INVESTIGATION AND ALLEGEDLY SEIZED THE JACKET FROM THE TRUCK, WITHOUT A SEARCH WARRANT, WAS NOT CALLED BY THE STATE TO TESTIFY DURING THE TRIAL. OFFICER GARY THOMPSON'S TESTIMONY WAS HEARSAY OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED. APPELLANT WAS THUS DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE MISSOURI CONSTITUTION AND THE UNITED STATES CONSTITUTION.

State v. Jordan, 664 S.W.2d 668 (Mo. App. 1984);

State v. Harris, 660 S.W.2d 349 (Mo. banc. 1981);

State v. Brooks, 618 S.W.2d 22 (Mo. banc. 1981);

State v. Roberts, 485 S.W.2d 70 (Mo. 1972).

II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE JURY TO HEAR TESTIMONY CONCERNING THE PRIOR OUT-OF-COURT IDENTIFICATION OF APPELLANT, BECAUSE THE PRIOR OUT-OF-COURT IDENTIFICATION WAS MADE UNDER CIRCUMSTANCES SO INHERENTLY SUGGESTIVE AND CONDUCIVE TO MISTAKEN IDENTIFICATION AS TO VIOLATE APPELLANT'S RIGHT TO DUE PROCESS AND FAIR AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I,

SECTIONS 10, 15, and 18(a), AND UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State v. Higgins, 592 S.W.2d 151 (Mo. banc. 1979);

State v. Sanders, 621 S.W.2d 386 (Mo. App. 1981);

State v. Toney, 680 S.W.2d 268 (Mo. App. 1984);

State v. Harding, 734 S.W.2d 871, 873 (Mo. App. 1987);

State v. Robinson, 725 S.W.2d 50 (Mo. App. 1987);

State v. Stephens, 708 S.W.2d 345 (Mo. App. 1986);

U.S. v. Wade, 388 U.S. 218 (1967);

Simmons v. U.S., 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968);

Kirby v. Illinois, 406 U.S. 682 (1972);

Neil v. Biggers, 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 374 (1972);

State v. Parker, 458 S.W.2d 241 (Mo. 1970).

III

THE TRIAL COURT ERRED IN FAILING TO QUASH THE ALL-WHITE VENIREMEN PANEL. EACH OF THE THIRTY-FOUR (34) POTENTIAL JURORS WERE MEMBERS OF THE WHITE RACE. APPELLANT IS A BLACK MALE AND IS THEREFORE A MEMBER OF A COGNIZABLE RACIAL GROUP. ALL OF THE STATE'S WITNESSES ARE WHITE. APPELLANT WAS THUS DENIED HIS RIGHT TO DUE PROCESS AND FAIR AND EQUAL PROTECTION OF THE LAWS, AND HIS RIGHT TO A FAIR AND IMPARTIAL JURY OF HIS PEERS AS GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 10 and 18(a), AND UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986);

Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 825 (1965);

People v. Hall, 35 Cal.3d 161, 197 Cal. Rptr. 71, 679 P.2d 854 (1983);

State v. Butler, 731 S.W.2d 269;

Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880);

Hill v. Texas, 316 U.S. 400, 86 L.Ed. 1559, 62 S.Ct. 1159 (1942).

IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AS A JACKET SEIZED FROM A TRUCK AND A NECKLACE SEIZED FROM APPELLANT WERE ADMITTED INTO EVIDENCE EVEN THOUGH THEY WERE SEIZED AS THE RESULT OF A WARRANTLESS SEARCH. THUS, THE APPELLANT WAS DENIED HIS RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, WHICH RIGHTS ARE GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 15, AND THE UNITED STATES CONSTITUTION, AMENDMENTS IV AND XIV.

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967);

Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968);

South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1967);

United States v. Staller, 316 F.2d 1284 (5th Cir. 1980), cert. denied 449 U.S. 869 (1980);

State v. Goodrich, 256 N.W.2d 506 (Minn. 1976);

United States v. Taylor, 428 F.2d 515, (8th Cir. 1970), cert. denied 91 S.Ct. 1208 (1971);

Chambers v. Mahoney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

V

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER THE TRIAL COURT VERBALLY REPRIMANDED APPELLANT IN FRONT OF THE JURY BY THREATENING TO HAVE HIM REMOVED FROM THE COURTROOM. SAID COMMENT BY THE TRIAL COURT INDICATED TO THE JURY THAT THE COURT WAS NOT NEUTRAL AND UNBIASED. AS A RESULT OF THIS STATEMENT THE JURY TO BECAME BIASED AND PREJUDICED AGAINST APPELLANT. APPELLANT WAS THUS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY, DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 10, AND 18(a) OF THE MISSOURI CONSTITUTION.

State v. Embry, 530 S.W.2d 401 (Mo. App. 1975);

State v. Castino, 264 S.W.2d 372 (Mo. 1954);

Hunter v. United States, 62 F.2d 217 (5th Cir. 1932);

State v. Landers, 596 S.W.2d 487 (Mo. App. 1980);

State v. Moore, 303 S.W.2d 60 (Mo. 1957).

VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO

SUSTAIN A CONVICTION. THUS, APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS WHICH RIGHTS ARE GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 2, 10 AND 18(a), AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI AND XIV.

State v. Mayes, 654 S.W.2d 926 (Mo. App. 1983);

City of Kansas City v. Oxley, 579 S.W.2d 113 (Mo. banc. 1979);

State v. Talbert, 524 S.W.2d 58 (Mo. App. 1975).

A R G U M E N T

I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE HEARSAY TESTIMONY OF OFFICER GARY THOMPSON ON THE SEIZURE OF THE JACKET FROM THE TRUCK AS OFFICER WILLIAM GLEASON, WHO CONDUCTED THE INVESTIGATION AND ALLEGEDLY SEIZED THE JACKET FROM THE TRUCK, WITHOUT A SEARCH WARRANT, WAS NOT CALLED BY THE STATE TO TESTIFY DURING THE TRIAL. OFFICER GARY THOMPSON'S TESTIMONY WAS HEARSAY OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED. APPELLANT WAS THUS DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE MISSOURI CONSTITUTION AND THE UNITED STATES CONSTITUTION.

Officer William Gleason, a state endorsed witness, was not called by the state to testify even though he conducted the investigation and allegedly seized the jacket from the truck without a search warrant. Officer Gary Thompson was permitted to offer hearsay evidence on when, where and how the jacket was seized from the truck by Officer Gleason even though Officer Thompson was not present when the actual search and seizure took place (T. 135-140).

One of the issues in this case was whether appellant was in possession of stolen property. Officer Thompson testified that a jacket was recovered from the truck

appellant was operating, therefore, the testimony was elicited for the sole purpose of proving the truth of the matter asserted, i.e., that the stolen jacket was found in appellant's car. Said statement by Thompson was a conclusion based on what Gleason had told him. Hearsay evidence is in-court testimony of an extra judicial statement offered to prove the truth of the matter asserted. Such testimony rests on the credibility of the out-of-court declarant. State v. Jordan, 664 S.W.2d 668, 670 (Mo. App. 1984) citing State v. Harris, 620 S.W.2d 349, 355 (Mo. banc. 1981).

Hearsay evidence is admissible when it is not offered for the truth of the matter asserted, but for some other legitimate purpose, State v. Brooks, 618 S.W.2d 22 (Mo. banc. 1981); State v. Roberts, 485 S.W.2d 70 (Mo. 1972). However, in this case there can be no doubt that evidence concerning the seizure of this jacket from the truck was offered for the truth of the matter asserted. The fact that the state did not have the proper witnesses available is not an exception to the hearsay rule.

Initially, the trial court held, "Obviously if the officer didn't conduct the investigation, he can't very well disclose what the investigation revealed, if in fact your offering it for the truth of what's involved in the investigation. And I'm going to sustain the objection" (T. 136).

In spite of appellant's objections, the trial court later permitted Officer Gary Thompson to offer hearsay evidence (T. 136-144).

Appellant was denied the right to meet, confront and cross-examine all witnesses against him. As Officer William Gleason was not called as a witness by the state, appellant was denied the opportunity to challenge his credibility and to cross examine on the alleged seizure from appellant's vehicle.

The trial court was clearly erroneous in overruling defendant's objection on this issue. Appellant asserts that his conviction is a direct result of this improper ruling. Appellant's conviction should be overturned.

II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE JURY TO HEAR TESTIMONY CONCERNING THE PRIOR OUT-OF-COURT IDENTIFICATION OF APPELLANT, BECAUSE THE PRIOR OUT-OF-COURT IDENTIFICATION WAS MADE UNDER CIRCUMSTANCES SO INHERENTLY SUGGESTIVE AND CONDUCTIVE TO MISTAKEN IDENTIFICATION AS TO VIOLATE APPELLANT'S RIGHT TO DUE PROCESS AND FAIR AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 10, 15, and 18(a), AND UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Missouri Courts have developed a twofold analysis on evaluating out-of-court identifications. The following should be considered, "Were the investigative procedures employed by the police impermissibly suggestive? If so, were they so impermissibly suggestive as to create a very substantial likelihood of an irreparable mistaken identification at trial?" State v. Higgins, 592 S.W.2d 151, 159 (Mo. banc. 1979).

Another identification test has also been devised, on the issue of the reliability of in-court identification. "If they are found to be impermissibly suggestive, then the inquiry turns to the reliability of the in-court identification." State v. Sanders, 621 S.W.2d 386, 389 (Mo. App. 1981); State v. Toney, 680 S.W.2d 268, 275 (Mo. App. 1984); State v. Harding, 734 S.W.2d 871, 873 (Mo. App. 1987); State v. Robinson, 725 S.W.2d 50, 53 (Mo. App. 1987). "If the police procedures are found to be impermissibly suggestive, then the question becomes whether there was an independent reliable basis for the in-court identification." State v. Stephens, 708 S.W.2d 345, 348 (Mo. App. 1986). Thus, the test regarding out-of-court identification is suggestiveness and not reliability.

Appellant contends that the out-of-court identification was so suggestive that appellant was denied due process.

The unreliability and fallibility of eye witness identifications are well known. There have been many instances of wrongful convictions based on mistaken identifications. Such miscarriages of justice undermine public confidence in the legal system. Justice Frankfurter once said, "What is the worth of the identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure." [Citation omitted] U.S. v. Wade, 388 U.S. 218, 228 (1967).

In the case at hand, appellant was convicted as a direct result of the identification testimony of Cynthia Olsen. Ms. Olsen had only a brief opportunity, about 15 seconds, to view the perpetrator of the offense as she was walking away from the crime scene and towards the mall (T. 109).

The Des Peres Police called Ms. Olsen to the station to view photographs and identify the suspect (T. 101). The five other subjects used in the spread did not bear remote resemblance to appellant who was a light to medium complexed black male. The other subjects were dark, black males (T. 122). On the other hand, the five other photographs used in the lineup had the same light blue

concrete wall background, indicating that they were probably taken at the same time and place. In addition, appellant's mug shot was displayed on a smooth pink wall background (T. 102). Appellant's picture was readily identifiable as being different from the other five pictures because it stood out from the other photographs. Therefore, it was inevitable that Cynthia Olsen chose appellant's photograph from the lay out.

"The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined." [Citation omitted] "Suggestion can be created intentionally or unintentionally in many subtle ways" Id. at 226.

"It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." Simmons v. U.S., 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968). In this case, the police could have ensured a reliable and valid identification by making sure that all mugshots were on the same background, and that the five other subjects used in the lineup bore some resemblance to appellant.

Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in her memory the image of the photograph, rather than of the person actually seen, thereby reducing the

trustworthiness of subsequent lineup or courtroom identifications. Id. at 383-84.

Certain safeguards must be taken to guarantee an untainted identification because, "[t]he police themselves have in a given case, little or no doubt that the man put up for identification has committed the offense and that their chief preoccupation is with the problem of getting sufficient proof, because he has not 'come clean', involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way..." [Citation omitted]. Wade, at 235.

"The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." Kirby v. Illinois, 406 U.S. 682, 691 (1972). Given the circumstances of appellant's photo lineup, there is little doubt that appellant's right to due process was clearly violated.

It is clear that the procedures employed in this case were impermissibly suggestive. The procedures employed violated appellant's Fifth and Fourteenth Amendment rights to due process. In reviewing appellant's due process allegation it should be remembered that the Supreme Court has said, "[i]t is the likelihood of misidentification which violates a defendant's right to due process." Neil v. Biggers, 409 U.S. 188, 198, 34 L.Ed.2d 401, 93 S.Ct. 374 (1972).

The above analysis indicated that "The Courts jealously guard against any chance of error" in identification cases. State v. Parker, 458 S.W.2d 241, 243 (Mo. 1970). In the case at hand, appellant's rights were clearly violated and with the techniques employed it was inevitable that Cynthia Olsen chose appellant as the person responsible for this crime. Appellant's conviction should be overturned.

III

THE TRIAL COURT ERRED IN FAILING TO QUASH THE ALL-WHITE VENIREMEN PANEL. EACH OF THE THIRTY-FOUR (34) POTENTIAL JURORS WERE MEMBERS OF THE WHITE RACE. APPELLANT IS A BLACK MALE AND IS THEREFORE A MEMBER OF A COGNIZABLE RACIAL GROUP. ALL OF THE STATE'S WITNESSES ARE WHITE. APPELLANT WAS THUS DENIED HIS RIGHT TO DUE PROCESS AND FAIR AND EQUAL PROTECTION OF THE LAWS, AND HIS RIGHT TO A FAIR AND IMPARTIAL JURY OF HIS PEERS AS GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 10 and 18(a), AND UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant, Gregory Walker, a black male, was tried and convicted by an all white jury. There were no blacks on the entire thirty-four (34) member jury panel (T. 63).

Appellant was required to select a jury from a panel that was all white even though St. Louis County has a sizeable black population. Appellant concedes that there was no direct prosecutorial misconduct, however, the

state's purposeful and deliberate denial of jury participation to blacks on account of race violates the Equal Protection Clause.

Supreme Court precedent supports appellant's contention that exclusion of blacks from jury participation is in violation of the Constitution. This precedent was announced in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), "State's purposeful or deliberate denial to Negroes on account of race and participation as jurors in the administration of justice violates the Equal Protection Clause." The Court maintained that, "Discrimination within the judicial system is especially pernicious because it is a stimulant to that rare prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

The initial standard set forth in Swain required the defendant to prove that blacks had been systematically excluded from jury panels. This standard has since evolved with the advent of Batson v. Kentucky, 106 S.Ct. 1712 (1986), wherein the defendant is no longer required to prove that the state discriminated over a period of time, but rather in the defendant's case only.

In the case at hand, all of the witnesses for the state, including the victim and eyewitness, were white. All of the witnesses for the defendant were black. Potentially racially sensitive aspects of a case should

be considered in evaluating the possibility for discrimination. "First, the susceptibility of the particular case to racial discrimination may be evaluated." People v. Hall, 35 Cal.3d 161, 167-168, 197 Cal. Rptr. 71, 672 P.2d 854 (1983). This theory was also reinforced in State v. Butler, 731 S.W.2d 269. "The court may consider the race of the victims and primary witnesses."

This principle was upheld when the "Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880).

Excluding blacks from jury participation conflicts with the Fourteenth Amendment to the United States Constitution. "The exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure," Strauder v. West Virginia, supra. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice," Batson, supra.

In this case, appellant should have been tried by a jury with his background and experience. "The exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure", Strauder v. West Virginia, supra.

On the issue of panel selections, the Courts have consistently held that blacks cannot be purposefully excluded from this forum. "While decision of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice." Hill v. Texas, 316 U.S. 400, 406, 86 L.Ed. 1559, 62 S.Ct. 1159 (1942). Therefore, the process utilized to select the panel must also be nondiscriminatory.

Appellant pled facts pertaining to the exclusion of black venire members, which according to the principles espoused in Batson v. Kentucky, would entitle him to relief.

Appellant's conviction should be overturned as he was denied his right to a fair and impartial trial.

IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE BY ADMITTING AS EVIDENCE A JACKET SEIZED from A TRUCK APPELLANT WAS OPERATING AND A NECKLACE SEIZED from APPELLANT'S PERSON AS THE EVIDENCE SEIZED AS A RESULT OF A WARRANTLESS SEARCH. THUS, THE APPELLANT WAS DENIED HIS RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, WHICH RIGHTS ARE

GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTION 15, AND THE UNITED STATES CONSTITUTION, AMENDMENTS IV AND XIV.

Physical Evidence was obtained during a search of the cab of the truck appellant was operating and the necklace was seized during a search of appellant's person (T. 143).

Generally, the search of private property is unconstitutional unless it is conducted pursuant to a properly issued search warrant. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Appellant concedes that a suspect and his property may be seized contemporaneously when an individual is under a lawful arrest. Once articles are in lawful police custody, the property and vehicle are then considered subject to a warrantless search or inventory, the so-called "inventory search" exception to the Fourth Amendment. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). Thus, listing articles in lawful police custody as a matter of procedure is not improper as protection against civil actions. Inventory searches are permitted under the following three circumstances: to protect the owner's property, for documentation against civil action, and to protect authorities from concealed or apparent threats in the form of contraband, weapons or other dangers. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

Courts have long recognized this exception to the warrant requirement. A search will be considered proper if the vehicle is lawfully impounded. United States v. Staller, 616 F.2d 1284 (5th Cir. 1980), cert. denied, 449 U.S. 869 (1980). If impoundment is not necessary, then a search is unreasonable. State v. Goodrich, 256 N.W.2d 506 (Minn. 1976). Automobile searches must meet the test of reasonableness under the Fourth Amendment before evidence seized as a result of a warrantless search is admissible. United States v. Taylor, 428 F.2d 515 (8th Cir. 1970), cert. denied, 91 S.Ct. 1208 (1971).

However, if an inventory search is merely pretext for an investigatory search for evidence, then the search is illegal and the seized evidence is inadmissible. Chambers v. Mahoney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

Under this test, the inventory search of appellant's truck and person was clearly improper as it was merely a pretext for an investigatory search for evidence. Harris v. United States, supra. Therefore, the evidence should have been suppressed under this test. Chambers v. Mahoney, supra.

In the case, the arresting authorities could have left the vehicle parked on the street, notified the owner, and taken the appellant into custody. If this had been done, the need for protection would not have followed. In this case, the unnecessary impoundment of

the truck and body search, gave the police an excuse to conduct an investigatory search. The trial court erred in legitimizing this activity. Appellant's conviction should be overturned.

V

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER THE TRIAL COURT VERBALLY REPRIMANDED APPELLANT IN FRONT OF THE JURY BY THREATENING TO HAVE HIM REMOVED FROM THE COURTROOM. SAID COMMENT BY THE TRIAL COURT INDICATED TO THE JURY THAT THE COURT WAS NOT NEUTRAL AND UNBIASED. AS A RESULT OF THIS STATEMENT THE JURY TO BECAME BIASED AND PREJUDICED AGAINST APPELLANT. APPELLANT WAS THUS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY, DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 10, AND 18(a) OF THE MISSOURI CONSTITUTION.

Due Process requires that a judge remain absolutely impartial as to both his remarks and conduct. A status of neutrality must be maintained throughout the ordeal of trial. State v. Embry, 530 S.W.2d 401, 403 (Mo. App. 1975); State v. Castino, 264 S.W.2d 372, 373-75 (Mo. 1954).

Judicial comments are improper if the remarks prejudice the jury against the defendant. State v. Landers, 596 S.W.2d 487, 488 (Mo. App. 1980). "A

CONTRACT →

District judge should not assume the role of prosecuting attorney and lend weight of his influence to the side of government, but should maintain an attitude of impartiality between government and accused. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused..." State v. Embry, supra at 403 citing Hunter v. United States, 62 S.W.2d 217, 220 (5th Cir. 1932). The Court also noted that, "It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty... should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial." Hunter v. United States, 62 F.2d 217 (5th Cir. 1932).

During the prosecutor's cross examination of Ann Walker (the defendant's mother) the trial judge said, "Mr. Walker, any more outbursts, and you'll be outside the courtroom" (T. 177).

Said comment by the court gave the appearance that the court was prejudiced against appellant. Therefore, the comment had the effect of aiding in the prosecution of the case by alienating the jury from the defendant. Thus, the jury was prejudiced against the defendant. The improper comment of the court undermined appellant's defense. He was therefore, denied a fair trial.

A high standard of fairness and impartiality must be maintained by a trial judge. This includes the principle that a judge must say nothing that can be construed by a jury to a defendant's detriment. State v. Casino, supra. This correctly states the rule for judicial guidance. State v. Moore, 303 S.W.2d 60 (Mo. 1957). Appellant maintains that his conviction is a direct result of the improper comment by the trial court. A conviction brought about such an impropriety cannot stand.

VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION. THUS, APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS WHICH RIGHTS ARE GUARANTEED BY THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 2, 10 AND 18(a), AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI AND XIV.

In deciding whether there is sufficient evidence to support a conviction, the reviewing court must distinguish between the weight of the evidence and the substantiality of the evidence of the defendant's guilt. The weight of the evidence is for the jury, but only if the reviewing court can first say that there was substantial evidence of guilt to support the verdict of the jury. State v. Mayes, 654 S.W.2d 926 (Mo. App.

1983); City of Kansas City v. Oxley, 579 S.W.2d 113 (Mo. banc. 1979); State v. Talbert, 524 S.W.2d 58 (Mo. App. 1975).

The issues and arguments raised in the prior argument are applicable and should be applied here. Given the foregoing discussions, it is clear that the verdict in appellant's case was not supported by sufficient substantial evidence.

C O N C L U S I O N

WHEREFORE for the foregoing reasons, appellant respectfully requests that this Court reverse and remand the above-style cause for a new trial.

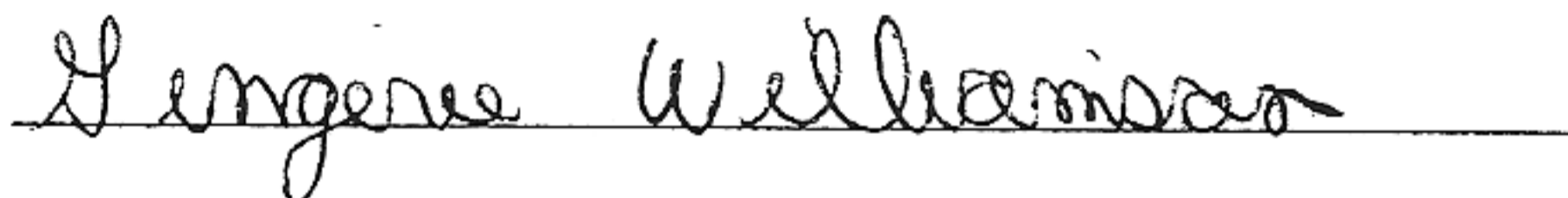
Respectfully submitted,



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D A T E D February 18, 1988

Two copies of the foregoing mailed to The Office of the Attorney General for the State of Missouri this 18th day of February, 1988.



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May 30, 2018

Employees of a Subsidiary of Financial Services Group, Inc.

(Adjuster)

Law Office of

1050 Crown Pointe Parkway, Suite 550

Atlanta, GA 30338-7726

The Hartford

Southeast WC Claim Center

P.O. Box 14473

Lexington, KY 40512

RE: Claim No.:

Date of Injury:

Your Insured:

Injured Worker:

Dear Ms.:

Please accept the following letter in support of our request for settlement of the above-captioned. This letter is sent in an effort to settle our case. I believe that you have obtained and paid all ambulance and medical bills in this matter. The medical bills total over eight thousand dollars.

(Injured Party) suffered severe physical injuries including permanent disfigurement of his right forearm while working on a warehouse truck.

(Injured Worker) has lived in Nashville, Tennessee for about 42 years. (Injured Party) obtained a Bachelor of Music Education degree from Tennessee State University in 1997. Further, he graduated from Tennessee State University with a Master of Science Degree in Music Education in 2004. He passed the music teacher certification examination and was therefore a licensed professional educator. However, his license is no longer active since he has not worked as a music teacher for many years. He taught primary school music and middle school band in the Metro Nashville Public School System for about four years at two separate lengthy intervals. An interesting fact about the (Injured Worker) is that he began working while still in primary school at the age of eight years old. He began working an hourly job as a grocery store bagger while in the third grade. Also, he worked full time in a bank while in high school in St. Louis, Missouri and during college he worked in kitchen services at a restaurant in Nashville, Tennessee. Prior to his teaching career, he worked at United Parcel Service for 17 years in the office where he held various administrative support jobs including but not limited to his last position as a computer technician. After graduating from college, he worked two jobs for two years with Metro Public Schools and United Parcel Service simultaneously. Sometime later, after receiving his master's degree, he then taught school for two years. Then he worked for about eight years at Dell Computer as a pro support computer technician.

(Injured Party) was in the Tennessee State University band where he served as a drum major during his senior year of college at the age of 23. He also played his senior trombone classical recital during this time as well. He began his college career at the age of 19 and resumed his academic pursuits later in life with the help of the UPS college assistance program. During college he made a recording with the university band and this group traveled to the grand opening of the Epcot Center in Florida. (Injured Party) is an accomplished trombonist who has been playing this instrument for 46 years. This music career began in his freshman year of high school when he joined the band. However, he also plays oboe, tuba and a little piano. Additionally, he plays all genres of music including jazz, gospel, classical, big band and rhythm and blues. He currently plays as a traveling and local musician on weekends with a few different bands in addition to his position with the warehouse. He uses this, now deformed, right forearm when he plays the trombone. He is married and has three children, all of whom are college students.

This injury occurred at work while hospital beds were being removed from a warehouse truck. On January 17, 2017, at approximately 1:00 p.m., a large, heavy hospital bed, atop of another hospital bed, that was being moved, fell onto (Injured Worker's) right forearm and he was immediately transported to the hospital by ambulance. The bed fell full brunt force onto his forearm and knocked him over completely, until the bed was fiercely wrestled and hoisted from his body. Initially, he was in shock and did not realize that he was bleeding from the impacted area. He was taken to the emergency room by ambulance where he received numerous stiches in his right forearm through muscle tissue, fat and surface layers of skin. After the accident, he suffered with agonizing pain, soreness and oozing from the injury. Once the stiches were removed, on February 1, 2017, an unsightly, bumpy, infection/rash developed on the gashed in area. Needless to say, this injury took months to heal and three to four daily dressing changes were required. He took or was administered the following medications as well:

Morphine Sulfate, Promethazine HCl, Lidocaine/Epinephrine, Tetanus/Diphtheria, and Toxoids. He also received a prescription for pain medication.

The permanent, unsightly scar is very apparent. This deep gash will be highly noticeable particularly during the summer months. Additionally, (Injured Party's) arm now has a non-uniform shape. The once smooth arm silhouette has been altered and permanently, disfigured because the gashed in area has receded.

Immediately after this incident, he was transported by ambulance to Summit Medical Center where the diagnosis was as follows: "Abrasion (left forearm), Laceration (right forearm) 15cm gaping 6cm, adipose separated down to the muscle sheath but no evidence of muscle injury. Exposed nerve and intact vein lateral." The number of closure layers was three and the suture technique "involved simple (Sub cutaneous, fascia, lat skin: Running (medial skin 8 c.m)." The free text HPI notes reiterate, "pt sts hospital bed fell off another hospital bed striking his volar arms bilateral and sustaining deep lac to rt forearm." Secondary impressions included "Abrasion of left forearm, Contusion of left forearm."

His total extensive medical bills are listed as follows:

Nashville Fire Department Ambulance	\$696.80
Radiology Alliance, PC	\$29.00
Summit Medical Center Emergency Room	\$327.89
Two Rivers Emergency Physician	\$2,785.00
Summit Physician Bill	\$4264.39
Total Bills	\$8103.08

In view of the facts and circumstances at hand coupled with the nature and extent of my client's injuries, I am prepared to recommend settlement all claims for (dollar amount). I believe this would be fair and adequate compensation. Please review this correspondence. This settlement opportunity will remain open for a period of thirty days (30). Thank you for your attention to this matter.

Sincerely Yours,

Gingeree Smith,
Attorney at Law

GES/gs

