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. 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.

Assistant Public Defender, 11th Judicial District.

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

Licensed in 2010. BPR #029337

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.

Only licensed to practice law in Tennessee.

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).

Not applicable

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).

Operated a law practice from 2010-2017. Practiced primarily in the areas of criminal defense, property law, and small business law. Before law school I was a teacher doing experiential/outdoor education in a variety of settings.

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.

Employed continuously since my legal education.

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

I represent criminal defendants charged with the full variety of criminal offenses. I practice law in both General Sessions and Criminal Court and handle cases from initial appearance through jury trials. I also handle cases post-adjudication either in conjunction with our appellate division or personally. I am my office's representative to the Hamilton County Recovery Court and serve as a team member in my role as a defense 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.

I operated a solo law practice from 2011 until obtaining my current employment in the fall of 2017. During my time as a solo practioner, I handled hundreds of criminal cases a year, both appointed and privately retained. My criminal caseload was primarily centered in Hamilton County but I also handled a number of cases in surrounding counties (Marion, Sequatchie, Bradley primarily). Occasionally as part of this part of my practice, I appeared in front of the Department of Safety Legal Division related to forfeitures/seizures. I tried seven cases to a jury involving charges ranging from Driving under the Influence all of the way up to First Degree Murder. During that time, I also argued two cases before the Court of Criminal Appeals.

While operating my practice, I also handled a large number of cases in the Civil Division of General Sessions Court. These were primarily landlord/tenant cases and I represented a number of property management companies and individual property owners. I also occasionally represented tenants in a pro bono capacity referred to me through Legal Aid. My work there occasionally metastasized into matters in the Civil Circuit courts and I handled a number of cases there as well.

Finally, I had a number of small business clients that I provided assistance with a variety of needs. These ranged from the formation stage (LLCs and Partnership agreements) into contractual and other issues that occasionally arose. I did conduct a bench trial of behalf of a small business client in the Hamilton County Chancery Court that led to a successful verdict.

All of the above I did without any employees. I prided myself on personally handling all matters and knowing that I was the responsible party. Operating this way also helped me to understand the importance of efficiency and doing thoughtful good work. It was also crucial for me to develop relationships throughout the legal system that allowed me to provide representation that was effective and impactful.

I have now been employed as an Assistant Public Defender for 4.5 years. I have roughly 50 clients at any given time charged with a wide variety of criminal charges. I practice primarily in Criminal Court but occasionally am assigned cases in General Sessions for clients charged with serious felonies. I have tried an additional three cases to juries as the lead attorney including one in which I had a new attorney as co-counsel. I really enjoy the opportunity at my current position to mentor younger attorneys as I am grateful for the wisdom other attorneys shared when I was new. For almost a year, I have been assigned as the public defender to the Hamilton County Recovery Court. That aspect of my job includes representing the participants in Recovery Court and participating as a member of the team. I have been fortunate to participate in specialized training including attendance at the National Association of Drug Court Professional yearly conference this past August in Washington, D.C.

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

Although I am proud of my success in trial (the majority of cases I have tried ended either in acquittals or in convictions on lesser charges), I am most gratified that I have always conducted myself as an attorney ethically and respectfully.

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.

Not applicable

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.

As a newly licensed attorney, I was appointed by the Chancery Court to serve as a guardian ad litem in conservatorship proceedings.

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

I taught an Intro to Criminal Law class at the University of Tennessee at Chattanooga for two years.

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.

Not applicable

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.

I attended the University of South from 1996 until my graduation in 2000 with a B.S. degree in Geology. I attended the University of Colorado Law School from 2006 until my graduation in 2009. In law school, I graduated as a member of the Order of the Coif recognizing that I was in the top ten percent of my class. As a law student, I continually received scholarship awards due to my academic success as well as community involvement. I participated as a student attorney in the year-long American Indian legal clinic and also volunteered as a community representative in the university's restorative justice program.

PERSONAL INFORMATION

15. State your age and date of birth.

I was born on [redacted]1978 and am currently 43 years old.

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

11.5 years

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

11.5 years

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

Hamilton

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.

Not applicable

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.

Not applicable

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.

Not applicable

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.

Not applicable

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

Not applicable

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.

Not applicable

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.

Member – Southeastern Climber's Coalition 2010 - Present

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.

Not applicable

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.

Member - The Justices Ray L. Brock-Robert E. Cooper American Inn of Court 2011-2018
- Served as member of the Board from 2016-2017

Member – Chattanooga Bar Association 2018 - Present

Member – Tennessee Bar Association 2017 – Present

Member – Tennessee Association of Criminal Defense Lawyers 2017 - 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.

Not applicable

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

Not applicable

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.

Not applicable

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.

Not applicable

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

Not applicable

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

I have attached an appellate brief that I drafted and argued before the Court of Criminal Appeals. I have also attached a recent motion that I drafted and argued which was sustained.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position because I want to continue to serve the people of Tennessee and also expand my criminal law experience in a new direction. While I enjoy trial practice, I miss the opportunity to engage with the law in a deeper way. I have always enjoyed reading judicial opinions and researching the law and believe that this opportunity would suit my skills and experience. I have always been passionate about helping to ensure that the rule of law is applied equally. At its heart, the Court of Criminal Appeals is a court to fix errors that have happened in trial courts. Helping to fix those errors is crucially important in ensuring that the law remains equally enforced across the eastern section of Tennessee.

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)***

Throughout my entire career, I have been dedicated to ensuring equal justice to all under the law. During all of my years as a solo practioner, I was recognized by the Tennessee Supreme Court as having performed at least 50 hours of pro bono service. I frequently represented people facing eviction or other civil lawsuits without payment and considered it my duty as an attorney. Judges and clerks throughout the courthouse trusted me to help indigent individuals whether it was simply answering a question or representing them. I accepted my current position in part to dedicate all of my law practice to assisting indigent people receive excellent legal representation and protecting the rights guaranteed to all Tennesseans. I continue to do this important work every day.

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

The Court of Criminal Appeals has twelve judges who hear appeals in criminal cases from trial courts throughout Tennessee. These appeals consist primarily of "appeals of right" from concluded cases at the trial court level. The Court may also hear discretionary interlocutory appeals when requested from a party while the case is still pending in the trial court. Finally, the

Court also hears appeals from denials of post-conviction relief. The Eastern Section of the Court consists of four judges who hear appeals from cases originating from the Eastern "grand division" of Tennessee as outlined in T.C.A. §4-1-202. I believe that I have a depth of criminal trial practice that would be an asset to the court. I have handled thousands of criminal cases, which will help in understanding both the law and its application at the ground level.

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 been greatly blessed in life, I believe it is important to help others who have been less fortunate. My legal career thus far has always involved helping people in a direct way. I have also taken advantage of my legal experience to assist students considering a career in the law. For years I have volunteered in our local Youth Court that helps local high school students with an interest in the law adjudicate minor violations in Juvenile Court. It is a fantastic program that provides experience for students to act as attorneys while also drawing juvenile offenders into a program that demonstrates a positive potential future. I have also served as a volunteer coach for a Mock Trial team and in other years a juror/judge during the state Mock Trial competition. Personally, I am a big proponent of the local blood bank and donate blood often. Finally, given my professional experience I have had clients who are served by our local food bank and have donated time and money to their important efforts. Now that my family is growing up, I plan to increase my community involvement along the same lines. If appointed to a judgeship I would expand my community involvement with youth. I am especially interested in increasing my involvement in communities who may not have contact with my attorneys or judges in a positive way. The law should serve all equally and I am passionate about increasing community awareness in that way.

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)***

In my last semester of law school I was in an accident and received a spinal cord injury. I spent a month in the hospital having surgeries and then three months in a specialized rehabilitation hospital. I went from almost graduating law school to being unable to move my legs. When I first arrived, I was told that they would help me prepare to live the rest of my life in a wheelchair. I left that hospital without the aid of a wheelchair feeling like the luckiest man in the world. I still acutely feel how fortunate I am. In addition to luck, I saw how a positive attitude and hard work can make all the difference. I also learned the importance of utilizing the talents of those who surround us. In my case, my two physical therapists pushed me through my recovery. They realized quickly that I would do anything they asked and more. We brought out the best in each other, I bought in completely which energized them to push me further. I have always sought to identify and utilize the talents of others to improve my performance. My experience is one of the most powerful of my life and continues to guide me today. Those lessons: of humility, the

value of hard work, maintaining an optimistic attitude, and how working together synergistically can benefit everyone apply to this day. If appointed as a judge, I promise to continue employing those lessons and doing excellent work.

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

Absolutely. I believe that the true power of our great legal system is that foundationally it is to apply to everyone equally. The law provides all of us with equal rights and a framework in which to move through the world. If individual actors began to substitute their personal feelings any equality under the law will quickly erode. I believe firmly in the separation of powers announced in the Tennessee constitution and think that judges should not legislate and vice versa. I have been a criminal defense lawyer the entirety of my legal career but realize in that capacity I play a limited role. All of the other actors (Judge, District Attorney, etc.) play their roles as well. I have represented my clients zealously within the bounds of the law and always strive to protect their constitutional rights. In that capacity, I have dealt with many instances in which a Judge has ruled against me. In no circumstance have I not dealt with that gracefully or forgotten the larger picture. The criminal justice system works best when all actors play their roles well. Moving outside of those boundaries invites chaos. Particularly in regards to an appellate court, legislating from the bench or attempting to adjust the law out of sympathy for an individual risks harming many future people.

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. Judge Tom Greenholtz- Second Division Hamilton County Criminal Court
Hamilton County Courts Building
[redacted]
Chattanooga, TN 37402
[redacted]

B. Steven Smith – Public Defender 11th Judicial District
[redacted]
Chattanooga, TN 37402
[redacted]

C. Brian O'Shaughnessy – Managing Partner, O'Shaughnessy & Carter, PLLC
[redacted]
Chattanooga, TN 37402
[redacted]

D. Shannon Morgan – Director, Hamilton County Drug Recovery Court Coordinator
[redacted]
Chattanooga, TN 37402
[redacted]

E. Denise Ray – Investigator, Public Defender's Office
[redacted]
Chattanooga, TN 37402
[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 Eastern Section of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: February 10, 2022.

Signature

When completed, return this application to Ceesha 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.

Jay Arthur Perry

Type or Print Name

Signature

February 10, 2022

Date

029337

BPR #

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

Not applicable

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ISSUES PRESENTED FOR REVIEW

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II. THE TRIAL COURT COMPOUNDED THE ABOVE ERROR BY ORDERING THAT DEFENDANT COULD NOT CALL WITNESSES AT TRIAL REGARDING THE ABOVE FAILURE TO COLLECT DEFENDANT'S CELL PHONE.

III. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO IMPEACH THEIR WITNESS, CO-DEFENDANT JOHN T. SIMPSON, AFTER HE TESTIFED THAT DIDN'T KNOW WHO HAD KILLED BERNARD HUGHES.

IV. THE TRIAL COURT FURTHER ERRED BY ALLOWING THE STATE TO ENTER WITNESS SIMPSON'S PREVIOUS STATEMENT TO POLICE INTO EVIDENCE.

V. THE TRIAL COURT ERRED BY LIMITING DEFENSE COUNSEL'S ABILITY TO MEANINGFULLLY CROSS EXAM WITNESS, JOHN T. SIMPSON, REGARDING HIS PREVIOUS STATEMENT AND GENERAL CREDIBILITY.

STATEMENT OF THE CASE

This case began in Division III of Hamilton County Criminal Court with the filing of a true bill (Case #280013) on April 27, 2011 charging the Defendant with First Degree Murder (T.C.A. §39-13-202), Felony Murder (T.C.A. §39-13-202), Attempt Especially Aggravated Robbery (T.C.A. §39-13-403), Attempt First Degree Murder (T.C.A. §39-13-202), and Employ Firearm During a Dangerous Felony (T.C.A. §39-17-1324). (I R., 4-9). There were three co-defendant's charged with the same offenses; Steven Ballou, Unjolee Moore, and John Simpson. (*Id.*). Current counsel was appointed on this matter on July 18, 2011 after Defendant's previous attorney moved to withdraw. (I R., 10-14). At some point, the Co-Defendant's were severed by agreement and then Defendant and Steven Ballou were consolidated on February 19, 2013. (I R., 81-82). As the case proceeded to trial there were two relevant hearings on motions to dismiss due to the loss or intentional non-recovery of possibly exculpatory evidence related to Defendant. The first was on April 2, 2012 and the trial court denied those motions on April 10, 2012. (I R., 54-55). Upon the discovery of further information after that hearing, Defendant filed a motion to reconsider on April 30, 2012. (I R., 56-57). A hearing was conducted on July 16, 2012 regarding Defendant's motion and that motion was subsequently denied. (I R., 56-67). The case proceeded to a jury trial which was conducted on September 3-5, 2013. Immediately before the trial began, the State of Tennessee dismissed Count 1 of the true bill alleging First Degree Murder. The jury returned a verdict on September 5, 2013 finding the Defendant guilty of Felony Murder, Attempt Especially Aggravated Robbery, Attempt First Degree Murder, Employ of a Firearm During a Dangerous Felony. (I R., 91). On that date, the Defendant was sentenced to Life on the Felony Murder conviction. (I R., 92). A sentencing hearing was conducted on

November 25, 2013 where defendant was sentenced on the remaining counts as follows: 12 years – Attempt Especially Aggravated Robbery, 25 years – Attempt First Degree Murder, and 6 years – Employ Firearm During Dangerous Felony. (I R., 93-95). Counsel filed a motion for new trial on December 17, 2013 and an Amended Motion for New Trial on March 7, 2014. (I R., 97-98 and 101-02). A hearing was conducted on those motions on March 12, 2014 and after that hearing they were denied. (I R., 105). Subsequently, Notice of Appeal was timely filed. (I R., 106).

STATEMENT OF FACTS

This matter concerns the events of June 28, 2010 at which time Bernard Hughes was killed and Timothy Westfield sustained gunshot wounds. On Defendant's (and all co-defendants) Motion To Dismiss, the Trial Court conducted a hearing on April 2, 2012. The Trial Court heard testimony from four witnesses at that hearing. First to testify was Investigator Wenger of the Chattanooga Police Department. Inv. Wenger was the lead investigator on the present case and was called to a home at 2004 Curtis Street on July 13, 2010. (III T., 15, 12). Inv. Wenger had received notice from another Investigator that a cell phone belonging to Defendant, Harold Butler, had been found at that residence. (*Id.*). The cell phone found had specifically been tracked by law enforcement because they believe it belonged to Harold Butler who they were seeking as a suspect. (VIII T., 377). At that time, Investigator had already taken out an arrest warrant for Defendant for the present case. (III T., 12). Upon his arrival, Inv. Wenger told another officer, Lieutenant McPherson, that he wanted to collect the phone. (III T., 13). Inv. Wenger wanted to collect the phone because he believed it belonged to Harold Butler. (III T., 16). His belief was based in part on pictures he observed on the phone of the Defendant, Harold Butler. (*Id.*). Inv. Wenger indicated that he believed the phone could have important evidence regarding the case and that he had used cell phones in past investigations. (III T., 21-22).

However, he was ordered by Lt. McPherson not to collect the phone, question anyone about it or even to mention it. (III T., 13, VIII T., 379). That order was given almost immediately upon Inv. Wenger's arrival at the scene. (III T., 24). At the time, Lt. McPherson was working in the special investigations divisions and not in the homicide division. (III T., 14). Lt.

McPherson's other connection with the case was providing Inv. Wenger with the names of possible suspects on the night of the incident. (III T., 15). That information was based on conversation Lt. McPherson had with his niece, Myra Collier, who was a witness in the case. (III T., 27-28). The stated reason not to collect the phone was that federal marshals (who were present) needed it. (III T., 13). Federal law enforcement officers were on the scene because they were looking specifically for the Defendant, Mr. Butler. (III T., 25). Shortly afterwards, Inv. Wenger received a phone call from Sergeant Phillips (his direct supervisor) ordering him to comply with Lt. McPherson's order. (*Id.*). On scene, Inv. Wenger spoke with the marshals and was advised that they no longer needed it. (III T., 14). At that time, Inv. Wenger spoke with Lt. McPherson again and was told that he could speak with Antonio Watkins regarding the phone but could not collect it. (*Id*). Antonio Watkins initially indicated at the scene that he had purchased the phone three days prior from Harold Butler. (III T., 18). At the hearing, Mr. Watkins denied buying the phone from Mr. Butler and indicated that he had purchased the phone from an unknown party. (III T., 70). He also denied having spoken with Inv. Wenger about the phone on July 13, 2010. (III T., 68). Inv. Wenger testified that Mr. Watkins had told him that he purchased the phone from Defendant Butler at the scene on that day. (III T., 84). Inv. Wenger testified that much of Mr. Watkins testified to on that time was inconsistent with what Mr. Watkins had told him at the scene on July 13, 2010. (III T., 84-86).

Inv. Wenger did not agree with the order not to collect the phone and felt that there may have been evidence on the phone. (III T., 26). He specifically was unable to "find the things I wanted to look at". (III T., 23), and did not have a chance to look for voicemails and text messages. (III T., 34-35). This was also the first time in his career that Inv. Wenger had been ordered not to collect potential evidence. (III T., 33). Also, despite having investigated between

50-70 homicides he had never been ordered not to recover possible evidence. (VIII T., 402). Inv. Wenger noted this unusual situation in his report and that report was made an exhibit to the hearing (III T., 26-27, 31-32).

The next witness was Sergeant Bill Phillips with the Chattanooga Police Department. Sgt. Phillips received a phone call on July 13, 2010 from his lieutenant, Lt. Eidson. (III T., 36-37). During that phone call, Sgt. Phillips was told to call Inv. Wenger and tell him to "leave that phone along". (III T., 38). He immediately called Inv. Wenger and relayed that message. Sgt. Phillips testified that never in his 23 years as a police officer has he been told to order an investigator not to recover evidence. (III T., 39). Sgt. Phillips had been sleeping at the time of receiving the call from Lt. Eidson and resumed sleeping after his short conversation with Inv. Wenger. (III T., 40, 42).

Captain McPherson was called to testify next and relayed that on July 13, 2010 he was a Lieutenant (one rank lower). Capt. McPherson indicated that Myra Collier is his niece and that he may have had some conversations about the case. (III T., 45). Capt. McPherson recalled seeing Inv. Wenger at the scene but testified that he did not recall ordering him not to collect the phone. (III T., 46). He made this assertion of not remembering multiple times. (III T., 47, 48, 49, 50, 54, 55, 57, 58, 62). He also specifically agreed that he had never ordered someone not to recover evidence. (III T., 58).

Subsequent to this hearing, additional information was indicated to counsel regarding concerns that Inv. Wenger had about the testimony of Capt. McPherson on April 2, 2012. (IV T., 5). The Friday prior to the April 2nd hearing (March 30), in a conversation at the police station parking lot, Capt. McPherson told Inv. Wenger that the reason that he ordered him not to collect the phone of July 13, 2010 was because they didn't have legal standing to do so. (IV T., 5). An

Investigator Narramore was also present for this conversation. (IV T., 5). Inv. Narramore told him just to tell the truth at the upcoming April 2nd hearing. (*Id*). Inv. Wenger was disturbed that Capt. McPherson instead testified that he didn't even remember giving the order just three days later after this conversation in the police station parking lot. (*Id.*). After discussions with his supervisor, Inv. Wenger was told to send an email to the District Attorney's office detailing the pre-hearing parking lot conversation with Capt. McPherson. (IV T., 10). However, Sergeant Fields of the Chattanooga Police Department actually made that known to the DA's office. At the trial in this case, Defendant's counsel had subpoenaed both Capt. McPherson and Inv. Narramore to inquire into the issue of what happened both on July 13, 2010 and the subsequent parking lot conversation before the April 2nd hearing. The Trial Court ruled that the Defendant could not call either witness at trial. (VII T., 181-82).

Prior to trial, on or about August 28, 2013, the District Attorney's office received a letter from co-defendant John Simpson. (Ex. 1, Motion for New Trial). The authenticity of the letter was stipulated to by the State of Tennessee. (XI T., 3-4). That letter indicates that Mr. Simpson is not willing to testify at the trial of Defendant, Harold Butler and that he "can not honor our plea agreement that we have". (Ex.1, Motion for New Trial). The plea agreement he refers to was entered on June 22, 2013 and required Mr. Simpson to testify at the trial of all co-defendants. (Trial Ex. 112). On September 4, 2013 the State of Tennessee called John Simpson as a witness.

After a few preliminary questions, Mr. Simpson responds "No" when asked if he knows who killed Bernard Hughes. (VII T., 273). The State's counsel then attempts to force Mr. Simpson to read his previous statement to police. (VII T., 276-77). After objection by counsel, the Trial Court rules that the State can play Mr. Simpson's previous statement to police. (VII T., 277-280). At trial, Mr. Simpson denies that Harold Butler killed Bernard Hughes. (VII T., 280-

81). Mr. Simpson indicated during his testimony repeatedly that he had informed his standby counsel that he did not want to testify at Harold Butler's trial (VII T., 282, 283, 286). That standby counsel was John Allen Brooks (XI T., 5), and State's counsel, Cameron Williams, indicated that "I did have conversations with Mr. Brooks, prior to and during trial, about Mr. Simpson testifying". (XI T., 7). John Simpson reiterated at the Motion for New Trial that he made indications to his standby counsel that he was reluctant to testify during Mr. Butler's trial. (XI T., 37). After lengthy argument between the parties, the Trial Court eventually ruled that the impeachment was proper and that a portion of the statement was admissible under Rule 803(26) of the Rules of Evidence. (VII T., 289-300). As part of that rule the Trial Court indicates that depending on the cross-examination the State may be able to go into other portions of the previous statement. (VII T., 299-300). Upon cross-examination, Mr. Simpson states that Mr. Butler did not kill Bernard Hughes and that he was lying to Inv. Wenger when he told him that Mr. Butler had killed Bernard Hughes. (VII T., 303-04). The State of Tennessee then did seek to introduce other portions of the previous statement but the Trial Court did not allow it. (VII T., 304-07).

At the conclusion of the trial, the jury found the Defendant guilty of all counts. (IX T., 533-36).

ARGUMENT

I. THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION TO RECONSIDER DISMISSAL DUE TO STATE'S LOSS/NONCOLLECTION OF POSSIBLE EXCULPATORY EVIDENCE.

A failure to preserve potentially useful evidence motivated by bad faith on the part of the police is a due process violation that necessitates dismissal. In *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), the Tennessee Supreme Court addressed the issue as to what factors guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory. Initially, the State's duty to preserve evidence turns first upon whether the defendant would be entitled to receive the evidence in discovery. *Ferguson*, 2 S.W.3d at 917. Tennessee Rule of Criminal Procedure 16 permits a defendant to inspect tangible objects within the State's possession that are material to the preparation of the defense, that the State intends to use in its case-in-chief, or that were taken from or belong to the defendant. Tenn. R. Crim. P. 16(a)(1)(F). Where, such material has been destroyed or purposely not recovered, the critical inquiry was whether a trial, conducted without the evidence, would be fundamentally fair. *Ferguson* at 914. The Ferguson court explicitly noted that they were addressing a situation "wherein the existence of the destroyed videotape was known to the defense but where its true nature (exculpatory, inculpatory, or neutral) can never be determined." *Id.* at 915. Their analysis considered the U.S. Supreme Court's decision in *Arizona v. Youngblood,* 488 U.S. 51 (1988), which held that if a criminal defendant could show bad faith on behalf of the police to preserve potentially exculpatory evidence there would be a violation of the Due Process Clause. The Ferguson court rejected a pure Youngblood analysis and instead found the Tennessee Constitution to require an *expanded* level of due process protection. *Id.* at 916

(Citing *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). So the *Ferguson* decision provides an analysis to serve in cases where bad faith cannot be shown or even alleged. However, as the Court in Ferguson recognized, while the Tennessee Supreme Court can expand Due Process protection under Tenn. Const. Art. I, §8, they cannot shrink Due Process Protection afforded by the U.S. Constitution. *Id.* In cases in which the loss/destruction of evidence is due to bad faith on the part of the police, the most protective Due Process analysis is found in *Arizona v. Youngblood.*

Central to the Court's reasoning in *Youngblood* was that the Due Process Clause requires judicial intervention in "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." 488 U.S. 51, 58. The inherent speculative nature of such evidence is of no concern as the decision notes "we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it *could have* been subjected to tests, the results of which *might have* exonerated the defendant." *Id.* (Emphasis added). The court in *Ferguson* also makes clear that the speculative nature is no bar. The question is instead the State's duty to preserve evidence is limited to constitutionally material evidence described as "evidence that *might* be expected to play a significant role in the suspect's defense." *Ferguson*, 2 S.W.3d at 917 (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984) (Emphasis added)). The Tennessee Supreme Court held that the evidence must *potentially* possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Ferguson*, 2 S.W.3d at 915, 918 (Emphasis added).

In this matter, it is clear that the phone was in the possession of the State. It had been collected by state/federal officials. When Detective Wenger sought to take it into his possession

he was twice ordered by Captain McPherson not to collect it. He was able to make some preliminary observations about the phone including seeing photographs of the Defendant such that he believed it belonged to him. Inv. Wenger testified that he had used information on a phone many times during an investigation. A "smart phone" contains much information beyond phone call records. It contains photographs, text message records, GPS information, voicemails, etc. Much of this information is time stamped and is highly important in determining where a suspect was at certain times.

An order not to collect this phone was according to all involved "highly unusual". It must be asked, why would a police officer order potential evidence not to be recovered? There is at the least a sense of impropriety in making such an order. This sense clearly evolved into "bad faith" under any interpretation by Captain McPherson's testimony on April 2, 2012. On that occasion he made repeated claims to not remember ordering the phone not to be recovered, in reviewing his testimony it strains all credibility.

But the record contains even more evidence on this point. At the subsequent hearing, Inv. Wenger recounted that he had a conversation just days before April 2 where Capt. McPherson offered a tepid explanation for why he had ordered Wenger not to recover the phone. This clearly demonstrates that Captain McPherson "remembered" this incident and his testimony just a few days later was untrue.

So, not only had Captain McPherson ordered the lead investigator not to collect potential evidence on a suspect but then later lied under testimony about doing so. A clearer case of bad faith on behalf of a police officer would be hard to imagine. This is exactly the sort of scenario envision by the U.S. Supreme Court, where "in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." The fact that the

bad actor in this situation was Captain McPherson, whose own niece was a witness and whom himself had been involved from the beginning of the investigation only makes the scent of corruption stronger.

What is also clear is that we will never know what information was on the phone, what information could have been possibly exculpatory for the Defendant. Cell phones, especially I-Phones, contain much information about the user. This information includes location data, text messages, voicemails, photographs, etc. Such information could have been helpful in mounting a defense to these charges. It could have demonstrated where the Defendant was on the night of the alleged crime. It could have shown who he was speaking with, what conversations he was having. The State argues that the information contained on the phone is speculative and there is no direct evidence that it would be exculpatory. However, it is only speculative because of the Captain McPherson's actions. As an agent of the State of Tennessee, his actions were extremely inappropriate and the appropriate remedy is dismissal. Any trial under these circumstances would necessarily would unfair because the Defense was unable to examine the phone and present to the jury any possible exculpatory evidence. This Court should apply *Youngblood* to this analysis for two reasons. First, this is a situation where there is actual proof of bad faith on the part of the police. The analysis announced in *Ferguson* deals with cases where there is not evidence of bad faith, merely negligence. Secondly, the Tennessee Supreme Court in *Ferguson* announced that they were deciding on an analysis that was **more** protective than that of *Youngblood*. Using the *Ferguson* analysis to consider a situation where bad faith is evident would result in a decision that was **less** protective of a Defendant's right to a fair trial. Perversely, it would in fact be less protective of the right to a fair trial that either the *Youngblood* or *Ferguson* framework embody.

The Trial Court in dismissing the Defendant's motion applied the wrong analysis and came to the wrong conclusion. This Court should examine the record and apply the *Youngblood* analysis, and should grant Defendant's motion dismissing these charges.

II. THE TRIAL COURT COMPOUNDED THE ABOVE ERROR BY ORDERING THAT DEFENDANT COULD NOT CALL WITNESSES AT TRIAL REGARDING THE ABOVE FAILURE TO COLLECT DEFENDANT'S CELL PHONE.

The decision of whether to permit a witness to be recalled is entrusted to the sound discretion of the trial court and will not be reversed on appeal absent abuse. See *State v. Caughron*, 855 S.W.2d at 539 (Tenn. 1993); *State v. Hartman*, 703 S.W.2d 106, 116 (Tenn. 1985), cert. denied, 478 U.S. 1010 (1986); *State v. Johnson*, 685 S.W.2d 301, 306 (Tenn. Crim. App. 1984) (citing *Lillard v. State*, 528 S.W.2d 207 (Tenn. Crim. App. 1975)).

An essential due process right is the right to "call witnesses in one's own behalf" *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973); *State v. Sheline*, 955 S.W.2d at 47 (Tenn. 1997). The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Washington v. Texas*, 388 U.S. 14, 23 (1976); *Sheline*, 955 S.W.2d at 47. In *Washington v. Texas*, the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19, 87 S. Ct. at 1923 (emphasis added). Similarly, in *Chambers*, the Court stated that "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 U.S. at 295-96. The Chambers Court emphasized that the denial or "significant diminution" of these rights "calls into question the ultimate integrity of the fact finding process and requires that the competing interest be closely examined." *Id.*; see also *Sheline*, 955 S.W.2d at 47.

The facts of each case must be considered to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence. Generally, the analysis should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important. See *Chambers*, 410 U.S. at 298-301, 93 S. Ct. at 1047-49.

"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. All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Tenn. R. Evid. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Tenn. R. Evid. 403.

At the trial of this case, the State objected to the Defense calling two witnesses, Captain McPherson and ATF Agent Phillip Narramore. The Trial Court rules that the Defense can call neither, although on what basis is somewhat unclear. There is a discussion that includes an

assertion that this "should have been done preliminary", and that "it's too far afield". (VII T., 182). Captain McPherson clearly had relevant testimony at the trial of this matter. He had been involved in the investigation from the very beginning and in fact was related to one of the witnesses inside the apartment. He testified at the earlier hearing that he had some telephone conversations on the night of the incident with his niece, Myra Collier. He also was present during July 13, 2010 and gave two orders to the lead detective not to collect a cell phone that belonged either currently or recently to the Defendant. This incident was mentioned by Defense Counsel during opening arguments (VI T., 24-25) and discussed later in the trial during Inv. Wenger's testimony. Captain McPherson also had testified at a pre-trial hearing that he didn't remember giving this order. It was clearly relevant and necessary for the jury to hear about how a high ranking police officer connected to the case twice ordered the lead detective not to collect potential evidence belonging to the Defendant. It was further relevant that the same officer had lied under oath about his memory related to the phone. The defense at trial centered around identity and included assertions that the other perpetrators were attempting to frame the Defendant for their actions. The incidents involving Captain McPherson went straight to this defense and would have presented evidence to the jury that not all of the relevant evidence regarding the Defendant was collected. That in essence, the assertions of co-defendant's was assisted by the actions of the police. That the police were apparently only concerned with collecting evidence showing guilt and that any exculpatory evidence went purposefully uncollected.

Agent Narramore was necessary to demonstrate to the jury that McPherson had been untruthful in previous testimony on this matter. The false testimony (in this matter) of a high ranking Chattanooga police officer who was directly associated with this case was certainly

relevant. While it seemed like the Trial Court was concerned about getting into tangential matters, those concerns could have been addressed in other less restrictive means. A blanket order that the Defense couldn't even call either of these witnesses was error and prevented the mounting of a complete and necessary defense to these charges. Although, the Defense was able to discuss the matter with Inv. Wenger the exploration of this issue was insufficient without Captain McPherson's testimony. The jury did not get to hear the whole story about this affair and that resulted in the Defendant not having a fair trial that comported with Due Process rights. Thus, the need to call these two witnesses were "critical to the defense", the first *Chambers* factor to consider.

Next, the second *Chambers* is clearly present as to the presence of sufficient indicia of reliability in regards to these two witnesses. They both were law enforcement officials who were to be called in order to testify to things that they had witnessed firsthand.

Finally, according to *Chambers* the interest supporting the trial court's decision to exclude this evidence is required to be "substantially important". This requirement is included because of the Due Process concerns of not allowing a Defendant put on a complete defense, especially in this type of case which carries a mandatory life sentence. From the record, it is unclear exactly why the Trial Court ruled that the Defendant could not call these witnesses. It seems to be 403 concerns regarding confusion of issues or waste of time. These relatively slight concerns are clearly not "substantially important" and do not outweigh the constitutional Due Process concerns at the heart of the matter.

The Trial Court's ruling excluding these two witnesses out of hand was harmful error and necessitates this Court ordering a new trial.

III. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO IMPEACH THEIR WITNESS, CO-DEFENDANT JOHN T. SIMPSON, AFTER HE TESTIFED THAT DIDN'T KNOW WHO HAD KILLED BERNARD HUGHES.

Rule 607, Tennessee Rules of Evidence, provides that "the credibility of a witness may be attacked by any party, including the party calling the witness." Prior inconsistent statements may be used to impeach the credibility of a witness. Tenn. R. Evid. 613; Neil P. Cohen et al., Tennessee Law of Evidence, § 613.1 at 405-06 (3d ed. 1995 & Supp. 1998). An inconsistent statement may be used to impeach the credibility of a witness who denies or cannot remember having made a prior statement. *State v. Kendricks*, 947 S.W.2d 875, 882 (Tenn. Crim. App. 1996). Rule 607 "permits impeachment by either party so long as the questioning is not a pretext for putting inadmissible hearsay before the jury." *State v. Timmy Fulton*, LEXIS 457, *6, No. 02C01-9706-CC-00223 (Tenn. Crim. App., 1998), app. denied, (Tenn., Dec. 28, 1998).

A party may not call a witness to testify for the primary purpose of introducing a prior inconsistent statement that would otherwise be inadmissible. *Mays v. State*, 495 S.W.2d 833, 837 (Tenn. Crim. App. 1972). Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony. *State v. Roy L. Payne*, LEXIS 47, *4-5, No. 03C01-9202-CR-00045 (Tenn. Crim. App. 1993). In such circumstances, striking the testimony and providing a curative instruction may be insufficient to render the error harmless, *State v. Steve Johnson*, LEXIS 182, *25, No. 02C01-9504-CC-00097 (Tenn. Crim. App. 1997), because the jury is unlikely to consider the prior statement for credibility purposes only and may view it as substantive evidence. Tennessee Law of Evidence, § 613[2][d]; see Tenn. R. Evid. 403.

The present case bears many similarities to the case of *Mays v. State.* First, there is evidence in the record that the State knew that John Simpson was not going to testify. He had

sent a letter to the State just days before trial informing them of this. The State makes no mention that he will testify during their opening statement. Mr. Simpson later testifies that he informed his elbow counsel that he would not testify and the State's attorney makes clear during the Motion for New Trial that he communicated with elbow counsel during the Defendant's trial. At trial, during his testimony, it is clear that Mr. Simpson was clumsily attempting to invoke his 5th Amendment right not to testify but the Trial Court repeatedly insisted that he testify. Of crucial importance is that John Simpson testifies at trial that he doesn't know who killed Bernard Hughes. At that point he hasn't testified to anything that is prejudicial to the State, and is merely reluctant to testify. The State did not even seek to treat Mr. Simpson as a hostile witness because this is what they were anticipating. That he would not testify in accordance with his earlier statement and they would be able to "impeach" him and get his otherwise inadmissible statement before the jury. This is exactly what the Court was considering *Mays*, a situation where "there was nothing to impeach. Impeachment was calculated to and did serve only one purpose which was to put before the jury the out of court statements". 495 S.W.2d 833, 836-37.

This error by the Trial Court was not harmless. They were presented with a statement from a co-defendant that directly alleged the Defendant was responsible for the crime. This portion of the statement was without the context of the entire statement and presented at trial in such an unusual way that the Jury could only consider it in an inappropriate manner. This is what the court considered in *Johnson*, but in this matter the damage is considerably worse. The appellate court in *Johnson*, ordered a new trial even though the Trial Court had stricken the inappropriate testimony and given a curative instruction. Here, neither was done.

It is troubling that this error occurred in part because of the actions of the Trial Court. Mr. Simpson attempted to invoke his 5th Amendment right a number of times but the Trial Court

repeatedly insisted that he had to testify. The active role the Trial Court played resulted in this error being compounded.

Furthermore, the Judge did not issue any statement that the previous statement should be considered only for the purposes of credibility. It was then (as discussed below) actually entered into evidence as substantive evidence. This gives the above error such importance that it requires a ruling by this Court for a new trial.

IV. THE TRIAL COURT FURTHER ERRED BY ALLOWING THE STATE TO ENTER WITNESS SIMPSON'S PREVIOUS STATEMENT TO POLICE INTO EVIDENCE.

In 2009, the Tennessee Supreme Court adopted a new hearsay exception that allows the limited use of some out of court statements to be used as substantive evidence. That exception, Tenn. R. Evid. 803(26) provides:

> A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:
>
> (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
>
> (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
>
> (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

The Advisory Commission Comments (2009) note as to the "trustworthiness" requirement that "[t]his is to prevent fraud such as where a parent tape records a child after training the child to say "bad things" about the other parent in anticipation of a custody dispute."

Although many of the requirements of 803(26) were met during trial, the Trial Court erred in finding that this prior statement was "made under circumstances indicting

trustworthiness." It was a statement given by Mr. Simpson after he had been arrested on these charges. (Tr. Ex. 124, page 2). It was given after the Detective and Mr. Simpson had already been talking about the incident for an hour (*Id.*). Simply put it was rehearsed. It was as self-serving as it could be especially for someone not versed in the intricacies of felony murder. He states that he did not have a weapon (*Id.* at 23). He states that he played no part other than knocking on the door (*Id.* at 28-38). He clearly knows many details of the incident but conveniently identifies the Defendant as having been there and playing a large role.

Such a statement is not "made under circumstances indicting trustworthiness". Although he makes damaging admissions, he also makes numerous self-serving statements. Remember that at the time he has already been arrested and has already spoken to the Detective for over an hour. That hour was not recorded and no one will ever know what had been discussed during that time. Such a statement cannot be considered trustworthy, especially when Mr. Simpson repudiates the central contentions under sworn testimony at trial. The State argued at trial that there was a difference in "trustworthiness" and "truthfulness". Their argument was that the Trial Court was only supposed to consider whether the statement was actually made or not. But that the rule did not require any deeper analysis into the truthfulness of the statement. The Advisory Comment makes clear that such an approach is wrong. The Trial Court is supposed to take into account of the circumstances, circumstances which bear on the truthfulness of the statement.

The Trial Court ruled that it was admissible and both the audio and text of the crux of the statement was admitted into evidence. This error greatly compounded the error discussed above and surely influenced the verdict. The only other significant evidence of the Defendant's involvement was testimony made by the other victim, Timothy Westfield. A review of his testimony, especially in light of the testimony of the expert witness demonstrates that it is rife

with inaccuracies and simply literally incredible. Conversations with jury members post-verdict demonstrated that Mr. Westfield's testimony was disregarded. Instead, it was that audio statement of Mr. Simpson that proved to be the most significant single item. It was evidence that was improper and should never have been included. It most certainly did "more probably than not affected the judgment". Its introduction, especially where Mr. Simpson had been called as a witness solely to get the statement into evidence necessitates a new trial.

V. THE TRIAL COURT ERRED BY LIMITING DEFENSE COUNSEL'S ABILITY TO MEANINGFULLLY CROSS EXAM WITNESS, JOHN T. SIMPSON, REGARDING HIS PREVIOUS STATEMENT AND GENERAL CREDIBILITY.

Under Tennessee law, a party has the right of unlimited cross-examination. *State v. Womack*, 591 S.W.2d 437 (Tenn.App. 1979). The right of cross-examination is essential to a fair trial. *State v. Butler*, 626 S.W.2d 6 (Tenn. 1981). the defendant's constitutional right to confront the witnesses against him 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, 431 (Tenn. 2000); *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992). Denial of the 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)). "The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the sound discretion of the trial court." *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); *Coffee v. State*, 216 S.W.2d 702, 703 (Tenn. 1948). Furthermore, "a defendant's right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or

marginally relevant interrogation." *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994). This court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. *Dishman*, 915 S.W.2d at 463; *State v. Fowler*, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (1963).

Although the trial court retains discretion regarding the exercise of the right to examine witnesses for bias, any undue restriction on that right may violate a defendant's right to confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 9, of the Tennessee Constitution. *State v. Sayles,* 49 S.W.3d 275, 279 (Tenn. 2001). To show a violation of the right to confrontation, the defendant must show that "'he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, thereby exposing to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witnesses.'" *State v. Black*, 815 S.W.2d 166, 177 (Tenn. 1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). Once a constitutional error has been established, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. *Momon v. State*, 18 S.W.3d 152, 167 (Tenn. 1999).

In this matter, the Trial Court improperly limited Defense's ability to cross examination witness John Simpson. After ruling that a small portion of Mr. Simpson's statement was admissible as substantive evidence, the Trial Court said the following:

> "I am then going to allow Mr. Perry to cross-examine on that, or wide open cross-examination, on whatever he want to cross-examine on, and then based upon that cross-examination, there may be other things that the State can go into". (VII T., 299-300).

From the Trial Court's ruling, it is clear that "wide open" cross examination would almost certainly result in more of the prior statement being introduced into evidence. From the

record, despite the limited cross-examination afforded Defense Counsel, the State attempted to ask about/introduce other parts of the prior statement.

The Trial Courts ruling placed Defense Counsel in an impossible and Constitutionally inappropriate position. A full cross examination into issues of Mr. Simpson's credibility and other false statements would have allowed for further damage to Defendant through the portions of the prior statement being introduced. This goes beyond a "tactical decision" and instead was the final straw in a cascade of improper rulings that left the Defendant with no functional ability to fully cross examine the witness. To do so would have resulted in further errors, errors that could only be addressed at the appellate level, cold comfort for sure.

The Trial Court's behavior in this regard unreasonably restricted the right of the Defendant to confront and cross-examine witnesses against him. Because this is a constitutional error, the State has the burden to show such error was "harmless". Given that this was a co-defendant's "testimony" that the Defendant was responsible, it cannot be harmless. Thus, again a new trial is necessary.

CONCLUSION

For the foregoing reasons, considered individually and collectively, this Court should grant the relief requested in this brief.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the foregoing brief has been served on adversary counsel by placement of said copy in the United States Mail, postage prepaid to:

John H. Bledsoe
AAG
P.O. Box 20207
Nashville, TN 37202

On this the 6th day of October, 2014

Jay A. Perry

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE	*	NO. 297497
	*	
	*	
VS.	*	
	*	
BRIAN WILKEY	*	SECOND DIVISION

MOTION TO DISMISS REVOCATION PROCEEDINGS

Counsel for the Defendant, pursuant to Rule 12 of the Rules of Criminal Procedure moves the Court to dismiss the revocation proceedings currently pending. As ground for the requested dismissal, Defendant through counsel would state:

1. The Defendant entered a guilty plea on May 12, 2017 to the offense of a violation of the Motor Vehicle Offender's Act[1] (T.C.A. 55-10-616) and received a sentence of six years suspended on supervised probation. That sentence was consecutive to the sentence in #298256, which was a six-year sentence to serve in the Tennessee Department of Corrections.

2. The probation violation report alleges that the Defendant absconded from supervised probation since last contact on October 22, 2020. However, no violation report was filed until November 15, 2021, over one year later.

3. When the report was filed, the Defendant was in Memorial Hospital where he was admitted on November 10, 2021 and not discharged until November 24, 2021. While hospitalized he was diagnosed with a variety of serious conditions chief among them being heart failure and septic shock. While hospitalized he received three significant incisions including an incision in his chest.[2]

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[1] The crime occurred on May 11, 2015 and involved no moving violations. See Exhibit 1 to this motion.
[2] See Exhibit 2.

4. The Defendant was re-admitted to the hospital on November 27, 2021 for a painful rash that occurred in reaction to one of his prescribed medications[3]. Those discharge papers note a future echocardiogram, scheduled for December 8, 2021. The Defendant has missed that appointment having been in custody since December 2, 2021.

5. The law regarding probation revocation is laden with examples of the wide discretion it allows to trial courts. For example, T.C.A. 40-35-311(a) does not require the trial judge to issue a warrant upon learning of a violation, it only grants them the power to do. In cases where the court finds, "by a preponderance of the evidence, that the defendant has committed a new felony, new Class A misdemeanor, zero tolerance violation as defined by the department of correction community supervision sanction matrix, or absconding, then the trial judge **may** revoke the probation and suspension of sentence". T.C.A. 40-35-311(e)(2)(emphasis added).

6. On May 24, 2019, the Tennessee Legislature approved a law removing the statutory provisions related to the Motor Vehicle Habitual Offender ("MVHO") offense and replaced it with a method to reinstate a driver's license revoked pursuant to the MVHO law. The relevant part of the law's amendment deleted the entirety of T.C.A. 55-10-616. To put it simply; the law that the Defendant violated in 2015 by driving a car no longer carries any imprisonment at all.

7. There is a "savings statute" which addresses repealed and amended criminal statutes. T.C.A. 39-11-112. Notably, it provides that where "the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act. *Id.*

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[3] See Exhibit 3.

8. Four different Court of Criminal Appeals panels[4] have ruled unanimously that the "savings statute" is applicable here and they ruled affirming that it would be improper to imposed incarceration for a conviction of a MVHO offense. While all of those cases involve situations where the Defendants had not been sentenced before the law change the same result should adhere in this matter. In fact, because the Defendant has already been punished (time on probation plus current incarceration), their rationale is more applicable.

9. The strongest argument for dismissal of these proceedings is the clear legislative intent in amending the MVHO provision to remove imprisonment as a punishment. The *Deberry* decision cited directly to the legislative comments that the amendment was "to reduce prison costs by reserving prison beds for 'the worst of the worst' while lessening sanctions for other offenses". 2021 WL 1561688, at *8. Other comments made upon the introduction of the amendment on February 27, 2019 make the point of the amendment clear. Representative Lamberth, the sponsor, claimed there were "several offenses that are reductions in penalty as part of this bill."[5] (2/27/19 at 28:41). He also stated that the bill called for "three reductions in felony sentences." (*Id.* at 29:15). When the bill was introduced on the House floor months later, he noted that the bill "reduced the penalty for some felonies, including 'low-level driving offenses.'" (4/17/19 at 2:23:28). Later in the same session he claimed that "nobody gets off the hook…but we put the penalty appropriate to the crime." (*Id.* at 2:24:00).

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[4] *State v. Deberry*, No. W2019-01666-CCA-R3-CD, 2021 WL 1561688 (Tenn. Crim. App. Apr. 21, 2021) (Appeal to Tennessee Supreme Court granted on Sept. 23, 2021), *State v. Person*, No. W2020-00937-CCA-R3-CD, 2021 WL 2579862 (Tenn. Crim. App. June 23, 2021), and *State v. Carter*, No. W2019-02278-CCA-R3-CD, 2021 WL 2556650 (Tenn. Crim. App. June 22, 2021. *State v. Austin*, No. W2020-01428-CCA-R3-CD, 2021 WL 4352745 (Tenn. Crim. App. Sept. 24, 2021) In *Deberry* and *Person*, the Court of Criminal Appeals affirmed trial court rulings imposing no incarceration. In *Carter* and *Austin*, the Court vacated the imposition of six-year four- year sentences respectively.

[5] The audio recordings of these legislative sentences are available at https://wapp.capitol.tn.gov/apps/billinfo/default.aspx?billnumber=hb0167&ga=111. The comments cited here are identified by date and timestamp.

10. The last comment rings loudest here. To continue to hold these revocation proceedings pending, to hold the Defendant in custody in direct danger to his long term health is in no way "appropriate to the crime". The Defendant drove a car back in 2015 in violation of a law that more than two years ago was amended to remove incarceration as a punishment. To consider sending him to prison for six years now is in violation of the current Legislative intent and also four different unanimous panels of the Court of Criminal Appeals. Most importantly, it is in violation of any rational concept of justice.

WHEREAS, the Defendant though his appointed counsel respectfully asks the Court to dismiss these pending revocation proceedings and release him from custody.

Respectfully submitted,

STEVE SMITH
DISTRICT PUBLIC DEFENDER

By: _____

Jay Perry
Assistant District Public Defender
720 Cherry Street
Chattanooga, TN 37402
423-209-6797

CERTIFICATE OF SERVICE
Proper service is hereby certified
under the applicable rule of procedure
this the _____ day of December, 2021.
DISTRICT PUBLIC DEFENDER

By: _____