# Tennessee Judicial Nominating Commission

## *Application for Nomination to Judicial Office*

*Rev. 26 November 2012*


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## ***INTRODUCTION***

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. 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 Commission 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 word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

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

1. State your present employment.

Baker Donelson Bearman Caldwell & Berkowitz, PC
Johnson City, Tennessee

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

1998 BPR# 019387

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

I am licensed only 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).

No.

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

Attorney, Baker Donelson Bearman Caldwell & Berkowitz, PC (June 2012 to present)
Johnson City, Tennessee

Senior Counsel, Office of the Attorney General & Reporter (January 2000 – June 2012)
Nashville, Tennessee

Attorney, Wampler & Pierce, P.C., Memphis, Tennessee (1999)

Attorney at Law, Southaven, Mississippi (1998 – 1999)

Law Clerk, William F. Travis, Travis Law Office, Southaven, Mississippi (1998)

5. 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.

Not applicable.

6. 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 clients in financial institutions, commercial, and employment litigation. More particularly, I work with financial institutions and special servicers in a broad array of legal matters, including commercial foreclosures, receiverships, lender liability claims, guarantor recovery, ejectment and detainer actions, petitions to quite title, fraudulent conveyances, and bankruptcy. This work represents about 60% of my practice. I represent employers in worker's compensation matters and employment law matters, including discrimination, retaliation, and wrongful termination. This work represents about 15% of my practice. I also handle general business and corporate litigation, including claims in sales, contract, and torts. This work represents about 10% of my practice. The reminder of my practice is divided among the following: appeals, general corporate matters for small businesses, pro bono cases, property litigation, criminal defense, and criminal prosecution.

My pro bono practice has included divorce, conservatorships, and criminal defense matters in the trial and appellate courts. I have also assisted one pro bono client by researching the requirements for citizenship in the Cherokee tribes. One of my pro bono cases was among the first cases handled through the Tennessee Bar Association's appellate pro bono project.

I also handle criminal prosecutions from time to time as a District Attorney General Pro Tem. Most recently, I represented the Tennessee District Attorneys General Conference before the Tennessee Supreme Court.

7. 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 Commission 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 Commission. Please provide detailed information that will allow the Commission 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. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I am a seasoned appellate lawyer, having briefed and argued 46 cases before the Tennessee Supreme Court and more than 300 cases in the Tennessee Court of Appeals, Tennessee Court of Criminal Appeals, and the U.S. Court of Appeals for the Sixth Circuit. I have also handled several certiorari responses in the United States Supreme Court.

**Experience in Private Practice (2012 - 2013)**

As noted previously, I represent institutional clients in financial institutions, commercial, and employment litigation. I also handle appeals, general corporate matters, property litigation, criminal defense, and criminal prosecution. I maintain a very active pro bono practice, which includes divorces and child custody matters, conservatorship matters, landlord-tenant disputes, and criminal defense matters in the trial and appellate courts. I also serve as a District Attorney General Pro Tem from time to time.

**Experience in the Attorney General's Office (2000 - 2012)**

Before joining Baker Donelson, I was employed in the Criminal Justice Division of the Tennessee Attorney General's Office. In that position, I practiced criminal law exclusively (100%) and most of my cases were before the appellate courts (85%), the Court of Criminal Appeals in particular. I handled appeals under Rules 3, 8, 9, 10, and 11 of the Rules of Appellate Procedure and petitions for writs of certiorari and mandamus. I have handled over 850 cases in the Tennessee Court of Criminal Appeals and more than 60 cases in the Tennessee Supreme Court. I also handled cases in the United States Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, and the Tennessee Court of Appeals.

The remainder of my practice was in the state and federal trial courts. I served on the capital litigation team for about two years, handling direct appeals, post-conviction appeals, and federal habeas corpus litigation in death penalty cases.

In 2004, I was promoted to team leader. In that capacity, I supervised seven attorneys who ranged in experience from one to more than twenty years. My supervisory responsibilities included assigning cases, monitoring case management, reviewing briefs and pleadings, supervising oral arguments, assisting in the analysis of complex issues, and responding to general questions concerning appellate practice and criminal law. I was also responsible for training new attorneys. To do so, I provided an extensive orientation to appellate practice, appellate brief writing, and oral advocacy. I also provided guidance in the handling of a full-time appellate caseload. I also provided intensive brief reviews, usually for several months, and guidance on oral argument techniques.

I provided legal advice to District Attorneys General and their assistants. I was the primary contact in the Attorney General's Office for prosecutors in middle Tennessee who wanted an appeal taken on behalf of the State of Tennessee. In those instances, I reviewed the trial court's decision, evaluated the legal arguments, determined the prospects of success, and decided if an appeal was in the best interests of the State. I also provided research assistance and advice on issues being developed in the trial courts, often receiving calls during a break in a trial. Additionally, on several occasions I was assigned to assist with high profile or complex cases.

I wrote formal and informal opinions for legislators, District Attorneys General, Judges, and Justices of the state supreme court, addressing questions of constitutional law and statutory interpretation. My opinion letter included the following subjects: the publication of criminal case dispositions on the Internet; financial responsibility for expenses associated with the withdrawal of blood from DUI suspectes; the proper procedure for collection of court costs, fines, and taxes; outsourcing a bad check program; admission to bail after execution of a waiver of extradition; extradition of an attorney held in contempt by the state Supreme Court; and the constitutionality of imposing the death penalty for child rape.

I was also responsible for advising crime victims and their families on the status of their cases. This was one of the most rewarding aspects of the job. Victims often feel forgotten in the criminal justice system and it was my responsibility to guide them through the appellate process.

**Experience in Private Practice (1998 - 2000)**

I maintained a general trial and appellate practice, representing private individuals and some small businesses. I handled domestic relations cases, juvenile cases, real estate and property disputes, personal injury cases, contracts litigation, general business matters, collections, enforcement of foreign judgments, employment matters, and probate matters. I drafted appellate briefs filed in the Mississippi Supreme Court, the Sixth Circuit Court of Appeals, and the Fifth Circuit Court of Appeals.

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

I am counsel for the Tennessee District Attorneys General Conference in the following case, which is pending in the Tennessee Supreme Court. I had primary responsibility for researching the issues, formulating the state's positions, writing the briefs, and presenting the oral arguments.

*Corinio Pruitt v. State*, ___ S.W.3d ____ (Tenn. 2012). The Tennessee District Attorneys General Conference was one of several organizations invited by the Tennessee Supreme Court to submit amicus curiae briefs addressing several issues related to comparative proportionality review in the appellate courts.

I was lead counsel for the State of Tennessee in the following Tennessee Supreme Court cases. As lead counsel, I had primary responsibility for researching the issues, formulating the state's positions, writing the briefs, and presenting the oral arguments.

*State v. Wayne Donaldson*, 380 S.W.3d 86 (Tenn. 2012). This case involved the question of whether a police officer may routinely direct the driver outside of the vehicle during a lawful traffic stop.

*Cyrus Deville Wilson v. State*, 367 S.W.3d 229 (Tenn. 2012). This case addresses the question whether a prosecutor's work product could constitute newly discovered evidence for purposes of a convicted defendant's petition for writ of error coram nobis.

*K.F. v. State*, 350 S.W.3d 911 (Tenn. 2011). This case involves construction of the expungement statute, more particularly whether each count of a multi-count indictment is a separate case for purposes of the expungement statute.

*State v. L. W.*, 350 S.W.3d 911 (Tenn. 2011). This case involves the same issue as *K.F. v State*, but under a slightly different version of the expungement statute.

*Henry Zillon Felts v. State*, 354 S.W.3d 266 (Tenn. 2011). In this case, post-conviction relief was granted on claims that counsel should have pursued a different defense theory and that counsel did not deliver on a promise to the jury that the defendant would testify.

*Stephen Wlodarz v. State*, 361 S.W.3d 911 (Tenn. 2011). This case addresses whether a guilty plea may be challenged in a petition for writ of error coram nobis.

*State v. Ungandua Andre Ingram*, 331 S.W.3d 746 (Tenn. 2011). This case addressed the standard governing appellate review of the trial court's determination that a person was arrested. It was argued in Centerville as part of the Supreme Court's SCALES project.

*State v. William Glenn Talley*, 307 S.W.3d 723 (Tenn. 2010). This case determined that residents of a condominium building have no reasonable expectation of privacy in the common areas.

*Terrance Lavar Davis v. State*, 313 S.W.3d 751 (Tenn. May 7, 2010). This habeas corpus case applied the rule that release eligibility and offender classification are not jurisdictional and may be negotiated in a guilty plea agreement.

*State v. Thomas Turner*, 305 S.W.3d 508 (Tenn. 2010). This case applied the rule that a criminal defendant's request for an attorney must be clear and unequivocal.

*State v. Cedric Saine*, 297 S.W.3d 199 (Tenn. 2009). This case involved a question of probable cause for a search of the defendant's home, particularly whether there was a nexus between crime and place to be searched.

*State v. Marcus Richards*, 286 S.W.3d 873 (Tenn. 2009). This case addressed whether law enforcement officers had probable cause to search individual member of group sitting a picnic table. It was argued in Columbia as part of the Supreme Court's SCALES project.

*State v. Terry Byington*, 284 S.W.3d 220 (Tenn. 2009). This case determined that entering a written order denying a motion for new trial is the best practice, but it is not required for appellate jurisdiction if the record contains a minute entry reflecting the denial of the motion.

*State v. Ricky Harris*, 301 S.W.3d 141 (Tenn. 2010). This case addressed whether due process tolled the statute of limitations for filing a petition for writ of error coram nobis.

*State v. Christopher Lovin*, 286 S.W.3d 275 (Tenn. 2009). This case addressed the right to self-representation on appeal.

*State v. Meeks*, 262 S.W.3d 710 (Tenn. 2008). This case addressed the timeliness of the State's notice of appeal and the creating exigent circumstances doctrine. It was argued in Cookeville as part of the Supreme Court's SCALES project.

*State v. Stacey Carter*, 254 S.W.3d 335 (Tenn. 2008). This is the first Supreme Court case to apply the Sentencing Reform Act as amended in 2005.

*State v. Devin Banks*, 271 S.W.3d 90 (Tenn. 2008). This case is a death penalty direct appeal and included issues concerning the admission of an excited utterance, whether imposition of the death penalty violated equal protection, and the correctness of the jury instructions on lesser-included offenses.

*State v. Tyson Lee Day*, 263 S.W.3d 891 (Tenn. 2008). This case addressed whether police officers had reasonable suspicion for a traffic stop based upon the conduct of an anonymous informant who pointed to the defendant's car. This case was argued in Jacksboro as part of the Supreme Court's

SCALES project.

*State v. R.D.S.*, 245 S.W.3d 356 (Tenn. 2008). This was the first Supreme Court case to address the authority of school resource officers to conduct searches on school property. It also addressed whether Miranda warnings are required when a resource office questions a student at school.

*State v. Henry A. Edmondson, Jr.*, 231 S.W.3d 925 (Tenn. 2007). This case addressed the definition of "take from possession" for purposes of the car-jacking statute. It was argued in Clarksville as part of the Supreme Court's SCALES project.

*State v. Eric Berrios*, 235 S.W.3d 99 (Tenn. 2007). This case involved whether questions asked by a police officer during a traffic stop exceeded the scope of the stop and whether the frisk and sit procedure invalidated the defendant's consent to search his car.

*Ronnie Finch v. State*, 226 S.W.3d 307 (Tenn. 2007). This case concerned the grant of post-conviction relief on the ground that defense counsel was deficient in handling the motion for judgment of acquittal at the close of the state's proof.

*State v. Victor Hugo Garza, et al.*, 221 S.W.3d 514 (Tenn. 2007). This case clarified the standard for issuance of a writ of error coram nobis.

*State v. Alice Smotherman*, 201 S.W.3d 657 (Tenn. 2006). This case addressed whether the allegations in the search warrant were sufficient to establish probable cause. It was argued in Cookeville as part of the Supreme Court's SCALES project.

*State v. Delawrence Williams*, 193 S.W.3d 502 (Tenn. 2006). This case concerned the sufficiency of the allegations in the affidavit in support of a search warrant under *State v Jacumin*.

*Karen Renee Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). This case addressed whether the defendant's guilty plea was knowing and voluntary under Boykin v. Alabama and whether defense counsel rendered ineffective assistance at the juvenile transfer hearing. It was argued in Kingsport as part of the Supreme Court's SCALES project.

*State v. Amy Deniece Sutton*, 166 S.W.3d 686 (Tenn. 2005). This case addressed the applicability of release eligibility dates to community correction sentences and the sufficiency of the convicting evidence.

*State v. William Timothy Carter*, 160 S.W.3d 526 (Tenn. 2005). This case involved the knock and talk doctrine, the inevitable discovery doctrine, and the creating exigent circumstances doctrine.

*State v. Robert Faulkner*, 154 S.W.3d 48 (Tenn. 2005). This case was a death penalty direct appeal and included challenges to the exclusion of diminished capacity evidence and Page error in jury instruction for first degree murder.

*State v. Stephen Denton*, 149 S.W.3d 1 (Tenn. 2004). This case involved the consolidation of multiple offenses against multiple victims in the same indictment and whether the sexual battery by authority figure statute applied to doctors.

*State v. Robert Leach*, 148 S.W.3d 42 (Tenn. 2004). This case was a death penalty direct appeal and included issues involving the collateral fact rule, the jury instruction on contextual background evidence, and pleading aggravating circumstances in the indictment.

*State v. G'Dongalay Parlo Berry*, 141 S.W.3d 549 (Tenn. 2004). This case was a death penalty direct appeal and included the issue whether aggravating circumstances must be pleaded in the

indictment.

*State v. Christopher Davis*, 141 S.W.3d 600 (Tenn. 2004). This case was a death penalty direct appeal and included issues involving disqualification of the district attorney general and the jury instruction on contextual background evidence.

*State v. F. Chris Cawood*, 134 S.W.3d 159 (Tenn. 2004). This case addressed the disposition of appellate records as public records.

*State v. Allen Prentice Blye*, 130 S.W.3d 776 (Tenn. 2004). This case involved the withdrawal of a blood sample pursuant to a search warrant.

*State v. Jerry Neal Carpenter*, 126 S.W.3d 879 (Tenn. 2004). This case established the standard of review for claims of ineffective assistance of appellate counsel.

*Ricky Harris v. State*, 102 S.W.3d 587 (Tenn. 2003). This case concerned due process tolling of the writ of error coram nobis statue of limitations.

*State v. Ralph Dewayne Moore*, 77 S.W.3d 132 (Tenn. 2002). This case addressed the sufficiency of the evidence of felony reckless endangerment and whether intentional aggravated assault was a lesser-included offense.

*State v. Colico Walls*, 62 S.W.3d 119 (Tenn. 2001). This case concerned whether escape from police car constitutes escape from a penal institution. It was argued in Gallatin as part of the Supreme Court's SCALES project.

*State v. Antonio M. Kendrick*, 38 S.W.3d 566 (Tenn. 2001). This case concerned the election of offenses in a rape case.

I was co-counsel on the following case with primary responsibility for writing the brief.

*Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000). This case established the standard for criminal contempt and double jeopardy in a child support dispute. It was argued in Memphis as part of the Supreme Court's SCALES project.

I was lead counsel for the State of Tennessee in the following cases in the Court of Criminal Appeals. As lead counsel, I had primary responsibility for researching the issues, formulating the state's positions, writing the briefs, and presenting the oral arguments.

*State v. Perry March*, 293 S.W.3d 576 (Tenn. Crim. App. 2008). This case involved issues concerning whether there was a material variance between the indictment and the proof; whether the jury instruction defining property was correct; whether sentence enhancement for abuse of a position of public or private trust was warranted; and whether there was plain error in sentencing the defendant in violation of Sixth Amendment.

*State v. James N. Cook*, 250 S.W.3d 922 (Tenn. Crim. App. 2007). This case addressed whether the defendant's guilty plea waived habeas corpus review of all non-jurisdictional issues and constitutional infirmities.

*State v. James Michael Hanners*, 235 S.W.3d 609 (Tenn. Crim. App. 2007). This case determined that the amendment to the expungement statute could not be applied retroactively to deny the

defendant's request for expungement.

*State v. William Ferguson*, 229 S.W.3d 312 (Tenn. Crim. App. 2007). This case determined that the defendant had effective consent to enter a business that was open and unlocked and the business owners permitted unrestricted entry.

*State v. Troy Brooks*, 228 S.W.3d 640 (Tenn. Crim. App. 2006). This case concluded that the prosecutor did not abuse his discretion in denying pretrial diversion due to seriousness of the offense of theft of $185,000 and abuse of position of trust as an attorney.

*State v. Jamie Bailey*, 213 S.W.3d 907 (Tenn. Crim. App. 2006). This case determined that competence to stand trial is not a dispositive issue and cannot be certified for appeal.

*State v. Shirley Spina*, 99 S.W.3d 596 (Tenn. Crim. App. 2002). This case determined venue for custodial interference, i.e., the child is "found" in the child's county of residence.

*In re: Sanford & Sons Bail Bonds, Inc.*, 96 S.W.3d 199 (Tenn. Crim. App. 2002). This case addressed the exoneration of the bail bondsman when the defendant was deported and held that the bondsman was entitled to a hearing.

*State v. Robert L. Easterly*, 77 S.W.3d 226 (Tenn. Crim. App. 2001). This case involved double jeopardy in a drug prosecution where the defendant was subsequently prosecuted in different county.

*Jerry L. Cox v. State*, 53 S.W.3d 287 (Tenn. Crim. App. 2001). This case determined that there is no Rule 3 appeal from the denial of a motion to correct an illegal sentence.

*State v. Jeffrey Dwight Whaley*, 51 S.W.3d 568 (Tenn. Crim. App. 2000). This case involved the defendant's right to a preliminary hearing and whether the prosecutor acted in bad faith in securing a presentment before the defendant could have a preliminary hearing.

*State v. Paul Andrew Thompson*, 43 S.W.3d 516 (Tenn. Crim. App. 2000). This case involved a challenge to the sufficiency of the evidence of premeditation and mutilation of a corpse and exclusion of surrebuttal evidence of the victim's assault conviction.

9. 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.

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

Not applicable.

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

During my time at the Attorney General's Office, I have often been selected or nominated for special assignments and training programs.

In 2010, I was nominated by the Attorney General to participate in the LEAD Tennessee leadership-training program.

In 2010, I was nominated by the Attorney General to participate in a management-training seminar presented by the National Attorneys General Training and Research Institute.

In 2010, I served as the Attorney General's representative on the Indigent Defense Fund Study Committee.

Since 2008, I have served as the Attorney General's representative on the Integrated Criminal Justice Program Steering Committee. In 2008-2009, I served as the chair of a subcommittee on web portal access. In 2009, I was elected to serve a two-year term as Chair of the Steering Committee.

In 2007, I served as the Attorney General's representative on the Governor's DUI Task Force.

In 2007, I was selected to serve as a faculty member for an appellate practice seminar hosted by the National College of District Attorneys at the National Advocacy Center in Columbia, South Carolina.

Since 2005, I have served as the Attorney General's official contact person for issues of consular notification and access arising under the Vienna Convention on Consular Relations.

Since 2003, I have served on a special team that handles extradition and detainer matters. The team reviews extradition requests for legal sufficiency and provides legal advice to the Department of Correction concerning extradition and detainer matters.

In 2002, I was selected to serve as an instructor in search and seizure law at the Tennessee Highway Patrol Cadet School.

12. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor 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.

In May 2011, I applied to fill a vacancy on the Court of Criminal Appeals, created by the retirement of Judge David H. Welles. The commission met on June 6, 2011. I was nominated along with Jeff DeVasher, Judge Jeffrey S. Bivens. Governor Haslam appointed Judge Bivens to fill the vacancy.

I applied for a position on the Court of Appeals in 2007. The selection commission met on July 31, 2007. I was not nominated.

## ***EDUCATION***

13. List each college, law school, and other graduate school which 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.

**LAW SCHOOLS:**

*Juris Doctor* (May 1998)
University of Memphis, Cecil C. Humphreys School of Law, Memphis, Tennessee
August 1996 – May 1998

Franklin Pierce Law Center, Concord, New Hampshire
August 1995 – May 1996.
Completed first year studies before transferring to the University of Memphis.
Started a chapter of the Federalist Society and served as President.

University of Tennessee, Knoxville, College of Law
Summer 1994
Received special admission to take Constitutional Law.

**GRADUATE SCHOOLS:**

Doctoral Candidate, early stage
Tennessee State University, Nashville, Tennessee
August 2006–present
Admitted to candidacy in the Spring of 2010.

*Master of Public Administration* (August 2009)
Tennessee State University, Nashville, Tennessee
August 2003— August 2009

*Master of Arts in Political Science* (August 1994)
University of Tennessee, Knoxville, Tennessee
August 1993 – May 1995

*Graduate Certificate in Applied Geospatial Information Systems* (May 2009)
Tennessee State University, Nashville, Tennessee
August 2005— May 2009

COLLEGE:

*Bachelor of Science, English and Political Science* (December 1991)
East Tennessee State University, Johnson City, Tennessee.

## ***PERSONAL INFORMATION***

14. State your age and date of birth.

44
November 18, 1968

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

33 years.

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

1 year

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

Washington County

18. 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.

19. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

20. 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.

21. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable.

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

No.

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

No.

24. 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 the plaintiff in a personal injury lawsuit that arose from a traffic accident when I was a minor. The complaint was filed on October 1, 1986, in the Circuit Court for Carter County, Tennessee. I reached a settlement agreement with the defendant. The case was dismissed on February 10, 1989.

The docket number was 4180.

I was the plaintiff in a property damage lawsuit that arose from a traffic accident. The case was filed in Washington County Circuit Court in the late 1980s or early 1990s The case was resolved through a settlement agreement.

25. 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 which you have held in such organizations.

The Honor Society of Phi Kappa Phi

Golden Key International Honour Society

Pi Alpha Alpha Honor Society

American Society for Public Administration

American Academy of Political Science

National Rifle Association

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

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

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

No.

## ***ACHIEVEMENTS***

27. 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 which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

**American Bar Association** (2012 - present)

*Litigation Section*, Member

- Appellate Practice Committee
- Commercial and Business Litigation

*Criminal Justice Section*, Member

- White Collar Crime Committee

*Labor and Employment Law Section*, Member

**Tennessee Bar Association** (2006 – present)

*Appellate Practice Section*, Member (2008-present)

- Chair, Executive Committee (2012— 2013)
- Member, Executive Committee (2008-present)
- Chair, Supreme Court Boot Camp planning subcommittee (2009— 2012)

Led the development of the idea, drafting of the agenda, and recruiting of speakers for the Supreme Court Boot Camp seminar.

- Chair, Bench-Bar Program planning subcommittee (2008— 2009)

Led the development of the idea, drafting of the agenda, and recruiting of speakers for the Bench-Bar Program.

- Member, subcommittee on appellate specialization (2008— 2009)

Assisted in the research of specialization in appellate practice and the analysis of the viability of a specialization program in Tennessee.

- Member, subcommittee on amending Tenn. R. Crim. P. 37 (2008— 2010)

Assisted in drafting a proposal to amend Rule 37 that was adopted, effective July 1, 2011.

*Criminal Justice Section*, Member (2008— present)

- Member, Executive Committee (2008— present)
- Member, subcommittee on section awards (2008— 2009)

Assisted in the creation of awards for service to the Criminal Justice Section and service to the Criminal Justice System.

- Member, CLE planning subcommittee (2008— 2009)

Assisted in the development of the section's two CLE programs for the year and helped recruit speakers.

*CLE Committee*, Member (2008— present)

- Chair, subcommittee on text programs (2009— 2010)

Led the review of existing text programs, identification of programs in need of updating,

identification of new programs to be developed, and recruiting of authors.

- Member, subcommittee on mentoring program (2008— 2010)

Drafted a response to the proposal to amend Supreme Court Rule 21, Section 4.07, relative to awarding CLE credit for participation in mentoring programs, and assisted in the design and drafting of TBA's mentoring program in anticipation of the amendment being adopted.

**Nashville Bar Association** (2002— 2010)

- Member, Appellate Practice Section.

Volunteered to assist with the 2008 SCALES program in Davidson County and worked with students from Montgomery Bell Academy.

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

Not applicable.

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

**MANUALS:**

Fulks, M.A. and Dyer, J.R., eds. The Tennessee Manual on Extradition and Detainers (2004).

**ARTICLES:**

Augustus Noble Hand. Great American Judges: An Encyclopedia. John R. Vile, ed. Santa Barbara, CA: ABC-CLIO (2003).

Libertarianism. The Encyclopedia of Civil Liberties in America. John R. Vile and David Schultz, eds. Armonk, NY: M.E. Sharpe, Inc. (2005).

Prosecutorial Misconduct. The Encyclopedia of Civil Liberties in America. John R. Vile and David Schultz, eds. Armonk, NY: M.E. Sharpe, Inc. (2005).

Minnesota v. Dickerson. The Encyclopedia of Civil Liberties in America. John R. Vile and David Schultz, eds. Armonk, NY: M.E. Sharpe, Inc. (2005).

International Society for Krishna Consciousness v. Lee. The Encyclopedia of Civil Liberties in America. John R. Vile and David Schultz, eds. Armonk, NY: M.E. Sharpe, Inc. (2005).

The Prosecutor's Guide to Perfecting a Direct Appeal. DUI News. Nashville: District Attorney General's Conference (Nov. 2006).

The Art of Interlocutory Appeal by Permission. DUI News. Nashville: District Attorney General's Conference (July 2007).

Civil Service and the Pendleton Act. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Confrontation Clause. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Payne v. Tennessee. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Habeas Corpus. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Stop and Frisk. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Harmless Error. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Strict Constructivism. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

Fay v. Noia. Encyclopedia of the United States Constitution. David Schultz, ed. New York: Facts on File, Inc. (2009).

The Nexus Doctrine Reconsidered. DUI News. Nashville, TN: District Attorneys General Conference (Dec. 2009).

Melendez-Diaz and the Confrontation Clause. DUI News. Nashville, TN: District Attorneys General Conference (July 2010).

Extradition. Encyclopedia of American Law and Criminal Justice. David Schultz, ed. New York: Facts on File, Inc. (2012).

Automobile Searches. Encyclopedia of American Law and Criminal Justice. David Schultz, ed. New York: Facts on File, Inc. (2012).

Herring v. United States. Encyclopedia of American Law and Criminal Justice. David Schultz, ed.

New York: Facts on File, Inc. (2012).

Solem v. Helm. Encyclopedia of American Law and Criminal Justice. David Schultz, ed. New York: Facts on File, Inc. (2012).

30. 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.

Ethics in Legal Writing. Tennessee Bar Association. Court Square Series: Kingsport, Tennessee. October 22, 2010.

Ethics in Legal Writing. Tennessee Bar Association. Court Square Series: Johnson City, Tennessee. October 21, 2010.

Ethics in Appellate Practice. Tennessee Bar Association. Tennessee Supreme Court Boot Camp. October 6, 2010.

Readability in Legal Writing. Tennessee Bar Association. General Practice Summit. August 21, 2010.

Readability in Legal Writing I and II. Attorney General's Office. August 4 and 19, 2010.

The Tennessee Supreme Court and Rule 11 Appeals. Tennessee District Attorneys General Conference. Advanced DUI Training Seminar. June 24, 2010.

CLE Blast. Moderator. Tennessee Bar Association. Dec. 2009.

Minimalist Analytic Wizardry and other Pitfalls in Legal Writing. Tennessee Bar Association. Webcast. December 16, 2009.

The Ethical Appeal for Criminal Practitioners. Memphis Bar Association, Criminal Law Section. December 17, 2009.

Habeas Corpus Litigation in Extradition Cases. Tennessee District Attorneys General Conference, Annual Training Seminar. October 22, 2009.

Appellate Practice Primer. Tennessee Bar Association. General Practice Summit. August 20, 2009.

Ethics, Professionalism, and Legal Writing. Attorney General's Office. July 23, 2009.

What Appellate Lawyers Need from Appellate Judges. Tennessee Bar Association. Bench-Bar Conference. June 18, 2009.

Appellate Practice in Tennessee: Civil Cases. Tennessee Bar Association. On-line Interactive Text Program, January 2010.

Appellate Practice in Tennessee: Criminal Cases. Tennessee Bar Association. On-line Interactive Text Program, January 2010.

Preserving Issues for Appeal in the Trial Court: Civil Cases. Tennessee Bar Association. On-Line Interactive Text Program. January 2010

CLE Blast. Moderator. Tennessee Bar Association. Dec. 2008.

Identity Theft and Internet Crimes: Appellate Issues. Tennessee Bar Association. Criminal Justice Section. December 12, 2008.

Fundamentals of Persuasive Legal Writing I and II. Tennessee Bar Association. Webcast. December 1-2, 2008.

Criminal Case Law Update. Panel Discussion. Tennessee District Attorneys General Conference, Annual Seminar. October 30, 2008.

Effective Oral Arguments in Appellate Courts. Tennessee Bar Association. Webcast. June 25, 2008.

Extradition and Detainers. Memphis Bar Association, Memphis, TN. November 2007.

Tips for the Trial Prosecutor from the Appellate Prosecutor. Panel Discussion. Tennessee District Attorneys General Conference. Annual Training Seminar. Chattanooga, TN. October 2007.

Analysis, Planning, and Persuasion in Appellate Practice. National College of District Attorneys, National Advocacy Center, Columbia South Carolina. June 25-29, 2007.

Appellate Brief Writing. National College of District Attorneys, National Advocacy Center, Columbia South Carolina. June 25-29, 2007.

Appellate Research and Writing. National College of District Attorneys, National Advocacy Center, Columbia South Carolina. June 25-29, 2007.

State Appeals. National College of District Attorneys, National Advocacy Center, Columbia South Carolina. June 25-29, 2007.

Appellate Oral Advocacy. National College of District Attorneys, National Advocacy Center, Columbia South Carolina. June 25-29, 2007.

31. 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.

My previous position in the Attorney General's Office is the only public office I have ever held. I was appointed to the position in January 2000 by Attorney General Paul G. Summers and reappointed by Attorney General Robert E. Cooper, Jr.

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

No.

33. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other

legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached the brief submitted on behalf of the Tennessee District Attorneys General Conference in *State v Corinio Pruitt* and the brief submitted on behalf of the State of Tennessee in *State v William Glenn Talley.*

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

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

I am a dedicated public servant, who considers it an honor and a privilege to work for the citizens of Tennessee. I would like to put my knowledge, skills, education, and training to work for the State of Tennessee in this capacity. The majority of my experience has been gained practicing in the Court of Criminal Appeals. So I am well-prepared for the position.

35. State any achievements or activities in which you have been involved which 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)***

During the past year, I have performed over 100 hours of pro bono service, represented and assisted clients in divorce proceedings, conservatorship proceedings, sales and contracts disputes, criminal cases, landlord-tenant disputes, and applying for Cherokee citizenship.

36. 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 hears appeals from criminal cases and matters related to criminal cases. In deciding cases, the judges read briefs, hear oral arguments, review the record, and conduct legal research in formulating the court's opinion. I gained the vast majority of my appellate practice experience appearing in the Court of Criminal Appeals. I have also trained appellate lawyers as a team leader in the Attorney General's Office and a frequent CLE speaker. Finally, I have been the Chair of the Executive Committee of the Tennessee Bar Association's Appellate Practice Section. All of these experiences have given me insight into the nature of appellate practice from the practitioners perspective. I believe this combination of experience will enable me to improve the court's operations, in particular, and the criminal justice system, in general.

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

I have participated in a number of community organizations and services through my employment,

religious, and educational affiliations. I volunteered with the Muscular Dystrophy Association. I served as the Treasurer of the Parent Advisory Committee for the Schrader Lane Church of Christ Child Care Center at Vine Hill. My wife and I support her parents, who are Baptist missionaries in Nicaragua. My wife volunteers for Our Kids in Nashville as a Spanish interpreter. I have always welcomed the opportunity to participate in the Supreme Court's SCALES program, volunteering to argue my cases as part of the program and meeting with the students afterward. I have also been very active in the Tennessee Bar Association, participating in a number of initiatives aimed at improving the law and the legal profession. As an appointed judge, I will welcome the opportunity to work for charitable causes.

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

I am a ninth generation Tennessean, being the direct descendant of settlers in Washington County in the late 1700s. I was born and raised in Johnson City, Tennessee. My father is an ordained minister who worked for Emmanuel School of Religion until his retirement. My mother was a licensed school teacher who stayed at home to raise me and my two brothers. My parents taught me the importance of faith, honesty, hard work, and moral rectitude. They also taught me the value of education.

I have worked full time since I was 18 years old, paying my way through college and supporting myself through graduate school and law school. I have worked as a janitor, a gas station attendant, a fast food restaurant manager, a telecatalog supervisor, and a retail salesperson. I those jobs I learned to treat people with dignity and respect.

My wife is the daughter of Baptist missionaries in Nicaragua, a beautiful country that often leaves them without modern amenities that we take for granted. It is also a country that is not always hospitable them. Nevertheless, they continue to serve, and they do so in good spirits. It is also a country whose political and economic systems leave its citizens toiling in abject poverty. My in-laws service is a genuine inspiration.

These are but a few examples of my experiences and influences. The overriding lesson is the importance of service to the community.

39. 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)***

I will apply the law as written even if I disagree with it. As an attorney for the state, I did not always agree with the decisions of our General Assembly. Yet, when called upon, it was my job to advise them on the constitutionality of existing laws and legislative proposals, notwithstanding any personal opinions or beliefs. A recent example is the discussion about eliminating post-conviction review. I would have defended such a decision as a legitimate exercise of legislative power, despite my personal reservations about the impact it would have on our justice system.

## ***REFERENCES***

40. 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 Commission or someone on its behalf may contact these persons regarding your application.

| |
|---|
| A. Dr. Brian E. Noland, Office of the President, East Tennessee State University, 206 Dossett Hall, Johnson City, Tennessee 37614; (423) 439-4211 |
| B. Dr. Rob Hardin, PhD., Associate Professor, University of Tennessee, 1914 Andy Holt Ave., 335 HPER Bldg., Knoxville, TN 37996-1281; (865) 974-1281 |
| C. Christopher J. Lowe, General Manager, The Martha Washington Hotel & Spa, 150 West Main Street, Abingdon, VA 24210; (276) 628-3161 |
| D. Kelly Johnson, Vice President, Regions Bank, 315 Deaderick Street, Nashville, TN 37238; (615) 496-5780 |
| E. Brent B. Young, Baker Donelson Bearman Caldwell & Berkowitz, 100 Med Tech Parkway, Suite 200, Johnson City, Tennessee 37604; (423) 928-0181. |

## ***AFFIRMATION CONCERNING APPLICATION***

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Criminal Appeals of Tennessee, and if appointed by the Governor, 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 questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 11, 2013.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

# TENNESSEE JUDICIAL NOMINATING COMMISSION

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 which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Mark A. Fulks
Type or Printed Name

Signature

June 11, 2013
Date

019387
BPR #

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

NONE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

| | | |
|---|---|---|
| STATE OF TENNESSEE,<br><br>Appellee,<br><br>v.<br><br>WILLIAM GLENN TALLEY,<br><br>Appellant. | ) | DAVIDSON COUNTY<br>No. M2007-01905-CCA-R11-CD |

ON APPEAL BY PERMISSION FROM THE JUDGMENT
OF THE COURT OF CRIMINAL APPEALS

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# BRIEF OF THE STATE OF TENNESSEE

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Attorney General and Reporter

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Solicitor General

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ORAL ARGUMENT REQUESTED

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### CASES

**OTHER AUTHORITIES**

## STATEMENT OF THE ISSUES

I.

It is well-settled that a person with joint access to a condominium building has no expectation of privacy in the common areas and assumes the risk that another person with joint access may admit the police. Here, the homeowners' association gave the police an access code for entry into the common areas when responding to calls, and when the police arrived to investigate a call, a man exited the building, greeted the officers, and held the door open to admit them. Was the initial entry into the defendant's building lawful because the homeowners' association authorized it and because a person with apparent authority permitted it?

II.

A voluntary consent to search is sufficiently attenuated from a Fourth Amendment violation if it is temporally removed from the illegality, intervening circumstances create a break in the chain of events, and the official misconduct is not flagrant. Here, assuming that the initial entry into the condominium building was unlawful, the officers reasonably believed their entry was authorized by the home owners' association and by the man who admitted them, and when they arrived at the defendant's door a few moments later, they knocked and asked for permission to enter from a resident of the condo. Did the Court of Criminal Appeals err in concluding that the consent was not sufficiently attenuated from the illegal entry?

## STATEMENT OF THE CASE

Law enforcement officers executing search warrants at the defendant's residence and business discovered child pornography and illicit drugs. As a result, the defendant was charged by indictment with sexual exploitation of a minor by possessing more than 50 images of child pornography, sexual exploitation of a minor by possessing more than 100 images of child pornography, possession of dihydrocodeinone with intent to sell or deliver, possession of alprazolam with intent to sell or deliver, possession of clonazepam with intent to sell or deliver, and possession of diphenoxylate with intent to sell or deliver (I, 1-8).

Before trial, he filed a motion to suppress evidence seized pursuant to search warrants, claiming that the entry into his condominium building and the subsequent entry into his unit, both of which preceded issuance of the search warrants, violated his right to be free from unreasonable searches and seizures (I, 9-150). He also filed a motion to suppress his statement made to police (II, 151-154). In a written order filed on June 20, 2007, the trial court denied the defendant's motions (II, 182-198).

The defendant sought permission to pursue an interlocutory appeal, which was granted by both the trial court and the Court of Criminal Appeals. In an opinion filed on July 1, 2009, the intermediate court affirmed the ruling of the trial court, concluding that the defendant did not have a reasonable expectation of privacy in the common areas of the condo building. *State v. William Glenn Talley*, No. M2007-01905-CCA- R9-CD, slip op. at 4-6 (Tenn. Crim. App. July 1, 2009) (copy attached). Nevertheless, in an advisory opinion, the court concluded that, but for the defendant's lack of a reasonable expectation of privacy, the entry would have been unlawful, and the consent to enter the defendant's condo given by a cohabitant was not sufficiently attenuated from the illegal entry to be valid. *Id.*, slip op. at 7-8. The defendant filed a timely application for permission to appeal in this Court, which was granted.

## STATEMENT OF THE FACTS

### I. Proof at the Suppression Hearing

Charles Reasor, Jr., a resident and homeowners' association board member, testified for the defendant about the Hedrick Place condominium building located at 116 31st Avenue North in Nashville, Tennessee. The building has 21 owners, including the defendant. Each owner owns a unit, a parking space, and an equal share of the common areas, such as the hallways, the stairs, and the outside yard. The rights and responsibilities of the various owners are established in the master deed.

Non-residents must contact a resident using a keypad and intercom, located at the front door, to be admitted into the building, unless someone who is leaving lets them inside. However, the fire department, the police department, the postal service, commercial delivery services, vendors, and the cleaning man have been given entry codes. The police department was given an entry code to use in their discretion. It is kept on file with dispatch, and officers can and get it when they respond to an emergency or to investigate a report of criminal activity. The alarm code is not limited to emergency uses. It can also be used for non-emergencies. Additionally, all of the residents and their guests would have the right to open the door for the police. (III, 3-14, 18, 22-28; Ex. 1-2, 3A-3B.)

All residents and their guests have access to the common areas of the building. Once inside, guests also have access to the front door. Accordingly, when a resident's guest has a visitor, the guest has the authority to open the door and admit their visitor. Mr. Reasor has allowed his guests to admit people into the building many times. And other residents have been known to give their entry codes to various food delivery services. Because of all the visitors admitted to the building, Mr. Reasor acknowledged a "reduced expectation of privacy." (III, 14-22.)

Detective Joseph Simonik of the Metropolitan-Nashville Police Department went to Hedrick Place condominiums on August 16, 2005, to investigate an anonymous complaint that the defendant was selling drugs at his condominium. Detective Simonik spoke with the caller, who had given a

name but wanted to remain anonymous. A few days later, he went to the condominium building with some other detectives, and they decided to do a knock-and-talk. Although they were not in uniform, they were wearing jackets that clearly identified them as Metro police officers. When they reached the front door, Detective Simonik called dispatch to get the entry code. But before dispatch returned his call, a man who was leaving the building opened the door, said hello to the detectives, and then held the door open for them. The man appeared to be a resident or a visitor. He was dressed casually. He was not in a uniform and he was not carrying any tools, so there was no reason to believe he was making a delivery or working in the building. And he did not appear to be a burglar. The detectives went inside, took the stairs to the second floor, and went to the defendant's condominium. (III, 37-42, 59-60, 67-68.)

The detectives knocked on the defendant's door and asked to speak with the defendant. Kimberly Knight, who answered the door, told them the defendant was not at home. Detective Simonik asked Ms. Knight if they could come inside and talk to her. Ms. Knight, who had been living with the defendant for about three weeks, allowed the detectives to come inside. When Detective Simonik entered, he saw "a glass smoking pipe and a knife with white residue on a computer desk in the living room area." (III, 41-43; Ex. 5A.)

Shane Cathey, Ms. Knight's 17-year-old brother, was there when the detectives arrived. He had been staying there for the past few days. Detective Fox asked Mr. Cathey if he had any contraband. At first, he said no, but then he admitted that he had a bunch of Xanax packaged in two clear bags. Mr. Cathey told the detectives that he got the pills from the defendant. (III, 43-45, 49, 53.)

Ms. Knight consented to a search of the condominium, but the detectives did not search it. Instead, Detective Fox asked Ms. Knight to call the defendant. When she reached the defendant on her mobile phone, Detective Simonik talked to him. Detective Simonik told the defendant why there

were in his condominium and asked the defendant if he would come home. (III, 43-45, 49, 53.)

When the defendant arrived, Detective Simonik explained that there had been a complaint of drug activity and that they had found drug paraphernalia in plain view. He asked the defendant for consent to search the condominium. The defendant appeared very nervous. He asked to speak to an attorney and attempted to call several. He even walked upstairs to an attorney's condominium and knocked on the door. After failing to contact an attorney, the defendant said he did not think it would be a good idea to consent to the search. At that point, the detectives maintained the security of the crime scene and went to get a search warrant. Detective Simonik told the defendant he was free to leave. (III, 45-46.)

Detective Simonik obtained a search warrant and returned to the residence. During the search, he found the following drug paraphernalia and evidence of drug abuse: a folding knife with white residue on it, a white cup with residue on it, a glass vial with copper mesh, a glass vial with residue, a glass pipe with dark residue, three straws with white residue, four plastic bags with white residue, a mirror with white residue, a metal marijuana pipe, two sets of digital scales, a bag containing plastic baggies, a plastic cocaine sniffer, a black and silver pipe, a set of glass pipes with residue, and a metal grinder for marijuana. He found a large amount of drugs, including two plastic bags of marijuana, two bags of Xanax, a pill bottle of hydrocodone, and various pill bottles containing 1,928 Xanax pills, 115 Mersyndol pills, 1,198 Lomotil pills, and nine Klonopin pills. He found a Dell notebook computer containing images of child pornography, three pornographic CDs, and several other CDs. He also found some images of child pornography in the defendant's briefcase, which he had brought home with him that day. (III, 46-49, 52, 54-55; Ex. 5A-I.)

During the search, Ms. Knight showed the detectives where to find the defendant's safe and several places where drugs and other contraband could have been hidden. She also told the detectives that the defendant had more drugs and a gun at his business in a hidden compartment under a sink.

(III, 49-51.)

While Detective Simonik finished the inventory of the contraband seized from the defendant's home, the other detectives executed a search warrant at the defendant's business. The defendant answered the door with a pistol in one hand and a crack pipe in the other. Inside, they found a gun, a plate with cocaine residue on it, and "hundreds if not thousands" of images of child pornography. (III, 51-53.)

The defendant had already been advised of his *Miranda* rights when Detective Simonik arrived at the defendant's business. When the defendant was being booked, he told Detective Simonik he had been using cocaine since the previous September. He also said he would give pills to his friends in exchange for money, but he did not consider that selling drugs. As for the child pornography, the defendant explained that he downloaded it because he was curious. (III, 53-54.)

**II. Findings of Fact and Conclusions of Law**

After hearing the evidence presented during the suppression hearing, the trial court made the following findings of fact:

> [D]uring August of 2005, the police received an anonymous telephone call about drug activity at the defendant's residence. On August 16, 2005, Detective Joseph Simonik, Detective Fox, Detective Osborne, Detective Gonzales, and Detective Stokes went to the defendant's residence located at 116 31st Ave. unit # 201 to investigate the complaints received. The defendant lived in a private condominium on the second floor and is also part owner in the condominium building. The entrance to the condominium building was guarded by a security system and any person without a key would have to be buzzed in by a tenant. While trying to obtain the code to enter the building from the Metropolitan Police Dispatch, a man leaving the condominium held the door open for the detectives to enter.
>
> Mr. Talley's girlfriend, Kimberly Knight, answered the door to the apartment and consented to the detectives' entrance. Upon entrance, Detective Simonik observed a smoking pipe with copper mesh inside and a knife with white residue on it in the living room as well as another individual, Shane Cathy. Detectives asked Ms. Knight about the whereabouts of the defendant and Ms. Knight indicated that he was not home. Ms. Knight called the defendant and the defendant spoke with the detective. Ms. Knight explained that she had been staying at the apartment approximately three weeks, that Mr. Talley sold pills and cocaine, that he had illegal narcotics and a pistol at

his business, and that they were kept under the sink in his office.

Detective Simonik obtained search warrants of the defendant's residence and business based on information given by Ms. Knight. Pursuant to the search of the defendant's residence, detectives recovered drugs, drug paraphernalia, sexual images of children as well as other electronic items were found in Mr. Talley's residence. The defendant was arrested and given his *Miranda* warnings during the execution of the search warrant of his business located at 535 Brick Church Park Drive. The detectives also recovered drugs, drug paraphernalia, and images of child pornography from his business. During booking, Mr. Talley disclosed that he gave the pills to his friends and in return they would give him money, but he did not consider that selling.

Based on the items recovered from the execution of the search warrants of the defendant's residence and business, the detectives obtained additional warrants on March 14, 2006, and September 19, 2006, to search the defendant's desk top computers, notebook computer, and computer discs in the possession of the Metropolitan Nashville Police Department's Property and Evidence. A search of the defendant's computer and computer discs revealed several sexual images of children.

(II, 182-184.)

In addressing the defendant's challenge to the officers' entry into the condominium building, the trial court found:

The area between the entrance of the condominium building and the defendant's condominium door is within the curtilage of his home, and is protected from warrantless entry by the Fourth Amendment. This area was used in the daily operation of the premises. It is the entrance used by all the residents and delivery personnel. In order for any person other than a resident to gain entry, they must be buzzed in or in possession of an entry code and thus authorized to enter the building. The threshold of the defendant's door extends to the entrance of the condominium building. The pathway that leads from the sidewalk to the front of the condominium building is for use by the public when conducting legitimate business. The detectives lawfully used the pathway leading to the condominium building's entrance . . . .

The defendant has a subjective expectation of privacy in the area between the entrance to the condominium building and the door to his condominium unit. Unlike an apartment tenant, a condominium owner has a property interest in the building. There is a security buzzer at the entrance to the building and persons other than residents need express authorization to enter. Express authorization is given by being buzzed in or by being given the access code. The security buzzer system allows residents to determine the amount of accessibility the general public has to individual condominium units.

The detectives did not have probable cause or exigent circumstances to enter the premises without a warrant. The detectives went on the premises to conduct a

> "knock and talk". The officers had something less than probable cause and reasonable suspicion to engage in this consensual encounter. . . . It is unknown who held the door open for the officers to enter; the person may have been a resident, guest, or trespasser.
>
> No incriminating evidence was discovered or seized as a result of the unlawful entry. Actually, nothing was seized from this area.

(I, 188-189.)

Concerning the detectives' justification for conducting a knock-and-talk investigation at the defendant's home, the trial court found:

> The present "knock and talk" was based on confidential phone calls to the drug hotline received by the detective. The "knock and talk" was an investigative technique to follow-up on the tips. The confidential tip was the basis of the "knock and talk". The phone call was made to a call center specially designed to handle information about criminal activity provided by citizens.
>
> In this case, the informant is known to the detective but his name was not disclosed. The informant told the detective that the defendant sold pills to his girlfriend. It is unknown whether the informant saw the exchange of money for pills or whether he was informed of the fact. Whether the informant had first or second-hand knowledge, he would be presumed reliable if the officers had no reason to doubt the credibility of the first-hand witness or the reliability of the information. Therefore, he would qualify as a citizen informant for the presumption of reliability. . . . In the instant case, the tip provided by the citizen informant provided sufficient support to justify a knock and talk.

(II, 191-192.)

Turning next to the detectives' entry into the defendant's individual condominium, the trial court found:

> Ms. Knight, can be deemed a co-occupant with equal right to use of the premises. Ms. Knight was the defendant's girlfriend who answered the apartment door when the detective arrived to conduct a "knock and talk." Ms. Knight consented to the detectives' entrance into the condominium unit voluntarily. Detective Simonik said Ms. Knight had a key to the condominium, clothes at the residence, she had been at the residence for three weeks, and she had her brother as a guest in the home at the time of the "knock and talk." . . . It was reasonable to believe that she had authority to allow the police to enter because at the door she told them that Mr. Talley was not home and that she was his girlfriend.
>
> . . .

> In the instant case, a smoking pipe with copper mesh inside and a knife with white residue on it were observed in plain view upon the detectives' consensual entry into the defendant's specific condominium unit.

(II, 192-193.)

Evaluating the defendant's challenge to the detectives seeing contraband in plain view, the trial court found:

> The officers arrived at the residence to conduct a "knock and talk." The initial entry into the condominium building was unlawful but the entry into the condominium unit itself was authorized by Kimberly Knight. The detectives were given consent to enter the location from which the evidence could be plainly seen. The officers had a lawful right of access to the evidence. Upon entry into the condominium, the officers did not search the premises but simply observed the contraband from inside the doorway. The incriminating character of the evidence was "immediately apparent." The detective's training and experience enabled him to immediately determine the illegal nature of the smoking pipe with copper mesh inside and a knife with white residue on it. The evidence seen in plain view was not the result of the unlawful initial entry but a result of the consensual entrance authorized by Ms. Knight.

(II, 194.)

With regard to the search warrant obtained based upon information gathered during the "knock and talk," the trial court found:

> In this case, the search warrant was obtained on the basis of information entirely independent from any information discovered during the initial warrantless entry. The officers did not observe any incriminating evidence during the initial warrantless entry. The information in the affidavit was obtained pursuant to the plain view doctrine and statements made by Ms. Knight.
>
> The search warrant affidavit for Mr. Talley's residence states:
>
> > Detectives received a drug complaint on 116 31st Avenue North, Apartment 201. Detectives went to this location and knocked on the door and a Kimberly Knight (F/W dob 10-29-86) answered the door. Detective Fox explained to Kimberly Knight that we were there for a drug complaint. Your Affiant asked Kimberly Knight if we could come inside to talk with her and she gave detectives permission to come inside the residence. Once your affiant came into the living room of this location on the table in plain view your affiant saw a glass smoking pipe with copper mesh in it with residue. Next to this pipe there was a knife with white residue on it. Your affiant asked Kimberly Knight if she lived at the residence and Kimberly Knight

> states she had been staying there for about 3 weeks. Detective Fox asked Shane Cathey who was also at this residence if he had anything illegal on his person and Mr. Cathey replied not that I know of and then Detective Fox asked are you sure and Mr. Cathey replied well I have some pills and motioned to his right front pants pocket. Detective Fox recovered 42 Xanax Bars and 3 half bars of Xanax from Mr. Cathey's pocket which were packaged in 2 clear bags.
>
> . . .

The search warrant affidavit [for Mr. Talley's business] states:

> During the conversation with Detective Simonik Mr. Talley stated that he owned a business named THM (Tennessee Home Medical). On 8/16/05 officers executed a narcotics warrant at 116 31st Avenue North Apartment 201, which is the residence of William Talley. Detectives recovered at this residence thousands of pills that are schedule narcotics, marijuana, and drug paraphernalia as well as several images of child pornography that were downloaded from different Internet sites. While under *Miranda*, Kimberly Knight, Mr. Talley's girlfriend, states that Mr. Talley commonly stores illegal narcotics at his place of business which is Tennessee Home Medical (THM Inc.). Ms. Knight also states that she has seen illegal narcotics at the location at 535 Brick Church Park Drive. Ms. Knight stated that she had seen illegal narcotics stored in a hidden compartment located under a sink located in Mr. Talley's office.

(II, 196-197.)

In denying the defendant's motion to suppress, the trial court ruled:

> [T]he Court finds the officers had a valid basis to lawfully conduct a "knock and talk" based on the information provided by the citizen informant. Further, the Court finds that although the initial entry into the condominium building was unlawful, the officers gained entry into Mr. Talley's condominium unit lawfully. The search warrants were issued based on affidavits, which contained evidence of a crime found in plain view and statements made by Kimberly Knight. Therefore, the motion to suppress physical evidence is respectfully DENIED. Additionally, there was uncontroverted testimony that *Miranda* warnings were given upon arrest and the defendant Talley waived his right to speak without an attorney and made statements. Therefore, the Court finds that the motion to suppress the statements made by defendant Talley is respectfully DENIED.

(II, 197-198.)

## ARGUMENT

### I. THE INITIAL ENTRY INTO THE BUILDING WAS LAWFUL BECAUSE THE HOMEOWNERS' ASSOCIATION AUTHORIZED IT AND BECAUSE A PERSON WITH APPARENT AUTHORITY PERMITTED IT.

A person with joint access to a condominium building may permit entry into the building, and other occupants have assumed the risk of another's decision to admit the police. Here, the homeowners' association gave the police an access code to the common areas of the building that the police were authorized to use when responding to calls about criminal activity. But before the detectives could use the access code, a man exited the building and held the door open for the officers to enter. Therefore, the entry into the defendant's building was lawful either because the home owners' association authorized it or because a person with apparent authority permitted it.

Under both the Fourth Amendment to the United States Constitution and Article I, Section 7, of the Tennessee Constitution, a warrantless search of a person's home is presumed unreasonable unless the search falls within one of the narrowly defined exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454 455 (1971); *State v. Bartram*, 925 S.W.2d 227, 229 230 (Tenn. 1996); *State v. Ellis*, 89 S.W.3d 584, 592 (Tenn. Crim. App. 2000).

A well-settled exception to the warrant requirement is a search conducted pursuant to the consent of the individual whose property is searched or by a third party who possesses common authority over the premises. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Bartram*, *supra*, at 230 231; *Ellis*, *supra*.

The State has the burden of establishing that the search was conducted pursuant to this exception. *Id.* In *Ellis*, the Court of Criminal Appeals quoted the United States Supreme Court's definition of "common authority" necessary to validate a third party's consent to a warrantless search:

> The authority which justifies the third party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any

> of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched.

*Ellis*, *supra*, at 593 (quoting *Matlock*, *supra*, at 171 n.7). The State may satisfy its burden of proof in this regard either by demonstrating that the third party in fact possessed common authority as defined above or by demonstrating that the facts available to the police officers would have justified a man of reasonable caution in the belief that the consenting party had authority over the premises. *Id.* (citing *Illinois v Rodriguez*, 497 U.S. 177, 188 189 (1990); *United States v Chaidez*, 919 F.2d 1193, 1201 1202 (7th Cir. 1990); *see also Clark*, 844 S.W.2d at 599 n.1; (other citations omitted)).

Here, the detectives' entry into the common areas of the condominium building was lawful for two reasons. First, according to the defendant's own witness, the homeowners' association consented to the entry. Charles Reasor, a resident and board member of the homeowners' association, testified that the police department was given an access code that they were authorized to use at their discretion, whether responding to an emergency or a complaint of criminal activity (III, 9-10, 18-20, 22). Additionally, Mr. Reasor explained that access to the common areas was granted to all residents, their guests, the fire department, the police department, the postal service, various commercial delivery services, the cleaning service, and numerous vendors, such as food delivery services (III, 8-10, 15-16). By providing the code to the police department, the homeowners' association granted the police permission to enter the common areas to investigate complaints. There is no proof in the record to support a claim that the police exceeded the scope of permission granted by the homeowners' association. Although the detectives did not use the security access code to enter the building, their entry through the open door was authorized by the grant of access the code represents.

Second, Mr. Reasor explained that any resident or guest could admit any member of the general public or the police to the common areas of the building (III, 9, 14-16, 20, 26). That is

precisely what happened in this case. While the detectives were waiting for the dispatcher to give them the access code, a man exited the building, greeted the detectives, and held the door open for them. The man appeared to be a resident or a guest. He was dressed casually. So the detectives knew he was not there to make a delivery or repair anything, and he did not appear to be a burglar or trespasser. (III, 39-40, 67-68.) Indeed, the trial court concluded that "a man leaving the condominium held the door open for the detectives to enter." (II, 183, 188-189.)

Under these circumstances, any reasonably cautious person would have believed the man holding the door open was authorized to grant admittance to the building. The trial court erred in finding the entry unlawful because it focused on the need for "express authorization" to enter in accordance with the security procedures established by the condominium's homeowner's association. However, as held by the United States Supreme Court in *Matlock* and the intermediate court in *Ellis*, the lawfulness of the entry for Fourth Amendment purposes does not depend upon the rules and regulations governing property owners. Instead, the determination is based on whether the information known to the detectives would have justified a reasonably cautious person in believing that the party consenting to the search had authority to do so. As previously demonstrated, the detectives reasonably believed they were given permission to enter by a resident or guest with authority to do so. The trial court erred in concluding otherwise.

The trial court erred in concluding that express authorization was required to enter the building. The evidence preponderates against that finding. Mr. Reasor plainly testified that the police department, as well as the fire department, the postal service, all commercial delivery services, and vendors serving residents of the building were generally granted access to the common areas. And the police and fire departments were given access codes to enter the building when responding to calls. Accordingly, there can be no question that the initial entry by the detectives was lawfully based upon the consent of the residents of the building.

The lacuna in the defendant's argument is his apparent obliviousness to the fact that the common areas belonged equally to all residents and their guests and was, therefore, subject to entry by the police based on their consent. This is a remarkable omission, given it was his witness—Mr. Reasor—who explained that the police had been given a security access code to use in their discretion when investigating complaints. He also fails to deal with the trial court's conclusion that the detectives were in fact admitted to the building by the man who was leaving. These omissions caused the defendant to overlook *United States v Matlock*, 415 U.S. 164, 171 (1974), and *State v Ellis*, 89 S.W.3d 584, 592 (Tenn. Crim. App. 2000), which address the issue of third-party consent.

Moreover, the defendant's reliance on *United States v Carriger*, 541 F.2d 545 (6th Cir. 1976), is misplaced. In *Carriger*, "[t]he officer's entry into [the] locked apartment building was without permission and without a warrant of any kind was an illegal entry. . . ." *Id.* at 550. Here, the police department was given permission to enter the common areas of the building by the homeowners' association and the man who held the door open for them.

Additionally, the defendant's claim that *Carriger*, which was decided in 1976, is a "leading case" is incorrect. In *United States v Miravalles*, which was decided in 2002, the Eleventh Circuit Court of Appeals stated:

> We have never spoken directly to the issue presented in this case, but a number of other circuits have. Five of the six circuits that have decided the issue have concluded that tenants do not have a reasonable expectation of privacy in the common areas of their apartment building. Of those five decisions, four necessarily suggest that it does not matter whether the door to the apartment building is locked or unlocked at the time law enforcement officers arrive, because in each of those cases the door was locked. *See United States v Nohara*, 3 F.3d 1239, 1241 42 (9th Cir. 1993) (apartment hallway); *United States v Concepcion*, 942 F.2d 1170, 1171 72 (7th Cir. 1991) (apartment common areas); *United States v Barrios Moriera*, 872 F.2d 12, 14 15 (2d Cir. 1989) (apartment hallway), *overruled on other grounds by Horton v Cal.*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *United States v Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (apartment hallway). It is not clear which position the other of those five circuits, the First Circuit, would take on locked door facts, but it has held there is no reasonable expectation of privacy in an apartment building's apparently unlocked parking garage. *See United States v Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976). The only circuit that

> has recognized a reasonable expectation of privacy in the common areas of an apartment building, at least when the door is locked, is the Sixth Circuit. *See United States v. Carriger*, 541 F.2d 545, 550 (6th Cir. 1976) (apartment common areas).
>
> The five circuits holding that there is no reasonable expectation of privacy in the common areas of an apartment building reason that tenants have little control over those areas, which are available for the use of other tenants, friends and visitors of other tenants, the landlord, delivery people, repair workers, sales people, postal carriers and the like. *See Nohara*, 3 F.3d at 1242; *Concepcion*, 942 F.2d at 1172; *Eisler*, 567 at 816; *Cruz Pagan*, 537 F.2d at 558. The reasonableness of a tenant's privacy expectation in the common areas of a multi-unit apartment building stands in contrast to that of a homeowner regarding the home and its surrounding area, over which the homeowner exercises greater control. *See Barrios Moriera*, 872 F.2d at 14; *Cruz Pagan*, 537 F.2d at 558. The more units in the apartment building, the larger the number of tenants and visitors, workers, delivery people, and others who will have regular access to the common areas, and the less reasonable any expectation of privacy. Whether the door to the building is locked is another relevant consideration.
>
> The Sixth Circuit stands alone in taking the position that it is reasonable for tenants to expect privacy in the common areas of their apartment building, at least when the building is locked. Its reasoning is that while tenants living in a locked building may expect that other tenants or their guests will be in the common areas, it is also reasonable for them to expect that the general public or trespassers (including law enforcement officers) will be excluded. *See Carriger*, 541 F.2d at 551 52. The Sixth Circuit decision is a quarter of a century old.

*United States v. Miravalles*, 280 F.3d 1328, 1331-32 (11th Cir. 2002). Thus, it appears other federal courts do not consider *Carriger* to be "leading." More importantly, *Miravalles* specifically dispenses with the claim that the presence of locked doors is somehow determinative. Indeed, that case demonstrates that the majority rule is that the existence of locked doors does not give rise to an expectation of privacy in the common areas of a jointly possessed building.

The defendant also relies on *People v. Trull*, 380 N.E.2d 1169 (Ill. App. 1978), another case from the 1970s. However, his reliance on that case is misplaced. The rule announced in *Trull* has been rejected in subsequent cases in Illinois and other jurisdictions. Most notably, in *People v. Lyles*, 772 N.E.2d 962 (Ill. App. 3d 2002), relying on "more recent authority," the Appellate Court of Illinois abandoned the rule announced in *Trull* and held "that a tenant has no reasonable expectation of privacy in common areas of an apartment building that are accessible to other tenants and their

invitees." *Id.* at 966. Accordingly, the *Lyles* Court concluded that "the search of defendant's back porch did not implicate defendant's Fourth Amendment rights" and the defendant "was not prejudiced by his trial counsel's failure to challenge the warrantless search of his back porch." *Id.* at 967.

Likewise, in *Commonwealth v. Dora*, 781 N.E.2d 62, 67-68 (Mass. App. Ct. 2003), the Appeals Court of Massachusetts rejected the rule espoused by *Trull* in favor of "better reasoned" authorities. Notably, the *Dora* Court rejected application of principles of property law and police trespass and focused on "the principal consideration—the reasonableness of privacy expectations in the area subjected to police activity." *Id.* at 68. The court explained:

> Here, the controlling circumstance was the accessibility of the hallways of the apartment building to many persons other than the defendant and his invitees. While a technical trespass by police officers theoretically may have civil implications, how they gain access to the common hallways of a multi-unit apartment building is of no constitutional consequence. "An expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions."

*Id.* (quoting *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1978) (emphasis in original)).

Moreover, *Trull* is easily distinguished on the facts. In that case, officers found a set of keys at the scene of a burglary and took them to the suspect's apartment building, where they used them to unlock the door to the building and then went to the suspect's apartment. *Id.* at 1171. Here, the officers had received permission from the homeowners' association to enter the building with an access code, but when they arrived they entered through the front door, which was unlocked and held open for them by a man with apparent authority to admit them.

The defendant also relies on *State v. DiBartolo*, 276 So.2d 291 (La. 1973). That case is readily distinguishable on the facts. In *DiBartolo*, police officers went to an apartment building to investigate whether drugs were being sold from a second-story window. *Id.* at 293. The front door was locked and nobody answered their knock, so the officers "walked to the side of the building and discovered a

large window with steps below it. The glass window was open, but there was a screen in place on the window, which the officers swung out or pulled out in order to gain admittance" to the building. *Id.* The officers went to the second floor and while they talked to a woman in one apartment, the defendant entered the hallway with drug paraphernalia plainly in his hands. *Id.* On those facts, the Louisiana Supreme Court found the defendant's arrest invalid under the Fourth Amendment because it followed the officers' entry through the window. *Id.* at 294. A police officer's entry through a screened window cannot be compared to an officer's entry through an open door, especially when the door is being held open to admit the officer.

This is essentially the distinction relied upon by the Fourth Circuit Court of Appeal of Louisiana in *State v. Washington*, 591 So.2d 1388 (La. App., 4th Cir., 1991), to reject Washington's reliance on *DiBartolo*. The court noted that there is a big difference in entering the common hallway of an apartment building through an unlocked common door and entering an apartment building through "force or guile." *Id.* at 1390. For that reasons, *DiBartolo* provides no guidance for a decision on the issue in this case.

The defendant also relies upon *State v. Garrison*, 345 A.2d 86 (Md. App. 1975), for the proposition that a resident of an apartment or condominium building has a reasonable expectation of privacy in the common areas of the building. In that case, the Court of Special Appeals of Maryland concluded that the police officers' entry into an apartment building at 2:35 a.m. without permission of the residents through a door that was normally kept locked constituted an unreasonable search under the Fourth Amendment. *Id.* at 94-95. Since 1975, Garrison has been cited only once, and that was in 1976. *See Haina v. State*, 352 A.2d 874, 887 (Md. App. 1976) (distinguishing *Garrison* on the facts). And, although it has not been formally overruled, the principle of law upon which it rests appears to be of questionable validity. In 2001, citing *United States v. Holland*, 755 F.2d 253, 255-256 (2d. Cir. 1985), for the proposition that a tenant in a multi-tenant building has no expectation of privacy in common

areas, the Maryland Court of Appeals noted that a motel guest does not have a reasonable expectation of privacy in the common areas of the motel. *Scott v Maryland*, 782 A.2d 862, 867 (Md. App. 2001). Likewise, in *Fitzgerald v State*, the Court of Special Appeals of Maryland ruled:

> A hotel or motel room, a sleeping compartment in a railway car, and a residential apartment in a larger apartment house all enjoy the full measure of Fourth Amendment protection enjoyed by any home. Such places, however, do not typically throw out penumbral curtilages or surrounding Fourth Amendment buffer zones as do many, albeit not all, houses.

837 A.2d 989, 1025-1026 (Md. App. 2003) (citations omitted).

Finally, the defendant relies on *People v Beachman*, 296 N.W.2d 305 (Mich. App. 1980). In that case, the Michigan Court of Appeals concluded that the lobby of a locked residence hotel is not a public place and, because entry was limited to occupants and their guests, the occupants could expect a high degree of privacy in that area. *Id.* at 308. The court explained:

> In the case at bar, the police officer, acting on probable cause supplied by the tip of a reliable informant, entered into a locked residence hotel without proper consent. He was not invited to enter by the defendant. He was not admitted by a manager or other person with authority. Ladonne Towns, who was alleged to have opened the door in response to the officer's knock, did not give the hotel as his address, so we must presume he was not a resident of the hotel at that time. Therefore, the warrantless arrest of the defendant would be the basis for reversal, absent a finding of exigent circumstances.

*Id.* Thus, that case is distinguishable on the facts and the law. In this case, the officers had been given permission to enter the building by virtue of the access code it received from the homeowners' association when it gave the police department an access code. Additionally, the Michigan Court of Appeals did not consider whether the person who admitted the police had apparent authority to do so, but appears to have limited the ability to grant consent to actual authority as conferred by a demonstration of residency. In Tennessee, apparent authority, as that exhibited by the man who held the door open to admit the officers into the defendant's building, is sufficient to establish valid consent. *Ellis, supra*, at 593; *Matlock, supra*, at 171 n.7.

Finally, on the record in this case, the defendant's claim of an expectation of privacy in the common areas of the condominium building cannot be recognized under this Court's decision in *State v Ross*, 49 S.W.3d 833 (Tenn. 2001). In *Ross*, this court addressed the means for determining whether a person has exhibited an actual expectation of privacy or whether he has shown that he sought to preserve something as private. *Ross* established, among others, the following factors: whether the defendant has a possessory interest in the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; and whether he took normal precautions to maintain his privacy. *Id.*, at 840-841. Here, although the defendant had an ownership interest in the common areas of the building, there is no proof in the record that he had a right to exclude anyone from the common areas. Indeed, the defendant's own witness testified that all residents had the right to admit anyone they pleased. There was no testimony that any one resident could override the decision of another.

Moreover, there is no evidence that the defendant exhibited a subjective expectation that the common areas would be free from government invasion. To the contrary, the record indicates that the homeowners collectively provided the police department with a security access code for use in responding to calls. Additionally, there is no evidence that the defendant took any precautions to maintain his privacy in the common areas of the building. Once again, the defendant's claim is a mere illusion with no basis in reality.

There being no illegality in the initial entry into the condominium building, it follows that the consent to enter the defendant's unit given by the defendant's girlfriend, who was living there at the time, is valid. Furthermore, the search warrants are valid and the defendant's statements, given after he was advised of his *Miranda* rights, are likewise untainted. Therefore, all of the evidence is admissible.

## II. THE COURT OF CRIMINAL APPEALS ERRED IN APPLYING THE ATTENUATION DOCTRINE TO THIS CASE.

A voluntary consent to search is sufficiently attenuated from a Fourth Amendment violation if it is temporally removed from the illegality, intervening circumstances create a break in the chain of events, and the official misconduct is not flagrant and serves a legitimate purpose. Here, assuming that the initial entry into the condominium building was unlawful, the officers reasonably believed their entry was authorized by the homeowners' association and by the man who admitted them, and then when they arrived at the defendant's door a few moments later, they knocked and asked for permission to enter from a resident of the condo who was completely unaware of the illegality of their presence. Therefore, the Court of Criminal Appeals erred in concluding that the consent to enter the condo unit was not sufficiently attenuated from the illegal entry into the condo building.

When a person consents to a search that follows a Fourth Amendment violation, the consent is valid only if it is voluntary and it did not result from an exploitation of the illegal seizure. *State v. Garcia*, 123 S.W.3d 335, 346 (Tenn. 2003) (citing Wayne LaFave, 3 Search and Seizure § 8.2(d) at 656 (3d ed. 1996)). Whether consent is voluntary is a question of act to be determined from the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227; *State v. Cox*, 171 S.W.3d 174, 184 (Tenn. 2005). The consent must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998). The pertinent question is whether the individual's act of consenting is the product of an essentially free and unconstrained choice. If the individual's will was overborne and his or her capacity for self-determination critically impaired, due process is offended. *Cox*, 171 S.W.3d at 185. The factors for determining whether voluntary consent is sufficiently attenuated from an unlawful seizure are "the temporal proximity of the illegal seizure and consent; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct." *Garcia*, 123 S.W.3d at 346 (quoting *Brown v. Illinois*, 422 U.S. 590,

603-04 (1975)); *see State v. Berrios*, 235 S.W.3d 99, 110 (Tenn. 2007) ("Our ruling in *Garcia* upholds the principle that when consent to search is not sufficiently attenuated from an unlawful seizure, it is presumptively the product of coercion").

In this case, even if the attenuation doctrine applies, the defendant is not entitled to relief because Ms. Knight's voluntary consent was sufficiently attenuated from the initial entry to be valid. The trial court implicitly found that Ms. Knight's consent was voluntary, and there is no proof in the record to demonstrate otherwise (II, 182-184). There is no evidence that the detectives' conduct toward her was coercive, either explicitly or implicitly, due to an implied threat or covert force. There is no evidence that the initial entry into the building was so coercive as to subdue her independent ability to exercise her free will in granting permission for the detectives to entry the condominium in which she lived. In fact, there is no evidence that Ms. Knight was even aware of the circumstances under which the detectives entered the building.

Moreover, although the officers arrived at the defendant's door moments after their initial entry, the officers knocked on that door and asked Ms. Knight for permission to enter the condo unit. And when they asked for consent, they had every reason to believe they were lawfully inside the building. After all, the homeowners' association had given them an access code and a man with apparently authority had held the door open for them to enter. Under these circumstances, the officers' knock and Ms. Knight's answer are intervening circumstances that dissipate the taint of the illegal entry and the official misconduct was, at most, a minor technical violation or a hairsplitting infraction.

The Court of Criminal Appeals erred in its application of the attenuation test. First, the court's evaluation of the intervening circumstances prong is simply incorrect. Upon entering the building, the officers had to go to a different floor, knock on the defendant's door, and then ask for permission from Ms. Knight to enter the residence. These facts distinguish this case from the typical

attenuation case in which the illegality is directed at the suspect who subsequently consents. *See, e.g. Berrios*, *supra*. Indeed, these facts constitute intervening circumstances that purge whatever taint could have existed from the entry into the building. Moreover, the fact that the officers did not "verbally inform [Ms.] Knight that they were detectives investigating a crime," Slip op. at 8, is irrelevant to the existence of intervening circumstances.

Second, the intermediate court's analysis of the purpose and flagrancy of the misconduct is erroneous. When a detective is investigating a crime allegedly committed by a particular suspect at a *particular residence*, there is no misconduct in asking a resident who is there if he can enter instead of waiting for a suspect who is not. Slip op. at 8. Whether the defendant was present or not, the officers were likely to find evidence of criminal activity inside the condo unit if the report being investigated proved true. Likewise, when a detective asks a resident who is actually present if he can enter instead of ending or delaying an investigation because another resident is absent, there is no misconduct. Slip op. at 8. Similarly, when a detective asks for consent to search for the purpose of looking for evidence in plain view to support issuance of a search warrant, there is no misconduct. Slip op. at 8. Additionally, any contradiction in Detective Simonik's testimony in characterizing the informant as anonymous is a matter of semantics rather than substance. Slip op. at 8. And, in any event, the alleged contradiction is of no consequence to his conduct at the condo building and should only be of concern to the trial court when making credibility determinations. Here, the trial court was unmoved by it. Because the officers did not engage in misconduct and there were intervening circumstances between the entry to the building and the consent to enter the condo unit, any taint was purged.

## CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class mail, postage paid, to the following:

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on January _____, 2010.

_____
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## CONCLUSION

The judgment of the trial court should be affirmed.

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

| | | |
|---|---|---|
| STATE OF TENNESSEE,<br><br>Appellee,<br><br>v.<br><br>CORINIO PRUITT,<br><br>Appellant. | ) | SHELBY COUNTY<br>No. W2009-01255-SC-DDT-DD |

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE COURT OF CRIMINAL APPEALS

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# BRIEF OF AMICUS CURIAE
# TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

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## STATEMENT OF THE ISSUES

I.

Should this Court modify the proportionality analysis adopted by the Court in *State v. Bland*, 958 S.W.2d 651, 664-658 (Tenn. 1997)?

II.

Should the absence of an intention to kill in a felony murder case render the death penalty disproportionate?

III.

Should the pool of cases considered in proportionality analysis be broadened to include non-capital cases?

## STATEMENT OF THE CASE

During a carjacking in August 2005, the defendant brutally beat Lawrence Guidroz and then body-slammed him on the parking lot, fracturing his skull, eleven of his ribs, and his orbital plates, breaking his collarbone, and causing a significant number of bruises, abrasions, and lacerations to his body. *State v. Pruitt*, No. W2009-01255-CCA-R3-DD, 2011 WL 2417856, *1-*8 (Tenn. Crim. App. June 13, 2011) (copy attached). The next day, Mr. Guidroz died from his injuries. The defendant was tried by a Shelby County Criminal Court jury. He was convicted of murder in the perpetration of a robbery and sentenced to death. On appeal, he challenged, among other things, the proportionality of his sentence. *Id.* The Court of Criminal Appeals affirmed. *Id.*

The case is now before this Court on mandatory review pursuant to Tenn. Code Ann. § 39-13-206. After briefing was completed, the case was argued and submitted to the Court on June 14, 2012. On December 6, 2012, this Court ordered the parties to submit supplemental briefs on three issues related to proportionality review. The Court also invited the Tennessee District Attorneys General Conference, and several other organizations, to submit amicus curiae briefs addressing those issues. The case is scheduled to be re-argued during the Court's April 2013 docket in Jackson, Tennessee.

## STATEMENT OF THE FACTS[1]

At the age of 79, Lawrence Guidroz was a forty-year resident of the Oakhaven neighborhood of Memphis, Tennessee. His neighbors knew him as "Mr. G." Though he was diminutive in stature— standing five feet, seven inches tall and weighing 127 pounds— he was a big part of his community. He grew fresh herbs in his garden and shared them with his neighbors. He gave children change or flowers for their mothers. He often picked up trash along the road in his neighborhood. He visited his mother daily at the nursing home until she passed away, and then he continued to visit the nursing home to care for other elderly people. And he regularly attended several different churches in Memphis. To Thomas and Marie Leech, he was a long-time family-friend, the godfather to their daughter, and an active part of their lives. To Apple Market on Winchester Road, he was a frequent customer.

On August 2, 2005, at about 9:00 a.m., Mr. Guidroz went shopping at the Apple Market. When he arrived, the defendant had already been there for about 20 minutes, hanging out with Courtney Johnson and looking for a car to steal. Eventually, Johnson left the market and walked to a nearby Family Dollar store with his friend Sed. Before they left, Johnson saw Mr. Guidroz enter the market.

Taka Pruitt went to the market that morning with her neighbor. While waiting in the car, Ms. Pruitt saw the defendant standing outside the store. She recognized him as a resident of her apartment complex. About five minutes later, Mr. Guidroz walked out with his groceries. As Mr. Guidroz walked toward his car, Ms. Pruitt watched the defendant run after him. The defendant caught Mr. Guidroz, pushed him inside the car, and launched a brutal attack. During the attack, Mr. Guidroz suffered an abrasion to the front of his face, a laceration to the left side of his forehead,

[1] The Court of Criminal Appeals accurately summarized the fact in its opinion. *See Pruitt*, 2011 WL 2417856 at *1-*8. This statement of the facts is adapted from that opinion and is being given to provide context for the arguments presented.

and hemorrhaging around both eyes; bruising to his ear, the left side of his chest and upper arm, the right side of his chest, his neck and shoulder, his ankle, the back of his left hand, the back of his right hand, his forearms, and his lips. He suffered eleven fractured ribs on his left side, which caused bruises on the surrounding lung tissue. He suffered a complete fracture of his collarbone. He also had extensive blunt force injuries to his head, which were caused by at least three separate blows to the left side of his head. His head injuries included fractures to the orbital plates directly above his eyes, skull fractures, bruises to brain tissue, hemorrhaging around the brain, and a subdural hematoma. After body-slamming Mr. Guidroz to the ground, the defendant fled in Mr. Guidroz's car.

Ms. Pruitt ran into the market, yelled for someone to call 911, and then ran to help Mr. Guidroz while dialing 911 herself. Mr. Guidroz was lying on the pavement. His body was shaking. He was struggling to breathe. And he was bleeding from his nose and both of his ears. When Officer Charmell Smith of the Memphis Police Department arrived, Mr. Guidroz was "semi-conscious." Officer Smith called for an ambulance. When Thomas Leech learned that Mr. Guidroz had been taken to the hospital, he went to be with his friend. But, by the time he arrived, Mr. Guidroz was already undergoing emergency brain surgery for the subdural hematoma. Mr. Guidroz never regained consciousness, and he died the next day.

After the carjacking, the defendant drove around in Mr. Guidroz's car, offering rides to his friends. Kendricks Scott accepted a ride from the defendant. The defendant told Scott that the car belonged to his aunt. Mbenda McCracken also accepted a ride from the defendant. The defendant told McCracken that the car belonged to his girlfriend. McCracken and the defendant "drove to the store, got a few beers, copped [*sic*] some weed[,] and rode around and got high" for three or four hours.

Meanwhile, Sergeant Robin Hulley of the Memphis Police Department was looking for Mr. Guidroz's stolen car. He eventually found it parked at the Somerset Apartments, where the defendant lived. But it was moved before the police could take further action. Later, another officer spotted Mr. Guidroz's car being driven into the garage of a house located at 3180 Beauchamp Drive, where Courtney Johnson lived with his grandmother. Several officers responded to the scene. Sergeant Hulley watched as the defendant, who was wearing a red shirt, exited Mr. Guidroz's car and entered the house. While the officers waited for backup, the defendant went inside and told Johnson that he had "body-slammed" Mr. Guidroz in order to steal his car. Moments later, Johnson walked outside and was immediately detained by police. Johnson yelled, "The guy that you want is in the backyard." Sergeant Hulley and Lieutenant Clark saw the defendant jump a fence, run through the backyard, and enter a wooded area. The officers summoned additional officers, police dogs, and a helicopter for assistance in the search for the fleeing defendant. All they found was a red shirt. The defendant surrendered the next day.

During the defendant's trial, Mbenda McCracken testified for the prosecution. Before he was called to testify, he spoke with the defendant in a holding cell. The defendant tried to persuade him to testify that someone else, presumably Courtney Johnson, drove Mr. Guidroz's car into the neighborhood and tried to sell it for parts. The defendant told McCracken that he and the other person were trying to break into Mr. Guidroz's car, and when Mr. Guidroz approached them, they "grabbed him and threw him down."

As part of his defense, the defendant challenged the cause of Mr. Guidroz's death through the testimony of Dr. O. C. Smith. Dr. Karen Chancellor had performed the autopsy on Mr. Guidroz's body on August 4, 2005. In July 2007, Dr. Smith reviewed Dr. Chancellor's file. Dr. Smith testified that he found a few lapses in the autopsy protocol. Dr. Smith also testified about some of Mr. Guidroz's health conditions. He opined that, in combination with the large amount of

blood Mr. Guidroz lost, his other health conditions would have made him vulnerable to physiologic shock and extra strain on his heart during medical treatment. But he noted that appropriate steps were taken during emergency treatment. Dr. Smith also opined that many of the injuries depicted in the autopsy photographs may have been caused by either emergency medical intervention or Mr. Guidroz's other health conditions. Dr. Smith also testified that the fractures to Mr. Guidroz's head, collarbone, and ribs were all on the left side and were "best explained by . . . some contact where the body is in motion, and then it's been arrested by a hard, unyielding surface." He agreed with Dr. Chancellor's conclusion that Mr. Guidroz's injuries were consistent with being pushed into a vehicle, severely beaten, and then thrown onto the concrete parking lot. In the end, Dr. Smith agreed with Dr. Chancellor's conclusions that Mr. Guidroz died from blunt force injuries to his head and chest.

The defendant testified that, on the day of the murder, he went to work and then left immediately because he had forgotten his identification badge. Instead of going home to get his badge, he took the bus to Johnson's grandmother's home on Beauchamp Drive. From there, he and Johnson walked to the Apple Market, where they loitered outside and looked for a car to steal. Eventually, Johnson approached Mr. Guidroz's car and climbed inside. The defendant claimed that, when Mr. Guidroz found Johnson inside his car, Mr. Guidroz began "struggling with" Johnson. At that point, the defendant ran to assist Johnson, grabbed Mr. Guidroz, and threw him to the ground. The defendant fled the scene in Mr. Guidroz's car, drove it to Johnson's grandmother's house, and left it there. He admitted that he had planned to sell the parts from Mr. Guidroz's car.

In rebuttal, Dr. Bruce Levy testified that Dr. Chancellor properly memorialized the autopsy in accordance with the standards of the National Association of Medical Examiners. Dr. Levy explained that Dr. Smith's autopsy protocol and practices were unique and that the omissions from Dr. Chancellor's autopsy report did not affect the accuracy of her autopsy. Additionally, Dr. Levy

agreed with Dr. Chancellor's findings that Mr. Guidroz's injuries were consistent with being beaten and then thrown to the ground. He opined also that "the complexity and number of the fractures" indicated "a significant amount of force, much greater than you could possibly get from simply falling to the ground and striking your head on a flat surface."

After deliberating, the jury found the defendant guilty of first degree murder in the perpetration of a robbery and second degree murder. The trial court merged the two convictions.

During the defendant's sentencing hearing, the State presented the testimony of Marie Leech. Mrs. Leech had known Mr. Guidroz for over 25 years and saw him several times a week, including at church. Mr. Guidroz was her daughter's godfather, and he would often visit the Leech home and participate in their family activities. He attended several different churches around Memphis. He visited his mother daily at the nursing home and, after her death, he continued to go to the nursing home to take care of other elderly people. He had lived in the Oakhaven neighborhood for over 40 years, and people in the neighborhood called him "Mr. G." He would give his neighbors fresh herbs from his garden or something made in his kitchen. He would also give children change or flowers to give to their mothers. He was often seen picking up trash on the road in his neighborhood.

Alice Robinson, a deputy court clerk with the Shelby County Criminal Court Clerk's office, testified that the defendant's criminal record included three convictions for aggravated robbery, one conviction for robbery, and one conviction for attempted robbery.

In mitigation, the defendant presented the testimony of Dr. Rebecca Caperton Rutledge, a clinical psychologist who was board-certified in forensic medicine and forensic evaluation. On November 18, 1996, she performed a psychological screening of the defendant while he was incarcerated in juvenile court. She stated that the intelligence test indicated that the defendant had an I.Q. of 66, which is in the mildly mentally retarded range. She noted in her report that the

defendant's test results may have been slightly lower than his actual level of cognitive functioning and that the defendant was not taking the process very seriously. However, she claimed, even if the defendant had tried harder, he would have been in the range of mild mental retardation. She opined that the intellect of a person suffering from "mild mental retardation" would not improve but their level of functioning might. Dr. Rutledge identified a September 2006 report prepared about the defendant by Dr. Rokeya Farooque and Dr. Samuel Craddock of the Middle Tennessee Mental Health Institute, which reached a similar result.

On cross-examination, Dr. Rutledge testified that the defendant did not suffer from any mental illness or disorder. She conceded that there were better tests for measuring intelligence than the one she had used. She also conceded that the test she used, unlike other tests, did not have built-in standards for determining if the subject was malingering. Dr. Rutledge stated the defendant thought the testing was a joke. She also acknowledged that Dr. Farooque had found that the defendant was exaggerating his symptoms. The defendant had claimed to have paranoid schizophrenia, but he had not been treated for it and tests raised doubts about the claim. The defendant had also pretended to be afraid of the interviewer. Dr. Rutledge conceded that the defendant could have been deliberately underperforming his mental ability in 1996 in order to avoid being transferred tried as an adult. She further acknowledged that her diagnosis did not mean that the defendant did not know right from wrong.

The defendant also called his mother Vivian Pruitt to testify. Ms. Pruitt testified that the defendant's father, Terry McGirk, was 16 or 17 when the defendant was born. Mr. McGirk never spent time with the defendant and never supported him. Ms. Pruitt stated that she loved her son and that if her son were given the death penalty, "[i]t would just kill [her], too." Ms. Pruitt said that she had been addicted to drugs for seven or eight years when the defendant was a child. She had one conviction for receiving stolen property and several convictions for public intoxication. Ms.

Pruitt's mother, Frankie Timberlake, helped care for the defendant and cared for him whenever Ms. Pruitt was incarcerated. Ms. Pruitt was married to Walter Lee Pruitt for about six years. During that time, Mr. Pruitt was jailed a number of times. Although Mr. Pruitt was close to the children, he left to be with another woman. Ms. Pruitt claimed that several family members had mental health problems, including her daughter Tapika. But she never sought mental health treatment for the defendant because she thought that he was a "normal child" who "didn't seem slow."

Ms. Pruitt stated that the defendant had never held a job for more than a month. At the time of the murder, the defendant was living with Ms. Pruitt's sister Alma Rockett. Although the defendant had previously lived with his mother and his sister Quiana in public housing, Ms. Pruitt was forced to have the defendant move in with Ms. Rockett after she and the defendant had a dispute over disciplining his nephew.

On cross-examination, Ms. Pruitt said the defendant was first arrested at age 13 or 14 and was arrested many times thereafter. She claimed that the defendant was in special education classes when he was in the fifth or sixth grade. However, she acknowledged that the defendant's achievement test scores were high. She said that the defendant stopped attending school after the seventh or eighth grade because he kept getting arrested and was placed in juvenile facilities.

Quiana Pruitt, the defendant's sister, testified that she would be really hurt if her brother was sentenced to death. She said that their father had never spent time with either of them. She described her childhood as "good off and on" though there were times when they did not have electricity. She also testified that their grandmother was their primary caregiver when their mother was away and that their aunt Alma Rockett would often tell them that their mother was on drugs and did not want them. She said several of their relatives had mental problems.

Ralph Nally, a criminal investigator, testified that he attempted to locate the defendant's father. Although he never talked to Mr. McGirk directly, Mr. McGirk sent a message to him that he did not want to participate in the defendant's proceedings.

In rebuttal, the State presented the testimony of Sandra Atkinson, the records supervisor at Memphis City Schools. Ms. Atkinson reported that the defendant enrolled in the first grade on September 9, 1987. The defendant repeated the first grade, although school records did not indicate why. Ms. Atkinson noted that the defendant's test scores during his first time in first grade were high enough to be promoted to the second grade. The defendant's grades were normal. During his second year in the first grade, he scored "exceptionally high" on the achievement test, especially in math. He was essentially a straight-A student. The defendant continued to perform well in school through the sixth grade, earning good grades and scoring well on the achievement test. He was never attended special education or resource classes. In her opinion, the defendant "was an excellent student."

In the seventh grade, the defendant transferred back and forth between a couple of middle schools. He was absent a significant number of days and did not finish seventh grade in the Memphis City Schools. He did not score well on the achievement test and, because he did not complete the seventh grade, he did not have any grades. Nevertheless, the defendant was promoted to eighth grade, but he did not enroll there until November 2, 1995. Then he withdrew for non-attendance on January 30, 1996. During his brief time in the eighth grade, his grades declined. On April 26, 1996, the defendant's records were sent to an alternative school. Students were sent to an alternative school for either non-attendance or behavioral problems. The defendant repeated the eighth grade in 1996 at Bellevue Junior High School. He was withdrawn from that school by court order after attending school for less than two months. Ms. Atkinson did not have any achievement

test scores for the defendant's eighth grade year at Bellevue. But she said that when the defendant attended school, "he was an excellent student."

In surrebuttal, the defendant recalled his mother, Vivian Pruitt. Ms. Pruitt explained that the defendant fell on his head when he was in the fifth grade. He was taken to the hospital and examined for a head and neck injury, but no tests were done. The defendant later complained of headaches. Ms. Pruitt also reported that four of the defendant's best friends were killed in a car accident in the seventh grade. The defendant "didn't act so good [*sic*]" after the accident. His brother Rico died from AIDS during that time, too. Ms. Pruitt believed that "[a]ll of that might have affected him" and that, in hindsight, she "should have paid more attention to him or something."

The trial court instructed the jury one three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies other than the present charge the statutory elements of which involved the use of violence to the person; (2) the murder was knowingly committed by the defendant while the defendant had a substantial role in committing or attempting to commit a robbery; and (3) the victim of the murder was 70 years of age or older.

The court also instructed the jury as to the following 23 mitigating circumstances: (1) the defendant's capacity to appreciate the wrongfulness of his conduct was substantially impaired; (2) the defendant's youth at the time of the crime; (3) the defendant has a family whose members have expressed love and support; (4) the defendant's formal education is limited to completing the seventh grade of school; (5) the defendant's father has never been a part of the defendant's life; (6) the defendant's family for three generations may have suffered from mental illness and drug or alcohol addiction; (7) the defendant's mother was arrested for receiving stolen property when the defendant was two years old and was arrested many more times; (8) the defendant experienced significant deficits in his adaptive behavior; (9) the defendant's I.Q. has been measured at 66, and he

was diagnosed as mildly mentally retarded when he was sixteen; (10) the defendant was diagnosed as being mildly mentally retarded by the Middle Tennessee Mental Health Center; (11) the defendant suffers from schizophrenia, has attempted suicide attempts, and has a family history of schizophrenia; (12) the defendant has expressed pressure and stressors leading up to the crime; (13) the defendant did not intentionally kill the victim; (14) the defendant did not premeditate the victim's murder; (15) the failure of our social system to protect and school the defendant; (16) the failure of our mental health system to treat the defendant; (17) the neglect and abandonment of the defendant during his childhood; (18) the trauma produced by loss during the defendant's childhood; (19) the defendant has expressed remorse for his actions; (20) any residual doubt that remains with you concerning the guilt or intent of the defendant; (21) the defendant possibly was prenatally exposed to drugs and alcohol; (22) the impact of an execution of the defendant upon his family members; and (23) any other mitigating factor raised by the evidence.

After deliberating, the jury found that the State had proven all three of the aggravating circumstances beyond a reasonable doubt. The jury further found that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. The jury imposed a sentence of death.

## ARGUMENT

## I. THE DISPROPORTIONALITY ANALYSIS SHOULD NOT BE MODIFIED.

The provisions of the criminal code are to be "construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations." Tenn. Code Ann. 39-11-104. Thus, courts are required to give "[t]he words of the statute ... their ordinary and natural meaning." *State v. Majors*, 318 S.W.3d 850, 859 (Tenn. 2010). The courts' role is "to give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000). Thus, Courts proceed without a "forced construction to limit or extend" the meaning of the words. *State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). Courts refer to dictionary definitions whenever it is appropriate. *Majors, supra.*

When reviewing a sentence of death, the appellate courts are required by statute to determine whether the sentence is "disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." Tenn. Code Ann. § 39-13-206(c)(1)(D). In *State v. Bland*, this Court adopted the precedent-seeking method of comparative disproportionality review. 958 S.W.2d 651, 662-668 (Tenn. 1997). In doing so, this Court construed the statute in accordance with "the statutory language at issue and the legislative intent in light of the jurisprudential background" of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *Bland*, at 664. Indeed, this Court repeatedly referred to the legislative intent, the "words" and "language" used by the General Assembly, and the courts' "statutory duty." *Id.* at 664, 665, & 667. In light of the plain language of the statute and this jurisprudential background, this Court explained that "the purposes of comparative proportionality review are to eliminate the possibility that a person will be sentenced to death by the action of an *aberrant jury* and to guard against the capricious or random imposition of the death penalty." *Bland*, at 665 (emphasis added).

Moreover, this Court emphasized that the "function" of disproportionality review "is not to search for proof that a defendant's death sentence is perfectly symmetrical, but to identify and invalidate the *aberrant death sentence*" and "prevent caprice" in the jury's decision to impose the death penalty. *Bland*, at 665 (emphasis added); *see id.* ("our duty . . . is to assure that no aberrant death sentence is affirmed" and "the goal of comparative proportionality review" is "identifying aberrant sentences"). Accordingly, this Court explained, "if the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate." *Id.* at 665 & 668.

To effectuate that standard, this Court identified a non-exhaustive list of circumstances that, in conjunction with "other salient factors," could be used to identify similar cases and conduct disproportionality review. *Id.* at 667. The "circumstances" at issue in disproportionality review were identified in accordance with the two statutory categories: (1) the nature of the crime and the nature of the defendant." *Id.* (*quoting* Tenn. Code Ann. § 39-13-206(c)(1)(D)). First, this Court identified several factors relevant to the nature of the crime: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victims' characteristics, including age, physical condition, and mental condition; (6) the victims' treatment during the killing; (7) the absence or presence of premeditation; (8) the absence or presence of provocation; (9) the absence or presence of justification; and (10) the injury to and effects on non-decedent victims. *Id.* at 668. Second, this Court identified several circumstances relevant to the nature of the defendant: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional, or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); and (8) the defendant's capacity for rehabilitation. *Bland*, at 668.

The adoption of the comparative disproportionality standard was a matter of statutory interpretation then and any reconsideration of the standard is likewise a question of statutory interpretation. Given the purpose of review— identifying aberrant death sentences— and the metric by which such identifications are made— plain lack of circumstances consistent with other death penalty cases— the *Bland* analysis is perfectly suited for the task. Moreover, because neither the statute nor the jurisprudential background has changed, a change in the methodology could only be accomplished through a wholesale reinterpretation of the statute coupled with a complete a reconceptualization of the precedents that guided the General Assembly in adopting disproportionality review. Neither is warranted.

**1. The death penalty statutes insure that the death penalty is imposed in a rational, non-arbitrary manner, and proportionality review serves as a fail-safe mechanism to identify aberrant death sentences.**

To keep any discussion of proportionality review in proper context, the procedures according to which death penalty cases are prosecuted must be a primary consideration. The arguments for reform generally contend that prosecutorial discretion is "unlimited." That contention can be quickly dispatched upon a quick review of the death penalty prosecution process.

In deciding to pursue the death penalty in a particular case, a prosecutor's discretion is guided by the state and federal constitutions, substantive and procedural statutes, rules of evidence, rules of procedure, rules of professional conduct, and many other considerations. A prosecutor cannot ethically go forward with a death penalty prosecution without probable cause. *See* Tenn. Sup. Ct. R 8, RPC 3.8(a). As a practical matter, a prosecutor cannot go forward without admissible evidence that a first degree murder was committed. Tenn. Code Ann. § 39-13-202; Tenn. R. Evid. 402. Additionally, a prosecutor cannot go forward without admissible evidence of at least one aggravating circumstance. Tenn. Code Ann. § 39-13-204. In both instances, the evidence must be sufficient to carry the heavy burden of proof beyond a reasonable doubt. *In re Winship*, 397 U.S.

358, 364 (1970) ("Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt"); Tenn. Code Ann. §§ 39-13-204(g)(1) and (i). Aggravating circumstances must be proved beyond a reasonable doubt and must be proved to outweigh any mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(g)(1); *see* Tenn. Code Ann. § 39-13-204(j). A prosecutor is also required to confer with the victims of the crime. Tenn. Const., art. I, § 35; Tenn. Code Ann. § 40-38-301. A prosecutor may consider the penalties available upon conviction. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979). A prosecutor may consider retribution and deterrence in deciding whether to seek the death penalty. *See Gregg v. Geogia*, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence"). A prosecutor may also consider the "practical realities" of "the allocation of limited public resources." *State v. Harton*, 108 S.W.3d 253, 261 (Tenn. Crim. App. 2002) (*citing Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

These are but a few of the myriad considerations involved in the decision to seek the death penalty in any given case. Nevertheless, they are sufficient to demonstrate that any claim that prosecutorial discretion is unlimited or that death penalty prosecutions lack a uniform protocol cannot coexist with reality. Death penalty prosecutions must run a gauntlet of rules, regulations, statutes, and constitutional constraints that are not conceived in non-capital prosecutions. *See, e.g., Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App. 2011) (copy attached) (Discussing application of the "death is different" principle in a variety of contexts).

Moreover, the argument that the exercise of prosecutorial discretion somehow taints the selection of cases for death penalty prosecution has been rejected by the United States Supreme Court and this Court. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *State v. Cazes*, 875 S.W.2d 253 (Tenn. 1994); *Cf. Cooper v. State*, 847 S.W.2d 521, 536 (Tenn. Crim. App. 1992) (discussing

prosecutorial discretion in relation to a post-conviction challenge by a capital defendant). In his challenge to the Georgia death penalty statute, Gregg claimed that "the opportunities for discretionary action that are inherent in the processing of any murder cases under Georgia law." *Gregg*, at 199. More particularly, Gregg claimed that "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them." *Id.* The Supreme Court rejected that argument, explaining:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

*Id.* The Court further explained that "[i]n order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant." Those points are just as salient, and conclusive, now as they were when *Gregg* was decided.

Furthermore, when the U.S. Supreme Court approved of the use of aggravating and mitigating circumstances in death penalty cases, the Court explained:

> While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

*Gregg*, at 193-195. If aggravating and mitigating circumstances reduce the likelihood that a jury will impose an arbitrary and capricious death sentence, it must also be true that they reduce the

likelihood that a prosecutor may act in an arbitrary and capricious manner in deciding to seek the death penalty in the first place.

Finally, the fact that only one case has been overturned on proportionality review demonstrates that the death penalty statutes effectively channel prosecutorial discretion in such a way that arbitrary death sentences are virtually impossible. It does not evince a broken system. It is often suggested that this Court's disproportionality review procedure makes it exceedingly difficult for defendants to show that their death sentences are disproportionate. *See, e.g., State v. Chalmers*, 28 S.W.3d 913, 923 (Tenn. 2000) (Birch, J., concurring and dissenting). This contention misses the point. Comparative disproportionality review is not a process for debating mere distinctions between cases. Indeed, "[n]o two cases or defendants are precisely identical." *Bland*, at 667. As this Court repeatedly explained in *Bland*, the purpose of disproportionality review is to identify aberrations. Aberrations are not quotidian phenomena. It should be exceedingly difficult to carry the burden of persuasion to establish the existence of an aberration. To reach any other conclusion requires either that one believe aberrations are commonplace in our justice system or that one apply a definition of aberration heretofore unknown to the English language. Either way, the argument stretches the limits of credulity.

**2. The General Assembly did not intend proportionality review to serve as a check on the exercise of prosecutorial discretion.**

There is nothing in the text of the death penalty sentencing statute to support the contention that the General Assembly intended for courts to review the exercise of prosecutorial discretion as part of the disproportionality review process.

This Court has repeatedly explained that review of prosecutorial discretion in deciding whether to seek the death penalty is not part of proportionality review. *State v. Reid*, 164 S.W.3 286, 316 (Tenn. 2005); *State v. Thomas*, 158 S.W.3d 361, 381( Tenn. 2005); *State v. Davis*, 141 S.W.3d 600,

620 (Tenn. 2004); *State v. Davidson*, 121 S.W.3d 600, 621 (Tenn. 2003); *State v. McKinney*, 74 S.W.3d 291, 311 (Tenn. 2002); *State v. Godsey*, 60 S.W.3d 759, 784 (Tenn. 2001); *State v. Chalmers*, 28 S.W.3d 913, 924 (Tenn. 2000). In *Godsey*, this Court explained that the "function [of disproportionality review] is limited to identifying aberrant death sentences, not identifying *potential* capital cases." *Id.* (emphasis in original). *Godsey* further explained that "[c]onsideration of cases in which the State did not seek the death penalty, in effect, would be using a prior decision of the State as a basis for invalidating a death penalty in an unrelated case" and pointed out that such judicial review could have a drastic impact on the manner in which prosecutors exercise their discretion. *Id.* One effect this Court noted was the potential for causing prosecutors to seek the death penalty more often for fear that the decision in a case where leniency is warranted may impact a subsequent case in which leniency is not warranted. *Id.* This is a consideration that should not be under-emphasized.

There is also the impracticality reality of such review to consider. In a footnote in *State v. Chalmers*, the Court suggested that "[i]f the evidence were to show that the death penalty had been arbitrarily applied because prosecutors treated similar cases differently for no rational reason, such random choices between life and death should not be accepted by this Court any more than if the same result had been created by aberrant juries." 28 S.W.3d 913, 924 n.4 (Tenn. 2000). There are at least two problems with that suggestion. First, there is no known source through which such evidence would find its way into the appellate record. Generally, the only evidence of the prosecutor's decision are the indictment or presentment and the notice of intent to seek the death penalty. Otherwise, prosecutors do not explain the reasons for their decisions. For that matter, the only consideration that needs to be made is whether the charge is supported by probable cause. *State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995). Moreover, this Court noted in *Bland* that no two cases or defendants are exactly alike and that it is difficult to completely enumerate and define the variables involved. If it is difficult for this Court to conduct the analysis

with the benefit of hindsight— which is why the appellate record permits— then, at the very least, it must be equally difficult for prosecutors to do so on a case by case basis in the first instance. They must make that decision before the first witness has testified and often before the investigation is complete. They must also make that decision based upon their own assessment of the evidence in light of all the other considerations previously discussed. *See supra* pp. 26-27. And they rarely, if ever, disclose their assessment of those considerations to the defendant and the trial court.

Second, and more importantly, our state Constitution prohibits courts from reviewing the exercise of prosecutorial discretion in pursuing criminal charges. As the Court of Criminal Appeals has held, "[t]he District Attorney General is an officer 'with the executive branch of the government and as an incident of the constitutional separation of powers, the courts are not to interfere with the free exercise of this discretionary authority in [the district attorney's] control over criminal prosecution.'" *State v. Ray*, 973 S.W.2d 246, 248 (Tenn. Crim. App. 1997) (*quoting State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995)). "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by the statute, the decisions of whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *Gilliam*, 90 S.W.2d at 389 (*quoting Wayte v. United States*, 470 U.S. 598, 607 (1985) (*citing Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))). The courts do not have the right to dictate to the prosecutor how to proceed in any given case. *Id.* The prosecutor's discretion is only "subject to procedural bars and the constitutional restraints of equal protection and double jeopardy." *Id.* (*citing United States v. Batchelder*, 442 U.S. 114, 123-126 (1979)); *see Oyler v. Boles*, 368 U.S. 448, 456 (1962) (The Equal Protection Clause prohibits selective enforcement based upon race, religion, and other arbitrary classifications). Absent such arbitrary conduct, "state officials enjoy broad prosecutorial discretion." *Cooper v. State*, 847 S.W.2d 521, 536 (Tenn. Crim. App.

1992). Any attempt by a court inject itself into the exercise of prosecutorial discretion would be an ultra vires act in violation of the constitutional separation of powers. *Id.*

Finally, to the extent that the state and federal constitutions, statutes, and rules of procedure impose constraints upon the prosecutor's discretion, defendants already have a remedy to pursue such claims. "[A]ny defense, objection, or request" may be raised in a pretrial motion. Tenn. R. Crim. P. 12(b). Moreover, Rule 12 requires that "a motion alleging a defect in the institution of the prosecution" be filed before trial. A defendant who wants to challenge his prosecution under the Due Process Clause, the Equal Protection Clause, or the Double Jeopardy Clause, may do so under Rule 12. *See, e.g., State v. Harton*, 108 S.W.3d 253, 261 (Tenn. Crim. App. 2002) (Discussing prosecutorial discretion and selective enforcement claims); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (Defendants claiming selective enforcement must establish that the law enforcement decision had a discriminatory purpose and produced a discriminatory effect.) This procedure ensures that the appellate court will have a fully developed record to review.

When the General Assembly drafted the comparative disproportionality review statute, it was certainly aware of the broad discretion afforded to prosecutors and the insulation provided the exercise of that discretion by the separation of powers in our state constitution. Additionally, the General Assembly was certainly aware that prosecutorial discretion could not be used to discriminate through vindictive or selective prosecution. Moreover, the General Assembly knew that any viable claim that prosecutorial discretion was abused could be pursued through a pre-trial motion to dismiss in accordance with the rules of criminal procedure. Furthermore, when the General Assembly drafted the disproportionality review statute, it chose two criteria for review—the nature of the case

and the nature of the defendant— neither of which includes the nature of the prosecutor's discretion.

**3. The General Assembly did not intend disproportionality review to serve as a check on discrimination in death penalty prosecutions.**

For the same reasons previously discussed, there is nothing in the text of the disproportionality review statute or its jurisprudential background that supports the contention that disproportionality review should include a review of discrimination. In short, any defendant wanting to pursue such a claim may do so by filing a pre-trial motion to dismiss. And, more importantly, the plain language of the statute does not include claims of discrimination. Furthermore, this Court has repeatedly rejected challenges to the constitutionality of the death penalty statute on various claims of alleged discrimination. *State v. Sexton*, 368 S.W.3d 371, 427-428 (Tenn. 2012); *State v. Brimmer*, 876 S.W.2d 75, 87 & n.5 (Tenn. 1994); *State v. Cazes*, 875 S.W.2d 253, 268 (Tenn. 1994); *State v. Smith*, 857 S.W.2d 1, 23 (Tenn. 1993). The rejected arguments have included claims of discrimination based on geography, the race of the defendant and victim, the gender of the defendant and victim, and the economic status of the defendant and the victim. *Sexton*, at 427-428.

**4. The General Assembly did not intended for proportionality review to serve as a narrowing device.**

Under the Eighth Amendment, as a constitutional prerequisite to imposition of a death sentence, the United States Supreme Court requires states to narrow the class of death-eligible murderers. *See Pulley v. Harris*, 465 U.S. 37(1984). This narrowing must be done in a way that reasonably justifies the imposition of a more severe sentence on the defendant compared to other murderers. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). A proper narrowing device provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). It must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in

which the death penalty may not be imposed. *Zant, supra*, 462 U.S. at 879. As a result, a proper narrowing device insures that, even though some defendants who fall within the narrowed class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers—those whose crimes are particularly serious or those for which the death penalty is peculiarly appropriate. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

Narrowing may be accomplished either by providing restrictive definitions of first-degree or capital murder or by utilizing aggravating circumstances at the sentencing hearing. *State v. Odom*, 928 S.W.2d 18, 33 (Tenn. 1996) (*citing Lowenfield v. Phelps*, 484 U.S. 231 (1988)). Our General Assembly has chosen to narrow the class through aggravating circumstances. *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992). Other states have chosen to narrow the class at the definitional stage. *Lowenfield*, at 244-246. However, no state has chosen to narrow through proportionality review. And no state has chosen to narrow on appellate review. Indeed, the suggestion that narrowing be conducted through disproportionality review on appeal is not contemplated by the Supreme Court's decisions. Most notably, the Supreme Court's cases on narrowing are focused on guiding the jury in the exercise of its discretion in sentencing. *Lowenfield*, at 244-245; *Gregg*, 428 U.S. at 189 (Discretion of "sentencing body ... must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). The suggestion that our dis-proportionality review statute should be reinterpreted to serve as a narrowing device on appeal is not only far afield of the General Assembly's intention but also utterly unprecedented in all of American jurisprudence. Such a dramatic departure from the plain intention and settled interpretation of a statute should originate only in the legislature itself.

**5. This Court's proportionality review does not serve as a "rubber stamp" for the decisions of prosecutors, judges, and juries.**

This Court's proportionality review is an objective test that subjects death sentences to a careful analysis that searches for aberrant sentences. The "rubber stamp" argument is premised on the belief that proportionality review lacks objective standards. *See, e.g., State v. Chalmers*, 28 S.W.3d 913, 924 (Tenn. 2000) (Birch, J., concurring and dissenting). It has been argued that, "without some objective standard to guide reviewing courts, 'proportionality' becomes nothing more than a statement that the reviewing court was able to describe the case before it in terms comparable to other capital cases." *Id.* This contention misses the distinctions between subjective factors and objective factors and between a subjective test and an objective test.

Generally, the word objective, when used as an adjective to describe a factor or consideration, means "based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." *Black's Law Dictionary*, 1103 (8th ed. 2004); *see Fowler's Modern English Usage*, 406 (2nd ed. 1965) (distinguishing objective and subjective). An objective standard is a "legal standard that is based on conduct and perceptions external to a particular person." *Black's Law Dictionary*, 1441 (8th ed. 2004). In contrast, the word subjective means "based on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena." *Black's Law Dictionary*, 1465 (8th ed. 2004). Thus, a subjective standard is "peculiar to a particular person and based on the person's individual views and experiences." *Black's Law Dictionary*, 1441 (8th ed. 2004). As used by the courts of this state, the word objective generally denotes well-defined or readily ascertainable considerations that guide a particular decision. *See, e.g., State v. Richardson*, 357 S.W.3d 620, 626 (Tenn. 2012) (discussing objective factors guiding prosecutor's discretion in considering application for diversion).

Aggravating circumstances, such as those found in our death penalty statute, are a fine example of objective criteria. *See State v. Middlebrooks*, 840 S.W.2d 317,345 (Tenn. 1992) (*quoting Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985)). They are "externally verifiable phenomena" that can be gleaned from the appellate record. If they were not externally verifiable, this Court could not review the record to determine if the evidence is sufficient to sustain them. Moreover, for the most part, the aggravating circumstances are not subject to any person's individual views and experiences.

A couple of examples are worthy of discussion. It has been argued that motive and manner of death are "subjective factors" that are "too malleable to justify primary reliance." *Godsey*, 60 S.W.3d at 797 (Birch, J., concurring and dissenting). However, whether those factors are subjective or objective is really a matter of semantics. Though motive, in a general sense, is properly characterized as subjective, the evidence will often include objective manifestations of the killer's motive. This case is a good example. While we may never know what the defendant was actually thinking, his motive is evidenced by his statements and his conduct. He said he was going to steal a car; he carjacked Mr. Guidroz, beat him to death, and fled in Mr. Guidroz's car; then he explained that he wanted to sell the car for parts. Thus, the defendant's motive is objectively verifiable.

The same may be said of manner of death. If manner of death is described in vague terms, such as "violent" or "torturous," cases may come before the courts in which there is room to debate the accuracy of those descriptions and applicability of the circumstance for disproportionality review. *See Godsey*, 60 S.W.3d at 786. But, if manner of death is defined in terms of the number and nature of the wounds inflicted, it becomes an objectively verifiable factor. Again, this case provides a good example. Mr. Guidroz's manner of death may be described as "violent" or, perhaps, "extremely violent," and some subjectivity may remain. However, if Mr. Guidroz's death is described in terms of his injuries, such as multiple blows to the head from punches and being body-slammed to the ground, Mr. Guidroz's manner of death is decidedly objective. Similarly, a victim's

manner of death could be described as an execution-style shooting or it could be described as a single gunshot wound to the back of the head. In either case, the essential idea is the same. The difference is that the former relies upon a broader concept while the latter relies upon a more concrete description. Any concerns that some of the circumstances are too subjective may be alleviated though more precise definitions or more particular applications. But the wholesale elimination of some circumstances is not warranted.

This Court's proportionality protocol is exceedingly objective in nature. It does not rest upon the beliefs, biases, opinions, preferences, or predilections of any particular judge or justice. Instead, it directs the judiciary to an unbiased review of the facts in accordance with considerations that exists independently of the observer— the nature of the case and the nature of the defendant.

**6. This Court's proportionality review protocol is not overbroad but is consistent in scope with the plain meaning of the statute.**

The overbreadth argument rests on the contention that the test is not "reliably gauged to identify disproportionate sentences" because a "sentence may be found proportionate based upon minimal similarities to a prior death penalty case." *Godsey*, 60 S.W.3d at 794 (Birch, J., concurring and dissenting). Under the alternative test advocated, "the circumstances of each case are analyzed to determine whether its characteristics are *more consistent* with other capital cases wherein a death sentence has been imposed." *Id.* at 794. The problem with this position is that is construes the statute exactly backwards. This argument seeks to determine whether a sentences is more proportional to other capital cases or other non-capital cases. Yet, the statute requires an analysis that looks for disproportionate sentences when compared to similar cases.

As this Court took pains to explain in *Bland*, the plain language of the statute viewed in light of the jurisprudential background demonstrates that the General Assembly intended that only aberrant— or disproportionate— sentences would be invalidated. By using the

word disproportionate, the General Assembly evinced its intention that courts would evaluate a sentence by comparison to the pool of existing death penalty cases to see if something has gone awry in the process, resulting in the imposition of a death sentence that should not be. The General Assembly did not intend for the appellate courts to evaluate a sentence to determine whether it is more like— or proportional to— capital cases or non-capital cases. Indeed, the arguments in favor of this alternative approach do not analyze the statutory language and, instead, search other jurisdictions for a preferred policy. This Court has previously recognized the limits of its authority when construing statutes: "We cannot, under the guise of judicial interpretation of the statute, in effect rewrite the law and thus substitute our own policy preferences for the Legislature's." *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 517 (Tenn. 2005). "If the statute is unambiguous, we need only enforce the statute as written[,]" with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose." *Id.* at 515. There is no ambiguity in the disproportionality review statute. It was correctly construed in *Bland*.

## II. THE ABSENCE OF AN INTENT TO KILL DOES NOT RENDER THE DEATH PENALTY DISPROPORTIONATE IN FELONY MURDER CASES.

The provisions of the criminal code are to be "construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations." Tenn. Code Ann. 39-11-104. Thus, courts are required to give "[t]he words of the statute ... their ordinary and natural meaning." *State v. Majors*, 318 S.W.3d 850, 859 (Tenn. 2010). The courts' role is "to give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000). Thus, Courts proceed without a "forced construction to limit or extend" the meaning of the words. *State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). Courts refer to dictionary definitions whenever it is appropriate. *Majors, supra*.

Under the death penalty appeal and review statute, appellate courts are required to determine whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." Tenn. Code Ann. § 39-13-206(c)(1)(D). In *Bland*, this Court explained that comparative disproportionality review is required by statute, not the constitution, and proceeded to establish the comparative disproportionality review as the procedure for carrying out the statutory obligation. *See Bland*, 958 S.W.2d at 662-668. In doing so, this Court took pains to be faithful to the language of the statute and the legal precedents that led to its adoption. *Id.* The same approach should be used in determining whether the absence of intent to kill renders the death penalty disproportionate in a felony murder case.

### 1. The General Assembly did not intend for a lack of intent to be considered during proportionality review in felony murder death penalty cases.

The General Assembly has declared that felony murder is an offense punishable by death. Tenn. Code Ann. § 39-13-202(c)(1). As defined by statute, felony murder is a "killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism,

arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, or aircraft piracy." Tenn. Code Ann. § 39-13-202(a)(2). Additionally, the General Assembly dispensed with the culpable mental state, "except the intent to commit the enumerated offenses or acts." Tenn. Code Ann. § 39-13-202(b). Statutory comparative disproportionality review is based upon a consideration of circumstances relating to "the nature of the crime and the defendant." Tenn. Code Ann. § 39-13-206(c)(1)(D); *Bland*, 958 S.W.2d at 665 & 667-668.

When used to refer to a concept or phenomena, the word nature is defined as "the essential characteristics and qualities." *Webster's II New College Dictionary*, 729 (2001). When used to refer to a person, the word nature is defined as "an individual's fundamental character or disposition: Temperament" or "the natural or real aspect of a person." *Id.* Applying these definitions to comparative disproportionality review of a felony murder conviction, it can be seen that the General Assembly did not intend for a lack of intent to be considered. Intent to kill is not an essential characteristic or quality of felony murder. Intent to kill is not an element of the offense. Tenn. Code Ann. § 39-13-202(a)(2). Nor is it "the conduct, the circumstances surrounding the conduct, or a result of the conduct described in the definition of the offense." Tenn. Code Ann. § 39-11-201. Intent to kill is a concept applicable elsewhere in the criminal law, but it is not a part of felony-murder jurisprudence. Likewise, intent to kill is not a part of the defendant's "fundamental character or disposition." Nor is it part of a defendant's natural or real aspect. It is not part of a defendant's characteristics, personality traits, physical or mental condition, socio-economic status, genealogy, or family background. Thus, in accordance with the natural and ordinary meaning of the statutory language, intent to kill is irrelevant to the comparative disproportionality analysis in felony murder cases.

**2. In felony murder death penalty cases, a killer's intent to kill or lack of intent to kill is irrelevant to the proportionality analysis.**

In *Tison v. Arizona*, the United States Supreme Court provided a lengthy explanation of the perils associated with considering intent to kill as part of any proportionality analysis:

> A narrow focus on the question of whether or not a given defendant "intended to kill" . . . is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty—those that are the result of provocation. On the other hand, some non-intentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

481 U.S. 137, 157 (1987). In that case, the Supreme Court held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." *Id.* at 158. Thus, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement" and support imposition of the death penalty. *Id.* (*citing Enmund v. Florida*, 458 U.S. 782 (1982)). To the extent that this Court is inclined to include a culpability requirement in the comparative disproportionality review of felony murder death sentences, it is the reckless indifference to human life that should be factored in, not the intent to kill or lack thereof. But only if that requirement can be squared with the natural and ordinary meaning of the statute.

## III. THIS COURT SHOULD NOT BROADEN THE POOL OF CASES CONSIDERED IN COMPARATIVE DISPROPORTIONALITY ANALYSIS.

The provisions of the criminal code are to be "construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations." Tenn. Code Ann. 39-11-104. Thus, courts are required to give "[t]he words of the statute ... their ordinary and natural meaning." *State v. Majors*, 318 S.W.3d 850, 859 (Tenn. 2010). The courts' role is "to give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000). Thus, Courts proceed without a "forced construction to limit or extend" the meaning of the words. *State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). Courts refer to dictionary definitions whenever it is appropriate. *Majors, supra.*

When a death sentence is imposed, appellate courts are required to determine whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." Tenn. Code Ann. § 39-13-206(c)(1)(D). In *Bland*, this Court explained that comparative disproportionality review is required by statute, not the constitution, and proceeded to establish the comparative disproportionality review as the procedure for carrying out the statutory obligation. *See Bland*, 958 S.W.2d at 662-668. In doing so, this Court took pains to be faithful to the language of the statute and the legal precedents that led to its adoption. *Id.* The same approach should be used in determining whether the pool of cases included in the comparative disproportionality analysis should be broadened.

In *Bland*, when considering the "universe" or "pool" of cases to be included in disproportionality review, this Court concluded that "the statute itself is silent on the issue." That is incorrect. When construing statutes, courts "determine legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without any

forced or subtle construction that would extend or limit the statute's meaning." *Austin v. State*, 222 S.W.3d 354, 357 (Tenn. 2007) (*quoting State v. Fleming*, 19 S.W.3d 195, 197 (Tenn. 2000)). Although the General Assembly did not expressly define the pool of cases to be used in disproportionality review, the legislative intent is plainly evident when the question is considered in "the context of the entire statute."

**1. The General Assembly intended to limit the pool of cases for comparative proportionality review to cases in which a death sentence was imposed.**

Throughout the first degree murder statutes, the General Assembly has recognized a clear distinction between sentences of death and sentences of life and life without parole. The General Assembly enacted separate sentencing statutes for "death sentences" and sentences of life imprisonment and life imprisonment without parole. Tenn. Code Ann. § 39-13-206 (review of death sentences); Tenn. Code Ann. § 39-13-207(g) (non-capital cases). Death sentences are given automatic review in this Court and "priority over all other cases." Tenn. Code Ann. § 39-13-206(a)(1) & (b). Most importantly, the General Assembly has provided for disproportionality review only for death sentences. Tenn. Code Ann. § 39-13-206(c)(1)(D). Sentences of life and life without parole are not afforded those additional protections. Tenn. Code Ann. § 39-13-207(g). Thus, when viewed "in the context of the entire statute," it is clear that the General Assembly has drawn a line of demarcation between death sentences and all other sentences for purposes of appellate review and, in turn, comparative disproportionality review. Therefore, the phrase "similar cases" must mean cases in which the death penalty was actually imposed.

This construction of the statute is consistent with the "natural and ordinary meaning" of the words similar and disproportionate. Similar means "resembling though not completely identical." Webster's II New College Dictionary, 1029 (2001). Things are considered proportionate when they share the same "magnitude, quantity, or degree." *Webster's II New College Dictionary*, 887 (2001);

*Fowler's Modern English Usage*, 487 (2nd. ed. 1965) (proportionate means "analogous in quantity"). Similarly, things are considered disproportionate when they are "out of proportion, as in relative size, shape, or amount." *Webster's II New College Dictionary*, 329 (2001).

Applying these definitions to the pool of cases included in comparative disproportionality review, it can be seen that the General Assembly intended to include only death sentences in the pool of cases. Sentences of life imprisonment and life imprisonment without parole are decidedly dissimilar and dramatically disproportionate to sentences of death. This is true with respect to the magnitude, quantity, and degree of these disparate punishments such that they cannot be reasonably considered "similar." This the reason our justice system is typified by a "death is different" principle. *See State v. Carter*, 890 S.W.2d 449, 454 (Tenn. Crim. App. 1994); *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App. 2011) (copy attached) (discussing application of the "death is different" principle in a variety of contexts). As this Court has recognized, "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *State v. Harris*, 919 S.W.2d 323, 334 (Tenn. 1996) (*quoting Gregg, supra*, 428 U.S. at 158). A death sentence is "severe beyond rectification." *Id.* It is this "qualitative difference" that requires "a correspondingly greater degree of scrutiny." *Id.* (*quoting California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

In *Bland*, this Court noted that the General Assembly enacted the death penalty sentencing statute in response to *Gregg*. Accordingly, this Court ruled that the statute should be construed in light of the "jurisprudential background" that preceded it. *Bland*, at 662 & 664. Indeed, "[t]he legislature is presumed to know the state of existing case law." *State v. Powers*, 101 S.W.3d 383, 394 (Tenn. 2003). *Furman* was the first case to hold that "the penalty of death is different in kind from any other punishment" and that "[b]ecause of the uniqueness of the death penalty" additional protections are required. *Gregg, supra*, at 188. And it was *Gregg* that started the development of the

"death is different" jurisprudence in earnest. *Gregg*, at 188. Accordingly, when our General Assembly enacted our death penalty statute, it knew that death sentences are fundamentally different from all other sentences, including other first degree murder sentences. Given the plain language of the statute and it's jurisprudential background, the General Assembly intended to define the "pool" of "similar cases" as those cases in which a death sentence was imposed. After all, the jurisprudential background speaks of the "penalty" imposed, not the case or prosecution or the type of hearing conducted.

Thus, the pool of cases defined and adopted in *Bland* is what the legislature wanted. Since that time, the legislature has not made any substantive changes to the disproportionality review statute. Moreover, the jurisprudential background upon which the statute was based remains the same. Because disproportionality review is a statutory procedure and neither the statute nor the history that brought it to fruition have changed, there is no justification for re-interpreting the statute and unsettling more than 30 years of precedent.

**2. The arguments for an expanded pool of cases support a review based upon demonstrably dissimilar cases.**

Moreover, the arguments in favor of expanding the pool are unpersuasive. The claims usually rests on the contention that the pool does not include all prior cases in which the death penalty could have been imposed and, therefore, fails to protect defendants from arbitrary prosecutorial decisions. *See Chalmers*, at 924. As previously shown, proportionality review was not intended to review the exercise of prosecutorial discretion in bringing criminal charges and, in light of our constitution's separation of powers, it cannot be extended to encompass such a review. Moreover, proponents of this argument would have the court include within its analysis all conceivable first degree murder cases, even if the death penalty was not pursued. Injecting non-death penalty cases into the proportionality analysis would necessarily result in the comparison of

cases that are decidedly different in many key respects. It has also been suggested that all cases involving indictments for first degree murder should be included in the disproportionality analysis. That contention is plainly absurd as it would draw cases into the analysis in which there is no evidence of aggravating circumstances. Cases in which the prosecution has no evidence of any aggravating circumstances and presents no evidence of aggravating circumstances should not be compared to cases in which the prosecution has evidence of one or more aggravating circumstances. Doing so would draw cases that are plainly irrelevant into the mix.

## CONCLUSION

The proportionality analysis adopted by this Court in *State v. Bland*, 958 S.W.2d 651, 664 658 (Tenn. 1997), should be reaffirmed.

Respectfully submitted,

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