The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Stanley Kurt Pierchoski

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Giles County

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application 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 Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the 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 document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Owner and sole practitioner of Pierchoski Law Firm

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

2002 BPR # 022235

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

Tennessee BPR # 022235 Oct 29, 2002, **Active**

United States Patent and Trademark Office, Patent Attorney # 55535, Oct 31, 2003, **Active**

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

No

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

Since the completion of my legal education in October 2002, I have been a practicing attorney and the owner of the Pierchoski Law Firm until the present.

Prior to attending law school from 1/93 to 9/98, I retired to private life for approximately 5½ years to single-handedly design and build my home located at the above Giles County address.

Prior to building my home, I was employed as a Nuclear Engineer with the following organizations:

From 12/90 to 12/92

General Physics Corporation, 6700 Alexander Bell Drive, Columbia, MD 21046
Supervisor: Jack Millspaugh
Position: Senior Nuclear Engineer, Operations Simulator Training
Location: Browns Ferry Nuclear Power Plant, Tennessee Valley Authority, Decatur, AL

From 8/89 to 8/90
FRG Corporation, 1017 N. Telegraph Road, Monroe, MI 48162
Supervisor: Ricky D. Goodrick
Position: Contract Senior Nuclear Engineer, Operations Training Department
Location: LaSalle Nuclear Power Plant, Commonwealth Edison, Ottawa, IL

From 5/85 to 8/89
Nuclear Energy Consultants, Inc., 15713 Crabbs Branch Way, Rockville, MD 20855
Supervisor: Bill Mills
Position: Contract Senior Nuclear Engineer, Nuclear Operations
Location: Browns Ferry Nuclear Power Plant, Tennessee Valley Authority, Decatur, AL

From 7/75 to 5/85
General Electric Company, 175 Curtner Ave, San Jose, CA 95125
Supervisor: Paul Zimmerman
Position: Nuclear Engineer, Startup Operations

From 4/76 to 9/78
D'Appolonia Engineers, 10 Duff Road, Pittsburgh, PA 15146
Supervisor: Tom Hill
Position: Part time during college – Soil and Water Lab Technician

From 4/75 to 9/75
Nash Masonry, 14300 Artic Ave, Rockville, MD 20051
Supervisor: Bernard Nash
Position: Summer job during college – Laborer/brick and block
From 4/74 to 9/74

Van Sumner Corporation, 5192 West Military Hwy, Chesapeake, VA 23321

Supervisor: Lawrence Price

Position: Summer job during college – Laborer/tennis court construction

From 4/73 to 9/73

Van Sumner Corporation, 5192 West Military Hwy, Chesapeake, VA 23321

Supervisor: Lawrence Price

Position: Summer job during college – Laborer/tennis court construction

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

I have been continuously employed since the completion of my legal education from October 2002 until the present.

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

At present my law practice consists of approximately 70% criminal defense trial work and 30% civil law. My criminal defense work is 20% juvenile delinquent, 30% General Sessions criminal and 50% Circuit criminal. My civil work is 30% General Sessions civil and 70% Circuit civil or Chancery.

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

My legal career actually began prior to my graduating law school and passing the bar. During law school I participated in an internship with the 22nd Judicial District Public Defender's Office. During that internship I was involved in three criminal jury trials under the supervision of Assistant Public Defenders Beverly White, Ship Weems and Robert Stovall. I assisted in preparing the questions for direct and cross examination, witness preparation and jury selection. After that internship I knew that my passion was to be in the courtroom as a trial attorney.

After passing the bar and being admitted to the practice of law in October 2002, I established the Pierchoski Law Firm, which consisted of just myself. My office was based in Lawrence County, but I practiced in Giles, Maury and Wayne as well. For the first couple of years I would take every case that walked into my office. There were lots of deeds, divorces, custody, probate, contracts and collections, but the majority of my practice was court-appointed criminal work. My courtroom experience began almost immediately, and I conducted my first jury trial just four months after passing the bar. I had a passion for legal research and soon developed a reputation for extensively briefing my legal issues. I was always one to conduct preliminary hearings in General Sessions Court rather than waive them, and I soon gained a reputation for zealously representing my clients. In 2003 I was appointed to represent the defendant in *State v. Cayle Wayne Harris* at the Motion for New Trial level. This was a highly-publicized, egregious child rape case. The public defender was the trial attorney, but I was appointed after the jury trial when a conflict developed. After thorough investigation of the record, I identified several issues to argue at Motion for New Trial, all of which were exhaustively briefed to the court prior to the hearing. After reading my brief, and before the hearing, Circuit Court Judge Robert L. Jones stated I had made him dig into old leather bound volumes of the law. Although the Motion for New Trial was denied at the trial court level, my severance of offenses issue was persuasive, and I successfully convinced the Court of Criminal Appeals to grant the defendant a new trial.

As a result of having a large number of criminal appointed cases I gained a reputation with the courts as being able to handle "difficult" clients. The only way I can explain how I was referred to as such is that there were several criminal defendants who would cycle through two or three attorneys by creating attorney-client conflicts. The conflicted attorneys would withdraw, and I was appointed. It seemed as if I was always able to get along and proceed the case to disposition. Many commented in open court that my zealous representation showed, and they just wanted someone to fight for them. Many of the hearings and trials resulted in an adverse outcome for my client, but it always amazed me how appreciative they were for my trying. In 2004 I was appointed to represent the most difficult client of my legal career in *State v. Hugh Peter Bondurant.* This was a high-profile, first-degree murder case in which the State had sought the death penalty that ultimately resulted in a second-degree murder conviction. Dennis Stack was appointed to represent my client's twin brother. This case was recently aired as an episode of "Evil Twins" on national television. The brothers had filed for post-conviction relief under the (then) recently enacted Post-Conviction DNA Analysis Act of 2001. My client had created a conflict with four appointed attorneys before me, yet I was able to pursue his case through to completion without having conflicting out.

Because of my reputation for being through, in 2005 Judge Jones appointed me to my first murder case, *State v. Damien Tolson*, in Lawrence County. This case was complex and was fiercely fought in pre-trial motions with general Doug Dicus and myself briefing the court on multiple legal issues. Prior to trial the parties identified 41 witnesses for both sides. I was unable

to make a case for a "particularized need" and therefore was unable to secure funding for private investigator services, so I personally tracked down and questioned all 41 witnesses throughout five separate counties. After a four-day jury trial the defendant was convicted of first-degree murder. During the preparation for Motion for New Trial I became aware of knowledge that a third party had admitted to the killing. Prior to hearing the Motion for New Trial the Court heard a lengthy Writ of Error Corum Nobis on the newly discovered evidence of the third party confession. Ultimately the writ and Motion for New Trial were denied. However, the Honorable Robert L. Jones, presiding, placed on the record the following remark, "I am pleased with the performance of Mr. Pierchoski before, during and after trial. It just shows how zealous Mr. Tolson was represented."

Not all my trials were murder trials. Throughout 2006 I tried criminal cases of every flavor, including high-profile, highly-publicized cases. In 2005 I represented two codefendants charged with the B misdemeanor of Disrupting Meeting or Procession. This case involved the alleged disruption of a school board meeting, which became so publicized and popular that it dominated the local newspaper for months. The two-day jury trial was standing-room-only and resulted in an acquittal for both defendants on all charges.
Because I had gained experience in homicide cases as well as high profile cases, in 2007 I was appointed to *State v. Jeffery Dwight Rodgers*, an attempted first-degree murder case that was later labeled by the media as the E.B.G.B. shooting – so named for the club in which it too place, the Eternal Brotherhood of Gentleman Bikers. This was a four-day jury trial prosecuted by the elected DA and heavily covered by the press.

During this time I had taken several civil cases that also went to jury or bench trial. The civil cases were land disputes, personal injury, contract disputes, etc. Nothing remarkable with the exception of a one-day bench trial of an adverse possession land case. This case involved considerable research of historic law dealing with this rare topic.

Recently I have been retained by a large corporate client engaged in the solar energy business. This representation has allowed me to get heavily involved in the Federal legislation of the Public Utilities Regulatory Policies Act of 1978 (PURPA).

Since I began the practice of law I have either been appointed or hired to represent criminal clients in numerous Post-Conviction Relief cases. One of the most challenging PCRs I have encountered was *Jeffery Wayne Robertson v. State*. I was not the trial attorney. The defendant was largely convicted on Comparative Bullet Lead Analysis (CBLA) evidence. This was a form of unique testing performed by the FBI where crime scene bullets along with bullets from source boxes are analyzed for several trace element impurities to determine if the bullets were manufactured from the same lead ingot batch. It is a highly technical and scientific process that employs complicated chemical separation analysis. In late 2005 the FBI essentially abandoned the CBLA testing. At the PCR hearing I essentially had to conduct a *Daubert* hearing to show the court that the scientific evidence used to convict the defendant did not pass muster under Tennessee's *McDaniel v. CSX Transportation* test. After months of research a two-day PCR hearing was conducted for which I had written, submitted and argued a voluminous brief to the court about the manufacturing process of lead bullets and the statistical determination involving the CBLA testing. At the conclusion of this hearing, the Honorable Jim T. Hamilton, presiding, began referring to me as a "bona fide rocket scientist."

Although the Court denied Post-Conviction Relief, the case took on a unique and interesting posture on direct appeal, which is further discussed in Question 8 below of this application.

In 2005 I became death-penalty defense qualified, and in 2008 I was court appointed to my first death penalty case. In *State v. Kenneth Patterson Bondurant*, the defendant was awarded a new trial at the trial court level. The new trial granted would have been the defendant's third death-penalty trial. Supreme Court Rule 13 requires defendants in capital cases be appointed both a lead attorney and a second chair attorney. After this defendant's second jury trial and prior to the Motion for New Trial, the second chair attorney suffered health concerns that necessitated his withdrawal. I was court appointed in his place as second chair attorney. The day I was appointed, the Honorable Jim T. Hamilton presiding, told the defendant "I am appointing you a bona fide rocket scientist for your second chair attorney." This case consumed approximately 70% of my time for the next nine months. The two prior trials were each two weeks long. The transcripts of pre-trial motions, voir dire and trial were voluminous, and the amount of physical evidence was staggering. During this case I was able to secure ex parte funding for private investigation services and expert forensic services. As second chair I worked mostly with the investigators and experts grooming their work and reports into admissible evidence. I was tasked with the issues for change of venue, spousal privilege, statement suppression and serology testing. One of my many duties was to attack the state's forensic evidence. As a result of my research, I was able to discredit the state's forensic anthropologist at a pre-trial evidentiary hearing in a manner that was never attempted in either prior trials. As a result I was successful in persuading the trial court to rule on the inadmissibility of some of the State's bone fragment evidence. Because this was a death-penalty case we were awarded funds for the mitigation team to mitigate the death penalty at the sentencing phase of the trial should the defendant suffer a conviction. As second chair I had a great deal of exposure to the organization and duties of this team. One of my duties with the mitigation team was to develop a jury questionnaire. One month prior to trial the State's main witnesses died and both sides participated in a flurry of pre-trial motions dealing with former testimony. One day prior to jury selection the case was settled with a second-degree murder plea.

Since then I continued to practice with approximately 70% of my cases criminal and 30% civil. I conducted criminal trials of all persuasion as a private attorney, but my court appointed caseload was dominated by the more egregious offenses such as homicide, rape, rape of a child, arson, etc.

In 2010 I was court appointed to represent the defendant in *State v. Brian Dodson* – a brutal stabbing in a first-degree murder and an attempted first-degree murder case resulting in a seven-day trial.

In 2011 I was court appointed to represent the defendant in *State v. Robert Wayne Garner* – an egregious first-degree murder/arson case resulting in an eight-day jury trial with 45 witnesses and 65 exhibits.

In 2012 I was court appointed to represent the defendant in *State v. Julie Bunch Bauer* – a mercury chloride based double poisoning case. This case lasted more than a year and Assistant

District Attorney Dan Runde announced on the record that this case had more discovery than any case he had seen in his 30 plus years of experience.

In 2013 and 2014 I was court appointed to *State v. Jerrell Sizemore, State v. Ricky Lee Houser, State v. Jason McCollum* and *State v. Megan Forsythe*. All were first-degree murder cases and all were pending at the same time. All the while I conducted my normal caseload of lesser crimes and civil cases. Throughout the above were several homicide cases that were settled without going to trial.

I have argued approximately 35 cases on direct appeal to either the Court of Appeals or the Court of Criminal Appeals. I have written as many Rule 11 Application for Permission to Appeal to the Tennessee Supreme Court but have not yet been granted permission.

The reason I emphasize my experience with first-degree murder and homicide related cases is important. Such cases are distinctive in that they cover the entire gambit of criminal trial and procedure. These types of cases almost always go to trial, and as a result I have been exposed to every aspect of our trial court system of jurisprudence. I have become fluent in criminal procedure, the Rules of Evidence, pre-trial motion writing and arguing, discovery practice, jail, penitentiary and Tennessee Department of Correction procedure, ex parte hearings, document filing under seal, settlement negotiations, guilty pleas, jury selection, direct examination and cross-examination of witnesses, exhibit admissibility, trial objections, Jencks Act material, sentencing, motions for new trial, interlocutory appeal and direct appeal. As a result of these criminal trials and my civil cases, I have been exposed to, and am familiar with, 100% of what transpires in circuit court many times over. If there is anything to which I have not been exposed, I have demonstrated my ability to learn it rapidly and thoroughly.

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

As discussed in Answer #8 above the first-degree murder Petition for Post-Conviction Relief case in *Jeffery Wayne Robertson v. State* took on an unusual posture after the trial court hearing and while on direct appeal. After the defendant suffered an adverse decision in the trial court, the decision was appealed to the Court of Criminal Appeals. While it was pending in the Court of Criminal Appeals but before the Appellant and Appellee Briefs were submitted, the Federal Bureau of Investigation requested the District Attorney allow them to inspect the record to ascertain the extent that Comparative Bullet Lead Analysis was used to gain the conviction. After review the FBI opined that the FBI examiner who testified at trial overstated the importance of the results possibly misleading the jury. I immediately tried to have the case remanded back to the trial court for review of this new evidence but no procedural vehicle to do so existed. After considerable research I filed a Motion to Hear Post-Judgment Facts with the Court of Criminal Appeals in an effort to bring this new evidence before the court. Sometime afterwards I was notified by the court's staff attorney that my Motion to Hear Post-Judgment facts was granted. The staff attorney indicated he could not shed any light on the court's granting

my motion because he had never seen it done before. He also indicated he would be in attendance in order to observe how the court would handle it. I had argued approximately 12 cases with the Court of Criminal Appeals by this time and was uncertain how to proceed. Further inquiry determined that the Court would allow me to argue my motion without any time limit and then hear from the State without any time limit. I was to then immediately proceed with my argument of the direct appeal within the normally allotted 20-minute time limit. My argument for the motion was approximately an hour long as it was very technical and encompassed the reasons the FBI was abandoning the analysis under the *Daubert* test. After several months the Court denied the petitioner post-conviction relief. Since this was a court-appointed case I was required to submit a billing after the Court's decision. Such cases have a monetary cap on compensation and because of all the extensive research and technical nature of the appeal my claim for attorney's fees was just under twice the monetary cap. I did not submit a Certificate for Extended and/or Complex Representation because it has been my experience and the experience of others that the granting of such at the appellate level was rare, especially if one was not successful. It is interesting to note that I was contacted by the Court and instructed that if I would file a Certificate for Extended and/or Complex Representation, the Court would entertain it. Therefore, I submitted one, and it was granted. This was the only time I ever received such a request from any court.

Due to the denial of Post-Conviction Relief, this case continued in the trial court with the filing of a Writ of Error Corum Nobis. The newly discovered evidence was the FBI notifying the District Attorney that CBLA was discontinued by the agency and that the FBI examiner who testified at trial had overstated the importance of the results possibly misleading the jury. In order to admit the FBI letters at the trial court hearing it was necessary to subpoena the FBI agents who made the determination. This process is very difficult, cumbersome and time consuming. The process for a State to subpoena a Federal employee is by permission of the United States only. The ability to do so is within the Code of Federal regulations but any ascertainable procedure is not. I again embarked on extensive research on how to subpoena an FBI agent into State court. Several attempts were made, each successive attempt was researched and refined and made slightly different from the one before. After approximately one calendar year I was finally successful, and the United States Attorney produced the necessary FBI agent who testified in the Lawrence County Circuit Court on Aug. 6, 2013. It was a personally satisfying moment.

As discussed in the Answer #8 above, in 2010 I was court appointed to represent the defendant in *State v. Brian Dodson*. This case involved Columbia, Tenn., gang members with a brutal stabbing in a first-degree murder and an attempted first-degree murder case resulting in a seven-day trial. I had prepared and worked on this case from the preliminary hearing in General Sessions Court through Circuit Court jury trial for a period of 16 months. In 2012 the defendant filed for post-conviction relief alleging some 75 grounds of violation of due process and ineffective assistance of counsel. After a two day post-conviction relief hearing, where I was testifying for a little more than a day, the Honorable Judge Stella L. Hargrove presiding, denied the petitioner relief. In her written opinion she stated the following, "Mr. Pierchoski is a very good defense lawyer; indeed, one of the best in our district. He is meticulous; he knows every minute detail of the case, and he leaves no stone uncovered."

As discussed in Answer #8 above, in 2012 I was court appointed to represent the defendant in *State v. Julie Bunch Bauer*, a mercury chloride based double poisoning case. This case was so involved and so complex that it lasted more than a year and included more than 7,000 pages of discovery. The sheer volume of this case was overwhelming. I was able to secure some meager ex parte funding for private investigator services, but the vast majority of work was squarely on my shoulders. As trial loomed closer I contacted the local Martin Methodist College and announced my interest in any criminal justice students who wanted to work an internship with me. The effort was a success, and I eventually was assigned three interns who each offered 100 hours in exchange for college credit. It was a perfect symbiotic relationship. I was relieved of much of the busy work while I concentrated on the witnesses and evidence admissibility. The students enjoyed a healthy dose of real-world criminal justice, and we were able to be prepared for trial.

I would like to express to this Commission that the *State v. Bondurant* death penalty case and *State v. Bauer* double poisoning case I defended were the most work intensive and legally challenging cases I have had. When an attorney is appointed by the court to defend someone who is facing the death penalty or life in prison, it is a staggering responsibility. There is no situation an attorney can be involved in where the stakes are higher. These cases generated significant media attention along with crowds of people attending every motion hearing and court date. Being under heighted scrutiny from the media, enduring intense hostility from victims' families and always performing outnumbered by the vast resources of the State is not for the faint-hearted. I believe being able to handle such workload and stress makes me a prime candidate for the bench.

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

Not Applicable

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

I have served as a court-appointed guardian ad litem and conservator on several dozen cases throughout my legal career but have never had the opportunity to serve as such in my individual capacity.

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

Because of my engineering and technical background I took and passed the patent bar exam in October 2003. Over my 12 years of law practice I have been involved in the prosecution of more than 50 patents. Said prosecution was by provisional patent application, non-provisional patent application and limited patent infringement litigation, most of which were done in my first eight years. Due to the increased volume of criminal work described in Answer #8 above, I have done little to no patent work over the last four years.

It is important to note that I passed the patent bar on my first attempt. Statistically, only 25% of all patent bar applicants are successful on their first attempt. Indeed, when I took the exam there were 35 applicants and I was one of 4 who were taking it for the first time.

Although my patent experience will have no application in the Circuit Court Judge position I am seeking, the practice of patent law is complex, meticulous and riddled with deadlines and time requirements. Even though I have not done any patent prosecution work for four years, my ability to be successful in those in which I did participate demonstrates my proven ability to learn and accomplish extended and complex tasks.

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

I submitted an application for the vacancy in the 22 Judicial District for Circuit Judge created when the Honorable Robert L. Holloway was appointed the Court of Criminal Appeals. Said application was heard by the Commission on October 15, 2014. My name was not submitted to the Governor for consideration.

EDUCATION

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

Nashville School of Law, Nashville, TN

From 9/98 to 6/02

Received J.D. in 6/02

Received the Cooper's Inn Society Award for 2nd highest GPA in class

Received the Moot Court Award

University of California, Berkeley, CA

From 9/81 to 12/82

M.S. Nuclear Engineering in 12/82

Author of "Design and Nuclear Characteristics of the Hafnium-Hybrid Control Blade", 12/82

University of Pittsburgh, Pittsburgh, PA

From 8/77 to 5/79

B.S. Chemical Engineering in 5/79

University of Pittsburgh, Pittsburgh, PA

From 9/72 to 8/77

B.S. Chemistry in 8/77

PERSONAL INFORMATION

15. State your age and date of birth.

Age 58, DOB 11/9/1955

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

24 years

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

24 years

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

Giles

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

Not Applicable

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

No

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

No

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

I can only recall a single complaint to the Board of Professional Responsibility. A Memorandum of Complaint File No. 31959-6-KS dated March 17, 2009, was filed by Barbara Swafford, mother of Bryan Milam. Mr. Milam was convicted of first-degree murder in Wayne County.

In late 2006, Darren Cole, an Indiana licensed attorney approached me and requested that I be his supervising attorney under Supreme Court Rule 19 so he could practice *pro hac vice.* Attorney Cole satisfied me that his application was pending before the Tennessee Bar and would take from 3 to 6 months for approval. Said Rule 19 requires the supervising attorney to be present during any court appearances. To my knowledge attorney Cole did not take any cases that required my supervising capacity until late in 2007 when he was retained by Barbara Swafford to represent her son, Bryon Milam, for a Motion for New Trial of Mr. Milam's murder conviction. Late in 2007 Attorney Cole scheduled an ex parte hearing in the Circuit Court of Wayne County to approve indigent funding for Mr. Milam. That ex parte hearing was the first and only court appearance I participated in. On or about Jan. 18, 2008, Attorney Cole informed me that he had gained admission to the Tennessee Bar, and I terminated my supervising attorney responsibilities that day. I sent Attorney Cole an invoice for that single appearance which was approximately $250– 350. To my knowledge Attorney Cole passed the invoice to Barbara Swafford who at some time paid it. I never involved myself with the merits of the case and never spent any time on it since said termination.

Ms. Swafford states in her complaint that at some subsequent date she called me and inquired about the appeal and that I made some statement concerning a conflict of interest. I do remember such a call but informed Ms. Swafford that I had not been on the case since prior to the Motion for New Trial and had no personal knowledge of anything that had transpired since. Attorney Cole was the attorney of record for the Motion for New Trial and portions of the direct appeal as of right. Her Complaint was in the most part concerning Attorney Daren Cole and Attorney Hershel Koger. In fact, Ms. Swafford inquired if I would take over the

appeal, and I declined the representation. That is the extent of my involvement in *State v. Milam*.

In Ms. Sawford's complaint she does not state that I engaged in any misconduct or impropriety. She simply states that I appeared with Attorney Cole once in court and that she called me once to inquire about the appeal. I promptly responded to the Board of Professional Responsibility and no action was taken.

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

No

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

No

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

Stanley Pierchoski v. Robert Harris, June 30, 2008, Giles County General Sessions Civil Court, # CV-18056. In 2007 I represented Mr. Robert Harris in a DUI case. After a jury trial he was acquitted. Mr. Harris defaulted on his attorney fee contract. I sued him for nonpayment of debt and received a judgment. The debt has never been collected.

Stanley Pierchoski v. Paul Sherrill, April 20, 2007, Lawrence County General Sessions Civil Court, #28763 . In 2004 I represented Mr. Paul Sherrill in a heavily disputed adverse possession case. After weeks of preparation and a lengthy civil trial, Mr. Sherrill defaulted on his attorney fee contract. I sued him for nonpayment of debt and received a judgment. The debt was eventually collected.

The State of Tennessee on the Relation of Stanley Pierchoski v. Robert D. Lawson, Commissioner of Department of Safety June 1992, Fifth Circuit Court for Davidson County, Tennessee, 91C-3451. This was a Petition for a Writ of Mandamus. I filed this writ as a good faith challenge to the legislation that required Tennessee driver's license applicants to supply a social security number on the application. The law on driver's license renewal in 1992 clearly provided that disclosure of the applicant's social security number was optional. In the process of renewing my TN driver's license I chose not to disclose my social security number, and the

Department of Safety denied the renewal. I petitioned the court for the extraordinary relief of the Writ of Mandamus and was successful. The Court ordered the license renewed without the social security number on the form. This action was done pro se and was six years before attending law school.

Pierchoski v. Pierchoski, Oct 1989, Giles County Chancery Court, #7141. The parties were awarded an absolute divorce.

Stanley Pierchoski v. United States, June 1984, United States District Court E.D. of PA., CA 84-1650. While I was employed by General Electric as an Engineer and my marital status was single, I filed this suit to contest the determination of an arbitrarily assessed civil penalty after I properly adjusted Form W-4 Employee Withholding Allowances to minimize annual refund and over withholding. The case was voluntarily non-suited.

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

Southern Tennessee Area Arts Repertory, Inc., Board of Directors, Treasurer 2008 – Present

Giles County High School Mock Trial Team, Attorney Coach 2004 - 2010

Boys and Girls Club, Member of Board of Directors, 2010

Boy Scouts of America, Assistant Scout Master

Giles County Chamber of Commerce

World Outreach Church

Men's CBS Bible Study

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

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

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

No

ACHIEVEMENTS

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

Lawrence County Bar Association, Jan 2003 – Oct 2006

Giles County Bar Association, Oct 2006 – Present

Tennessee Association of Criminal Defense Lawyers, Jan 2003 - Present

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

Nashville School of Law Cooper's Inn Award

Nashville School of Law Moot Court Award

Giles County High School Mock Trial Team, Best Attorney Coach Award

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

Not Applicable

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

Not Applicable

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

From 11/13 to 8/14, Candidate for Giles County General Sessions Judge, elective position

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

No

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

Attachment 1: *State of Tennessee v. William Michael Phillips*, Circuit Court of Giles County, Docket No. 14061 – 100%

Attachment 2: *State of Tennessee v. Alicia Lynnette Colvett*, Circuit Court of Giles County, Docket No. 15141 – 100%

Attachment 3: *James Laws v. State of Tennessee, Department of Children Services*, Circuit Court of Giles County, Docket No. 12880J – 100%

ESSAYS/PERSONAL STATEMENTS

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

For 13 years I have been a trial attorney. I have experience with and have been exposed to every aspect of our Circuit Court and Chancery Court. Although only a few writing examples have been submitted in response to Question 34 above, it has always been my practice to research issues and brief the court. I enjoy research and writing, and I excel at it. A Circuit Court Judge must be familiar with all legal issues to be able to effectively rule from the bench. A judge would also take many decisions under advisement, which is what I am good at. I would review the case, review any memoranda filed by the parties then do my own research and type my own orders or judgments. I would be an effective judge that would in turn be an asset in reducing the ever-increasing criminal dockets in this district.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Throughout my legal career I have been court appointed to represent people in more than 1,000 cases. These are people who are found to be indigent and cannot afford legal help. I have never turned down such an appointment. I have provided no-cost legal assistance to several local not-for-profit corporations. There have been many occasions where I would represent an inmate pro bono on an issue or ruling that I felt needed to be challenged. I have done so because I have a passionate love for the law, and these indigent people had no recourse. On many of the more involved and egregious court appointed cases I have exceeded the number of hours in which the State will compensate. Although not technically considered pro bono the AOC has recently tracked these hours as non-compensated, and over the years mine probably number in the hundreds.

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

I seek one of the four Circuit Court Judgeships for the 22nd Judicial District. This position hears Circuit Criminal, Circuit Civil and Chancery cases in four counties. The vast majority of the collective docket is criminal and seems to get larger every year. I personally know the other three judges and have no doubt I could work with them. I would bring to the court 13 years of circuit court experience, during which time I have tried and participated in all types of cases from DUI to first-degree murder including my representation of a death penalty case. My civil experience has seen cases from divorce to adverse possession to corporate law. I believe my extensive trial experience has prepared me to hear oral arguments, preside over jury trials and write opinions in any type of criminal or civil case. Furthermore, I bring to the court a passion and enthusiasm for Tennessee jurisprudence.

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

I have been involved in many community organizations over the last 15 years as highlighted in Answer # 26 above. Specifically in the last eight years I have been involved in the Southern Tennessee Area Arts Repertory (STAAR) local community theatre. STAAR, Inc. is a non-profit corporation and 100% of the time I donate is volunteer. My community service with this organization is on several levels. I have been the Treasurer on the Board of Directors since 2008, represented STAAR as legal counsel and participated in the theatre events. My collective participation requires an average of approximately 20 hours a week and over seven years has been several thousand hours. As Treasurer I exercise a fiduciary duty, as legal counsel I have assisted the gaining of non-profit status, grant writing and contract preparation, and as participant I have performed on stage as an actor, done major construction and maintenance to the building, designed and created stage sets, installed and operate a sophisticated wireless sound and light system and assumed the role of director for several performances.

This organization creates an environment for children and adults to gain exposure to the performing arts. I have seen many children with low self-esteem and fear of speaking in front of people, become confident in themselves and advance to perform on stage before a full audience. Service with this organization is a very worthwhile and rewarding experience. If appointed Judge I would continue my participation to whatever extent my official duties would allow.

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

My legal career has enjoyed significant diversity and that has prepared me to be a trial judge. I have worked with many prosecutors and many private attorneys and have always treated them with respect and a sense of fair play, which in turn has allowed me to enjoy a reputation of

honesty and integrity from my colleagues.

My wife and I have been married for 27 years, and we have raised three children. I am proud to say they are all successful and on their way to happy productive lives.

As a teenager I attained the rank of Eagle Scout and as an assistant Scoutmaster have seen my oldest son also become an Eagle Scout.

As a young child I was instilled with a strong work ethic and have always managed to have a stream of income. At age 12 through high school I delivered newspapers, mowed lawns, did odd jobs and worked in a bowling alley. I worked my way through college doing construction jobs. To this day I have always been employed. I intend to bring this hard work ethic to the circuit court bench. I welcome any challenge the bench presents.

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

Yes. I represented a client in a multiple burglary and theft case. He had made a very detailed confession of how, when and where he broke into the store and stole the merchandise. The interviewing police told him he didn't need an attorney and promised him he would fare better if he confessed to some recent unsolved burglaries. He confessed in great detail to more than 10 burglaries and thefts. One of the victim businesses was owned by a friend of mine. I zealously attacked the confession in accordance with the law and convinced the court at a suppression hearing that it was inadmissible. All charges were dismissed for lack of evidence. My ethics bound me to the rules of evidence, which made the confession illegal even though we all heard his words of unconditional guilt. I did not like freeing a defendant who violated the law and deserved to be punished, but I upheld the law.

Another example was a DUI case where the DA brought to my attention that the breathalyzer read-out showed the officer did not wait the required 20 minutes as determined by law in *State v. Sensing* and offered to amend to reckless driving. Upon my own inspection, I discovered that the DA was wrong and had incorrectly read the 24-hour time stamp. In fact, the officer had waited 24 minutes to administer the test. I felt ethically bound to bring the mistake to the court's attention, even to the detriment of my client.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Honorable Judge Robert L. Jones, Circuit Court Judge for the 22nd Judicial District P.O. Box 462, Columbia, TN 38478-0462 Telephone (931) 540-2458
B. Pastor Ricky Keith, First Assembly of God of Pulaski 105 Owl Hollow Road, Pulaski, TN 38478 Telephone (931) 363-0697
C. Honorable Robert L. Carter, District Attorney for the 17th Judicial District, P.O. Box 878, Fayetteville, TN 37334 (931) 438-1906
D. Danny Arnold, SYSCO Representative
E. Crystal Greene, Giles County Circuit Court Clerk Work (931) 424-8787

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 Circuit Court for the 22nd Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council 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 Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 24, 2015.

Stanley K Kuchaski

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

Stanley K. Pierchoski
Type or Print Name

Stanley K Pierchoski
Signature

2-24-15
Date

022235
BPR #

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

Tennessee BPR # 022235

United States Patent and Trademark Office

Registration No. 55535

Attachment 1

IN THE CIRCUIT COURT FOR GILES COUNTY, TENNESSEE

AT PULASKI

STATE OF TENNESSEE,	)	
	)	
vs.	)	**Case No. 14061**
	)	
WILLIAM MICHAEL PHILLIPS,	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION FOR SEVERANCE

Comes now the defendant, William Michael Phillips, by and through his counsel of record, respectfully shows to the court the following:

STATEMENT OF FACTS

The defendant has been indicted by the Giles County Grand Jury in cause number 14061 with four (4) counts of sale of cocaine more than 0.5 grams allegedly occurring on or about June 22, 25, 29 and July 2, 2012, respectively; one (1) count of sale of cocaine less than 0.5 grams allegedly occurring on or about June 28, 2012; one (1) count of possession of cocaine more than 0.5 grams allegedly occurring on or about July 3, 2012; one (1) count of possession of drug paraphernalia allegedly occurring on or about July 3, 2012 and one (1) count of possession of a firearm during the commission of a dangerous felony allegedly occurring on or about July 3, 2012.

Broken down by occurrence date the indicted offenses are as follows:

Indictment	Charge	Offense Date
16041 Count 1	Sale of Cocaine more than 0.5 grams	June 22, 2012
16041 Count 2	Sale of Cocaine more than 0.5 grams	June 25, 2012

16041 Count 3	Sale of Cocaine less than 0.5 grams	June 28, 2012
16041 Count 4	Sale of Cocaine more than 0.5 grams	June 29, 2012
16041 Count 5	Sale of Cocaine more than 0.5 grams	July 2, 2012
16041 Count 6	Possession of Cocaine more than 0.5 grams	July 3, 2012
16041 Count 7	Possession of Drug Paraphernalia	July 3, 2012
16041 Count 8	Possession of a Firearm during the commission Of a Dangerous felony	July 3, 2012

LAW ON SEVERANCE OF OFFENSES

Offenses permissibly joined by the prosecution may be severed upon motion by the defendant as a matter of right, with one exception: where the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others. Rule 14(b)(1), Tennessee Rules of Criminal Procedure. "The primary inquiry into whether a severance should be granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the others if the counts of the indictment had been severed." *State v. Moore, 6 S.W.3d 284, 235 (Tenn. 1999).*

> To ensure that a defendant receives a fair trial, Tennessee Rule of Evidence 404(b) excludes evidence of "other crimes, wrongs, or acts" committed by the defendant when offered only to show the defendant's propensity to commit those "crimes, wrongs, or acts." However, when offenses alleged to be parts of a common scheme or plan are otherwise relevant to a material issue at trial, then Rule 404 will not bar their admissibility into evidence.

Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980). Defendant assumes that the State will conclude that the three indictments constitute a common scheme or plan because the offenses involved the same type of criminal conduct. Such a conclusion is error on the part of the State

In Tennessee, there are three categories of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. *State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999).* As a matter of fact and as a matter of law the defendant's offenses cannot be considered to fit within categories (2) or (3). However, the defendant assumes the State will argue that the offenses fit category (1).

1. Category (1); Distinctive Design or Signature Crimes

With respect to category (1), the defendant assumes the State will maintain that the only possible ground for a common scheme or plan in this case is that of distinctive design or signature crime, and would therefore not require severance. Again, this would be error.

> [T]he mere existence of a common scheme or plan is not a proper justification for admitting evidence of other crimes. Rather, admission of evidence of other crimes which tends to show a common scheme or plan is proper to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue. Unless expressly tied to a relevant issue, evidence of a common scheme or plan can only serve to encourage the jury to conclude that since the defendant committed the other crime, he also committed the crime charged.

State v. Hallock, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1993). Crimes having a distinctive design are usually only relevant to establish the identity of the offender. It is important to note

that in the present case the identity of the perpetrator is at issue. The only other conceivable purpose of admitting evidence of other crimes would be to establish intent.

Before multiple offenses may be said to reveal a distinctive design, and therefore give rise to an inference of identity, the "modus operandi employed must be so unique and distinctive as to be like a signature." *State v. Carter, 714 S.W.2d 241, 245 (Tenn. 1986).* While this is not to say that the offenses must be identical in every respect, *Bunch v. State, 605 S.W.2d 227, 231 (Tenn. 1980),* the methods used in committing the offenses must have "such unusual particularities that reasonable men can conclude that it would not likely be employed by different persons." *Harris v. State, 189 Tenn. 635, 644, 227 S.W.2d 8, 11 (Tenn. 1950).* In other words, "the *modus operandi* of the other crime and of the crime on trial must be substantially identical *and must be so unique* that proof that the defendant committed the other offense fairly tends to establish that he also committed the offense with which he is charged." *Bunch, 605 S.W.2d at 230* (emphasis in original).

In order to determine whether "evidence of one [offense] would be admissible in the trial of the other," a trial court, in essence, must determine whether proof of a defendant's alleged bad act may be admitted in his trial for another alleged bad act. *See State v. Dotson,* 254 S.W.3d 378, 387 (Tenn.2008). Thus, this determination implicates Tennessee Rule of Evidence 404(b), which bars the admission of "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity with the character trait." Rule 404(b)'s purpose is to avoid "the inherent risk of the jury convicting a defendant of a crime based upon his or her bad character or propensity to commit a crime, rather than the strength of the proof of guilt of the specific charge." *Id.* Given that this risk of unfair prejudice is even higher where the defendant's bad act is similar to the crime for which the defendant is on trial, "any doubt about the propriety

of the consolidation of similar offenses over a defendant's objection should be resolved in favor of the defendant." *State v. Garrett,* 331 S.W.3d 392, 403 (Tenn.2011).

In summary, a trial court must determine that the following three things are true in order to deny a defendant's motion for severance:

(1) the multiple offenses constitute parts of a common scheme or plan, Tenn. R.Crim. P. 14(b)(1); (2) evidence of [one] offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); *Moore,* 6 S.W.3d at 239; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3).
Spicer, 12 S.W.3d at 445.

It is important to note that our appellate Courts have, in similar cases, held that multiple drug transactions can qualify as a common scheme or plan. *See State v. Steve Mosley,* No. 01 C01–9211–CC–00345, 1993 WL 345542, at *4 (Tenn.Crim.App., at Nashville, Sept. 9, 1993) (holding, "In the case at bar, four of the indicted offenses occurred within a three-day period and the other occurred approximately six weeks later. All of the offenses involved the same controlled substance, the same defendant, the same informant and the same witnesses. It was such a continuous episode and so closely related that the proof was essentially the same in each case.), *perm. app. denied* (Tenn. Dec. 28, 1993); *see also State v. Joseph Clyde Beard, Jr.,* No. 03C01–9502–CR–00044, 1996 WL 563893 (Tenn.Crim.App., Knoxville, Sept. 26, 1996),(finding "common scheme" where same informant purchased similar amounts of cocaine from same defendant for same amount of money in same location although transactions occurred a month apart), *perm. app. denied* (Tenn., Feb. 3, 1997); *State v. Wayne Hymes Richards, a/k/a Pete Richards,* No. 03C01–9503–CR–00102, 1996 WL 384897, at *2 (Tenn.Crim.App., at

Knoxville, July 8, 1996) (holding a common scheme or plan existed when the offenses occurred within forty-eight hours and each involved a sale of a single ounce of marijuana for a price set by the defendant and paid in cash to the defendant. Each involved the same buyer and companion, which was the confidential informant. In both cases the undercover officer picked the defendant up at the same place and then drove to the same residence. Each time the defendant then left the other two and entered the residence where he obtained the marijuana. Both times the defendant then rejoined the other two men and delivered the marijuana.); *State v. Roger D. Pulley,* No. 01 C01–9501–CC–00013, 1995 WL 555060, at *2 (Tenn.Crim.App., at Nashville, Sept. 20, 1995) (severance inappropriate where the five drug offenses "occurred within eight weeks of one another and involved virtually the same sequence of events, the same confidential informant, and the same established procedure.")

"[A] common scheme or plan for severance purposes is the same as a common scheme or plan for evidentiary purposes." *State v. Moore,* 6 S.W.3d 235, 239 n. 7 (Tenn.1999). Three types of common scheme or plan evidence are recognized in Tennessee: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. " 'In order to be "parts of a common scheme or plan" as contemplated by Rules 8(b) and 14(b)(1), two or more sets of offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s).' " *State v. Wooden,* 658 S.W.2d 553, 557 (Tenn.1983) (quoting *State v. Peacock,* 638 S.W.2d 837, 840 (Tenn.Crim.App.1982)). Moreover, this court ruled in *State v. Hallock* that:

[T]he mere existence of a common scheme or plan is not a proper justification for admitting evidence of other crimes. Rather, admission of evidence of other crimes which tends to show a common scheme or plan is proper to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue.

875 S.W. 2d 285 (Tenn. Crim. App 1994)

It is important to emphasize that the "test [for finding a common scheme or plan] is not whether there was evidence that a defendant committed all the crimes, but whether there was *a unique method* used in committing the crimes." *Young v. State, 566 S.W.2d 895, 898 (Tenn. Crim. App. 1978)* (emphasis added). Although some cases have suggested that multiple offenses which are "strikingly similar" may constitute parts of a common scheme or plan, *White v. State, 533 S.W.2d 735, 741 (Tenn. Crim. App. 1975),* a proper analysis of this issue must be accompanied by more than a mere weighing of the similarities and differences of the various offenses. A common scheme or plan is not found merely because the similarities of the offenses outweigh any differences. Rather, the trial court must find that a distinct design or unique method was used in committing the offenses before an inference of identity may properly arise. *State v. Moore, 6 S.W.3d 235, 241 (Tenn. 1999).*

In this case, the court must conclude that the offenses were not committed with "such unusual particularities" as to indicate the presence of a distinct modus operandi, nor were the offenses so "strikingly" similar that they may be regarded as the stamp or signature of the defendant. The "mere fact that a defendant has committed a series of ... crimes does not mean that they are part of a common scheme or plan although the offenses may be of the 'same or similar character.'" *State v. Peacock, 638 S.W.2d 837, 840 (Tenn. Crim. App. 1982).* The modus operandi in this case, if there is one at all, is not so unique and distinctive as to allow one to

conclude that if the [defendant] committed the alleged [count 1] offense, then he also must have committed the [counts 2-8] offenses as well. *State v. Moore, 6 S.W.3d 235, 241,242 (Tenn. 1999).*

2. Category (2); Larger Continuing Plan or Conspiracy

Research of Tennessee law shows that our appellate courts consider the "larger, continuing plan or conspiracy" element of a common scheme or plan to be a rare occurrence. The leading case reaffirming the general rule regarding evidence of other crimes is *Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980)* in which the Court declared:

It is well established, of course, that in a criminal trial evidence that the defendant has committed some other crime wholly independent of that for which he is charged, even though it is a crime of the same character, is usually not admissible *because it is irrelevant.* Moreover, because of the obvious prejudice of such evidence to the defendant its admission often constitutes prejudicial error, requiring the reversal of a conviction. However, if evidence that the defendant has committed a crime separate and distinct from the one on trial, *is relevant* to some matter actually in issue in the case on trial and if its probative value as evidence of such matter in issue is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted.

On occasions, evidence of crimes other than that on trial has been admitted as being relevant to such issues on trial as motive of the defendant, intent of the defendant, the identity of the defendant, the absence of mistake or accident if that is a defense, and, *rarely, the existence of a larger continuing plan, scheme, or conspiracy of which the crime on trial is a part.* (emphasis added).

Bunch v. State, 605 S.W.2d at 229.

The alleged activities of the defendant do not constitute the requirements of a larger, continuing plan or conspiracy. The larger, continuing plan category encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose. *State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993).* In the instant case there are no sequences of crimes. It is alleged that the defendant burglarized and stole jewelry on three (3) separate occasions. Furthermore, the "common ultimate goal or purpose" spoken of by Justice Birch in *Hallock* is not satisfied by the evidence in the instant case. In *Hallock* the defendant was charged with incest of females within the household and the court held that neither sexual gratification nor monetary gain can satisfy this ultimate goal or purpose.

Those who misapprehend the common scheme or plan exception would venture here that *Hallock*, indeed, had a continuing plan or conspiracy, i.e., to sexually abuse the minor females in his household for the purpose of gratification. The fallacy inherent in this thinking is easily exposed by the following example: X is on trial for three counts of burglary, each involving a different building, a different form of entry, and a different day. His overall purpose, however, was to acquire money for college. Clearly, without more, X is entitled to severance under Rule 14(b)(1).

State v. Hallock, 875 S.W.2d at 290.

Clearly, our courts have held that the larger, continuing plan or conspiracy element of a common scheme or plan for purposes of severance is a very rare and specific sequence of crimes or criminal activity all geared toward an ultimate goal or purpose. The circumstances and activity leading up to the defendant's presently indicted counts of murder, arson and theft, as a matter of law, does not rise to the level of a larger, continuing plan or conspiracy.

In keeping with the Court's steadfast foothold on severance of offenses, the Court has reiterated the same position in recent authority in its detailed analysis in *State v. Tolivar, 117 S.W.3d 216, 229 (Tenn. 2003):*

3. Category (3): Offenses that are all part of the same criminal transaction

The defendant will concede and his Motion to Sever requests that the offenses that occurred on the same day are part of the same criminal episode and he does not object to them being tried together.

SEVERANCE OF OFFENSES PRE-TRIAL HEARING

The law on consolidation of offenses under Rule 8 of the Tennessee Rules of Criminal Procedure and the severance of offenses under Rule 14 of the Tennessee Rules of Criminal Procedure is well established by our Supreme Court in *Spicer v. State, 12 S.W.3d 438 (Tenn. 2000), State v. Moore, 6 S.W.3d 235 (Tenn. 1999)* and *State v. Shirley, 6 S.W.3d 243 (Tenn. 1999).* In *Spicer*, the court described the type of hearing which **must** be held before there can be a consolidation or severance of offenses (emphasis added):

> A motion to consolidate or sever offenses is typically a pre-trial motion, see Tenn. R. Crim. P. 12(b)(5), and consequently, evidence and arguments tending to establish or negate the propriety of consolidation must be presented to the trial court in the hearing on the motion. *Bruce v. State, 213 Tenn. 666, 670, 378 S.W.2d 758, 760 (1964)* (stating that decisions to join offenses necessarily must be made prior to trial). Before consolidation is proper, the trial court must conclude from the evidence and arguments presented at the hearing that: (1) the multiple offenses constitute parts of a common scheme or plan, Tenn. R. Crim. P. 14(b)(1); (2) evidence of each offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); *Moore, 6 S.W.3d at*

239; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3). Further, because the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts should usually only look to that evidence, along with the trial court's findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses.

12 S.W.3d at 445 (footnote omitted).

In *State v. Peek, 2000 Tenn. Crim. App. LEXIS 352*, the Court of Criminal Appeals makes it clear that our Supreme Court considers the presentation of such evidence at a severance hearing as mandatory and explicit and requiring affirmative compliance.

"The procedures are mandatory and explicit which must be followed in a hearing to determine the admissibility of proof of other crimes. They are explained in *State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985):*

First [the trial judge] should have heard the evidence out of the presence of the jury for the purpose of determining whether or not the proof of commission of the prior crime and defendant's connection therewith met the clear and convincing test mandated in *Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854 (1943)*. If the proof had cleared that hurdle then the final test should have been whether or not its prejudicial effect outweighed its probative value. *See Bunch v. State, 605 S.W.2d 227, 229-230 (Tenn. 1980).*

This Brief in Support of Motion for Severance presents this Court with primary, mandatory authority, as well as secondary, persuasive authority that the defendant's three (3)

indictments charges can not be considered as constituting a common scheme or plan, nor is the evidence of one admissible upon the trial of the others.

Therefore, as a matter of right, the defendant respectfully moves this Court to sever the indicted offenses and grant him three (3) separate trials, with indictment 15034 being tried first.

Respectfully submitted,

Stanley K. Pierchoski, BPR # 022235
103 North First Street
Pulaski, TN 38478
(931) 363-7222

CERTIFICATE OF SERVICE

I, Stanley K. Pierchoski, Court Appointed Attorney for the defendant, do hereby certify that I have this day served true and exact copies of the foregoing, via U.S. Mail, postage prepaid, or by hand delivery to the Honorable Beverly White, Assistant District Attorney General, 22nd Judicial District, Pulaski, TN 38478.

This 12 day of September, 2014.

Stanley K. Pierchoski

Attachment 2

IN THE CIRCUIT COURT FOR GILES COUNTY, TENNESSEE
AT PULASKI

STATE OF TENNESSEE	)	
	)	
vs.	)	No. 15141
	)	
ALICIA LYNNETTEE COLVETT	)	

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO REVIEW ACTION OF THE DISTRICT ATTORNEY REFUSING DIVERSION

Comes the Defendant, Alicia Lynnette Colvett, by and through her attorney, pursuant to T.C.A. § 40-15-105(b)(3), and would petition this Court to review the refusal of the District Attorney General to enter into a memorandum of understanding allowing the defendant to participate in a pretrial diversion program as authorized in T.C.A. § 40-15-102.

In support of said Petition the defendant would show the following:

I. Factual Background

The defendant waived Grand Jury review and brought this case to the Giles County Circuit Court by Criminal Information on October 25, 2010. The defendant completed the comprehensive pre-trial diversion form as suggested by the Tennessee Supreme Court pursuant to *Tenn. Code Ann. § 40-15-107* and submitted said application on September 23, 2010. The District Attorney's Office filed a written Response to Application for Pre-Trial Diversion on October 18, 2010.

II. Pre-Trial Diversion Procedure

The burden is upon the defendant seeking pretrial diversion to provide the prosecuting attorney with sufficient background information and data to enable that officer to make a reasoned decision to grant or deny the relief sought. State v. Lane, 2000, 56 S.W.3d 20. The defendant who is seeking pretrial diversion should provide the prosecutor with as complete

an application as circumstances warrant in order to carry his burden to provide the prosecuting attorney with sufficient background information. State v. Lane, 2000, 56 S.W.3d 20.

The defendant contends he has satisfied this initial burden by submitting the uniform application for diversion pursuant to *Tenn. Code Ann. § 40-15-107* as recommended and approved by the Tennessee Supreme Court. Once an application is filed action by the district attorney is triggered to consider all the factors required for eligibility. Among the factors to be considered by district attorney general in determining whether to grant pretrial diversion to defendant, in addition to the circumstances of the offense, are defendant's criminal record, social history, the physical and mental condition of defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and defendant. State v. McKim, 2007, 215 S.W.3d 781.

The defendant acknowledges that the decision to grant or deny diversion rests solely in the discretion of the district attorney, but he must first examine the facts of the defendant to make any such grant or denial. Once an application has been filed the district attorney has an obligation to review and consider these factors. That a defendant bears the burden of establishing suitability for pretrial diversion does not relieve the district attorney general of the obligation to examine all the relevant factors and set out the required written findings. State v. Bell, 2002, 69 S.W.3d 171.

Said findings must be written and made a part of the record. If the district attorney general denies defendant's application for pretrial diversion, the factors upon which the denial is based must be clearly articulable and stated in the record; this requirement entails more than an abstract statement in the record that the district attorney general has considered

all relevant factors. State v. McKim, 2007, 215 S.W.3d 781. The requirement that the district attorney general, when denying pretrial diversion, must provide a written discussion of the weight accorded to each factor for making the determination, entails more than an abstract statement in the record that the district attorney general has considered those factors. State v. Thompson, 2005, 189 S.W.3d 260.

The requirement of a written discussion made part of the record is to ensure the defendant gets a review and that it is a meaningful one. To afford meaningful review, it is incumbent upon prosecutor who is denying application for pretrial diversion to articulate factors and particularize reasons upon which denial is based. T.C.A. § 40-15-105, 40-15- 105(b)(3). State v. Carr, 1993, 861 S.W.2d 850. This requirement is necessary to prevent exactly what is happening in the instant case. A qualified defendant has been delayed and unreviewed and is being forced to trial without his right to review. While it is true the defendant has no right to diversion, he does have a right to a meaningful review and consideration for diversion.

III. Certiorari for Review by Trial Court

A denial of diversion is reviewable by the trial court by writ of certiorari. When petitioning for a writ of certiorari to the trial court in order to challenge the denial of pretrial diversion, defendant should attach the record to the petition, and he should identify any disputed fact that the prosecutor has not identified. State v. Lane, 2000, 56 S.W.3d 20. The defendant has complied with this requirement and has attached the entire record as Attachment 1 to his Petition for Writ of Certiorari to Review Action of the District Attorney Refusing Diversion.

IV. Trial Court Review

In deciding whether the district attorney general has abused his or her discretion in

denying pretrial diversion, the trial court must determine whether the district attorney general has considered all of the relevant factors and whether there is substantial evidence to support the district attorney general's findings with respect to the denial of pretrial diversion. State v. Yancey, 2002, 69 S.W.3d 553.

On review of the denial of pretrial diversion, the trial court may conduct a hearing only to resolve any factual disputes raised by the prosecutor or the defendant, but not to hear additional evidence. State v. Lane, 2000, 56 S.W.3d 20. The *Lane* Doctrine places the parties in this case into the position that neither party raises a factual dispute concerning the eligibility for diversion, yet the district attorney refuses to enter into a memoranda of understanding with the defendant. Trial court, in reviewing district attorney general's decision on an application for pretrial diversion, must focus on the prosecutor's methodology rather than the intrinsic correctness of his decision, and the trial court should therefore not engage in re-weighing the evidence considered by the district attorney general. State v. McKim, 2007, 215 S.W.3d 781.

The District Attorney's denial does not comply with the law.

> If the prosecutor denies the application, "the factors upon which the denial is based must be clearly articulable and stated in the record." State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989), overruled in part on other grounds by State v. Yancey, 69 S.W.3d 553, 559 (Tenn. 2002). "This requirement entails more than an abstract statement in the record that the district attorney general has considered [all relevant] factors." Id. Rather, "[i]f the district attorney general denies pretrial diversion, that denial must be written and must include both an enumeration of the evidence that was considered and a discussion of the factors considered and weight accorded each." Pinkham, 955 S.W.2d at 960; see also Bell, 69 S.W.3d at 178 (reiterating that the district attorney general must not only consider all relevant factors, including evidence favorable to the defendant, he or she must also weigh each factor and must explain in writing how a decision to deny pretrial diversion was determined). A district attorney general's failure to consider and

articulate all relevant factors constitutes an abuse of discretion. Bell, 69 S.W.3d at 178; see also Curry, 988 S.W.2d at 159.

State v. Hatcher, 2010 WL 457491 (Tenn.Crim.App.)

In the State's Response to Application for Pre-Trial Diversion there are 16 factors considered. Nine (9) of the enumerated factors contain a generalized statement that the District Attorney's office has no information beyond that provided her application for pre-trial diversion. There is no articulated reason as to favorable or unfavorable and there is no weight assigned to the factors. With respect to the "circumstances of the offense" there is only a brief statement of what the defendant is charged with. There is no articulated reason as to favorable or unfavorable and there is no weight assigned to the factor. With respect to the "criminal record" there is only a sentence that the defendant has no prior record. There is no articulated reason as to favorable or unfavorable and there is no weight assigned to the factor. With respect to "deterrent effect of punishment upon other criminal activity" there is some discussion but no articulated reason as to favorable or unfavorable and there is no weight assigned to the factor. With respect to the "defendant's amenability to correction" there is what amounts to testimony of the District Attorney with no articulated facts and no weight assigned to the factor. The same response is contained in "likelihood that pre-trial diversion will serve the ends of justice and best interest of the public and defendant" and "the attitude of law enforcement". There is no articulated reason other than the statement that the District Attorney's office does not believe diversion is in the interests of justice. Again, there is no weight assigned to the factor.

The Court of Criminal Appeals is clear in Hatcher (referring to Bell) is clear. The assistant district attorney general **must** assign a weight to each factor, both favorable and unfavorable, **weigh** the factors against each other, and reach a conclusion based on the **relative weight** of all factors. Bell, 69 S.W.3d at 177-78. (emphasis added)

If the trial court, in reviewing district attorney general's decision on an application for pretrial diversion, determines that the district attorney general has failed to consider and weigh all relevant factors, trial court must reverse the district attorney general's decision and remand the matter for further consideration and weighing of all of the factors relevant to the pretrial diversion determination. State v. McKim, 2007, 215 S.W.3d 781.

Nor can the District Attorney re-file his response stating that he weighed the factors and still denies diversion. [W]e observe that more than a "rote statement" that the negative factors outweigh the positive factors is required. Bell, 69 S.W.3d at 177-78.

The Court also has the authority to order the District Attorney to place the Defendant on diversion status pursuant to T.C.A. § 40-15-105(b)(3). "If the trial court finds that the prosecuting attorney has committed an abuse of discretion in failing to divert, the trial court may order the prosecuting attorney to place the defendant in a diversion status on the terms and conditions as the trial court may order."

The defendant respectfully submits that the district attorney general has failed to consider and weigh all relevant factors in this case. Therefore, this Court must reverse that decision and remand the matter for the appropriate consideration or in the alternative order the Defendant be placed on diversion status.

Respectfully submitted this 24th day of November, 2010.

Stanley K. Pierchoski, BPR# 022235
Counsel for Defendant
28-B Public Square
Lawrenceburg, TN 38464
(931) 766-1800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage pre-paid, to Larry Nickell, Assistant District Attorney General, Second Floor Courthouse, Pulaski, TN 38478 on this the 24th day of November, 2010.

Stanley K. Pierchoski

Stanley K. Pierchoski