

**The Governor's Council for Judicial Appointments**

**State of Tennessee**

***Application for Nomination to Judicial Office***

Name: Johnny D. Houston, Jr.

Office Address:

(including county) 3417 Dayton Blvd, Chattanooga, Hamilton County, TN 37415

Office Phone: 423-267-6715

Facsimile: 423-267-9271

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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](http://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](mailto: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.

Self-employed, Houston & Ziebold

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

1989. TBPR No. 013834

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.

Georgia-1990  
Bar No. 369630  
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).

1989-1991 Stophel & Stophel, Litigation Associate

1991-1993 Hanzelik & Houston, Associate

1994-present Self-employed as primarily criminal defense attorney

2000 Appointed as interim Red Bank City Judge when elected judge took a leave of absence. Had Municipal and State jurisdiction over criminal matters.

2006-2014 Elected as Red Bank City Judge.

2014 Elected to second term as Red Bank City Judge

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.

Not applicable

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

I practice in a two-attorney law firm, with my associate Meredith Ziebold. We represent "regular people" many of whom are charged with violating the law and others who have been injured in accidents. Criminal defense comprises about 85% of our practice and the other 15% is personal injury.

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

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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.**

In 1989, I was hired as a litigation associate by the firm of Stophel and Stophel, where I was employed for two years. My work there was 100 percent litigation. My primary work consisted mostly of product liability defense. I appeared in state and federal courts and argued motions and took participated in other contested matters and hearings. I also handled some civil work, appearing in General Sessions and Circuit courts. I tried cases in General Sessions and represented clients in motions and other contested matters in Circuit and Chancery Court.

In 1991, I worked as an associate for a small, two-attorney firm that later came to be known as Hanzelik & Houston. We handled a variety of civil matters, including personal injury, workers' compensation, bankruptcy, divorce and collections. I handled a number of General Sessions Court trials as well as some trials in Circuit and Chancery Court. I could not even guess as to the number of bankruptcy court proceedings I handled. I would estimate I personally handled several thousand bankruptcy files, represented clients at meetings of creditors, objections to confirmation and basically was involved in every aspect of a creditor practice in bankruptcy court.

I started handling criminal matters in approximately 1991 while working as an associate at Hanzelik & Houston. In 1993, I started my own law practice and have been self-employed ever since. I have represented countless defendants in General Sessions Court and all Criminal Courts in Hamilton County as well as in Marion, Bradley, Rhea and Sequatchie Counties. My criminal practice has included minor matters like traffic tickets, but also preliminary hearings and trials in all types of contested criminal matters. Again, these matters have ranged from relatively minor criminal charges through and including being lead counsel in first degree murder trials in Criminal Court. I also have experience in sentencing and probation hearings, parole hearings and just about every type and every aspect of a criminal case.

I have also handled a variety of criminal matters in the municipal courts in Hamilton County, including East Ridge, Soddy Daisy, Signal Mountain, Collegedale and Red Bank as well as the municipal courts in other counties. These cases range from traffic tickets to DUI to serious felonies including theft, aggravated robbery and murder.

I became licensed in Georgia in 1990. My practice there has consisted mainly of criminal matters and personal injury cases. I have represented clients in cases ranging from traffic cases to serious drug charges there for the last 25 years, although my law practice is primarily in Tennessee.

~~In addition to the above, I have represented parties in civil litigation including personal injury cases, workers' compensation, business litigation and divorce cases.~~

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

In May of 2009, along with Myrlene Marsa, I represented a defendant charged with murder in Hamilton County. State v. Nicholson. This was actually the second trial, the first having ended in a hung jury. We handled the second case pro bono as the client only had funds to hire us for the first trial. I was lead counsel in both trials and was involved in every aspect of trying the case including investigation, preliminary hearing, motions, dealing with the trial judge re funding matters and eventually the actual trial of the case. This was my third time trying a murder case although this particular case went to trial twice, each trial lasting for approximately three weeks. The second jury found Mr. Nicholson :not guilty of all charges.

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.

In 2000, I was appointed on an interim basis as the Red Bank City Judge. I presided over numerous criminal and municipal matters. I held this position for approximately ten months.

In August of 2006, I was elected to the bench in Red Bank, the position I formerly held on an interim basis, defeating the incumbent who had previously been elected twice and I believe had held the position for 19 years. As judge, I have literally handled thousands of criminal cases and I am well versed in handling criminal matters from a judicial perspective. These cases have ranged from traffic tickets to very heinous murder and rape cases.

As special judge, I have presided over several murder case in Hamilton County General Sessions Court. My hearing these cases was normally because some or all of the judges in General Sessions had a conflict. I have presided over cases involving the deaths of children as well as the death of a local police officer who was shot and killed in the line of duty.

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.

Very little experience in these areas, although back in the early 90s, I was appointed as guardian ad litem a few times in Chancery Court. One Chancery Court case involved a woman who was not quite competent to handle her own affairs, another was a woman who was a resident at Joe Johnson Mental Health Center and another was a woman who was unfortunately a total invalid at the Hamilton County nursing home. I am sure I have had other guardian ad litem cases, but those were twenty years or so ago.

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

During my last year of law school from 1988-89, I was a judicial law clerk for the Criminal Court Judges of Shelby County. I performed quite a bit of research and observed many trials that year and had the opportunity to observe how eight different judges, all unique in their personalities and approaches, dealt with prosecutors, defense attorneys, defendants and the manner in which they presided over trials.

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.

None

### **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.



1981 Memphis State University for one semester. Moved to Knoxville and worked full time.

1982-1986 Attended and graduated from UT Knoxville. BA degree with a major in Philosophy

1986-1989 Attended and graduated from University of Memphis Law School (then known as Memphis State University) Member of the Law Review

**PERSONAL INFORMATION**

15. State your age and date of birth.

51. Date of birth-7/19/1963

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

With the exception of one year in Arkansas when I was five years old, I have resided in Tennessee my entire life .

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

I have lived in Hamilton County since July of 1989, almost 26 years.

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

Hamilton County

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

None

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.

In approximately 1994, the ex-wife of a client filed a claim against me regarding a fee. Given that I charged exactly what my fee agreement stated, the claim was dismissed.

During my first term as Red Bank Judge, a woman filed a judicial complaint against me. I had dismissed an alleged noise complaint, a municipal violation, for lack of evidence wherein she had been the complainant. That complaint was dismissed.

In approximately 2008, a judicial complaint was filed against me in a case where I had sat in as special judge in Hamilton County General Sessions Judge. The defendant claimed that I violated his rights by not disqualifying the assistant district attorney, Lila Statom. The defendant claimed that the DA "had it in for" him and that I should remove her from prosecuting his case. That complaint was dismissed summarily, prior to my knowing that it had been filed.

In June of 2012, I received a reprimand from the Court of the Judiciary for a comment that I made at the conclusion of a particularly horrific murder preliminary hearing. I heard overwhelming evidence that one of the defendants (of the four charged) had beaten a young man to death with a pry bar, literally beating his brains out of his skull while another defendant stood by and did nothing to prevent the killing. I did not think that any of the defendants were particularly remorseful, and as a matter of fact, had seen them laughing prior to the hearing and in seeking to bring home to them what they had done, I made a comment to which the Court of Judiciary took exception. None of the defendants nor their attorneys had filed a complaint.

I accepted the reprimand and it was noted that I had "no prior negative experience with the Court of the Judiciary."

As stated above, I have had no other negative experience with the Court of Judiciary, either before or since.

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.

Other than a small matter in Shelby County General Sessions Court, in approximately 1988, I have not been party to any legal proceedings. I do not remember the case number, but recall I was suing "Crazy Ray's Junkyard" over a transmission that was represented to be a five speed transmission, when it was in fact a four speed transmission. The number of gears in the transmission did not become apparent until after I had installed the transmission in my 1977 Honda Civic. When I asked "Crazy Ray" to refund my money, he refused.

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.

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

None

**ACHIEVEMENTS**

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

Tennessee General Sessions Judges Conference (2006-present)  
Tennessee Municipal Judges Conference (2006-present)  
Tennessee Association of Criminal Defense Lawyers (From 90s until now)  
Chattanooga Bar Association (From approximately 1989-present)  
American Bar Association (From approximately 1990-present)  
National College for DUI Defense (Approximately 1994-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.

2009 "Outstanding Judge Award" given by the "Courtwatchers" organization

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.

2009 Updates in Tennessee Criminal Law (CLE seminar)

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.

1998-candidate for Chattanooga City Court  
1999-Red Bank City Judge (appointed on an interim basis)  
2006-Elected as Red Bank City Judge  
2014-Re-elected as Red Bank City Judge

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.

**ESSAYS/PERSONAL STATEMENTS**

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

This community has given much to me and my family. My wife and I moved here in 1989 and did not know a single person. We made friends, attended church and made a life in this community. This community provided me with the means to earn a living and support my family. Frankly, I have had a very successful law practice and even though I would be giving up some income, I want the opportunity to better serve this community as a full time judge.

I have a combination of criminal defense experience AND almost ten years of judicial experience. Although the entire scope of judicial duties is not precisely the same, a lower level judge with state jurisdiction handles the very same cases as a criminal court level judge. These duties include dealing with attorneys, protecting the Defendant's rights as guaranteed by the constitution, reviewing search warrants and arrest warrants, hearing motions and dealing with witnesses and victims.

The bottom line is that I would like to do more to serve the community and Criminal Court Judge is a position for which I am very qualified and is well-suited to my skills and experience. I would be honored and privileged to serve.

**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)**

I have handled a number of cases for free as well as at a reduced fee for clients who were otherwise unable to afford an attorney. I have taken a number of appointed cases, for which I rarely submitted fee requests. I don't generally advertise nor tell others that I sometimes handle cases for free. But, people come in the office that I have felt compelled to represent. In 1998, along with another attorney, I handled what turned into an approximate three-week murder trial completely for free. The defendant said he had exhausted his funds paying us for the first trial (although the first trial was at a reduced rate.) The second trial resulted in an acquittal. Handling that second case for free was just the right thing to do.

I have also represented numerous elderly people who needed advice as well a little work and simply just did not have the money to hire an attorney. Most recently, I represented an elderly man whose daughter had procured his power of attorney, even though he was competent, and had been frittering his assets away. I have handled numerous matters pro bono, including criminal cases. Several years ago, I handled a DUI case for a woman who had served in the military and was suffering from PTSD.

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

I am seeking appointment as Hamilton County Criminal Court Judge. I bring ten years of judicial experience with me as well as 24 years of experience as a criminal defense attorney and nearly 26 years of litigation experience. Frankly, it is hard to predict how someone will act after they become "judge." Some judges remain grounded and humble, but sadly, this seems to be the exception rather than the rule. They quickly become short-tempered and suffer from "robe-itis." I believe that I am a known quantity and I have the genuine reputation of treating people fairly and with respect. My appointment as judge would guarantee immediate continuity and the lack of a learning curve and would allow me to hit the ground running.

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 coached my children and numerous other children in football and baseball for several years. I was the President of the Red Bank Chamber of Commerce in 1991. As far as future community involvement, I would like to continue the drug court started by Judge Stern. Drugs and violence are a tremendous drain on our society and I want to continue her good work with the drug court as I believe it can and is making a difference. I would also like to work with community leaders, police, youth, legislators, District Attorneys and defense attorneys to find a way that we can more effectively address the crime rate. Politicians and judges want to be seen as "tough on crime," but nobody seems to want to be "smart on crime." I think we can all do better and me much "smarter on crime."

In my opinion, a judge has two very important responsibilities. The first is upholding the constitution. The second, and often overlooked responsibility is deciding which defendants should have their freedom taken away. I have sentenced many people to jail, but before I do that, I always ask myself whether it would serve the interests of justice to incarcerate them. If a judge jails someone without any thoughts to the consequences to that defendant individually and to society in general, then in my opinion, that judge has failed to do his or her job. I have never jailed someone without carefully considering the impact it would have on them.

As Criminal Court Judge, these responsibilities are even more important because most cases and prosecutions end there without appeals and further review.

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

I am the product of middle class upbringing. My parents divorced when I was 3 years old and without going into detail, I had a difficult childhood. I was forced to become self-reliant, independent and introspective. After graduating high school (and working a job every other morning from 3-6 AM my senior year), I had to work to put myself through school. My divorced parents simply did not have the money to pay for college. Government assistance helped. After putting myself through school, I attended law school. My father had promised to pay the tuition, but unfortunately became disabled the very first semester. I continued to work during that first year of law school (although it was forbidden) and again, with some student loan programs, was able to pay for school, maintain very good grades and was a staff member of the Law Review. This work ethic served me well as I was always willing to do whatever it took to have a successful law practice, while never forgetting "where I came from."

When I was elected to the bench in 2006, I made a promise to myself and others that I would treat everyone before me respectfully and fairly. I have never wavered from that. As a matter of fact, a couple of years ago I ran into a Defendant who had previously appeared in front of me. He told me that he had spent a lot of time in court and had been before many judges, but I was "the only one who ever treated him like a human being." While I have no doubt that he brought his legal troubles on himself, it reaffirmed to me that you can and should always be decent to others. Even when sentencing a person to jail, which I have done many times, you can still be respectful of the person and the process.

These qualities have served me well as as Red Bank City Judge and will continue to serve this community if I am pointed as Criminal Court Judge.

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)*

Lawyers and judges have different roles in our legal system. It is the responsibility of Judges to uphold the laws as written, while it is often the attorney's role to challenge the law. As Judge, I have always taken seriously my responsibility to follow the law.

Just prior to my election as City Judge, the City of Red Bank had installed red light cameras. These cameras would record people who were either speeding or who had run the red lights. I was personally opposed to these "red light cameras," but given that our appellate courts had held these cameras and subsequent citations to be "legal," I felt compelled to rule in accordance with the appellate courts even though I did not personally agree with the law.



**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. Robert Lawson, attorney and private business owner,
B. Clarence Shattuck, Hamilton County General Sessions Judge, 600 Market Street, Chattanooga, TN 37402. 423-209-7660.
C. Carl Pendergrass, retired postal worker, Red Bank, TN
D. Myrlene Marsa, Assistant Federal Defender, 835 Georgia Avenue, Suite 600, Chattanooga, TN 37402.
E. Steve Hope, Sgt. Red Bank Police Department, 3117 Dayton Boulevard, Chattanooga, TN 37415 (423) 877-2481

**AFFIRMATION CONCERNING APPLICATION**

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

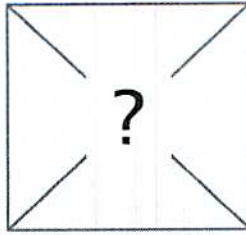
I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Criminal Court of Hamilton County, Tennessee, and if appointed by the Governor 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 23, 2015.

  
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**

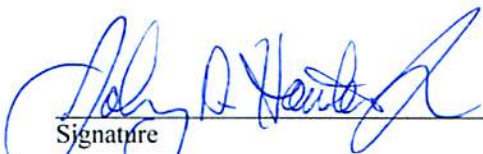
511 UNION STREET, SUITE 600  
NASHVILLE CITY CENTER  
NASHVILLE, TN 37219

**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.

Johnny D. Houston, Jr.  
Name

  
Signature

February 23, 2015  
Date

013834

BPR #  
Application Questionnaire for Judicial Office

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

Georgia-1990- Bar no. 369630

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

UNITED STATES OF AMERICA, )  
)  
vs. ) 1:11 -cr-00084  
)  
GRADY TALLENT, ) JUDGE COLLIER  
)  
Defendant. )

**MEMORANDUM OF DEFENDANT GRADY TALLENT REGARDING  
RESTITUTION UNDER 18 U.S.C. § 2259(b)(3)**

Defendant Grady Tallent submits the following following memorandum regarding restitution under 18 U.S.C. § 2259(b)(3).

**1. Does 18 USC 2259(b)(3) impose a proximate cause requirement on 2259 (b)(3) (A)-(F) or just on 2259 (b)(3)(F)?**

18 USC 2259(b)(3) imposes a proximate cause requirement on 2259 (b)(3)(A)-(F). In U.S. v. Evers, 669 F.3d 645 (6th Cir. 2012), the Sixth Circuit Court of Appeals held that 18 U.S.C. § 2259, requires a proximate cause showing for each type of damage described in subsections (b)(3)(A)-(E), in addition to section (F) in order for restitution to be imposed. The Court, in Evers, noted: "We find the reasoning of the circuit majority to be persuasive and follow it. Had Congress meant to abrogate the traditional requirement for everything *but* the catch-all, surely it would have found a clearer way of doing so." 669 F.3d at 658-659, quoting Monzel, 641 F.3d at 536-537.

**2. Regardless of whether proximate cause must be established for (A)-(F)...how should the Court conduct a proximate cause analysis under 2259(B)(3)?**

In Evers, the Sixth Circuit stated that “proximate cause requires some direct relationship between the injury asserted and the injurious conduct alleged.” 669 F.3d at 659 (6th Cir. 2012), quoting Hemi Group, LLC v. City of New York, 130 S.Ct 983, 989 (2010). In U.S. v. Kennedy, 643 F.3d 1251 (9th Cir. 2011) two victims were identified, “Amy” and “Vicky.” The government introduced evidence of damages as to both of them but no evidence as to what portion of damages or what specific damages were proximately caused by Defendant. The government proposed that the Defendant be ordered to pay their “full damages” under a theory of joint and several liability or that the Defendant be ordered to pay \$1000.00 per image. The district court found \$1000 per image to be reasonable. The 9th Circuit reversed the award saying there was no evidence of a causal chain between the Defendant’s conduct and the specific losses incurred by the victims, and stated that Although the [d]efendant’s conduct need not be the sole cause of the loss, it must be a material and proximate cause, and any subsequent action that contributes to the loss, such as an intervening cause, must be directly related to the defendant’s conduct. Kennedy, 643 F.3d at 1263.

The recent case of United States v. Kearney, 672 F.3d 81, 2012 WL 639168 (1st Cir. Feb. 29, 2012) gives guidance pertinent to this case as it dealt with not only the exact same victim, “Vicky,” but also the issue of “aggregate harm.” The First Circuit stated, “Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.”

Frankly, given the case law as well as the materials that have been submitted in the present case, it appears likely that the government will be able to prove proximate cause

attributable to Mr. Tallent such that he would be liable for “provable losses” that occurred after March 22, 2009, the offense date in the present case.

**3. If restitution is appropriate in this case, what is the proper amount of restitution?**

First and foremost, Mr. Tallent should not be held liable for losses that occurred prior to March 22, 2009, the offense date. Second, the United States must prove by a preponderance of evidence the amount of the damage subsequent to March 22, 2009 and then apportion a percentage of that loss to Mr. Tallent.

Frankly, the Defendant is in no position to decide how much of Vicky’s losses were sustained after March 22, 2009 nor how much of that loss should be apportioned to him. As represented by Counsel for the government as well as the Defendant, the parties were amenable to agreeing to a restitution amount of approximately \$3,500. While at first glance that may seem an arbitrary figure, given the total number of Vicky cases (200, as represented by the government), and the total restitution claimed to be owed to Vicky (per materials furnished to Counsel), of approximately \$808,000, that would be a restitution amount attributable to Mr. Tallent of \$4,020, a restitution amount that he would agree upon.

While Congress did not explain how damages were to be apportioned or calculated, apportioning a percentage of the “total loss” to Mr. Tallent and assessing that as the amount of damage that he caused, does comply with congress’ intent that a victim be “fully compensated,” given that Mr. Tallent should only have to “fully compensate” Vicki for the amount of damages that Mr. Tallent himself caused.

**4. In determining an amount of restitution, how should the Court construe and apply to this case the following statutory language: “The order of restitution under this**

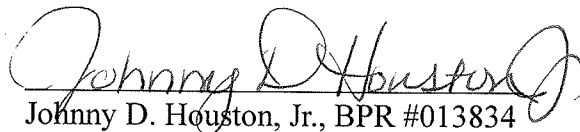


**section shall direct the defendant to pay the victim...the full amount of the victim's losses as determined by the court pursuant to paragraph (2) (2259)(b)(1).**

Pursuant to the Sixth Circuit's reasoning in Evers, what would or should be implicit in the statutory language is "the full amount of the victim's losses [*proximately caused by and attributed to the defendant*] as determined by the court pursuant to paragraph (2) (2259)(b)(1).

Defendant would respectfully proffer that such a finding is in compliance with the statutory intent as well as the proximate cause analysis required in Evers.

RESPECTFULLY SUBMITTED,



Johnny D. Houston, Jr., BPR #013834

Attorney for Defendant

Suite 301 Flatiron Building

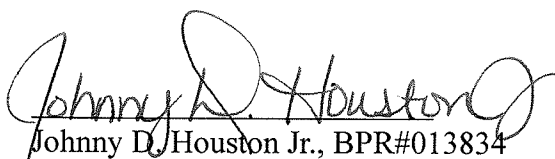
707 Georgia Avenue

Chattanooga, TN 37402

423-267-6715

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, a copy of the foregoing Memorandum was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.



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**IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE**

**STATE OF TENNESSEE,** )  
 )  
 )  
 **vs.** ) **No. 288256**  
 )  
 **RICHARD SMITH** ) **DIV. III**  
 )

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**SUPPLEMENTAL BRIEF PRESENTED IN SUPPORT  
OF DEFENDANT'S MOTION TO SUPPRESS**

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Defendant submits the attached additional case law and appellate court precedent as well as the transcript of the suppression hearing in support of Defendant's Motion to Dismiss.

**PERTINENT FACTUAL BACKGROUND**

On August 26, 2012, Defendant was arrested by Officer Casey Cleveland and charged with DUI. Per Officer Cleveland's sworn Affidavit of Complaint, he—

OBSERVED A VEHICLE MOVING EAST ON ASHLAND TERRACE IN THE LEFT LANE HAVING DIFFICULTY MAINTAINING ITS LANE. THE DRIVER DROVE ACROSS THE LANE DIVIDERS A COUPLE OF TIMES WHILE MOVING DOWN ASHLAND TERRACE. WHEN THE VEHICLE APPROACHED THE INTERSECTION OF NORCROSS ROAD WHILE ON ASHLAND TERRACE, THE DRIVER SIGNALLED A LEFT TURN BUT CONTINUED THROUGH THE INTERSECTION.

(Affidavit attached as Exhibit A.)

The Affidavit sets forth three supposed driving violations that Officer Cleveland deemed to be his reasonable and articulable suspicion to stop Mr. Smith's car—crossing the lane "dividers a couple of times" and supposedly a turn signal violation.

When Officer Cleveland was before the court on October 27, 2014 , he testified that there were at least five instances of bad driving despite only identifying three in his Affidavit. The first was that the Defendant's right tires "crossed the dashed line." (Transcript of Hearing, p. 11, Attached as Exhibit B). However, the video clearly shows that at worst, Mr. Smith's right tires go onto the center line for just barely three seconds, or maybe a fraction less. (See Video at 0:00:25-28). According to Officer Cleveland, the next infraction occurs at approximately 1:00 into the video when Mr. Smith "looks like he has crossed the dash marks." (See Transcript, Exhibit B, p. 12, line 23. Also, see Video at 1:00). As the court can see from the video, it is again a momentary brush with the center for right at two or three seconds line as the road curves to the right.

The next act that Officer Cleveland claims gave him reason to stop Mr. Smith was when Mr. Smith turned on his left turn signal almost simultaneously with passing the intersection of Norcross and Ashland Terrace. (See Transcript, Exhibit B at p. 13.) When cross-examined however, Officer Cleveland admitted that it was NOT a violation for Mr. Smith to turn on his turn signal. (See Transcript, Exhibit B at pp. 15-16.) Moreover, Officer Cleveland also testified that Mr. Smith indeed turned left at the very next intersection which, as seen on the video, is just eight SECONDS from the Norcross intersection (See Video at 1:14-22, Transcript, Exhibit B, p.17), an intersection that even the Assistant District Attorney described as "a somewhat complicated intersection." (See Transcript, Exhibit B at p. 21.)

Despite not appearing in Officer Cleveland's Affidavit, he next testified that Mr. Smith's left turn to Hixson Pike was in error because Mr. Smith crossed the yellow lines that, as seen on

the video, essentially extend somewhat into the intersection and the left turn seems otherwise to be a completely normal turn. (See Video at 1:23.)

The Assistant District Attorney next totally mischaracterized Officer Cleveland's testimony by stating "And you say that he drove into the ditch there?" (See Transcript, Exhibit B at p. 8.) To his credit, Officer Cleveland corrected that misstatement and testified that it was a "drainage area" and further explaining that it was "a different type of surface, I would say." (See Transcript, Exhibit B at p. 8.) However, an examination of the video shows that it was for approximately three seconds, was not dramatic in any way, and occurred when there was a car in the adjacent left lane as the road turned to the right. (See Video at 1:42-1:46.)

#### **LAW**

When a police officer turns on his blue lights, a stop has clearly been initiated "and has seized the subject of the stop within the meaning of the Fourth Amendment of the Federal Constitution and Article I, section 7 of the Tennessee Constitution." State v. Garcia, 123 S.W.3d 335, 343 (Tenn. 2003). (citing State [\*344] v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993) ).

In the present case, when Officer Cleveland turned on his lights, he must have had reasonable suspicion, supported by specific and articulable facts, that Mr. Smith had committed, or was about to commit a criminal offense. Otherwise, the stop is NOT constitutionally valid. (State v. Garcia at 343). In order to determine whether Officer Cleveland (and therefore the state) has met this standard, a reviewing court must look at the totality of the circumstances. State v. Bridges, 963 S.W.2d 487, 492 (Tenn. 1997).

Despite having a video that showed Mr. Smith's driving, this court seemed to place some emphasis on the credibility of Officer Cleveland, stating that the court has heard credible

testimony from him for the past eight years. (See Transcript at p. 28). Whether or not there is reasonable suspicion to stop, although a mixed question of fact and law, is an “objective analysis.” (State v. Garcia, p. 343). Given that there is a complete video of Mr. Smith’s driving, this objective analysis should not therefore be influenced by whether or not the court believes that Officer Cleveland testimony is credible.

Frankly, the video reflects that there was no reasonable suspicion existing for Officer Cleveland to stop Mr. Smith. This court stated that Officer Cleveland “observed him [Mr. Smith] cross the, or at least touch the lines to the left, lines to the right, on several occasions, with a blinker, before he approached the intersection.” (See Transcript, Exhibit B, p. 28). However, as the Tennessee Supreme Court pointed out in Garcia, “the number of times that a vehicle touches a center line or drifts within a lane is not dispositive” of whether reasonable suspicion existed ... “Rather, as we have previously noted, a court must consider the totality of the circumstances in determining whether reasonable suspicion was present at the time a stop was initiated.” Id. at 353.

In the above-mentioned Garcia case, the Tennessee Supreme Court referenced the Binette case, (State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000)) (attached) emphasizing that there was no pronounced “weaving or hard swerving.” (Id. at 344). As the court held in State v. Ann Martin, 2000 Tenn. Crim. App. LEXIS 693, at \*19 (Tenn. Crim. App. 2000) (Attached) the fact that a vehicle “briefly crosses the solid white line on the shoulder” should not necessarily constitute a finding of reasonable suspicion. In the present case, frankly, the video and the “totality of the circumstances” preponderates AGAINST a finding of reasonable suspicion. Mr. Smith is driving on a relatively curvy road, approaching a “complicated intersection” and drives

well over a two-minute period. As reflected on the video, any incursions on the painted lanes of traffic are slight and do not appear to be the result of pronounced weaving and/or swerving.

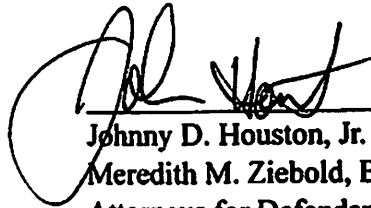
Additionally, the point when Mr. Smith is turning left at this “complicated intersection” and crosses over yellow lines appears to be the result of a perfectly reasonable and smooth left turn that occurred after Mr. Smith properly utilized his left turn signal. Mr. Smith smoothly and properly changed lanes several times, without any apparent difficulty.

### **CONCLUSION**

Reviewing the video as well as an examination of the case law, Officer Cleveland did not have reasonable and articulable suspicion to stop Mr. Smith. Therefore, the stop should be held a violation of the law and all evidence obtained subsequent to the stop should be suppressed.

Respectfully submitted,

**HOUSTON & ZIEBOLD**



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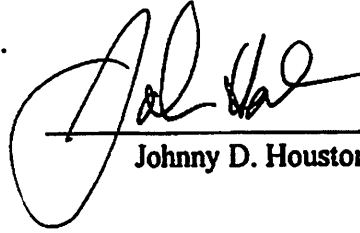
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**Certificate of Service**

The undersigned hereby certifies that an exact duplicate of the foregoing pleading was served to the following by hand delivery:

Bates Bryan  
Office of Hamilton County District Attorney  
Suite 310 Courts Building  
600 Market Street  
Chattanooga, TN 37402

This 17<sup>th</sup> day of November, 2014.



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Johnny D. Houston, Jr.