

**Tennessee Judicial Nominating Commission**  
***Application for Nomination to Judicial Office***

*Rev. 29 January 2010*

Name: Elizabeth Garland Ingram Ergüden

Office Address: Shelby County District Attorney General  
201 Poplar Avenue, Suite 3-01  
Memphis, TN 38103

Office Phone: (901) 545-2437 direct line, (901) 545-5900 main number  
Facsimile: (901) 545- 3937

Email Address: Work: [Garland.Erguden@scdag.com](mailto:Garland.Erguden@scdag.com) Home: [Garlandy@aol.com](mailto:Garlandy@aol.com)

Home Address: [REDACTED] Shelby County

Home Phone: [REDACTED] Cellular Phone: [REDACTED]

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**INTRODUCTION**

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) **and** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit nine (9) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to [sarah.bradley@tncourts.gov](mailto:sarah.bradley@tncourts.gov).

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

**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

Shelby County Assistant District Attorney General, 30<sup>th</sup> Judicial District, Memphis

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

1995, BPR# 017347

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# 017347, Oct. 1995, active license.

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).

Assistant District Attorney General, Shelby County, January 2009 to Present

Criminal court trial assistant handling all matters - preliminary hearings, indictments, trials, hearings, negotiations - associated with cases assigned to the divisions. Rotation into Grand Jury division in March 2011 to handle indictments and assist in advising police bureaus on legal issues. Also provide assistance with capital post-conviction litigation. The Shelby County District Attorney has 100+ assistants covering ten divisions of criminal court, nine divisions of general sessions criminal court, juvenile court, and grand jury.

Assistant Shelby County Public Defender, June 1998 to December 2008

Appellate section with W. Mark Ward and Tony Brayton handling cases in the Tennessee appellate courts and U.S. Supreme Court (2000-09). Handled 250+ appeals to Court of Criminal Appeals and Tennessee Supreme Court. Each member of the appellate team was "partnered" with a trial lawyer on the capital defense team from initial intake with the client in all potential death penalty cases to assist with motion practice and make recommendations to preserve and/or develop potential appellate issues. Assisted 70+ lawyers with issue spotting, provided training and continuing legal education, worked on special projects for the Public Defender, and was a

member of the speaker bureau created by then Public Defender A C Wharton Jr., to cover speaking engagements when Mr. Wharton was unavailable. Previously assigned as a trial attorney in major violator/career criminal division (Judge Joseph Dailey) and to the general sessions felony team.

Private Practice, Oct. 1995 to June 1998

Emphasis on criminal and family law, criminal cases which included appointments at trial, post-conviction, and appellate levels; co-counsel with W. Mark Ward on three appeals to Tennessee Supreme Court; contract research and brief writing.

Court Appointed Special Advocates (CASA), 1998

Part-time staff attorney at the Shelby County Juvenile Court, handled CASA's contested termination of parental rights cases at trial and on appeal. Reported to then Executive Director Dan Michael.

*Pro Bono* Manager/Attorney, Memphis Area Legal Services, Inc. (MALS), Aug.1996- Mar.1998

Reported to then Executive Director Karen Dennis. Managed *pro bono* program with 400+ volunteer attorneys, developed and managed model *pro bono* divorce clinics, provided legal representation and assistance to outreach clients (Friends For Life AIDS/HIV+ Support, YWCA Battered Women's Program, Aloysius House [hospice], Homeless Shelters), developed *pro se* materials and obtained grant for SSI/SSDI Reconsideration Kits, developed and/or taught CLE for volunteer attorneys, outreach speaker for MALS (advance directives, family law, landlord-tenant law), developed collaborative grants for family law legal services 1998-99 with Community Legal Center and University of Memphis Law School Legal Clinic, columnist for Memphis Bar Association's monthly "Bar Essentials" magazine.

Pando Publications, Roswell, Georgia & Memphis, TN, 1990 to present

Editor and co-owner with husband Andrew Bernstein of a company which publishes books and teaching materials on the card game of bridge. Wholesaler to book distributors/sellers and groups such as the American Contract Bridge League. I occasionally edit new material or ghost-write as necessary. Most recently worked on *Teach Me To Play, Volume 2*, a book aimed at teaching children ages 8 to 12 how to play bridge.

Devyn Press, Roswell, Georgia & Louisville, Kentucky, 1979-1990

Editor and part-owner with Andrew Bernstein and Randy Baron of a company which published 100+ titles (books, pamphlets, and teaching materials) on the card game of bridge.

Scientific-Atlanta, Inc., Atlanta, Georgia, 1982-1990

Senior Database Administrator at Fortune 500 engineering and communications company. Provided IBM mainframe system software implementation and database support, problem resolution, disaster recovery, Q & A, system security, and training for technical support, software development, and operations departments of the Management of Information Systems group.

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.

N/A

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.

Assistant District Attorney General, Memphis, Shelby County

2009-2011: Trial assistant in criminal courts, assigned to Division 6 (Judge John Fowlkes) and Division 10 (Judge James Beasley). Division 10 is a major violator, vertical prosecution unit with cases handled by an individual assistant from preliminary hearing through indictment and trial. March 2011: Grand Jury Division assistant handling indictments and advising police bureaus. One hundred percent of my present practice deals with criminal law.

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 Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

My practice has been confined to criminal trial and appellate work (criminal court, general sessions, juvenile courts) and family law (legitimation, adoption, child support, divorce, protective orders, termination of parental rights, guardian ad litem practice in Probate, Circuit, Chancery, and Juvenile Court). I have extensive experience in appellate work having handled approximately 250 appeals (25 appeals per year from 2000 to 2009) in the Court of Criminal Appeals and Tennessee Supreme Court.

I maintained an extensive pro bono practice from 1995 until I moved to the District Attorney in 2009 (prosecutors are not permitted to represent clients), handling cases for indigents or the working poor from Shelby County in civil cases (family law/restoration of civil rights/child support cases referred from the Probationer's Support Program, Public Defender, the Community Legal Center, and civil/criminal cases referred from the District Attorney's Mentor Program at Juvenile Court).

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

administrative bodies.

The most significant trial court result for a client was *State v. Robert Hood*. On March 17, 2006 Judge Joseph Dailey (Division Five, Shelby County Criminal Court) granted a Writ of Error *Coram Nobis* based upon newly discovered evidence, setting aside a death-penalty conviction already affirmed by the Court of Criminal Appeals and which was pending decision in the Tennessee Supreme Court. Mr. Hood was granted a new trial on that homicide and the State dismissed a second, unrelated capital case set to be tried in June 2006. The first case was then settled and Mr. Hood pled guilty to second degree murder before being returned to Colorado to serve two life sentences for murder.

Appellate courts:

*Rogers v. Tennessee*, 532 U.S. 451 (2001)

Co-counsel (research, editing, preparation for oral argument) with W. Mark Ward. This case involved a 1994 stabbing which led to the victim's death 15 months later. Tennessee then followed the common law year-and-a-day rule which required that a victim die within a year-and-a-day of the assault before the attacker could be convicted of homicide. The Tennessee Supreme Court abolished the rule and applied its decision retroactively, thereby upholding the homicide conviction. The case is significant because the United States Supreme Court fully analyzed the extent to which general *ex post facto* principles apply to judicial decisions through the Due Process Clause. *Rogers* held that the 14th Amendment prevents judicial decisions from retroactively changing the criminal law where the change is both unexpected and indefensible by reference to pertinent prior expressions of the law. In a 5-4 opinion, the Court held that the change was not unexpected and that its retroactive application did not violate the Due Process Clause.

*Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000)

Sole appellate counsel before Court of Appeals. At the Tennessee Supreme Court, I was co-counsel (wrote brief) with W. Mark Ward. The Supreme Court made the case part of the Supreme Court's Advancing Legal Education for Students (SCALES) project.

The case involved questions of whether: (1) double jeopardy prevented the defendant's retrial for criminal contempt (non-payment of child support) after testimony had been taken by one judge and the case was then transferred to a second judge; and (2) whether the defendant was entitled to a jury trial when being tried for criminal contempt under T.C.A. § 29-9-102. The Court, citing double jeopardy protections, reversed the defendant's convictions and vacated his sentences, but held that he was not entitled to a jury trial under T.C.A. § 29-9-102.

*State v. Stanley Boxley*, 76 S.W.3d 381 (Tenn. Crim. App. 2002)

Sole appellate counsel. Defendant was convicted of felony murder and attempted aggravated robbery. The Court of Criminal Appeals reversed the convictions and dismissed the case finding (1) that there was insufficient evidence to corroborate the accomplice testimony, and (2) that defendant's due process rights were violated by the failure to fully disclose the terms of the plea agreements struck with the accomplice witnesses; the jury was misled by testimony concerning those agreements; and defendant had been deprived of the opportunity for full cross-examination of those witnesses.

*State v. Larico Ficklin*, 2001 WL 1011470 (Tenn. Crim. App. 2001)

Sole appellate counsel. The defendant's conviction for second degree murder was reversed and remanded for new trial based upon a finding that his initial arrest was without probable cause (an "on the hook arrest") and that his confession, obtained 53 hours later without a judicial determination of probable cause, should have been suppressed.

*In the Matter of Renee Carmon Vallee*, 31 S.W.3d 566 (Tenn. App. 2000)

Sole trial and appellate counsel for CASA. Clarified that the mandates of Rule 39(f) [right to an attorney] of the Tennessee Rules of Juvenile Procedure require strict compliance by the trial court. The court appointed an attorney *ad litem* to represent the mother because of her mental illness and a guardian *ad litem* for the children. The Court of Appeals reversed and remanded for further proceedings because of the trial court's failure to provide separate counsel for the husband/father. The termination of parental rights was ultimately upheld in a subsequent trial and appeal.

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

I was part of a group trained by the Association for Women Attorneys to work as *pro bono* mediators and was certified as a family law mediator in 1996 by the Mediation Association of Tennessee (I have not maintained this certification). I mediated three marital dissolution agreements for Community Legal Center clients in 1996-97, ten cases (vandalism and/or quarrels between neighbors) for Shelby County's Citizen's Dispute Center in 1997-98, and five restitution mediations between victims and non-violent juvenile offenders for MARRS in 1997.

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 was a board member and office holder (secretary, treasurer, vice-president, president) in my condominium association in Atlanta, Georgia during the early 1980's.

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

I have spoken about legal issues to groups ranging from lawyers and jurists from the Middle East, France, and Bangladesh touring the courts with State Department projects to high school students who were part of the Tennessee Supreme Court's SCALES program. I frequently speak to student groups visiting the courts and have appeared on Judge Potter's television show to discuss criminal law issues. I have been on several "Meet the Lawyers" panels at the Orange Mound Community Center, spoken on divorce and child support issues at the YWCA Shelter for abused women, and discussed advanced directives with residents of two nursing homes and a support group for people with AIDS.

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

August 2004: Applied for the opening created in Division I, Shelby County Criminal Court, when Judge Bernie Weinman retired. My name was one of three submitted to the Governor as a nominee.

November 2004: Applied for the opening in Division 9, Shelby County Criminal Court, created when Judge J.C. McLin was appointed to the Court of Criminal Appeals, as the Governor had not yet made his selection on the Division 1 seat. I was not selected as a nominee.

July 2007: Applied for the opening created in Division 6, Shelby County Criminal Court, when Judge Fred Axley retired. My name was one of three submitted to the Governor as a nominee.

June 2008: Applied for the opening created on the Court of Criminal Appeals when Judge David Hayes took Senior Judge status. I was not selected as a nominee.

### EDUCATION

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

Memphis State University, Memphis, Tennessee 1969-1971  
Political Science/History. Married, leaving school in my junior year.

Kennesaw State University, Kennesaw, Georgia 1990-1992  
*Bachelor of Arts, summa cum laude*, Political Science, 1992

Cecil C. Humphreys School of Law 1992-1995, The University of Memphis  
*Juris Doctorate*, May 1995  
Am Jur Award, Criminal Procedure I  
Dean's Award, Academic Excellence, ADR Negotiations.  
Dean's Distinguished Service Award.  
Association for Women Attorneys selection for 46 hours Family Mediation Training  
Honor Code Committee

### PERSONAL INFORMATION

14. State your age and date of birth.

60, January 28, 1951

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

19 years

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

19 years

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

Shelby

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

N/A

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

No

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

No

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

N/A

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

No

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



No

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

Irreconcilable Differences Divorce from Turhan Ergüden, 1976 Istanbul, Turkey.

I do not have the docket number or exact date as the papers were lost when my basement flooded a number of years ago. If necessary, I can obtain an additional translated copy from the Turkish Embassy.

Federal District Court, Miami, Florida, late 1970's - *Alan Cokin and Steve Sion vs. American Contract Bridge League*.

Professional players Cokin and Sion were expelled from the American Contract Bridge League after being caught cheating. As a witness to the cheating incident I was one of 44 defendants (all were either witnesses or employees/board members of the American Contract Bridge League) in their anti-trust lawsuit. It ended in a mistrial and eventual settlement.

Small Claims Court, Atlanta, Georgia in the early 1980's.

Dispute with tenant over a broken lease and damage to rental property. I was awarded damages. I do not remember the exact date or the name of the tenant.

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

Girl Scouts Council of Memphis  
Board Member, 2007-2008

Shelby County Drug Court Foundation  
Board Member, 2005-2007  
(Foundation raises money to support client programs for Drug Court)

Foster Care Review Board, Shelby County Juvenile Court  
Board Member, 2003-2008  
(Board reviews plans/progress reports for children in the custody of the Dept. of Children's Services)

Community Legal Center, Memphis  
Board of Directors, 1998-2002  
*Pro Bono* Attorney/Speaker/Mediator, 1995 to 2009  
(Center provides civil legal assistance for the working poor)

Court Appointed Special Advocates (CASA)  
Shelby County Juvenile Court  
Volunteer 1999-2007 (occasionally handled CASA appeals)

Public Defender's Adopt-a-School Program, (Peabody Elementary School),  
1998 to 2009

Wolf River Society, Memphis  
(downtown luncheon club)  
2004 to 2009

American Contract Bridge League, Memphis, TN  
Member 1973-2008; Vice-Chair, National Appeals Committee, 1980-1985; Member, National Goodwill Committee; ranked in top 5% of tournament players, represented U.S. in World Bridge Federation Competition 1986; District 7 Secretary, 1980-1984; Unit 114 Charity Chair, 1982-1983.

25. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
  - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

### ACHIEVEMENTS

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

Leo Bearman, Sr. Chapter, American Inns of Court, Memphis, 2007 to 2010

Tennessee Bar Association, 1996-1998, 2007 to present

\* Appellate Practice Section, Executive Council/West Tennessee Delegate 2008 to present.

Memphis Bar Association, 1996-1998, 2004 to present

\* Shelby County Jail Master Plan, 2007, invited by then Sheriff Luttrell to represent bar

associations.

- \* Criminal Law Section Chair, 2005-2006, treasurer 2007-08: restarted section, provided monthly lunch programs aimed at both prosecution and defense bar; provided CLE programs for section; organized 2006 candidate forums for criminal and juvenile court judicial races, Sheriff, and District Attorney.
- \* Mentor Program, 2006 to present: assist new lawyers with appellate questions and criminal cases; 2010-11 mentor to Leadership Program for young lawyers.
- \* Steering Committee Member (2006), for SCALES Project (Nov. 14, 2006): this group (run by Judge Jerry Stokes) organized a Tenn. Supreme Court project to prepare city and county high school students for oral arguments in Memphis.
- \* Host Committee for June 2006 TBA Annual Meeting in conjunction with Judicial Conference and TLAW.
- \* Public Service Task Force 2003-2004: this group worked on a number of proposals to make the court system more accessible to the public, more "user friendly" to *pro se* litigants, and to improve the delivery of *pro bono* services.
- \* Government Lawyers Section, Board Member, 1997-1998.

Tennessee Association Criminal Defense Lawyers, 1998 to 2009.

- \* Bench-Bar Liaison, Judicial Conference, 2005 to 2009, reappointed for second term in 2007
- \* Amicus Committee, 1998-2002.

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

- 2001 Elmore Holmes Award, Outstanding Service to the Community Legal Center
- 2002 Tennessee Bar Association, Public Service Attorney of the Year.
- 2004 One of three names selected by Judicial Selection Commission for Governor's consideration for appointment to criminal court bench.
- 2006 Mid-South Super Lawyers/Memphis, The City Magazine, rated for appellate work.
- 2007 One of three names selected by Judicial Selection Commission for Governor's consideration for appointment to criminal court bench.
- 2008 BV rating Martindale Hubble.

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

J. Ross Dyer and Garland Ergüden, *Tennessee's Application of Crawford v. Washington's Confrontation Clause Analysis*, Memphis Lawyer, Memphis Bar Association Magazine May/June 2006.

29. 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.

April 11, 2011 “Violent Crimes Law” Shelby County Sheriff’s Training Academy
July 30, 2010 “Arrest and Confession Law” Shelby County Sheriff’s Training Academy
Oct. 27, 2009 “Arrest Law” Shelby County Sheriff’s Training Academy
Oct. 14, 2009 “Drug and Gun Laws” Shelby County Sheriff’s Training Academy
Nov. 17, 2008 “Post Judgment Motions” guest lecturer at Judge Mark Ward’s Advanced Criminal Procedure class at The University of Memphis Law School
April 7, 2008 “How To Get Your Brother-in-law Out Of Jail” with Judge Mark Ward for Memphis Area Legal Services training of pro bono attorneys, Memphis
Dec. 12, 2006 “Criminal Case Law Update” Memphis Bar Association, Memphis
Nov. 10, 2006 “Post Judgment Motions” guest lecturer at Judge Mark Ward’s Advanced Criminal Procedure class at The University of Memphis Law School
Dec. 19, 2005 “Criminal Appeals - Making the Record” Memphis Bar Association, Memphis.

30. 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.

N/A
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31. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No
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32. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are two samples which are each 100% my work. The first is the State’s response to a petition for writ of error corum nobis, <i>George Campbell v. State of Tennessee</i> . The second, <i>State of Tennessee v. Judge Brooks</i> , is an application for permission to appeal to the Tennessee Supreme Court in a homicide case dealing with the forfeiture by wrongdoing exception.
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**ESSAYS/PERSONAL STATEMENTS**

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

The position is unique in that it is intellectually challenging with its mix of legal issues and application of law problems. It requires experience, skills and traits which I possess: in depth knowledge of criminal law and procedure; extensive appellate experience, an understanding of the roles of the prosecution, defense, and bench gleaned from having worked as both a defense lawyer and prosecutor, a two year clerkship for the Shelby County criminal court judges, research and writing skills, and a strong work ethic.

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

While a law student I worked with the HIV/AIDS Street Clinics and Public Interest Law clinics at the Orange Mound and Frayser Community Centers and answered calls from Community Legal Center (CLC) clients, screening 100+ clients each month for referral to other community resources.

I took pro bono cases for Memphis Area Legal Services (1995-98), CLC (1995-2009), worked as a volunteer mediator for the Citizen's Dispute Center, CLC and MARRS (restitution by non-violent juvenile offenders) (1996-98), handled cases referred from the Probationer's Support Program and DA's Mentor Program at Juvenile Court (2004-09), and served on the boards of Dismas House (transition housing for parolees) (1997-98), CLC (1998-2002), Foster Care Review (2003-08), and the Drug Court Foundation (2005-07). I was awarded the 2001 Elmore Holmes Award for outstanding service to CLC and the 2002 Tennessee Bar Association Public Service Attorney of the Year for pro bono work.

As a prosecutor I am not permitted to represent clients so now try to be more active in local bar programs to mentor and train young lawyers.

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

The Court of Criminal Appeals hears appeals - in the form of oral and written argument by defense counsel and the Tennessee Attorney General - from the trial courts of felonies, misdemeanors, and habeas corpus and post-conviction petitions. Decisions from the Court may be appealed to the Tennessee Supreme Court with permission, with the exception of capital cases which are automatically heard by the Supreme Court.

The Court consists of twelve judges who sit in panels of three each month in Jackson, Nashville, and Knoxville. Four judges are selected from each of the three grand divisions of the State. Since Judge J.C. McLin's death, the Western Section is served by Judge Alan E. Glenn,

Judge John Everett Williams, and Judge Camille McMullen.

The Court has a number of exceptionally good judges. I hope to favorably impact the system by emulating the model provided by those judges in work ethic, knowledge of the law, and quality of written opinion.

36. 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 would remain involved in those community service and bar activity projects as outlined above which do not require legal representation or fund raising. I enjoy teaching continuing education seminars for attorneys and legal seminars at the Sheriff's Training Academy and would continue to do those if asked. I have spoken to a number of community groups about legal issues and have served as a judge of student appellate advocacy competitions at the University of Memphis Law School. I would continue to do both activities if invited.

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

I have worked steadily since my teenage years and paid for all of my college and law school expenses with the result that I am self-disciplined and have good work habits. My experience as a trial and appellate lawyer give me a broad understanding of, and appreciation for, the role of the appellate courts. My extensive appellate experience and strong writing skills will ease the transition into a new role.

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

I fully agree with the requirements that all drivers be licensed and insured, and, as a prosecutor, handle traffic violations as the law is written. However, compliance with those requirements is made difficult here in Shelby County by a combination of inadequate public transportation and a large population which lives at or below the poverty level. It is not unusual to see adults who have no criminal record other than many convictions for driving with a suspended license. The lack of public transportation, plus the inability to pay the court costs, fines, and state fees in full on the front end for reinstatement of driving privileges means that most will continue to drive illegally, accumulating additional tickets and further costs.

This problem could be helped by expanding the "Drive while you pay" program instituted by the City of Memphis to costs entailed by state and county tickets. This program reinstates licenses which have been suspended because of city tickets upon payment of an initial sum, plus regular monthly payments. It has the further advantage of making collection of such fees and fines an actuality rather than a write-off for government.

**REFERENCES**

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

A. W. Mark Ward, Criminal Court Judge, Shelby County, 274 North McLean, Memphis 38112, home: (901) 725-6884, cell (901) 233-7267, work (901) 545-3772.
B. Debby Michael, Director Human Resources, Baptist Homecare, work: (901) 767-6767, home address: 12400 Fox Lair Drive, Collierville, TN 38017, cell: (901) 491-2103, (non-lawyer, family friend).
C. Dan Michael, Juvenile Court Magistrate, work: (901) 405-8400, home address: 12400 Fox Lair Drive, Collierville, TN 38017, cell: (901) 212- 6559.
D. Bernard Yomtov, retired businessman, 4 Centre Street Unit #1, Cambridge, MA, 02139, (617) 864-6968 (non-lawyer, family friend).
E. Pamela Skelton, VP Legal & Corporate Transactions, EnSafe, work: (901) 372-7962, cell: (901) 412-5567.

**AFFIRMATION CONCERNING APPLICATION**

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: September 13, 2011.

\_\_\_\_\_

Signature

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





**TENNESSEE JUDICIAL NOMINATING COMMISSION**

**511 UNION STREET, SUITE 600**

**NASHVILLE CITY CENTER**

**NASHVILLE, TN 37219**

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY**

**WAIVER OF CONFIDENTIALITY**

**I HEREBY WAIVE THE PRIVILEGE OF CONFIDENTIALITY WITH RESPECT TO ANY INFORMATION WHICH CONCERNS ME, INCLUDING 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, AND I HEREBY AUTHORIZE A REPRESENTATIVE OF THE TENNESSEE JUDICIAL NOMINATING COMMISSION TO REQUEST AND RECEIVE ANY SUCH INFORMATION.**

**GARLAND ERGUDEN**

---

SIGNATURE

**SEPT. 13, 2011**

**TN 017347**

**BPR #**

IN THE CRIMINAL COURT OF TENNESSEE  
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS  
DIVISION X

---

GEORGE CAMPBELL,  
PETITIONER,

vs.

No. 93-00428-29

STATE OF TENNESSEE,  
RESPONDENT.

---

STATE'S RESPONSE TO PETITION FOR WRIT OF ERROR CORAM NOBIS

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The State of Tennessee, by and through the undersigned Assistant District Attorney General, moves the Court to dismiss the Petition for Writ of Error Coram Nobis.

The Petition alleges “newly discovered evidence” in the form of “exculpatory” statements by Lontina McGary. It further claims that this information comes from a hitherto unknown *Brady* violation which Petitioner discovered on October 8, 2010 - 19 years after the murder for which he was convicted - after he obtained access to District Attorney investigative files on the murder of Kevin McConico pursuant to a Chancery Court Order.

In support of its motion, the State avers the following:

- (1) Petitioner conspired with Vander Moore and Lontina McGary to commit home invasion

robberies in the Memphis area. Petitioner chose the robbery target, drove Moore and McGary to and from the robbery, supplied the guns used by Moore and McGary, and instructed the pair on how to commit the robbery. *State v. George Campbell*, 1996 Tenn. Crim. App. LEXIS 391 (June 28, 1996) (copy attached).

On April 22, 1991 Petitioner contacted McGary and Moore about a proposed robbery at the home of Anthony Bean on Afternoon Lane. They met at the Southland Mall and drove to Bean's home in Petitioner's blue pickup truck. Petitioner provided handguns, showed the pair the house, provided a package and instructed them in a package delivery scheme as the ruse to gain entry. Events went awry inside the home as Moore first struggled with, and then shot and killed Kevin McConico, while McGary and the homeowner exchanged gunfire. Another guest inside the home was shot in the foot. *Id.*

When Moore and McGary left the truck to enter Bean's home, Petitioner drove to a corner intersection where he waited with the engine running. Two neighbors saw the truck which they described as an older model. One witness saw an African American inside the truck. One witness saw two African Americans run to the truck before it drove away. Both witnesses said the truck shown in photographs at trial was consistent in appearance with the truck they saw idling at the intersection. The State established that a pickup matching the description provided by the witnesses was registered to Petitioner and that the license plate shown in photographs at trial was registered to Petitioner. *Id.*

(2) Police were not initially aware of Petitioner's identity as Moore and McGary did not give up his name until much later in the process. Moore and McGary were indicted jointly for aggravated assault and felony murder under indictments 91-09379 and 91-09380. McGary pled guilty on May 11, 1992 to concurrent sentences of three years for the assault and forty years for

murder in the second degree. Moore was convicted at trial on Oct. 1, 1992 of both aggravated assault and felony murder. Moore was sentenced to concurrent sentences of six years and life imprisonment.

(3) Petitioner was indicted on January 14, 1993 under indictment numbers 93-00428-29. He was convicted of felony murder and aggravated assault and sentenced to consecutive sentences of life and ten years by the Honorable Joe Brown, Division 9, Shelby County Criminal Court.

(4) On direct appeal, *State v. George Campbell*, 1996 Tenn. Crim. App. LEXIS 391 (June 28, 1996), Petitioner raised four issues: (1) an alleged *Brady* violation in the State's failure to provide McGary's statement containing exculpatory material; (2) trial court error in denying his pre-trial motion for a copy of McGary's statement and in failing to dismiss on speedy trial grounds; (3) trial court error in failing to strike the State's proffer of a photograph of a blue pickup truck; and, (4) trial court error in denying his motion for judgment of acquittal at the conclusion of the State's case in chief. *Id.*

Although the appellate court held that the issue of the pre-trial motion for McGary's statement had been waived for various reasons, Judge Joe B. Jones noted that if the issue had been addressed on the merits, Petitioner would not have been entitled to relief:

The state furnished defense counsel with a copy of the statement after McGary testified, and defense counsel used the statement to cross-examine McGary. In essence, he received the maximum benefit from the statement. This was the only manner in which this statement could be used. Campbell fails to establish how he was prejudiced by not receiving the statement prior to trial. This Court finds no prejudice.

Campbell was not entitled to McGary's statement prior to trial pursuant to Rule 16, Tenn. R. Crim. P. McGary entered a plea of guilty. Moore was tried separately. Moreover, McGary was not a co-defendant as that term is used in Rule 16. It

appears that McGary and Moore were indicted jointly. The indictment in this case only names Campbell.

Rule 16(a)(1)(A), Tenn. R. Crim. P., provides in part: “Upon a determination by the State to place co-defendants on trial jointly, the State shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under this subdivision as to each co-defendant.” Based upon the facts in this case, Campbell was clearly not entitled to McGary’s statement prior to trial.

This issue is without merit.

*Id.* at \* 8-9.1

Judge Jones found no merit in any of Petitioner’s other claims on direct appeal. As to the denial of his motion to dismiss on speedy trial grounds, Judge Jones stated that Campbell was not entitled to relief as pre-accusation “delay is treated differently than delay occurring after an indictment . . . has been returned by the grand jury.” *Id.* at \* 9-10 (citing *United States v. Marion*, 404 U.S. 307 (1971), and *State v. Gray*, 917 S.W.2d 668 (Tenn. 1996)). As to the introduction of the photograph of the blue truck at trial, Judge Jones said that if this was treated as a motion to suppress the issue would “be summarily denied.” *Id.* at \* 10-13. If this issue was treated as a objection based on lack of foundation, the appellate court found that the proper predicate was laid and that the trial court had not abused its discretion in admitting the photograph. *Id.* at \* 13. Finally, as to the allegation that the trial court erred by denying his motion for judgment of acquittal, the appellate court said:

There is ample evidence contained in the evidence to support a conviction for felony murder and aggravated assault. Campbell, as an aider and abettor of these crimes, is just as guilty as Moore and McGary. The only real bone of contention is whether the testimony given by McGary, an accomplice, was sufficiently corroborated. This Court is of the opinion that McGary’s testimony was sufficiently corroborated.

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<sup>1</sup> See also, *Tennessee Criminal Trial Practice*, Judge W. Mark Ward, Thomson West, § 13:7 Statements of co-defendants: If one or more of the co-defendants is severed and granted a separate trial, the defendant, of course, is not entitled to discover the co-defendant’s statements. However, if the co-defendants appear at the defendant’s trial and testify for the prosecution, the defendant is entitled to discover the statements pursuant to the Tennessee Jenks Act (citing to Tenn. R. Crim. P. 26.2) after the co-defendants have testified on direct examination. See Annotation, “Statements of Persons Other than Defendant as Subject to Discovery by Defendant under Rule 16 of the Federal Rules of Criminal Procedure,” 115 A.L.R. Fed. 573.

*Id.* at \* 14-15.

(5) Attached to Petitioner's petition are copies of McGary's testimony at the trial of Vander Moore in which she named Moore and "George" as participants in the murder. (pp. 240-257). On direct examination by prosecutor Tom Henderson, McGary noted she spoke for the first time to Mr. Henderson two hours before her testimony, (p. 241), acknowledged that she gave a statement about the robbery when first arrested but had not mentioned anyone named George, (p. 256), and pled guilty after a plea agreement was negotiated by defense counsel and had understood that she would testify at the trials of her co-defendants. (pp. 256-57).

Petitioner has attached pages of Moore's trial testimony, (pp. 270-73), which dovetail with the facts laid out in the appellate opinion and cited above, and the testimony of McGary naming Petitioner as a participant in the murder of Kevin McConico. This is followed by the attachment of a May 25, 1994 memo to the file written by Mr. Henderson which documents that he advised Brett Stein, Petitioner's trial counsel, that the State met with Moore in the jail on May 24, 1994, and that Moore had been brought to 201 Poplar from the state penitentiary in the same car with Petitioner. The memo states that Mr. Henderson told Mr. Stein that Moore said that the man he rode from prison with was not the same "George" who helped with the robbery. The memo concluded: "I told Stein that VM [Vander Moore] was available to test/y + (*sic*) had that exculpatory evid. (*sic*). I also advised that I was looking forward to cross-examining VM again."

(6) On January 5, 1998 Petitioner filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel. Judge Chris Craft appointed counsel (Michael Scholl at trial, Marty McAfee on appeal). Among other complaints, Petitioner testified that he first met Moore when they were cell mates awaiting their respective trials. *George Campbell v. State of*

*Tennessee*, 2001 Tenn. Crim. App. LEXIS 722 (Sept. 10, 2001) (copy attached). Petitioner said that Moore told him then that it was McGary’s idea to implicate him in the crime. *Id.* at \* 3-4.

Moore testified at the post-conviction hearing, saying that McGary wrote him letters before their scheduled trial telling him that they “needed to bring up [Petitioner’s] name” in order to get some “time off of [them]” and to get “a break in the case.” *Id.* at \* 8. Moore testified that the prosecutor tried to get him to testify against Petitioner but said he had refused to do so. *Id.* at \* 9. Moore said he had never identified Petitioner as an accomplice, explaining that he never got a good look at the man who picked him up before the robbery, and whom McGary referred to as “George,” because it happened under the darkness of night. *Id.* at \* 9. (*Cf.* Moore’s trial testimony naming Petitioner as an accomplice, pages 270-73, attached to present writ.). Judge Craft denied the petition<sup>2</sup>. The appellate court affirmed the denial of post-conviction relief. *George Campbell v. State of Tennessee*, 2001 Tenn. Crim. App. LEXIS 722 (Sept. 10, 2001).

(7) On May 28, 2002 Petitioner filed a *pro se* petition for writ of habeas corpus, alleging that his convictions were void because the trial court was without jurisdiction to render judgment. The petition was summarily dismissed by the trial court. That dismissal was affirmed by the appellate court in *George Campbell v. Bruce Westbrook, Warden*, 2003 Tenn. Crim. App. LEXIS 851 (Oct. 6, 2003) (copy attached).

(8) On February 16, 2007 Petitioner filed a writ of error coram nobis alleging newly

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<sup>2</sup> A copy of Judge Craft’s Order denying the petition for post-conviction relief is attached. It notes that Moore testified that it was too dark for him to see clearly and so could not say whether or not Petitioner was the man who gave him and McGary a ride to and from the killing. (p. 5). Moore stated that defense counsel had interviewed him before Petitioner’s trial. (p. 5). The Order further notes that defense counsel interviewed McGary before Petitioner’s trial and that trial counsel testified that he was allowed to read McGary’s statement during pretrial discovery. (p. 5).

discovered evidence that may have resulted in a different outcome if admitted at trial. Specifically he alleged that “on or about August, 2005, petitioner received ‘Verbatim’ (*sic*) - transcripts of the only alleged prosecution witness, Lontina McGary, during the trial of Vander Moore (shooter).” *George Campbell v. State*, 2008 Tenn. Crim. App. LEXIS 421 (May 28, 2008) at \* 2-3. Petitioner claimed that McGary’s testimony at that trial indicated that the indictments against him were procured through fraud. *Id.* at \* 3. Judge Mark Ward dismissed the petition without appointment of counsel or a hearing on March 22, 2007, finding that Petitioner had failed “to allege . . . the substance of the fraud or false testimony, fail[ed] to allege that this ‘newly discovered evidence’ may have resulted in a different verdict, and failed to allege why he waited 18 months after discovering this ‘newly discovered evidence’ to file the present Petition.” *Id.* at \* 3.

The appellate court noted the State’s request to affirm the denial of relief pursuant to Rule 20. As a basis for that motion, the State asserted that: the petition was time barred as it was not filed until twelve (12) years after the limitations period ran; Petitioner had failed to demonstrate that due process required tolling of the statute of limitations; claimed health problems in 2005 (diabetes and mini-strokes) had no bearing on the one-year statute of limitations that began to run in 1994; and finally, that Petitioner offered no proof that McGary gave false testimony at trial. *Id.* at \* 4-7. The appellate court stated that “nothing in the record implicates any due process concerns that would require that the statute of limitations be tolled.” *Id.* at \* 7. Further, upon a review of the transcript “attached” to “Petitioner’s application and the facts as recited in this Court’s 1996 opinion affirming the Petitioner’s convictions, we discern no evidence of fraud as alleged by Petitioner.” *Id.* at \*7-8. Finding that an opinion would have no precedential value, the appellate court affirmed by memorandum opinion the denial of error coram nobis relief. *Id.* at \* 8.

(9) Tennessee Code Annotated § 40-26-105 (h) provides that error coram nobis relief shall be



confined to matters outside the record and to matters that were not or could not have been litigated in a motion for new trial, on appeal, or in a habeas proceeding. *Id.* Upon the petitioner’s showing that he was without fault in failing to present certain evidence at the proper time, a writ will lie for newly discovered evidence relating to matters litigated at trial “*if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.*” *Id.* (emphasis added).

(10) The present petition for error coram nobis relief can only be described as beating a long dead horse. These matters are not “newly discovered” as they were well known to Petitioner at the time of trial in 1994. Trial counsel requested McGary’s statement in a pre-trial motion (see Petitioner’s attachments) and were properly denied by the trial court. The Jenks statement, which defense counsel was allowed to read in pre-trial discovery, was provided to counsel at trial and was the basis of McGary’s cross-examination. The issue was dealt with again in Petitioner’s motion for new trial.

The appellate court dealt with this issue extensively in Petitioner’s direct appeal of his convictions and found that the issue had no merit in 1996. *State v. George Campbell*, 1996 Tenn. Crim. App. LEXIS 391 (June 28, 1996). The appellate opinion also makes clear that this matter could not result in a different judgment.

The post-conviction court addressed the issue once again and found it had no merit in a March 2000 order. The appellate court affirmed that denial in 2001 and also found that Petitioner’s arguments were without merit.

The first error coram nobis raising this issue was denied by the trial judge in 2007. The appellate court affirmed the denial in 2008. At last count, six courts have looked at this issue in

one form or another before the filing of Petitioner's second error coram nobis petition and found it devoid of merit.

(11) Tennessee Code Annotated § 27-7-103 provides for a one year statute of limitations period which begins to run when judgment in the case becomes final. *Id.* See also, *State v. Mixon*, 983 S.W.2d 661 (Tenn. 1999) (concluding that judgment was final, initiating the one year limitations period, thirty days after entry of judgment in the trial court if no post-trial motion was filed, or upon entry of an order disposing of a timely filed post-trial motion).

The one year limitations period commenced in June, 1996 when the Court of Criminal Appeals filed its decision upholding the felony murder and aggravated assault convictions. *State v. George Campbell*, 1996 Tenn. Crim. App. LEXIS 391 (June 28, 1996). The present Petition was filed in the Shelby County Criminal Court Clerk in November, 2010, almost fourteen years after the limitations period had expired.

(12) Petitioner may not avoid the limitations period by availing himself of the due process considerations invoked in cases such as *Philip Workman v. State*, 41 S.W.3d 100 (Tenn. March 30, 2001), which lifted the limitations bar. The *Workman* Court stated:

Workman has raised serious questions regarding whether he fired the shot that killed Memphis Police Lieutenant Ronald Oliver. If he did not fire that shot, he is not guilty of the crime for which he is scheduled to be put to death. These claims are based upon evidence obtained from the Shelby County Medical Examiner's Office long after the conclusion of the state post-conviction proceedings. *Id.* at 103.

The Court noted that due process concerns "apply with even greater force when the statute of limitations is being applied in a capital case to bar a claim that newly discovered evidence may prove that a defendant is *actually innocent* of the capital crime of which he was convicted." *Id.* at 101. (emphasis added). The Court cited its earlier decision in *Buford v. State*, 845 S.W.2d 204

(Tenn. 1992), (Buford filed a petition for post-conviction relief within three years of the date on which four of five prior convictions used to enhance a persistent offender sentence had been set aside, but not within three years of the date of final action on the sentence) which had lifted the limitations bar saying, “. . . it is possible that under the circumstances of a particular case, application of the statute may not afford reasonable opportunity to have the claimed issue heard and decided.” *Id.* at 102. The Court applied a balancing analysis of “the governmental interests involved and the private interests affected by the official action,” and held that under the circumstances of Buford’s case, application of the limitations period would violate his right to due process. *Id.*

The due process concerns found in cases such as *Buford* and *Workman* do not apply in Petitioner’s case. There are no “serious questions” as to Petitioner’s guilt. Rather, there is no question at all of his guilt. The conviction of felony murder rests upon detailed testimony by his co-conspirators, Vander Moore and Lontina McGary, and neighbors at the crime scene who saw a man in a beaten up, older, blue pickup truck like the one Petitioner owned.

(13) Petitioner’s case properly falls within the ambit of the general rule stated in *State v. Doyle Hart*, 911 S.W.2d 371 (Tenn. Crim. App. July 19, 1995), in which Judge Joe B. Jones wrote:

As a general rule, subsequently or newly discovered evidence which is simply cumulative to other evidence in the record, (citations omitted), or serves no other purpose than to contradict or impeach the evidence adduced during the course of trial, *see Hawkins v. State*, 417 S.W.2d 774, 778 (Tenn. 1967), will not justify the granting of a petition for the writ of error coram nobis when the evidence, if introduced, would not have resulted in a different judgment.

*Id.* at 375.

Assuming only for the sake of argument that McGary’s statement was in fact “newly discovered evidence,” it serves no other purpose than to contradict or impeach the evidence

presented at trial. As such, it does not justify the granting of the petition as it would not have resulted in a different judgment at trial.

For all of the reasons explained above the State respectfully requests that the petition for writ of error coram nobis be dismissed summarily.

Respectfully submitted,

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Garland Ergüden, BPR # 17347  
Asst. District Attorney General  
201 Poplar Avenue, Suite 3-01  
Memphis, TN 38103  
(901) 545-52437

Certificate of Service

I hereby certify that a true and exact copy of the foregoing has been forwarded by U.S. Mail, first class, postage prepaid to: Lance Chism, counsel for Petitioner, on this the \_\_\_\_ day of March, 2011.

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Garland Erguden

IN THE SUPREME COURT OF TENNESSEE

At Jackson

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STATE OF TENNESSEE,

Appellee,

vs.

Shelby County Criminal

No. W2004-02834-CCA-R3-CD

Trial Court # 03-08238

JUDGE BROOKS,

Appellee.

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APPLICATION FOR PERMISSION TO APPEAL

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Garland Erguden, BPR #17347

Assistant Shelby County Public Defender

Attorney for Appellant

Suite 2-01, 201 Poplar Avenue

Memphis, TN 38103

Telephone: (901) 545-5882

OF COUNSEL:

Robert Wilson Jones

Shelby County Public Defender

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TENNESSEE:

This Application for Permission to Appeal is brought on behalf of Appellant Judge Brooks who was found guilty of first degree murder in Division Five of the Shelby County Criminal Court and sentenced to life imprisonment by the Honorable Joseph B. Dailey.

On August 31, 2006, the Court of Criminal Appeals affirmed the conviction and sentence. A copy of the opinion of the Court of Criminal Appeals is attached hereto and incorporated herein by reference. No Petition for Rehearing was filed in the case.

#### QUESTIONS PRESENTED FOR REVIEW

- I. Whether the hearsay evidence was properly admitted under the "equitable principles" of the forfeiture by wrongdoing exception to the confrontation clause where there was no proof that the killing was done to procure the victim's unavailability as a witness?
  
- II. Whether the appellate court erred in finding that admission of the hearsay evidence was harmless error?

## FACTS

The facts contained in the opinion of the Court of Criminal Appeals are adequate for a determination of the present Application.

In summary, the proof covered two physical altercations between Deborah Chance and Appellant which occurred on May 10, 2003 and July 21, 2003. The proof of the May 10, 2003 assault consisted of the following: Appellant's niece, Latisa Bridges, testified that the couple had a tumultuous, off and on live-in relationship. (IV, 144-45, 158-59). Bridges drove Chance over to give Appellant the keys to their apartment and watched as she smacked Appellant in the back of the head without provocation. (IV, 138, 150, 152). Appellant turned and slapped Chance, but she continued to hit and spit on Appellant, "egging" the fight on verbally. (IV, 139-40, 153-54). As the fight escalated in seriousness, Bridges intervened, stopped Appellant, and pushed Chance into her car. (IV, 139-41, 156, 162). Bridges described Chance as having a busted lip, black eyes, a knot over her right eye, and scratches. (IV, 141-42). Chance told police officers who had been summoned by neighbors that she did not want to press charges against Appellant because she loved him. (IV, 159).

Shereka Wright, an investigator for the District Attorney's Domestic Violence Unit, testified that she took photographs of Chance on May 15, 2003. (IV, 122-28; II, Ex. 1, Ex. 9).

Melissa Horner, a Criminal Court clerk, presented a copy of indictment number 03-08237 and its underlying affidavit of complaint, which detailed Appellant punching her in the face and "stomp[ing]" her face, chest and body. Ms. Horner testified that the warrant was issued on May 16, 2003 and executed on July 22, 2003, the day after Chance's death. (IV, 112-16; II, Ex. 8; V, 272-73).

Chance's uncle, Harlie Smith, and aunt, Betty Zabt, testified about Chance's visit to Middle Tennessee on May 16-17, 2003. Both Smith and Zabt said Chance was beaten up, with bruises, black eyes, and hair pulled out of her scalp. Smith related that Chance attributed her condition to Appellant. Zabt testified to overhearing a telephone conversation during this visit in which Appellant shouted, "You bitch, I will kill you." (IV, 53-54, 59-60, Ex. 1; V, 293-94).

The proof concerning Chance's death on July 21, 2003 consisted of the following: Harlie Smith testified that Chance called him on July 20th and said the couple had "lots of problems," that Appellant was beating her and accused her of infidelity, and that she didn't know how to get out of it or what to do as she loved him. (IV, 58-59, 66). Smith said Chance called again late the next day, between 6:00 and 7:00 p.m., to tell him that Appellant had beaten her all day and that she would "sneak away" when she got the chance. (IV, 55, 66-67). Smith said he could hear a man's voice, whom Chance identified as Appellant, calling Chance a bitch and whore, and threatening to kill her. (IV, 56-57).

Memphis police officer Jeremy Wells responded to a call from Appellant's apartment about 3:00 a.m. on July 21, 2003. He was "flagged down" by Appellant, whom he described as "pretty hysterical," while he urged the officer into the apartment explaining that his girlfriend was inside and might be dead. (IV, 74-76, 90). When asked what had happened, Appellant said, "I don't know. We got to fighting earlier, and I think I may have killed her." (IV, 77-78). Chance was found dead in the bathtub and Appellant was arrested. (IV, 85, 87).

Crime scene officer David Galloway, documented the blood on the living room walls and floor, (IV, 94-96), and photographed Chance, clothed and lying face down in the bathtub, as well as broken glass in the bedroom, a broken lamp, and bloody pillow and tee shirt. (IV, 98-102; Exs. 2-7).



The medical examiner said Chance died from blunt force trauma to the head. (V, 217-18, 233). He said Chance's blood alcohol level was .24. (V, 221, 245-47). Dr. Smith described the many bruises of varying ages on her arms and legs as commonly seen in "people of chronic alcoholism." (V, 189, 191-92, 225, 238, 240). He noted the more recent bruises found on the top of her head, right neck and right wrist, and the large hematoma on her scalp. (V, 191, 217-18). While Dr. Smith testified that he did not believe that all of Chance's injuries were caused by a human hand, (V, 197), he said that not all of her head injuries were the result of falling into the tub. (V, 222-23).

Jessie Anderson, a bar owner, testified that Appellant and Chance were in her establishment twice on July 20th. (V, 257-63; II, Ex. 1). Anderson said the couple first came in the afternoon and drank a thirty-two ounce beer. (V, 257-60). Anderson said they were not drunk and she saw no signs of a quarrel between them. (V, 260-63). Anderson said they returned sometime between 6:00 and 7:00 p.m. and left again between 8:00 and 9:00 p.m. She described them as "walking and talking" when they left. (V, 261-62).

Mike Triplett, a General Sessions clerk, presented Chance's May 15, 2003 application for an ex parte order of protection. (V, 266-68, Ex. 50). He read Chance's signed statement which reiterated the fight witnessed by Latisa Bridges and Chance's comment, "Due to this incident and prior acts of violence, I desire to have no further contact with him." (V, 269-70). He testified that the ex parte order was dismissed in June when Chance failed to appear. (V, 271-72).

## ARGUMENT

- I. Whether the hearsay evidence was properly admitted under the "equitable principles" of the forfeiture by wrongdoing exception to the confrontation clause where there was no proof that the killing was done to procure the victim's unavailability as a witness?

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The *Crawford* decision only loosely defined the phrase "testimonial statements" - those statements which would make a declarant a "witness" within the meaning of the Confrontation Clause. *Id.* at 51.

In *Davis v. Washington*, 126 S.Ct. 2266 (2006), consolidated domestic violence cases involving victim remarks to a 911 operator and police officers at the scene, and in which neither victim testified at trial, the United States Supreme Court took up the issue again. The respondents argued that the nature of domestic violence cases required more "flexibility" in the use of testimonial evidence because such victims are susceptible to intimidation and coercion to ensure that they do not testify at trial, with the effect of a "windfall" for the offender via the Confrontation Clause. *Id.* at 2279-80. Although acknowledging this potential reality, the Court responded: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." *Id.* at 2280. It continued:

But when defendants *seek to undermine the judicial process* (emphasis added) by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not

require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing. . . extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. (citations omitted). State courts tend to follow the same practice. (citations omitted).

*Id.*

Tennessee Rule of Evidence 804 generally codifies the forfeiture doctrine, deeming a declarant "not unavailable as a witness" if the absence "is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." *Id.* Rule 804(b)(6) "Forfeiture by Wrongdoing," more specifically defines the doctrine as a hearsay exception: "A statement offered against a party that has engaged in wrongdoing *that was intended to and did procure the unavailability of the declarant as a witness.*" (emphasis added). *See also, State v. Ivy*, 188 S.W.3d 132, 147 (Tenn. 2006) (in a jury out hearing the court must find by a preponderance of the evidence that the defendant was involved in or responsible for procuring the unavailability of the declarant, and that the defendant intended, at least in part, to procure that absence).

The Court of Criminal Appeals found that the preponderance of the evidence did not support a finding that Deborah Chance was killed to procure her unavailability as a witness. 2006 WL 2523991 at \* 7. It noted that the evidence did not show that Appellant knew of the May 2003 affidavit of complaint and arrest warrant. It further acknowledged that the couple continued to live together and that the warrant was not served on Appellant until two months later, after Chance's death. *Id.* As such, the appellate court concluded that Chance's statements to her uncle, Harlie

Smith, and the statements in her affidavit of complaint were not admissible under the forfeiture by wrongdoing hearsay exception. *Id.*

However, the Court of Criminal Appeals distinguished the forfeiture by wrongdoing rule as it applies to hearsay from a forfeiture by wrongdoing rule as it involves the Confrontation Clause, relying upon *Crawford v. Washington*, 541 U.S. 36, 68 (2004), and *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005). It cited the Sixth Amendment of the U.S. Constitution, Article I, § 9 of the Tennessee Constitution, and *Crawford v. Washington*, 541 U.S. 36, 68 (2004), for the requirement that testimonial evidence required both unavailability and a prior opportunity for cross-examination. *Id.* It quoted *Crawford*: "[t]he rule of forfeiture by wrongdoing [which we accept] extinguishes confrontation claims on essentially equitable grounds." *Id.* at 62. The Court of Criminal Appeals continued, "In other words, 'if a witness is absent by [the defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.'" (quoting *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

The Court of Criminal Appeals cited *United States v. Garcia-Meza*, *supra*, a case factually similar to the present one, as authority for the dual propositions that (1) Appellant had forfeited the right to confrontation by the admitted killing of Deborah Chance, and (2) that the forfeiture by wrongdoing exception did not hinge upon the killer's motive. In *Garcia-Meza*, the defendant killed his wife in front of her family because he was jealous of her dancing with another man. Five months earlier, the defendant had beaten his wife, and threatened to kill her, because of jealousy about her former boyfriend. 403 F.3d at 366-67. The Sixth Circuit rejected the defendant's claims that evidence of his wife's statements to police after the earlier beating were

testimonial and violated his confrontation rights. It said: "We need not decide today, however, whether a victim's excited utterance made to an investigating police officer is testimonial, for the Defendant has forfeited his right to confront [the victim] because his wrongdoing is responsible for her unavailability." *Id.* at 370. Citing *Crawford's* description of the forfeiture doctrine as an equitable rule, *Crawford*, 541 U.S. at 62; *Reynold's* comment that the forfeiture rule's foundation is in the "maxim that no one that no one shall be permitted to take advantage of his own wrong," *Reynolds*, 98 U.S. at 158-59; and *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004), which held that a defendant forfeits the right to confront a witness who is only unavailable because the defendant intimidated or killed the witness, the Sixth Circuit held that Garcia-Meza had forfeited his right of confrontation. 493 F.3d at 370.

The Sixth Circuit rejected out of hand Garcia-Meza's argument that forfeiture by wrongdoing required him to have killed his wife in order to prevent her testimony. The Court explained:

Though the Federal Rules Evidence may contain such a requirement, *see* Fed. R. Evid. 804(b)(6), the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence." *Crawford*, 124 S.Ct. at 1370. The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

*Id.* at 370-71.

The Court of Criminal Appeals was persuaded by the reasoning in *Garcia-Meza*, and concluded that, "unlike the forfeiture by wrongdoing exception to the hearsay rule, a defendant's intent is irrelevant with respect to the forfeiture by wrongdoing exception to the Confrontation

Clause when the defendant does not dispute that he procured the victim's unavailability." It noted its earlier statement that "the right of confrontation is not absolute and must occasionally give way to considerations of public policy and necessities of the case." (quoting *State v. Kennedy*, 7 S.W.3d 58, 65 (Tenn. Crim. App. 1999)). Finally it concluded that the "unique circumstances" of the case required such considerations and held that Appellant had forfeited any Confrontation Clause claim to Chance's affidavit of complaint.

The *Garcia-Meza* opinion was released April 5, 2005, while the *Davis v. Washington* opinion was released June 19, 2006, two and one half months before the Court of Criminal Appeals released its August 31, 2006 opinion. Significantly, the Court of Appeals does not reference *Davis v. Washington*. Nothing in the language of the U.S. Supreme Court decision in *Davis* hints at the sea change in Tennessee Sixth Amendment law espoused by the Court of Criminal Appeals.

In response to argument advocating a more "flexible" approach to the use of testimonial evidence in domestic violence cases where the victim might be coerced or intimidated into not testifying, leading to a Confrontation Clause "windfall" for an offender, Justice Scalia acknowledged the potential pitfalls, but clearly stated the Court's refusal to "vitiating constitutional guarantees." *Davis*, 126 S.Ct. at 2279-80. The *Davis* opinion carefully explained that the Sixth Amendment's confrontation guarantees do not apply "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims." *Id.* *Davis* went on to articulate a defendant's duty to "refrain from acting in ways that destroy the integrity of the criminal-trial system." *Id.* It continued: "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing. . . extinguishes confrontation claims on essentially equitable grounds.'" *Id.* It was in this very limited context - that of a defendant deliberately undermining the system by

procuring or coercing the silence of a witness - that the forfeiture rule comes into play with the loss of confrontation rights.

Appellant respectfully contends that the appeals court has taken the above quoted language out of context and constructed a house of cards upon this faulty premise. By using this language in a way which was not intended either by its plain meaning or context, the holdings in *Reynolds v. United States* and *Crawford v. Washington* are given a new and different effect. It cites *Crawford* for the comment that Sixth Amendment protections do not depend upon "the vagaries of the Rules of Evidence," and its "recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture." It culminates by concluding that this recent affirmation by the U.S. Supreme Court "strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive." Appellant respectfully asserts that the appellate court's conclusion is in error.

II. Whether the appellate court erred in finding that admission of the hearsay evidence was harmless error?

The Court of Criminal Appeals acknowledged that Harlie Smith's testimony about what Deborah Chance told him during their telephone conversations on July 20-21, 2003, her statements to him about the May 10, 2003 assault, and her statements in the affidavit of complaint were hearsay under Tenn. R. Evid. 801(c). It also acknowledged that this hearsay was not admissible under the forfeiture by wrongdoing exception. It deemed any error in admission of that proof as harmless, concluding that it did not effect the outcome of the case.

Without that proof, the State's case would have consisted only of the following proof of the May assault: (1) Latisa Bridges' testimony of a volatile relationship and a fight started and egged on a drunken Deborah Chance two months before her death, with injuries of a busted lip, black eyes, scratches, and a knot on her head. (IV, 138, 141-42, 144-45, 150, 152, 158-59); and (2) Harlie Smith and Betty Zabt's testimony that Chance had bruises, black eyes, and hair pulled out of her scalp when they saw her a day later, and Zabt's testimony that she heard Appellant threaten to kill Chance over the telephone. (IV, 53-54, 59-60; V, 293-94). Proof as to happenings which transpired in July would consist of: (1) Dr. Smith's testimony about Chance's injuries and the many photographs he took during the autopsy. (V, 189, 191-92, 197, 217-18, 222-23, 225, 238, 240); (2) Officer Wells' testimony that he responded to a call from Appellant's apartment and was flagged down by a hysterical Appellant who urged the policeman into the apartment, saying "We got to fighting, and I think I may have killed her." (IV, 74-78, 90); (3) Officer Galloway's testimony of the disarray in the apartment. (IV, 94-96, 98-102); and (4) Jessie Anderson's testimony that the couple was peaceful while drinking in her bar during the earlier evening. (V, 257-63).



Appellant's theory of defense was that he lacked the mens rea necessary for premeditated murder and that the death was a second degree murder arising from a drunken brawl between the couple. The jury may well have accepted this theory given the fact that Appellant summoned the police, waited for them to arrive, and immediately acknowledged his culpability, in conjunction with Chance's alcoholism and the couple's history of physical conflict. The additional hearsay evidence effectively removed this possibility and thus was not harmless error. Appellant respectfully asserts that the evidence, if stripped of inadmissible hearsay, was insufficient to justify a rational trier of fact in finding that the killing was premeditated beyond a reasonable doubt when tested against the standard enunciated in Rule 13(e), T.R.A.P. and *Jackson v. Virginia*, 443 U.S. 307 (1979).

#### REASONS FOR REVIEW

The Court of Criminal Appeals has fashioned a substantial change in Sixth Amendment law which departs from this Court's holdings in cases such as *State v. David Ivy*, 188 S.W.3d 132, 147 (Tenn. 2006), the rule clearly articulated in Tenn. R. Evid. 804, and the unchanged policies supporting the forfeiture rule explained in *Davis v. Washington*, 126 S.Ct. 2266 (2006).

This case involves the need to secure uniformity of decision, the need to secure the settlement of important questions of law, and the need for the exercise of the Supreme Court's supervisory authority.

#### CONCLUSION

For the foregoing reasons Appellant Judge Brooks respectfully requests this Court to grant his Application for Permission to Appeal.

Respectfully submitted,

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Garland Erguden, BPR# 17347  
Assistant Public Defender  
201 Poplar Avenue, Suite 2-01  
Memphis, TN 38103  
(901) 545-5882

Certificate of Service

I hereby certify that a copy of the foregoing Application was mailed, first-class postage prepaid, to the Office of the Attorney General, Criminal Division, P.O. Box 20207, Nashville, TN 37202, this the 30th day of October, 2006.

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Garland Erguden