Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev.14 September 2011

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Shelby County

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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 seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Shelby County Public Defender's Office

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

License 1991: Bar No: 14738

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

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).

The law firm of Perkins, Wilson and Associates 10/91 to 9/98

Shelby State Community College/Southwest Community College1/92 to 8/95

Shelby County Public Defender's Office 7/93 to 9/98; 9/06 to Present

LemoyneOwenCollege 1/03 to Present

General Sessions Criminal Court, ShelbyCounty, TN 9/98 to 9/06

StrayerUniversity 8/05 to Present

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.

None 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 am an assistant public defender and I represent defendants who are charged with criminal offenses. My practice consists primarily of representing persons charged with misdemeanor and felony offenses.

(85% -Criminal) and (15%-Civil)

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.

I am licensed to practice in all Courts in Tennessee and all federal courts including the United State Supreme Court. I have handled hundreds of all types of criminal and civil case from arraignment to trial be it jury or bench trial. This includes personal injury, divorce, malpractice, contractual disputes, divorces, adoptions, probate matters, juvenile court proceeding, child support, social security cases, etc. along with all types of criminal cases including death penalty

cases. Further I have had oral argument with the Tennessee Court of Appeal and in the Sixth Circuit. In most of the cases I have handled I have been the primary litigator that was responsible for the research, trial preparation, trial and appeal.

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

I have handled social security disability claims, civil service employment terminations claims, forfeiture and seizures hearing claims, denial of unemployment benefits, and workmen compensations claims for my clients where I have had to go before various administrative judges/boards and commissions.

Case #1 - State of TN vs. Jeffrey Mika, Criminal Court of Shelby County, Tennessee, Division 8. My client, Jeffrey Mika, was fifteen years old and charged with Murder First Degree because he stole a car and had an accident where an elderly couple was killed. I represented him in trial and the verdict was returned of vehicular homicide on January 24, 1995. I was grateful that this young man was not convicted of Murder first degree due to an automobile accident. Today, Jeffrey is out of jail and has never gotten back into trouble.

Case #2 - State of TN vs. Chuck Laws, Criminal Court of Shelby County, Division 6 in July 1994. My client, Chuck Law was charged with bribery of a public servant where he was accused of helping an inmate with a parole hearing. I argued with the state that Mr. Laws was merely a county employee and not a public servant. We went to trial and he was found not guilty. This case is significant to me because it was my first jury trial and it was held in front of Judge Fred Axley the judge retiring from the sit I am now seeking.

Case # 3 - USA vs. Don Smith, Western District of Tennessee (federal case). My client, Don Smith, was found guilty at trial of possession with the intent to distribute cocaine (I didn't represent him at trial but was appointed as appellate counsel). On appeal the case was overturned and all charges were dismissed. This appeal was heard in October or November of 1993. The oral argument was before the Sixth Circuit of the United States Court of Appeals.

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 elected to be General Sessions Criminal Judge in August 1998. I served for eight years and was not re-elected in 2006. I presided over misdemeanor court and handled felony cases from arraignment to preliminary hearings. For five years I heard only domestic violence cases.

All the cases I presided over were important to me therefore I cannot pick out one case that I thought was more significance than another. The sheer volume of our caseload makes it almost impossible to recall one case over the other. On a daily basis, I hear from 100 cases to 500 cases a day along with 1 to 10 bench trials or preliminary hearings.

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.

Throughout my practice of law, I have been appointed guardian ad litem in divorce case, custody dispute and probate matters for the last twenty years. In a lot of the probate cases I was required to manage the trust fund for the guardian and/or assist the appointed conservator.

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

I have participated in a number of mediations for my personal injury and divorce clients.

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.

This will be my forth time appearing before the Judicial Commission. I appeared the following two times and I my name was not submitted to Governor Bredsen.

Judge of Criminal Court for the Thirtieth Judicial District, Division 5, 2008

Judge of Criminal Court for the Thirtieth Judicial District, Division 7, Feburary 2009.

Judge in Circuit Court, for the Thirtieth Judicial District,, Division 8, November 2009.

EDUCATION

14. 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.

I graduated from the University of Memphis with a Bachelor's Degree in May 1983 and my major was Criminal Justice. I also graduated from University of Memphis' Cecil Humphrey's School of Law in May 1987 with a Juris Doctorate Degree.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 50 years old and my date of birth is August 30, 1961.

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

For 50 years. I am a Native Tennessean.

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

For 50 years. I have never lived anywhere but Shelby County, Tennessee,

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

Shelby 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 Applicable

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

No

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

No

22. 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.

No

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.

No

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 which you have held in such organizations.

National Bar Association – Past correspondence secretary for Ben F. Chapter (1993)

Tennessee Association of Criminal Defense Lawyers (Since 1993)

Member of Criminal Justice Advocate Panel (Since 1998)

Former Member of Tennessee General Sessions Judges Conference (9/98 to 9/06)

Member of Memphis Bar Association (since 1998)

Member of Association of Women Attorneys (since 1992)

Member of Tennessee Association of Defense Lawyers (since 1993)

Sigma Gamma Rho Sorority (since 1999)

Former Board Member of Houston High School's PTSA (2004-2006)

Former Member of Shelby County Advisory Planning Group for HIV (1999)

Active member and Sunday School Teacher of Pentecostal Temple Institutional Church of God in Christ (since 1983)

Leadership Memphis Class of 2000 (since 2000)

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

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

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

No

ACHIEVEMENTS

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

National Bar Association – Past correspondence secretary for Ben F. Chapter (1993)

Tennessee Association of Criminal Defense Lawyers (Since 1993)

Member of Criminal Justice Advocate Panel (Since 1998)

Former Member of Tennessee General Sessions Judges Conference (9/98 to 9/06)

Member of Memphis Bar Association (since 1998)

Member of Association of Women Attorneys (since 1992)

Member of Tennessee Association of Defense Lawyers (since 1993)

29. 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.

I was nominated for the Criminal Justice Advocate of the Year for two years for presiding over Domestic Violence Court.

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

None that have been published.

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.

I teach Business Law courses at Lemoyne Owen College and Strayer University and have been given CLE credit as well as participated in CLE credit courses for our local bar where I discussed domestic violence and general sessions court procedures.

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.

I was elected as General Sessions Criminal Court Judge for Division XI in 9/98 and held this office until 9/06.

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

The attachments are personal works where I diligently represented my client with a positive outcome. They were prepared by me after extensive research.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position because I have the experience, the knowledge and skills to perform the job of a criminal court judge. I was a judge for eight years and have over twenty years of legal experience and love appellate work.

36. 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 on the bench I vowed to educate the public about the legal system and tried to let the public know that there is equal justice under the law. Some of my activities were allowing students from elementary to college come into my courtroom. Further I participated in any community forum where I could discuss equal justice or demonstrate that in my courtroom there is equal justice under the law. Further I encouraged colleagues to get involve with community activities to help insure the public that our court exercise and follow the concept of equal justice under the law.

Pro bono

I handled divorces cases on a pro bono basis for Memphis Area Legal Services. I also handled pro bono for senior citizens for Delta Commission on Aging.

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

The judgeship I am seeking is Court of Criminal Appeal seat that was vacated by the death of Judge J. C. McLin who was a good friend of mine.

I was taught by Judge McLin and highly respected him. This court has appellate jurisdiction and handle only criminal appeals. I have always done appellate work for the cases that I handled as private attorney in the public defender's office and I would love to use my knowledge and skill to assist the other Criminal Court of Appeal judges with the cases they handle.

As a former General Sessions Criminal Court Judge I would bring my work ethic, experience and proven record along with my team building skills.

13

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 will continue to be an advocate for domestic violence and participate in any community involvement that will educate the public about the court system and be a judge that is accountable to the people.

39. 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)***

First of all, I am a native Memphian and have lived in Memphis, Shelby County, TN all my life. I was educated in Memphis. Further I have dedicated my life to public service and have the record of proven judicial experience in the criminal justice arena. Therefore, I know I have the eight years of judicial experience, the personal community involvement, and the talents to fill this judgeship.

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

Yes I will always uphold the law because it is the law. As an attorney and former judge we take an oath to uphold the law. There a lots of laws that I disagree with but I am bound to abide by them. When I was a judge and I felt the law was a bit unfair to litigant I still had to apply the law and sentence the defendant accordingly even when it appears to be unfair. I was presiding over a case where a parent was charged with assault because he whipped his child with a belt when he

was extremely anger causing bodily injury. I found the defendant guilty at bench trial although the defendant felt I was punishing him for disciplining his child. Also as an attorney when defendant are not properly searched when they are brought to jail and have contraband on them and then are charged with a felony. This seems unfair because the officer did not ask or did not properly search before taking them into custody but this is 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 Commission or someone on its behalf may contact these persons regarding your application.

A. Judge Tim Dwyer, 201 Poplar Avenue, Ll-56, Memphis, TN 38103 (901) 545-5190
B. Judge Larry Potter, 201 Poplar Avenue, LL-56, Memphis, TN 38103 (901) 545-5190
C. Judge Otis Higgs, 201 Poplar Avenue, Criminal Court II. 5th Floor, Memphis, TN 38103 (901) 545-5858
D. Tamara Hardy, 1154 Havenwood Drive, Cordova, TN 38018, (901) 275-4899
E. Linda Carter, 1246 Old Hickory Road, Memphis, TN 38116, (901) 674-8221

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: October 3, 2011

_____
Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511

Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

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.

Mischelle Alexander-Best
Type or Printed Name

_____
Signature

October 3, 2011
Date

14738
BPR #

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

vs. **NO. 93-5732**

DON CURTIS SMITH,
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BRIEF OF THE DEFENDANT-APPELLANT, DON CURTIS SMITH

MISCHELLE ALEXANDER-BEST
22 North Second, Suite 400
Memphis, TN 38103
(901) 527-4744

COURT APPOINTED ATTORNEY FOR
THE APPELLANT DON CURTIS SMITH

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant, Don Curtis Smith, pursuant to Sixth Circuit Rule 9, requests oral argument to be heard in this case if this court believes that oral argument would be of substantial assistance in the determination of the issues herein.

STATEMENT OF JURISDICTION

The district court has jurisdiction in the case as the defendant, Don Curtis Smith, was indicted by a federal grand jury on February 13, 1992 for alleged violation of Title 21 U.S.C. 841 (a) (1), possession of a controlled substance with intent to distribute, and Title 18 U.S.C. 924 (c), carrying and using a firearm during and in relation to a drug trafficking offense.

The Sixth Circuit of Appeals has jurisdiction to hear the present appeal pursuant to 28 U.S.C. 1291. The defendant filed a notice of Appeal on May 12, 1993, from the Judgment in a Criminal Case filed May 17, 1993. This judgment disposed of all claims with respect to the parties herein and is a final decision of the district court.

ISSUES PRESENTED FOR REVIEW

1. Whether the district Court committed error by failing to grant the defendant's motion to suppress evidence.
2. Whether the district Court err in denying the motion of the Defendant for judgment of acquittal on the ground that the proof introduced at the trial was not constitutionally sufficient to establish the guilt of the defendant beyond a reasonable doubt.
3. Whether the trial court err in charging the jury on guilty knowledge in the absence of proof of the Defendant's knowledge of drugs or weapons in the car which he did not own.
4. Whether the court committed err when it allowed the obstruction of justice enhancement points to enhance the defendant sentence when there was no proof that perjury had been committed, no specify material facts outlined by the court and no independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same under the perjury definition.

STATEMENT OF THE CASE

Nature of the Case:

Appellant Don Curtis Smith appeals his conviction from the United States District Court for the Western District of Tennessee before the Honorable Julia Smith Gibbons. The Judgment Including Sentence under the Sentencing Reform Act was rendered on May 7, 1993, (R. 77) and May 17, 1993 (R. 79) and a timely Notice of Appeal was filed May 12, 1993 (R. 80).

Proceedings and Dispostion in the Trial Court:

On February 13, 1992, the Federal Grand Jury for the Western District of Tennessee returned an indictment (R. 1), charging in Count 1, that the defendant, Don Curtis Smith on or about January 13, 1992 in the Western District of Tennessee, unlawfully, knowingly and intentionally possess with the intent to distribute approximately 48 grams of cocaine base, controlled substance as classified by Title 21, United State Code, Section 812 as a schedule II controlled substance, in violation of title 21, United States Code, Section 841 (a) (1). In Count 2 of the indictment, defendant, Don Curtis Smith, on or about January 13, 1992, did during and in relation to a drug trafficking crime; that is, the possession with intent to distribute a controlled substance did knowingly carry and use a firearm in violation of Title 18, United States Code, Section 924 (c).

The defendant pled not guilty and a jury trial commenced on November 2, 1992 (R. 60). After hearing the proof, the closing arguments of counsel and the charge of the District Court, the jury began its deliberations on November

3, 1992 (R. 61). The jury returned a verdict of guilty on November 4, 1992 (R. 64).

The defendant was subsequently sentenced to 195 months imprisonment (Count One 135 months, Count Two 65 months to run consecutive to 135 months in Count One for a total of 195 months) to be followed by 4 years of supervised release (R. 77).

FACTS RELEVANT TO THE CASE

On February 13, 1992, Defendant, Don Curtis Smith, was indicted for unlawful possession with intent to distribute cocaine base and for possession of a firearm in relation to a drug trafficking crime. The underlying offense took place on January 13, 1992.

The defendant, Don Curtis Smith, through his attorney filed a motion to suppress and supporting memorandum on July 9, 1992 (R. 38) claiming that he was unlawfully stopped without probable cause and that the stop was a pretext for the police to conduct an illegal search of the vehicle he was driving. Defendant further contended that there was no consent for the search but any consent given by him was involuntary. Therefore, the search was without probable cause and violation of his rights under the Fourth Amendment. The government response to the defendant's motion (R. 43) alleged that the search was pursuant to a valid consent and searched after the defendant was placed under arrest for driving on a suspended driver's license.

Magistrate J. Daniel Breen held an evidentiary hearing August 14, 1992, on the motion to suppress. No opening statement were made by either side. Counsel for the Defendant submitted that his supporting memorandum outlined his client's position in that this was a warrantless stop which is presumed to be unreasonable. During the hearing, Counsel for Defendant cross-examination of the arresting officer which revealed that this officer exceeded his proper constitutional bounds by conducting the search without

"suspicious articulate factors: once he discovered the Defendant was not under the influence of alcohol or drugs (TR, Motion to Suppress, 8/14/92, pages 50-51, 53-57). The government repeated its assertion that the search resulted from a consent lawfully executed by the defendant (TR, Motion to Suppress, 8/14/92, page 26).

On January 13, 1992, Officer Matthew Jordan, was at a stationary post at Interstate 240 and Watkins looking for traffic violations. At approximately 1:20 a.m., Jordan decided to change his location when he observed the defendant pass by him. The officer pulled onto the highway and trailed Defendant Smith for a distance when he noticed the defendant vehicle to actually veer over onto the white line once or twice (TR, Motion to Supress, 8/14/92, page 11). Shortly thereafter, Defendant Smith put on his right turn signal although no exit was within a reasonable distance. Based on those observations, Officer Jordan thought the driver might be intoxicated (TR, Motion to suppress, 8/14/92, page 12). From his police training, the officer stated that an intoxicated driver oftentimes operates his vehicle in a over cautious manner such as straddling lanes, anticipating distance, poor judgment of distance (TR, Motion to Suppress, 8/14/92, page 13). Jordan pulled up beside Smith but was unable to determine his condition.

Officer Jordan and the defendant then exited onto Hollywood Boulevard which had two lanes leading up to a traffic light. As the officer pulled up to the light, he noticed that Smith stopped his vehicle approximately five car lengths from the intersection although no traffic was in front of him. At that point,

Jordan believed that further investigation of Smith was warranted. Therefore, he turned on his blue light and pulled the defendant over after his past by the police car that was at the traffic light (TR, Motion to Suppress, 8/14/92 pages 16-17). Jordan obtained defendant's driver's license and inquired as to where he had been and where he was going. The officer asked Smith to sit in the police vehicle and before doing so patted Smith down to determine if he had any concealed weapons (TR, Motion to Suppress, 8/14/92, page 19). As a result of the search, the officer found $2,000.00 which was removed and placed on the dashboard of the officer's vehicle. Jordan noted defendant's license was from Arkansas but he was driving with Tennessee tags. He recalled seeing Smith on previous occasions in Memphis and thought he lived here. Thus, the officer was surprised to see an out-of-state driver's license (TR, Motion to Suppress, 8/14/92, page 21).

Because of the some uncertainty as to he defendant's driving status, Jordan called over his radio and determined that the defendant had a valid Arkansas license but his driving privileges in Tennessee had been revoked. Before learning that information, Jordan inquired of Smith if he was carrying anything illegal to which the Defendant replied "No". Jordan then asked Smith if he would consent to a search and Smith replied that he had no objection (TR, Motion to Suppress, 8/14/92, page 22). The officer went to the defendant's vehicle to search the seats and in the console. He found a compartment housing a coin change/cup which would rotate when a wheel was turned. With the use of a flashlight, the officer looked into the space

underneath the cup holder and note what appeared to be the barrel of a gun along with a white substance. The officer immediately thought this might be cocaine (TR, Motion to Suppress, 8/14/92, page 23). On cross-examination by defense counsel, Officer Jordan was asked (TR, Motion to Supress, 8/14/92 page 98):

> Q. Okay. Now after the citizen is in your car, and we have agreed – or you have said he's not under arrest, but he's not free to go, is that right, and you have got his license?
>
> A. Upon him initially being put in the car, he was not free to go and he was not under arrest.
>
> Q. And he had a valid Arkansas license?
>
> A. He had a valid Arkansas license.

Jordan returned to his vehicle and asked the defendant if he would sign a consent form since Jordan concluded that if this was an illegal substance, a written authorization would substantiate that he had consent to search. Before the form was signed, Jordan learned over his radio that Smith was driving on a revoked Tennessee driver's license. At that point, Jordan decided to place Mr. Smith under arrest and called another officer to the scene as a backup (TR, Motion to Suppress, 8/14/92 page 25). On cross-examination of Officer Jordan by defense counsel, he was asked the following question:

> Q. And so you're arresting him because you think his Tennessee license may be suspended or revoked?
>
> A. I arrested him on – well, at that point, the reason he was – had the charge of suspended or revoked or cancelled license was because the dispatcher advised me of that, but I

> had also already saw what appeared to be a pistol and the dope (TR, Motion to Suppress, 8/14/92, page 99).

Officer Word arrived and witnessed the consent to search form executed by Smith. Jordan then asked Word to search the vehicle. Apparently Jordan wanted to see if his partner could find the drugs and guns. Officer Word was unable to do so. Jordan then showed Officer Word what he had previously found (TR, Motion to Suppress, 8/14/92, page 28). When the console was removed, the officers retrieved several bags of crack cocaine and two firearms. After Officers Word and Jordan had both seen the drugs and firearms, they inadvertently closed and locked the doors of the defendant's vehicle. In order to open the door to the car, a call was placed to defendant's sister who came to the scene and brought an extra set of keys.

Defendant Smith testified that he saw officer Jordan parked at Interstate 240 and Watkins. The defendant stated that he traveled on the interstate until he came within "half a block" from Hollywood and turned on his right turn signal. It was the Defendant's testimony that the distance between where he gave the signal and the Hollywood exit was about 200 yards (TR, Motion to Suppress, 8/14/92, page 119). Smith denied that he gave oral consent to search and contended that he was coerced to sign the consent form. Further the Defendant stated that he felt he had a expectation of privacy within the vehicle (TR, Motion to Suppress, 8/14/92, page 113) and he was detained for a period of three hours before the written consent form was signed by him (TR, Motion to Suppress, 8/14/92, page 117). Defendant related that Officer Jordan threatened him by beating his fist on the steering wheel and telling him about what other officers

might do if he did not sign the consent form (TR, Motion to Suppress, 8/14/92, page 117). Defendant related that Officer Jordan threatened him by beating his fist on the steering wheel and telling him about what other officers might do if he did not sign the consent form (TR, Motion to Suppress, 8/14/92, page 122). The defendant's testimony was that Officer Jordan would never tell the other officers that stopped to check on him what was occurring but simply instructed them to leave (TR, Motion to Suppress, 8/14/92, page 123).

Defendant's sister, Artricia Smith, stated that she was called around 2:00 a.m. bring another set of keys to the scene. She followed the instructions and gave them to a police officer. Ms. Smith admitted driving the car on occasions but denied she knew anything about the guns or cocaine found in the vehicle (TR, Motion to Suppress, 8/14/93 page 128).

After the proof was conclusion of the suppression hearing, the court gave not finding. However, on September 15, 1992, the court gave report and recommendation. The defendant's motion to suppress was denied.

There was a two day trial that resulted in a guilty verdict. During the trial the same evidence was presented as in the suppression hearing except there were more witnesses and more detail (TR, Trial, 11/2 to 11/3/92, Volumes 1 & 2, pages 71-265). However, Officer Jordan's testimony changed and he admitted that he had made some misstatements in his approximation of distance (TR, Trial, 11/2 to 11/3/92, Vol. 1, page 121). The defendant was questioned during the trial and he stated that he had no knowledge of any drugs or guns being in the vehicle he was driving nor (TR, Trial, 11/3/92, Volume 2, page 217) was there

any proof from the government stating that he had knowledge of any drugs of weapons being in the vehicle (TR, Trial, 11/2/93, Volume 1, pages 74-144). Therefore, it can be seen that the government's proof concerning possession and knowledge of the cocaine and the intent to distribute was at best weak and circumstantial. No direct proof was presented to prove the aforestated elements of the crime, leaving the jury simply to speculate on the guilt of the defendant.

Defense counsel asked the court to charge the jury with the mere presence charge however the court denied his request (TR, Trial, 11/3/92, page 270-271).

On the date of sentencing counsel for the defendant asked that the two enhancement points for obstruction of justice not be added which increases the amount of time the Defendant would receive. However, the court did allow the enhancement points to be added in absence of stating any material facts that were testified to falsely by the defendant.

ARGUMENT

Issue No. 1:

WHETER THE DISTRICT COURT COMMITTED ERROR BY FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE:

The district court ruled that the search of the defendant's vehicle was pursuant to a valid consent executed after a investigatory stop for a possible D.U.I violation which later resulted in the defendant being arrested for a revoked driver's license. Stopping an automobile and detaining an occupant is a "seizure: under the Fourth Amendment. Delaware vs. Pouse, 440 U.S. 648, 99 S.Ct. 1391 (1979), The minimal degree of intrusion in the traffic stop make the stop analogous to an investigative detention under Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

The Scope of a Terry stop is limited, and if police officers "exceed the bounds permitted by reasonable suspicion, the seizure becomes an arrest and must be supported by probable cause. United States vs. Richardson, 949 F.2d 851, 856 (6th Cir. 1991). Florida vs. Royer, 460 U.S. 491, 103. S.Ct. 1319, 1325 (1983), points out that the scope of an investigative detention under Terry "must be carefully tailored to its underlying justification." Royer discusses both the permissible length and degree of intrusion:

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last not longer than is necessary to

Motion to Suppress, 8/14/92, page 109). Clearly, this stop, subsequent search of the vehicle and tainted consent would exceed the boundaries of a permissive investigative detention. Florida vs. Royer, supra, 103 S.Ct. at 1326, 1329, and United States vs. Richardson, supra, 949 F.2d at 858.

Because a stop cannot be justified by subsequent events, the founded suspicion must be based solely upon facts and circumstances known to the officer a the time of the stop. United States vs. Patterson, 648 F.2d 625, 634 n. 25 (9th Cir. 1981); United States vs. Morrison, 546 F.2d 319 (9th Circuit 1976). As the court pointed out in Morrison, when a law enforcement officer, by use of a siren or red light, signals a motorist to stop there has been a seizure which must be justified under the Fourth Amendment. In the present appeal, the defendant was pulled after by Officer Jordan who was merely stopping him because he thought he might be intoxicated. However, once he saw the Defendant, it was clear that he was not under the influence of intoxicants and his license was subsequently checked which were valid Arkansas license. The Defendant was questioned about things unrelated to the stop while he was detained in the police car (TR, Motion to Suppress, 8/14/92, pages 19/25),

A similar fact question came before the Tenth Circuit in United States vs. Walker, 933 F. 2d 812, (10th Cir. 1991). The defendant was stopped for a speeding violation, and he handed justification, and (2) the defendant's detention was in fact an arrest and therefore beyond the permissible limits of Terry.

The placement of the defendant in the squad car for questioning was not the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a period of time." Florida vs. Royer, supra, 103 S. Ct. at 1325-26. Officer Jordan never expressed a particularized concern that the defendant posed a threat and he had no reasonable, articulate suspicion of criminal activity when the vehicle was stopped. Officer Jordan testified that he had no suspicion that the defendant was involved in narcotics or drugs (TR, Motion to Suppress, 8/14/92, page 65). The defendant therefore submits that he was detained without reasonable suspicion. See United States vs. Walker, 933 F.2d 812, 815-16 (10th Cir. 1991). He also claims that his detention exceeded the permissible limitations of valid Terry stop and was in fact a custodial arrest before he was arrested for the alleged traffic violation of revoked driver's license. Subsequently, the written consent was involuntary after Defendant had been retained four three hours. Several factors must be considered by the court when determining whether the consent was voluntary. One of the is dispositive. They include: (1) whether the defendant was in custody, United States vs. Alfonso, 759 F.2D 728 (9th Cir. 1985); (2) whether the arresting officers have their guns drawn, United States vs. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986); (3) whether Miranda warnings have been given, Al-Azzawy; (4) whether the defendant was told of hose right not to consent, United States vs. Wanless, 882 F.2d 1459 (9th Cir. 1989) (failure to inform car owner of right to refuse consent for inventory search vitiated the consent); Al-Azzawy; and (5)

whether the defendant was told a search warrant could be obtained, United States vs. Salvador, 740 F.2d 752, (9th Cir. 1984), cert. denied, 469 U.S. 1196 (1985). See United States vs. Castillo, 866 F.2d 1071 (1989). In the appeal at hand, the defendant was initially retained for several hours before he was officially charged with any crime. Therefore the defendant was in custody. The second factor listed above does not apply in the car at bar. The government failed to carry its burden of proof by establishing that factors three, four or five were implemented or followed by the arresting officer. Therefore any consent given by the defendant was tainted and invalid.

The defendant submits that the authorities cited herein establishes that he was stopped illegally, his consent was tainted, and his search of the vehicle was no validated. Therefore, the ruling of the court denying the defendant' motion to suppress was not supported and the court should have granted the defendant motion. Defendant prays that this court reverse the judgment of the district court and remand this proceeding with instructions to grant the motion to suppress.

Issue No. 2

WHETHER THE DISTRICT COURT ERR IN DENYING THE MOTION OF THE DEFENDANT FOR ACQUITTAL ON THE GROUND THAT THE PROOF INTRODUCED AT TRIAL WAS NOT CONSTITUTIONALLY SUFFICIENT TO ESTABLISH THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT:

The Due Process Clause of the Fifth Amendment protects an accused against conviction 'except upon proof a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In Re Winship,

397 U.S. 358, 90 S.Ct. 1068, 1073 (1970). The government must satisfy the courts that the evidence adduced at trial could support a rational determination of guilt beyond a reasonable doubt. United States vs. Powell, 469 U.S. 57, 105 S. Ct, 471, 478 (1984). In this context however, the appellate court should review the evidence in the light most favorable to the government. United States vs. Tilton, 714 F.2d 642, 645 (6th Cir. 1983). If the government fails to sustain its burden of proof on any element the Defendant-Appellant must be acquitted. Winship, 397 at 363.

The Defendant Don Curtis Smith alleges that the verdicts of guilty to counts 1 and 2 is not supported by facts and the proof adduced by the government at the trial and therefore his motion for judgment of acquittal (TR, Trial, 11/2/92, page 145) should have been granted. The government in the case at bar failed to prove every element of the offenses with which the Defendant was charged.

First the government failed to prove knowingly and intentional possession of the cocaine and the weapons as no single government witness testified that the Defendant was knowingly in possession of the cocaine and the weapons as no single government witness testified that the Defendant was knowingly in possession of the cocaine and weapons seizure from inside the car under the console (TR, Trial 11/2/92, pages 71-145). On the contrary the Defendant himself testified that he had no knowledge of the existence of cocaine or weapons in the car. Further defendant testified that he did not

own the automobile and that it was owned by his brother (TR, Trial, 11/3/92, pages 216-217).

Secondly, the government failed to prove the defendant's intent to distribute the cocaine in question. No government witness testified that the defendant had the intent to sell cocaine of that he actually sold the 48 grams of cocaine base in question. No drug paraphernalia was recovered from the defendant.

As stated above the government in particular failed to prove knowledge on the part of the Defendant about the cocaine or weapons hidden under the console of the automobile he was driving that was utilized by several individuals. Defendant asserts that knowledge is an essential element constituting the crimes charged. See Mason vs. Balkcom, 669 F.2d 222, 224-6 (5th Cir. 1982). Government's failure to prove malice and intent required reversal of convictions for murder), cert. denied, 460 U.S. 1016 (1982); United States vs, McIntyre, 836 F.2d 467, 471-72 (10th Cir. 1987) (government's failure to establish beyond reasonable doubt common purpose among defendant and conspirators required reversal of conviction for conspiracy to distribute cocaine); also see Thomas vs. Kemo, 800 F.2d 1024, 1026 (11th Cir. 1986) (State's failure to prove beyond reasonable doubt defendant had requisite intent to kill required reversal of conviction for capital murder), cert. denied, 481 U.S. 1041 (1985).

The defendant Smith asserts that there was no testimony presented at the trial indicating that defendant smith either personally put the drugs or the

weapons in the car or that he had any knowledge that these items were in the car he was driving. Defendant was merely stopped for an alleged traffic violations and he was driving the car that was used by a number of his family members (TR, Trial, 11/3/92, pages 197-217). As much as the Defendant was concern, he had no knowledge of the drugs or weapons being in the vehicle nor did he have any reason to believe that the car had any hidden contraband in it.

The proof is clear that the defendant did not own the automobile and that he merely drove it when the need arose. There was no government testimony presented indicating that Don Curtis Smith owned the automobile. He was in possession of he automobile without having any knowledge of the presence of drugs or firearms, that in itself would not suffice to indicate either actual or constructive possession of these items. Constructive possession "must" be established by "ownership, dominion, or control over the contraband itself or the premises… in which the contraband is concealed. United States vs. White, 932 F.2d 588, (6th Cir. 1991). In this case dominion and control the defendant exercised over the automobile was innocent and transient and without any reason to believe that the car contained contraband. The mere presence of the defendant driving this vehicle that belonged to his brother, regardless of its extent or frequency, fails to provide a "nexus between the accused and the prohibited substance. United States vs. Ferg, 504 F.2d 917 (6th Cir. 1991). Similarly the mere possession of the automobile by the defendant without further evidence fails to prove the nexus between

the drugs and the defendant (TR, Trial, 11/2/93, pages 127-129). The government produced absolutely no evidence of defendant' involvement in drug trafficking or his possession of any drug paraphernalia. The cocaine and weapons found were obviously concealed from plain view. Therefore, the government failed to show either the necessary prerequisites of knowledge or dominion and control over the drugs and weapons. See United States vs. White, supra, 932 F.2d at 589-90, and United States vs. Rodriquez, supra, 761 F.2d at 1341 (9th Cir. 1985).

There was no proof presented satisfying all the elements of knowledge, possession and intent to distribute, to prove the guilty beyond a reasonable doubt.

Therefore, the defendant Don Curtis Smith, asserts that even if the whole proof is viewed in light most favorable to the government, the evidence against him is scant and meager that required the jury to only speculate his guilt. Further, Don Smith asserts that a reasonably minded jury must have a reasonable doubt under the circumstances to his involvement and guilt. In United States vs. Jones, 580 F.2d 219, 222 (6th Cir. 1978), quoting Wigmore on Evidence, (3rd Ed. 1940), Section 2570, states that the scope of a juror's general knowledge "is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every day life." Consequently:

> ….while the jury may properly rely upon its own knowledge and experience in evaluating evidence and drawing inferences from that evidence, there must be sufficient record evidence to permit the jury to consult its general knowledge in deciding the existence of the fact.

1 Weinstein's Evidence (1991), Section 201 [03], page 210-25, fn.2, citing United States vs. Mentz, 840 F.2d 315, 3121-23 (6th Cir. 1988), observes that courts should be careful when taking judicial notice of facts constituting elements of the government's burden of proof. Weinstein's observation is equally applicable here with respect to circumstantial inferences and conclusions reached by the jury.

Proof beyond a reasonable demands that there be a "substantial basis of fact from which the fact in issue can be reasonably inferred, "United States vs. Green, 548 F.2d 1261, 1266 (6th Cir. 1977), quoting United States vs. Martin, 375 F.2d 956, 957 (6th Cir. 1967). Circumstantial evidence "from which one can infer either facts tending to prove the defendant's guilt or facts tending to prove his innocence" is insufficient to support a conviction. United States vs. Leon, 534 F.2d 667 (6th Cir. 1976). It is important to a free society that an individual "have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

Proof beyond a reasonable doubt demands that there be a "substantial basis of fact from which the facts in issue can be reasonably inferred, United States vs Green, 548 F.2d 1261, 1266 (6th Cir. 1977), quoting United States vs. Martin 375 F.2d 956, 957 (6th Cir. 1967), and convincing presumptions of possession "ought to be clear." United States vs. Bettis, 408 F.2d 563, 568 (9th Cir. 1968). Although the state of the law of proof of constructive

possession is both “unsatisfactory and confused,” United States vs. Birmley, 103, 107, n. 1 (6th Cir.

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

STATE OF TENNESSEE,
Plaintiff,

VS **NO: 069228061**

THEODIRE PITTMAN
Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant by and through undersigned counsel, and submits this Memorandum of Law in Support of Defendant's Motion to Suppress Evidence seized on September 24, 2006.

STATEMENT OF AT HE CASE AND RELEVANT FACTS

On September 24, 2006, the Defendant, Theodire Pittman was driving his automobile on Reid Hooker in Shelby County, Tennessee along with three passengers were pulled over by Shelby County Deputies, allegedly because the tail light was broken and there was an expired car tag. The officers then searched the passenger compartment of the automobile, and found a bag containing three rocks of cocaine. Mr. Pittman was charged with Unlawful Possession of Controlled Substance to wit: Cocaine and Violation of Vehicle Registration.

ARGUMENT

I. THE SEARCH CANNOT BE JUSTIFIED AS A LEGITIMATE PROTECTIVE SWEEP FOR OFFICER SAFETY BECAUSE THERE WERE NO SPECIFIC AND ARTICULABLE FACTS WHICH WOULD WARRANT A REASONABLE OFFICER IN BELEIVING THAT DEFENDANT WAS ARMED AND DANGEROUS.

In *Michigan v. Long*, 463 U.S. 1031 (1983), the United States Supreme Court addressed the issue of whether the Fourth Amendment prohibits a police officer from performing a protective sweep of the passenger compartment of a suspect's automobile. In that case, the suspect was stopped for excessive speeding and suspicion of Driving Under the Influence. Id. At 1035. Police

observed a hunting knife in the passenger compartment of suspect's automobile, and subsequently searched the passenger compartment of the automobile for other weapons. Id. 1036. During this search, the officer found a packet of marijuana. Id.

In *Long*, the Court held that a protective sweep of suspect's car must be analyzed under the same standards applicable to protective frisks of a person under *Terry v. Ohio*, 392 U.S. 1 (1968). Id. at 1046. In *Long*, the Court stated:

> **"These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon maybe placed or hidden, is permissible if the police officer possesses a reasonable belief based upon 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." Id. At 1049, quoting *Terry*, 392 U.S. at 21.**

The Court noted that as in *Terry*, the "issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. At 1050, quoting *Terry*, 392 U.S. at 27.

In the present case, there were no specific and articulable facts which would give rise to a reasonable belief that Mr. Pittman was armed and dangerous. The affidavit of complaint, for example, is completely devoid or any facts which would suggest that the officer had any reason to believe the Defendant was armed and dangerous. The search here was a routine search, based upon the premise that all traffic stops must be treated as hazardous of officer safety. Although the safety hazards police officers face are certainly serious, the Fourth Amendment does not allow a protective sweep to be based upon a presumption that a suspect may be armed and dangerous.

II. THE SEARCH IS NOT A PROPER SEARCH INCIDENT TO ARREST BECAUSE A ROUTINE TRAFFIC CITATION MAY NOT BE THE BASIS OF A SEARCH INCIDENT TO ARREST.

In *Knowles v. Iowa*, No. 97-7597 (December 8, 1998), the United States Supreme Court addressed the issue of whether a routine traffic stop could be the basis of search incident to arrest, and thus an exception to the warrant requirement of the Fourth Amendment. In Knowles, the defendant was stopped for speeding by police officers, who then searched his automobile and found drug paraphernalia. Id. at 1. The Court found that the threat to officer safety is lower in the context of a routine traffic stop as compared to a custodial arrest. Id. at 4. The Court stated. "The threat to officer safety from issuing a traffic

citation, however, is a good deal less than in the case of a custodial arrest." Id. Secondly, the second justification for search incident to arrest (collection of evidence), is completely missing in a routine traffic stop. The Court noted, "Once *Knowles* was stopped for speeding and issued a citation, all the evidence needed to prosecute that offense had been obtained." Id. at 5. Thus, the Court held that a routine traffic citation may not be the basis of a search incident to arrest.

In *State v. Chearis*, 24 TAM 21-24 (March 2, 1999), the Tennessee Court of Criminal Appeals ruled that where a suspect is charged with Possession of Alcohol in a Public Place, that charge may not be the basis of a search incident to arrest. Again, the court noted that generally a citation would be issued, eliminating the need for a search incident to arrest.

In the present case, Defendant Pittman was stopped for Violation of Vehicle Registration Law. This clearly falls into the category of the routine traffic stop described in *Knowles and Chearis*, where the usual remedy is a misdemeanor citation. The State cannot reasonably argue that this was a custodial arrest since the officer eventually released Defendant with a misdemeanor citation even after he charged the defendant with possession of cocaine. This is precisely the kind of non-custodial citation situation the Supreme Court contemplated in Knowles. Thus, the search at issue was not a proper search incident to arrest.

CONCLUSION

Defendant's automobile was searched by Shelby County Sheriff Deputies without a warrant. Thus the State has the burden to prove the existence of exception to the warrant requirement of the Fourth Amendment. Based upon the discussion above, the search at issue in this case clearly violates Defendant's rights under the Fourth Amendment. Therefore, the cocaine seized is inadmissible evidence due to the unconstitutional search.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have hand delivered a copy of the foregoing motion and memorandum to Assistant District Attorney Amy Weirich this 2nd of October 2006.

_____

Mischelle Alexander-Best
Attorney at Law