Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

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Name: Stacy Lee Street

Office Address: (including county) 213 North Main Street
Elizabethton, Tennessee 37643
Carter County

Office Phone: 423-543-6900 Facsimile: 423-543-6030

Email Address: stacy@streetlawtn.com

Home Address: (including county) [redacted]
Carter County

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

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

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a solo practitioner practicing primarily criminal law in the four counties of the First Judicial District of Tennessee as well as Sullivan County, Tennessee and the United States District Court for Eastern District of Tennessee.

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

I was licensed to practice law in Tennessee in 1992. My Tennessee Board of Professional Responsibility number is 15680.

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.

State of Tennessee, 1992, BPR #15680

United States District Court, Eastern District of Tennessee, 1993

United States District Court, Western District of Virginia, Pro Hac Vice on per case basis

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, I have never been denied admission to, suspended or placed on inactive status by the Bar of any State.

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).

- January 2010 – Present, Solo Practitioner, Stacy L. Street, Attorney at Law, Elizabethton, Carter County, Tennessee
- January 1996 – December 2009, Partner, Hampton & Street in Elizabethton, Carter County, Tennessee

- August 1992 – December 1995, Associate, Hampton & Hampton in Elizabethton, Carter County, Tennessee
- Summer 1990 and 1991, Clerk, Hampton & Hampton in Elizabethton, Carter County, Tennessee
- 1989 – Present, Licensed Affiliate Real Estate Broker (in retirement status). Since 1989, I have invested in a number of real estate properties including various rental properties both residential and commercial. These properties are owned by myself individually or with other investors and are bought and sold as the market allows.
- 1999 – Present, My immediate family owns and lives on a fifty (50) acre farm which produces hay and cattle.
- 1985 – 1998, Christmas Tree farmer raising approximately fifteen to twenty thousand Christmas trees on a property owned by my family in Roan Mountain, Tennessee. As the last of the trees were harvested, the farm was converted to other uses.

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

Not applicable.

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

I primarily practice criminal defense in the four counties of the First Judicial District of Tennessee as well as in the United States District Court for the Eastern District of Tennessee. My practice includes all types of criminal defense in the City Courts, General Sessions Courts and Criminal Courts for these counties. The types of cases range from the most serious capital murder cases to speeding tickets in the local municipalities. Criminal defense constitutes ninety percent (90%) of my practice. The remaining ten percent (10%) of my practice includes plaintiff personal injury work and basic estate and real estate work such as the preparation of wills and deeds.

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.

I have practiced law for over 20 years in the courts of East Tennessee. During the first 10 years of my practice, I was involved in a true general practice of law representing clients in criminal cases, divorce and custody cases, personal injury matters, workers compensation and estate matters in the Criminal Courts, Circuit Courts, Chancery Courts and General Sessions Courts in Carter, Johnson, Unicoi, Washington, Sullivan and Greene Counties in East Tennessee. During this period of time, I tried approximately fifty to one hundred civil cases, the majority being contested divorce and custody cases. These trials would have been primarily non-jury/bench trials.

While learning as a general practitioner, I was privileged to have a number of mentors from the bar who encouraged me to practice criminal law early in my career. I was fortunate to begin to build a significant criminal practice in the General Sessions Courts and Criminal Courts for all counties in upper East Tennessee, but in particular in Carter, Johnson, Unicoi and Washington Counties. In 1993, barely six months into my practice, I was asked to sit as co-counsel in a first degree murder capital case in which the state was seeking the death penalty. The requirements that counsel be certified to represent defendants charged in capital cases were not in place at that time. From this first case, I gained invaluable experience which I use to this day. I have now been lead counsel or co-counsel in 12 death penalty cases. These cases have all originated in Carter, Johnson, Washington, Sullivan and Greene County, Tennessee. The results in these cases have varied from acquittals to one conviction resulting in the death penalty occurring in Sullivan County, Tennessee. At present, that case is on direct appeal and is scheduled for oral arguments before the Tennessee Supreme Court on January 3, 2013.

When the requirements were instituted to be certified as lead or co-counsel in death penalty cases, I met the requirements and remain certified to act as lead counsel or co-counsel in capital cases.

I have also, in addition to the above described capital murder cases, been either counsel or co-counsel in approximately 30 homicide cases throughout the First, Second and Third Judicial Districts of Tennessee. These cases range from first degree murder (non death penalty cases) to vehicular homicides and criminally neglect homicides. I have tried, as lead counsel, co-counsel, or sole counsel at least two homicide jury trials in each of the counties in the First Judicial District. Further, I have tried numerous homicide jury trials in Sullivan County, Tennessee, the majority being first or second degree murder charges. A number of these trials have resulted in acquittals or convictions of lesser included offenses.

I think my extensive experience with homicide cases most accurately reflects my personal work

ethic as a criminal lawyer. A homicide case in general and a capital case in particular is the most intense experience, both in preparation and in the actual litigation, that I have encountered in the law.

During the past 10 years, since approximately 2002, my practice has been almost exclusively criminal defense. My best estimate is that I have tried between 75 and 100 jury trials, approximately four to five per year. I stopped counting the number of cases I tried. For me it wasn't about my numbers or personal statistics but it was about my client, the case and defending my client to the absolute best of my abilities.

The types of cases I have tried range from the least serious misdemeanor to the most serious felony. Regardless of the nature of the case or the "likeability" of the defendant, I have tried to treat all defendants and frankly, all persons coming in contact with our criminal justice system, with respect and dignity. I try very hard to separate a person's conduct from the actual person. This allows me to represent individuals charged with heinous offenses with the same degree of deliberation and skill I use to represent individuals charged with less serious offenses.

The same analysis holds true for all participants in a criminal trial. In a criminal trial where a person's freedom is at stake passions generally run high on both sides be it the prosecution or defense. Through my experience I have learned the value of an even temperament. I have found that even when a person doesn't like the content of what I am saying whether it is my own client, a hostile witness, a police officer for the state, opposing counsel or even the judge, if the information is delivered in a calm deliberate manner all parties handle the situation better.

In short, I spend each and every day of my work week litigating in one or more of the General Sessions Courts or Criminal Courts for Carter, Johnson, Unicoi and Washington counties, the counties that are the First Judicial District. Unlike an Assistant District Attorney who is typically assigned to one court for an extended period of time, I am in constant contact with these courts and court personnel. I have worked for years in the very Court to which I am seeking an appointment. I have handled every type of criminal case. I have tried to conclusion by a jury the most complicated and intricate cases our justice system has to offer. I have done this for several reasons but the most telling is that I do it because I truly enjoy it. I have the highest respect for our system of justice and I am proud to be a part of it. In the practice of law, criminal law and its principles of equality, fairness and justice for all are what matter to me.

There are a number of skills I have refined over the years as a criminal defense attorney such as research, writing, review and critical analysis of legal issues, how to build a proper record at trial and trial preparation. These skills would serve me well in a transition from advocate to judge.

I also have a significant practice before the Tennessee Department of Safety regarding seizures

of vehicles and other property pursuant to drug arrests and DUI arrests. I have conducted trials before the Commissioner for the Department of Safety in Fall Branch, Tennessee and in Knoxville, Tennessee.

I have tried a number of jury trials in the United States District Court for the Eastern District of Tennessee at Greeneville, often involving multiple defendants charged with violation of the drug laws for the United States Government. I have tried, after being admitted Pro Hac Vice, two cases in the United States District for the Western District of Virginia, one of which resulted in an acquittal of a defendant charged with illegal possession of firearms.

I have argued numerous cases on the appellate level before the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court.

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

Having tried as many death penalty cases and homicide cases as I have over the last 20 years, it is difficult to distinguish one as more significant than the other, however the following do standout for me as being personal learning experiences or personal satisfaction in the result:

(1) In 1996-1998, I was appointed as co-counsel for the lead defendant in the "Lillelid Murder Case" in Greene County, Tennessee. The case involved the killing of a mother, father and their six year old daughter and the severe injuring of their two year old son at a rest area in Greene County, Tennessee. The victims were traveling from Johnson City, Tennessee to Knoxville after having attended a Jehovah Witness Convention. The defendants consisted of four adults and two juveniles from the Pikeville, Kentucky area which had traveled to Greene County, Tennessee and approached the couple, eventually kidnapping them from the rest area along Interstate 81 in Greene County, Tennessee. The defendants eventually made their way to Mexico then back into the United States in Arizona. Upon being arrested, they were transported to Greene County, Tennessee. The state filed notice seeking the death penalty against the four adults and life without parole against the juveniles. There were ten attorneys involved for the defendants and in excess of twelve hundred exhibits in the case. After almost two years of litigation, we were able to convince the state to withdraw their notice to seek the death penalty. After the entry of a guilty plea, there was a weeklong sentencing hearing conducted for the defendants which resulted in life in prison without parole. This case, more than any other that I have been involved with, taught me how to accumulate, review and access large numbers of documents and evidence. It has also taught me how to deal with a variety of issues surrounding a high profile trial. This case was the number one news story for two years in the State of Tennessee in 1997 and 1998. While entering the courthouse, the lawyers were often escorted by armed officers to safely allow us to enter into the courtroom. As such, we all learned the proper demeanor and manner to zealously represent our clients.

(2) Other significant cases for me are those in which the defendant was charged with murder. These are the most intense cases in terms of preparation and consequences for all involved. This experience is important because a judge in this Court must be capable of presiding over intense and difficult cases and large numbers of cases and do so in a calm rational manner. From a period of time between 2006-2010 I tried, either as sole counsel or co-counsel, six homicide cases in Carter, Johnson and Sullivan County, Tennessee. In each of these cases, the defendant was charged with either first degree or second degree murder. I feel that this period of time is significant in that it took a tremendous amount of time and work to properly prepare these cases and to confidently try them in front of a jury in each of the counties. Two of the first degree murder cases, one in Carter County, Tennessee and one in Johnson County, Tennessee, resulted in the acquittal of the defendant.

(3) An example of a significant case in a forum other than a Criminal Court jury trial occurred before the Commissioner for the Department of Safety in a seizure hearing arising out of Sullivan County, Tennessee. After executing a search warrant, federal authorities had seized approximately Four Hundred Sixty-Five Thousand Dollars ($465,000.00) in cash from a building on our client's property allegedly the proceeds of an indoor marijuana grow operation. After a certain period of time, the federal authorities elected not to pursue the case as they felt the evidence was not sufficient to proceed with a federal prosecution.

The matter was then picked up by Sullivan County, Tennessee Sheriff's Department who then instituted seizure proceedings against the money and against our client. Eventually, our client was also charged in the Criminal Court for Sullivan County, Tennessee for the manufacture of marijuana in excess of five hundred pounds. A jury trial resulted in a hung jury on those charges and that charge was later dismissed by the Criminal Court for Sullivan County, Tennessee.

The Sullivan County Sheriff's Department proceeded with the seizure hearing which resulted in a three day trial before the Administrative Law Judge assigned to the case in Knoxville, Tennessee. This case is significant to me in that we were asking the Administrative Law Judge who was an employee of the State of Tennessee, to find for our client and return the Four Hundred Sixty-Five Thousand Dollars ($465,000.00) in cash that had been held by the Sullivan County Sheriff's Department for over four years. Following the trial, the Administrative Law Judge in fact ruled in our favor and ordered the return of the money. After three appeals and numerous hearings, the ruling of the Administrative Law Judge was upheld and the money was returned to our client in full.

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.

During my career, I have sat as the General Sessions Judge and Juvenile Court Judge/referee in Carter County, Tennessee. From approximately 1994 through 1998, the General Sessions Judge appointed me to sit in matters in his absence, hearing a small variety of cases including arraignments and/or detention hearings. From the years 1999 through the present, I have acted as one of two appointed referees for the Carter County Juvenile Court to conduct detention hearings for juveniles housed in the Regional Juvenile Detention Center in the Judge's absence. These appointments are made by the General Sessions Judge/Juvenile Court Judge for Carter County, Tennessee and occur approximately five to eight times per year, depending upon the judge's absence. I have conducted detention hearings for juveniles charged with delinquent acts as minimal as theft or assault and as serious as aggravated rape. The purpose of these detention hearings is to determine whether the juvenile should continue in the Juvenile Detention Facility pending trial or should be released to an appropriate/willing parent or guardian.

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.

During the early part of my career from approximately 1992 through 1998, I have on numerous occasions acted as guardian ad litem for juveniles in divorce proceedings and disabled or elderly wards subject to conservatorship proceedings. These appointments as guardian ad litem were made in proceedings pending before either the Circuit Court for Carter County, Tennessee, the Chancery Court for Carter County, Tennessee or the Juvenile Court for Carter County, Tennessee. My duties in this capacity included interviewing the ward/subject of the proceedings, investigating the facts and circumstances giving rise to the proceeding, and preparing and delivering a detailed report to the courts upon request.

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

Since 2008, I have served as the named executor of two estates, each involving elderly widows leaving no surviving children or grandchildren. The last of these estates, which closed in 2011, involved in excess of Ten Million Dollars ($10,000,000.00), with the majority of the assets being held in private or public stock holdings. The work as the executor in this estate involved the sale of the stock and the liquidation of the other assets with the proceeds being primarily distributed to four major charities or organizations, including the American Heart Association, American Cancer Association, the Shriners Children Hospital and St. Jude's Hospital in Memphis, Tennessee.

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.

None.

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.

East Tennessee State University, Cum Laude, 1985-1989, B.S. Degree in Political Science with minor in Real Estate and Criminal Justice.

Thomas M. Colley School of Law, Lansing, Michigan, 1990 on full tuition scholarship, 4.0 GPA with book award for highest class average in contracts, criminal law I & II and torts I & II.

I transferred after my first year of law school, despite the full tuition scholarship, to the University of Tennessee College of Law due to my desire to return to practice in my hometown of Elizabethton, Tennessee.

University of Tennessee College of Law, 1990-1992, Doctor of Jurisprudence; Cum Laude, graduate with awards for family law, evidence and participation in the College of Law legal clinic.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 45 years old and my date of birth is 3/10/1967.

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

With the exception of one year for attendance at school in Michigan, I have lived continuously in the State of Tennessee for 45 years.

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

With the exception of the time away at school, I have lived continuously in Carter County, Tennessee for 45 years.

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

I am registered to vote in Carter County, Tennessee.

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

Not applicable.

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

No, with the exception of one paid speeding ticket in Johnson County, Tennessee 10 years ago.

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.

I was a party plaintiff in a multi-plaintiff lawsuit filed in the Circuit Court for Carter County, Tennessee in 1999-2000 involving a utility easement over property that was bought by the multi-plaintiffs at auction. This matter was settled shortly after the filing of the suit and the result was the conveyance of an additional portion of land that did not involve the payment of any money. There was no hearing conducted before any judge or mediator/arbitrator.

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.

Elizabethton/Carter County American Little League, Board of Directors

Calvary Baptist Church, Trustee and Sunday School Teacher

Watauga Junior Athletic League Association, Member and Coach

Baptist Campus Ministries, East Tennessee State University, Board of Directors

Happy Valley Youth Club, Contributor

Keenburg Youth Club, Contributor

Harold McCormick Elementary School, Parent-Teacher Association Member and Contributor

Elizabethton Cyclone Touchdown Club, Member and Contributor

American Red Cross, Carter County Office, Board Member through 2003

Mock Trial Competition for Northeast Tennessee, 1992 to Present (serving as team coach, mentor and/or judge each year)

Carter County Republican Party, Board Member serving as Parliamentarian, 1998-2000

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.

American Bar Association, 1992 to present

Tennessee Bar Association, 1992 to present

Carter County Bar Association, 1992 to present (Secretary/Treasurer 1994-1996 and President 1996-1998)

National Association of Criminal Defense Lawyers, 1996 to present

Tennessee Association of Criminal Defense Lawyers, 1992 to present

Tennessee Association of Justice (formerly Tennessee Trial Lawyers Association), 1992 to 2010

Attorney Admission Committee for the Northeast Division of the United States District Court (Appointed in February 2010 by U.S. District Judge J. Ronnie Greer for a three year term)

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.

AV-Preeminent Rating 5.0 from the LexisNexis Martindale-Hubbell Peer Review Ratings

Best Attorney, Carter County, Readers of the Elizabethton Star, 2009-2010 and 2012

Certified as Lead Counsel and Co-Counsel in capital murder cases, 1996 to present

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

Not applicable.

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

Tennessee Association of Criminal Defense Lawyers, Presidents Tour for Tri-Cities, 2009 and 2010 in Kingsport, Tennessee and Johnson City, Tennessee.

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.

Not applicable.

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 first attached example is a brief to the Tennessee Court of Criminal Appeals on a direct appeal of a second degree murder conviction in the Criminal Court for Carter County, Tennessee. I drafted over eighty-five percent (85%) of the brief with co-counsel contributing a portion of the first argument. The result of this brief and oral argument was that the conviction for second degree murder was reversed and the matter was remanded for a new trial.

The second attached example is a Motion for Downward Departure and Sentencing Memorandum filed in the United States District Court for the Eastern District of Tennessee. I was the sole author of this document. The result of this motion, sentencing memorandum and subsequent hearing was that the court granted the motion for a downward departure and variance resulting in a four level reduction of the defendant's potential sentence with the court requiring the defendant to serve only 30 days in jail.

ESSAYS/PERSONAL STATEMENTS

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

I seek this position because it is an outstanding opportunity at an opportune time. I have practiced law for 20 years. As my practice evolved, it became apparent that criminal law provided the most satisfaction, mentality, emotionally, financially and professionally. I want to use my experience to maintain the high standards of this Court. This Court is important to me; I have spent my entire career in this Court and in these counties. My personal and professional experiences in this Court and district uniquely qualify me for the transition from advocate to

Judge. Criminal Court judgeships in this district are rarely available, and if history holds true, this position could be filled for a number of years. This is the only position for which I would ever leave my practice. This position would allow me to serve all the citizens in the region where I have spent my entire career.

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)***

During my 20-year career, I have worked each case to the best of my ability regardless of the client's social or financial status. I have accepted several pro bono cases, large and small, in all of the courts in the First Judicial District. Most recently, in 2011 I assisted a young attorney in the representation of an indigent elderly gentleman charged with first degree murder in Johnson County. After the attorney accepted another position, I assumed responsibility for the case. Following a lengthy preliminary hearing, I requested that the defendant appear before the grand jury which returned a no true bill. Following a second hearing, the case was dismissed.

Any success I have had in the practice of law is attributable to experienced attorneys who mentored me. I have been asked by young attorneys for advice on their cases and have been able to mentor many young attorneys on an almost weekly basis.

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)***

This judgeship is one of two Criminal Court Judges for the First Judicial District of Tennessee encompassing the rural counties of Carter, Johnson, and Unicoi, and the urban/rural county of Washington. This court hears all criminal matters from Class C misdemeanors to capital murder cases. The geographic area is extensive.

The judges serving this area have large dockets and travel to each county numerous times each month. In three counties, the main courtrooms are shared with other judges in the district. Flexibility in scheduling is crucial. The dockets grow rapidly due to increase in prescription medication and methamphetamine abuses. The judge must work these dockets in a fair, efficient manner.

One of the largest prisons in Tennessee is in Johnson County, resulting in many post-conviction petitions raising a variety of issues. The judge must be prepared to address these petitions. My experience will allow me to assume these responsibilities fairly and efficiently.

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)***

My community service involves work in my church, the bar, and my family. I have been a member of Calvary Baptist Church in Elizabethton, Tennessee for approximately 43 years. I have held a number of positions currently serving as Trustee and Sunday School Teacher. This work resulted in my appointment as board member for the Baptist Campus Ministries at E.T.S.U., overseeing the Baptist Student Ministries for that university.

As a member of the bar, I am also a member of the local and state bar associations. I have served as an advisor, coach and judge in the local mock trial competitions since 1992.

Another significant involvement in community service involves work with youth. I have been married for 15 years and am a proud parent of a 13-year-old daughter and an 11-year-old son. I am actively involved in school organizations and in athletic organizations in which they participate. I have served as board member and coach for the Carter County American Little League for four years; therefore I am able to spend my limited free time with my children and their friends on almost a daily basis.

A judge should be respected in the community. They must conduct themselves as if they are wearing the robe at all times. I am committed to protecting and preserving the respect of the position by remaining actively involved in the community.

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)***

My most important life experiences and talents are the ability to work hard and to treat everyone respectfully. I have worked at a variety of jobs, including a restaurant, a cattle farm, a Christmas tree farm and practicing law. My practice involves a large number of serious cases throughout the First Judicial District. In each job, I learned a person must face the task and work diligently as possible because that was expected by the employer. Over time, it is what I came to expect from myself.

I have learned that it is crucial to respect others. I believe that no person has the right to be disrespectful to another human being regardless of station in life. This has served me well and has nurtured many wonderful relationships with a variety of people. I have been fortunate to represent a wide range of clients, from multimillionaires to the poorest people in our area. I have tried to treat each of my clients with respect. I have also learned how important it is to be respectful to everyone involved in the court system. Even in the most heated exchanges in the

courtroom, I attempt to be respectful of both the person and position.

This court involves serious cases, sometimes involving life or death, and deals with a wide range of emotions from the parties involved. A hard-working judge should be respectful everyone. My experience and temperament would allow me to serve the First Judicial District as Criminal Court Judge.

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

I would uphold the law whether or not I agreed or disagreed with the substance of the law. As a criminal defense attorney, I face this issue frequently. Even in a moral issue in which I believe my client is guilty, I am required to review the facts for any errors committed by the prosecution. My cases often involve very sympathic victims, and it would be simpler to not give my best to that case. However, that is not what my role requires. It is necessary to set aside moral considerations and follow the law as it applies to the facts.

Another example is the difficult area of sentencing. I often encounter situations whereby the punishment seems too harsh or too lenient. Once again, the laws and the sentencing structure of our state dictate the results. I have no problem whatsoever in following the law.

I seek this position with no personal agenda or position. This position will require a transition from an advocate to a neutral, objective judge who can review the facts and apply the law. This judgeship is not a position to create law; it is a court that must follow the direction of the Appellate Courts and the Supreme Courts for the State of Tennessee and the United States whether or not the individual judge agrees with the laws. If a change in the law is necessary, this is the job of another court or the appropriate legislative body.

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. Carolyn Wilson Hawkins, Circuit Court Clerk for Johnson County, Tennessee, 222 W. Main Street, Mountain City, Tennessee 37683, Telephone [redacted]

B. James T. Bowman, Attorney at Law, 128 E. Market Street, Suite 1, Johnson City, Tennessee

37604, Telephone [redacted]
C. Norita "Jill" Estep Cooper, M.A., Probation & Parole Manager for Tennessee Department of Correction, 196 Montgomery Street, Johnson City, Tennessee 37601, [redacted]
D. Hon. Lynn W. Brown, First Judicial District, 713 East Elk Avenue, Elizabethton, Tennessee 37643, [redacted]
E. Charles "Keith" Bowers Jr., Attorney at Law, 3863 Highway 19E, Elizabethton, Tennessee, [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Criminal Court of 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: January 8, 2013.

Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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

WAIVER OF CONFIDENTIALITY

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

Stacy Lee Street
Type or Print Name

Signature

January 8, 2013
Date

15680
BPR #

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

Tennessee Real Estate Commission #241820

(Retired)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	]	
	]	
VS.	]	DOCKET NO: 2:10-CR-23-001
	]	
JOSEPH FLOYD STORIE	]	

MOTION FOR DOWNWARD DEPARTURE AND/OR VARIANCE AND SENTENCING MEMORANDUM ON BEHALF OF DEFENDANT JOSEPH FLOYD STORIE

Comes the defendant, Joseph Floyd Storie, by and through counsel, and submits this Motion for Downward Departure and/or Variance and Sentencing Memorandum for the Court's consideration in his sentencing hearing. In support thereof the defendant would submit the following:

I. PROCEDURAL HISTORY

On April 28, 2010, the defendant, Joseph Floyd Storie, entered a plea of guilty to count one (1) and two (2) of an indictment charging him with Possession of a Firearm by a Convicted Felon, in violation of Title 18, U.S.C. § 922(g)(1). The defendant pled to the only two (2) counts of the indictment. The United States will bring to the court's attention the nature, extent and value of the defendant's cooperation so that it may be considered in determining a fair and appropriate sentence under the facts of this case and,

at that time, if the defendant complies with the terms of this agreement, the United States will not oppose a two-level reduction for acceptance of responsibility under the provisions of U.S.G. § 3E1.1(a).

Mr. Storie was initially released on an unsecured appearance bond with electronic monitoring and a curfew of 2:00 p.m. to 6:00 a.m. On April 28, 2010, the electronic monitoring was removed and the curfew was expanded to 8:00 p.m. to 6:00 a.m. Mr. Storie has remained in full compliance of all conditions of this release. The sentencing hearing in this matter is scheduled for October 26, 2010 at 9:00 a.m.

II. GUIDELINES ANALYSIS

The Presentence Investigation Report was completed on September 20, 2010, indicating a base offense level of fourteen (14) pursuant to USSG § 2K2.1(a)(6)(A) of the advisory Sentencing Guidelines. The Presentence Investigation Report then proposed an additional increase of six (6) levels pursuant to USSG § 3B1.3 for possessing more than twenty-five (25), but less than ninety-nine (99) firearms. This proposed increase brings the level to twenty (20).

Because the defendant has admitted to the conduct and because he entered a timely plea of guilty, the offense level is reduced by three (3) levels pursuant to USSG § 3E1.1(a) and (b). Therefore, the Presentence Report proposes that the adjusted offense level for the defendant in this case should be that of level seventeen (17).

The total criminal history points for Mr. Storie is one (1) which establishes a criminal history category of I and results in an advisory Guideline range of imprisonment of twenty-four (24) to thirty (30) months.

At the time of sentencing, counsel for Mr. Storie will request the Court to impose a sentence below this advisory Guideline range in consideration of the facts and circumstances of this case, the age of Mr. Storie, the current health and medical condition of Mr. Storie, the substantial work history of Mr. Storie, the impact that incarceration would have on Mr. Storie's business and the impact that incarceration would have on employees of his business, his charitable works, both pre-indictment and post-indictment, as well as the evidence of his excellent reputation in the community as evidenced by the attached character letters from family and fellow citizens.

III. PERSONAL BACKGROUND

Mr. Storie was born in Carter County, Tennessee, on October 4, 1940. His father, Harold Storie, died in 1991 at the age of 81 from cancer. His mother, Virgie Storie, died in 1979 at the age of 66 from leukemia. The defendant has two (2) brothers that are deceased, Harold and Paul Storie. He has three living siblings: Carolyn Boggs, age 67, and Freda McKinney, age 55, both of whom reside in Roan Mountain, Tennessee and Jerry Storie, age 64, who resides in Unicoi County, Tennessee. The defendant had no problems during his childhood or adolescent years. The defendant married Clara Johnson on October 21, 1961 and the marriage ended in divorce on May 19, 1977. There were three children born of this union: Jeff Storie, age 47, and Joe Storie, age 42, both of

whom reside in Elizabethton, Tennessee and Clara Storie, age 45, who resides in Johnson City, Tennessee. The defendant remains close to all his children and has contact with them on a regular basis. The defendant was also extremely close to his brothers and sisters and, following the death of his two (2) brothers, he and his three remaining siblings remain close and see each other on a weekly basis.

Mr. Storie graduated from Cloudland High School in Roan Mountain, Tennessee in 1958. Following graduation from high school, Mr. Storie became self-employed as a roofer and moved to Charlotte, North Carolina doing roofing jobs for various companies in southern North Carolina. Shortly thereafter, the defendant moved back to Carter County, Tennessee and began Floyd Storie Roofing Contractors with his brother, Paul Storie, and has maintained this very successful roofing company since that time. Mr. Storie's company does both residential and commercial roofing contracting and has successfully completed jobs as large as the West Town Mall in Knoxville, Tennessee and as small as a single family residence. During the course of the years, Mr. Storie has employed as many as one hundred (100) employees and has consistently maintained a workforce of at least twenty (20) workers at all times. In fact, some of the employees of Mr. Storie have been working for him for thirty plus (30+) years. Following the death of his brother and business partner, Paul Storie, Mr. Storie was forced to reduce the size of jobs in which he undertook and following open heart surgery on August 8, 1998, and his subsequent health problems, Mr. Storie has maintained approximately twenty (20) employees and undertakes medium to small commercial and residential work in the Northeast Tennessee, Southwest Virginia, and Western North Carolina areas. Mr. Storie has an outstanding reputation for his work and has a loyal and dedicated work staff and

has the respect and admiration of both his customers as well as the suppliers of roofing materials, many of which have worked with Mr. Storie for more than twenty-five (25) years.

In addition to the roofing contracting business, Mr. Storie also raises cattle and due to his health condition, has been forced to employ workers to assist with the daily care and maintenance of his stock.

In addition to his business ventures, Mr. Storie has a strong and unique bond with his community, especially the Crabtrtee and Roan Mountain areas of Carter County, Tennessee. Mr. Storie grew up in an extremely rural and detached area of Carter County, Tennessee along an old railroad grade in the Crabtree community of Roan Mountain, Tennessee. While he was always provided for and cared for, Mr. Storie grew up extremely poor and it was during this time that his family instilled in him the need to take care of his family, his friends and his neighbors. At a very early age, Mr. Storie learned to assist neighbors in working on their farms and/or doing things necessary to assist his neighbors. This outstanding character trait has continued with Mr. Storie throughout his entire life. At the sentencing hearing in this matter, Mr. Storie will present evidence of his many charitable works conducted throughout the years. These works were done not for notoriety for Mr. Storie nor for reductions for income tax purposes but rather to fulfill his need to assist his fellow man. Mr. Storie was reluctant to provide names of such people that were assisted to protect them from any embarrassment such a revelation may cause, however counsel for Mr. Storie urged him to provide such names in order to provide this court with a better prospective of Mr. Storie and the good things that he has done in his life. Mr. Storie has taken it upon himself to send his crews to numerous job

sites to help widows and other sickly elderly people and repaired their roofs or other repairs to their homes at no cost to the person and such repairs were done at Mr. Storie's expense. Further, Mr. Storie has a number of people that he personally visits on a weekly basis to make sure that they have their food or other medication and will often obtain these things for them as they have no one else to perform these tasks. An excellent example of such conduct occurred during the sever winter of 2009/early 2010 in which the Roan Mountain section of Carter County endured numerous snow storms and extremely cold temperatures. On numerous occasions, Mr. Storie had his employees cut and deliver firewood to a number of individuals to ensure that they had heat to survive the cold temperatures and power outages. Once again, this was done without any monetary benefits to Mr. Storie and such acts by him are unknown to anyone else other than the person he assisted and the workers who performed the tasks.

Another example of Mr. Storie's character and strong sense of community is the fact that one of the reasons he requested that his curfew be expanded to include 8:00 p.m. was to allow him to travel to the funeral home located in Roan Mountain, Tennessee to attend the visitation and funerals of elderly friends and neighbors who have passed away. During the time of his restricted curfew, Mr. Storie was unable to attend such gatherings and would instead visit during the hours allowed in his curfew. Attending such solemn events is just another example of the strong sense of community, duty and respect instilled in him at an early age that he has continued to exhibit throughout his life.

As stated in the Presentence Report and as will be supplemented when such records become available, Mr. Storie suffers from a variety of serious medical and health conditions. At the time of the sentencing hearing in this matter, Mr. Storie will be

seventy (70) years old. The defendant had open heart surgery on August 8, 1998 at the Johnson City Medical Center and continues to suffer from a variety of complications related to the heart procedure. In addition, as a lifelong smoker, Mr. Storie suffers from breathing problems and lung conditions that necessitate frequent hospitalization. Mr. Storie is prone to have the slightest cold or flu turn into pneumonia and require his hospitalization to clear the infections.

A further medical complication occurred as a result of the facts leading up to the incident offense. As more fully detailed in the statement of facts of this offense, Mr. Storie was found to possess the firearms in this matter only after having been found at his residence unconscious in his living room after suffering from an accidental self inflicted gunshot wound. As stated, Mr. Storie fell on the outside of his home and the loaded pistol in his pocket discharged sending the bullet through the lower abdomen up through his lung nearly missing his heart and lodging in the upper spine region near his neck. Mr. Storie suffered a tremendous loss of blood and had struggled to make it back inside his residence before losing consciousness. When found, he was immediately transported to the Johnson City Medical Center where he remained in the intensive care unit for a number of days with his life hanging in the balance. After being stabilized, the doctors opined that the risk involved in removing the bullet was greatly outweighed by the risk of the surgery, especially in light of the weakness of Mr. Storie's heart and his other health complications. Therefore, the bullet remains in his body at this time and the doctors will remove the bullet only if it becomes a life or death situation.

A further example of Mr. Storie's poor health condition is evidenced by the statements of the Presentence Investigative Officer who prepared this report. The

financial information and the complete medical information from Mr. Storie have been delayed due to the inability of Mr. Storie to provide such to counsel due to recent hospitalizations for incidents related to his medical condition. Most recently, while attempting to water flowers in hanging baskets on his front porch, Mr. Storie lost consciousness, fell from the porch and struck a vehicle parked in his driveway with such force that it caused a dent in the fender of the car. After being hospitalized and treated, it was determined that Mr. Storie's heart was not pumping a sufficient amount of blood to provide oxygen to his impaired lungs resulting in this loss of consciousness. Mr. Storie was able to leave the hospital only after receiving four (4) units of blood on numerous occasions and was released only after the doctors were convinced that his body could maintain a proper oxygen level and blood flow. Mr. Storie remains under the treatment of both his cardiologist as well as Dr. Metzer at Holston Valley Medical Center for his lung and breathing problems.

IV. FLOYD STORIE'S CHARACTER

Many of his fellow citizens and community leaders in Carter County and beyond have offered letters attesting to their knowledge of Mr. Storie's excellent reputation in the community where he has resided for most of his life and the letters have been provided to the Court, the Probation Officer who prepared the Presentence Investigation Report, and to the U.S. Attorney's Office. What they have written regarding their knowledge of Mr. Storie's character and reputation demonstrate that his character and reputation in his

community, where he has resided for almost all of his seventy (70) years, is such that he should be granted a significant sentencing departure and/or variance in this matter.

Some of the remarks contained in those letters from these fellow citizens speak volumes about the character of Floyd Storie. For instance:

> *"I have known and had business dealings with Mr. Floyd Storie for 40 years. I have never dealt with a more honest, dependable, trustworthy, capable, honorable and a true gentleman than Mr. Storie. Little do people know what a generous man he is by doing such things for our community and people in need. I happen to know that Mr. Storie pays his men (from his own pocket) to cut stack and haul wood for the elderly folks in need. I also know that Mr. Storie buys items for the people who have had their homes destroyed by fire and other mishaps."*
>
> -- Randall Birchfield, Owner of a Real Estate & Auction Co.

> *"Approximately 30 years ago Floyd went in business for himself. His business, Floyd Storie Roofing on Hattie Avenue is located downtown. He is well known by man in our community. He has been one of Elizabethton's better business men. He has employed many who were down and out. He has given them a chance to earn a living. He is known, here in town, for the good deeds he has done throughout the years. He has given to fund raisers for local ball teams and always has been willing to help those in need, when he was asked to help. He has been a huge credit to Carter County and the people around him."*
>
> -- David Blackwell.

> *"I have known Floyd Storie all of my life. I have found him to be a man who will be the first to give a helping hand to anyone in need."*
>
> -- Pat "Red" Bowers, City Councilman & Former Mayor of City of Elizabethton

> *"I have known Floyd Storie for at least 40 years. I used to be able to help him out when he needed it but since I have lost my eyesight he is mostly on the giving end. My wife died on an Easter Sunday and he called and then came to my home to ask me if I needed him to dig the grave. If I needed something anytime day or night I could call on him to help. He's just that kind of a guy."*
>
> -- R.V. Brown

"I have known Floyd Storie and his family for over 60 years. I also knew his mother and father well. They raised a large family and sacrificed very much to rear their eight children. I know no one with a bigger heart for those who need help than Floyd. I could give many examples of the free gratis work Floyd has done for individuals and the churches in our area. Floyd never seeks public knowledge for his acts of kindness. Floyd's private mission to his neighbors is a truly magnificent obsession that has benefited countless numbers of people."

-- Robert O. Burleson, Former State Representative
Tennessee House of Representatives

"I have known Mr. Floyd Storie about 30 years. I have always found him to be a very hard working man with a lot of faith in the Lord. And his service to his and surrounding communities to people in need such as someone losing their home in a fire, illness, death in family and especially elderly people who can't help themselves."

-- Paul Clawson

"I have known Floyd since we were in grade school. He has his hired help cut wood and hay to give to the elderly. In my opinion he has been an outstanding man in the community. If I was to ever need help he would be the man I would go to."

-- Stuart Dyer

"I was a bank officer at Citizens Bank for 21 years and the Carter County Mayor for four years. His business, Floyd Storie Roofing Contractors, Inc. is very well respected and highly esteemed in the Tri-Cities area. I know him to have his community at heart because of his philanthropic giving to many worthwhile community efforts. Personally, I respect Floyd Storie, realizing no one is perfect and we all make mistakes, however our life's worth must be evaluated in its totality. Mr. Storie deserves adequate consideration based on the many acts of goodness that he has so generously given.

-- Dale Fair, Executive Director at First Tennessee Human Resource Agency

"I have known Floyd Storie for more than 25 years. He is honest in his business dealings and always willing to help someone who needed assistance. I remember one time when I served as chairman of the building and grounds committee at Grace Baptist Church. We had a problem with a leak around the church steeple. Floyd sent three or four of

his men to the church and they did stress tests and worked there three or four days. I could not get him to send a bill to the church."

-- Allen Goodwin

"I have personally known Floyd Storie for the past 38 years. In fact, he personally hired and trained me and my brothers in the field of roofing. He took care of us financially and physically when we were out of jobs. He taught me many things about the jobs but also about life. Always be on time for work, always give an honest day for the pay and never steal from the company or your fellow workers. I worked for and with him about 18 years. He taught me many things I still use today in my work and my home life. Always do your best and never do people wrong is the motto Floyd gave to us. We call him "Dad" as a nickname but in a sense that is what he has been to us."

-- Dallas, Albert, Dean & Harvey Harrald

"I have personally known Floyd for over 60 years and can state without fear of repudiation that he has been and remains currently a man of integrity who is a positive influence in his community and the surrounding area. Whenever there is a death or other tragedy, Floyd is generally the first person on the scene to bring food and ensure the needs of the family are looked after. Whenever he learns of a community need he acts without delay. As an example, he is almost solely responsible for the care and upkeep of a family cemetery in a remote area of Beech Mountain, NC and orchestrates a yearly get together for ancestors of those buried there. On a personal note, Floyd installed a roof on my father's house charging only for materials used. He installed a roof on my wife's parents' house at no charge whatsoever. Floyd also sponsors and pays for several family-oriented outings each year. I recall well his pointing at the youngsters at these get togethers and stating "We are making memories for them today"."

-- R. George Heaton, LTC, US Army (Retired)

"I have worked for Floyd Storie for eighteen years. I perform various jobs for him including digging graves for people who are not able to afford to hire someone, putting up hay on the farms, taking care of livestock, lawn and general maintenance of his property, keeping fences built and repaired, cutting wood for people who can't afford to buy it and people who are sick and any other odd job he needs done. Floyd has paid my wages for me to help many people. I have worked at many churches for him where he did not charge the church for the work we did. A lot of people have depended and benefited from Floyd.

-- Billy Hilton

"I have been the chairman of the Downtown Business Associations beatification committee for the last 9 years and I can tell you that all of the improvements that we have made to the Historic Downtown would not have been completed without his generosity of advice, manpower and equipment for all of which Floyd would take no payment. Floyd is without a doubt the hardest working man that I have ever met, his generosity to the community as well as individuals in need is never ending."

-- John Huber, Chairman beatification committee, D.B.A.

"I have had the pleasure of knowing Floyd Storie for the past 20 years. Floyd is a very successful businessman in our community who is responsible for the employment of numerous tax paying citizens. He employs many people and I know personally he pays these employees not only for their time at work but often helps both them and their families in times of need. Floyd Storie is, in my humble opinion, a tremendous asset to our community."

-- Mike McKinney

"I became acquainted with Mr. Storie in the summer of 2007. Our church was constructing our new facility which is located across from Mr. Storie's residence and adjacent to his property. Mr. Storie has assisted our church in various ways and it has always been appreciated. I know if I need his help, he will assist whenever possible."

-- Pastor Marvin Slagle, Heartland Fellowship

"I have worked with Floyd Storie for the past 25 years as an estimator for Floyd Storie Roofing Contractors, Inc. in Elizabethton, Tennessee. During my employment with this company, Floyd has worked large crews of men doing work local as well as performing roofing jobs in the states of North Carolina, Virginia, South Carolina, New Jersey and Georgia in order to provide work for his employees. Floyd has always took care of the men and their families. An example of this, during slow down time he allows the men to cut firewood and do various other jobs in order for them to have a weekly paycheck and also to provide firewood for elderly and needy people at no charge in order for them to stay warm during the winter. Floyd has helped many churches by providing labor to install shingle roofs at no cost to them and some churches he has provided the material at no cost to them. He has also provided a heating and air system in church at no cost to them. On the Pleasant Beach Baptist Church in Elizabethton he deducted $1,150.00 from the bill as a donation to the church. Each year at Christmas, Floyd buys many hams and I help

him to deliver these hams to widows and other elders in the community as well as employees to assure they will have a good Christmas dinner. This has been a practice of his for many years. He does not do this for recognition as he rarely if ever speaks of it. He does it to benefit the Carter County community. If it is told it is from the persons or organizations he has helped out. Floyd has worked hard for the benefit of his business, Carter County and the City of Elizabethton. When asked why he doesn't retire, as he has health issues and will celebrate his 70th birthday October 4th, he replies "but what will the men do?" In this time of a slow economy and people struggling to find work he will not desert his employees and without his years of expertise and knowledge it is very doubtful the company could survive."

-- James "Jim" Storie, Estimator for Floyd Storie Roofing Contractors, Inc. & Pastor at High Point Baptist Church in Roan Mountain, Tennessee

"Floyd always gives 100% to his customers and does the job right. In addition to that, Floyd is very kind and trustworthy. He always does what he is hired to do and stands behind his work. I have always considered it a privilege to deal with Floyd Storie because he can be trusted and is an asset to the community.

-- Bill Tetrick, President of Happy Valley Memorial Park, Inc.

"There is so many acts of kindness it is hard to put on paper not only for myself and my husband, Jeff, but the many people of Carter County and surrounding area. When people are in need of help Floyd has always been there. He has helped so many that didn't have the means to help themselves."

-- Jeff and Sherry Underwood

V. SENTENCING FACTORS TO CONSIDER

A result of the decision of the United States Supreme Court in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), was to render the Sentencing Guidelines to an advisory role. Consequently, the Court must now decide, on

a case by case basis, what sentence is reasonable in each case based upon a consideration of not only the advisory Guideline range but also other statutory factors which are set forth in the Sentencing Reform Act. In particular, 18 U.S.C. § 3553(a) requires a sentencing court to consider seven (7) statutory considerations as follows:

1. The nature and circumstances of the offense and the history and characteristics of the defendant;

2. The need for the sentence imposed –

   A. To reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;

   B. To afford adequate deterrence to criminal conduct;

   C. To protect the public from further crimes of the defendant; and

   D. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

3. The kinds of sentences available;

4. The kinds of sentence and the sentencing range established for:

   A. The applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission...;

5. Any pertinent policy statement issued by the Sentencing Commission ...;

6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

7. The need to provide restitution to any victims of the offense.

The dramatic change brought about by the Booker decision in the amount of discretion accorded to district courts in sentencing was recently described in the decision

by the Sixth Circuit Court of Appeals in the case of United States v. Fuson, 2007 WL 414265 (6th Cir. February 7, 2007) [copy attached] as follows:

> After Booker, which rendered the Sentencing Guidelines advisory for all criminal cases, district courts have enhanced discretion when sentencing criminal defendants. United States v. Jackson, 408 F.3d 301, 304 (6th Cir. 2005) (citation omitted). Ultimately, however, Booker requires that the sentence the district court imposes be reasonable. Id. Both district courts imposing sentences and appellate courts reviewing sentences are to be guided by the factors set forth in 18 U.S.C. § 3553(a). Id. Section 3553(a) instructs a district court to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553 (a)(2)]." United States v. Collington, 461 F.3d 805, 807 (6th Cir. 2006). Under § 3553(a), the district court should consider the seriousness of the offense, deterrence of future crimes, protection of the public from future crimes of the defendant, and providing the defendant with needed training or correctional treatment. Id. (citing § 3553(a)(2)). The Court should also consider the nature and circumstances of the defendant, the kinds of sentences available, the sentencing Guideline range, policy statements from the Sentencing Commission, the need to avoid sentencing disparities, and the need to provide restitution to the victims. Id. At 807 n. 1 (ctiting § 3553(a)(1), (3) – (7)). Thus, under this new sentencing scheme, district courts are required to consider the applicable Guideline sentencing range when arriving at a defendant's sentence, see § 3553(a)(4), but as only one factor of several laid out in § 3553(a). Jackson, 408 F.3d at 304; see also United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006) ("once the appropriate advisory Guideline range is calculated, the district court throws this ingredient into the § 3553(a) mix.")

Id. at *3.

In addition, while before Booker downward departures under the mandatory Guideline system were limited to very specific grounds, since the Booker decision, however, the Courts have recognized what is known as a non-Guideline departures. As was also summarized by the Court in United States v. Fuson, supra, such departures are not nearly as limited. As stated by the Court in that case:

> We conclude, however, that Fuson's sentence was not the result of a Guideline-based departure; rather, it was a now-typical § 3553(a) sentence, also known as a "non-Guideline departure," "deviation," or "variance." See e.g., United States v. Cousins, 469 F.3d 572, 577 (6th Cir. 2006).

Id. at *4.

See also United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006) ("In contrast to the sentencing scheme before Booker when a sentence outside the mandatory guideline range was permitted on only very limited grounds, there are now more sentencing variables.") See also United States v. Husein, _____ F.3d _____, 2007 WL 623448, at *12 (6th Cir. March 2, 2007) ("As an initial matter, the offense to which Husein pled guilty, 21 U.S.C. § 841(b)(1)(C), does not mandate a minimum sentence. (The statutory range is 0 to 20 years in prison.) Congress thus not only envisioned, but accepted, the possibility that some defendants found guilty of that subsection of the statute would receive no jail time at all.")

Taken in the chronology as found in Section 3553(a), any decision as to sentencing of a defendant must begin with consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant."

The nature and circumstances of the offense in this case are on their face very straightforward. Mr. Storie was in fact a convicted felon having successfully completed his sentence and term of probation in both Carter County and Sullivan County, Tennessee. Mr. Storie in fact did possess a number of weapons at his residence having been a convicted felon. While the number of guns possessed by Mr. Storie would at first appear troubling, counsel for Mr. Storie would urge the court to review the list of weapons closely and follow the defendant's statements at the sentencing hearing in this

matter with regard to the age, history and means by which these number of weapons were accumulated. Many of the weapons that were seized were rifles and/or shotguns given to Mr. Storie as a young child, including the first weapon every purchased for him by his father. These were some of the only non-food or clothing items ever purchased for Mr. Storie by his family. These weapons were in essence essential to his family's survival as they were used for hunting purposes and provided many meals for his family. Therefore, many of these weapons have more sentimental value than monetary or other types of value to Mr. Storie. Further, many of the weapons that were seized were guns that were owned by his deceased brothers that were also given to them by their father.

Upon Mr. Storie's conviction for the underlying felony offense in Carter County, Tennessee, many, if not all, of these weapons were seized during the investigation of that case. Following his convictions, the weapons seized during that raid, many, if not all, of which are listed as being seized in this case, were returned to his brother, Paul and remained in his possession for a number of years. Shortly prior to Mr. Paul Storie's death, he transported the weapons back to Mr. Storie for safe keeping as they were certain to fall into his children or step-children's hands and would be sold or otherwise improperly used. Mr. Storie in fact, appeared to be the only safe haven for these weapons. In spite of the fact of being a convicted felon, Mr. Storie kept these weapons, many in plain view, at his residence. In addition to these weapons received from his brothers, most if not all of the ammunition that was seized in this matter was also delivered by his brother to his residence.

While this explanation does not provide Mr. Storie with a defense to the possession of these weapons after having been convicted of a felony, it provides the court

with a proper prospective by which he possessed these weapons. Counsel for the defendant would urge the court to recognize the distinction between someone in Mr. Storie's position of possessing these weapons as part of a lifelong heritage and a preservation of his family's weapons and/or heirlooms as opposed to a convicted drug dealer who is found in possession of an automatic weapon for use in future drug deals. That distinction is real in this case and warrants a downward departure and/or variance for Mr. Storie, in spite of the large number of weapons that were found.

The defendant would further point out that the nature and circumstances of offense and the history and characteristics of the defendant also allow the court to consider a variance in the sentence for Mr. Storie. The circumstances of the present offense involve a situation by which Mr. Storie suffered an accidental self inflicted gunshot wound that very nearly caused his death. As a result of this, he now cares the bullet lodged in his body that cannot be removed due to his various medical conditions. This fact would also point to the appropriateness of the court granting a variance for Mr. Storie in this matter.

Of course, as evidenced by the letters submitted by twenty-three (23) fellow citizens and community leaders from Carter County, Mr. Storie has for many years been an active and faithful and productive member of Carter County, Tennessee and has conducted himself in such a fashion that he is held in high esteem by those there who have come to know him.

Further, counsel would urge the court to consider the impact that incarceration would have upon Mr. Storie in light of his medical condition. As stated, he is seventy

(70) years old and suffers from a great many serious medical conditions, any one of which could be life threatening.

Further, counsel for the defendant would urge the court to consider the impact that an incarceration would have upon Mr. Storie's business as he is now the only surviving member of the original roofing company and in fact is attempting to keep the business going on his own. Mr. Storie is very hands on in the business and, as evidenced by the serious decline in his business during his recent hospitalizations, without Mr. Storie present to conduct the day-to-day operations, including payroll, biding of jobs, obtaining the necessary supplies and using his connections with the supplier, and directly supervising the work, his business will surely fail. As a result, counsel for the defendant would urge the court to also consider the impact that an incarceration of Mr. Storie would have on his employees. Mr. Storie has approximately twenty-one (21) employees, many of which have worked for him for over thirty (30) years. If Mr. Storie is incarcerated, his business will surely close and result in the loss of jobs for these twenty (20) employees. As the court can recognize, an elderly employee who has worked at only manual labor for the same roofing contractor for thirty (30) years is very unlikely to find employment with anyone else, especially during these dire economic times.

Mr. Storie has the capability of operating the roofing contracting business from his home. While this would be less than convenient, there is a large storage facility located adjacent to his home and it would be possible for Mr. Storie to speak with his field supervisors and order supplies from his personal residence. While this is not the ideal situation for the employment, counsel would submit that it is a fact that the court could consider. Should the court feel a downward variance is justified, but not to the

extent of probation, it would be a viable option for the court to consider home confinement for the defendant. A period of home confinement, as opposed to incarceration, would allow the defendant to keep his business open and protect his employees while at the same time providing sufficient punishment for the crimes for which he stands convicted.

Counsel for the defendant would point out to the court that the charitable works of the defendant as well as the employment factors relating to Mr. Storie are not just examples of the character of Mr. Storie but are also factors in which this court can consider a variance under the Sentencing Reform Act at U.S.C. §3553 or the downward variance section of the Sentencing Reform Act. At least two (2) Circuit Court opinions have upheld the use of these factors as being proper to support a downward variance. See United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) and United States v. Thurston, 544 F.3d 22 (1st Cir. 2008). In the Tomko case, the Third Circuit Court upheld the District Court's analysis that the defendant's involvement in exceptional charitable work and community activities justified in part, the downward variance of a sentence for home confinement. It is important to note that the court found that the majority of the defendant's charitable works in that case were performed post-indictment for the charges which he stood convicted. In the present case, Mr. Storie has performed post-indictment charitable works, but as evidenced by the letters submitted to the court and the proof to be heard at the sentencing hearing, these charitable works and community activities are things that Mr. Storie has done his entire adult life. Further, as noted in the Thurston case, it is no longer required that the charitable works be "exceptional good works". While the works necessary for a strict downward departure analysis, require exceptional

good works, applying these factors to a Section 3553(a) downward variance analysis, it is not required that the good works be exceptional. In this case, the defendant would argue that given the length and extent of Mr. Storie's charitable works, they would apply under the analysis of exceptional or non-exceptional good works and support a downward variance in this case.

Further, the employment factors discussed above were also upheld in the Tomko case and the finding that should the defendant in that case, who was the chief financial officer, be sentenced to a term of imprisonment, the company would be in dire financial straits and the jobs of their employees would be threatened. In upholding the downward variance in that case, the Third Circuit found that the court's reliance on these factors, including the detrimental impact of the defendant's incarceration in that case would have the company's "innocent" employees was a reliance on these factors that was logical and consistent with a Section 3553(a) analysis. The defendant acknowledges that a below guideline sentence based upon Section 3553(a) and upon these subjective factors such as the defendant's health, employment history and impact on the defendant's employees are factors that the Guidelines usually discourage in considering a sentence, the defendant would further emphasize to the court that these are proper factors for the court to consider for a downward variance in this case. The defendant would submit that these factors standing alone and when considered together, are strong evidence of this defendant's history and characteristics which is the first factor to be considered in a Section 3553(a) analysis.

Next, the court must look at the need for the sentence imposed to reflect the seriousness of the offense, afford adequate deterrents, protect the public from further

crimes and to provide the defendant with a needed educational and other training in the most effective manner.

Counsel for the defendant would submit that the seriousness of the offense, as well as the adequate deterrence to such conduct by others can be achieved in this case without the need to incarcerate Mr. Storie. These objectives can be achieved by the fact that Mr. Storie was once a proud, successful businessman in Carter County, Tennessee who must now face the embarrassment and humiliation of a federal conviction for possessing firearms. While Mr. Storie faced a similar predicament at the time of the underlying charges resulting in the felony conviction, Mr. Storie has worked long and hard to restore his reputation and standing in the community and but for the accidental shooting occurring in this matter, would in all likelihood never have been charged with these crimes, as the weapons were in his residence and not in the public. Mr. Storie will now be forced to once again face friends and foes, or advocates and critics, regarding the conviction and the sentence for which the court will levy against him. The fact that this seventy (70) year old man in poor health must endure a federal sentence sends a message to others that reflects the seriousness of the offense to those in a similar position as Mr. Storie. This fact itself constitutes a deterrent to others from such conduct, just as loudly as a term of incarceration. Further, the need for deterrence is but one (1) factor to be considered in Section 3553(a) analysis not to be elevated above all others. In this case, this objective can be obtained by a sentence that does not include incarceration for Mr. Storie. As stated, the fact that a man of Mr. Storie's pre-indictment status, a man of seventy (70) years old, and a man in as poor health as Mr. Storie, who must endure the

rigors of facing the charges and potential sentences to receive, would serve as more than sufficient deterrent for himself and others in the present case.

The defendant would further submit that the previous described factors of Mr. Storie's age, health and the letters received in his support by those closes to him speak volumes about the lack of any need to protect the public from any further or future offenses by Mr. Storie. In all likelihood, Mr. Storie's age and health will prevent his engaging in any further illegal conduct in the future and the court can fashion a sentence in this case to ensure his future compliance with the law that would not have to include incarceration.

The additional factor for the court to consider concerning any educational and/or vocational training for the defendant appears on its face to be a non-factor in this case or at least a factor to be given little weight by the court given Mr. Storie's age, work history and health. However, it is evident from the underlying felony conviction and Mr. Storie's history that there is a concern regarding alcohol abuse or consumption. The court could fashion a sentence to provide for counseling and/or treatment for alcohol use for Mr. Storie that could be considered educational training and would further ensure his future compliance with the law and prevent any future offenses by Mr. Storie.

In considering the types of sentences available, the court should look to avoid any unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. The defendant would submit that the court can fashion a sentence in this case that would not require incarceration and would not be an "unwarranted" sentence disparity. The defendant would submit that the crime for which Mr. Storie stands convicted, possession of a firearm by a convicted felon, is not on its

face unique. However, the facts and circumstances leading up to Mr. Storie being charged and the other factors discussed in more detailed concerning his age, his health and his character are unique and would justify a variance from the suggested guideline range. It is unlikely that the court will encounter a defendant with the unique set of characteristics of Mr. Storie or with the unique facts leading up to the charge. The defendant would submit that this would not be an unwarranted sentence disparity in this matter should the court grant a variance from the sentencing guidelines that would include home confinement and/or probation for the defendant.

Lastly, the court must look at the factor of restitution to a victim and that appears to be a factor that bears little weight in this matter as there appears to be no restitution or a known victim in this case.

Counsel for the defendant would submit that, in light of the facts and circumstances of this case, this is a proper case for the court to find that a downward departure and/or variance from the sentencing guideline is warranted and would respectfully request the court to sentence the defendant to a period of probation and/or home confinement followed by supervised release.

RESPECTFULLY SUBMITTED:

/s/Stacy L. Street
STACY L. STREET (BPR #15680)
213 NORTH MAIN STREET
ELIZABETHTON, TN 37643
423-543-6900

/s/James T. Bowman
JAMES T. BOWMAN (BPR #940)
128 E. MARKET STREET
JOHNSON CITY, TN 37604
423-926-2022

CERTIFICATE OF SERVICE

I hereby certify that notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other interested parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

This the 5th day of October, 2010.

/s/Stacy L. Street
STACY L. STREET

Slip Copy, 2007 WL 414265 (C.A.6 (Ohio)), 2007 Fed.App. 0097N
(Cite as: Slip Copy)

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Briefs and Other Related Documents
U.S. v. FusonC.A.6 (Ohio),2007.2007 Fed.App. 0097NThis case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATIONPlease use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,Sixth Circuit.
UNITED STATES of America, Plaintiff-Appellant,
v.
John A. FUSON, Defendant-Appellee.
No. 05-3782.

Feb. 8, 2007.

On Appeal from the United States District Court for the Northern District of Ohio.

Before DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge.

*1 The Government appeals the sentence the district court imposed on John Fuson after he pleaded guilty to one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) . The recommended sentence under the United States Sentencing Guidelines was twenty-four to thirty months in prison. The district court sentenced Fuson to five years of probation (six months of which required home confinement) and imposed a fine of $2000. On appeal, the Government argues that (1) the district court incorrectly applied the Sentencing Guidelines' departure criteria in reaching this sentence, and (2) even if viewed as a non-Guidelines departure under 18 U.S.C. § 3553(a) (in which case the district court has greater discretion), the sentence is both procedurally and substantively unreasonable. For the following reasons, we conclude that the sentence is a non-Guidelines departure under § 3553(a) that is procedurally and substantively reasonable. We therefore AFFIRM the district court.

I. BACKGROUND[FN1]

FN1. Some of this background information is discussed in this Court's prior decision in this case, *United States v. Fuson (Fuson I)*, 116 F. App'x 588 (6th Cir.2004).

In September 2001, Fuson's wife purchased a seventy-five-year-old handgun at an antique show with the intent to resell the gun for profit. Shortly after she purchased the gun, Fuson allegedly expressed his objection to it and mentioned that he was not supposed to have weapons in the house due to his prior felony convictions. The gun nonetheless remained in the house for the next four months.

In January 2002, police found the gun while searching Fuson's residence in connection with a warrant unrelated to the antique weapon. When the gun was found, it was in a closet and in the same case that it was in when Fuson's wife purchased it. The gun was not loaded, but there was ammunition elsewhere in the house. Fuson told authorities that neither he nor his family members had ever fired the gun.

A background check revealed that Fuson was a convicted felon. He had previously pleaded guilty to the following three counts of drug trafficking under Ohio law: (1) selling a half ounce of marijuana for $90 to a confidential informant on August 3, 1996; (2) exchanging 0.69 grams of marijuana for three cartons of cigarettes (worth about $75) with a confidential informant on October 23, 1998; and (3) exchanging one-eighth of an ounce of marijuana for three cartons of cigarettes with a confidential informant on October 24, 1998. Additionally, Fuson had pleaded guilty to driving

under the influence on two occasions, once in 1993 and once in 1994.

The Government charged Fuson under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm, and he pleaded guilty on July 22, 2003. After his plea but before beginning his sentence, Fuson voluntarily sought drug-abuse treatment at his own expense.

The district court held a sentencing hearing on December 12, 2003. The Pre-Sentence Investigation Report (PSR) concluded that under the Sentencing Guidelines Fuson's Criminal History Category was II and his base offense level was seventeen. This calculation resulted in a sentencing range of twenty-seven to thirty-three months. The parties did not object to the PSR, but the district court departed downward from this range, invoking Guidelines departure provisions and explaining that it relied on the following bases for departure: Fuson is a productive citizen in business with his daughter's boyfriend; he supports his wife and three children; he voluntarily sought drug-abuse treatment at his own expense and has not had a relapse since he began treatment; the gun was an antique, had never been fired, and was purchased for collection purposes only; and a small amount of marijuana formed the basis for his predicate felony offenses. Although the court gave these reasons orally, the written statement of reasons for the departure contained only the following: "Over the objections of the government, the court determined that the defendant's Criminal History Category was overstated. Further, the court departed eight levels based upon the finding that his case is outside the heartland of the guidelines, pursuant to U.S.S.G. 4A1 .3." After accounting for this departure, the court sentenced Fuson to five years of probation (with the first six months to be served through home detention) and fined him $2000. The Government timely appealed.

*2 On November 16, 2004, this Court vacated the sentence and remanded for re-sentencing, holding that (1) the district court's written order neither adequately explained nor justified the departure and therefore violated 18 U.S.C. § 3553(c)(2); and (2) the court's oral explanation did not support the departure because (a) the court's determination that the PSR overstated Fuson's criminal history would allow for only a one-level downward departure from Category II to I, not an eight-level downward departure in offense level; (b) many of the court's reasons for departure under the Guidelines' departure provisions were foreclosed by this Circuit's cases or the Guidelines themselves; and (c) the court considered factors that the Guidelines deem "not ordinarily relevant" (e.g., employment history) but did not explain, as it was required to do, how these factors were "present to an exceptional degree or in some other way made the case different from the ordinary case where the factor is present." *See Fuson I,* 116 F. App'x at 590-91. Shortly after this decision, but before the district court re-sentenced Fuson, the United States Supreme Court decided *United States v. Booker,* 543 U.S. 220 (2005), which held that the Guidelines are not mandatory but only advisory.

On May 16, 2005, the district court conducted another sentencing hearing. The court again considered the original PSR, which concluded that Fuson's Criminal History Category was II and his offense level was seventeen. The court again concluded that Criminal History Category II overstated Fuson's criminal history and determined it should be Category I. Fuson's offense level and Criminal History Category correlated to a Guidelines range of twenty-four to thirty months. The Government agreed that a sentence in this range would be reasonable, and it requested such a sentence. The court then stated it believed "it would be appropriate to deviate from the guideline range." The court indicated that it planned to impose the same sentence it imposed before, and the probation officer stated that the corresponding Guidelines offense level for that sentence (considering a Criminal History Category I) would be ten. The court responded that "the appropriate sentence in this case is at the level 10."

The court then provided its reasons for imposing the lesser sentence, noting that "the nature and circumstances of this particular offense justify, if indeed they do not compel, a result that is more lenient than the guidelines would mandate." Similar to Fuson's first sentencing, the court recounted

certain factors, including that Fuson's wife bought the gun, it was not bought to further criminal conduct, and it was kept in a closet. The court further noted that although "a fair amount of ammunition at some point ... had been acquired by someone," had the gun been a year older, "we would not be here." [FN2]

FN2. Although the record is not clear on this comment, we presume it to mean Fuson could not be prosecuted for possessing an antique firearm under 18 U.S.C. § 921. The Government does not dispute the district court's comment.

The court turned again to the nature of the particular offense: "I think of all these kinds of cases, this is one where the nature and the circumstances of how the offense occurred and the fact that this was essentially constructive possession justify a deviation or variance from the guidelines." At this point, the court noted that Fuson's record was "unblemished" since his marijuana-trafficking conviction seven years earlier, and no contraband was found in his house during the search that turned up the gun. The court further noted that Fuson "is working, supporting the family," and although the court recognized "that normally is not a basis for a departure or deviation," it at least "suggests ... a lenient sentence is appropriate." The court next explained that the punishment was just; that there probably would be a general deterrent effect on those who know the sentencing risk to which Fuson was exposed; and that the public was never in danger. The court acknowledged that although Fuson's sentence "will have the effect of creating some disparity between the defendant and other people convicted of this offense," the court believed this disparity was justified here because of "the nature and circumstances of this offense in comparison with those and other cases of this sort being brought by the Government." Finally, the court noted there was no issue of restitution. The court ultimately imposed the original sentence of five years of probation (including six months of home confinement) and a $2000 fine. The Government now appeals.

II. DISCUSSION

A. Standard of Review

*3 After *Booker,* which rendered the Sentencing Guidelines advisory for all criminal cases, district courts have enhanced discretion when sentencing criminal defendants. *United States v. Jackson,* 408 F.3d 301, 304 (6th Cir.2005) (citation omitted). Ultimately, however, *Booker* requires that the sentence the district court imposes be reasonable. *Id.* Both district courts imposing sentences and appellate courts reviewing sentences are to be guided by the factors set forth in 18 U.S.C. § 3553(a). *Id.* Section 3553(a) instructs a district court to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]." *United States v. Collington,* 461 F.3d 805, 807 (6th Cir.2006). Under § 3553(a), the district court should consider the seriousness of the offense, deterrence of future crimes, protection of the public from future crimes of the defendant, and providing the defendant with needed training or correctional treatment. *Id.* (citing § 3553(a)(2)). The court should also consider the nature and circumstances of the defendant, the kinds of sentences available, the sentencing Guideline range, policy statements from the Sentencing Commission, the need to avoid sentencing disparities, and the need to provide restitution to the victims. *Id.* at 807 n. 1 (citing § 3553(a)(1), (3)-(7)). Thus, under this new sentencing scheme, district courts are required to consider the applicable Guideline sentencing range when arriving at a defendant's sentence, *see* § 3553(a)(4), but as only one factor of several laid out in § 3553(a). *Jackson,* 408 F.3d at 304; *see also United States v. McBride,* 434 F.3d 470, 476 (6th Cir.2006) ("Once the appropriate advisory Guideline range is calculated, the district court throws this ingredient into the section 3553(a) mix."). We review a district court's imposition of a sentence for reasonableness with an eye toward those same § 3553(a) factors. *Jackson,* 408 F.3d at 304.

B. "Non-Guidelines Departure" Under § 3553(a)

Before *Booker,* under the mandatory Guideline system, a defendant's only hope of a lesser sentence was a Guideline-based downward departure. *McBride,* 434 F.3d at 476. These Guideline-based departures were very limited. *See id.* ("In contrast to the sentencing scheme before *Booker* when a sentence outside the mandatory guideline range was permitted only on very limited grounds, there are now more sentencing variables.") (citation omitted). The Government argues that Fuson's sentence "appears to be the product of a departure under the Sentencing Guidelines," (Appellant's Br. 19-20), as opposed to a "non-Guidelines sentence under § 3553(a)," (*id.* 26). In short, according to the Government, the district court departed under the Guidelines and was therefore required to depart in the limited ways enumerated in the Guidelines. Thus, the Government argues, the district court "recommitted the same Guidelines errors it committed when it initially sentenced Fuson." (*Id.* 19-20.)

*4 We conclude, however, that Fuson's sentence was not the result of a Guideline-based departure; rather, it was a now-typical § 3553(a) sentence, also known as a "non-Guideline departure," "deviation," or "variance." *See, e.g., United States v. Cousins,* 469 F.3d 572, 577 (6th Cir.2006) ("We often refer to Non-Guideline departures as 'variances.' "); *United States v. Davis,* 458 F.3d 491, 497 (6th Cir.2006) (noting that a factor the district court considered "did not authorize a "*downward departure* " under the Guidelines, but separately addressing whether the factor authorizes a "*variance* " under § 3553(a)). As discussed further below, the district court plainly imposed Fuson's sentence by considering the § 3553(a) factors and not simply the Guideline departures. The district court even stated that Fuson's sentence amounted to a "variance" from the Guidelines. (*See, e.g.,* J.A. 98 ("I think of all these kinds of cases, this is one where the nature and the circumstances of how the offense occurred ... justify a *deviation or variance* from the guidelines. " (emphasis added)).) And although the district court remarked that "the appropriate sentence in this case is at the level 10," (*id.* 96), we conclude the court was merely indicating (albeit unnecessarily) where the sentence would fall if it were derived from the Guidelines. The court was not, as the Government contends, "recommitting" the same Guideline-departure errors we found in *Fuson I.*

C. Reasonableness

The government further contends that even as a non-Guidelines sentence under § 3553(a), Fuson's sentence is unreasonable, both procedurally and substantively. We disagree.

1. *Procedural Reasonableness*

A sentence may be procedurally unreasonable if the district court fails to consider the applicable Guidelines range or neglects to consider the other factors listed in § 3553(a) and instead simply selects what the court deems an appropriate sentence. *Collington,* 461 F.3d at 808 (citing *United States v. Webb,* 403 F.3d 373, 383 (6th Cir.2005)). Here, the district court correctly calculated the Guidelines range of twenty-four to thirty months, and the Government conceded that this range was reasonable. The court then independently considered and faithfully applied the § 3553(a) factors, specifically discussing the nature and circumstances of the offense and Fuson's history and characteristics (*see* § 3553(a)(1)); the need for the sentence imposed to provide just punishment (*see* § 3553(a)(2)(A)), to afford adequate deterrence (*see* § 3553(a)(2)(B)), and to protect the public (*see* § 3553(a)(2)(C)); the need to avoid unwarranted sentencing disparities (*see* § 3553(a)(6)); and the need to provide restitution (*see* § 3553(a)(7)). For procedural reasonableness, this is all that we require. *See Davis,* 458 F.3d at 495 (noting that sentence "satisfies each of [the] procedural requirements and indeed can fairly be described as a thorough application of the § 3553(a) factors" where the judge used the appropriate version of the Guidelines and correctly calculated the Guidelines range, considered the availability of Guidelines departures, and independently considered and faithfully applied each of the § 3553(a) factors); *see also Collington,* 461 F.3d at 809 (sentence was procedurally reasonable even though district court did not explicitly name each of the § 3553(a)

factors it used to arrive at the sentence). We therefore conclude the district court imposed a procedurally reasonable sentence.

2. Substantive Reasonableness

*5 When a district court considers the relevant § 3553(a) factors in depth and reaches its determination that the appropriate sentence varies from the advisory Guidelines range, we are reluctant to find the sentence unreasonable. *Id.* at 811. Nonetheless, a sentence may be considered substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors, or gives an unreasonable amount of weight to any pertinent factor. *Id.* at 808 (citing *Webb,* 403 F.3d at 383). When the district court independently chooses to deviate from the advisory Guidelines range (whether above or below it), we apply a form of proportionality review: "[T]he farther the judge's sentence departs from the guidelines sentence ... the more compelling the justification based on factors in section 3553(a)" must be. *Davis,* 458 F.3d at 496 (citations omitted).

Davis and *Collington* guide our decision here. In Davis, we held that a district court's downward variance from the Guidelines was substantively unreasonable. *Id.* at 500. There, a jury convicted the defendant of bank fraud, and the district court determined the Guidelines sentencing range to be thirty to thirty-seven months. *Id.* at 494. Under § 3553(a), the district court imposed a lower sentence, relying heavily on three factors: the defendant was seventy years old, fourteen years had elapsed since he committed the offense, and the offense was a white-collar crime. *See id.* The sentence amounted to one day in prison, three years of supervised release (including one year of home confinement) and 100 hours of community service. *Id.* at 495.

This Court vacated the sentence, concluding it was substantively unreasonable. The Court noted that the one-day prison sentence amounted to an extraordinary variance from the Guidelines range of thirty to thirty-seven months and that the circumstances did not justify that variance. First, the Court explained that the fourteen-year gap between conviction and sentence did not support such a dramatically reduced sentence "and indeed may not support a variance at all" because "[t]ime intervals of this sort appear nowhere in" the list of § 3553(a) factors. *Id.* at 497. Second, the Court noted that although *Booker* gives the district court "a freer hand to account for [disfavored sentencing factors such as] the defendant's age in its sentencing calculus under § 3553(a) than it had before *Booker,*" the defendant's age did not warrant the one-day sentence where the defendant's fraud caused over $900,000 in losses, he did not repay the lost money, he did not accept responsibility for his crime, and he had yet to show remorse. The Court also explained that the sentence left no room to make reasoned distinctions between the defendant's sentence and sentences more worthy defendants may deserve. *See id.* at 499. Third, the Court rejected the district court's reliance on the white-collar nature of the crime to reduce the sentence, explaining that "[o]ne of the central reasons for creating the sentencing guidelines ... was to ensure stiffer penalties for white-collar crime and to eliminate disparities between white-collar sentences and sentences for other crimes." *Id.* Thus, although the Court recognized that the district court "retains ample discretion to grant [the defendant] a variance on this record," the one-day sentence on these "less-thanextraordinary facts" was unreasonable. *Id.* at 500.

*6 In *Collington,* on the other hand, we upheld a district court's downward variance from the Guidelines. There, the defendant pleaded guilty to possession of over fifty grams of crack cocaine with intent to distribute; being a felon in possession of a firearm; and unlawful possession of a machine gun. 461 F.3d at 806. The district court determined the Guideline sentencing range would be 188 to 235 months. *Id.* at 807. The district court then varied downward from this range based on the defendant's (1) criminal history (he had been imprisoned for only seven months before this crime and this incident was the first time this quantity of drugs and guns had been found in his possession); (2) family history (his father was murdered when the defendant was nine years old, and the defendant's

mother died of cancer two years later); and (3) age (the defendant was young enough that he might reform and lead a productive life when released from prison in his mid-thirties). *Id* . at 809. Considering these factors, the district court sentenced the defendant to 120 months' imprisonment with five years of supervised release. Noting that the district court "couched all of its reasons for [the defendant's] sentence in the factors listed in section 3553(a)" and did not "assign an unreasonable amount of weight to any of the factors it considered," this Court upheld the sentence as substantively reasonable.

We conclude Fuson's sentence is substantively reasonable. In contrast to the district court in *Davis,* which relied heavily (and nearly exclusively) on disfavored or improper sentencing factors (time lapse before sentence, age of the defendant, and the white-collar nature of the crime), the district court here relied more on the "nature and circumstances" of the offense and properly considered "history and characteristics of the defendant" under § 3553(a)(1) , noting certain particularly unique factors: Fuson's wife bought the gun, which was an antique; it was not bought for any criminal purpose; and Fuson's criminal record, comprised of relatively minor predicate offenses, was unblemished for the past seven years. The court's application of the § 3553(a) factors here was thus akin to the district court's reasonable sentence in *Collington.* And although the district court remarked that Fuson was working and supporting his family, the court did not rely heavily on this factor, even noting that it was disfavored. The district court retains discretion to give such disfavored factors *some* weight. *See, e.g., Davis* 458 F.3d at 498 (district court has a "freer hand" to consider disfavored factors); *Jackson,* 408 F.3d at 305 n. 3 ("To the extent that the district court in resentencing relies on any factors [that] are deemed by the Guidelines to be prohibited or discouraged ... , the district court will need to address these provisions and decide what weight, if any, to afford them in light of *Booker."). Had* the court relied heavily on improper factors, such as Fuson's family situation, our task would be more difficult. In sum, although we deem this case to approach the boundary of the district court's broader sentencing discretion under *Booker,* it does not cross the line.

III. CONCLUSION

*7 For the foregoing reasons, we AFFIRM the sentence imposed by district court.

JULIA SMITH GIBBONS, Circuit Judge, concurring.

While determining that Fuson's sentence is procedurally reasonable is relatively easy, it is far less obvious that the sentence is substantively reasonable. Nevertheless, after much consideration, I join the majority opinion's conclusion that the sentence should be affirmed. In reaching this result, an important point for me is that six months home confinement was imposed as a condition of probation; another is that Fuson's period of supervision is the maximum permitted by statute. Yet, other factors counsel against a determination of substantive reasonableness in my mind. Many defendants charged with violations of 18 U.S.C. § 922(g) evidence no intent to use the weapon in a violent manner, support their families, and have not been in trouble for a long time. It is hard for me to see why this defendant was deserving of a very lenient sentence, while others similarly situated have served prison sentences. I must acknowledge, however, that district courts post-*Booker* have sentencing discretion that in some circumstances permits such disparity. And I agree with the majority that this case differs from *Davis,* in which our court found a one-day sentence based on the defendant's age, white-collar offense, and the passage of time substantively unreasonable. I therefore concur, agreeing that the sentence does not cross the boundary line of a district court's broader sentencing discretion under *Booker.*

C.A.6 (Ohio),2007.
U.S. v. Fuson
Slip Copy, 2007 WL 414265 (C.A.6 (Ohio)), 2007 Fed.App. 0097N

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7. Clawson, Paul
8. Dyer, Stuart
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11. Harrald, Albert & Dallas & Dean & Harvey
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14. Huber, John
15. Hyder, Billy R.
16. Kerley, Lawson
17. McKinney, Mike
18. Range, Johnny S.
19. Shoun, Bill
20. Slagle, Pastor Marvin
21. Storie, James "Jim" L.
22. Tetrick, Bill
23. Underwood, Jeff & Sherry

September 29, 2010

To Whom it May Concern:

I have known Mr. Floyd Storie for several years and believe that I am qualified to speak of his good character. He has always been hard-working, dependable, reliable, and honest. He also demonstrates empathy and compassion for those less fortunate; his generosity in helping various people when they need help speaks for itself. He is a tremendous asset to his community; many seek his advice and guidance often on numerous topics.

Mr. Storie is deeply committed to giving assistance when and where needed. He is a man of great integrity, and I have no reservations in speaking of his good character.

Sincerely,

Mrs. Lisa Benfield

RANDALL
BIRCHFIELD
REAL ESTATE & AUCTION

501 EAST E STREET ELIZABETHTON, TN 37643

www.birchfieldauctions.com

OFFICE: 423-543-5959
FAX: 423-543-4341

To whom it may concern;

I have known and had business dealings with Mr. Floyd Storie for 40 years. I have never dealt with a more honest, dependable, trustworthy, capable, honorable and a true gentleman than Mr. Storie.

I, like Mr. Storie, start my business day early in the morning (4:00 –5:00 A.M.). Once or twice a week, I like to stop by and discuss things with Floyd, such as community affairs and related topics. Like myself, Mr. Storie works 6 plus days a week.

Little do people know what a generous man he is by doing such things for our community and people in need. I happen to know that Mr. Storie pays his men (from his own pocket) to cut stack and haul wood for the elderly folks in need. I also know that Mr. Storie buys items for the people who have had their homes destroyed by fire and other mishaps.

For over 40 years it has been my pleasure, privilege and honor to call Floyd my friend and a true gentleman.

Respectfully,

Randall Birchfield
Broker/Auctioneer/Appraiser/Owner

October 1, 2010

To Whom It May Concern:

This letter is in regard to a very special friend of mine, Floyd Storie. He is and has been one of my better friends through out my life. Floyd and I went to High School together at Cloudland High. He was well liked by all our classmates, in which, one year he was nominated Homecoming King.

After High School, Floyd and I moved to Myrtle Beach and roofed buildings for a living. After several years, we then moved to Indiana for a number of years and worked in Steel Mills. He has always been a hard working man.

Approximately, 30 years ago, Floyd went in business for himself. His business, Floyd Storie Roofing, on Hattie Avenue, is located downtown. He is well known by many in our community. He has been one of Elizabethton's better business men. He has employed many who where down and out. He has given them a chance to earn a living. He is known, here in our town, for the good deeds he has done throughout the years. He has given to fund raisers for local ball teams and always has been willing to help those in need, when he was asked to help. He has been a huge credit to Carter County and the people around him.

I believe you can see what a kind, generous, thoughtful and hardworking man Floyd has been. I know from my experience Floyd has given so much to our community and his friends. In my opinion, you wouldn't meet a better person than Floyd Storie.

Thank you,

David Blackwell

Pat "Red" Bowers
1224 Thomas Boulevard
Elizabethton, TN 37643

September 30, 2010

To Whom It May Concern:

I have known Floyd Storie all of my life. I have found him to be a man who will be the first to give a helping hand to anyone in need.

Mr. Storie is a man who greatly loves Elizabethton and Carter County. Mr. Storie will be the first to do anything he can for the betterment of Elizabethton and Carter County.

Mr. Storie is a man who for many years has owned and operated his own successful business. Mr. Storie is a man who I have personally done business with and have always found him to be very honest in all his business dealings.

Respectfully,

Pat "Red" Bowers

Oct 1, 2010

To Whom it May Concern

I have known Floyd Stone for at least forty years. During these years I have found Floyd to be good honest man who accomadates people — if you need something he'll get it for you.

I have been in situations where I needed him and he has always come thru for me and still does. I used to be able to help him out when he needed it but since I have lost my eyesight he's mostly on the giving end.

My Wife died on an Easter Sunday + he called and then came to my home to ask me if I needed him to dig the grave.

If I needed something anytime day or night I could call on him to help. His just that kind of a guy. He always has been to me. He makes you a promise you can count on it.

R V Brown

R. V. Brown
613 Fuller Ave
Eliz., In. 37643

Bob Burleson
117 Anne Leigh Drive
Roan Mountain, TN 37687

To Whom It May Concern:

I have known Floyd Storie and his family for over 60 yrs. I also knew his mother and father well. They raised a large family and sacrificed very much to rear their eight children.

Over the years I have had many dealings with Floyd in business and other endeavors. Throughout our relationship I have never known a more straightforward honest man or one with such great integrity. I have never known a better businessman or one who has been more successful in his chosen field. He is widely respected for his business knowledge.

I know no one with a bigger heart for those who need help than Floyd. I could give many examples of the free gratis work Floyd has done for individuals and the churches in our area. Floyd never seeks public knowledge for his acts of kindness. Floyd's private mission to his neighbors is a truly magnificent obsession that has benefited countless numbers of people.

I will always acknowledge Floyd Storie as one of my closest and dearest friends.

Sincerely,

Robert O. Burleson (Bob)

I have known mr Floyd Storie about 30 years. I have always found him To be a very hard working man with a lot of Faith in The Lord. And his service To his and Surrounding Comunitys To People in need Sickas someone Losing There Home in a Fire, INness, Death in Family (an Esp. Elderly people who Cant help Themselves) Is Really great he has always Done Exactly what he [redacted] said And Treated me with Nothing but Respect.

Paul Dawson

OCTOBER 1, 2010

STUART DYER
173 MARION BRANCH RD.
ELIZABETHTON, TN. 37643
TELEPHONE # 423-543-4576

TO WHOM IT MAY CONCERN:

I HAVE KNOWN FLOYD SINCE WE WERE IN GRADE SCHOOL. HE WAS ALWAYS KIND AND HELPFUL TO EVERYONE.

HE HAS HIS HIRED HELP TO CUT WOOD AND HAY TO GIVE TO THE ELDERLY.

IN MY OPINION HE HAS BEEN AN OUTSTANDING MAN IN THE COMMUNITY.

THE DEALINGS THAT I HAVE HAD WITH HIM HE WAS ALWAYS HONEST AND TRUTHFUL. IF I WAS TO EVER NEED HELP HE WOULD BE THE MAN I WOULD GO TO.

SINCERELY,

Stuart Dyer

STUART DYER

First Tennessee Human Resource Agency

DALE FAIR
Executive Director

Burlington Park
2203 McKinley Road, Suite 210
Johnson City, Tennessee 37604

Office: 423-975-5005
Fax: 423-461-8228
E-Mail: dfair@fthra.org
Web: www.fthra.org

October 1, 2010

Floyd Storie Roofing Contractors, Inc.
Attn: Janet Denny
518 Hattie Avenue
Elizabethton, TN 3643

To Whom It May Concern:

My name is Dale Fair. I have lived almost my entire life (age 55) in Elizabethton. I was a Bank Officer at Citizens Bank for 21 years and the Carter County Mayor for four years.

I have known Floyd Storie for most of my adult life. My father, L.D. Fair, has worked with and for Mr. Storie on numerous occasions. His business, Floyd Storie Roofing Contractors, Inc. is very well respected and highly esteemed in the Tri-Cities area.

Mr. Storie has always been extremely kind and considerate to me and my family. I know him to have his community at heart because of his philanthropic giving to many worthwhile community efforts.

Personally, I respect Floyd Storie, realizing no one is perfect and we all make mistakes, however our life's worth must be evaluated in its totality. Mr. Storie deserves adequate consideration based on the many acts of goodness that he has so generously given.

Sincerely,

Dale Fair

DALE FAIR

October 1, 2010

To Whom It May Concern:

I have known Floyd Storie for more than 25 years. Over this period of time I have always found him to be a man of his word and a man of character. He is honest in his business dealings and always willing to help someone who needed assistance.

I remember one time when I served as chairman of the building & grounds committee at Grace Baptist Church – we had a problem with a leak around the church steeple. Floyd sent three of four of his men to the church and they did stress tests and worked there three of four days. I could not get him to send a bill to the church.

I am proud to call him my friend and hope he feels the same about me.

Allen Goodwin

Allen Goodwin
174 Lincoln Drive
Elizabethton, TN 37643

I have personally known Floyd Stone for the past 38 years. He was my first out-of-town foreman on roofing jobs. In fact, he personally hired and trained me and my brothers in the field of roofing. He took care of us financially and physically when we were out on jobs. He was my mentor and my friend. He taught me many things about the jobs but also about life. Always be on time for work; always give an honest days for the pay; never steal from the company or your fellow-workers. Later, when he started his own company, I was the first one he hired to be his foreman. I got the chance to show him what I had learned.

On the jobs we done, Floyd was fair to his customers and employees. He is honest and treated us as he would have liked to be treated. If we had a problem on the job or at home, he was the one we called to for help. He always came thru for us. I worked for and with him about 18 years. He taught me many things I still use today in my work and my home life. "Always do your best and never do people wrong" is the motto Floyd gave to us. He has been an inspiration to me for many years and I truly appreciate the time he spent on me. We call him "DAD" as a nickname, but in a sense, that is what he has been to us. He is a real friend in every way. I'm proud to know and call him my friend.

Dallas Darnell Albert Darnell

September 29, 2010

To Whom It May Concern:

This letter is written to attest to the good character and reputation of Mr. Floyd Storie, Elizabethton, Tennessee.

I have personally known Floyd for over 60 years and can state without fear of repudiation that he has been and remains currently a man of integrity who is a positive influence in his community and the surrounding area. Whenever there is a death or other tragedy, Floyd is generally the first person on the scene to bring food and ensure the needs of the family are looked after. Whenever he learns of a community need, he acts without delay. As an example, he is almost solely responsible for the care and upkeep of a family cemetery in a remote area of Beech Mountain, NC and orchestrates a yearly get together for ancestors of those buried there. On a personal note, Floyd installed a roof on my Father's house, charging only for materials used; he installed a roof on my wife's parent's house at no charge whatsoever. Floyd also sponsors and pays for several family-oriented outings each year. I recall well his pointing at the youngsters at these get togethers and stating, "We are making memories for them today".

I can think of no finer man in terms of care and concern for others. I am extremely proud to be able to call Floyd my friend.

Sincerely,

R. George Heaton
LTC, US Army (Retired)
1 N. Crossbow Lane
Johnson City, TN 37604

OCTOBER 1, 2010

TO WHOM IT MAY CONCERN:

I HAVE WORKED FOR FLOYD STORIE FOR EIGHTEEN YEARS. I PERFORM VARIOUS JOBS FOR HIM INCLUDING DIGGING GRAVES FOR PEOPLE WHO ARE NOT ABLE TO AFFORD TO HIRE SOMEONE, PUTTING UP HAY ON THE FARMS, TAKING CARE OF LIVESTOCK, LAWN AND GENERAL MAINTENANCE OF HIS PROPERTY, KEEPING FENCES BUILT AND REPAIRED, CUTTING WOOD FOR PEOPLE WHO CAN'T AFFORD TO BUY IT AND PEOPLE WHO ARE SICK, AND ANY OTHER ODD JOB HE NEEDS DONE.

IN THESE EIGHTEEN YEARS HE HAS ALWAYS PROVIDED WORK FOR ME AND TREATED ME FAIR. HE LENDS ME HIS EQUIPMENT WHEN I NEED IT FOR MYSELF. HE IS ONE OF THE BEST FRIENDS I HAVE EVER HAD AND I FEEL LIKE IF I ASK HIM FOR ANYTHING HE WILL HELP ME.

FLOYD HAS PAID MY WAGES FOR ME TO HELP MANY PEOPLE. I HAVE WORKED AT MANY CHURCHES FOR HIM WHERE HE DID NOT CHARGE THE CHURCH FOR THE WORK WE DID. A LOT OF PEOPLE HAVE DEPENDED AND BENEFITED FROM FLOYD.

Billy Slatten

John Huber
277 Dalewood RD.
Johnson City TN. 37601

9/28/2010

To whom it may Concern

It has been my good fortune to have known Mr. Floyd Storie for the past 14 years and I feel privileged to have him as a friend.

During that time Floyd has done numerous jobs for me through his business Floyd Storie Roofing, these many jobs have always been completed In a professional and timely manner, his expertise in this area is second to none.

He is and always has been a benefactor to the community in countless project for both Carter County and City of Elizabethton.

I have been the chairman of the Downtown Business Associations beatification committee for the last 9 years and I can tell you that all of the improvements that we have made to the Historic Downtown would not have been completed without his generosity of advice, manpower and equipment for all of which, Floyd would take no payment.

Floyd is without a doubt the hardest working man that I have ever met, his generosity to the community as well as individuals in need is never ending. His honesty and character are above reproach.

Respectfully,

John Huber
Chairman beatification committee
D.B.A.

CONSTRUCTION ASPHALT PAVING SERVICES, INC.

TELEPHONE: 926-8808 - 926-3945 - FAX: 929-8883 - E-MAIL -
capspaving@embarqmail.com
320 BILL GARLAND ROAD
UNICOI, TN 37697

September 28, 2010

TO WHOM IT MAY CONCERN:

I have known and been friends with Mr Floyd Storie, for the past 45 years. I have found Mr. Storie to be a honest businessman, as well as, a outstanding citizen. He has supported his community with his time and money.

Sincerely,

Billy R. Hyder
Construction Asphalt Paving Services

OCT 2010

TO MY FRIEND FLOYD STORIE

IT HAS BEEN MY GREAT
PRIVILEGE AND HONOR TO BE
KNOWN AS A FRIEND OF
FLOYD'S. HE IS A FINE MAN
AND GOOD BUSINESS MAN.
FLOYD [illegible] HE IS [illegible]
AND HAS [illegible] MOST
OF HIS LIFE. HE HAD NOTHING
GIVEN TO HIM BUT BECAME
A GREAT BUSINESSMAN WHO
IS LIKED BY MANY PEOPLE. ALL
[illegible]
FOR HIM. MAY HE CONTINUE
TO PROSPER IN HIS BUSINESS.
I WISH HIM THE BEST.

[illegible] KERLEY

September 29, 2010

To Whom It May Concern:

I have had the pleasure of knowing Floyd Storie for the past 20 years. During those years I have known Floyd in many capacities. He has been a person whom I have worked with as well as a personal friend.

Floyd is a very successful businessman in our community who is responsible for the employment of numerous tax paying citizens. He employs many people and I know personally he pays these employees not only for their time at work, but often helps both them and their families in times of need.

Mr. Floyd Storie is, in my humble opinion, a tremendous asset to our community.

Sincerely,

Mike McKinney 9/29/10

Mike McKinney

Johnny S. Range
205 Bunker Hill Rd.
Elizabethton, Tennessee
37643
Phone: (423) 542-5237

October 3, 2010

To Whom it May Conern,

Re: Mr. J. Floyd Storie

I have known Floyd Storie for approximately 35 years. To me he has been a man of his word.

Having been employed at Floyd Storie Roofing for the past 7 years as a Project Manager, he's been a good boss and a better friend.

Sincerely,

Johnny Range

Johnny S. Range

09-28-10

To Whom It May Concern

I am writing to testify to the character of my friend and business associate, Floyd Storie..

I have always know Floyd Storie, to be truthful and honest in his business transactions and in the community, which he has served so diligently and faithfully.

Sincerely,

Bill Shoun
Shoun Contruction
1062 Hwy. 321
Hampton, Tn. 37658
(423)895-0546

Heartland Fellowship
Pastor Marvin Slagle

211 Heartland Way
Elizabethton, TN 37643
Church Office: 423-543-7770

Mailing Address: PO Box 241, Hampton, TN 37658
Website: www.heartlandfc.org
E-mail: heartlandfc@charterinternet.com

Pastor: 423-542-4602

September 29, 2010

To Whom It May Concern:

This letter is a recommendation about Mr. Floyd Storie.

I became acquainted with Mr. Storie in the summer of 2007. Our church was constructing our new facility which is located across from Mr. Storie's residence and adjacent to his property.

Our relationship began very positive and has continued to be positive.

Mr. Storie has assisted our church in various ways and it has always been appreciated.

I know if I need his help, he will assist whenever possible.

Our relationship has always been edifying and there has never been a negative situation.

Sincerely,

Pastor Marvin Slagle

Pastor Marvin Slagle

JAMES L. STORIE
7953 HIGHWAY 19-E
TEL: 772-3350 *ROAN MOUNTAIN, TN. 37687* *CELL: 483-0635*

TO WHOM IT MAY CONCERN:

RE: JOSEPH FLOYD STORIE

I HAVE WORKED WITH FLOYD STORIE FOR THE PAST 25 YEARS AS AN ESTIMATOR FOR FLOYD STORIE ROOFING CONTRATORS, INC. IN ELIZABETHTON, TN.

DURING MY EMPLOYMENT WITH THIS COMPANY, FLOYD HAS WORKED LARGE CREWS OF MEN DOING WORK LOCAL AS WELL AS PERFORMING ROOFING JOBS IN THE STATES OF NORTH CAROLINA, VIRGINIA, SOUTH CAROLINA, NEW JERSEY AND GEORGIA IN ORDER TO PROVIDE WORK FOR HIS EMPLOYEES.

FLOYD HAS ALWAYS TOOK CARE OF THE MEN AND THEIR FAMILIES. AN EXAMPLE OF THIS BEING DURING SLOW DOWN TIMES HE ALLOWS THE MEN TO CUT FIREWOOD AND DO VARIOUS OTHER JOBS IN ORDER FOR THEM TO HAVE A WEEKLY PAYCHECK AND ALSO TO PROVIDE FIREWOOD FOR ELDERLY AND NEEDY PEOPLE AT NO CHARGE IN ORDER FOR THEM TO STAY WARM DURING THE WINTER.

FLOYD HAS HELPED MANY CHURCHES BY PROVIDING LABOR TO INSTALL SHINGLE ROOFS AT NO COST TO THEM AND SOME CHURCHES HE HAS PROVIDED THE MATERIAL AT NO COST TO THEM. HE HAS ALSO PROVIDED A HEATING AND AIR SYSTEM IN A CHURCH AT NO COST TO THEM. ON THE PLEASANT BEACH BAPTIST CHURCH IN ELIZABETHTON HE DEDUCTED $1,150.00 FROM THE BILL AS A DONATION TO THE CHURCH.

EACH YEAR AT CHRISTMAS FLOYD BUYS MANY HAMS AND I HELP HIM TO DELIVER THESE HAMS TO WIDOWS AND OTHER ELDERS IN THE COMMUNITY, AS WELL AS EMPLOYEES, TO ASSURE THEY WILL HAVE A GOOD CHRISTMAS DINNER. THIS HAS BEEN A PRACTICE OF HIS FOR MANY YEARS.

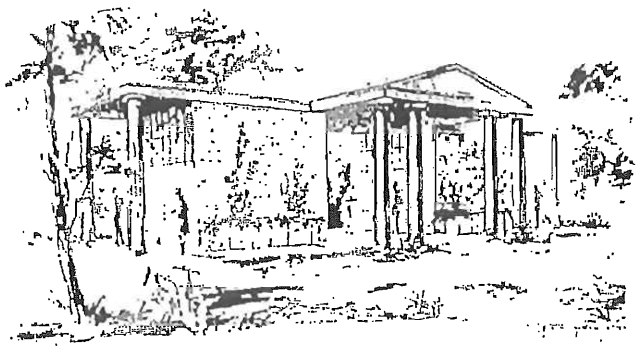
HE DOES NOT DO THIS FOR RECOGNITION AS HE RARELY IF EVER SPEAKS OF IT. HE DOES IT TO BENEFIT THE CARTER COUNTY COMMUNITY. IF IT IS TOLD IT IS FROM THE PERSONS OR ORGANIZATIONS HE HAS HELPED OUT.

FLOYD HAS ALWAYS EMPHASIZED QUALITY WORK WHETHER IT IS A BUSINESS OR HOME OWNER AND HAS TREATED PEOPLE FAIR AND HONEST AS HE IS A CARING PERSON AND GIVES CONSIDERATION TO THE PEOPLE HE IS DEALING WITH.

FLOYD HAS WORKED HARD FOR THE BENEFIT OF HIS BUSINESS, CARTER COUNTY AND THE CITY OF ELIZABETHTON. WHEN ASKED WHY HE DOESN'T RETIRE, AS HE HAS HEALTH ISSUES AND WILL CELEBRATE HIS 70TH BIRTHDAY OCTOBER 4TH, HE REPLIES " BUT WHAT WILL THE MEN DO"? IN THIS TIME OF A SLOW ECONOMY AND PEOPLE STRUGGLING TO FIND WORK HE WILL NOT DESERT HIS EMPLOYEES AND WITHOUT HIS YEARS OF EXPERTISE AND KNOWLEDE IT IS VERY DOUBTFUL THE COMPANY COULD SURVIVE.

SINCERELY,

JIM STORIE, ESTIMATOR
FLOYD STORIE ROOFING CONTRACTORS, INC.
PASTOR, HIGH POINT BAPTIST CHURCH, ROAN MTN, TN.



Happy Valley Memorial Park, Inc.

P.O. Box 1150
2708 Elizabethton Highway
Elizabethton, TN 37644
(423) 543-1051
"Serving the Living"
Website: www.happyvalleymemorial.com
E-mail: hvmpinc@charter.net

September 28, 2010

To Whom It May Concern:

This letter is in regards to Mr. Floyd Storie, my friend of many years.

Floyd's company, Floyd Storie Roofing Contractors, Inc., has done work for Happy Valley Memorial Park, Inc. and for me personally for many years. Floyd always gives 100% to his customers and does the job right. In addition to that Floyd is very kind and trustworthy. He always does what he is hired to do and stands behind his work.

I have always considered it a privilege to deal with Floyd Storie because he can be trusted and is an asset to the community.

Respectfully,

Bill Tetrick

Bill Tetrick
President

BT/rm

TO WHOM IT MAY CONCERN,

I HAVE KNOWN FLOYD STORIE SINCE I WAS A YOUNG GIRL. ACTUALLY FLOYD IS MY COUSIN. THERE IS SO MANY ACTS OF KINDNESS IT IS HARD TO PUT ON PAPER NOT ONLY FOR MYSELF AND MY HUSBAND JEFF BUT,THE MANY PEOPLE OF CARTER COUNTY AND SURROUNDING AREA. WHEN PEOPLE ARE IN NEED OF HELP FLOYD HAS ALWAYS BEEN THERE. HE HAS HELPED SO MANY THAT DIDN'T HAVE THE MEANS TO HELP THEMSELVES.

MY MOTHER HAS PASSED ON BUT,SHE AND FLOYD WERE VERY CLOSE AND THOUGHT HE WAS AWONDERFUL PERSON TO HER AND HIS FAMILY.HE IS A GREAT BUSINESS MAN IN THE COMMUNITY AND IT IS KNOWN BY SO MANY.YOU CAN GO TO HIS HOUSE ANY SUNDAY MORNING AND WHO EVER WANT'S CAN EAT BREAKFAST WITH HIM. I KNOW I HAVE DONE THIS MANY TIMES AND SO HAVE MANY PEOPLE.

HE HAS TRIED TO SERVE HIS COMMUNITY THE BEST HE CAN. HE LOVES CHILDREN AND, HAS GIVEN SO MUCH TO HELP THEM.I AM WRITING THIS LETTER HOPING THAT SOME CONSIDERATION WOULD BE GIVEN TO THIS MAN IN REGARDS TO HIS SENTENCING THAT HE IS A PERSON THAT IS HUMAN AS

ALL OF US ARE. THANK YOU FOR YOUR TIME IN READING THIS.

MANY REGARDS,

JEFF AND SHERRY UNDERWOOD

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

WENDI NICOLE GARRISON APPELLANT,	]]
VS.	] C.C.A. NO. E2007-02895-CCA-R3-CD] CARTER COUNTY CIRCUIT COURT
STATE OF TENNESSEE, APPELLEE	]]

BRIEF ON BEHALF OF APPELLANT,

WENDI NICOLE GARRISON

STACY L. STREET
BPR # 15680
HAMPTON & STREET
630 ELK AVENUE
ELIZABETHTON, TN 37643
423-543-6000

JAMES T. BOWMAN
BPR #000940
128 E. MARKET STREET, SUITE 1
JOHNSON CITY, TN 37604-5712
423-926-2022

ATTORNEYS FOR APPELLANT
WENDI NICOLE GARRISON

ORAL ARGUMENT REQUESTED

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MAY IT PLEASE THE COURT:

INTRODUCTION

This is an appeal of right as to the judgment entered by the Criminal Court for Carter County, Tennessee, First Judicial District, the Honorable Lynn W. Brown, Presiding.

This trial began on February 27, 2007 and lasted until March 1, 2007. At the conclusion of the trial, the jury found the defendant, Wendi Nicole Garrison, guilty of second-degree murder. Following a sentencing hearing on June 25, 2007, the trial court sentenced the defendant to sixteen (16) years in the Tennessee Department of Corrections.

In the interest of time and for the sake of brevity, the appellant will be referred to as the "defendant" or by her surname of "Garrison." The victim will be referred to as the "victim" or by his surname of "Perry." The State of Tennessee, the appellee, will be referred to as the "prosecution" or the "State."

The trial transcript is in multiple volumes, but is consecutively numbered, and the abbreviation "Vol." will indicate a reference to what will be referred to as the volume number, followed by the specific page number. The Technical Record will be referred to as "T.R." followed by the volume number ("Vol. I") and page ("P") number. The Sentencing Hearing will be referred to as "Vol. VIII" designated and specific page ("P") number. There is also contained a separate transcript of the beginnings of a miscellaneous day in the Criminal Court for Carter County, Tennessee conducted on March 2, 2007 for the purposes of the defendant's argument regarding the jury selection

error and will be referred to as Jury Absentee Hearing Transcript of March 2, 2007 will be referred to and designated as "Vol. VI" and specific page ("P") number. The Motion for New Trial will be referred to and designated as "Vol. VII" and specific page ("P") number.

ISSUES PRESENTED FOR REVIEW

The defendant, Wendi Nicole Garrison, submits the following issues presented for review:

1. The trial court committed reversible error in that the evidence is insufficient to support the verdict of guilty of Second Degree Murder.

2. The trial court committed plain error in failing to charge the lesser included offense of voluntary manslaughter even though the defendant did not request such an instruction.

3. The trial court committed reversible error when it declined to grant the defendant a new trial because the defendant was denied a jury comprised of a fair cross-section of the community.

STATEMENT OF THE CASE

Wendi Nicole Garrison was indicted on one (1) count of second-degree murder. The trial began on February 27, 2007 and lasted until March 1, 2007. At the conclusion of the evidence, the jury entered a verdict of guilty as to second-degree murder. The court conducted a sentencing hearing on June 25, 2007, and after review of enhancement factors and mitigation factors found the defendant acted under strong provocation, and, entered a sentence of sixteen (16) years to the Tennessee Department of Corrections. On August 9, 2007, the court conducted a hearing on the defendant's motion for a new trial and denied that motion.

This an appeal from the conviction entered against the defendant, Wendi Nicole Garrison.

STATEMENT OF THE FACTS

This case stems from the death of Joshua Perry from a single gunshot wound to the head from a 50 caliber muzzleloader during the early morning hours of March 25, 2005. On March 25, 2005, at approximately 6:10 a.m., Ms. Nora Davis, the next door neighbor of the defendant and Mr. Perry, was awakened by the doorbell ringing and as she answered the door in the dark, she saw the defendant, Wendi Garrison, crying on her porch stating that Josh was dead and that she had shot Josh. (Vol. II, p. 22.) After bringing the defendant into the home and attempting to calm her down, Ms. Davis calls 911 for Carter County, Tennessee. (Vol. II, p. 23.) For the next eleven (11) minutes, the conversation between the 911 dispatcher, Ms. Davis and Ms. Garrison is recorded while awaiting the arrival of the Carter County Sheriff's Department. The 911 tape of this conversation was filed as "Exhibit 1" in this case. (Vol. II, p. 26.)

During the recorded conversation, Ms. Davis is heard relaying information from the defendant to the 911 dispatcher. The defendant can be heard crying and screaming in the background and states at various times that Mr. Perry is dead and that she had pulled the trigger. Ms. Davis relates to the 911 dispatcher that it was an accident, that they had had a gun and that the victim, Mr. Perry, had told the defendant to pull the trigger and she did and it was loaded. The defendant then identifies herself as Wendi Garrison and states that the victim had told her that he was not going to let her go and that the victim had placed the gun to his head and had told her to pull the trigger. The defendant is then heard saying that the victim told her that she was not going to leave him and that he stood in front of her and said pull the trigger and she repeatedly stated I don't want to pull the trigger but that the gun went off and he is dead. The defendant acknowledged during the

tape that the parties had been drinking and that the victim would not let her leave and she repeatedly asked to leave and he stated the only way you are going to leave me is to kill me and he put the gun to his head and told her to pull the trigger. The defendant is heard crying and screaming that she loved the victim and that he is dead and that there is brain matter all throughout their house. The defendant then states that she does not even now where her car keys were and that he may have burnt her phone and keys in the fireplace because the victim would not let her leave the residence. The defendant then repeats over and over that he is dead, that he is dead, that he is dead. At the end of the 911 call, the officers of the Carter County Sheriff's Department can be heard walking into the residence of Ms. Davis and begin speaking with Ms. Garrison where she repeated that the parties were fighting and the victim would not let her leave the house and that the victim had gotten the muzzleloader and told her to pull the trigger. This 911 tape was played for the jury numerous times during the trial, during the examination of witnesses, during the closing arguments and was further listened to by the jury during their deliberation. (Vol. II, p. 28, 34.)

At the time of the incident, the defendant, Wendi Nicole Garrison, was thirty-two (32) years old and she and Mr. Perry had been living together as boyfriend and girlfriend at a rented residence in a remote area in the Stoney Creek community of Elizabethton, Tennessee. (Vol. III, p. 250.) The defendant and Mr. Perry had been dating for approximately eight (8) to nine (9) months and had lived together at various apartments and other residences during this period of time. (Vol. III, p. 232.) In August of 2004, some seven (7) months prior to the killing of Mr. Perry, the defendant and Mr. Perry had an altercation wherein the defendant was beaten by Mr. Perry in the bedroom of their

rented apartment. Mr. Perry choked the defendant and as she ran from the apartment Mr. Perry grabbed the defendant by the hair of the head and drug her on the ground and hit her head repeatedly on the ground. (Vol. III, p. 235-236.) The Johnson City, Tennessee Police Department was called and Mr. Perry was arrested and charged with domestic violence and the defendant then sought an order of protection against Mr. Perry. (Vol. III, p. 239.) Photographs were taken of the injuries of the defendant at that time. (Vol. III, p. 237.) Prior to the order of protection and Mr. Perry's assault case being heard in the Washington County, Tennessee General Sessions Court, the defendant dropped the order of protection against Mr. Perry and informed the District Attorney's Office that she wished to dismiss the assault case against Mr. Perry and did not show for the hearing. (Vol. III, p. 241.)

In August of 2004, the defendant and Mr. Perry resumed living together and decided to have a baby, despite the fact that Mr. Perry was still married and despite the fact of the previous domestic violence. (Vol. III, p. 243.) The defendant did become pregnant when the couple moved into the house in the remote area of Stoney Creek in Elizabethton, Tennessee in January of 2005. (Vol. III, p. 244.) In February of 2005, the defendant lost the baby which she was carrying while the couple were residing in their new rented residence. (Vol. III, p. 248.)

The defendant testified in her own behalf with regard to the events leading up to the death of Mr. Perry. The defendant testified that on the day prior to Mr. Perry's death, March 24, 2005, that she had taken the day off from work and that Mr. Perry had to work an abbreviated work schedule of 6:00 p.m. to 11:00 p.m. on this date. (Vol. III, p. 258.) After Mr. Perry left for work prior to 6:00 p.m., the defendant testified that she ran

errands, including going to the local Dollar Store to buy Mr. Perry an Easter basket and that Mr. Perry had sent her a text message stating that he would like to have some beer with their dinner that night and the defendant then purchased beer. (Vol. III, p. 260.) The defendant testified she arrived home at around 9:15 p.m. and anticipated Mr. Perry arriving at approximately 11:40 p.m. (Vol. III, p. 260.) The defendant testified that this was to be a special night as their schedules usually did not coincide and their plans were to spend the night having dinner and being with each other. The defendant testified that after cooking dinner, she took a shower, put clothes and makeup on as Mr. Perry usually only saw her in her pajamas and waited for Mr. Perry to arrive. (Vol. III, p. 261.) The defendant also built a fire and took photographs of the fire as Mr. Perry apparently did not believe that she was capable of doing so. (Vol. III, p. 262.) Further, the defendant cleaned the house in anticipation of their night together. During testimony concerning the building of the fire, the defendant identified a picture of the living room of the residence or depicting the scene at approximately 11:00 p.m. March 24, 2005 prior to Mr. Perry's arrival. (Vol. III, p. 263-265.) The significance of this testimony was that the photograph showed the weapon used in this case as being in the corner of the room in plain sight. (Vol. III, p.265.)

The defendant testified that Mr. Perry arrived home at approximately 11:40 p.m. and as he walked through the door he was carrying a six pack of pony beers and he was drinking one. (Vol. III, p. 266.) After watching music videos on the T.V. for some period of time, the defendant and Mr. Perry danced in front of the fireplace to a song and then decide around midnight to go to the local Wal-Mart to purchase movies to watch that night. (Vol. III, p. 267.) After traveling to the Wal-Mart, the parties purchased movies,

CD's and more beer and the defendant testified that they were having a great time with no problems or any fights on the drive down or back from their shopping spree. (Vol. III, p. 268.) They arrived back at their residence at approximately 2:00 a.m. on the morning of March 25, 2005, and after showering and changing clothes, Mr. Perry and the defendant began watching a movie that lasted until approximately 4:00 a.m. (Vol. III, p. 269.) The defendant testified that at some point during the movie, she and Mr. Perry began arguing about the subject matter of the movie. The defendant testified that when the movie was over everything was okay between the parties. (Vol. III, p. 270.)

At this point, as the defendant was going into the bedroom, Mr. Perry asked if she wanted to try to have another baby and the defendant told him that she did not want to talk about it. (Vol. III, p. 271.) The defendant testified that Mr. Perry then jumped at her, with his nose to her nose, and called her a f - ing bitch and said that it was all her fault that she had lost the baby. The defendant then stepped back and smacked him and took off running to the bedroom and crawled onto the bed as far against the wall as she could. (Vol. III, p. 271.) The defendant testified that Mr. Perry then came in and sat at the edge of the bed and asked her what she was doing and if they were going to make love. (Vol. III, p. 271.) The defendant said that she was not going to have sex with him after his comments. (Vol. III, p. 271.) Mr. Perry started calling her a liar for saying that they would make love earlier. (Vol. III, p. 271.) The defendant began running to the kitchen and Mr. Perry grabbed her by the hair pulled her down and she landed on her back. (Vol. III, p. 272.) The defendant testified that Mr. Perry grabbed her by the hair and starting banging her head against the floor. (Vol. III, p. 272.) The defendant was smacking and hitting Mr. Perry telling him that he had promised that he would never do this to her

again. (Vol. III, p. 272.) The defendant testified as she screamed for Mr. Perry to let her loose he kept banging her head against the floor as he had previously done in the prior domestic assault. (Vol. III, p. 272.) The defendant testified that she put her hands on his chest and attempted to push him away and that Mr. Perry took her hands and wrapped them around his neck asking her to kill him with her hands. (Vol. III, p. 272.) At this point the defendant pushed Mr. Perry off of her and ran toward the front door and grabbed her keys and opened the front door. Mr. Perry then grabbed the keys from her and grabbed her by the hair of the head and guided her into the living room. (Vol. III, p. 274.) As Mr. Perry turned, the defendant grabbed her cell phone as there was no phone line at the residence, and began to call 911. Mr. Perry grabbed the phone and threw it into the fireplace. (Vol. III, p. 274.)

At this point, the defendant testified that Mr. Perry calmed down somewhat and was not yelling and was no longer hitting her. (Vol. III, p. 276.) The defendant sat on the hearth of the fireplace with Mr. Perry sitting on the edge of the coffee table about one (1) foot from each other. (Vol. III, p. 276.) The defendant then began asking Mr. Perry to let her leave, that everything would be okay, at which point Mr. Perry told her that she was not leaving and would never be able to leave and that he was not going to let her leave. (Vol. III, p. 277.) At this point, Mr. Perry stood up, stepped over the leg of the defendant and picked up the muzzleloader located at the side of the fireplace. (Vol. III, p. 278.) Mr. Perry then walked toward the table at the bottom of the steps, looking for the caps for the muzzleloader and began screaming "where are my caps?" "Where are my f - ing caps?" (Vol. III, p. 279.) Mr. Perry began walking back and forth from bedroom to bedroom in

their home looking for the supplies to load the muzzleloader and in particular the fanny pack containing these items. (Vol. III, p. 280.)

As he went into the room where the fanny pack was located, the defendant testified she was screaming "what are your doing?" "What are you doing?" (Vol. III, p. 282.) When he did not answer, the defendant testified that she got up and started walking toward the door to leave. (Vol. III, p. 282.) At this point, Mr. Perry came to the doorway of the bedroom and the defendant saw him standing with the 50 caliber muzzleloader and the fanny pack in his hand and began walking toward her. The defendant states she immediately looked down at the ground so as not to make eye contact with Mr. Perry. (Vol. III, p. 284.) The defendant stated that he forced her to sit down on the loveseat and she looked away from Mr. Perry toward the windows behind the adjacent couch. The defendant felt something beside her leg and as she looked over, she realized that Mr. Perry had placed the butt of the gun against her leg. (Vol. III, p. 285.) The defendant testified as she sat on the loveseat, Mr. Perry was standing over her with the muzzleloader, with the barrel of the muzzleloader pressed against his forehead above his left eyebrow with the butt of the gun on the couch beside her in an upward position toward Mr. Perry. (Vol. III, p. 288-289.) As she looked at the gun, she realized that Mr. Perry had placed the gun against his forehead and was telling her to kill him. (Vol. III, p. 285.) The defendant testified that she told him that she did not want to and begged Mr. Perry to let her leave to which Mr. Perry replied, "no if you leave you will never come back." (Vol. III, p. 286.) The defendant then continued to try to talk to Mr. Perry however, she testified that all the while he was reaching for her hand telling her to pull the trigger. (Vol. III, p. 285.) The defendant testified that Mr. Perry grabbed her arm and

attempted to peel her fingers from a fist and place them on the trigger, all the while telling her to kill him. (Vol. III, p. 286.) The defendant testified that while they were struggling she turned and told him that she didn't want to kill him and the gun went off. (Vol. III, p. 286.) The defendant then testified during this time she was looking away toward the window and did not see the trigger pulled. (Vol. III, p. 292.)

The defendant testified that after the gun went off, she turned around to see what he was doing and he was lying on the ground. The defendant testified she didn't believe him and thought he was joking. (Vol. III, p. 293.) At this point, she began screaming "get up, get up, this is not funny anymore." (Vol. III, p. 293.) The defendant got up from the loveseat and testified she heard liquid running and thought that her dog was peeing on the floor. (Vol. III, p. 293.) At this point, she realized that it was blood dripping from Mr. Perry's head. (Vol. III, p. 293.) It was at this point that the defendant ran next door to the residence of Ms. Nora Davis and rang the doorbell leading up to the calling of 911. (Vol. III, p. 294.)

Following the arrival of the Carter County Sheriff's Department, the defendant was taken to the Carter County Jail where a gunshot residue kit was performed on her hands that was later found to be inconclusive. (Vol. II, p. 134.) The defendant was also taken to Sycamore Shoals Hospital wherein she was examined in the Emergency Room by Dr. Randall Lee Belt. (Vol. III, p. 167.) Dr. Belt examined Ms. Garrison for an injury to her right thumb and noted in the history taken from the defendant that she stated she had been assaulted. (Vol. III, p. 167.) The doctor also noted during his examination that she had bruising, a contusion and a sprain to the thumb and also had some bruising to her right forearm which she attributed to the assault by Mr. Perry. (Vol. III, p. 170.)

Special Agent Shannon Morton of Tennessee Bureau of Investigation testified that the defendant asked him to check Mr. Perry's hands for residue because she thought he helped pull the trigger. (Vol. II, p. 78.) The defendant said they were fighting and she thought that he may have helped pull the trigger. (Vol. II, p. 78.) Special Agent Shannon Morton of Tennessee Bureau of Investigation testified that the fanny pack that had muzzle loading supplies in it was clutched in Mr. Perry's right hand when his body was found. (Vol. II, p. 74.)

The victim's body was transported to the Quillen College of Medicine wherein an autopsy was performed by Dr. William F. McCormick, forensic pathologist. (Vol. III, p. 174.) Dr. McCormick opined that Mr. Perry died of a direct result of a massive gunshot wound to the head with massive destruction of the head and evulsion of the brain. (Vol. III, p. 184.) Dr. McCormick also opined that the wound was in a stellate pattern with radiating tears around it. (Vol. III, p. 177.) This was later shown by Tennessee Bureau of Investigation agents and the experts for the defense to be indicative of a contact or near contact wound. (Vol. IV, p. 417.) Dr. McCormick further found that Mr. Perry had very fresh scratches along the side of his neck which were consistent with fingernail scratches. (Vol. III, p. 179.) Dr. McCormick further found a very prominent bruise of the back of the knuckle of the little finger of the right hand of Mr. Perry and appeared to look like a bruise as from hitting any object, person, floor or table. (Vol. III, p. 179.)

Dr. McCormick further found that Mr. Perry had a heavy brownish black circle around the thumb and base of the first finger of the left hand which is consistent with soot from gunpowder residue. (Vol. III, p. 183.) Photographs from the autopsy also showed

burning or sooting from gunpowder residue on the left hand of the deceased which were admitted into evidence as "Exhibit 32." (Vol. III, p.180, 183.)

The state further called as an expert witness Special Agent James Russell Davis of Tennessee Bureau of Investigation showing that the gunshot residue kit performed on the defendant were found to be inconclusive. (Vol. II, p. 134.) Agent Davis further found that the gunshot residue kit performed on Mr. Perry were indicative of gunshot residue and one of the areas tested was the back of the left hand of Mr. Perry and all of this area met the criteria for having elements indicative gunshot residue. (Vol. II, p. 147.) This is consistent with the finding of Dr. McCormick regarding the staining of the victim's left hand. (Vol. III, p. 183.) Agent Davis further testified that he had conducted a controlled test firing of the weapon on December 19, 2006, some two (2) months prior to the trial in this matter. (Vol. II, p. 148.) The purpose of this test firing was to determine if the weapon would emit gunshot residue and be collected on the hands that were near the trigger or port of this 50 caliber muzzleloader. The results of the test firing show that the shooter of this type weapon would have gunshot residue on their hands sufficient to have fired the weapon. (Vol. II, p. 149.) Agent Davis acknowledged that the findings concerning the presences of gunshot residue under laboratory conditions were the same as the results from the gunshot residue tests performed on Mr. Perry. (Vol. II, p. 151.)

In addition to the defendant testifying, the defendant called two (2) expert witnesses, Dr. Paulette Sutton, a blood splatter expert, and Dr. Larry Miller, a firearms expert, for the purposes of examining the physical evidence at the scene and attempting to re-create the occurrences as shown from the evidence marked by the Carter County Sheriff's Department and the Tennessee Bureau of Investigation.

Dr. Paulette Sutton was admitted as an expert and leading authority on blood splatter evidence by the court. (Vol. IV, p. 439.) Dr. Sutton testified that after reviewing photographs and the entire evidence given to the defense in discovery, her expert opinion was that the gunshot went from the area of the loveseat toward the second floor stairway. (Vol. V, p. 466.) At the time of the gunshot, Mr. Perry would have been standing with his back toward the stairway and standing in front of the loveseat. (Vol. V, p. 466.) His left side would have been forward and the defendant would have been seated on the loveseat sitting most probably in an Indian or cross legged style position in front of Mr. Perry. (Vol. V, p. 466.) Mr. Perry's left side would have been forward and Ms. Garrison was within three (3) to four (4) feet of the site of the wound to the head. (Vol. V, p. 466.) His left arm would have been forwarded toward the defendant and was above or over top of the defendant. (Vol. V, p. 466.) Dr. Sutton's opinion is consistent with the version of the events given by the defendant.

Dr. Larry Miller was qualified as an expert in crime scene analysis and firearms ballistics testing. (Vol. IV, p. 386-387.) Dr. Miller opined that based upon all the physical evidence, including the ceiling pattern showing blood spatter, bullet fragments and sabots, the autopsy photographs, the measurements and the presence of gunpowder residue on Mr. Perry's hands, the only plausible reconstruction would be that the muzzle of the gun was in contact to the forehead of Mr. Perry with his left hand down near the vent port and the trigger area of the rifle when it was discharged. (Vol. IV, p. 417.) Mr. Perry's head would have been over at an angle, over the barrel of the rifle in order to produce the blast pattern as shown from the physical evidence. (Vol. IV, p. 417.) Dr. Miller testified that the pattern of the shot from a 50 caliber muzzleloader and the

location of the brain matter and other debris scattered throughout the walls and ceilings of the house were consistent with the defendant's description of the occurrence. (Vol. IV, p. 417.)

The importance of the expert testimony is noted by the court in conjunction with the defendant's testimony. The court finds at the sentencing hearing that the testimony of the expert witnesses called by the defendant was uncontroverted and undisputed as accurately describing the events leading up to the point in which time the trigger was pulled on the firearm. (Vol. VIII, p. 61.) As the court found, the evidence is undisputed that Mr. Perry is the one that got the weapon, brought the weapon to the position that it was in at the time of the firing, loaded the weapon and told the defendant to pull the trigger. (Vol. VIII, p. 30.) While the defendant appeared to give inconsistent statements concerning matters not relevant to the facts of this night upon cross-examination, the finding by the court stands that the physical evidence is uncontroverted as accurately describing the events leading up to the point and time in which the trigger was pulled. (Vol. VIII, p. 30 & p. 61.)

The state argued throughout the case that the 911 tape was the best evidence in the case and that it established that this was a knowing killing, justifying second degree murder. The defendant argued throughout the case that the victim, Mr. Perry, began the altercation leading up to the point that he got the gun, loaded the weapon, brought the weapon to the couch and told the defendant to pull the trigger but that she did not voluntarily pull the trigger. The state then argued that she in fact was the one that pulled the trigger. By its verdict it appears that the jury did not believe the defendant as to the fact that she did not pull the trigger.

The defendant submits the following facts concerning the trial and subsequent hearings as a basis for the arguments of this appeal. During the jury selection process, for the purposes of this brief, approximately twenty (20) names were called by the court as jurors that did not respond when called. (Vol. II, p. 1-12.) The court had the clerk make a specific list of all names not answering the call for jury duty for the purposes of sending a letter regarding their failure to appear. (Vol. I, p. 10.) (Vol. II, p. 3.)(Vol. V, p. 536.) Counsel for the defendant made no objection at that time as they were unaware of any problem with the fact that the jurors did not attend the trial. The day following the conclusion of the trial in this matter, during a miscellaneous day of the court held on March 2, 2007, counsel for the defendant was present in the courtroom when it was learned that the clerk of the court had improperly left a wrong message on the recording for which the jurors were required to call in to determine if their presence was necessary for this defendant's trial. The court found that the clerk had improperly left the message that their services was not needed therefore at least twenty (20) prospective jurors that were called in this matter failed to appear due to the actions of the Circuit Court Clerk's Office. (Vol. VI, p. 1-11.) As the court noted in closing comments following the jury's verdict, the judge told the jury that he had written a letter to all twenty (20) jurors that did not show up and that is was unconscionable to him that people did not show up for jury duty and that in not showing up "some of you all wouldn't be in the box if some of them had showed up. That's the bottom line." (Vol. V, p. 536.)

With regard to the jury instructions provided by the court, counsel would point out that there were no pre-trial discussions regarding the proposed jury instructions. On the third day of the three day trial, after the state and defense had delivered their closing

arguments to the jury, the court made one brief comment regarding the jury instructions. The court stated "I am going to charge second degree murder, reckless homicide, criminal negligent homicide, followed by circumstantial evidence, expert witnesses and standard opening and closing instructions." (Vol. V, p. 504.) There was no further discussion between counsel or the court regarding the homicide charges or the fact that the judge was not going to charge voluntary manslaughter. Instead, the record reflects that no mention was made of the lesser included offense of voluntary manslaughter. The record reflects that the court immediately then began discussions with counsel for the defendant regarding a handwritten instruction concerning another issue that arisen during closing arguments and no further mention was made by the court or counsel concerning the lesser included offenses, including the lack of a charge for voluntary manslaughter. (Vol 4, p. 504-505.) The defendant once again took the stand at the Motion for New Trial and testified that she did not make a tactical decision concerning the lesser included offenses of second degree murder nor did she make any tactical decision regarding the fact that the judge did not charge voluntary manslaughter. (Vol. VII, p.21.) The defendant further stated that she did not at anytime intentionally waive her right to have the jury consider all forms of homicide raised by the evidence. (Vol. VII, p. 21.)

The court conducted a Sentencing Hearing in this matter on June 25, 2007. The court noted that the defendant properly executed a Waiver of Ex-Post Facto Protections allowing her to be sentenced under the new sentencing structure that went into effect June 7, 2005, which allowed for the presumptive sentence to be the minimum in the range. (Vol. VIII, p. 6.) In this case, the court properly found that the defendant was a Range I standard offender with a minimum sentence beginning at fifteen (15) years with the

maximum being twenty-five (25) years. (Vol. VIII, p. 6.) The court, after hearing arguments and once again listening to the 911 tape, made its findings of fact and conclusions of law regarding the sentence of the defendant. The court notes that after once again reviewing the tape, the defendant is terribly emotional and sobbing and that she appears to immediately regret what she had done. (Vol. VIII, p. 61.) The court also finds that the defendant stated over and over that Mr. Perry told the defendant that she was not going to leave him. (Vol. VIII, p. 62.) The court further noted that the parties had been drinking and that Mr. Perry would not allow the defendant to leave the residence, although the court found that Ms. Garrison did have that option at some point early in the evening. (Vol. VIII, p. 62.) The court then finds that the testimony, "all in all, is that this was a relationship bent on destruction and that theirs was a relationship from hell." (Vol. VIII, p. 62.) The court states that it was bent on destruction and both of them kept going back to it. The court noted the testimony at trial involving the prior domestic assault and the fact that the defendant went back to the victim, Mr. Perry. (Vol. VIII, p. 63.) The court further noted that the defendant stated that Mr. Perry had put the gun to his head and this was confirmed by the physical evidence and that it was in fact a contact wound with the barrel of the gun against the forehead of Mr. Perry. (Vol. VIII, p. 63.) The court then notes that Mr. Perry had taken the defendant's car keys and had burnt her cell phone and keys in the fireplace and that it appears that the defendant was being restrained by Mr. Perry for whatever reason. The court notes that the remains of the cell phone was found in the fireplace and that the physical evidence is something that can not be changed. (Vol. VIII, p. 64.)

In finding the specific mitigating factors, the court again noted that the defendant believed that she was being held in the house and had made the statement about her car keys and not knowing where they are. (Vol. VIII, p. 64.) The court further noted that the cell phone is destroyed and there must have been a terrible argument although the defendant, in the court's opinion, could have walked away from it at some time in the evening but she didn't. The court then notes very importantly that the defendant acted under strong provocation. (Vol. VIII, p. 68.) The court states that this is one mitigating factor that the court must consider and "it's there." (Vol. VIII, p. 68.) The court says that the strong provocation is there and part of that provocation is apparently Mr. Perry and the court finds he said "pull the trigger." (Vol. VIII, p. 68.) The court then notes that it appears that Mr. Perry acted with some sort of death wish and that these people should have never been together. (Vol. VIII, p. 68.) The court then sentenced the defendant to a term of sixteen (16) years in the Tennessee Department of Corrections. (Vol. VIII, p. 71.)

The court heard the Motion for New Trial on August 9, 2007. The defendant raised, among other issues, the sufficiency of the evidence to sustain a conviction for second degree murder as well as the court's failure to instruct the jury with a lesser included offense of voluntary manslaughter. (Vol. I, p. 39-41.) (Vol. VII, p. 4.) The court once again found that the defendant acted under strong provocation. (Vol. VII, p. 4.) The court noted that "although she was certainly provoked, the adequate provocation goes on." "It's defined as provocation that would make a reasonable person act in an unreasonable or irrational manner." "And the court's finding did not come nearly - - did not rise nearly to that point." (Vol. VII, p. 5.) The court then found that the defendant did not say anything about provocation other than - - "that she had been in a confrontation,

that her cell phone had been thrown into the fireplace, and there certainly was evidence to support that, and that he wouldn't let her leave, at least took her car keys." (Vol. VII, p. 5.) The court then said that it appeared that she could have walked away and used better judgment. (Vol. VII, p. 5.) As to the sufficiency of evidence argument, the court found that although the provocation the court found benefited the defendant in mitigating her sentence, it did not rise to the level that the court, either as a thirteenth (13^{th}) juror or on Motion for Judgment for Acquittal, could find that a reasonable, rational finder fact could not find beyond a reasonable doubt that she is guilty of second degree murder. The court then respectfully denied this ground.

The defendant then argued that the court erred in failing to instruct the jury of the lesser included offense of voluntary manslaughter, especially in light of the court's finding that there was provocation. The defendant acknowledged that a written request for the charge of voluntary manslaughter had not been filed by the defendant. (Vol. VII, p. 24.) The court then made specific findings that the court had held pre-trial conferences and had started discussing jury instructions including lesser included offenses and that it should be on the record. The defendant would point out that the only discussion previously been discussed as occurring following closing arguments. (Vol. V, p. 504.) The court then found that the defense in this case was not voluntary manslaughter and that that defense was contrary to everything that the defendant was trying to do in this case. (Vol. VII, p. 25.) The court noted that it is the court's obligation to instruct all lesser included offenses. But the court made a specific finding that on the proof in this case, a reasonable, rational finder of fact could not have found defendant guilty of voluntary manslaughter because the element of heat of passion based upon adequate

provocation, that provocation being such that it would cause a reasonable person to act in an irrational manner." (Vol. VII, p. 26.) The court then went to find specifically that the court would not have given the charge had the defendant requested it because it's not there. (Vol. VII, p. 27.) The court concluded by saying that the Motion for New Trial based upon the failure to charge a lesser included offense of voluntary manslaughter is denied based on the ground that "you all didn't ask for it" and secondly "she wasn't entitled to it." (Vol. VII, p. 28.)

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY OF SECOND DEGREE MURDER.

The defendant submits that the court committed error in that the evidence is insufficient to support the verdict of guilty of second degree murder. The standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The appellate court does not reweigh the evidence, but presume that the jury has resolved all conflicts in the testimony and drawn all rational inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn.1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978).

The defendant was convicted of second degree murder. The factual situation leading up to the fatal shooting is not disputed. Ultimately, the disputed issue was whether the defendant pulled the trigger on the black-powder rifle. The defendant testified at trial that she did not voluntarily pull the trigger. On the 911 call immediately following the shooting the defendant stated that she did pull the trigger. The jury's verdict resolved that issue against the defendant. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn.1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978).

In order to convict the defendant of second degree murder the State was required to prove beyond a reasonable doubt that the defendant (1) unlawfully killed the alleged victim, and (2) that the defendant acted knowingly or intentionally. (Vol. V, p. 516.)

Knowingly means that a person acts with an awareness that her conduct is reasonably certain to cause the death of the alleged victim. (Vol. V, p. 516.) The element of knowingly is satisfied if the evidence establishes that the defendant acted intentionally. (T.C.A. § 39-11-106.)

The defendant was also charged with the lesser included offense of reckless homicide. In order to convict the defendant of reckless homicide the State was required to prove beyond a reasonable doubt that the defendant (1) unlawfully killed the alleged victim, and (2) that the defendant acted recklessly. (Vol. V, p. 517.) A person acts recklessly when the person is aware of, but consciously disregards a substantial risk that the alleged victim will be killed.

The Court did not charge the lesser included offense of voluntary manslaughter. That issue is presented separately in Argument II of this argument.

Given the facts of this case, the evidence is insufficient to prove that the defendant acted knowingly. The evidence taken in the light most favorable to the State could prove only a reckless killing.

> "Recklessness is a hybrid concept which resembles both negligence and intent, yet which is distinct from both and can be reduced to neither. "A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result."(citation omitted) Although the reckless actor intends to act or not to act, the reckless actor lacks the "conscious objective or desire" to engage in harmful conduct or to cause a harmful result. (citation omitted) ("[R]ecklessness and negligence are incompatible with desire or intention."); Dobbs § 147, at 351 (The reckless actor "does not intentionally harm another, but he intentionally or consciously runs a very serious risk with no good reason to do so.")." Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22 (Tenn.,2005).

At trial, Ms Garrison gave a detailed account of the events leading up to the shooting. This recitation is fully set out in the Statement of Facts. Essentially, the only

fact in dispute was whether Ms Garrison pulled the trigger or whether Mr. Perry did.

While it is established by the jury verdict that the defendant intentionally or knowingly pulled the trigger, that does not address the mental element of knowingly, *i.e.*, acting with an awareness that her conduct is reasonably certain to cause the death of the alleged victim. On the other hand that same conduct could certainly constitute recklessness, *i.e.*, acting with an awareness of, but consciously disregarding a substantial risk that the alleged victim will be killed. The uncontroverted evidence is that at the moment that the weapon was fired the victim and the defendant were engaged in a struggle wherein the victim was urging the defendant to pull the trigger. The defendant did not know exactly where the end of the barrel was pointed immediately before and at the moment the weapon discharged. (Vol. III, 292.) She testified that she did not know if the gun was loaded. (Vol. III, p. 292.) Immediately afterward she did not even realize that he was injured and thought he was joking. (Vol. III, p. 293.) She could not know, therefore, that her conduct was reasonably certain to cause the death of the victim. On the other hand, such conduct certainly amounts to recklessness.

> "Shooting a gun in a room with two persons present and failing to ensure that it is pointed in a safe direction are substantial and unjustifiable risks that death will occur. The defendant was aware of the risk of death because he first threw another gun onto the couch, scaring Mr. Batson who was sitting there, and then showed him that the gun was empty. The defendant then jumped up and pulled out another gun, shooting the fatal blow to the victim. Although the defendant may not have intended to hurt the victim, he deliberately used eight to fifteen pounds of pressure to pull the trigger. He consciously disregarded the risks of hurting or killing one of the other persons in the room. Shooting a gun in a room with occupants is a gross deviation from the standard of care that an ordinary person would exercise. Under these circumstances, we conclude that a rational juror could have found the defendant guilty of reckless homicide beyond a reasonable doubt." State v. Braden, Not Reported in S.W.2d, 1998 WL 321947, Tenn.Crim.App., June 19, 1998.

It is not here subject to dispute that Ms Garrison intended to pull the trigger on the rifle, but she did so under circumstances so unusual that it belies any conscious objective or desire to engage in harmful conduct or to cause a harmful result, though certainly those same unusual circumstances demonstrate that she ran a very serious risk with no good reason to do so.

On appeal, all conflicts in the testimony are resolved in favor of the State, but there is no contradictory testimony as to this. While she was aware that Mr. Perry was attempting to get her to pull the trigger, her undisputed testimony is that she was not looking at him at the moment of discharge. Under such circumstances there is insufficient evidence upon which a jury could conclude that she acted knowingly. (Knowingly means that a person acts with an awareness that her conduct is reasonably certain to cause the death of the alleged victim. (Vol. V, p. 516.)

The case of State v. Baggett, 836 S.W.2d 593 (Tenn.Cr.App.,1992) illustrates the extreme limit of reckless behavior.

> "In this case, the substantial and unjustifiable risk caused by the unconscious victim being placed on the roadway at night was the danger of the victim being struck by a passing car. Obviously, the defendant was aware of, but consciously disregarded, this risk in such a fashion as to constitute a gross deviation from the standard of care that an ordinary person would have exercised. Indeed, the defendant's conduct could easily sustain a determination that his conduct was intentional and knowing, as well. *See* T.C.A. § 39-11-106(a)(18) and (20). Thus, the very event which the defendant contends was an independent, intervening cause was an event of which the defendant would be aware would constitute a substantial and unjustifiable risk of, and would result in, serious bodily injury to the victim. The danger caused by the approaching car was not created by a new and independent force, but was the very danger created by the defendant's placing the victim on the roadway. The defendant's conduct was a proximate cause of the victim's serious bodily injury so as to justify a conviction for aggravated assault."

The Court noted that Baggett's conduct could have sustained a determination that his conduct was intentional or knowing. This is contrasted to the conduct of Ms Garrison wherein, in a highly charged emotional situation, she formed the intention to pull the trigger and did so within what can only be described as a moment and without knowledge as to exactly where the muzzle of the weapon is pointed.

Under such circumstances no rational trier of fact could conclude that she acted knowingly, therefore, the evidence is insufficient to support her conviction of second degree murder.

II. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO CHARGE THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER EVEN THOUGH THE DEFENDANT DID NOT REQUEST SUCH AN INSTRUCTION.

The defendant would submit that trial court committed plain error in failing to charge the lesser included offense of voluntary manslaughter even though the defendant did not request such an instruction. The defendant proffered as her defense that she did not voluntarily pull the trigger of the muzzle-loader rifle, hence, she did not kill Mr. Perry. She testified that she did not want to kill Mr. Perry. (Vol. III, p. 286.) It is axiomatic, therefore, from the defendant's standpoint, that she did not kill him while in a state of passion produced by adequate provocation.

It is the obligation of the Court to charge all lesser-included offenses raised by the evidence, whether such defense is advanced by the defendant or not.

> Irrespective of section 40-18-110, a defendant has a constitutional right to a correct and complete charge of the law to ensure that he receives a fair trial. State v. Teel, 793 S.W.2d 236, 249 (Tenn.1990). This right encompasses the right to have a jury instructed on all lesser-included offenses supported by the evidence. State v. Page, 184 S.W.3d 223 @ 229 (Tenn. 2006).

In recognition of this obligation, the Court informed the parties that the Court would charge the lesser-included offenses of reckless homicide and criminal negligent homicide. (Vol. V, p. 504.) The record, at that point, reflects that there was no further discussion concerning lesser-included offenses. Indeed, the Court and parties immediately began discussing another issue.

After the defendant's conviction for second degree murder, at the sentencing hearing, the Court found as a mitigating factor that the defendant acted under "strong provocation". The defendant asserts that the sentencing hearing was the first occasion in

the entire trial that anyone, the defense, the prosecution, or the Court had ever used the word provocation. The Court even made the observation (at the motion for new trial hearing) that the defendant never said anything about provocation except,

> ". . . that she had been in a confrontation, that her cell phone had been thrown in the fireplace, and there certainly was evidence to support that, and that he wouldn't let her leave, at least took her keys."

Once the Court made a finding of fact that "strong provocation" existed, the defendant alleged, in her Motion For New Trial, plain error in the Court's failure to charge voluntary manslaughter.

Failure of the Court to charge a lesser-included offense may not be raised in a motion for new trial or on appeal unless such failure to charge amounts to plain error. T.C.A. § 40-18-110 and State v Page, 184 S.W.3d 223 @ 230 (Tenn. 2006). In order to establish plain error, the defendant must satisfy five factors:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

(d) the accused [must not have waived] the issue for tactical reasons;

(e) consideration of the error [must be] "necessary to do substantial justice."

The defendant asserts that all five factors have been established in this case.

This Court has the entire record of this case, thereby establishing factor (a).

A defendant has a constitutional right to a correct and complete charge of the law to ensure that he receives a fair trial. This right encompasses the right to have a jury instructed on all lesser-included offenses supported by the evidence. State v. Teel, 793

S.W.2d 236, 249 (Tenn.1990); State v. Page, 184 S.W.3d 223 @ 229 (Tenn. 2006). Factor (b) is therefore established.

The Trial Court found, independently, that the defendant acted under strong provocation. The defendant was convicted of second degree murder, a knowing killing. T.C.A. § 39-13-210. Voluntary manslaughter is, likewise, a knowing killing. T.C.A. § 39-13-211. The distinction between the two is adequate provocation. If a factual issue of provocation is presented by the evidence, the matter must be submitted to the jury for resolution.

> "The defendant's version of events, even if uncorroborated, presented a factual issue that could only be resolved by the jury. The overriding principle is that if there is any evidence in the record from which the jury could have concluded that the lesser included offense was committed, there must be an instruction for the lesser offense." [citation omitted] Ruling otherwise effectively deprived the defendant of a jury trial on the lesser included offense. Whether there was adequate evidence of provocation by Tate to warrant consideration of voluntary manslaughter should have been submitted to the jury." State v. Summerall, 926 S.W.2d 272 @ 279 (Tenn. Crim. App. 1995.)

> "However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so he invades the province of the jury, whose peculiar duty it is to ascertain the grade of the offense. However clear it may be, the Court should never decide the facts, but must leave them unembarrassed to the jury." Poole v State, 61 Tenn. 228 (1872).

Lesser-included offense instructions must be given if "any evidence exists that reasonable minds could accept as to the lesser-included offense" and if this evidence, viewed in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence, "is legally sufficient to support a conviction for the lesser-included offense." State v. Burns, 6 S.W.3d 453, 469 (Tenn:1999).

The foregoing cases obviously predate the amendment to T.C.A. § 40-18-110, but they address the obligation of the trial court to charge lesser included offenses if there is any evidence that might support a verdict as to that offense. In the present case the trial court found that the defendant acted under strong provocation, but then, contrary to foregoing case law, proceeded to make a judgment that such provocation was inadequate to justify a charge as to voluntary manslaughter. (Vol. VII, p.26.) The trial court even went so far as to state that even if the charge had been requested the court would not have given it because "she [the defendant] wasn't entitled to it." (Vol. VII, p. 27, 28.)

Factor (c), a substantial right of the accused must have been adversely affected, is therefore established

Factor (d), the accused [must not have waived] the issue for tactical reasons, is established by the following considerations.

The defendant testified at the Motion for New Trial hearing that she did not make any tactical decision regarding the fact that the judge did not charge voluntary manslaughter, nor did she intentionally waive her right to have the jury consider all forms of homicide raised by the evidence. (Vol. VII, p. 21.) Her testimony in that regard is supported by the transcript which reflects that when the Court announced what the Court was going to charge there was no discussion concerning the omission of voluntary manslaughter, nor was there any break in the proceedings wherein the defendant would have had an opportunity to confer with counsel concerning the issue. The defendant notes that the Court stated that in earlier pre-trial conferences jury instructions, including lesser included offenses, had been discussed. (Vol. VII, p. 25.) The defendant asserts that, to her knowledge, this Court has all relevant portions of the record necessary for a

proper review of this issue, but if other relevant records exist it would be proper for this Court to allow the State to supplement the record.

A review of the defense presented supports the proposition that the defendant made no tactical decision to waive her right to this charge. Her defense was that she did not shoot Mr. Perry: not knowingly; not knowingly, but with adequate provocation; not recklessly; not negligently. She never testified that he "provoked" her into shooting him. Arguably, a defendant who asserted that she did not shoot the deceased, as a tactical matter, might urge the Court that there were no lesser included offenses, thus presenting the jury with a stark choice of "guilty" or "not guilty", but that obviously was not this defendant's approach. The Court stated the lesser included offenses that the Court proposed to charge and the defendant acceded with virtually no comment. A review of the entire transcript of the trial reveals that the first time the word "provocation" was ever used was in the sentencing hearing. (Vol. VIII, p. 46.) There, the Court found as a mitigating factor that the defendant acted under strong provocation. (Vol. VIII, p. 67-68.) When presented with a finding of fact by the Court that the defendant acted under strong provocation, she was confronted with the obvious conclusion that the Court should have charged voluntary manslaughter.

All of the foregoing establishes the last factor: consideration of the error [must be] "necessary to do substantial justice."

A trial court's erroneous failure to instruct on voluntary manslaughter is subject to harmless error analysis. State v. Williams, 977 S.W.2d 101 (Tenn., 1998)

When determining whether an erroneous failure to instruct on a lesser-included offense requires reversal, the proper inquiry for an appellate court is whether the error is

harmless beyond a reasonable doubt. State v. Ely, 48 S.W.3d 710 (Tenn., 2001)

The defendant submits that the requirement of this factor is satisfied if this Court finds that failure to give the lesser-included offense instruction would have been error had it been requested and that such error was not harmless. This concept is embodied in Rule 52, Tennessee Rules of Criminal Procedure:

> (a) Harmless Error. No judgment of conviction shall be reversed on appeal except for errors which affirmatively appear to have affected the result of the trial on the merits.
>
> (b) Plain Error. An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do justice.

and in Rule 36(b), Tennessee Rules of Appellate Procedure:

> (b) Effect of Error. A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

It would not have been harmless error if the trial court had refused to instruct the jury as to voluntary manslaughter if the defendant had requested the instruction.

In State v. Williams, 977 S.W.2d 101 (Tenn., 1998) the jury was instructed not only on the charged offense of premeditated first degree murder, but also on the lesser-included offenses of second degree murder and reckless homicide. The error in failing to charge voluntary manslaughter was deemed harmless beyond a reasonable doubt because by rejecting the lesser offense of second degree murder, the jury clearly demonstrated its disinclination to convict on any lesser offenses, including voluntary manslaughter.

In State v. Ely, 48 S.W.3d 710 (Tenn., 2001), however, the jury was given no option to convict of a lesser offense than felony murder, even though the evidence clearly was sufficient to support a conviction for second degree murder, reckless homicide, or criminally negligent homicide.

The Court said, "Under these circumstances, we cannot say the failure to instruct on the lesser-included offenses was harmless beyond a reasonable doubt." State v. Ely, 48 S.W.3d 710 @727 (Tenn., 2001)

T.C.A. § 40-18-110(a) . . .However, the trial judge shall not instruct the jury as to any lesser included offense unless the judge determines that the record contains any evidence which reasonable minds could accept as to the lesser included offense. In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of evidence. The trial judge shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

Whether an instruction is required depends upon the evidence, not the theory of the defense or the State. State v. Robinson, 146 S.W.3d 469 (Tenn., 2004).

In this case, leading up to the shooting and immediately prior thereto, the defendant testified that Mr. Perry had called her a liar (Vol. III, p. 271), grabbed her by the hair and pulled her down and started banging her head against the floor (Vol. III, p. 272), prevented her from leaving the house (Vol. III, p. 274, 277, 286), and threw her cell phone into the fireplace and brought the weapon to the place of the firing. (Vol. III, pg. 284.)

In finding strong provocation, the trial judge clearly credited some, if not all, of this testimony, but apparently made the judgment that this evidence was not legally sufficient to support a conviction for the lesser included offense of voluntary manslaughter. The case law does not support that position. State v. Good, 956 S.W.2d 521 (Tenn. Crim. App., 1997), defendant who shot individual trying to get his cocaine from him guilty of voluntary manslaughter; State v Wilson, 556 S.W.2d 232 (Tenn., 1977), defendant and deceased engaged in fist fight in bar and then defendant struck victim several times with club killing him; Hackney v. State, 551 S.W.2d 335 (Tenn. Crim. App., 1977), victim and defendant engaged in ongoing argument "which may be taken as a motive for Hackney's behavior."

One might characterize the "fist fight in a bar that turns deadly" as a classic voluntary manslaughter case. Certainly, for the purpose of determining whether a voluntary manslaughter charge is justified in the present case, viewing "the evidence liberally in the light most favorable to the existence of the lesser included offense" (T.C.A. § 40-18-110(a)) the circumstances of this case can be no less compelling.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DECLINED TO GRANT THE DEFENDANT A NEW TRIAL BECAUSE THE DEFENDANT WAS DENIED A JURY COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY.

The defendant submits the court committed reversible error when it declined to grant the defendant a new trial because the defendant was denied a jury comprised of a fair cross-section of the community. In the course of jury selection approximately twenty juror failed to answer when selected by the Court. (Vol. II, p. 1-12.) Unbeknownst to the Court and parties, the clerk of the court had erroneously instructed those jurors to not report for jury service on the day this case was scheduled. (Vol. VI, p. 1-11.) This fact was not made known to the Court or parties until after the trial had concluded. The defendant does not allege that this was anything other than an honest mistake, nevertheless, it had an effect on the proceedings, as was noted by the trial judge in a remark that he made to the jurors after they reported their verdict.

He said, "Some of you wouldn't be in the box if some of them had showed up. That's the bottom line." (Vol. V, p. 536.)

The Sixth Amendment, United States Constitution, (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed), and Article 1, § 6, Tennessee Constitution, ("That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."), guarantee the right to a jury trial in criminal cases. The jury must be an impartial jury from the community. Members of the community may not be excluded from jury service for religious, political, racial, ethnic, gender, or any other impermissible discriminatory

reason. A jury must be comprised of a fair cross-section of the community. The basic protection of a right to trial by jury includes the right to a jury representing a fair-cross section of the community. Taylor v. Louisiana, 419 U.S. 522, 526-31, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). U.S. v. Traficant, C.A.6 (Ohio) 2004, 368 F.3d 646, certiorari denied 125 S.Ct. 920, 543 U.S. 1055, 160 L.Ed.2d 779.

For defendant to establish prima facie violation of fair cross-section requirement, defendant must show that group alleged to be excluded from jury pool is distinctive group in community; that representation of this group in venires is not fair and reasonable in relation to number of such persons in community; and that this underrepresentation is due to systematic exclusions of group in jury selection process; once defendant has made prima facie case, government bears burden of justifying infringement by showing that attainment of fair cross-section is incompatible with significant governmental interest. U.S. v. Barry, C.A.7 (Wis.) 1995, 71 F.3d 1269. The foregoing statement is the criteria for establishing a violation of the fair cross-section requirement.

No argument can be made in this case that any particular identifiable group was systematically excluded. Twenty jurors were excluded because they called the clerk's office and were told not to report. Indeed, one could argue that those jurors were randomly excluded.

The objection in this case is unique in that the defendant has found no cases addressing this particular issue.

The defendant asserts, however, that a fair cross-section of the community requires that a reasonable number of citizens be selected for jury service. If only twenty-eight prospective jurors are summoned (twelve jurors plus sixteen peremptory

challenges) does that satisfy the fair cross-section requirement. The defendant would argue that it does not.

An analogy can be made in the field of probability and statistics. It is understood that statistically a coin toss will result in 50% heads and 50% tails. That result will come about if the coin is tossed an infinite number of times. If, however, the coin is tossed only two times, the result may be two heads or two tails, certainly not representative of the true probabilities. That is the basic premise in public opinion polling – a sufficiently large number of people must be polled to provide a representative sample. The larger the number polled, the more accurate the results.

In this case, the defendant's position is that the exclusion of twenty otherwise qualified jurors by State action, albeit, not malicious, deprived the defendant of a fair cross-section of the community to serve as jurors in her case.

CONCLUSION

The defendant respectfully asserts that the trial court committed reversible error and asks this court to vacate the judgment entered against her, as well as her sentence, and remand this matter for a new trial.

RESPECTFULLY SUBMITTED,

BY: _____
STACY L. STREET, ATTORNEY FOR APPELLANT, WENDI NICOLE GARRISON

BY: _____
JAMES T. BOWMAN, ATTORNEY FOR APPELLANT, WENDI NICOLE GARRISON

STACY L. STREET
BPR # 15680
HAMPTON AND STREET
630 ELK AVENUE
ELIZABETHTON, TN 37643
423-543-6000

JAMES T. BOWMAN
BPR #000940
128 E. MARKET STREET, SUITE 1
JOHNSON CITY, TN 37604-5712
423-926-2022

CERTIFICATE OF SERVICE

I, Stacy L. Street, attorney for Wendi Nicole Garrison, hereby certify that I have delivered an exact copy of the foregoing document to upon the following:

Attn: John H. Bledsoe
Assistant Attorney General
P. O. Box 20207
Nashville, TN 37202-4015

by United States Mail, postage prepaid.

This the 29th day of May, 2008.

STACY L. STREET