The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Criminal Court Judge (Division III)

Thirtieth Judicial District at Memphis (Shelby County)

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

1980 BPR# 007037

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.

Colorado 1999 #30778 This license has never been in "active" status. The license is in good standing, but "inactive". I once contemplated a move to Colorado, but decided against it.

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, never.

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).

Kirkpatrick, Lucas and Kirkpatrick	Aug. 1980- March 1981
Friedman and Sissman, PC	March 1981- Nov. 1982
Shelby County Public Defender's Office	Nov. 1982- Feb. 1985
Shelby County District Attorney General's Office	Feb. 1985- Sept. 1, 2010

Criminal Court Judge (State of Tennessee)	Sept. 1, 2010 – present

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

N/A

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

Criminal Court Judge (100% criminal law)

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

My initial work experience (Kirkpatrick) involved the handling of insurance defense matters and the related subrogation and general practice issues of a medium sized law firm. My practice became much more centered on criminal law and the related spin-off at the smaller firm (Friedman) and graduated to the total practice of criminal law at the Public Defender's office. That work was courtroom based and entirely criminal defense in nature. For twenty-six years I prosecuted criminal cases for the District Attorney General's Office serving in a variety of capacities for three different District Attorneys. Since my election in 2010, I have presided over an exclusively criminal docket. I inherited one of the largest case backlogs in Shelby County which I have managed to reduce to one of the smallest where it has remained for the last four years. My work history has given me the varied perspectives of all of the positions in a criminal court in both a private and publicly retained capacity.

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

As a prosecutor and public defender I have personally tried over two hundred jury trials including many capital (death penalty) murder cases. As a trial judge I have presided over more than one hundred more jury trials in addition to the motions, hearings, Post -Conviction Petitions and related matters that make up criminal law. Of particular note, I was appointed by Governor Haslam as a Special Supreme Court Justice (2012-2014) and participated in the case of Hooker vs Haslam, 437 S.W. 3d 409 (Tenn. 2014). This case involving a lengthy procedural challenge to the manner in which appellate judges were appointed by the Governor. I have also been appointed to sit as a Special Court of Criminal Appeals Judge to fill in for a vacancy caused by the retirement of one of the CCA judges.

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.

Hooker v Haslam 437 S.W.3d 409 (Tenn. 2014) As a Special Justice of the Supreme Court of Tennessee I participated in numerous pre-trial motions, oral argument and ultimately participating in the issuance of a unanimous ruling denying a constitutional challenge to the way Tennessee's Supreme Court and intermediate appellate courts are selected. This was later basically adopted as an amendment to the Constitution of the State of Tennessee. It is significant in that it essentially addressed the legality of the appointment of a variety of Supreme Court, Court of Appeals and Court of Criminal Appeals judges and justices.

State of Tennessee v Craig Patrick Hebert No. M2012-02299-CCA-R3-CD (Dec. 22, 2014) I sat on this case as a Special Court of Criminal Appeals Judge and wrote the opinion of the court.

State of Tennessee v Christopher Jones I presided over this murder first degree trial in which the defendant was convicted of murdering his wife and burning the body. It was very high profile and was covered by Court TV as well as all of the local stations. In it, I demonstrated the ability to manage a significant case without allowing the distractions to interfere with the orderly process of a criminal trial.

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

I was the executor of my aunt's estate in probate court over twenty years ago. While working for the District Attorney's office I served as Director of the West Tennessee Judicial Drug Task Force. I was in charge of a budget in excess of $250,000.00, including the grant applications and required audits associated with a Task Force spanning eleven west Tennessee counties. The

financial oversight included asset forfeiture accounts totaling in excess of $300,000.00 at times.

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

In addition to the Drug Task Force, while with the District Attorney's Office I served as Chief Child Abuse and Homicide Prosecutor, Director of Training, head of the Gang and Narcotics Prosecution Unit and Division Leader in the Major Violators Unit. Under District Attorney General Bill Gibbons, I was responsible for filing the first public nuisance actions against a variety of establishments that were detrimental to the public welfare.

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

July 23-24, 2007 I applied for the position of Criminal Court Judge and my name was not submitted to the Governor.

October 24, 2011 I applied for the position of Court of Criminal Appeals and my name was submitted to the Governor. (Roger Page was appointed.)

EDUCATION

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

Christian Brothers College 1973-1977 B.A- English B.A.- Humanities Magna Cum Laude

Cecil C. Humphreys School of Law (Univ. of Memphis) 1977-1980 J.D. Moot Court Board

PERSONAL INFORMATION

15. State your age and date of birth.

(60) December 9, 1955

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

48 years

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

48 years

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

Shelby County

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

N/A

20. Have you ever pled guilty or been convicted or are now on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

N/A

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.

N/A

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

2, both were dismissed In 1981 a divorce client filed a disciplinary board complaint alleging that her divorce was taking too long. This complaint was dismissed as unfounded.

In 1998 the Defendant in a murder trial that I was prosecuting filed a complaint. This complaint was also dismissed as unfounded. I have never had any disciplinary action taken against me.

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.

N/A

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.

Carter v Carter Docket No. 11748-RD3 Circuit Court of Shelby County

(uncontested divorce) (granted August 1988)

James Bryant v Jack Owens, Sheriff et al Docket No. 90-2364-HB Western District of Tennessee

An inmate filed a frivolous lawsuit against everyone whose name appeared in or on his criminal court case file. The matter was dismissed for failure to state a claim on August 19, 1991 without the necessity of answering or otherwise responding.

Memphis Bonding Company v Criminal Court of Tennessee 30th Judicial District et al

No. W2015-00562-COA-R10-CV (Nov. 25, 2015) A bonding company filed a lawsuit seeking to prevent the local Criminal Court judges from enforcing the local rules. The Court of Criminal Appeals dismissed for lack of jurisdiction.(permission to appeal to the Supreme Court requested)

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

Hein Park Neighborhood Association Security Coordinator 2012-present

Trout Unlimited no office

Mid-South Fly Fisher's no office

Memphis Hightailer's Bicycle Club no office

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

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

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

None

ACHIEVEMENTS

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

American Bar Association - Judicial Division 2010-present

Leo F. Bearman Chapter - American Inns of Court 2010-present

Tennessee Judicial Conference - Criminal Pattern Jury Instruction Committee 2010- present

- Education Committee 2010-present

Tennessee Attorney General's Conference -Education Committee 1985-2010

Memphis Bar Association 2009-present

Association of Government Attorneys in Capital Litigation (inactive)

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

James G. Hughes C.P.I.T. Excellence Award 2010 (for professionalism in the field of Child Abuse Prevention and Prosecution)

Memphis Bar Foundation Fellow (service to legal profession) 2010

Christian Brothers University Distinguished Alumni 2012

Memphis Catholic High School Hall of Fame inducted: March 29,2015

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

I wrote the section, "Considerations in Opening Statement" for a book entitled **Successful Trial Strategies for Prosecutors**, published in 2005 by the National College of District Attorneys, Columbia, South Carolina. It is attached as one of my writing samples.

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.

Legislative Update Memphis Bar Association Bench/Bar Conference 2014

Elder Abuse Law Tennessee Judicial Conference October, 2014

Case Law Update Tennessee Judicial Conference March, 2013

Criminal Wire Tap Tennessee Judicial Conference (w/ Judge John Campbell) 2014

Electronic Eavesdropping Memphis Bar Association (Family Law Section) February, 2016

The History of the Constitution Christian Brothers University Constitution Day Sept.17, 2014

Guest Speaker University of Memphis Criminal Justice Section 2014 and 2015

Guest Lecturer University of Memphis Law School Trial Advocacy Class 2014 and 2015

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.

Criminal Court Judge elected in 2010 and re-elected in 2014

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

No

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

All writing samples are 100% my own work. (attached)

ESSAYS/PERSONAL STATEMENTS

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

I have spent thirty-five years handling cases in the criminal trial courtroom, from every position. Trial lawyers and judges must rely upon appellate decisions for guidance. Good appellate opinions serve two functions. First, they must address the immediate issue of the correctness of the actions complained of, and second, provide guidance to judges, attorneys and litigants as to better practices. I welcome the opportunity to continue in this instructive function. My experience as a trial judge and lawyer, along with my capacity for managing a large caseload make me well suited for this important task. I would relish the chance to advance to this next level.

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

My entire legal career, since 1982, has been in the service of the people of the community. As a public defender, representing the indigent, and for the next twenty-six years representing the victims of crime, I have devoted myself to making the system work for all people. I have always taken great care with the victims of crime and their families in order not to re-victimize them while seeking justice for them. I have been very active with the Child Advocacy Center and with other crime victim's organizations such as the Shelby County Victim's Advocates group. While prohibited from representing individuals, I have still been a part of helping to provide equal justice to all.

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

I am seeking appointment to the Court of Criminal Appeals for the Western Section of Tennessee. There are twelve appellate judges who hear cases all across the state and hold court in Nashville, Knoxville and Jackson, primarily. My experience as a trial judge and attorney in this area gives me a solid grasp of the issues presented that cannot be ascertained from simply reading a record. The Court of Criminal Appeals judges participate in approximately 250 cases per year and are expected to write the opinions in 80-100 of them. Last year I disposed of over 1500 cases as a trial judge. I have one of the lowest case backlogs in Shelby County. My capacity for hard work and my experience would allow me to maintain the level of quality output necessary to keep the Court of Criminal Appeals functioning as it should.

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)***

The Judicial Canons require judges to refrain from activity that would reflect poorly on the fairness and integrity of the profession. I feel that a judge, as a public figure, has a responsibility to participate in appropriate community service, while remaining mindful of the Canons.

I have long been on the Host Committee for the MIFA (Metropolitan Inter-Faith Association) Feed The Soul initiative. This program raises funds vital to their mission of providing assistance to people in need. I also served on the Pillars of Excellence committee for the University of Memphis Alumni Association. I was "guest bartender" at Cocktails for a Cause and served on a number of event committees for the purpose of raising money for the Memphis Child Advocacy Center. I mentor a law student through a program sponsored by the Inns of Court and the University of Memphis Law School. Two years ago I led a project that allowed lawyers to raise enough money to pay off a tax lien for the Mid-South Spay Neuter Association. Additionally, I have been asked to judge a variety of community events. These include: the University of Memphis efforts at breaking a Guinness world record for sit-ups, the Irish Stew Cooking Contest held annually at Little Flower School, the yearly speech tournament at Bellevue Baptist Church, and the Tennessee High School Mock Trial tournament sponsored by the Tennessee Bar Association.

I believe that a public servant has a responsibility to participate in community service events and will continue to do so, if appointed.

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

I have always been a voracious reader with a passion for writing and teaching. These are essential skills for the appellate bench. As a child in a Navy family, I spent a significant portion of my early life living abroad. The lessons learned from living in such foreign cultures (Morocco, Spain and Iceland) serve me very well today when encountering the wide variety of people who come through our courts. My years as a trial attorney and trial judge give me an

insight into how trials are conducted that would be very difficult to understand without having that hands on experience. Outside of the court, my hobbies are bicycling and fly fishing. Both of these sports reward planning, focus and preparation. The concentration, patience and endurance required dovetail nicely with my judicial activity. In summary, my demonstrated capacity for hard work, coupled with my intensive criminal law experience has prepared me for the Court of Criminal Appeals.

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)***

Absolutely. I believe that my job as a judge is to uphold and apply the law...not to write it. As an attorney, one can always ask the judge to construe the law differently or make a change, in the name of advocating for one's client. As a trial judge (and intermediate appellate judge) the duty is to rule correctly, not to advocate for change. As a trial judge, it has been frustrating to me to see criminal defendants who make very large bonds and even hire expensive attorneys, come before me and asked to be declared "indigent" for purposes of having the State pay for expert services such as investigators or psychologists. Tennessee law mandates that a judge can only consider the assets of the defendant and cannot look to the evidence that his family and friends have made payments on his behalf. I do not agree with this, but I follow the law as instructed.

REFERENCES

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

A. Amy P. Weirich, District Attorney General, Thirtieth Judicial District of Tennessee

B. Alan E. Glenn, Judge, Court of Criminal Appeals of Tennessee (Western Section)

C. Harold B. Collins, Memphis City Councilman 2008-2016

D. Dot Gilbertson, Chief Operating Officer, Metropolitan Inter-Faith Association (MIFA)

E. Valerie L. Smith, Attorney at Law

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: February 22, 2016.

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

J. Robert Carter, Jr.
Type or Print Name

Signature

February 22, 2016
Date

BPR # 007037

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

OPENING STATEMENTS

"Well Begun is Half Done"

Black's Law Dictionary defines the Opening Statement of Counsel as an "outline of anticipated proof… it's purpose is to advise the jury of facts relied upon and issues involved, and to give the jury a general picture of the facts and situations so that the jury will be able to understand the evidence." (citations omitted) [2]
Taken literally, it would seem that Opening Statements are little more than a table of its contents. Unfortunately, all too many prosecutors view Opening as something to be gotten out of the way as quickly as possible, so that the "real trial" can begin. Those individuals spend little time preparing for Opening, and miss a tremendous opportunity to further the ultimate goal of the advocate, persuasion.

An effective Opening sets the stage for the rest of the trial and will stay with the jury throughout the entire matter until completion in Final Argument. This full circle approach to trying cases is what is taught by the National College of District Attorneys and referred to as Analytical Advocacy. [3]

Chief Justice Burger, in his concurring opinion, declared, "An Opening Statement has a narrow purpose and scope. It is to state what evidence will be presented to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an **occasion for argument"**. United States vs. Dinitz, 424 U.S. 600 (1976)

Opening Statements should be fact or evidence based and should not include argument. This emphasis on facts is what differentiates an Opening Statement from a Closing Argument. In a Closing one may certainly argue inferences, the credibility of witnesses, nuance, and even urge such logical conclusions as may be drawn from the evidence. These are not appropriate topics in an Opening Statement.

Our task is to determine how we can stay within the legal confines of this "narrow purpose and scope" and still get the most out of this golden opportunity to further our case. A legitimate, legal, ethical, and most importantly, effective Opening does not have to be a boring recitation of dry

facts and expectations, filled with a litany of phrases, such as, "We believe the proof will show…" "We submit that you will see" and God forbid, "We will all discover together". But, given the admonishments of Dinitz, supra, how are we to avoid this? By treating our Opening Statement as a key part of the synthesized and integrated method of trial preparation known as Analytical Advocacy. We can use a simple model for our Opening that is adaptable to any case from the simplest to the most complicated.

Before we get into the nuts and bolts of constructing an Opening Statement, let's take a moment to remind ourselves exactly what it is that we are doing. We are trying to convince a group of people of something. This group was chosen, at least in part, because of their lack of knowledge about the subject. And we must convince them "beyond a reasonable doubt". Our burden of proof is, in effect a burden of persuasion.

The burden of persuasion begins in jury selection if your jurisdiction allows a significant degree of interaction with the jury during this process. Of course, this is limited to the questions and answers aimed at getting an appropriate jury for this case. Once selected, "potential jurors" now become "jurors" and seem to experience a heightened sense of responsibility that was not in existence when they were simply part of the venire. Thus, Opening Statement becomes the first part of the trial for them as "real jurors".

Keep in mind that everything that we do communicates something to the jury and we must be mindful of the impression we make before the first word is spoken. Are you prepared, professional and in charge, or are you running around shuffling papers and looking like you don't have a clue.

It is important to capitalize on this most focused state and not to waste it on less than important housekeeping matters. The jury is about to form its first impression of you as an advocate, and more importantly, of your case. While it is not impossible to change a first impression, it is certainly easier to bolster a positive impression, then to overcome a negative one. There is an apocryphal study, done by the University of Chicago, which showed that eighty percent of jurors made up their minds, or at least formed opinions, on liability at the end of opening statements, and did not change their opinions during the entire trial. [4]

Even allowing for the questionable statistical accuracy of such claims, it is clear that experience, knowledge and general principles of communication teach us that the Opening Statement may be one of the most important parts of the entire trial. And to think, there are many lawyers who consider it a formality to be gotten over with, or even waived altogether, a truly unpardonable sin.

This seems all too common in bench trials, where it is reasoned that Opening is not important. The importance is not diminished in front of a judge, although the approach may be somewhat different. Providing the trier of fact with a clear and persuasive outline to follow can help us to prevail more frequently. This principle applies to "mini-trials" such as pre-trial hearings and Motions to Suppress as well.

The doctrine of primacy says that that which is heard first is remembered best. [5] Will you use this "once in a trial" opportunity to talk to the jury about "road maps", "puzzles", and to assure them that "What I am about to say is not evidence"? You might as well tell them not to listen at all.

All good Opening statements share three common traits. Each has: a good start or "hook", a factual outline or main body, and a well thought out high note for an ending. We will discuss how to incorporate these elements into our own effective Opening Statements.

The first minute or so of the Opening is used to articulate the theme of your case or perhaps to describe an advantageous fact capsule. You may even wish to highlight some other aspect of the case in such a way as to capture the attention of the jurors. This Attention Step [6] is critical and should be well thought out. There are a number of different types of Attention Steps to choose from depending upon the nature of your case and your personal style. These include value-based themes, fact characterization themes or fact capsules. [7]

Value-based themes serve as memory devices for the jury which serve to illustrate the case theory in terms of human values. These values may be either positive or negative. By aligning our case with human values, we, in essence, create a desire to deliver a verdict consistent with these values. We are appealing to both the logical and the emotional facets of the decision making process.

Examples:

"Greed brings us to the courtroom today, greed on the part of this defendant. He wanted something. He saw it. And he took it. It really didn't matter that it didn't belong to him..." (negative value)

The values may attach to the overall event, the individuals in the event or actions on the part of those individuals.

An example of a positive value:

"Gina Watson worked two jobs for two full years to buy her first car. It only took two minutes for this defendant to take it away."

When reviewing a case for the first time, we sometimes encounter something that "just doesn't feel right" about it. Be aware that such things about your case which bother you, may be your intuition warning you of some negative value or aspect of your case, perhaps a less than likable victim. If it bothers you it may bother the jury. We will address meeting these negatives "head-on" in the factual narrative.

Another type of effective Attention Step involves the use of Fact Capsules. These may be Event-based, People-based or a mixture of both.

An Event-based Opening focuses initially on "what happened" with the people involved being brought in later.

"The Sunday morning silence on Park Avenue, a quiet residential street, was shattered by the BANG! BANG! BANG! of three shots from a high-powered rifle."

This may be an effective tool where there are multiple witnesses, or in cases where victims are not as compelling individually. Such cases may include multiple victims in a white-collar fraud case. Where you have a person or persons, whose perspective is unique, a more People–based fact capsule may be in order.

In this approach, you relate the event from the vantage point of one witness.

Example

"On December 4th, Ellen Jones kissed her husband, George as he walked out the door for his shift with the Metro Police Department. As she always did, she straightened his tie and gave him a final "uniform check". She had no way of knowing that it was the last time she would see him alive."

Many good Attention Steps combine elements of both Event-based and People-based capsules. An excellent example would be excerpts from a 9-1-1 call or some other pertinent exerted utterance.

Example:

"They killed him! They killed him! These were the words Andrew Johnson heard when he picked up the phone that Tuesday morning."

Now having fully engaged the attention of the jury, it is time to move on to the main body of the Opening. This Fact Narration is what defines the Opening. As we have discussed, we can do this in a perfunctory manner in such a way as to get it over with, or we can take the time to present these facts in a manner designed to advance our case theory in the most positive fashion.

Traditionally, the old standby technique has been a witness-by-witness list that reminds one of a Table of Contents from a high school textbook, only less compelling. "Next you will hear from Officer Smith who will say that..."

A far more interesting way would be to relate the case from the perspective of a single significant witness or to take much more of a story-telling approach. This is certainly easier for the jury to follow, and, in reality, easier for you to relate. Many young attorneys struggle through an Opening Statement only to go to lunch and be asked by someone about the case. At that point they recount this interesting tale complete with a human interest angle that makes for very easy and entertaining listening. The trick is to incorporate portions of this conversational style into our Opening.

In using a narrative approach, we can eliminate the use of such "crutch language" as "We expect the proof to show", and "We submit that you will see". Conversational language is far more compelling to the jury.

This method requires preparation, however, it is not effective to read to the jury. You must be thoroughly familiar with your facts, and able to relate them without constant reference to notes. If you must use notes, prepare an outline and leave it nearby to refer to in an emergency. Just knowing that you have this "safety blanket" may keep you from ever needing it.

One solution to the need for notes, especially in a complicated case, is to use visual aids. Whether in the form of charts, diagrams, photographs or PowerPoint ® computer slideshows, this will add another dimension to your Opening. Your PowerPoint or other computer presentation becomes your notes or outline. By preparing it, you practice and then have command of your information, which will be presented in the order you have planned.

This use of visuals will often draw an objection based on any number of things but usually translating to "we never used to do that". Be aware of your own rules, but, generally speaking, except in South Dakota, "if you can say it, you can show it. [9] Visuals may range from being very helpful in a simpler case, to being almost essential in a more complicated matter. Again, recall how much more information that a juror retains by seeing it as well as hearing it.

During your fact narration you will need to keep in mind certain principals. While being thorough, you do not want to go into every detail. Don't bog down. While it essential to state your facts firmly, you must exercise care not to overstate them. If you say one thing in Opening that you cannot prove, you cast doubt on everything else that you have said. You run the risk of losing your credibility.

Not only is this a tactical error, but possibly an ethical violation. Disciplinary Rule 7-106 (c) (1) provides that a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or will not be supplied by admissible evidence. [10]

This is the time to tell the jury about a witness or victim's criminal record or prior inconsistent statement. You will be much better able to lessen the sting of such matters and to explain them if you first bring them up, rather than waiting for them to hear about them from the defense and get the impression that you were hiding something.

Another thing that your Factual Narrative must do is to get the defendant involved. It does little good to weave a compelling narrative about a horrible crime, and have the jury unsure who that guy behind the other attorney is.

The tone used should be dictated by the circumstances of the case. A different mood should be used in a murder case, as opposed to a small theft, or DUI. A career violent offender may merit different treatment than that reserved for a first offender. Every offense merits the appropriate level of seriousness, but not every case should be handled in a way that makes the jury think of you as "heavy-handed" or overly strict. While there may be times when humor finds its way into a trial, your Opening Statement should probably not be one of them.

Care should be taken not to lapse into legal jargon or "cop talk" when speaking to the jury. Have your witnesses "get out of the car" rather than "exit the vehicle". Allow your police officers to "go to lunch" not "Signal Five at this location".

The narrative section of your Opening should also begin to meet specific defenses, if known to you. By addressing the evidence that you will rely upon to meet these defenses, you go a long way toward diffusing them. Another benefit of addressing these issues in a non-argumentative way is that you, in effect, challenging the defense in their Opening to state exactly what their defense is. This makes for a nice contrast between your Opening and the typical defense Opening that rambles on about "not deciding until all the proof is in" and "looking for reasonable doubts."

Now, having engaged the attention of the jury, and presenting them with a well thought out narrative of the facts, it is time to end the Opening Statement. With some attorneys, this last section again gives rise to admonitions about what we say not being evidence or thanking the jury of their service. Like the first thing heard, the last thing tends to stay with the listener, as well. Therefore, our Exit Line[11] should be prepared carefully. It may be used to summarize issues, or sound certain terms that you want the jury to remember. It may be a call to act or a plea for justice. [12] It is of particular importance because it will be remembered longest.

This one or two sentence Exit Line should be memorized so that its delivery can have maximum impact. A reference to a theme or fact that you used on your Attention Step may give a nice sense of closure or completeness to the Opening.

Example:

"At the conclusion of the States case, you will have seen, a combination of eyewitness testimony, expert testimony and scientific evidence that prove that the person who fired the shots that shattered that Sunday morning silence, is this defendant. And I will ask you to render the only verdict that truth dictates and justice demands. "

Using the basic model outlined above with an Attention Step, Factual Narrative and Exit Line, we are now prepared to construct an effective Opening in any type of case. The time invested in such preparation will continue to pay dividends as yet one more tool for the successful advocate. We are now poised to make Opening Statement one of the most powerful and persuasive portions of our case while still remaining true its intended purpose.

END NOTES

1. Early American Proverb

2. BLACK'S LAW DICTIONARY, Revised Fourth Edition
   Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern
   Henry Campbell Black, M.A.
   St. Paul Minn. West Publishing Co. 1968

3. Analytical Advocacy – (unsure how to cite)

4. Art of Advocacy – OPENING STATEMENT
   Leonard DeCof
   Matthew Bender 1982 §1.01 p.1-4

5. Art of Advocacy § 1.01 (1) p. 1-6

6. Analytical Advocacy

7. Analytical Advocacy

8. Analytical Advocacy

9. 16 ALR 4th 810

10. Trial Ethics,
    Richard Underwood & William H. Fortune
    Little, Brown and Company 1983 at p. 311

11. Analytical Advocacy

12. Art of Advocacy § 1.21 p.1-56

2014 WL 7261802
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT NASHVILLE.

State of Tennessee
v.
Craig Patrick **Hebert**

No. M2012–02299–CCA–R3–CD
June 17, 2014 Session
Filed December 22, 2014

Appeal from the Criminal Court for Davidson County, No. 2011C2451, J. Randall Wyatt, Jr., Judge

Attorneys and Law Firms

David A. Collins (on appeal) and Jeffrey Thomas Daigle (at trial), Nashville, Tennessee, for the appellant, **Craig** Patrick **Hebert**.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Brian Ewald, Assistant District Attorney General, for the appellee, **State** of Tennessee.

Opinion

J. Robert Carter, Jr., Sp. J., delivered the opinion of the court, in which Norma McGee Ogle and Roger A. Page, JJ., joined.

OPINION

J. Robert Carter, Jr., Sp. J.

*1 A Davidson County jury convicted the defendant, **Craig** Patrick **Hebert**, of assault, and the trial court sentenced him to six months, which was suspended and ordered to be served on probation. On appeal, the defendant contends that (1) the trial court erred in failing to charge the jury in accordance with Tennessee Pattern Jury Instruction—Criminal No. 42.23 (Duty to Preserve Evidence); and (2) that the evidence was insufficient to support his conviction. Following the denial of the motion for new trial, the defendant filed a petition for writ of error coram nobis, which was heard and denied. This court consolidated the appeal of the denial of his petition with the original appeal as of right in this cause. Upon review, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

The defendant was indicted for a single count of aggravated assault arising out of an incident at Southern Thrift Store in Nashville, Tennessee on March 14, 2011.

At trial, the victim, Sandra Dodson, testified that she was the assistant manager at the store on the day in question. Ms. Dodson testified that store policy dictated that the doors be locked at closing time, which in this case was 6:30 p.m. She further testified that the defendant entered the store at closing time or shortly thereafter. Another store employee, Tyrese Buggs, told the defendant that the store was closed, to which the defendant responded, "not by my clock." After being repeatedly told that the store was closed, the defendant became angry and demanded that the employees call their district manager. Ms. Dodson testified that while she was on the telephone with her district manager, the defendant began circling her, cursing her, and threatening to sue the store. Upon a recommendation from her manager, she activated a silent alarm that summoned the police.

Ms. Dodson described feeling threatened by the defendant as a result of his continued yelling and cursing. The defendant left the store but returned and threatened Mr. Buggs with violence. After finally leaving the store, the defendant got into a pick-up truck to leave. Ms. Dodson testified that she went to the parking lot and attempted to write down the license number of the vehicle. She testified that at this time, the defendant told her that he would run over her if she attempted to obtain the tag number. The defendant began backing his truck toward Ms. Dodson, and she had to run out into a lane of traffic to avoid being struck by the defendant's truck. Ms. Dodson testified that she was scared because she was almost hit by a car traveling down the road.

Ms. Dodson testified that the events inside the store were captured by a surveillance camera but that it did not record sound. The events in the parking lot were not covered in the security video.

Tyrese Buggs testified that he was present when the defendant came in the store and would not leave. Mr. Buggs described the defendant as irate and testified that the defendant kept trying to goad him into coming into the parking lot to fight. Mr. Buggs observed Ms. Dodson's attempt to get the license number from the defendant's vehicle and witnessed the defendant backing up toward her in the truck. He testified that Ms. Dodson ran all the way into traffic in an effort to avoid the defendant's truck.

***2** Detective Adam Weeks testified that approximately a week after the incident, he reviewed the security video with Ms. Dodson. He testified that it contained no sound and showed only the events inside the store. His understanding was that the offense in question occurred in the parking lot. He spoke with the defendant at some point, who described being upset as a result of what he considered the "early closing" of the store and agreed everything began to escalate after that initial encounter. Detective Weeks testified that he did not obtain a copy of the video but thought that the store retained a copy. Following the testimony of Detective Weeks, the **State** rested.

The defendant testified that he arrived at the store and was told that it was closed. He agreed that there was an argument that escalated into shouting. The defendant testified that he left the store and that Ms. Dodson followed him out and went toward the rear of his vehicle. He denied that she was ever directly behind his truck or that he in any way forced her into the road. He generally disagreed with the accounts given by Mr. Buggs and Ms. Dodson.

The jury convicted the defendant of the lesser-included offense of misdemeanor assault, and the trial court sentenced the defendant to a six-month suspended sentence. This appeal followed.

In June 2012, new counsel was appointed to represent the defendant in his direct appeal. During the pendency of the direct appeal, counsel filed a petition for a writ of error coram nobis, alleging that following the defendant's trial, he learned that the foreman of the grand jury that issued the indictment against the defendant was a convicted felon, violating the defendant's constitutional right to a "qualified and lawful grand jury." The trial court denied the petition, and the appeal of that denial was consolidated with the direct appeal from the trial.

On appeal, the defendant contends that (1) "the evidence was insufficient to support his conviction," (2) "the trial court committed reversible error in failing to charge the jury pursuant to Tennessee Pattern Jury Instruction 42.23," and (3) "that the trial court erred in failing to grant the petition for writ of error coram nobis."

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence is insufficient to support his conviction for assault because of discrepancies between the testimonies of two of the **State's** witnesses, Ms. Dodson and Mr. Buggs. He maintains that these differences suggest that their testimony was fabricated. The **State** argues that the jury's verdict resolved any

conflicts and that the evidence was sufficient to support a guilty verdict. We agree with the **State**.

When a defendant challenges the sufficiency of the evidence, the standard for review by an appellate court 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 (1979); *see also* Tenn. R.App. P. 13(e). It is well settled that the **State** is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. ***State** v. Cabbage,* 571 S.W.2d 832, 835 (Tenn. 1978).

An assault occurs when one "intentionally or knowingly causes another to reasonably fear imminent bodily injury." T.C.A. § 39–13–101(a)(2). The proof at the trial, viewed in the light most favorable to the **State**, showed that when Ms. Dodson went behind the defendant's truck to write down his tag number, the defendant began backing his truck toward her, forcing her to run out into a lane of traffic. Ms. Dodson testified that she was afraid. Her account was substantiated by the testimony of Mr. Buggs.

3* The defendant argues that inconsistencies between these two witnesses were of such a degree as to negate the testimony. Questions concerning the credibility of witnesses and the weight and value to be afforded to the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. ***State v. Bland,* 958 S.W.2d 651, 659 (Tenn. 1997). The jury accredited the testimony of the **State's** witnesses. This court will not reweigh or reevaluate the evidence, nor will it substitute its inferences for those drawn by the jury. *Id.* The burden is on the defendant to demonstrate that the evidence was insufficient. The evidence in this case is clearly sufficient to sustain the defendant's conviction for assault.

B. FAILURE TO CHARGE PATTERN INSTRUCTION 42.23

The defendant claims that the trial court erred in failing to charge Pattern Criminal Instruction 42.23 which reads as follows:

> T.P.I—CRIM. 42.23 Duty to preserve evidence
>
> The **State** has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of such a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The **State** has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value, so that an as yet unknown defendant may later examine the evidence.
>
> If, after considering all of the proof, you find that the **State** failed to gather or preserve evidence, the contents or qualities of which are an issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

The defendant asserts that such a charge was required because the proof at trial established that neither the police nor the store maintained a copy of the security video from inside the store. The **State** argues that the issue is waived as a result of the failure of the defense to request the charge at the trial. Tenn. R. App. P. (36)(b). The defendant urges this court to review this issue as plain error.

This court may address an issue as plain error only if each of the five specific factors are met:

> (1) the record clearly establishes what occurred in the trial court, (2) a clear aud unequivocal rule of law was breached, (3) a substantial right of the accused was adversely affected, (4) the accused did not waive the issue for tactical reasons, and (5) consideration of the error is necessary to do substantial justice.

***State** v. Hester*, 324 S.W.3d 1, 56 (Tenn. 2010). The asserted "plain error must have been of such a great magnitude that it probably changed the outcome of the trial."

State *v. Adkisson*, 899 S.W.2d 626, 642 (Tenn.Crim.App.1994).

The first step in the analysis would be to determine whether or not the **State** had a duty to preserve the evidence. Generally, the **State** should preserve all evidence discoverable under Tennessee Rule of Criminal Procedure 16. The difficulty in defining what must be maintained has been recognized by our supreme court and the United **States** Supreme Court:

> "Whatever duty the Constitution imposes on the **States** to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must possess both an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

State *v. Ferguson* 2 S.W.3d 912, 917 (Tenn. 1999) (quoting *California v. Trombetta*, 467 U.S. 479, 488–89 (1984)).

**4* The trial court found that the recording was not relevant, noting that the camera recorded only what transpired inside the store and that the offense occurred in the parking lot. We agree. Accordingly, we conclude that it was not plain error to fail to charge Pattern Instruction 42.23.

C. ERROR CORAM NOBIS

Finally, we will address the defendant's challenge to the trial court's denial of his petition for writ of error coram nobis. The writ of error coram nobis, which is an "extraordinary procedural remedy" that fills only a "slight gap into which few cases fall," is available to criminal defendants by statute in Tennessee. ***State*** *v. Mixon*, 983 S.W.2d 661, 662 (Tenn. 1999); T.C.A. § 40–26–101, *et seq.* It is known more for its denial than its approval. *Mixon*, 983 S.W.2d at 666.

The defendant complains that the indictment is void on its face because the grand jury foreman was a convicted felon and thus ineligible to serve on the grand jury. T.C.A. § 22–1102. The **State** responds that the defendant waived the issue by not raising it prior to trial.

Tennessee Rule of Criminal Procedure 12(b)(2) requires that any objection to a defect in the indictment must be filed prior to trial but that "at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense." *See also* ***State*** *v. Lopez*, 440 S.W.3d 601, 610 (Tenn.Crim.App.2014). The constitutional requirements of an indictment are: (1) to give notice to the accused of the offense charged, (2) to provide the court with an adequate ground upon which a proper judgment may be entered; and (3) to provide the defendant with protection against double jeopardy. ***State*** *v. Lindsey*, 208 S.W.3d 432, 438 (Tenn.Crim.App.2006).

The defendant does not contend that the indictment failed to provide notice, charge an offense, or protect him from double jeopardy. *Lopez*, 440 S.W.3d at 610. Instead, he questions whether the indictment, which was signed by a person who was statutorily ineligible to serve as grand jury foreperson, was " 'so defective as to deprive the court of jurisdiction.' " *Kenneth DeWayne Johnson v.* ***State***, No. M2013–02491–CCA–R3–PC, 2014 WL 3696268, at *3 (Tenn.Crim.App. at Nashville, July 24, 2014) (quoting *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn.1998)). This court has recently examined this issue and held that "[t]he status of the grand jury foreman as a convicted felon does not relate to the power of the court to hear and decide a case." *Lopez*, 440 S.W.3d at 610; *see Johnson*, No. M2013–02491–CCA–R3–PC, 2014 WL 3696268, at *3. Based upon the foregoing, the defendant has failed to establish that the court was without jurisdiction to hear the case. *Lopez*, 440 S.W.3d at 610. Therefore, he waived his challenge to the grand jury foreman by failing to raise the issue prior to trial. *Id.*

Moreover, "the historic doctrine of aider by verdict stands for the proposition that any

defects in the indictment are cured if the jury reaches a verdict." *Id.* The jury in the instant case heard the evidence and returned a verdict, thereby curing any defects in the indictment. *Lopez,* 440 S.W.3d at 610. Thus, the trial court properly denied the petition for writ of error coram nobis.

III. CONCLUSION

*5 After a review of the record and the applicable law, we affirm the judgment of the trial court.

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IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION III

Dimitrie Colbert, **Petitioner**	)	
VS.	)	**Case Number: 12-00762**
State of Tennessee, **Respondent**	)	

Order

This cause came to be heard upon the "Petition for Post-Conviction Relief and/or a New Trial" filed by Petitioner and the Amended Petition for Post-Conviction Relief filed by Petitioner's retained counsel, an evidentiary hearing conducted on two separate days and the entire record in this cause.

FROM ALL OF WHICH IT APPEARS TO THE COURT:

I. Procedural History

Petitioner was indicted by the Shelby County Grand Jury on February 14, 2012 in a six count indictment charging him with Murder During the Perpetration of Kidnapping, Premeditated Murder, Especially Aggravated Kidnapping, Aggravated Rape, Aggravated Kidnapping and Intentionally Evading Arrest in a Motor Vehicle. These charges arose out of events occurring between August 26 and August 29, 2011 and involved a victim named Janette Corria.

Petitioner was taken in custody on August 28, 2011 and formally charged August 29, 2011. Following his indictment, Petitioner was unable to hire private counsel to represent him and on April 25, 2012 the office of the Shelby County Public Defender was appointed.

Petitioner's case was assigned to the Capital Defense Team of that office. Numerous Motions were filed on behalf of Petitioner and the State, including the State's Notice of Intent to seek the Death Penalty. A Motion to Dismiss for Lack of Jurisdiction (venue) and a Motion to Suppress Defendant's Statement were denied after evidentiary hearings.

On September 13, 2012 the Petitioner entered a negotiated guilty plea to counts one and six of the indictment. In count I (felony murder), Petitioner received an agreed upon sentence of Life (with the possibility of parole). In count six he received a sentence of four (4) years as a Range I, Standard Offender, to be served consecutively to count I. All remaining counts and charges were dismissed as part of the plea agreement.

On March 27, 2013 Petitioner filed his initial Petition for Post-Conviction Relief. His privately retained counsel filed an Amendment to the Petition for Post-Conviction Relief. An evidentiary hearing was conducted on August 1, 2013 and September 26, 2013 during which Petitioner and the State of Tennessee each called witnesses and introduced exhibits.

II. Findings of Fact

Petitioner does not attack the facial validity of his guilty plea. Rather, he asserts a litany of omissions in the preparation and investigation of the case that, he alleges, results in effective assistance of counsel in the plea negotiation stage. As a result, it is his contention that his plea was, therefore, invalid.

At the hearing, Petitioner first called Dr. Cindy Vnencack-Jones, a geneticist from Vanderbilt University. She described the procedures used

in her laboratory for testing for the presence of a certain gene describe as MAOA and some times referred to as the "warrior gene".

Dr. Vnencack-Jones recounted that she had received a sample of blood from the Petitioner which was tested for the presence and frequency of this gene. She testified that her testing of Petitioner's blood and "the literature" allowed her to characterize Petitioner as having a "higher relative risk" for demonstrating violent behavior. It is interesting to note that, apparently Vanderbilt is no longer doing the testing for this gene.

On cross-examination, she agreed that this MAOA level was indicative of violent behavior only when "accompanied by maltreatment". She further agreed that at least one journal article (Ex. 5) concluded that such a finding in an individual might "cut both ways" and be of strategic use to the prosecution, as well as the defense.

Petitioner next called John McCoy, PhD. Dr. McCoy, a clinical and forensic psychologist, testified that he examined the Petitioner's jail medical records and spent roughly two and a half hours interviewing Petitioner prior to the hearing.

Dr. McCoy made reference to various mental conditions ascribed to Petitioner in the jail records. Chief among those were "Intermittent Explosive Disorder" and "Post-Traumatic Stress Disorder". In his opinion, the Petition suffers from "Bi-Polar Disorder."

As a result of Petitioner's conditions, and based upon his interview with Petitioner, Dr. McCoy opined that Petitioner was more likely to be violent due to the gene MAOA, and what Dr. McCoy believed to be a history of "childhood abuse".

He further testified that he did not believe Petitioner to be capable of "planning a homicide" as a result of being "unable to control himself."

On cross-examination, Dr. McCoy agreed that had not reviewed any of the police records of the events or the statement given by Petitioner. The witness stated that this was not germane to his opinion.

When asked about details that suggested a plan or reason for Petitioner's actions, Dr. McCoy again opined that it "didn't matter" because Petitioner "didn't realize the seriousness of what he was doing". In short, Dr. McCoy portrays the events that occurred as being all part of a rage that prevented any planning by Petitioner.

The Petitioner was called to testify on his own behalf. He stated that he did not know anything about being bi-polar or having a particular genome. He stated that he would be willing to plead guilty to Second Degree Murder.

Petitioner stated that he has rage that he can't control. He also recounted that when he was eight years old his step-father pushed him and told him "you're not my son". He testified that he witnessed the step-father beat his mother. Petitioner said that he had never been hospitalized, but in 2009 at age seventeen, he had been sent to Lakeside for behavior problems arising out of a misunderstanding at school.

On cross-examination, Petitioner agreed that the abusive step-father left their lives when Petitioner was eleven years old. Petitioner recounted that he did not intend to kill the victim, but rather thought about killing himself.

When asked about the entry of the guilty plea Petitioner maintained that he was emotionally drained and that he "didn't know what was going on".

At the hearing the State called the Assistant District Attorney responsible for handling the case and the lead defense attorney from the Office of the Shelby County Public Defender.

Petitioner's lead attorney was the supervisor of the capital defense team. He was assisted by other attorneys, investigators, and a social worker and instigation expert who worked as a team on Petitioner's representation. The lead attorney has twenty-two years of experience including over one hundred murder cases including over thirty where the death penalty was being sought.

The attorney described the handling of this case which included weekly meetings with Petitioner and an investigation into both defenses and mitigation. This process included meeting with Petitioner's mother "four or five times" and Petitioner's father "once".

A part of the process was a search for possible mental defenses. This included looking at medical and mental health records for both Petitioner and his family. In cases of this magnitude counsel testified that they looked for evidence of child abuse or mental health issues that could be useful in Petitioner's defense. In this case they could not find any.

The attorney stated that in the case at hand, he had a client whose parents were divorced, but cooperated, who graduated from high school and who seemed to have had a good upbringing.

Counsel testified that he was familiar with the "warrior gene" but that he did not believe it would be helpful in this case due to the facts. He thought it would be more effective in a case where a client seemed more "out of control". Petitioner's trial attorney believed that the proof would show his client to have been acting in a controlled manner. Even Petitioner, in his statement to the police characterized himself as "calm".

Counsel, simply, did not see any evidence of the uncontrolled rage that Dr. McCoy described.

As part of the preparations for trial, defense counsel provided Petitioner with the Tennessee Pattern Jury Instructions in which terms such as "premeditation" are defined.

At a follow-up hearing the State provided copies from the trial attorneys' file which showed that Petitioner had been evaluated at the request of his initial retained attorney and by trial counsel for competency to stand trial, the existence of support for an insanity defense or for any signs of a diminished capacity (Ex. 7).

Also included in the Exhibit were copies of school and psychological records obtained during the representation.

On October 10, 2011 a letter from Dr. Wyatt Nichols, Ph. D. reflected his findings that Petitioner was competent to stand trial, that a defense of insanity could not be supported and that the Petitioner was able to form the requisite culpable mental state required for First Degree Murder. A January 25, 2012 letter from Debbie Nichols, LCSW, the Forensic Coordinator of West Tennessee Forensic Services, Inc., indicates that Petitioner was evaluated by a Dr. Michael Seay who reached the same conclusions on these issues.

In the same follow-up hearing, Dr. McCoy was recalled by Petitioner for further testimony, which was described as being "supplemental". Dr. McCoy reiterated that he made no findings as to the Petitioner's competency, but again expressed the opinion that Petitioner could not have formed premeditation. Dr. McCoy did not feel that Petitioner was capable of committing what Dr. McCoy referred to as "cold blooded murder".

III. Conclusions of Law

A guilty plea must be voluntarily, understandingly and knowingly entered to pass constitutional muster. Boykin v. Alabama, 395 U.S. 238 at page 242 (1969). In examining whether a guilty plea was knowingly and voluntarily entered, the standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. "Jaco v. State, 120 SW 3d 828, 831 (Tenn. 2003) as cited in Howell v. State, 185 SW 3d 319, at page 331. (Tenn. 2006)

The trial court may consider a number of factors in making this determination. Blankenship v. State, 858 SW 2d 897 (Tenn. 1993) these include:

1) the defendant's elative intelligence
2) the defendant's familiarity with criminal proceedings
3) the competency of counsel and the defendant's opportunity to confer with counsel about alternatives;'

4) the advice of counsel and the court about the charges and the penalty to be imposed, and
5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial.

In the case at hand, Petitioner does not attack the voluntariness of his guilty plea. Indeed, the transcript of the plea, entered at the hearing as Exhibit #6, shows that the plea was made knowingly, voluntarily and in full understanding of his constitutional rights.

Petitioner maintains, that by failing to test for the "warrior gene" and by failing to have Dr. McCoy testify, that trial counsel was ineffective.

It is Petitioner's contention that the failure of his trial counsel led to the entry of a guilty plea which he now asserts should be found to be defective.

The first issue to be decided is whether or not trial counsel's performance was deficient, and if so, whether the deficiency resulted in prejudice to Petitioner. Strickland v. Washington, 466 U.S. 668, 692 (1984)

To establish deficiency, a petitioner must show that counsel's representation full below an objective standard of reasonableness under prevailing professional norms. Strickland at page 688 and Baker v. Rose, 523 SW 2d 930 at page 936 (Tenn. 1975)

Petitioner asserts that his trial counsel was deficient in "failing to investigate, failing to research and failing to utilize the services of Dr. James Walker, forensic psychologist from Nashville, Tennessee".

The record is clear that trial counsel investigated the possibility of a mental defense or condition such as the diminished capacity to form a culpable mental state.

Counsel testified that they routinely look for this type of proof to use in the case in chief as well as for possible mitigation. Petitioner was examined and evaluated by two separate psychologists during the case. Both rendered opinions that did not support the insanity defense, and more

importantly, both opined that Petitioner was able to form the requisite mental state required for the charge of Murder First Degree. (see ex. 7)

As an aside, the court noted at the hearing that the Petitioner was charged with "felony murder", as well as "premeditated murder", and actually entered his guilty plea to Murder during the Perpetration of a felony, to-wit: kidnapping, as charged in count 1 of the indictment.

It is difficult to attribute a particular "defense strategy" to the entry of a guilty plea. In the case at hand, after representing Petitioner for months, the strategy could best be described as "trying to save his life". In view of fact that the plea agreement resulted in the withdrawal of the notice seeking the Death Penalty or Life without Parole, it would have to be considered successful.

In this case, trial counsel used all of the resources available to them to prepare this case. Trial counsel's performance must be evaluated from the "prospective of counsel at that time" (emphasis added) Strickland at page 689.

At the hearing, Petitioner produced proof, that if accepted by the jury, might result in the jury returning a verdict of Murder Second Degree, in the 2d count of the indictment. The subsequent discovery is not evidence of a deficient performance by trial counsel.

In summary, trial counsel performance was well within the range of acceptable performance. Further, the guilty plea was made knowingly and voluntarily, and with the advice of competent counsel. Petitioner's assertion now that he would plead guilty to second degree murder is not relevant to the issue at hand.

This court finds no merit in the claims of Petitioner, and hereby denies the Petition for Post-Conviction Relief.

This is the 14th day of November, 2013.

J. Robert Carter, Jr.
Judge - Division III