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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. 54 (May 19, 2016) 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. 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 Microsoft Word 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 Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner in the firm of Austin, Davis & Mitchell

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

1995 #017328

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee #017328 Licensed since October 24, 1995. License is still active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

I joined the Law Office of L. Thomas Austin on the Monday after taking the bar exam (July 1995). I became his associate immediately after being notified that I had successfully passed the bar exam (October 1995). I have remained with this office ever since and was named as a partner in 2002. I currently practice with three (3) other attorneys. We primarily practice in the areas of criminal defense, domestic relations, personal injury, real estate closings & litigation, business formation and estate planning.

In 1996, I was appointed as the City Attorney for the City of Whitwell, TN and served in that capacity (part time) until I resigned in 1999. Upon my resignation, another attorney in my firm took over the position. The duties of this position included advising the city commission and representing the City of Whitwell in litigation and negotiations.

In 1996, I was also hired as a part time assistant for the Twelfth Judicial District Public Defender's Office. My duties in this position were to represent indigent persons who had been charged with a crime. I was responsible for handling cases in the General Sessions Courts of Bledsoe & Rhea County and the Circuit Court of Bledsoe County.

In 2005, I was elected as the Municipal Judge for the City of Dunlap (TN). In that capacity I preside over cases involving misdemeanors, traffic violations and violations of city ordinances.

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.

My present practice is a general practice. Although difficult to quantify, I would estimate that approximately 90% of my practice involves litigation. I would estimate that approximately 60% of my practice is devoted to criminal defense (both state and federal defense) with the remainder of my practice being in the areas of personal injury (5%), domestic relations (10%), juvenile court matters (10%) and real estate litigation (5%). I estimate that approximately 10% of my practice involves transactional work which includes helping people form small businesses as well as in the areas of estate planning and handling probate matters.

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.

In my 25+ years of practicing law, I have handled numerous cases in several areas of the law in both state and federal court. During these years I have represented individuals charged with crimes ranging from speeding tickets to First Degree Murder. I have served as lead counsel in approximately forty (40) jury trials (including First Degree Murder, Child Rape, Aggravated Child Abuse, Aggravated Assault, Vehicular Assault, DUI, domestic assault, federal drug trafficking cases, federal carjacking, federal firearms and personal injury). I have also sat as second chair in several jury trials—most of which involved criminal defense. I have not kept up with the number of bench trials that I have handled but I would estimate at least three hundred (300) bench trials.

I have also handled appeals (both civil and criminal) before the Tennessee Court of Appeals, the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court (Workers' Compensation Panel) and the United States Court of Appeals for the Sixth Circuit.

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

I have been fortunate to have had a few criminal convictions/sentences reversed on appeal. One of these cases involved a young lady whom I represented at trial and was convicted by a jury after the trial judge denied my motion for judgment of acquittal at the conclusion of the state's case. *See*, State vs. Appleton, M2011-00866-CCA-R3-CD, 2012 WL 474551 (Tenn. Crim. App. February 15, 2012). Another involved an appeal from the trial court's denial of defendant's suppression motion. Subsequent to the denial of this motion, my client entered a plea but reserved a certified question of law. The trial court's denial of my client's suppression motion was subsequently reversed on appeal. *See*, State vs. Mosley, M2014-02533-CCA-R3-CD, 2016 WL 309837 (Tenn. Crim. App. January 26, 2016). Another case involved a defendant who was sentenced in federal court. On appeal, the Sixth Circuit determined that the trial judge had considered an improper factor during the sentencing hearing and remanded the case for a new sentencing hearing. *See*, United States vs. Wright, No. 08-6546, 426 Fed.Appx. 412 (6th Cir. July 1, 2011). My client subsequently received a much less harsh sentence.

I have also had some success in civil appeals. For example, in one case I represented a small trucking company on a claim against its insurance company for the loss of one of its trucks due to a theft. I was successful in obtaining a judgment for my client after a bench trial and the insurance company subsequently appealed. The Court of Appeals affirmed the judgment and I eventually collected the judgment. *See*, Grapevine Trucking, LLC vs. Carolina Casualty Ins. Co., E2008-01362-COA-R3-CV, 209 WL 3486639 (Tenn. Ct. App. October 29, 2009). In another civil appeal I represented a lady in a contested annulment matter in which the estate of her first husband challenged her right to an annulment against her second husband. At the conclusion of the trial, the trial judge refused to grant my client an annulment on the basis that she had unclean hands. This judgment was subsequently reversed on appeal. *See*, Emmit vs. Emmit, 174 S.W.3d 248 (Tenn. Ct. App. 2005).

I have also taken several criminal cases to trial before a jury. My last homicide trial involved a young lady who was charged with 1st degree murder for the death of her boyfriend's five year old son. She refused the State's 18 year offer and proceeded to trial. The case was very complex and involved expert testimony from several medical doctors as well as expert testimony from a biomedical engineer. She was ultimately convicted of Reckless Homicide and Aggravated Assault and received a sentence of six (6) years. The case was tried over the course of four (4) days and was extremely stressful due to the complexities of the case.

I have also tried several civil cases to a jury. As an example, several years ago I represented a lady in a trip & fall case in Sevier County. Her total medical bills were $4,995.00. The day before trial, the defense attorney offered to settle the case for $4,995.00. We proceeded to trial and the jury awarded my client $112,000.00 but determined that she was 35% at fault. We subsequently agreed to resolve the case for approximately $65,000.00.

One of the more interesting civil bench trials that I have had involved my representation of a manufacturer from the United Kingdom against a local parachute manufacturer to collect on a foreign judgment for breach of contract. Not only did I successfully navigate the complexities of the Hague Convention on the enforcement of foreign judgments but I was also successful in piercing the defendant's corporate veil and obtain a judgment against the individual who owned the defendant company. After obtaining a judgment, I was finally able to collect the judgment through considerable efforts.

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

In 2005 I was elected as the municipal judge for the City of Dunlap (TN). I primarily preside over criminal cases involving individuals who are charged with misdemeanors, traffic violations and violations of city ordinances. Every case is noteworthy because, for many of the defendants, this is the only experience that they will ever personally have with our criminal justice system.

I have not served as either a mediator or arbitrator.

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

I occasionally serve as a guardian ad litem for juveniles in dependency and neglect matters that are brought in juvenile court.

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

I have assisted several non-profit organizations with forming their organization, assisting them with obtaining recognition as a 501(c)(3) organization by the IRS and subsequently advising them on various matters.

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 or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

This is the first time that I have ever submitted such an application or sought such a position.

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.

1985-1990 University of Tennessee at Chattanooga. BA in Economics & BS in Political Science (Public Administration). Pi Sigma Alpha Honor Society.

1992-1995 Cecil C. Humphreys School of Law, University of Memphis. J.D. Selected for membership on school's moot court board. Member of Federalist Society. Graduated in the top fifteen percent (15%) of my class.

PERSONAL INFORMATION

15. State your age and date of birth.

53 years of age. Born [redacted] 1967.

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

53 years.

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

24 years.

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

Sequatchie 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.

Not applicable.

20. Have you ever pled guilty or been convicted or placed 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.

Public Intoxication on October 31,1987. Paid fine.

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

No.

22. Please 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.

I believe that I have had two complaints filed against me with the Board of Professional Responsibility for which I had to file a response and both were dismissed. No disciplinary action has ever been 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.

None.

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 defendant in an action brought in Sequatchie County General Sessions Court as a result of a car accident in 1995. I do not recall the docket number. Fault was determined to be 50/50.

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.

Sequatchie County Soccer Club, Inc. (member 2014-2017); Alan & Kathryn Greenberg Scholarship Committee (board member 2005-present); Chapel Hill United Methodist Church Administrative Board (chairperson 2014-2015).

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.

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

Tennessee Bar Foundation (Fellow-- Class of 2016); Twelfth Judicial District Bar Association (President 2016); Tennessee Association of Criminal Defense Lawyers (Board Member 2014-2017); Tennessee Bar Association (member); Tennessee Trial Lawyers' Association (Member).

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.

Selected as a Fellow with the Tennessee Bar Foundation in 2016.

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

"A Comparison of Self-Defense Strategies—Establishing the Defendant's Reasonable Fear of the Alleged Victim Versus the Assertion of the First Aggressor Defense" published in *For The Defense* in April of 2014.

"Interstate Compact on Detainers—A Roadmap for Finding Your Way to the Courthouse" published in *For the Defense* in April of 2009.

"The Battered Spouse Defense—An Outline on Preparing a Domestic Violence Case for Trial in Tennessee" published in *For the Defense* in February of 1998.

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.

None.

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.

Elected to position of Municipal Judge for the City of Dunlap (TN) in 2005.

I was also a candidate for the Marion County Commission in 1990.

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

No.

34. Attach to this application 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.

See attached documents. I am one hundred percent (100%) responsible for authoring each of these documents.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking the position due to the fact that I truly enjoy legal research and writing. Over the years, my practice has gravitated towards criminal defense because, in my humble opinion, it is the last remaining vestige of trial practice. I feel that, as someone who has represented individuals in courts ranging from city courts and general sessions courts to the state and federal appellate courts, I have a fairly good grasp of our criminal justice system and the relationship between our government and its citizens. I understand that the decisions made by our appellate courts have a direct impact on both citizens who have been charged with a crime and those charged with enforcing our nation's laws and that there is a balance between the two that must be consistently recognized.

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)***

Since beginning my practice in October of 1995, I have accepted appointments to represent indigent individuals who were accused of crimes in state court. I still continue to accept such appointments. In 2001, I was accepted to the CJA panel for the United States District Court for the Eastern District of Tennessee. As member of the CJA panel, I am appointed to represent indigent individuals who have been charged with federal crimes. In 2018, I was appointed to the CJA panel for the United States Court of Appeals for the Sixth Circuit where I am appointed to represent indigent individuals in federal criminal appeals.

I have also provided *pro bono* advice to several local non-profit organizations on an as-needed basis. These local organizations include the Sequatchie County Cancer Support Network, Inc., the Sequatchie County Fellowship of Churches, Inc. (local food bank); Next Steps, Inc. (a local pregnancy crisis center) and the Sequatchie County Soccer Club, Inc..

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 an appointment to serve as one of twelve justices of the Tennessee Court of Criminal Appeals and fill the expected vacancy for the Middle Division due to the announced retirement of Justice Woodall. In that capacity, I would be serving on a three member panel of judges who would be hearing appeals in criminal matters. In addition to being fair and impartial, I believe that I will be able to offer my perspective as a lawyer who has tried numerous jury trials to both urban and rural juries.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I understand that, as a judge, one must be careful as to what organizations one joins and what activities that one participates in. Since 2005, I have been involved with the Alan & Kathryn Greenberg Scholarship Committee which offers college scholarships to graduates of Whitwell High School (my alma mater). Whitwell High School serves an economically distressed area of Marion County (TN) and the scholarships offered by this organization are very beneficial to the recipients of these scholarships. I intend to continue my association with this organization.

I also intend to continue with my involvement in my church and its many activities.

I would also like to be able to continue to *pro bono* advice to the various non-profit organizations which I have been associated with over the years.

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

I am the only attorney in my family and I was the first to obtain a bachelor's degree. I graduated from Whitwell High School in 1985. At that time the school lacked enough History and Senior Math text books for all of the students in my class. Nevertheless, between 1985-1990, my school produced five graduates who eventually earned law degrees. While I

obtained my law degree from the University of Memphis, the others obtained theirs' from Harvard University, Emory University, George Washington University and Vanderbilt University.

After graduating from college in December of 1990, I obtained a job and saved to pay for law school. During the summer after my first year of law school, I volunteered with the public defender's office in the mornings and worked at an office supply store in the evenings/weekends. During my last two years I attended classes during the mornings and clerked for a small law firm in the afternoons.

My first job after law school was with a sole practitioner who subscribed to the "sink or swim" theory. He eventually made me a partner– a position that I currently hold. It has been a difficult decision to apply for a position that will require me to leave this firm.

I have been married since 1992 and I have two children. My son recently graduated from Tennessee Tech and is currently working full time with a Nashville CPA firm while attending graduate school. My daughter is a junior at the University of Tennessee.

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

Yes. As a municipal judge, I am required to preside over cases and I occasionally sit for general sessions judges in other counties if the presiding judge has a conflict. I was recently asked to sit as judge on an eviction case involving a lady who had previously been evicted and given 10 days to vacate the premises but she did not appeal her eviction. Instead, a motion to extend the time for her to vacate was filed on her behalf and I was asked to hear that motion after the judge who originally heard the case recused himself. I personally would have liked to have given the lady more time to vacate but the granting of that request was not supported by the law given the fact that the judgment which had evicted her had become final. I feel that it is necessary that the application of the law remain consistent in order to guide others in the future. As cold as it may seem, the law must be applied as written. To hold otherwise would result in outcomes being dependent upon the personal whims of the judge(s) who hear(s) the case.

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. Glenn Barker, Chairman of Citizens Tri-County Bank & Past President of the Tennessee Bankers' Assoc., [redacted] Dunlap, TN 37327 [redacted]

B. Buddy D. Perry, retired Circuit Judge [redacted], Dechard, TN 37324 [redacted]

C. Steve Strain, Assistant District Attorney, [redacted] Jasper, TN 37347 [redacted]

D. Coy Swanger, Sequatchie County Sheriff, [redacted] Dunlap, TN 37327 [redacted]

E. Travis McDonough, U.S. Dist. Judge, [redacted] Chattanooga, TN 37402 [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 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 application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application 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: October 2, 2020.

Signature

When completed, return this application to Ceesha Lofton, 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.

M. Keith Davis
Type or Print Name

M. K. D.
Signature

10/2/2020
Date

017328
BPR #

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

Not licensed in any other State

Admitted to practice before the United States District Court for the Eastern District of Tennessee (6/6/96)

Admitted to practice before the Untied States Court of Appeals for the Sixth Circuit (4/13/98)

A comparison of self defense strategies--
establishing the defendant's reasonable fear of the alleged victim
versus the defendant's assertion of the first aggressor defense

Submitted by M. Keith Davis, Attorney at Law
Austin, Davis & Mitchell
Dunlap, TN

Any competent defense attorney understands that self defense may serve as an absolute defense in cases in which the client is charged with a form of either homicide or assault. However, it is important to note that the defense of self defense comes in different forms. For example, in certain situations, defense counsel may introduce evidence of the alleged victim's reputation for violence in order to establish that it was the victim who was the first aggressor. In other cases, defense counsel may be able to introduce evidence of the alleged victim's prior violent acts in order to establish the defendant's state of mind. In other words, under the first situation, evidence is presented to establish that the alleged victim started the altercation. In the latter situation, evidence is presented to establish the defendant's reasonable fear of the alleged victim. While the two situations may appear to be similar, there is a vast difference in the manner in which the *Tennessee Rules of Evidence* applies to the two scenarios. This difference is especially significant in situations when the defendant himself has a history of prior violent acts. The distinction between the two self defense theories also affects the manner in which defense counsel may introduce evidence of specific instances of the alleged victim's conduct. The purpose of this article is to assist defense counsel in recognizing these differences and their possible consequences when making the decision as to which self defense theory to pursue.

Initial Burden

Regardless of which self defense theory is pursued, defense counsel must first present evidence which raises an issue to which the alleged victim's violent tendencies would be relevant.[1] As the courts have repeatedly acknowledged, the issue of self defense must be raised by the proof and not by the mere words and statements of counsel.[2] In other words, defense counsel must present some evidence which fairly raises the issue of self defense. In order to do this, testimony must be elicited from a witness who testifies that the defendant was acting in self defense. This may be accomplished on either cross-examination of the State's witnesses or on direct examination of either the defendant or a defense witness. Only after the issue of self defense has been raised by the evidence may counsel pursue one of the two self defense theories which are separately addressed below.

Defendant's Apprehension of Victim

Once the issue of self defense has been properly raised by the proof presented at trial, a defendant may testify as to his knowledge of the victim's prior violent acts in order to establish the apprehension which he felt towards the alleged victim prior to or during the assault.[3] Under this theory, testimony of third parties as to the victim's prior violent acts is limited to what such witnesses may have told the defendant in order to demonstrate that the defendant was aware of

the alleged victim's prior violent act.[4] Essentially, this self defense theory allows the introduction of evidence to show the defendant's state of mind.[5] Since the defendant is using the evidence to prove his own fear rather than the victim's propensity for violence, it is not considered to be "character evidence" of the sort contemplated by Rule 404(a)(2).[6] As a result, the State should not be allowed to counter with the introduction of evidence of the defendant's own character for violence– i.e. his prior acts of violence. The essential element which must be established in order to use this theory is that the defendant must have been personally aware of the alleged victim's prior violent acts prior to the incident for which he is being tried. In other words, evidence of the alleged victim's prior violent acts is not admissible if the defendant did not know about them until after the incident occurred. As a result, this self defense theory seems to ordinarily require that the defendant testify at trial in order to establish that he was aware of the alleged victim's prior violent behavior and that he was in fear of the alleged victim at the time that he committed the act which led to his being charged with an offense. Furthermore, this particular defense theory does not appear to prohibit counsel from introducing evidence of the alleged victim's prior violent acts during the defendant's case-in-chief so long as the defendant had some knowledge of them at the time that he committed the act at issue. In the event that the State questions the defendant's basis of knowledge concerning the alleged victim's prior violent acts, then defense counsel may introduce the testimony of third persons to corroborate the fact that the defendant had been made aware of the alleged victim's prior violent acts.[7] In such an event, the testimony of third persons is limited to what they may have told the defendant.[8] Under this theory, the fact that the third person may have personally witnessed the alleged victim previously engage in a violent act would be irrelevant unless the third person told the defendant about it or testified that the defendant also witnessed the victim's prior violent act.

First Aggressor Defense

In the event that the defendant was not aware of the alleged victim's propensity for violence at the time of the incident for which he is being tried, defense counsel may still introduce evidence of the victim's propensity for violence acts so as to corroborate the defendant's allegation that the alleged victim was the initial aggressor.[9] Under this theory, uncommunicated threats or previous acts of violence which are unknown to the defendant, although not admissible to establish the victim's character trait for violence or the defendant's state of mind, are nevertheless admissible to establish who was the first aggressor.[10] As the Tennessee Court of Criminal Appeals has previously noted, a defendant is "entitled to show the state of mind of the deceased so the jury could determine who was the true aggressor."[11] However, defense counsel must be cautious here because, once defense counsel places the alleged victim's character for violence at issue, then the State may counter by offering evidence about the defendant's character for violence in its rebuttal.[12] As a result, before possibly opening the door to the introduction of evidence of the defendant's character for violence by introducing evidence of the alleged victim's character for violence, defense counsel must thoroughly investigate the defendant's background so as to ensure that there are no skeletons living in his closet. This pre-trial investigation should include a thorough discussion with the client of the necessity of full and complete disclosure of his own prior violent acts.

If counsel chooses to pursue this defense theory to show that the alleged victim was the

first aggressor, it is important to note that the admissibility of character evidence is governed by Rule 404(a) of the *Tennessee Rules of Evidence* which provides as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> 1) *Character of accused.* In a criminal case, evidence of a pertinent trait of character offered by the accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution:
>
> 2) *Character of alleged victim.* In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.

Furthermore, the admissibility of character evidence is subject to the balancing test set out in Rule 404(b) of the *Tennessee Rules of Evidence.*[13] As a result, the trial court must conduct a hearing outside the presence of the jury and defense counsel must then be able to satisfy the following three (3) prerequisites in order to corroborate the alleged victim's first aggressor tendencies:

> 1) there must be some proof that the defendant acted against the alleged victim in self-defense;
>
> 2) the trial court must determine that there is a factual basis underlying the defendant's allegations that the alleged victim had first aggressor tendencies; and
>
> 3) the trial court must determine that the probative value of the corroborative evidence is outweighed by the potential for unfair prejudice.[14]

Counsel may proceed with this defense theory only after satisfying this balancing test.

Once the prerequisites for admitting character evidence are satisfied, Rule 405 of the *Tennessee Rules of Evidence* serves to limit the manner in which character evidence may be introduced to three (3) types of evidence-- (1) reputation, (2) opinion and (3) specific instances of

conduct.[15] In the event that defense counsel desires to introduce evidence of a specific event, it is important to recall that, under Rule 405, evidence in the form of specific instances of conduct may only be brought up on cross-examination.[16] As a result, while defense counsel may call witnesses during his case-in-chief to establish the alleged victim's reputation for violence or the witness's opinion as to the alleged victim's character for violence, the *Tennessee Rules of Evidence* prohibits defense counsel from calling a witness during his case-in-chief to prove that the alleged victim actually committed a specific violent act. As stated above, such evidence is admissible only on cross-examination of the State's witnesses.[17]

Conclusion

As stated above, while the two self defense theories appear to be similar, they have vastly different consequences. Counsel should be knowledgeable of the benefits, limitations and possible consequences of each theory before making a choice between them. Furthermore, due to the similarities between these two self defense theories, defense counsel should advise the trial court as to which theory is being presented in order to avoid any confusion on evidentiary rulings. The failure to properly advise the trial court as to which self defense theory defense counsel is proceeding could possibly result in either the trial court erroneously deciding to allow the State to introduce evidence of the defendant's character for violence or with the trial court improperly excluding evidence of the victim's propensity for violence. In fact, in one case the Tennessee Court of Criminal Appeals determined that defense counsel had waived the issue of whether the trial court had improperly excluded evidence of the alleged victim's propensity for violence when he failed to give the trial court an explanation and argument for admitting the testimony under the "first aggressor" rationale and that defense counsel had failed to take reasonable action to prevent the exclusion of the evidence.[18]

Counsel's choice of which self defense theory to pursue will determine whether the limitations on the manner of introducing evidence of specific conduct under Rule 405 of the *Tennessee Rules of Evidence* will be triggered. For example, if defense counsel chooses to focus on the defendant's state of mind, he will be allowed to introduce evidence of specific instances of the alleged victim's prior violent conduct on direct examination– so long as defense counsel is able to present proof that the defendant was aware of these prior violent acts at the time that the alleged crime was committed. However, if counsel chooses to focus on the alleged victim's character for violence, Rule 405 states that defense counsel may only introduce evidence of specific instances of the victim's prior violent conduct on cross-examination.

Finally, the decision as to which defense theory to pursue may very well depend upon the defendant's own history of having previously engaged in violent acts. Defense counsel should beware that, should he choose to pursue the initial aggressor defense, he is opening the door so as to allow the State to introduce evidence of the defendant's own prior violent acts in order to rebut the defendant's claim that the alleged victim was the first aggressor.

1. *See*, State vs. Ruane, 912 S.W.2d 766, 780 (Tenn. Crim. App. 1995); *see also*, State vs. McAfee, No. E2010-01730-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 191 at *26 (Tenn. Crim. App. March 4, 2013).

2. *See,* State vs. Ruane, 912 S.W.2d at 780.

3. *See*, State vs. Furlough, 797 S.W.2d 631, 648 (Tenn. Crim. App. 1990) *(citing* Williams vs. State, 565 S.W.2d 503, 505 (Tenn. 1978)).

4. Furlough, 797 S.W.2d at 648.

5. *Id.* at 649.

6. *See*, N. Cohen, D. Paine & S. Sheppard *Tennessee Law of Evidence* §404[5] (5th Ed. 2005).

7. *See*, State vs. Hill, 885 S.W.2d 357, 361 n.1 (Tenn. Crim. App. 1994) *(citing* Williams vs. State, 565 S.W.2d 503 (Tenn. 1978)) and State vs. Furlough, 797 S.W.2d at 648-49.

8. State vs. Hill, 885 S.W.2d at 361 n.1 *(citing* Williams vs. State, 565 S.W.2d at 505-506).

9. Furlough at 649; *see also*, State vs. Hill, 885 S.W.2d at 362 and State vs. Bennett, No. 03C01-9304-CR-00115, 1994 Tenn. Crim. App. LEXIS 104 at *13 (Tenn. Crim. App. February 24, 1994) as well as State vs. Barnes, 675 S.W.2d 195, 197 (Tenn. Crim. App. 1984).

10. *See*, State vs. Shelton, 854 S.W.2d 116, 120 (Tenn. Crim. App. 1992) and State vs. Furlough, 797 S.W.2d at 648.

11. Furlough at 649; *see also*, State vs. Cobb, No. W2011-02437-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 280 at *35 (Tenn. Crim. App. March 26, 2013).

12. *See*, State vs. Cobb at *35.

13. State vs. Seabrooks, No. W2008-00443-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 834 at *24 (Tenn. Crim. App. May 5, 2009).

14. *See*, State vs. Ruane, 912 S.W.2d at 781 and State vs. Wait, No. E2010-01212-CCA-R3-CD, 2011 WL 5137178 at *12 (Tenn. Crim. App. June 28, 2011).

15. *See,* State vs. Hill, 885 S.W.2d at 362.

16. *See*, State vs. Ruane, 912 S.W.2d at 781.

17. *See*, State vs. Hill, 885 S.W.2d at 363.

18. *See*, State vs. Wright, No. 03C01-9410-CR-00388, 1995 WL 728535 at *6-7 (Tenn. Crim. App. December 11, 1995).

IN THE TWELFTH JUDICIAL DISTRICT OF TENNESSEE
CIRCUIT COURT OF MARION COUNTY

STATE OF TENNESSEE

vs. No. 10792

MITCHELL HOYT LEIDERMAN

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

Comes now the Defendant MITCHELL HOYT LEIDERMAN by and through his appointed counsel who would hereby respectfully submit the following Memorandum of Law in support of his Motion to Suppress.

Evidence Sought to be Suppressed

The evidence which Mr. Leiderman seeks to suppress consists of all items discovered/seized as the result of his warrantless arrest on or about May 14, 2018. The items sought to be suppressed also include those items discovered during the non-consensual search of his vehicle. The items sought to be suppressed include, but are not necessarily limited to,

1) a pistol believed to be a .22 caliber derringer manufactured by Davis Industries;

2) various drugs believed to be in the form of prescription narcotics;

3) journal entries/ledgers; and

4) cash.

Upon information and belief, most of these items were discovered during an inventory search

which was conducted after Mr. Leiderman's warrantless arrest. Upon further information and belief, law enforcement contends that Mr. Leiderman's warrantless arrest was the result of a "controlled" buy which occurred a few hours earlier in Grundy County.

ISSUE TO BE ADDRESSED

1. Did law enforcement possess the requisite probable cause necessary to effectuate the warrantless arrest of Mr. Leiderman?

2. Was law enforcement authorized to seize Mr. Leiderman's vehicle which formed the basis for conducting an inventory search?

FACTS

The Defendant's arrest in Marion County (TN) on May 14, 2018, was the direct result of a "controlled" buy which had occurred a few hours earlier in Grundy County (TN). As a result, it is necessary to consider the facts surrounding each of these two events. Counsel will separately summarize the relevant facts of each event below.

Grundy County Controlled Buy

On May 14, 2018, Agent Chad Johnson of the Twelfth Judicial District Drug Task Force (DTF) oversaw an undercover operation which purportedly resulted in the purchase of two (2) pills from Mr. Leiderman in Grundy County, Tennessee.[1] At approximately 10:57 a.m. that day, Agent Johnson and other officers met with a "confidential informant" at an undisclosed location, searched his person and his vehicle, wired him with a covert electronic transmitting device and provided him with $100.00 in pre-recorded funds with specific instructions to purchase pills from Mr. Leiderman. What distinguishes this scenario from other "controlled" buys is the fact

[1] To the best of counsel's knowledge these two pills have not been lab tested. Instead, Agent Johnson referenced a "drug bible" and determined that these were both opiod derivative narcotics.

that the "confidential informant" would not be making the purchase himself but, instead, he would be picking up his next door neighbor (William Jones a/k/a "AG") and taking "Jones" to meet Mr. Leiderman at one of his rental properties so that he ("Jones") could purchase the pills. Upon information and belief, "Jones" was supposedly not aware of his role in this "controlled" buy and neither he nor his home were subjected to a search prior to the alleged transaction.

Prior to sending the "confidential informant" on his mission, Agent Johnson spoke into the recording device and stated that the "confidential informant" would be traveling with a female and a child and that he would be taking them home before picking up "Jones" who was alleged to be his neighbor. As a result, the "confidential informant" made two (2) separate stops between the location where he met with law enforcement and the location of Mr. Leiderman's rental property. Upon information and belief, neither of these stops were supervised by law enforcement.

Agent Johnson became aware of the "confidential informant" after the informant approached law enforcement and claimed that Mr. Leiderman had been selling drugs to a member of his family and that he was "getting tired of it". According to Agent Johnson, the "confidential informant" wanted to know what they could do to stop it and then he subsequently agreed to cooperate with law enforcement. Upon information and belief, law enforcement had never previously used the "confidential informant" to make a "controlled" buy prior to the date in question and they have not used him to make any subsequent "buys". As consideration for his cooperation, the "confidential informant" was paid an undisclosed amount of cash.

At the time of the "controlled" buy at issue in this case, Mr. Leiderman was 64 years old. While Agent Johnson had heard rumors that Mr. Leiderman had been suspected of being

involved in criminal activity for years, he had never initiated an active investigation of Mr. Leiderman prior to the date at issue. Despite these rumors, Mr. Leiderman did not have any prior drug arrests and Agent Johnson was not aware any previous "controlled" buys from him. Furthermore, Mr. Leiderman had never been the target of a search warrant.

After leaving the undisclosed location of his rendezvous with Agent Johnson, the "confidential informant" drove away with the unknown female and child and subsequently stopped the vehicle a few minutes later. Upon information and belief, everyone exited the vehicle and the "confidential informant" accompanied the female and child as they entered a home. Shortly thereafter, the "confidential informant" left the home, returned to the vehicle and drove a short distance before stopping. After stopping the vehicle, the "confidential informant" appears to have gone inside another residence where he spoke to a man who is alleged to be William Jones. During this conversation, the "confidential informant" told "Jones" that he had a sick family member whose treating doctor was refusing to give him any medication to control his pain. The "confidential informant" then told "Jones" that his wife had given him $100.00 and asked him to go find something for him. "Jones" then replied by saying that he could get him "something" and that he would run the "confidential informant" to "Hoyt's" to see if he had anything. The two men then left the residence, got into a vehicle and then drove a few minutes before stopping the vehicle at one of Mr. Leiderman's rental properties. The vehicle was then turned off and the two men exited the vehicle. Upon information and belief, the "confidential informant" waited near the vehicle while "Jones" went inside the home and purportedly met with Mr. Leiderman. Whatever conversation that "Jones" allegedly had with Mr. Leiderman was not recorded. Furthermore, despite setting up surveillance around Mr. Leiderman's rental property,

law enforcement had no idea as to how many people were present at Mr. Leiderman's rental property at the time of the "controlled" buy. It is significant that law enforcement never observed Mr. Leiderman at the property nor did they observe him leave the property. However, they did observe an orange and white flatbed truck parked at the residence.

After "Jones" returned to the vehicle, he purportedly handed the "confidential informant" two (2) pills and the two left the location in a vehicle and returned to "Jones'" home. During the drive, "Jones" began discussing the fact that he was in the business of buying and selling pills to make a little money. While "Jones" admitted to making a little money doing this, he claimed that he would end up spending the money on pills. "Jones" then began discussing Mr. Leiderman's alleged drug operation and the prices that he charged. After a few minutes, the vehicle stops and both men exited the vehicle. The "confidential informant" went into the home where the female and child were staying. He, the female and child then returned to the vehicle, started it and drove away. As they were driving, the female received a telephone call from someone believed to be Agent Johnson who instructed them to meet him at his office. After arriving at Agent Johnson's office, the vehicle was turned off. Agent Johnson subsequently spoke into the recording device and announced that the time was 11:50 a.m. and that he was turning the recording off.

As of this date, the "unwitting informant" (William Jones) has never been charged with a crime related to his alleged purchase of two (2) pills from Leiderman.

<u>Marion County Arrest</u>

A few hours after the Grundy County "controlled" buy, officers observed an orange and white flatbed truck driving in Marion County and they began following the vehicle. They subsequently observed the vehicle stop to pick up a female passenger (later determined to be

Kathy McNabb). The vehicle then drove a short distance before stopping at a church parking lot located on 4th Street in Jasper, TN. The driver subsequently dropped the female off at a residence. Officers then followed the vehicle to the Marion County Farmer's Co-op and observed the driver go inside the business before returning to the vehicle. Officers then followed the vehicle back through the town of Jasper. As the vehicle traveled back towards Grundy County along Highway 150, other officers were instructed to conduct a traffic stop of the vehicle. During the ensuing traffic stop, Agent Johnson approached Mr. Leiderman and advised him that he was under arrest for the sale of a controlled substance. After placing Mr. Leiderman under arrest, Agent Johnson searched his person and discovered $70.00 of the prerecorded "buy" money inside a wallet located in Mr. Leiderman's left rear pocket.

In addition to searching Mr. Leiderman's person, officers also conducted an inventory search of his vehicle due to the fact that they would be seizing the vehicle. Upon information and belief, the basis for the seizure of the vehicle was the "controlled" buy which had transpired in Grundy County earlier that day. During the course of this inventory search, officers discovered a .22 caliber derringer in the cab of the truck. They also discovered two (2) journals/ledgers and several pill bottles which contained various prescription medications. These pill bottles were discovered concealed inside a pvc pipe that was lying in the cab of the pickup truck.

It is significant to note that the female (Kathy McNabb) was not working as an informant and that she was not interviewed prior to Mr. Leiderman's arrest. Upon information and belief, she was interviewed subsequent to Mr. Leiderman's arrest and the search at issue. It is believed that she has not been charged with any crime related to her alleged drug sales to Leiderman.

LAW AND ARGUMENT

I. Law enforcement did not have the requisite probable cause to effectuate a warrantless arrest of Mr. Leiderman.

Both the Fourth Amendment to the *United States Constitution* and Article I Section 7 of the *Tennessee Constitution* protect the citizens of this great state from unreasonable searches and seizures.[2] To pass constitutional muster, the United States Supreme Court has previously held that an arrest must be based upon probable cause which is defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense". Gerstein vs. Pugh, 420 U.S. 103, 111-112, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975) *citing* Beck vs. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964), Henry vs. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959) and Brinegar vs. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879 (1949). Similar to the standards applicable to cases involving searches and seizures, this standard "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." Id. The purpose of this standard is to protect citizens from "rash and unreasonable interferences" with their privacy and from being required to face unfounded criminal charges. Id.

Similarly, the Tennessee Supreme Court has previously held that probable cause to arrest exists when "at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had *reasonably trustworthy information*, are sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense."

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[2] As this court well knows, the 4th Amendment to the *United States Constitution* is applicable to the States via the 14th Amendment to the *United States Constitution*.

State vs. Bell, 429 S.W.3d 524, 530 (Tenn. 2014) *citing* State vs. Echols, 382 S.W.3d 266, 277-78 (Tenn. 2012) (*quoting* Beck vs. Ohio, 379 U.S. at 91); *see also* State vs. Lawrence, 154 S.W.3d 71, 75-76 (Tenn. 2005) and State vs. Henning, 975 S.W.2d 290, 300 (Tenn. 1998). While probable cause need not establish absolute certainty, it is required to be more than mere suspicion. Id. *citing* State vs. Melson, 638 S.W.2d 342, 350 (Tenn. 1982) and State vs. Echols, 382 S.W.3d at 278; *see also* State vs. Lawrence, 154 S.W.3d at 76. In order to determine whether the requisite probable cause to conduct a warrantless arrest of a suspect exists, courts must "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable... officer, amount to' probable cause." Maryland vs. Pringle, 540 U.S. 366, 371, 124 S.Ct. 795 (2003) (*quoting* Ornelas vs. United States, 517 U.S. 690 (1996)).

While there exists a preference for the issuance of a warrant prior to making an arrest, courts have previously recognized that the warrantless arrest of a suspect is constitutionally permissible. Id. at 75; *see also* State vs. Henning, 975 S.W.2d at 300. In this regard, an officer is authorized to make a warrantless arrest when it is shown that a felony has in fact been committed and the officer has reasonable cause for believing that the person being arrested committed it. Id.; *see also* T.C.A. §40-7-103(a)(3). In other words, the arresting officer must have probable cause to believe that the person being arrested committed the crime. Id. *citing* State vs. Lewis, 36 S.W.3d 88, 98 (Tenn. Crim. App. 2000).

Tennessee courts have previously addressed situations in which an officer made a warrantless arrest based upon information that was supplied to them by another person. *See,* State vs. Marshall, 870 S.W.2d 532 (Tenn. Crim. App. 1993). In this regard, it has previously

been held that:

> If the information possessed by the officers is not of their personal knowledge, but is received from an informant, probable cause under Article I, §7 of the *Tennessee Constitution* requires that the officers must know that (1) the informant has a basis for his information that a person was involved in criminal conduct and (2) the informant is credible or his information is reliable. State vs. Jacumin, 778 S.W. 2d 430, 436 (Tenn. 1989); *see* State vs. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). However, any deficiency in the informant's information under this two-prong test may be overcome by independent police corroboration. Jacumin, 778 S.W.2d at 436.

Id. at 538-39. Counsel has been able to identify only two (2) cases in which the courts of this great state have previously addressed situations in which officers relied upon information which was supplied by a "confidential informant" who obtained the information from a third party (i.e. an "unwitting informant"). While both cases are referenced in separate unpublished opinions issued by the Tennessee Court of Criminal Appeals, the decisions were rendered by different divisions and reached different conclusions. *See*, State vs. Rosenboro, No. 03-C-01-9203-CR-00080, 1993 WL 78746 (Tenn. Crim. App. E.D. March 18, 1993) and State vs. Belk, No. W2014-00887-CCA-R3-CD, 2015 WL 2258398 (Tenn. Crim. App. W.D. May 13, 2015). Furthermore, it is important to note that, unlike the present case which involves a warrantless arrest, each of these cases involved a search conducted pursuant to a search warrant that had been issued by an independent magistrate who had considered affidavits acknowledging the source of the "confidential informant's" information.

In Rosenboro, the proof was that, similar to the present case, the "confidential informant" never entered the defendant's home and did not make any observations but merely relied upon the information provided by the "unwitting informant". 1993 WL 78746 at *2. The court noted

that, while the reliability of the "confidential informant" was never questioned, the affidavit submitted in support of the search warrant application failed to establish the reliability of the "unwitting informant". Id. In fact, the court noted that the affidavit did not contain any language to "show underlying circumstances from which the officer concluded that the "unwitting informant" was 'credible' or that his information was 'reliable'". Id. The court then agreed with the defendant's argument that the affidavit used to obtain the search warrant contained "two (2) separate and distinct layers of hearsay". Id. It then concluded that the affidavit failed to satisfy the credibility prong of the *Aguilar-Spenelli* test and reversed the trial court's decision which had upheld the validity of the search. Id.

In Belk, the affidavit submitted in support of the search warrant application provided information that the "confidential informant" had previously made drug purchases from the "unwitting informant" on two different occasions during the investigation with the most recent purchase occurring within 72 hours of the application. 2015 WL 2258398 at *5. The affidavit stated that, during the last purchase, the "unwitting informant" had instructed the "confidential informant" to drive him to the defendant's residence which the "unwitting informant" identified as "the residence of the 'dopeman'". Id. The affidavit reflected that the "unwitting informant" had identified the individual who resided at this residence as being his source and supplier of crack cocaine. Id. The affidavit then stated that the "confidential informant" had observed the "unwitting informant" enter the residence and subsequently exit the residence and return to the "confidential informant". Id. The affidavit stated that while the "unwitting informant" did not possess the crack cocaine which the "confidential informant" ordered prior to entering the residence, he returned with the amount of drug which the "confidential informant" had ordered.

Id. The affidavit then went on to state that the "criminal informant" had previously worked with law enforcement in unrelated matters on several occasions and had conducted purchases from three (3) other individuals who were not involved in the case. Id. at *6. The affidavit stated that agents had conducted surveillance of the "confidential informant" on each of these unrelated cases and that the "confidential informant" had followed the agent's instructions. Id. The affidavit stated that the information which the "confidential informant" had previously supplied had resulted in the seizure of drugs in another case and led to two (2) arrests. Id. The affidavit also supplied information about the "unwitting informant" and noted that he had a prior drug conviction and that other officers had reported that they had received information in the past that the "unwitting informant" had sold illegal narcotics. Id. Finally, the affidavit noted that agents were familiar with the defendant and that they had received information in the past about him selling illegal narcotics-- including the fact that the defendant had a prior conviction for selling cocaine. Id. Based upon this information, the court distinguished the facts from the ruling in Rosenboro in which there was no corroboration for the "unwitting informant's" claim that he had purchased the drugs in the house which was to be searched. Id. at *7. The court then affirmed the trial court's decision to deny the defendant's suppression motion.

Since the decisions in Rosenboro and Belk, the Tennessee Supreme Court has abandoned its reliance on Jacumin and adopted the "totality of the circumstances" analysis for determining whether an affidavit used to obtain a search warrant establishes the requisite probable cause under Article I section 7 of the *Tennessee Constitution*. *See*, State vs. Tuttle, 515 S.W.3d 282, 289 & 307-08 (Tenn. 2017). In reaching this decision, the Tennessee Supreme Court specifically acknowledged that the "totality of the circumstances" approach still required consideration of the

informant's basis of knowledge and veracity or credibility. Id. at 308. The court explained that, rather than being separate and independent considerations, these two factors "should [now] be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place". Id. *citing* Illinois vs. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

When considering the weight to be afforded to the credibility of an informant, the courts have long differentiated between "citizen informants" and "criminal informants". In regards to a information received from a "citizen informant", such information is *presumed* to be reliable. State vs. Tuttle, 515 S.W.3d at 301 *citing* State vs. Williams, 193 S.W.3d 502, 507 (Tenn. 2006). However, no such presumption of reliability is afforded to information obtained from either an unknown informant or an informant from the "criminal milieu". Id. *citing* State vs. Smotherman, 201 S.W.3d 657, 662 (Tenn. 2006) *citing* Williams, 193 S.W.3d at 507 and Jacumin, 778 S.W.2d at 436).

Finally, it is important to note that our courts have specifically acknowledged a preference for warrants over situations in which a warrant was not obtained. Tuttle, 515 S.W.3d at 300. In this regard, our courts have previously reasoned as follows:

> The point of the Fourth Amendment... is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. *citing* United States vs. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)

quoting Johnson vs. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). As a result, in doubtful or marginal cases, a search conducted pursuant to a warrant may be held to be valid where a search without a warrant would not. Id. *citing* United States vs. Ventresca, 380 U.S. at 106, 85 S.Ct. 741. Counsel would respectfully contend that, while this rationale was directed towards cases involving searches, the preference for warrants is also applicable to arrests.

In the case *sub judice*, there is no dispute that the search of Mr. Leiderman's person and vehicle was the direct result of his warrantless arrest. As a result, counsel would respectfully contend that, if this court finds that this case is either doubtful or marginal, the arrest must be deemed to be invalid. *See*, Tuttle, 515 S.W.3d at 300 and Ventresca, 380 U.S. at 106. However, for the reasons which follow, counsel would respectfully contend that the "totality of the circumstances" clearly do not support a finding of the requisite probable cause which was necessary to effectuate Mr. Leiderman's warrantless arrest.

First, it is important to note that, even if this court were to find that the "confidential informant" was a "citizen informant", there is only a *presumption* that the information which he provided was reliable. *See*, Tuttle, 515 S.W.3d at 301 *(citing* Williams, 193 S.W.3d at 507). In this regard, counsel would point to the fact that, unlike the informant used in Belk, the "confidential informant" at issue had never been used prior to Mr. Leiderman's arrest nor has he been used since his arrest. 2015 WL 2258398 at *6. In fact, there is very little known about the "confidential informant" other than the fact that he had a personal motivation to ensure that Mr. Leiderman was arrested due to his unsupported allegations that Mr. Leiderman had been selling drugs to one of his family members and that he was "sick of it". It is significant that the

"confidential informant" inquired of Agent Johnson as to what he could do to help stop it.

Second, there is absolutely no information about the "unwitting informant's" credibility. Agent Johnson had no information as to whether "Jones" had a criminal record nor did he have any knowledge as to whether he was related to the "confidential informant". No law enforcement agent was able to check him or his home for contraband prior to the alleged transaction. Furthermore, there is absolutely no proof that "Jones" even interacted with Mr. Leiderman. In this regard, it is significant that not only is Mr. Leiderman's voice not reflected on the audio recording but law enforcement never observed him at the residence either before, during or after the alleged transaction. While the alleged transaction allegedly took place on Mr. Leiderman's property, it is important to note this was one of his rental properties and that law enforcement never observed Mr. Leiderman leave the property after the alleged transaction. Counsel would respectfully contend that "Jones" is an "unknown informant" and, therefore, the information that he provided is not deemed to be reliable. *See*, State vs. Tuttle, 515 S.W.3d at 301 *citing* State vs. Smotherman, 201 S.W.3d at 662. Furthermore, counsel would respectfully contend that the recording reflects that "Jones" admitted that he was engaged in the criminal activity of buying and selling prescription drugs. As a result, he should also be considered to be a "criminal informant" whose information is not presumed to be reliable. Id.

Third, it is important to note that Mr. Leiderman was sixty-four (64) years old at the time of the alleged transaction. Despite his age, he has never been charged with a prior drug offense nor had he been involved in any "controlled" buys prior to his arrest. Furthermore, he has never previously been the target of a drug investigation or the target of a search warrant. These facts distinguish this case from the facts of Belk in which the affidavit at issue stated that the

defendant had prior drug convictions. Additionally, there is no evidence of any phone calls or texts between Mr. Leiderman and either the "confidential informant" or "Jones" regarding any alleged drug activity.

Finally, counsel would respectfully contend that, whatever this transaction was, it was anything but a "controlled" buy. While officers stated that they had searched the "confidential informant" and his vehicle prior to sending him out on his mission to purchase pills from Mr. Leiderman, there is no indication that anyone searched the female who accompanied him. It is also significant to note that the "confidential informant" made two (2) unsupervised stops at two different residences and entered each of these residences prior to taking an unknown person ("Jones") to the rental property owned by Mr. Leiderman. Agents were not able to search either of these homes for contraband prior to the alleged transaction. The "confidential informant" was then accompanied to Mr. Leiderman's rental property by "Jones"– an individual who was not only not subjected to a precautionary search for contraband but was someone that Agent Johnson knew nothing about. After leaving Mr. Leiderman's rental property, the "confidential informant" returned to the home where he left the female and child and entered it. At no point was Mr. Leiderman's presence at the rental property confirmed by law enforcement and his voice is never reflected on the audio recording. It is also important to note that, while Mr. Leiderman was observed driving the orange and white pickup truck in Marion County a few hours subsequent to the "controlled" buy, there is no proof as to who drove the orange and white pickup truck to Mr. Leiderman's rental property prior to the transaction at issue or who drove it from said location.

For each of the foregoing reasons, the undersigned counsel would respectfully contend that officers did not possess the requisite probable cause necessary to effectuate the warrantless

arrest of Mr. Leiderman. As a result, all of the evidence derived from his arrest and subsequent search must be suppressed.

II. There was no probable cause to conduct a warrantless search of Mr. Leiderman's vehicle.

Our courts have long recognized that there is an automobile exception to the Fourth Amendment's warrant requirement if they have probable cause to believe that the vehicles contains evidence of a crime. *See*, United States vs. Smith, 510 F.3d 641, 647 (6th Cir. 2007) (*citing* United States vs. Lumpkin, 159 F.3d 983, 986 (6th Cir. 1998) and Smith vs. Thornburg, 136 F.3d 1070, 1074 (6th Cir. 1998). In this regard, "probable cause is defined as 'reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion'". Id. at 647-48 (*citing* Smith, 136 F.3d at 1074). When determining whether probable cause exists, the court is required to look at the "objective facts known to the officers at the time of the search". Id. at 648 (*citing* Smith, 136 F.3d at 1075).

In the present case, it is important to note that neither "Jones" nor the "confidential" informant ever made any reference to Mr. Leiderman's pickup truck being involved in either the "controlled" buy or the transportation of drugs. Furthermore, law enforcement never observed Mr. Leiderman drive the pickup truck to the location of the "controlled" buy nor did they observe him drive away from that location in the pickup truck. As a result, there is absolutely no probable cause that the pickup truck would contain any contraband and, therefore, the warrantless search of Mr. Leiderman's pickup truck was not proper under the Fourth and Fourteenth Amendments to the *United States Constitution* and Article I Section 7 of the *Tennessee Constitution.*

Additionally, for the reasons stated in the foregoing argument, counsel would respectfully contend that there was no probable cause to believe that Mr. Leiderman was involved in any illegal activity. As a result, the warrantless search of his vehicle was improper.

Finally, it is important to remind the court that Agent Johnson has previously claimed that the sole purpose of searching Mr. Leiderman's pickup truck was to conduct an "inventory" search due to the fact that the vehicle was being seized. In this regard, counsel would refer to the Affidavit of Complaint which Agent Johnson filed with the Marion County General Sessions Court. In that sworn affidavit, Agent Johnson specifically alleged that law enforcement conducted an inventory search of Mr. Leiderman's pickup truck because the Drug Task Force was going to seize the vehicle. Agent Johnson's previously executed affidavit does not mention that officers had probable cause to believe that contraband would be discovered in Mr. Leiderman's pickup truck.

III. Law enforcement did not have any grounds to seize Mr. Leiderman's pickup truck and, therefore, their purported "inventory" search was unconstitutional.

In the Affidavit of Complaint filed with the Marion County General Sessions Court, Agent Johnson specifically alleged that law enforcement conducted an inventory search of Mr. Leiderman's pickup truck because the Drug Task Force was going to seize the vehicle. While our courts have previously recognized that an inventory search constitutes an exception to the Fourth Amendment's warrant requirement they have expressly cautioned about the dangers of such searches being used as a justification for conducting a search which would otherwise be unconstitutional. *See*, United States vs. Tackett, 486 F.3d 230, 232 (6th Cir. 2007) (*citing* Colorado vs. Bertine, 479 U.S. 367, 371-72, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). For the

following reasons, counsel would respectfully contend that the "inventory" search of Mr. Leiderman's vehicle was in violation of the Fourth and Fourteenth Amendments to the *United States Constitution* and Article I Section 7 of the *Tennessee Constitution.*

A. Mr. Leiderman's pickup truck was not subject to being seized.

Due to the fact that they had no knowledge of Mr. Leiderman engaging in any drug transactions in Marion County at the time, it must be presumed that the seizure of this vehicle was related to the "controlled" buy which occurred in Grundy County a few hours earlier. Counsel would note that this is significant because no one observed Mr. Leiderman drive the pickup truck to the rental property where the "controlled" buy took place nor did they observe him drive away from that location in the pickup truck. Furthermore, there is no evidence that the pickup truck was ever used to transport drugs to the location of the "controlled" buy. In fact, it appears that law enforcement merely observed the pickup truck parked outside the residence.

In regards to Mr. Leiderman's activities in Marion County, law enforcement claims to have observed Mr. Leiderman pick up an unidentified female (subsequently determined to be Kathy McNabb) and subsequently observed the two engage in some sort of suspicious activity. However, while this fact may have constituted the requisite reasonable suspicion to effectuate a mere traffic stop, this fact does not rise to the level of the requisite probable cause to either effectuate Mr. Leiderman's arrest or authorize the search of his vehicle.

A warrantless inventory search of a vehicle is only permissible if law enforcement has lawfully taken custody of the vehicle. United States vs. Smith, 510 F.3d 641, 651 (6th Cir. 2007) (*citing* United States vs. Lumpkin, 159 F.3d 983, 987 (6th Cir. 1998). In this regard, it is important to note that the statute authorizing the seizure of vehicles in drug cases is codified at

T.C.A. §53-11-451. The applicable portions of this statute read as follows:

> (a) The following are subject to forfeiture:
>
> (4) All conveyances, including aircraft, vehicles or vessels that are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of property described in subdivision (a)(1) or (a)(2), but....
>
> (6)(A) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance or controlled substance analogue in violation of the Tennessee Drug Control Act of 1989, compiled in part 3 of this chapter, this part and title 39, chapter 17, part securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control act.

In other words, in order to legally seize Mr. Leiderman's pickup truck, officers were required to have evidence that he either used drug funds to purchase the pickup truck or that he used the pickup truck in a drug transaction. Counsel would respectfully contend that there was no probable cause to believe that either of these situations existed at the time that officers made the decision to seize Mr. Leiderman's pickup truck. As a result, the seizure of said pickup truck was in violation of Mr. Leiderman's rights under the Fourth and Fourteenth Amendments to the *United States Constitution* and Article I Section 7 of the *Tennessee Constitution.*

B. The "inventory" search of Mr. Leiderman's pickup truck was merely a guise for a criminal investigation.

As stated above, our courts have previously recognized that an inventory search constitutes an exception to the Fourth Amendment's warrant requirement. *See,* United States vs. Tackett, 486 F.3d at 232 (*citing* Colorado vs. Bertine, 479 U.S. at 371-72). The reasoning behind this exception is summarized as follows:

> This exception recognizes that in addition to investigating crime,

> officers have an established caretaking role vis-a-vis the public. South Dakota vs. Opperman, 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Inventory searches further legitimate goals of protecting property from theft or damage, preventing property disputes between the property owner and police, mitigating safety risks inherent in taking possession of unknown items. Id. At 369, 96 S.Ct. 3092.

Id. However, when conducting a permissible inventory search, officers must act in good faith and they are not allowed to conduct an inventory search as a pretext for a criminal investigation. Id. As a result, an inventory search must be conducted in accordance with a standardized criteria which regulates the opening of containers discovered during the course of the inventory search in order to avoid the ruse of a general rummaging in order to discover incriminating evidence. Florida vs. Wells, 495 U.S. 1, 4 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990). In other words, "the policy or practice governing inventory searches should be designed to produce an inventory" and "the individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime'". Id. (*citing* Bertine, 479 U.S. at 376, 107 S.Ct. At 743 (Blackmun, J., concurring)).

In the case *sub judice*, it does not appear that officers followed any standard policies when they began searching Mr. Leiderman's pickup truck. In fact, it appears that the "inventory" search which officers conducted was simply a ruse to further their criminal investigation. As a result, the "inventory" search was conducted in violation of Mr. Leiderman's rights under the Fourth and Fourteenth Amendments to the *United States Constitution* and Article I Section 7 of the *Tennessee Constitution*.

CONCLUSION

For each of the foregoing reasons, counsel would respectfully submit that the evidence

seized as the result of Mr. Leiderman's arrest in Marion County for his alleged actions in the "controlled" buy which took place in Grundy County earlier in the day must be suppressed. He would respectfully reiterate that said evidence was obtained in violation of the rights guaranteed to him by virtue of the Fourth and Fourteenth Amendments to the *United States Constitution* and Article I, Section 7 of the *Tennessee Constitution.*

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing motion has been provided to David McGovern, *Assistant District Attorney*, by placing same in the U.S. Mail with sufficient postage to assure its prompt and proper delivery to him at P.O. Box 1058, Jasper, TN 37347 on this 29th day of July, 2019.

IN THE TWELFTH JUDICIAL DISTRICT OF TENNESSEE
CIRCUIT COURT OF MARION COUNTY

STATE OF TENNESSEE

vs. **No. 9088**

JAMES TIMOTHY MEEKS, III

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS STATEMENT AND EVIDENCE DERIVED THEREFROM

COMES NOW the Defendant JAMES TIMOTHY MEEKS, III by and through his attorneys of record who would hereby respectfully submit the following Memorandum of Law in support of the Motion to Suppress his statement and the evidence derived therefrom.

Applicable Law

The Fifth Amendment to the *United States Constitution* provides that "no person... shall be compelled in any criminal case to be a witness against himself." State vs. Crump, 834 S.W.2d 265, 268 (Tenn. 1992). Similarly, Article I section 9 of the *Tennessee Constitution* provides that "in all criminal prosecutions, the accused... shall not be compelled to give evidence against himself." *Id.* The most significant difference between these two provisions is that the test of voluntariness for confessions under the *Tennessee Constitution* is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. *Id.*; *see also* State vs. Powell, No. M1998-00757-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 387 at *11-12 (Tenn. Crim. App. May 12, 2000).

The Courts have long recognized the powerful impact that a confession has on a

Defendant's likelihood of success. For example, in State vs. Walton, the Tennessee Supreme Court stated that:

> a confession by a defendant is "like no other evidence" and the sheer power of an admission of guilt is precisely the reason that we go to extraordinary lengths to ensure that it is reliable, *i.e.*, voluntarily made without compulsion or coercion, and that it is corroborated by some other evidence.

41 S.W.3d 75, 94 (Tenn. 2001) *citing* State vs. Smith, 24 S.W.3d 274, 281 (Tenn. 2000). In the landmark case of Miranda vs. Arizona, the United States Supreme Court promulgated a set of safeguards which were meant to protect the constitutional rights of persons subjected to custodial police interrogation. 384 U.S. 436 (1966). As the United States Supreme Court noted:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates ***in any manner***, at any time prior to ***or during questioning***, that he wishes to remain silent, ***the interrogation must cease***. At this point he has shown that he intends to exercise his Fifth Amendment privilege; ***any statement taken after the person invokes his privilege cannot be other than the product of compulsion***, subtle or otherwise. Without the ***right to cut off questioning***, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Id. at 473-74. The Court then went on to lay out a set of procedural safeguards in order to protect an individual's privilege against self-incrimination which the Court instructed were to be "scrupulously honored." *Id.* at 478-79. As this Court well knows, under Miranda, law enforcement are required to advise a suspect of his constitutional rights prior to initiating a custodial interrogation. Furthermore, it has previously been acknowledged that the United States Supreme Court's "fundamental aim in designing the Miranda warnings was to assure that the individual's right to choose between silence and speech remains unfettered throughout the

interrogation process." *See*, Colorodo vs. Spring, 479 U.S. 564, 572 (1987). The Miranda warnings protect a suspect's Fifth Amendment rights by ensuring that he knows that "he may choose not to talk to law enforcement officers, to talk only with counsel present, or to ***discontinue talking at any time.***" *Id.* at 574.

A suspect's initial waiver of his Miranda rights does not preclude him from stopping the interrogation and exercising his constitutional rights. For example, in Michigan vs. Mosley, the United States Supreme Court addressed a situation in which a suspect who asserted his right to remain silent after being given his Miranda warnings could be subjected to a second interrogation after the passage of a reasonable amount of time between the two interrogations. 423 U.S. 96 (1975). In its decision, the United States Supreme Court acknowledged that the "critical safeguard" is a person's "right to cut off questioning." *Id.* at 103. As the Court noted, a suspect who is the subject of an interrogation can exercise this option to terminate questioning in order to control the time at which questioning occurs, the subjects being discussed and the duration of the interrogation. *Id.* at 103-104. The Court then went on to hold that, under Miranda, the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored." *Id.* at 104. In upholding the admissibility of the defendant's statement, the United States Supreme Court took into consideration that the defendant was given his Miranda warnings prior to each interrogation, that the officers immediately ceased their interrogation when the defendant stated that he did not want to discuss the robberies and did not try to either resume the interrogation or in any way try to persuade the defendant to reconsider his position. *Id.* The Court also considered the fact that more than two hours elapsed between the cessation of the first

interview and the beginning of the second interview, the fact that he was interviewed by another officer and that the defendant was given full and complete Miranda warnings at the outset of the second interview. *Id.* The Court then went on to distinguish this scenario from one in which the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. *Id.* at 105-106.

In Oregon vs. Elstad, the United States Supreme Court addressed the difference between situations in which the police engaged in conduct which merely violated Miranda's procedural safeguards and situations in which the police engaged in conduct which resulted in a violation of a suspect's federal constitutional rights. 470 U.S. 298 (1985); *see also* State vs. Crump, 834 S.W.2d 265, 270 (Tenn. 1992). If the police conduct merely results in a violation of the Miranda safeguards, the admissibility of a confession depends only upon whether it was made knowingly and voluntarily. Crump, 834 S.W.2d at 270 *citing* Elstad, 470 U.S. at 309. However, if the police conduct constitutes a federal constitutional violation, the inquiry becomes one of whether the confession was involuntarily made and whether it was obtained as a result of that violation and must, therefore, be excluded as "fruit of the poisonous tree". *Id. citing* Elstad, 470 U.S. at 305.

In State vs. Crump, the Tennessee Supreme Court addressed a situation in which the defendant initially asserted his right to remain silent by stating either "I don't have anything to say right now" or "I don't have anything to say". *Id.* at 266. Approximately thirty minutes later, the defendant agreed to take a ride with the detectives to the scene of where he had escaped from a prison work detail. *Id.* at 266-67. The detectives then began retracing the defendant's escape

route as he described it to them. *Id.* at 267. When the detectives approached a hotel parking lot, they asked the defendant if he had taken any items from a car parked there and he admitted that he had but that he had later thrown the items away. *Id.* The detectives then told the defendant that the stolen items had been found at a murder scene. *Id.* When the defendant arrived at the police station, he was read his Miranda rights and gave a taped confession to the murder. *Id.* The issue on appeal was whether the police had scrupulously honored the defendant's invocation of his right to remain silent. *Id.* After addressing the issue, the Tennessee Supreme Court concluded that the police had failed to scrupulously honor the defendant's invocation of his right to remain silent which amounted to a violation of his state and federal constitutional rights. *Id.* at 270. The Court then went on to state that:

> Once an individual invokes his right to remain silent and the police fail to honor that invocation by continuing to interrogate him, that violation, by definition, is of constitutional magnitude.

Id. citing Hartley vs. State, 103 N.J. 252, 273, 511 A.2d 80, 91 (1986) and Wainwright vs. Greenfield, 474 U.S. 284, 293 (1986). The Tennessee Supreme Court then went on to hold that:

> [t]he factors to be examined in determining whether a confession has been purged of the taint of a prior constitutional violation include: (1) the giving of proper Miranda warnings; (2) the temporal proximity of the police misconduct and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct.

Id. at 272 *citing* Brown vs. Illinois, 422 U.S. 590, 603-604 (1975) and State vs. Chandler, 547 S.W.2d 918, 920 (Tenn. 1977).

Facts

In the case *sub judice*, Mr. Meeks executed a written waiver of rights form which advised him that he was merely being charged with the crime of "auto theft". *See* Gordon County

Certificate of Waiver for Miranda Rights. During the initial interrogation, the two Gordon County (GA) detectives never broached the topic of either the Sequatchie County theft or the homicide investigation. (*Transcript of Interrogation by Georgia detectives*). At no point was there any indication that he was advised of his rights regarding either the homicide investigation or the Sequatchie County theft investigation despite the fact that a warrant had previously been issued for the Sequatchie County theft case. Furthermore, a review of the video of Mr. Meeks' interrogation reveals that Georgia authorities had concluded their interview of Mr. Meeks prior to the arrival of Detective Jody Lockhart of the Sequatchie County Sheriff's Department. (*See* Video Disc 1 at 00:01). In fact, the evidence clearly establishes that the subject matter of the Georgia auto theft had concluded and that several minutes transpired before Detective Lockhart initiated a second interview of Mr. Meeks on an unrelated vehicle theft. As the two Georgia detectives testified during the suppression hearing, after concluding their interview regarding the pending Georgia charges, Mr. Meeks was transported to another room prior to the initiation of the second interview which was conducted exclusively by Tennessee authorities.[1] Detective Lockhart's interview began as an investigation of the theft of the truck which was involved in the accident at issue before quickly evolving into the subject matter of the pending homicide investigation. After Detective Lockhart was unsuccessful in obtaining a confession from Mr. Meeks, he and the other Sequatchie County detective left the room. (Video Disc 2 at 18:00). Approximately six (6) minutes later, Mr. Meeks was subjected to a third interrogation which was

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[1] During the suppression hearing, both of the Georgia Detectives admitted that they were finished with their interrogation prior to transporting Mr. Meeks to another interview room for interrogation by Tennessee authorities. Both of these detectives admitted that they never conducted a second interview of Mr. Meeks nor did they participate in the interviews conducted by the two Tennessee agencies.

conducted by yet a third set of law enforcement personnel (two Tennessee Highway Patrol investigators) who focused on the pending homicide charge. (Video Disc 2 at 24:40). Counsel would respectfully contend that there was a clear delineation between the interrogation conducted by Georgia authorities and the two subsequent interviews conducted by Tennessee authorities. As a result, counsel would respectfully contend that Detective Lockhart should have provided Miranda warnings to Mr. Meeks prior to initiating the second interview which was unrelated to the Georgia theft. Due to Detective Lockhart's failure to properly advise Mr. Meeks of his constitutional rights prior to this second interview, any admission subsequently obtained from Mr. Meeks was in violation of Miranda and must, therefore, be suppressed.

Even if this Court were to conclude that the form executed by Mr. Meeks during his interrogation by the two (2) Georgia detectives is sufficient to satisfy the requirements previously established by the United States Supreme Court in Miranda in regards to his homicide case, counsel would respectfully contend that the evidence clearly establishes that law enforcement ignored Mr. Meeks' repeated assertions of his right to remain silent. Shortly after the start of the second interview, the subject of the interrogation turns to the accident at issue. After a few minutes of questioning, Mr. Meeks tells Detective Lockhart that "Dude I'm, Jody, I am done telling you man..." (*See, Transcript of Interrogation* at p. 19, Video Disc 1 at 19:30). A few minutes later, Mr. Meeks tells Detective Lockhart that he is tired and then states:

> I'm tired, I'm coming down there, you know what I'm saying? I'm coming down there, we'll talk, we'll talk about it, you know what I'm saying and I'll bring my witnesses and shit, everything, I mean, Jody, you know man, you know me...

(*Transcript* at p. 31, Video Disc 1 at 31:16).[2] However, the interrogation does not cease. After nearly an hour of being interviewed, Mr. Meeks specifically tells Detective Lockhart that the two of them will each bring their witnesses to court. (*See, Transcript* at p. 50 also Video Disc 1 at 52:00). Mr. Meeks subsequently breaks down and begins crying after Detective Lockhart continues with his persistent interrogation. (*Transcript* at p. 65 and Video Disc 2 at 10:00). Mr. Meeks subsequently stands and starts to walk towards the door but is told by another detective to sit down. (*Transcript* at p. 72; Video Disc 2 at 19:58). The detective then begins photographing Mr. Meeks' body.[3]

After Detective Lockhart is unable to elicit an admission, Tennessee State Troopers Minter and Dickson enter the room and begin interrogating Mr. Meeks. (*Transcript* at p. 75 and Video Disc 2 at 24:40). There is no indication that they ever *Mirandized* Mr. Meeks. Approximately seven (7) minutes later, Mr. Meeks reiterates that he wants to wait until he goes to court before speaking with them when the following exchange takes place:

Meeks: I'll be in Tennessee, I'm going to Sequatchie.

Dickson: Uh, huh.

Meeks: Ok?

Dickson: Right.

Meeks: Period, ok?

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[2] Counsel would respectfully contend that this colloquy is evidence of Mr. Meeks' request to terminate the interrogation and exercise his right to a trial by jury which was ignored.

[3] Trooper Dickson later advised Mr. Meeks that the purpose of taking these photographs was that the injuries were indicative of someone who had been in an accident. (*Transcript* at 81). Counsel also seeks to exclude evidence of these photographs.

Dickson: What's that?

Meeks: Just period, ok?

Dickson: Ok. Period what?

Meeks: Just period, ok, just ya'll, I mean, ya'll, ya'll, you, ya'll have been down there.

Minter: Listen, you think you ain't been able to sleep since the wreck; it ain't gonna get nothing but worse until you get it off your chest.

(*Transcript* at p. 83, Video Disc 2 at 31:55).[4] When the two troopers refused to stop their interrogation, Mr. Meeks asks "And why can I not talk to ya'll again?" to which Trooper Minter tells him that this may be his only opportunity to get his side out. (*Transcript* at 84, Video Disc 2 at 33:28).

During the troopers' relentless interrogation, Trooper Minter informs Mr. Meeks that the victims are being buried the next day and that their families want to know what happened so that they could rest at night. (*Transcript* at p. 86 and Video Disc 2 at 35:45). Trooper Dickson then continues with his attempt to play on Mr. Meeks' emotions by making the following comments:

1) All right you want, would you like your family laid out here on the table? Do you want; would you like your family to be laid out here on the table? (*Transcript* at p. 89 and Video Disc 2 at 37:43);

2) You go, you're gonna, you're gonna let these people go in the ground tomorrow... (*Transcript* at p. 90 and Video Disc 2 at 30:22).

Mr. Meeks subsequently reiterates again his desire to wait until court before making a statement when the following exchange takes place:

Meeks: I'm just saying, I mean, could ya'll not be there on court

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[4] Counsel would contend that this colloquy is evidence of another request by Mr. Meeks to terminate the interrogation

that day and just, you know what I'm saying? Just be there on court that day, please ya'll?[5]

Dickson: What, when you go to court on this?

Minter: For the stolen truck?

Dickson: For this charge?

Meeks: If they charge me for it, I'm going to, I'm going to jail down there, ya'll come to court please?

Minter: **No, we need to know before then.**[6]

Dickson: **We're not waiting for that.**[7]

Minter: **No.**

Dickson: **We're not, we've got to get our reports in. We've got to get this finalized. You know how, you know how that is.**

Minter: **This family is; this family needs to know.**

Dickson: **You know how court stuff goes, that could be six months from now.**

Meeks: Yeah, it could be six months from now before they fucking tell (in audible).

Dickson: Shoot yeah, I'd like to know. We'd like to tell them tonight before they put them in the ground.

(*Transcript* at 94-95 and Video Disc 2 at 43:38).

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[5] Counsel would respectfully contend that this colloquy is evidence of Mr. Meeks' plea to terminate the interrogation.

[6] Counsel would respectfully contend that Trooper Minter's statement is evidence of his refusal to comply with Mr. Meeks' request to terminate the interrogation.

[7] Counsel would respectfully contend that Trooper Dickson's statement is evidence of his refusal to comply with Mr. Meeks' request to terminate the interrogation.

Despite Mr. Meeks again telling the troopers that he wanted to wait until he went to court to tell his side of the story, the two troopers continue with their relentless questioning. Mr. Meeks subsequently begins crying. (Video Disc 2 at 50:57). He then makes the following statement:

> ***I don't want to talk***, I want to talk to my dad right fast. That's the only person I want to talk to and then I'll, I will talk to you man. I'm not bargaining with you, I'm not trying to make no deals.

(*Transcript* at p. 101 and Video Disc 2 at 52:14).[8] After the two troopers continue to interrogate him, Mr. Meeks admits that he is close to getting this off of his chest and then states

> I want to talk to my dad first, ok? ***Period, I'm not talking nothing else***, I'm not trying to disrespect y'all. I want to just talk to my dad and my mom. Period. ***I'll do it at six o'clock in the morning***. Can you hear me?

(*Transcript* at p. 102-103 and Video Disc 2 at 54:30).[9] Trooper Dickson then responds by telling Mr. Meeks that they will leave him alone after he tells them what happened. (*Transcript* at p. 103 and Video Disc at 55:07). Mr. Meeks tells them that he will talk to them but that he needs to talk to his dad first. (*Transcript* at p. 104 and Video Disc 2 at 56:33). Still the two troopers continue with their interrogation and Trooper Minter tells him that he would like to call the family before the funeral in the morning. (*Transcript* at p. 105 and Video Disc 2 at 57:07). Trooper Minter then tells him that the family is currently at visitation and that it would ease their mind. (*Transcript* at p. 107 and Video Disc 2 at 59:35). Mr. Meeks subsequently tells the two

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[8] Counsel would respectfully contend that this colloquy is clear evidence of Mr. Meeks' request to terminate the interrogation and to control the time at which questioning occurs, the subjects being discussed and the duration of the interrogation. *See*, Michigan vs. Mosley, 423 U.S. 96, 103 (1975).

[9] *See*, explanation in footnote 8.

troopers that if he admitted to doing this, ***he didn't want to do it there*** and wanted to go to Sequatchie County. (*Transcript* at 112 and Video Disc 3 at 5:17). Mr. Meeks subsequently makes yet another reference to going to court and the following exchange takes place:

> Meeks: Why can't we just all meet in court man?[10]
>
> Dickson: That's, no that's gonna be six months from now.
>
> Minter: We need it right now, come on.
>
> Dickson: What he said, we're trying to get this worked up, we're trying to get the family satisfied. We need to know. This crap don't work six months, a year from now. We need to know now.
>
> Minter: You want to tell us, come on, sit down here, let's (inaudible)...
>
> Meeks: My dad ain't got money, I'm not making my dad spend money so therefore I'm gonna have to do the dead time.

(*Transcript* at pps. 112-13 and Video Disc 3 at 6:03). Mr. Meeks subsequently states "it's like my heart don't want me to say anything". (*Transcript* at p. 116). Trooper Minter immediately responds:

> Well your heart, your head's telling you to say it and your heart, this family is mourning right now. They're talking to you, they're talking to you, the family is talking to you.

(*Transcript* at p. 116 and Video Disc 3 at 9:38). Mr. Meeks subsequently caves into the pressure which the two troopers exerted upon him and he eventually admits that he was the driver of the vehicle which rammed the vehicle in which the victims were passengers. (*Transcript* at p. 122 and Video Disc 3 at 16:55).

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[10] The transcript prepared by the State unexpiclably states "I can't believe (inaudible) court man." However, a close listening of the relevant portion of Video Disc 3 reflects that Mr. Meeks asks "Why can't we just all meet in court man?"

After Mr. Meeks admitted to his involvement in the accident at issue, the two Tennessee State Troopers allowed him to make a total of three (3) telephone calls which they recorded with Mr. Meeks knowledge. These phone calls were made to his friend (Josh Johnson), his father (Tim Meeks) and his girlfriend (Amber Bankston) in the presence of at least one of the Tennessee State Troopers. The Tennessee Troopers monitored and recorded each of these phone calls in which Mr. Meeks admitted his involvement in the accident at issue. The State now seeks to also introduce the recordings of these three telephone calls in addition to the video recordings of Mr. Meeks' statement to law enforcement.

Argument

Counsel would respectfully contend that the video recording (and any summary of its contents) are not admissible during the State's case-in-chief. First, counsel would respectfully contend that the video recording of Mr. Meeks' confession is the result of a different and separate interrogation from that conducted by the Gordon County detectives and, as a result, under the U.S. Supreme Court's decision in Miranda vs. Arizona, the two Tennessee law enforcement agencies were required to advise Mr. Meeks of his constitutional rights prior to beginning their interrogations. Secondly, counsel would respectfully contend the law enforcement agents failed to "scrupulously honor" Mr. Meeks' assertion of his right to terminate the interrogation. Finally, counsel would respectfully contend that due to the fact that his confession was obtained in violation of his constitutional rights, the subsequent telephone calls which Mr. Meeks made to his father and friends constitute part of the "fruit" of the constitutional violation and must therefore be suppressed as well. In support of his request that each of his statements (and the corresponding recordings) be suppressed, counsel would address each of these three (3) theories

separately below.

I. The Agents Failed to Mirandize prior to second interrogation

Both the United States and Tennessee Constitutions protect a suspect from "being compelled to give evidence against himself." State vs. Huskey, 177 S.W.3d 868, 878 (Tenn. Crim. App. 2005) *citing* State vs. Berry, 141 S.W.3d 549, 576 (Tenn. 2004). If a suspect is in custody, law enforcement must first advise him of his Fifth Amendment rights in order for his confession to be admissible as substantive evidence in his trial. *Id. citing* Miranda vs. Arizona, 384 U.S. 436 (1966).

In the case *sub judice*, it is clear that the only law enforcement agents which advised Mr. Meeks of his Miranda rights were the two Gordon County detectives who interrogated Mr. Meeks on the issue of two stolen vehicles that were the subject of a Georgia investigation. As both of the Georgia detectives testified during the suppression hearing, they had concluded their interrogation and then Mr. Meeks was transported to another interview room where he was interrogated by Tennessee authorities. Neither of these two Georgia detectives participated in the two interrogations conducted by the Tennessee agencies. Given the clear separation between the interrogation conducted by the Georgia detectives and the two subsequent interrogations conducted by the Sequatchie County detectives and the Tennessee Highway Patrol, counsel would respectfully contend that the failure of either of the two Tennessee agencies to administer the Miranda warnings to Mr. Meeks makes his subsequent confession inadmissible as substantive evidence at his trial.

II. The Agents Failed to Scrupulously Honor Mr. Meeks' Assertion of His Right to Cut Off Questioning

As the United States Supreme Court acknowledged in Michigan vs. Mosley, the "critical safeguard" as set out in Miranda is a person's "right to cut off questioning." 423 U.S. 96, 103 (1975). As the Court noted, a suspect who is the subject of an interrogation can exercise this option to terminate questioning in order to control the time at which questioning occurs, the subjects being discussed and the duration of the interrogation. *Id.* at 103-104. The Court then went on to hold that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored." *Id.* at 104. In the case at bar, the officers totally ignored Mr. Meeks' repeated attempts to assert his right to cut off questioning. These attempts include the following:

1) His statement to Detective Lockhart that they will talk when he comes to court and they each bring their own witnesses. (*Transcript* at p. 31 and Video Disc 1 at 31:16);

2) when Mr. Meeks starts to walk towards the door but is told by one of the detectives to sit down. (*Transcript* at p. 72 and Video Disc 2 at 19:58);

3) his statement to the two state troopers that he is going to Sequatchie. Period. (*Transcript* at p. 83 and Video Disc 2 at 31:55);

4) His request for the troopers to come to court when he is charged only to be told that the troopers weren't going to wait six months for that to happen. (*Transcript* at pps. 94-95 and Video Disc 2 at 43:38);

5) His statement that "***I don't want to talk***, I want to talk to my dad right fast. That's the only person that I want to talk to and then I'll, I will talk to you man. I'm not bargaining with you, I'm not trying to make no deals." (*Transcript* at p.101 and Video Disc 2 at 52:14);

6) His statement that he wanted to talk to his dad first. "Period, I'm not talking nothing else, I'm not trying to disrespect y'all. I want to just talk to my dad and my mom. Period. I'll do it at six o'clock in the morning. Can you hear me?"

(*Transcript* at pps. 102-103 and Video Disc 2 at 54:30);

7) His statement that he would talk to them but that he needs to talk to his dad first. (*Transcript* at p. 104 and Video Disc 2 at 56:33);

8) His statement that if he admitted to doing this, he didn't want to do it there and wanted to go to Sequatchie County. (*Transcript* at 112 and Video Disc 3 at 5:17);

9) His second reference to court to which the two troopers respond by telling him that would be six months from now and they need it right now. (*Transcript* at pps. 112-13 and Video Disc 3 at 6:03); and

10) His statement that his heart didn't want him to say nothing to which Trooper Minter responded by stating "Well your heart, your head's telling you to say it and your heart, this family is mourning right now. They're talking to you, they're talking to you, the family is talking to you." (*Transcript* at p. 116 and Video Disc 3 at 9:38).

On no less than ten (10) different occasions, Mr. Meeks clearly indicated that he did not want to talk at that time. Nevertheless, the officers ignored his repeated requests and continued to subject him to relentless interrogation which continued without interruption. As Trooper Dickson expressly stated to Mr. Meeks during the troopers' interrogation, they would leave him alone after he tells them what happened. (*Transcript* at p. 103 and Video Disc at 55:07). While it may be true that a confession from Mr. Meeks may have eased the minds of the victims' families on the evening before the three funerals and while it may have been convenient for the officers to extract an immediate confession rather than waiting for Mr. Meeks' court date, Mosley specifically provides that a suspect has the right to cut off questioning in order to control the time at which the questioning occurs, the subjects being discussed and the duration of the interrogation. *Id.* at 103-104. As the United States Supreme Court stated in its decision in Miranda, if the individual indicates ***in any manner***, at any time prior to ***or during questioning***, that he wishes to remain silent, ***the interrogation must cease***. 384 U.S. 436, 473-74 (1966).

Furthermore, once an individual invokes his right to remain silent and the police fail to honor that invocation by continuing to interrogate him, that violation, by definition, is of a constitutional magnitude. *See*, State vs. Crump, 834 S.W.2d 265, 270 (Tenn. 1992). As a result, the State bears the burden of establishing that Mr. Meeks' confession was purged of the constitutional violation. Due to the fact that the officers relentlessly continued to interrogate Mr. Meeks despite his repeated assertions that he did not want to talk, counsel would respectfully contend that the State has not met its burden. As a result, all evidence of Mr. Meeks' interrogation and the evidence subsequently derived therefrom (including, but not necessarily limited to, the transcript of Mr. Meek's interrogation, the video of this interrogation, the photographs taken of Mr. Meeks' body during the interrogation and Mr. Meeks' subsequent telephone calls) must be suppressed.

In its brief, the State seems to take the position that Mr. Meeks did not make his assertion of his right to cut off questioning clear to the law enforcement officers who were questioning him.[11] Despite this contention, both the video recording and the transcript clearly show that the two troopers recognized that Mr. Meeks was stalling. In this regard, counsel would point to the following portions of the Tennessee interrogations:

1) Trooper Minter tells Mr. Meeks that it ain't going to get nothing but worse until he gets it off his chest. (*Transcript* at p. 83, Video Disc 2 at

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[11] While counsel is aware that several courts have previously held that a suspect must make an unequivocal request for the assistance of counsel, he is not aware of any precedent which holds that a suspect must make an unequivocal request to terminate the interrogation. In fact, such a holding would be in direct contrast to the U.S. Supreme Court's ruling in Miranda vs. Arizona which specifically states that questioning must cease if the suspect ***indicates in any manner,*** at any time prior to or during questioning, that he wishes to remain silent. 384 U.S. 473-74. Regardless, counsel would respectfully contend that Mr. Meeks clearly and repeatedly indicated his desire to terminate the questioning.

31:55);

2) Both Trooper Dickson and Trooper Minter specifically tell Mr. Meeks that they aren't going to wait until Mr. Meeks goes to court because that could take more than six months. (*Transcript* at 94-95 and Video Disc 2 at 43:38);

3) Trooper Dickson tells Mr. Meeks that they will leave him alone after he tells them what happened. (*Transcript* at p. 103 and Video Disc at 55:07); and

4) Trooper Dickson responds to Mr. Meeks request to talk after he goes to court by telling him "no that's gonna be six months from now" to which Trooper Minter added "We need it right now, come on." (*Transcript* at pps. 112-13 and Video Disc 3 at 6:03).

The State is essentially requesting this Court to bury its head in the sand and ignore the overwhelming evidence that Mr. Meeks exercised his absolute right to terminate the interrogation and that both Trooper Minter and Trooper Dickson recognized this fact but chose to continue with their interrogation. As Trooper Dickson candidly admitted, the two troopers were not going to leave Mr. Meeks alone until he told them what had happened. (*Transcript* at p. 103 and Video Disc at 55:07). Whether the two troopers intentionally violated Mr. Meeks' constitutional rights or whether the pressure to solve the alleged crime caused them to simply exercise poor judgment, the simple fact of the matter is that they failed to scrupulously honor Mr. Meeks' request to terminate the interrogation. As a result, the evidence is clear that Mr. Meeks' confession was improperly obtained and, therefore, it must be suppressed.

III. Mr. Meeks' Telephone Conversations With His Friend, Father and Girlfriend Constitute the "Fruit" of His Prior Confession.

In Wong Sun vs. United States, the United States Supreme Court acknowledged that evidence which was seized as a result of unlawful police action were subject to the exclusionary

rule. 371 U.S. 471, 484-85 (1963). However, the introduction of such evidence is not always required. In this regard, the United States Supreme Court has previously stated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Id. at 487-88. As a result, the State bears the burden of demonstrating that the evidence which it seeks to introduce was not affected by the unlawful actions of the police.

In the case *sub judice*, Mr. Meeks was allowed to make telephone calls to his father, girl friend and friend only after he confessed to his involvement in the accident at issue. These telephone calls were made in the presence of at least one (1) Tennessee State Trooper who monitored and recorded these telephone calls. A review of the entire video recording and transcript of Mr. Meeks' interrogation reveals that Mr. Meeks had repeatedly denied being in the pickup truck before he eventually confessed to his involvement after more than two hours of interrogation. Counsel would respectfully contend that it is illogical to believe that Mr. Meeks would have admitted his involvement to his father, girlfriend and friend while in the presence of at least one of the two troopers knowing that the phone calls were being recorded had he not previously offered his confession to this very same trooper. Counsel would respectfully contend that the State has not presented any evidence that Mr. Meeks would have otherwise made these calls in the presence of law enforcement (knowing that they were going to be recorded) if he had not previously "let the cat out of the bag" earlier in the evening. Absent such a showing, any

evidence of these telephone calls constitutes the "fruit" of the unlawful confession and must, therefore, be suppressed.

Conclusion

For each of the forgoing reasons, counsel would respectfully contend that his confession was the direct result of the violation of Mr. Meeks' right to remain silent as provided to him by both the Fifth Amendment to the *United States Constitution* and Article I section 9 of the *Tennessee Constitution* and, therefore, his statement and all evidence derived therefrom must be suppressed.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing document has been provided to David McGovern, *Assistant District Attorney*, via facsimile and by placing same in the U.S. Mail with sufficient postage to assure its prompt and proper delivery to him at P.O. Box 1058, Jasper, TN 37347 on this 15th day of January, 2013.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA

vs. No. 1:17-cr-113
McDonough/Steger

ROBERT PENN

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

Comes now the Defendant ROBERT PENN by and through his attorney of record who would respectfully submit the following memorandum of law in support of his Motion to Withdraw Guilty Plea.

Procedural History

Defendant PENN was indicted by a federal grand jury in this matter on July 25, 2017. (*Arraignment*, Doc. #1). Due to his indigency, the Federal Defender's office was appointed to represent him. (*Order of Appointment*, Doc. #5). It appears that he subsequently indicated a desire to enter a plea of guilty when his previous attorney filed a Notice of Intent to Enter Plea on or about November 27, 2017. (*Notice of Intent to Enter Plea*, Doc. #15). He appeared for rearraignment on January 5, 2018 but decided not to enter a plea on that day. (*Minute Entry*, Doc. #18). A motion to suppress was subsequently filed on his behalf. (*Motion to Suppress*, Doc. #22). A hearing on his suppression motion was held on March 28, 2018. (*Minute Entry*, Doc. #29). During the hearing, his previous attorney discovered that she had overlooked the existence of a body cam video that the government had included in its responses to Defendant

PENN's discovery requests.[1] (*Motion to Request A Hearing Regarding Attorney Representation*, Doc. #41). The suppression hearing was postponed at defense counsel's request so that Defendant PENN could review the entirety of all of the videos. (Id.). After reviewing these additional videos, Defendant PENN's previous attorney moved to strike his previously filed suppression motion and an Order granting this request was subsequently entered on April 19, 2018. (*Motion to Strike*, Doc. #32 and *Order*, Doc. #33). As a result, a ruling on the merits of his suppression motion was never made. Defendant PENN subsequently entered a guilty plea on May 8, 2018.[2] (*Minute Entry*, Doc. #34). During his rearraignment, he agreed to allow United States Magistrate Judge Steger to conduct his plea hearing. (*Consent to Magistrate Judge*, Doc. #35). An Order accepting and adopting the U.S. Magistrate's Report & Recommendation was entered on May 30, 2018. (*Order*, Doc. #38). A sentencing hearing was scheduled for September 21, 2018. (*Minute Entry*, Doc. #34). A few days prior to his scheduled sentencing hearing, Defendant PENN's previous attorney filed a motion to determine whether she should remain as his attorney at his upcoming sentencing hearing due to his having expressed frustration with her representation of him. (*Motion to Request A Hearing Regarding Attorney Representation*, Doc. #41). As a result of this motion, Defendant PENN's sentencing was cancelled. (*Order*, Doc. #43). Defendant PENN's previous attorney was subsequently allowed to withdraw and the undersigned counsel was appointed to represent him. (*Minute Entry*, Doc. #46).

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[1] The government's discovery responses included a compact disc that included body cam videos from two East Ridge police officers. Accessing the second body cam video is somewhat tricky due to the fact that one has to go to the end of the first video and wait for a few seconds to access the second video.

[2] Defendant PENN entered a guilty plea without the benefit of a written plea agreement. Instead, the government filed a Factual Basis for Plea. (Doc. #17).

The undersigned counsel subsequently obtained a copy of Defendant PENN's file from his prior attorney, reviewed same and then met with Defendant PENN on a couple of different occasions. The undersigned counsel then ordered a copy of the transcript of Defendant PENN's rearraignment which was subsequently filed with the Court on November 26, 2018. (*Transcript of Rearraignment*, Doc. #48). While awaiting the completion of said transcript, Defendant PENN filed a *pro se* motion in which he seeks to withdraw his previously entered guilty plea. (*Motion to Withdraw Guilty Plea*, Doc. #47). After receiving and reviewing the transcript of Defendant PENN's rearraignment, the undersigned counsel proceed to file a Motion to Withdraw Guilty Plea with this accompanying Memorandum of Law.

Summary of Facts of Case

Defendant PENN is currently indicted on the charge of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g). On or about January 29, 2017, officers with the East Ridge Police Department noticed a red Honda automobile parked in the parking lot of the Motel 6 located in East Ridge, Tennessee. Said vehicle matched the description of a vehicle which had previously been reported stolen. Officers went to the motel office and spoke to a clerk who identified one of the occupants of the red Honda as being Trevor Casteel. The clerk confirmed that Mr. Casteel had rented room #141 at the motel. According to the clerk, Mr. Casteel had rented the room in his name and represented that there would be two (2) adults staying in the room. His room rental did not identify the adults who would be staying in the motel room. Upon information and belief, officers subsequently ran a background on Mr. Casteel and determined that he was a convicted felon whom they mistakenly believed was on probation.[3]

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[3] Contrary to the officer's conclusion that Mr. Casteel was on probation, Mr. Casteel was not on probation but had instead served his entire sentence.

Room #141 was located on the ground floor of the motel. A number of officers approached the motel room and waited nearby while one of them knocked on the door. Officers observed a black male move the window blinds and briefly look out. A few seconds later a young white female opened the door and officers immediately entered the hotel room despite the fact that they had not obtained a warrant and were not invited in. The officers contend that they observed a black male dash towards the bathroom while the door to the motel room was partially open. Upon entering the motel room, officers discovered that the room was occupied by two (2) black males and one (1) white female– Defendant PENN, Trevor Casteel and Sarah Croy. They observed Defendant PENN coming from the area near the room's bathroom. After entering the room, the officers immediately placed each of the occupants in handcuffs and began questioning them. One of the officers advised Mr. Casteel of his *Miranda* rights and it appears that he subsequently consented to a search of the motel room. After obtaining Casteel's consent, officers discovered a 9mm Ruger pistol wrapped in a bathroom towel. Officers interviewed each of the occupants in the days after the discovery of the pistol. Both Casteel and Croy gave separate statements in which they each claimed that the Ruger 9mm belonged to Defendant PENN. During his interview, Defendant PENN stated that this pistol belonged to Sarah Croy but he admitted to having handled it because he was thinking about buying it.

Facts Specifically Related to Motion to Withdraw Guilty Plea

Defendant PENN alleges that he was not able to adequately communicate with his previous attorney prior to making the decision to enter a guilty plea. Prior to his suppression hearing, he was not privy to the existence of both of the body cam videos of the officers' entry into the motel room where the pistol was discovered. In fact, it was not until the middle of the evidentiary hearing on his suppression motion that he became aware of the existence of the

second video. While he was subsequently granted an opportunity to review both videos, Defendant PENN would respectfully contend that he was not provided the applicable case law regarding the issues regarding the search of the motel room which resulted in the discovery of the Ruger 9mm which he is alleged to have possessed.

Within a few weeks of having entered his guilty plea, Defendant PENN was mistakenly transported to the Irwin County Detention Center in Ocilla, Georgia. (*Motion to Request A Hearing Regarding Attorney Representation*, Doc. #41). He was not returned to local custody until late August. (Id.). During the two subsequent meetings which he had with his previous attorney, Defendant PENN expressed his frustration with her representation. (Id.).

Since being appointed, the undersigned counsel has provided Defendant PENN with copies of cases on certain issues so that he could make an informed decision before deciding whether to seek a withdrawal of his previously entered guilty plea. Furthermore, undersigned counsel has met with Defendant PENN on two (2) separate occasions and reviewed the government's responses to his discovery requests as well as answered all questions which Defendant PENN has posed. After considering all of this information, Defendant PENN has insisted that the undersigned counsel file a motion seeking a withdrawal from his previously entered guilty plea. Apparently the undersigned counsel did not act quickly enough to satisfy Defendant PENN who proceeded to file a *pro se* Motion to Withdraw Guilty Plea. (*Motion to Withdraw Guilty Plea*, Doc. #47).

Law and Argument

The founding fathers of this great nation specifically recognized the importance of granting individuals accused of a crime the right to a trial before a jury of their peers when they enacted the Sixth Amendment to the *United States Constitution* which reads as follows:

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

There is perhaps no greater protection against governmental overreach than to have one's case decided by a jury of his peers. However, as with many constitutional rights, a person who is accused of a crime may choose to waive his right to a jury trial and enter a guilty plea.

A accused's decision to forego his right to a jury trial and enter a guilty plea is not a decision that is always final. For example, Rule 11(d)(2)(B) of the *Federal Rules of Criminal Procedure* specifically grants an accused the right to withdraw from a guilty plea prior to sentencing even if the court has previously accepted the guilty plea provided that the accused is able to "show a fair and just reason for requesting the withdrawal". *See generally* United States vs. Hyde, 520 U.S. 670, 117 S.Ct. 1630, 137 L.Ed. 2d 935 (1997). When considering the issue, the Sixth Circuit Court of Appeals has previously directed that the following factors be considered:

1) the amount of time that elapsed between the plea and the motion to withdraw from the plea;
2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceeding;
3) whether the defendant has asserted or maintained his innocence;
4) the circumstances underlying the entry of the guilty plea;
5) the defendant's nature and background;
6) the degree to which the defendant has had prior experience with the criminal justice system; and
7) potential prejudice to the government if the motion to withdrawal is granted.

See, United States vs. Haygood, 549 F.3d 1049, 1052 (6th Cir. 2008) *citing* United States vs. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994), *superceded on other grounds as recognized in*

United States vs. Caseslorente, 220 F.3d 727, 734 (6th Cir. 2000). When considering these factors, it is important to note that no single factor is controlling and that the foregoing list is general and non-exclusive. Id. *citing* United States vs. Bazzi, 94 F.3d 1025, 1027 (6th Cir. 1996). Furthermore, the "relevance of each factor will vary according to the 'circumstances surrounding the original entrance of the plea as well as the motion to withdraw'". Id. *citing* United States vs. Triplett, 828 F.2d 1195, 1197 (6th Cir. 1987). The purpose of Rule 11(d)(2)(B) is "to allow a hastily entered plea made with unsure heart and confused mind to be undone..." Id. at 1053 *citing* United States vs. Alexander, 948 F.2d 1002, 1004 (6th Circ. 1991).

In this case, Defendant PENN would respectfully contend that his decision to withdraw his previously filed suppression motion was made without his having the benefit of reviewing the case law which is applicable to the issue of the whether officers conducted a constitutionally permissible search of the motel room which resulted in the discovery of a pistol in the bathroom. In this regard, it is important to note that officers entered the motel room without either a search warrant or an arrest warrant. Furthermore, the officers' initial entry into the motel room was not consensual. As a result, the officers' initial entry into the motel room is presumed to be impermissible and the burden is on the government to show that an exception to the warrant requirement exists. *See,* United States vs. McClain, 444 F.3d 556, 561 (6th Cir. 2005) *citing* Coolidge vs. New Hampshire, 403 U.S. 443, 474-75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Unfortunately, based upon the advice of his previous attorney and without the benefit of having reviewed the applicable case law on the issue for himself, Defendant PENN chose to forego a complete hearing on his previously filed suppression motion and, therefore, he never obtained a ruling from the Court as to the merits of his suppression motion.

While it is true that several months have elapsed since the entry of Defendant PENN's

guilty plea, it is important to note that, soon after entering his guilty plea, he was transported to a facility several hours away which hampered his ability to communicate with his previous attorney. Once such communication was reestablished, his previous attorney acknowledges that Defendant PENN expressed his frustration with her representation. (*Motion to Request A Hearing Regarding Attorney Representation*, Doc. #41). After being substituted as counsel of record, the undersigned counsel researched the issues applicable to Defendant PENN's case and provided him with copies of relevant cases. The undersigned counsel then requested that the hearing on Defendant PENN's be transcribed so as to review the circumstances underlying the entry of his guilty plea prior to filing this motion.[4] This transcript was provided to undersigned counsel on November 26, 2018. (*Transcript of Rearraignment*, Doc. #48). Given these circumstances, Defendant PENN would respectfully contend that the delay in filing the motion to withdraw his guilty plea is excusable and reasonable.

In regards to Defendant PENN's nature, background and prior experience with the criminal justice system, it appears that he is currently twenty-four (24) years old with some college. (*Presentence Investigation Report*, Doc. #39 at PageID#175 & 186-187). While it is true that he has had several previous arrests, it is unclear as to whether he entered pleas or proceeded to trial. Furthermore, it is unclear as to whether there were any suppression issues involved in any of his prior cases.

In regards to whether the government would suffer any prejudice from allowing Defendant PENN to withdraw from his previously entered guilty plea, it is believed that the government still has access to all of the evidence which it previously relied upon to charge him in

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[4] Undersigned counsel ordered a copy of the transcript of this hearing on October 13, 2018.

this matter including, but not necessarily limited to, the physical evidence, the body cam videos and the availability of the officers involved in both the search of the motel room and the subsequent interviews of the occupants of said room. As a result, Defendant PENN would respectfully contend that the government will not be prejudiced by allowing him to withdraw his previously entered guilty plea.

CONCLUSION

For the reasons stated above, Defendant PENN would hereby respectfully move this Honorable Court to set aside his guilty plea so as to give him the opportunity to challenge the constitutionality of the search of the motel room in which he was staying and which resulted in the discovery of the firearm for which he has been charged.

Respectfully submitted,

/s/ M. Keith Davis
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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing motion has been provided to all interested parties via the Court's Electronic Filing System on this 28th day of November, 2018.

/s/ M. Keith Davis