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.

Circuit Court Judge, Part III in the Tenth Judicial District of Tennessee. I preside over one half of the criminal court docket in Bradley, McMinn, Monroe and Polk Counties.

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

I was licensed to practice law in Tennessee in 2004. My TN BPR number is 23989.

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.

I was licensed to practice law in Georgia in 2004. My GA Bar number is 141825. My license in Georgia is currently inactive. As Judge, I am prohibited from engaging in the practice of law outside my judicial duties. I remain a dues paying member of the Georgia Bar.

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).

As stated above, my Georgia law license is currently inactive as I am prohibited from engaging in the practice of law outside my judicial duties. I remain a dues paying member of the Georgia Bar.

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).

Circuit Court Judge, Part III
Tenth Judicial District of TN (McMinn, Monroe, Polk, and Bradley Counties)
Elected Office Holder (2014 – present)

I preside over criminal jurisdiction matters throughout Southeast Tennessee having adjudicated innumerable jury trials, motion hearings, and plea colloquies involving the criminally accused. I preside over approximately eleven hundred adjudicated criminal cases each year. I have not had a case or conviction adjudication decision of mine reversed upon appellate review. Specifically, my adjudicative decisions regarding dismissal, diversion or conviction have all been upheld, promoting confidence and reliability in court proceedings. This judgeship handles all jury trials as requested by the citizen accused. This judgeship involves a predominantly felony-level trial practice, including the most serious accusations of criminal activity in our society up to capital homicide.

Chancey-Kanavos
Cleveland, TN
Private Law Firm
Associate (2011 – 2013); ***Partner*** (2014)

General legal practice focusing on the defense of clients accused of criminal activity.

Office of the District Attorney General
Tenth Judicial District of TN (McMinn, Monroe, Polk, and Bradley Counties)
Assistant District Attorney (2004 – 2011)

I prosecuted crimes in the criminal courts of Southeast Tennessee. I coordinated with crime victims and multiple law enforcement agencies to facilitate crime investigation, prosecution and the incarceration or rehabilitation of offenders.

Litigation Experience

As a lawyer, I served as sole or lead counsel in over sixty (60) jury trials. I presented evidence and advocated to the community in criminal trials, successfully obtaining the desired result for the client in over eighty (80) percent of all jury trials. Jury cases involved homicides, robberies, white-collar embezzlements, and felony drug violations. As a prosecutor, my trial practice specialized in the prosecution of child sex abuse cases.

Leadership Experience

I led Child Protective Investigative Teams (CPIT) for McMinn and Monroe counties as a prosecutor until 2011. CPIT involved the coordination of efforts of law enforcement officers, child protective service workers, forensic interviewers, and others to effectively prosecute child sex abuse and serious physical abuse cases. I provided training to law enforcement officers and child protective service workers on contemporary tools and techniques needed to solve and combat child based crimes.

I am currently the Presiding Judge for the Tenth Judicial District Recovery Court (2014-present), which is a judicially monitored, intensive out-patient treatment program for non-violent criminal offenders seeking to overcome addiction and mental illness. Offenders are monitored by the Court for eighteen to twenty-four months. Our Recovery Court boasts a success rate markedly better than the statewide average, reducing offender recidivism. Our collaborating staff members include a program director, case manager, prosecutor, defense attorney, therapist, and multiple other health experts.

I founded a "Mental Health Court" rehabilitation program serving the mentally ill convicted of non-violent criminal offenses. This program involved the coordination of area lawyers, treatment providers and charities to ensure that the creation of this intensive rehabilitation program became a reality. Efforts to establish this program commenced in 2015. The Mental Health Court began servicing participants on February 1, 2017, and remains a success to present day.

I ran a successful four-county contested campaign for elected office to serve as Circuit Court Judge for the Tenth Judicial District of Tennessee in 2014. I was elected to serve as Circuit Judge at thirty-five years of age.

Teaching Experience

I served as an Adjunct Professor at Tennessee Wesleyan College (2009-2011). I taught within the Criminal Justice Department courses related to law and order. Courses included Terrorism and the Law, Corrections, and Juvenile Justice.

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.

I have been continuously employed since 2004.

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.

N/A

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.

I respectfully write for your consideration as a candidate to fill the judicial vacancy at the Tennessee Criminal Court of Appeals.

I am currently honored and blessed to represent the citizens of Southeast Tennessee, who comprise the Tenth Judicial District of our great state as a Circuit Court Judge. My current position as Circuit Judge grants me jurisdiction to hear all criminal jury trials, felony crimes, and civil matters in Bradley, McMinn, Monroe and Polk counties. To date, I have focused my judicial work presiding over criminal matters.

Before my popular election as Circuit Court Judge in 2014, I worked professionally as a prosecutor for the District Attorney General's Office for over seven years. I also engaged in the private practice of law as associate, and then partner, for a law firm located in Cleveland, Tennessee for over three years. As a litigator, I participated in well over sixty jury trials as either sole or lead counsel. I humbly submit you will find my litigation experience handling criminal matters as a lawyer and presiding judge qualifies me for service as an appellate justice.

My vast experience with criminal litigation as a lawyer allowed my popular vote election in 2014. As Circuit Court Judge, I have presided over innumerable jury trials, motion hearings, and plea colloquies involving the criminally accused. I preside over approximately eleven hundred adjudicated criminal cases each year. Despite this voluminous caseload to manage as Circuit Court Judge, no dismissal or conviction decision of mine has been reversed or vacated by a reviewing court.

I am a Christian, a Conservative, a Federalist and a Constitutionalist. I am a Textualist in that I believe the proper role of the judiciary is to enforce existing law to give effect to legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.

Our courts should derive legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without application of any forced or subtle construction to extend or limit a statute's meaning, yielding absurd results. This legal philosophy has guided my professional career.

While I take pride in my legal and judicial records based upon traditional measurements, I also consider myself a leader in criminal justice reform efforts. That said, a marked distinction exists within our laws between violent and non-violent offenders. I am a supporter of judicially monitored, intensive rehabilitative efforts for non-violent offenders only. I currently preside over our local rehabilitation program, formally known as our Tenth Judicial District Recovery Court.

My commitment to assist non-violent criminal offenders with their addiction and co-occurring mental illness needs has remained a focal point of my entire career. Prior to my acceptance to the University of Tennessee College of Law, I was an undergraduate student at the University of Wisconsin focusing my studies in psychology and criminal justice. While a student, I worked at a mental health institution assisting adults with mental limitations within a secured facility. This experience fueled my desire and commitment to improve addiction and mental health care within the criminal justice system.

After being elected Circuit Court Judge, I was able to lead the construction of an intensive rehabilitation program specifically for the mentally ill, known as our "Mental Health Court", from the ground up. I coordinated with area lawyers, local treatment providers and charities to ensure this program became a reality. I also exhibited leadership qualities in the successful pursuit of a Department of Justice Substance Abuse and Mental Health Services Administration (SAMHSA) grant to expand program availability to our Recovery Court. In 2016, our Recovery Court was the recipient of one of only six maximum award scholarships nationwide. As a result of this federal grant receipt, our program has been able to assist a population more than double in size than when I took office as Circuit Judge in 2014.

My dedication to the continued success of recovery court programs has also led me to partner with the National Association of Drug Court Professionals (NADCP). In the recent past, I was able to assist legislative efforts with the Tennessee delegation in our nation's capital to great reception and success. Through these collaborative efforts, nationwide appropriations have expanded in recent years to fund rehabilitative efforts of offenders within criminal justice settings. Additionally, I am currently a serving member of the Tennessee Recovery Court Advisory Committee under the State of Tennessee Department of Mental Health and Substance Abuse Services, which works closely with state legislators and program coordinators throughout Tennessee to ensure the continued success of our recovery courts statewide.

Beyond any professional accomplishment, I strive to be a good father to my two children who remain the joy of our family life. I strive daily to exhibit an intelligence, confidence and character of the highest order. I hold every confidence that, if nominated for this judgeship, I can both succeed and lead as Judge on the Criminal Court of Appeals. It is my belief that our courts must remain an asset to our community, state, and entire nation.

I humbly submit that I would be a valuable addition to the appellate judiciary if nominated and confirmed. It is my honor to submit myself for your consideration to serve as Judge for the Tennessee Court of Criminal Appeals. I encourage you to ask your colleagues about me. I am confident you will find that I know the law, am passionate about justice, and that I am fair.

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

N/A

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.

The following is a list of significant cases over which I acted as presiding judge, as reported by the Tennessee Court of Criminal Appeals:

State of Tennessee v. Jeremy Isaac Martin

E2020-01259-CCA-R3-CD

January 27, 2022

A Bradley County jury convicted the Defendant, Jeremy Isaac Martin, of possession with intent to sell or deliver a Schedule II controlled substance, .5 grams. or more of methamphetamine. The trial court sentenced him as a multiple offender to fourteen years. On appeal, the Defendant contends that the evidence is insufficient to sustain his conviction. After review, we affirm the trial court's judgment.

State of Tennessee v. John Bradford Underwood III

E2020-01080-CCA-R3-CD

December 16, 2021

The Defendant, John Bradford Underwood III, was convicted by a Bradley County Criminal Court jury of possession of contraband in a penal facility, a Class D felony. See T.C.A. § 39-16-201. The trial court sentenced the Defendant as a Range II, multiple offender to eight years in confinement. On appeal, the Defendant contends that (1) the evidence is insufficient to support his conviction, (2) the trial court erred by denying his motion for a judgment of acquittal, and (3) the trial court erred by admitting an expert report identifying the contraband. Although we affirm the Defendant's conviction, we remand for the entry of a corrected judgment reflecting the conviction offense as possession of contraband in a penal facility.

State of Tennessee v. Joseph John Turchin

E2020-00491-CCA-R3-CD

December 9, 2021

A Monroe County Criminal Court Jury convicted the Appellant, Joseph John Turchin, of two counts of especially aggravated sexual exploitation of a minor, Tenn. Code Ann. § 39- 17-1005, one count of sexual exploitation of a minor, Tenn. Code Ann. § 39-17-1003, and one count of unlawfully photographing a minor in violation of the minor's privacy, Tenn. Code Ann. § 39-13-605. The trial court imposed a total effective sentence of twenty years in the Tennessee Department of Correction. On appeal, the Appellant contends that the trial court erred by denying his motion to suppress, arguing that he was not properly served with a warrant for the search of his cellular telephones. Upon review, we affirm the judgments of the trial court.

State of Tennessee v. Robert Charles Atkins

E2020-00351-CCA-R3-CD

October 25, 2021

A Monroe County Criminal Court Jury convicted the Appellant, Robert Charles Atkins, of first degree premeditated murder, and the trial court sentenced the Appellant to life imprisonment in the Tennessee Department of Correction. On appeal, the Appellant challenges the sufficiency of the evidence sustaining his conviction, contending that the State failed to establish that he was the perpetrator of the crime or, in the alternative, that he acted with premeditation. The Appellant also contends that the trial court erred by allowing a State's witness to testify regarding threats he received prior to trial to explain his nervous demeanor in court. Upon review, we affirm the judgment of the trial court.

State of Tennessee v. Terry Lee Gilbreath

E2020-00971-CCA-R3-CD

September 28, 2021

A Monroe County jury convicted the Defendant of rape of a child, and the trial court sentenced him to forty years of incarceration. On appeal, the Defendant contends that: (1) the trial court erred when it did not suppress electronic evidence against him; (2) the evidence is insufficient to sustain his conviction; (3) the prosecutor's closing argument was improper; and (4) the trial court erred when it denied his motion for a new trial. After review, we affirm the trial court's judgment.

State of Tennessee v. Abraham Julien Augustin

E2020-00965-CCA-R3-CD

July 15, 2021

The Defendant pleaded guilty to three counts of attempted second degree murder, a Class B felony; three counts of reckless endangerment committed with a deadly weapon, a Class E felony; attempted aggravated robbery, a Class C felony; criminal conspiracy to commit robbery, a Class D felony; escape, a Class E felony; theft of property valued at $2500 or more but less than $10,000, a Class D felony; and theft of property valued at $1000 or less, a Class A misdemeanor. See T.C.A. §§ 30-13-210 (second degree murder) (2018), 39-12- 101 (2018) (criminal attempt), 39-13-402 (2018) (aggravated robbery), 39-12-103 (criminal conspiracy), 39-13-103(a), (b)(2) (reckless endangerment committed with a deadly weapon), 39-16-605 (2018) (escape), 39-14-103 (2018) (theft of property), 39-14- 105 (2018). The trial court imposed an effective twenty-five-year sentence. On appeal, the Defendant contends that the trial court erred in sentencing. We affirm the judgments of the trial court.

State of Tennessee v. Ricky Lee Womac

E2019-00643CCA-R3-CD

July 30, 2020

A McMinn County jury convicted the Defendant, Ricky Lee Womac, of two counts of attempted first degree premeditated murder and one count of reckless endangerment. In a separate proceeding, the Defendant pleaded guilty to possession of a firearm by a convicted felon. For these convictions, the trial court sentenced the Defendant to serve an effective sentence of eighty years in the Tennessee Department of Correction. On appeal, the Defendant asserts that the evidence is insufficient to support his convictions for attempted first degree premeditated murder and that his trial counsel was ineffective. After review, we affirm the trial court's judgments.

State of Tennessee v. Timothy Cole Moose

E2019-00648-CCA-R3-CD

June 9, 2020

Defendant, Timothy Cole Moose, was charged with one count of possession of a firearm by a convicted felon in an indictment returned by the Monroe County Grand Jury. Following a jury trial, he was found guilty of the lesser included offense of attempted possession of a firearm by a convicted felon. The trial court sentenced defendant to a six year sentence as a career offender. In this appeal, Defendant's sole issue is a challenge to the sufficiency of the evidence to support the convictions. After a thorough review of the record and the briefs of the parties, we affirm the judgment of the trial court.

State of Tennessee v. Martha Ann McClancy

E2018-00295-CCA-R3-CD

August 9, 2019

The defendant, Martha Ann McClancy, appeals her Monroe County Criminal Court jury convictions of attempted first degree murder and conspiracy to commit first degree murder, arguing that the trial court erred by denying her motion to suppress photographs of the scene taken by her co-conspirator Charles Kaczmarczyk, her motion in limine to exclude evidence of acts committed following the death of the victim, and her motion for a mistrial; that the trial court erred by admitting photographs of the victim taken during the autopsy; that the trial court's making negative comments to and about her in front of the jury deprived her of the right to a fair trial; that the evidence was insufficient to support her convictions; and that the trial court erred by imposing consecutive sentences. The State concedes, and we agree, that the trial court erred by imposing consecutive sentences in this case. Instead, because Code section 39-12-106 prohibits the imposition of dual convictions for two inchoate offenses designed to achieve the same objective, the trial court should have merged the defendant's convictions. Thus, we affirm the jury verdicts, reverse the imposition of consecutive sentences, and remand the case for the entry of corrected judgment forms reflecting that the convictions are merged.

State of Tennessee v. Edwin Millan

E2017-01053-CCA-R3-CD

November 1, 2018

The defendant, Edwin Millan, appeals his Bradley County Criminal Court jury convictions of filing a false or fraudulent insurance claim, initiating a false police report, and tampering with evidence. In this appeal, the defendant contends that the trial court erred by excluding certain evidence, that the prosecutor engaged in misconduct by failing to correct false testimony offered by a State's witness, that the trial court erred by refusing to instruct the jury that certain witnesses were accomplices as a matter of law, that the trial court erred by permitting a witness to testify as an expert, that the trial court erred by permitting certain testimony, that the trial court erred by denying the defendant's motion to dismiss the evidence tampering charge, that the evidence was insufficient to support his convictions, and that the trial court erred by ordering a fully incarceration sentence. Discerning no error, we affirm.

State of Tennessee v. Jason Paul Baker

E2017-01581-CCA-R3-CD

August 22, 2018

The Defendant, Jason Paul Baker, appeals his conviction for premeditated first degree murder and his sentence of life imprisonment without the possibility of parole. In imposing the sentence, the jury found one aggravating circumstance: the Defendant was previously convicted of one or more felonies with statutory elements involving the use of violence to the person. See T.C.A. § 39-13-204(i)(2). On appeal, the Defendant contends: (1) the evidence established that he was insane at the time of the offense; (2) the evidence is insufficient to support his conviction; and (3) the trial court erred during the penalty phase in allowing the State to rely upon the Defendant's prior aggravated assault conviction to establish the (i)(2) aggravating circumstance. The State concedes that the trial court erred during the penalty phase, and we agree. Accordingly, we reverse the Defendant's sentence of life imprisonment without the possibility of parole and remand the case to the trial court for entry of a judgment reflecting a sentence of life imprisonment. We otherwise affirm the judgment of the trial court.

State of Tennessee v. Alina Sherlin

E2017-01225-CCA-R3-CD

July 24, 2018

Defendant, Alina Frankie Sherlin, was indicted for first degree murder. After a jury trial, she was found guilty of second degree murder and sentenced to fifteen years in incarceration. The trial court denied the motion for new trial, and Defendant appealed to this Court. On appeal, Defendant raises the following issues for our review: (1) whether the trial court erred by admitting a videotape from the ambulance ride depicting Defendant's actions after the incident; (2) whether the trial court erred by admitting the preliminary hearing testimony of a witness that the trial court deemed unavailable; (3) whether the trial court erred by permitting the State to call a surprise witness; (4) whether the trial court erred by excluding testimony about the victim's motorcycle gang membership; (5) whether the trial court erred by prohibiting Defendant from introducing nude photographs and sexual videos of a witness for impeachment purposes; (6) whether the trial court properly excluded testimony regarding a threat made by the victim toward Defendant; (7) whether the trial court erred by excluding Defendant's medical records; (8) whether the trial court erred by refusing to allow defense counsel to point out specific areas of photographs that were discussed during the videotaped deposition of the unavailable witness; (9) whether the trial court erred by refusing to grant Defendant's motion for judgment of acquittal at the close of the State's proof; (10) whether the State committed prosecutorial misconduct during opening and closing statements (11) whether the evidence was sufficient to support the conviction ; and (12) whether cumulative error by the trial court necessitates a reversal of Defendant's conviction. For the following reasons, the judgment of the trial court is affirmed.

State of Tennessee v. Steven Swinford

E2017-01613-CCA-R3-CD

April 17, 2018

The defendant, Steven Swinford, pled guilty to vandalism of property in the amount of $1,000 or more but less than $10,000 (Count 1), vandalism of property in the amount of $10,000 to $60,000 (Count 2), burglary (Count 3), and vandalism of property in the amount of $60,000 to $250,000 (Count 4), for which he received an effective twelve-year sentence. The defendant now appeals the twelve-year sentence imposed by the trial court for his conviction in Count 4, arguing it to be excessive. Separately, the State challenges the trial court's application of the criminal saving's statute of Tennessee Code Annotated section 39-11-112 to the defendant's vandalism conviction of Count 1 through the amended version of the theft statute of Tennessee Code Annotated section 39-14-105. Following our review, we affirm the trial court's application of the criminal saving's statute to Count 1 and the trial court's sentencing in Count 4, but remand the case to the trial court for a hearing on the matter of sentencing as to Counts 1, 2, and 3.

State of Tennessee v. Thomas Paul Odum

E2017-00062-CCA-R3-CD

November 20, 2017

Defendant, Thomas Paul Odum, was indicted for first degree felony murder, first degree premeditated murder, conspiracy to commit aggravated burglary, aggravated burglary, burglary, theft of property valued at more than $1000, and possession of a firearm by a convicted felon. Prior to trial, the State filed a notice of intent to seek the death penalty and dismissed the first degree premeditated murder charge. At the close of the State's proof, the trial court granted a motion for judgment of acquittal with respect to the burglary charge. The jury ultimately found Defendant guilty of felony murder, conspiracy to commit aggravated burglary, aggravated burglary, theft of property valued at more than $1000, and possession of a firearm by a convicted felon. Following the penalty phase, the jury sentenced Defendant to life without the possibility of parole. The trial judge separately sentenced Defendant to an effective sentence of five years for the remaining convictions, to be served consecutively to Defendant's life sentence. Defendant appeals, arguing that (1) the trial court erred by denying the motion to disqualify the District Attorney's Office prior to trial; (2) the trial court erred by denying the motion to suppress Defendant's statement; (3) the evidence was insufficient to support the convictions; and (4) the sentence was excessive. For the following reasons, we affirm the judgments of the trial court.

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.

N/A

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

N/A

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 my first application before this, or any similar, reviewing body.

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.

University of Tennessee College of Law **Knoxville, TN**

Doctor of Jurisprudence, 2004

University of Wisconsin – Madison **Madison, WI**

Bachelor of Arts, 2001 Major: Psychology Minor: Criminal Justice

PERSONAL INFORMATION

15. State your age and date of birth.

I am 43 years of age with a date of birth of [redacted]1978.

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

Since 2001.

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

Since 2004.

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

Bradley County.

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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.

Louis A. Mbughuni v. Andrew M. Freiberg and Sentry Insurance, et al.

State of Wisconsin, Portage County

Circuit Court, Branch 2

99-CV-281

This case stemmed from an automobile accident in which I was involved as a student in High School. The Plaintiff voluntarily dismissed the lawsuit on October 26, 1999.

Samuel Whiting v. Captain David McGill, et al.

United States District Court for the Eastern District of Tennessee

Case No. 1:12-cv-00301

Upon motion to dismiss filed by the defendant Andrew M. Freiberg and upon the admission of the Plaintiff that defendant should be dismissed, this case was dismissed with prejudice on March 25, 2013. This matter involved my role as prosecutor regarding a traffic citation which was litigated in the criminal courts of McMinn County, Tennessee.

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.

Memberships include: First Lutheran Church (current congregation Vice President and past-President), Federalist Society, Heritage Foundation, National Rifle Association (NRA), Cleveland Hunting Rifle and Pistol Club (CHRPC), Kiwanis Club of Bradley County, National Association of Drug Court Professionals (NADCP), and Benevolent and Protective Order of Elks (B.P.O.E.).

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 Trial Judges Association, Member, 2014 – present

Tennessee Judicial Conference, Member, 2014 – present

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.

"Everyday Hero Award" as presented by the Child Protective Investigative Team - 2011

"Citizen of the Year" as presented by the Benevolent and Protective Order of Elks – 2015

"Distinguished Service Award" as presented by the Bradley County Sunrise Rotary – 2020

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

N/A

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.

N/A

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.

My current elected position as Circuit Court Judge as of 2014.

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

N/A

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. With minimal exceptions, I have always drafted my own orders. My submissions herein are a product of my own mind, time, and talents.

ESSAYS/PERSONAL STATEMENTS

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

I have a passion for service. I pride myself on bringing a detailed and thorough mentality to my work. I enjoy legal research and learning about developments in the law. I communicate effectively through written orders and correspondence. I believe my abilities lend themselves well to being an effective appellate court judge.

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)***

I have been active and involved in local charities for the last fifteen years. I seek to serve others and to contribute to elevating the quality of life for all community residents. Specifically, I support monetarily, and through volunteer work, charitable entities focused on providing addicts and the mentally ill a platform upon which they can build a better life for themselves. I also contribute to, and volunteer for, organizations aimed at improving the residential and occupational wellness of community citizens.

As a practicing lawyer, I handled many court appointed and pro bono cases in the General Sessions, Juvenile, and Criminal courts in our community. I believe in equal and fair access to our courts, and equal justice under the law.

As a judge, I have tried my best to make sure every litigant felt criminal court was procedurally fair and that everyone was presented a meaningful opportunity to be heard.

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 seek nomination and confirmation to be an appellate judge for the Tennessee Court of Criminal Appeals. I would strive to be a guardian of law and justice on the appellate level. I seek to hold this appellate position for the Eastern grand division of this State. If entrusted with this appellate position, I would attempt to repay that trust with a servant's heart and my very best effort.

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 intend to continue my community involvement as outlined herein to the extent allowed by the Code of Judicial Conduct.

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)***

Being a father has taught me lessons in patience, compassion, understanding, discipline and accountability. Being a father has reinforced my belief in active listening and effective communication being the foundational core of true leadership. Such leadership, when exhibited, engenders respect and loyalty. Being a parent changes your whole worldview. Being a father has made me a better person and a better judge.

My life experience has also taught me that to get respect you must first be willing to extend respect toward others. Kindness and politeness are simple gifts which can easily be extended in any situation or setting, even criminal court. I have conveyed respect to others and demanded it in return.

As judge, I have prayed daily for wisdom, that my position might be a vessel through which true justice is achieved. I remain a student of the law, seeking always that my rulings be the correct application of the rule of law.

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)***

As a state court trial judge presiding over criminal offenses, I apply the law as drafted and codified by the Tennessee General Assembly when citizens find themselves accused of criminal activity. I am a Constitutionalist and a Textualist. As I have articulated above, I believe in applying the law as it is written. I am opposed to a judiciary that violates the separation of powers and seeks to legislate by judicial opinion. I believe the proper role of the judiciary is to enforce the law to give effect to legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. Our courts should derive legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without application of any forced or subtle construction to extend or limit a statute's meaning. Ambiguities should be resolved and clarified by the legislature.

I do not personally agree with the entirety of our criminal code and sentencing act as contained in Titles 39 and 40 of the Tenn. Code Ann. Nevertheless, I have always set my personal views aside and applied the law throughout my judicial career. I do not think it appropriate to express my personal opinions, lest I be subject to potential future challenges regarding bias and fairness concerns.

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. Mike Bell, Tennessee State Senator
[redacted]
Riceville, TN 37370
[redacted]

B. Dan Howell, Tennessee State Representative
[redacted]
Benton, TN 37307
[redacted]

C. Carroll Ross, Retired Judge
[redacted]
Etowah, TN 37331
[redacted]

D. Grant Everett Starrett, Federalist Society President (Nashville Lawyers Chapter)
[redacted]
Murfreesboro, TN 37128
[redacted]

E. Larry Wallace, Former Director of the Tennessee Bureau of Investigation
[redacted]
Englewood, TN 37329
[redacted]

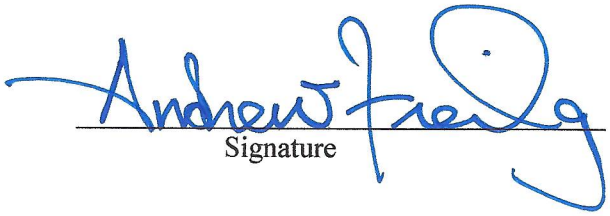
AFFIRMATION CONCERNING APPLICATION

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: February 21, 2022.



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.

Andrew Mark Freiberg
Type or Print Name

Andrew Freiberg
Signature

February 21, 2022
Date

TN 23989
BPR #

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

GA 141825

IN THE CRIMINAL COURT OF MCMINN COUNTY, TENNESSEE

STATE OF TENNESSEE,

v. **CASE NO. 18-CR-151**

MATTHEW W. WINGETT,
Defendant.

ORDER

This matter came to be heard before the Court on January 11th, February 8th, and March 4th of 2019 upon Defendant's Motion to Suppress evidence (hereafter, "Motion") found in Defendant's vehicle. After deliberation on the Motion itself, the responsive pleading and protestation from the State of Tennessee, digital video disc (hereafter, "DVD") evidence presented at the Motion hearing, the witness testimony heard in open court, the arguments of counsel, and the record as a whole, the Court makes the following findings of fact and law. Under the totality of the circumstances present in this case and upon good cause having been shown, both legal and factual, this Court finds Defendant's Motion to Suppress to contain merit entitling Defendant to relief, pending further litigation. Officers searched an automobile in which Defendant held a possessory interest without a warrant and no exception to the warrant requirement applied to justify the illegal search. Further proceedings in this case are necessary to determine whether any and all evidence found as a product of the warrantless search of the vehicle shall be suppressed and excluded as evidence in this matter.

The Court heard testimony from Trooper Travis Ryans and Trooper Daniel Ruskey with the Tennessee Highway Patrol, and private citizen Basil Nunley at the hearing. The parties also stipulated and admitted into evidence Exhibit 1, an aerial photograph of the location where the subject vehicle was found. Notably to this Court, Trooper Ryans during his hearing testimony placed a small oval in blue ink to mark the location where the vehicle was found on Exhibit 1. Furthermore, a disc containing a DVD video depicting the relevant facts of this case through the dash camera video of Trooper Travis Ryans was admitted as Exhibit 2. While this video in totality is lengthy, the Court found the majority of operative facts at issue in this case to have existed within the first twenty minutes of footage. Exhibit 3 is a two page collective computer assisted dispatch printout, or CAD report, outlining the radio communications between the officers and dispatch communications regarding this case. The beginning entries on the Exhibit 3 CAD report were of particular note to this Court. Of significant interest to the Court is the entry on Exhibit 3 noting that Trooper Ryans, or "Caller", advised dispatch that the subject vehicle was parked at the "Relax In[n] near the Citgo" gas station in Riceville, Tennessee on "l/9/2017 7:27:25" with the same "Caller" advisement "they [law enforcement] are just going to tow the vehicle" occurring at "1/9/2017 7:28:16". In finding merit in Defendant's Motion, this Court encourages both parties to fully address whether suppression of any and all evidence found in the subject vehicle is proper as a result of the warrantless and unlawful inventory search conducted in this case at the next court hearing set for May 10, 2019.

FINDINGS OF FACT

In reviewing the evidence and scrutinizing both the testimony and credibility of the hearing witnesses, the Court looked to proof of any of the following factors: (1) the general character of the

witness; (2) the evidence, if any, of the witness's reputation for truth and veracity; (3) the intelligence and respectability of the witness; (4) his or her interest or lack of interest in the outcome of the proceeding; (5) his or her feelings; (6) his or her apparent fairness or bias; (7) his or her means of knowledge; (8) the reasonableness of his or her statements; (9) his or her appearance and demeanor while testifying; (10) his or her contradictory statements as to material matters, if any are shown; and (11) any and all the evidence in the case tending to corroborate or to contradict the witness.

Mr. Basil Nunley was the only lay witness to testify. Mr. Nunley presented as a three year employee of "Anarchy Diesel", an automobile mechanic shop located in McMinn County, Tennessee. In addition, Mr. Nunley resides with his wife and family in Riceville, Tennessee in close proximity to the Relax Inn where the subject vehicle was located and also near the Dollar General Store off Highway 11, where Defendant was ultimately detained later in the morning of January 9, 2017. Mr. Nunley did present as a credible witness. He conveyed his testimony in a clear and concise manner, with a calm and forthright appearance and demeanor. Mr. Nunley possessed a memory of events and facts surrounding his limited involvement in this case. Furthermore, he did not hesitate to admit a lack of knowledge or memory as to other facts under examination by counsel on numerous occasions. Rather than detract from the overall credibility of Mr. Nunley, his lack of knowledge or memory as to some events actually enhanced his veracity with the Court as to the information he could recall. It is truly unreasonable to presume a witness will possess total recall as to events occurring two years removed from present day. Mr. Nunley told this Court what he knew to be fact and this Court finds that such testimony possessed an inherent logic and reasonableness, as conveyed by a credible witness.

Likewise, this Court found the hearing testimony of Troopers Travis Ryans and Daniel Ruskey with the Tennessee Highway Patrol to both be very credible. Trooper Ruskey is presently a supervisor over wrecker agencies in the state, but was a Lieutenant on the date of the incident of January 9, 2017. Then Lieutenant Ruskey received a call from dispatch to assist Trooper Ryans in this case as "backup". Trooper Ruskey testified to arriving much later at the scene where the subject vehicle was found. This was confirmed by the video recording of this incident as contained on the disc admitted into evidence as Exhibit 2. As such, most of the operative facts regarding the decision to tow the subject vehicle and conduct an inventory search of the vehicle contents were made before Trooper Ruskey's arrival at the scene to assist Trooper Ryans. Trooper Ryans had already opened the door to the subject automobile and begun the search at issue before Trooper Ruskey's arrival. Thus, this Court finds that Trooper Ruskey's testimony provided only limited value regarding the search issue of the vehicle before the Court.

Trooper Ryans, as chief prosecuting agent in this case, presented the lion's share of the evidence in this case as it related to Defendant's Motion to Suppress the contested warrantless automobile search. Trooper Ryans was an exceptionally credible witness. He conveyed his testimony in a clear and concise manner, with a calm and forthright appearance and demeanor. Trooper Ryans exhibited an above-average level of intelligence and presented as a man of high character and honor, demanding the upmost respect for himself and his profession. Trooper Ryans possessed a clear memory of events that included the finer details of the facts surrounding this case. While he did not hesitate to admit a lack of knowledge or memory as to some facts under examination by both counselors, such occasions were rare. Rather than detract from the overall credibility of Trooper Ryans, his lack of knowledge or memory as to minor matters actually enhanced his veracity with the

Court. He was truthful in all respects, to those facts which both bolstered and hindered the cause of the State of Tennessee. Trooper Ryans possessed an excellent memory of this incident and therefore held a strong basis of knowledge upon which to convey testimony. Trooper Ryans presented as a very fair and unbiased witness. Trooper Ryans told this Court what he knew to be fact and this Court finds that such testimony possessed an inherent logic and credibility, as conveyed by an extremely credible witness.

Finally, this Court reviewed the video disc evidence submitted to the Court as Exhibit 2. It is said that a picture is worth a thousand words. This Court is not aware of any companion colloquial phrase relative to video recordings. However, the comparative total of spoken words necessary to produce an equivalent account of events as depicted in a real-time, live-action recording of a previous occurrence would be exponentially higher. Through the wonders of modern technology, this Court was able to view for itself all of the operative facts at issue in the matter at bar through a scrutinized review of Exhibit 2, the DVD recording from this incident. Much of the hearing testimony of Trooper Ryans was corroborated by the Exhibit 2 video. However, the composite view of this case as depicted on video represents the best evidence in the opinion of this reviewing Court. While the accuracy and completeness of human memory fades with the passage of time, a video account of events remains undiminished for posterity. As such, any and all factual disputes in the proof will, therefore, be resolved in favor of the video evidence contained in Exhibit 2 over the hearing testimony of the respective witnesses. As Trooper Ryans' testimony corroborated and mirrored most of the video recording of events, any and all factual disputes in the testimonial proof of the witnesses upon issues which Exhibit 2 remain silent will, therefore, be resolved in favor of Trooper Ryans. Again, the testimony of Trooper Ruskey and Mr. Nunley provided little proof bearing on the search issue before

the Court.

The accredited facts, based upon the evidence and testimony presented at the hearing, related to Defendant's Motion to Suppress, are as follows:

1. Trooper Ryans was working and performing traffic control duties for the Tennessee Highway Patrol on January 9, 2017, the date of this incident. Trooper Ryans was positioned in the median of Interstate 75 (hereafter, "I-75") at approximately the 37 mile marker within McMinn County, Tennessee. Trooper Ryans was running radar for potential speeding offenders on January 9, 2017 in a marked patrol vehicle.

2. At approximately 7:25 a.m., Trooper Ryans observed a black BMW automobile, the subject vehicle in this case, and a red automobile both speeding while traveling northbound on I-75. These vehicles can be seen as they pass through Trooper Ryans' stationary field of vision from his dash camera as depicted in the Exhibit 2 recording. Trooper Ryans clocked both vehicles travelling 91 miles per hour, well in excess of the 70 mile per hour travel limitation on I-75.

3. Trooper Ryans pulled out from his stationary position in the Interstate median and proceeded to follow the subject vehicles northbound on I-75.

4. Trooper Ryans activated his blue, traffic control lights and siren in an attempt to initiate a traffic stop of both vehicles.

5. Trooper Ryans first approached the red vehicle, which pulled to the shoulder of the roadway. Trooper Ryans drove his patrol unit in a manner to approach alongside the red vehicle, which slowed to a stop in the emergency lane of I-75. Trooper Ryans shouted at the motorist of the red vehicle through the front passenger window that the officer had

recorded the tag number of the red vehicle and told the motorist of the red vehicle to follow the Trooper as he then continued to travel northbound in an effort to initiate a traffic stop on the black BMW automobile.

6. Trooper Ryans continued to pursue the black BMW automobile in the hope of effectuating a traffic stop of the vehicle for the speeding violation. This case was one of a high speed chase with speeds in excess of 100 miles per hour. The first dispatch communication as contained on the CAD report, submitted as Exhibit 3, was logged on "1/9/2017 7:26:02" which records: "THP Pursuit; I-75 north passing 40 [mile marker]; black vehicle going over 100MPH".

7. Trooper Ryans did not see the occupant of the black BMW vehicle well, but did note the driver to be a white male. As the chase continued northbound, probable cause to initiate a traffic stop for speeding turned into probable cause to initiate a traffic stop for felonious evading arrest by motor vehicle.

8. As the high speed chase approached mile marker 42, known as the "Riceville Exit", Trooper Ryans noticed that the black BMW had taken the interstate exit and turned eastbound toward Highway 11. Trooper Ryans only noticed this after he had passed the exit ramp and had traveled over the Interstate bridge overpass. The second dispatch communication as contained on the CAD report, submitted as Exhibit 3, was logged on "1/9/2017 7:26:17" which records: "Caller [Ryans] advised vehicle took exit 42, took right towards [Highway] 11".

9. Trooper Ryans, in an effort to continue pursuit of the BMW automobile, drove off the Interstate and through a field to take the Riceville exit, albeit by way of travel via the

on-ramp toward the Interstate against the designated direction of traffic. During this time, Trooper Ryans noticed the black BMW automobile parked at the Relax Inn, which adjoins a Citgo gas station via entry and egress access and joint paved parking area. The third dispatch communication as contained on the CAD report, submitted as Exhibit 3, was logged on "1/9/2017 7:26:29" which records: "Caller [Ryans] advised vehicle pulled into store off 42 exit".

10. Trooper Ryans drove into the business area of the Relax Inn and found the black BMW parked with doors closed with no evidence of the driver in sight. Trooper Ryans pulled his patrol unit directly behind the subject vehicle preventing any egress from said parking spot had a driver been present and so inclined. The subject vehicle was parked in such a manner that to the right of the automobile, from the vantage point of the dash camera video submitted as Exhibit 2, sat a free standing utility shed with a double door entryway facing outward toward the road. The back of the subject vehicle was flush with the utility shed. To the left of the subject automobile was a home modified into an office building for the administrators of the Relax Inn motel. A porte-cochere, or carriage porch, extended from the front of the Inn office building and faced the roadway similar in position to the manner in which the double door entryway to the utility shed was postured. The subject vehicle sat flush with the main office structure and was not obstructing entry or egress of the Inn structure or its carriage porch. Likewise, the subject vehicle was not obstructing entryway into the utility shed.

From the Exhibit 2 video, the subject vehicle was parked several feet from both the shed and the Inn office building on either side. The fourth dispatch communication as

contained on the CAD report, submitted as Exhibit 3, was logged on "1/9/2017 7:27:25" which records: "Caller [Ryans] advised [automobile] unit is at the Relax In[n] near the Citgo". In front of the subject vehicle, by what appears to be just a few feet from the hood of the BMW, stood a livestock fence beyond which a wooded field is depicted on both the Exhibit 1 aerial map and the Exhibit 2 dash cam video. This BMW vehicle, where parked, was not obstructing any pedestrian or motorized travel and did not create any annoying or hazardous condition where it was found.

11. The subject vehicle was parked at a private business open to the public, but was not obstructing any known walkway, or commercial activity of the Relax Inn. The subject vehicle did not create a hazardous condition or obstruct any traffic, nor any other known entranceway to any of the structures in the area. The parked subject vehicle comes into view on the Exhibit 2 video recording at the 4:25 mark of the recording. Where parked, the area around the Relax Inn office was not specifically lined for automobile parking. However, as depicted on the Exhibit 2 video recording, none of the area around the motel office or its carriage porch was specifically lined for automobile parking. The only spaces specifically lined for automobile parking existed in front of each motel room door, which opened directly to the parking lot separate from the Inn office building. All such motel rooms were contained in a separate free-standing structure located to the right of the utility shed.

12. Trooper Ryans approached the parked and detained subject vehicle and found no one in or around the BMW. Likewise, Trooper Ryans did not find anyone present as a proprietor of the Relax Inn. The fifth dispatch communication as contained on the CAD

report, submitted as Exhibit 3, was logged on “1/9/2017 7:27:35” which records: “Caller [Ryans] advised vehicle is abandoned; driver fled on foot”. The sixth dispatch communication as contained on the CAD report, submitted as Exhibit 3, was logged on “1/9/2017 7:27:44” which records: “Caller [Ryans] advised they are not in a foot pursuit [of the driver]”.

13. Trooper Ryans found the subject vehicle to have on headlights. The seventh dispatch communication as contained on the CAD report, submitted as Exhibit 3, was logged on “1/9/2017 7:28:16” which records: “Caller [Ryans] advised they are just going to tow the vehicle”. This decision to “tow the vehicle” was announced less than one minute after the vehicle was observed parked at the Relax Inn and just a little over two minutes from the time that the fresh pursuit on the Interstate had been announced on the dispatch radio.

14. Trooper Ryans can be observed on the Exhibit 2 recording opening the driver side door of the subject vehicle, which he found to be unlocked. Thereafter, the officer began looking inside the passenger compartment area at the 6:22 mark of the recording. The opening of the automobile door occurs less than two minutes from when the Trooper’s patrol unit parked behind the subject vehicle and when the parked BMW first came into view on the Exhibit 2 dash camera video recording.

15. Trooper Ryans is seen on the Exhibit 2 recording to have begun the search of the automobile in earnest at the 11:50 mark of the recording. Thereafter, Trooper Ryans pulled from the vehicle what was to be the first of multiple bags pulled from the vehicle and began looking through this first bag at the trunk area of the BMW at the 15:10 mark of the vehicle recording. Ultimately, a substantial amount of controlled substance

narcotics are located inside a locked black box, which was located inside the automobile as depicted at the 24:20 mark of the Exhibit 2 recording. Trooper Ryans opened this locked black box with keys that were separately found inside the vehicle. Additionally, items of drug paraphernalia were found during the search from various locations inside the vehicle. Nothing patently contraband was ever found by officers to be in plain view inside the vehicle before the exhaustive interior search of the vehicle commenced.

16. Trooper Ryans did run the Knox County registration belonging to the vehicle, which came back to "Timothy Valentine" as registered owner of the BMW. Likewise, at the 16:30 mark of the Exhibit 2 video recording, the officer located the driver's license of Timothy Valentine during the search.

17. Trooper Ryans is observed to fill out paperwork related to this seizure and search for the first time at approximately the 38:00 mark of the Exhibit 2 video recording.

18. Defendant was later detained and arrested at a Dollar General store a short distance from the parked subject vehicle at the Relax Inn as noted on the Exhibit 3 CAD report to be "1/9/2017 10:51:28".

ANALYSIS

Inventory Search

Both the federal and state Constitutions protect against unreasonable searches and seizures. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated." Article I, Section 7 of the Tennessee Constitution similarly guarantees "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures." "[U]nder both the federal constitution and our state constitution, a search without a warrant is presumptively unreasonable, and any evidence obtained pursuant to such a search is subject to suppression unless the state demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement." *State v. Cox,* 171 S.W.3d 174, 179 (Tenn. 2005).

The recognized exceptions to the traditional warrant requirement include searches incident to a lawful arrest[1], consensual searches, searches incident to the "hot pursuit" of a fleeing criminal, "stop and frisk" searches, and searches based on probable cause under exigent circumstances. *See State v. McMahan,* 650 S.W.2d 383, 386 (Tenn. Crim. App. 1983). A police officer may also conduct a warrantless inventory search of a lawfully impounded vehicle even in the absence of probable cause that the vehicle contains evidence subject to seizure or exigent circumstances. *See South Dakota v. Opperman,* 428 U.S. 364, 372 (1976); *State v. Watkins,* 827 S.W.2d 293, 295 (Tenn. 1992); *State v. Glenn,* 649 S.W.2d 584, 588 (Tenn. 1983).

A valid inventory search depends on whether it was reasonably necessary to impound the subject vehicle. *State v. Lunsford,* 655 S.W.2d 921, 923 (Tenn. 1983). An "inventory search ... is

[1] Pursuant to *Arizona v. Gant*, 556 U.S. 332 (2009), and its progeny, a search of an automobile incident to arrest is only lawful if reasonable cause exists to believe the arrestee was within reach of the vehicle at the time of the arrest or the vehicle contains evidence of the arrested offense. Returning to the present case, there can be no question that such search at issue in this case was conducted well in advance of Defendant's ultimate arrest and detention approximately three hours later in a location well removed from the subject vehicle. Therefore, no search could be conducted pursuant to this exception to the warrant requirement. As such, this Court agrees with the responsive pleading of the State that *Gant* has "no applicability to the case at bar." A warrantless search may not precede an arrest and serve as part of its justification. *Smith v. Ohio,* 494 U.S. 541 (1990); *Sibron v. New York,* 392 U.S. 40, 63 (1968); *State v. Reid*, No. M1999-00058-CCAR3CD, 2000 WL 502678, at *5 (Tenn. Crim. App. Apr. 28, 2000). The proof and argument at the hearing in this case focused on the legality of the self-described inventory search.

ostensibly to protect the occupant of the vehicle against the loss of his property or the law enforcement agency against the occupant's claim for failure to guard against such loss." *State v. Donald Curtis Reid,* No. M1999–00058–CCA–R3–CD, 2000 WL 502678 (Tenn. Crim. App. Apr. 28, 2000). In *Drinkard v. State,* 584 S.W.2d 650, 653 (Tenn. 1979), our supreme court established the following guidelines concerning the impoundment of a vehicle:

> *[I]f the circumstances that bring the automobile to the attention of the police in the first place are such that the driver, even though arrested, is able to make his or her own arrangements for the custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, the police should permit the action to be taken rather than impound the car against the will of the driver and then search it. Just cause to search the driver is not alone, enough; there must also be reasonable cause to take his vehicle into custody.*

The burden of proof is always on the State to show that the impoundment was necessary. *Id.* at 654. Concerning the factors to consider whether impound of a vehicle is reasonable, under a totality of the circumstances review, our Tennessee Supreme Court hath further opined:

> *[T]he officer [must] advise a present, silent arrestee that his car will be impounded unless he can provide a reasonable alternative to impoundment. Our holding does not mandate that an arrestee must be advised of all available options to impoundment; such a per se rule would be unworkable because of changing conditions and circumstances. However, the extent of the consultation with an arrestee is a factor for the trial judge to consider in determining whether the impoundment was reasonable and necessary.*

State v. Lunsford, 655 S.W.2d 921, 924 (Tenn. 1983). Case law guides that an inquiry into the validity of an inventory search requires an analysis of "all the facts and circumstances of [a] particular case." *Drinkard* at 654.

Returning to the present case, this Court finds that the State has not met its burden and has failed to show that impoundment of the subject vehicle was necessary. Trooper Ryans was in hot pursuit of a vehicle engaged in felonious evading arrest and possible endangerment of other

motorist. This was a high stress environment in which the Trooper found himself. And yet, when Trooper Ryans made contact with the subject vehicle, he found it parked in the lot of the Relax Inn, a private business open to the public. The area in which the subject vehicle rested did not obstruct any public or private foot or motorized traffic, nor did it create any hazard to the public or the patrons of the Relax Inn. The subject vehicle was parked in a way that it did not obstruct access to any part of the business or its curtilage. While the vehicle rested in an area not specifically lined for automobile parking, the vehicle was parked next to the Relax Inn office. Exhibit 2 depicted that none of the paved area around the office, or its carriage porch, had lines designating parking. In the event that a citizen were to desire accommodations at the Relax Inn, hypothetically, there were multiple other areas in which a parked automobile in an undesignated spot would have obstructed access to property or other motorists of either the Relax Inn or adjoining Citgo gas station. And yet, the subject BMW in this case obstructed nothing where parked.

Much was made at the hearing of the headlights being on to the subject vehicle. Every motorist has at one point absentmindedly left dome, parking or headlights on in their vehicle to their own detriment. These headlights did not create any public hazard or exigency demanding immediate impound and intrusion into the subject vehicle. The headlights were projecting only toward a country fence and wooded field area. It is also true that the subject vehicle was unlocked, but it was parked with all doors closed. The engine to the BMW vehicle was off. The vehicle transmission was in the park position. And while Defendant did not lock the subject vehicle as a further effort to exclude members of the public and to protect his privacy interests inside the automobile, there is no requirement in the law that an automobile or home be locked to protect against intrusions thereto. These pronouncements are not intended to make light of the aggravated

nature of this case. This vehicle was engaged in a high speed chase upon the roadways of McMinn County. Further, a substantial quantity of illegal narcotics and drug paraphernalia was ultimately found inside this BMW in a key locked black security box. Simply, this vehicle was secured and a search warrant should have been obtained by officers to properly access the interior of the vehicle.

As of the first moments of initial approach to the BMW, the Trooper could clearly see through the automobile windows that a cellular phone existed inside the passenger compartment area. It is certainly true that identity evidence of the motorist was likely to exist inside the subject automobile, but the vehicle was seized and detained by law enforcement for all intents and purposes with the Trooper patrol unit parked directly behind the BMW preventing its departure and a search warrant for the phone, fingerprints, mail, titled documentation and any other evidence tending to establish the identity of the motorist should have been prepared and submitted to a judicial officer. January 9, 2017 was a business Monday and docket day for the courts of McMinn County and the circuit-level courts of the Tenth Judicial District. This vehicle was seized at 7:27 a.m. and could have remained seized for a reasonable amount of time necessary to prepare a warrant for a judicial officer to authorize intrusion into and search of the automobile.

It is with great humility that this Court be engaged in hindsight analysis of peace officer's actions, as officers are the ones in public subjected to high pressure environments requiring split-second decision making of monumental inquiries. It is clear that Trooper Ryans is an honorable officer who attempted his very best to ensure both public safety and accountability for those who would perpetrate violations of the law. And yet, this Court cannot escape the conclusion that this decision to impound the subject vehicle was made rashly and without good cause. Pursuant to the CAD report submitted to this Court as Exhibit 3, Trooper Ryans was logged on

"1/9/2017 7:28:16" announcing that "they are just going to tow the vehicle". This decision to "tow the vehicle" was announced less than one minute after the vehicle was observed parked at the Relax Inn and just a little over two minutes from the time that the fresh pursuit on the Interstate had been announced on the dispatch radio. Likewise, on the Exhibit 2 video recording of this case, this BMW vehicle does not come into view of the dash camera until the 4:25 mark of the recording. Within less than two minutes of video recorded time lapse, Trooper Ryans opened the automobile driver door and begins searching the BMW at the 6:22 mark of the recording.[2] Trooper Ryans agreed during his hearing testimony that it was a "2 minute decision" to call for a wrecker.

There was a considerable amount of evidentiary testimony elicited at the hearing from both Trooper Ryans and Ruskey regarding the internal Tennessee Highway Patrol policies and procedures, or "General Orders", which relate to the tow, impound and inventory of seized automobiles. These "General Orders" were described as voluminous. Trooper Ryans articulated that they cannot leave a vehicle unoccupied for public safety alongside an Interstate Highway or other heavily trafficked thoroughfares. The "General Orders" allow for the disposition of vehicles to third parties where feasible and practical according to Trooper Ryans. It is true at bar that as the motorist fled the vehicle and scene on foot there was no possibility of a conversation to determine whether a third person could safely take the vehicle, nor the opportunity for a consultation about whether the vehicle could remain locked and secured at the parked location. However, this vehicle was parked off a roadway in the lot of a private business open to the public. Where parked, this subject vehicle did not obstruct any entranceway to any structure, nor did it obstruct any motor or

[2] This Court finds that the physical search of the subject vehicle contents commenced in earnest at the 11:50 mark of the Exhibit 2 recorded dash camera video. The search began at the 6:22 mark of the video recording where Trooper Ryans opened the driver's automobile door and began looking into the interior of the BMW.

foot traffic to either the Citgo gas station or Relax Inn. This BMW vehicle, where parked, created no annoyance or hazard or public alarm.

When criminal matters are presented to citizen jurors for trial determination, our Tennessee pattern jury instructions advise decision makers to view the case through their own observations and experiences in life. In a similar vein, this Court is aware that gas station parking lots and adjoining business lots are regularly used to park automobiles for extended periods of time while motorists car pool with friends and family to other desired destinations. As long as such automobiles do not cause an obstruction or hazard, such automobiles are not subject to government intrusion and inspection merely because they are left unattended. Again, this Court has recognized that this subject automobile was engaged in felonious criminal activity mere moments before it was located without the motorist driver. However, such is all the more reason why a warrant should have been prepared by officers establishing probable cause that evidence of the identity of the motorist responsible for the felony fleeing and endangerment along the roadways of McMinn County existed and was likely to be found inside the automobile. The BMW vehicle was seized for all practical intent and was not going anywhere. The prudent course of investigation, and that demanded by Constitutional authority, demanded that a search warrant be obtained to search the interior of the subject automobile.

In sum, there was no credible proof before this Court to justify or explain why impoundment of Defendant's vehicle was reasonable and necessary. The inventory search in this case appears to be a product of the discretion of Trooper Ryans and of the "General Orders" of the Tennessee Highway Patrol instructing officers when tow, impound and inventory of automobiles is mandatory in certain situations, while granting Trooper discretion whether to conduct

"inventory" searches in non-mandatory situations as pronounced by Troopers Ryans and Ruskey during the hearing testimony. However, such internal policies do not usurp constitutional prohibitions against warrantless and unreasonable searches. Likewise, when an officer makes a judgment decision to conduct a warrantless search of an automobile, such decision is subject to review and scrutiny by our reviewing courts.

The video evidence contained in Exhibit 2 clearly shows the subject vehicle parked safely and lawfully in a private business parking lot. The subject vehicle is parked in such a manner as to be both conspicuous, yet removed from both the roadway and more heavily traveled business area conjoined by the Relax Inn and Citgo business area. Without more, however, this Court is left with the impression that this vehicle, which Trooper Ryan's declared as "abandoned" within one minute of contact as justification to open the automobile to begin an "inventory" search within less than two minutes of contact, was more a product of department presumption and arbitrary policy than a conscious decision based upon the existing and objective facts of this case. This is bore out on the Exhibit 2 video recording observing the manner in which the on-scene officers begin this warrantless search without any pause or discussion, as if impound and inventory decisions were fait accompli. Truly, both Trooper Ryans and Ruskey conceded in their hearing testimony to never having considered a search warrant to gain entry into the interior of the vehicle in this case. No business owner was ever contacted to determine whether the vehicle could remain where parked. The accredited facts of this case, under a totality of the circumstances analysis, leads this Court to conclude that impound and inventory was not reasonably necessary where the subject vehicle was lawfully parked and secured. This Court does not find that immediate entry into and search of this

parked vehicle comports with constitutional mandates and this Court is aware of no legal authority sanctioning the search at bar.

There is no proof before the Court related to the character of this business area where the subject vehicle was located. Even some residential streets contain parking or emergency lanes. As such, even some residential streets allow automobile parking along the roadway when facing the appropriate direction of traffic. On video, the subject vehicle appears lawfully parked perpendicular to the edge of a country fence line and wooded area in a private business parking lot open to the public. Numerous other vehicles are seen parked in the business parking lot joining both the Citgo and Relax Inn. These other parked vehicles in the area are likewise unoccupied as was the subject BMW vehicle at issue in this case. It is illogical to this Court why the unoccupied and lawfully parked subject vehicle is considered abandoned and subject to impound over the other unoccupied and lawfully parked vehicles in the immediate vicinity. The distinguishing characteristic of the subject BMW vehicle differentiating it from the other automobiles in the vicinity is that it had recently been used to effectuate a felonious evading arrest and endangerment on I-75. Thus, the vehicle had recently been utilized in a recent crime and was subject to inspection by a judicially authorized search warrant for further evidence of those past crimes. This vehicle was not, however, subject to a one minute decision declaring it abandoned or subject to a warrantless search within two minutes of contact with the subject vehicle.

As clearly shown on the Exhibit 2 video recording, this BMW automobile could have remained lawfully parked as it rested and did not, where parked, obstruct traffic or endanger the public. This automobile was subject to further investigation by officers, but such did not include a warrantless search of the passenger compartment areas. It was the State's burden in this matter to

establish the reasonableness of the impoundment and inventory search and such proof is lacking before the Court. Inventory searches can pass constitutional muster following and attendant to lawful impound based upon lawful cause. *State v. Lunsford*, 655 S.W.2d 921 (Tenn. 1983). However, the police should permit other action be taken rather than impound the car against the will of the driver and then search it. *Id*. Again, this Court appreciates the difficult decisions that law enforcement officials must make quickly and decisively under environmental stress. However, the existence of such difficulties inherent in police work does not absolve state agents of compliance with the full merits of the law.

Any valid inventory search must be conducted in accordance with routine administrative procedures, not as an afterthought after a warrantless search has already uncovered purported evidence of illegal activity. *See State v. Watkins*, 827 S.W.2d 293, 295 (Tenn. 1992) (*citing South Dakota v. Opperman*, 428 U.S. 364, 372 (1976)). No such inventory or administrative standards appeared to exist in the present case other than a mere eager hunt for, and seizure of, contraband. It is not until well after the search has concluded that any inventory paperwork, or evidence log, is observed in any officers' hands on the Exhibit 2 video recording of this case. Trooper Ryans is observed to fill out paperwork at approximately the 38:00 mark of the Exhibit 2 video recording which is a full thirty minutes after the commencement of the warrantless search and after it was completed. Merely characterizing a warrantless search under the auspice of an "inventory" does not, in itself, make it such. Such conduct at bar, while factually successful in uncovering the possession of illegal narcotics, does not comport with the strict inventory search mandates as established by law. State agents at bar did not attest, nor was proof submitted, to explain: why, beyond broadly cited departmental policy, the self-described inventory search was objectively

justified in this case; why such actions were reasonable under the circumstances; why inventory was necessary as a matter of governmental or departmental policy; what administrative procedures were followed in conducting the search; and why the vehicle could not have been merely secured and left parked at the business until a search warrant could be obtained. Under the totality of the circumstances, the State has not met its burden and this Court will not validate a warrantless search of property in light of the facts in this case.

While not cited by either party in the cause, this Court has also looked to the *State v. Davis* opinion, No. E2012-01595-CCA-R3-CD, 2013 WL 4082669 (Tenn. Crim. App. Aug. 14, 2013), as it correctly illuminates the legal inquires mandated whenever inventory search is claimed as an exception to the warrant requirement. The *Davis* court correctly suppressed a warrantless search even where an officer testified to the subject vehicle potentially blocking a private driveway and preventing line of sight of motorists, thereby potentially obstructing safe turning and travel on the roadway. While *Davis* was arrested alongside the vehicle, whereas the Defendant at bar fled, both cases involved a felony evading arrest as the predicate violation of law. *State v. Davis*, No. E2012-01595-CCA-R3CD, 2013 WL 4082669, at *7 (Tenn. Crim. App. Aug. 14, 2013). In *Davis*, such proof of a potential obstruction of traffic was not enough to justify an inventory search, which is substantially more proof than is present at bar before this Court. The subject BMW automobile at bar was not blocking or obstructing anything where lawfully parked at the Relax Inn. Thus, reasonable cause to take this vehicle into custody at the moment it was searched is lacking.

There are legitimate purposes for conducting a reasonable and valid inventory search. These purposes are set out in *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976), as (1) the protection of the owner's property while it remains in police custody, (2) the protection of the

police against claims or disputes over lost or stolen property, and (3) the protection of the police from potential danger. Cases dealing with the reasonableness of inventory searches point out that there is a delicate balance between conflicting public and private interests—the need to search in order to protect law officers and car owners and the invasion of Fourth Amendment protected interests of private citizens. *State v. Glenn*, 649 S.W.2d 584, 585–86 (Tenn. 1983). This Court does not find the search at issue, without a warrant, to be reasonable under all the circumstances. As such, this warrantless search under the facts of this case and in light of established legal precedent on the legality of inventory searches is unlawful. No search "unlawful at its inception may be validated by what it turns up." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

Automobile Exception

During the hearing of this Motion, the State attempted to justify the contested search at bar pursuant to the automobile exception to the search warrant requirement. While this Court encouraged the State to focus on the inventory exception in briefing the issue by pleading, a full review of the Exhibit 2 video recording compels the Court to address the automobile exception in full in holding that officers conducted an illegal search without a warrant to obtain narcotics evidence found in the subject BMW automobile. While the hearing testimony of the witnesses disclosed all operative facts necessary to make a full review of the legality of this warrantless search at issue, the video recording depicted fluid events which occurred in rapid succession to one another mandating greater articulation of reasoning behind the Court's holding in this matter. Our courts have traditionally drawn a distinction between automobiles and homes or offices in relation to the constitutional protections against unreasonable search and seizure guaranteed by the Fourth

Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970).

The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, render rigorous adherence to and enforcement of the warrant requirement impossible. *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Coolidge v. New Hampshire*, 403 U.S. 443, 459-460 (1971). But the United States Supreme Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. *Chambers v. Maroney*, *supra*, 399 U.S., at 51-52; *Cooper v. California*, 386 U.S. 58 (1967). Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. *Cady v. Dombrowski*, *supra*, 413 U.S. at 442. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police officers stop and examine vehicles when license plates or inspection stickers have expired; or if other violations, such as exhaust fumes or excessive noise, are noted; or if headlights or other safety equipment are not in proper working order.

Furthermore, the expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. “One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.” *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). In the interests of public safety and as part of what our courts have called “community caretaking functions”, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police frequently remove and impound automobiles that violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

In *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court observed as follows:

> *On reason and authority, the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.*

See also State v. Reid, No. M1999-00058-CCAR3CD, 2000 WL 502678, at *5 (Tenn. Crim. App. Apr. 28, 2000). In this matter before this Court, the subject BMW automobile had been utilized to engage in a past felonious evading incident. Trooper Ryans found the vehicle lawfully parked and

closed. At that moment, the identity of the automobile driver remained an unsolved issue. Trooper Ryans did see a cellular phone in the interior of the BMW. While a phone might have been able to assist officers in establishing the identity of the motorist, even electronic information stored in such phones requires a judicially authorized warrant. *See generally Timothy Ivory Carpenter v. U.S.*, 138 S. Ct. 2206 (2018). There was nothing visible inside the subject vehicle "which by law is subject to seizure and destruction", nor did any evidence related to felonious evading which may have been present inside automobile exempt officers from seeking a warrant to search the interior of the BMW.

Thus, neither *Carroll*, nor any other case precedent of our courts require or suggest that in every conceivable circumstance the search of an automobile even with probable cause may be made without the extra protection for privacy that a warrant affords. The circumstances that may furnish probable cause to search a particular auto for particular articles of contraband are most often unforeseeable; moreover, the opportunity to search may be fleeting since a car is readily movable. In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, our courts have long insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. *Chambers v. Maroney*, 399 U.S. 42, 50–52 (1970). As a general rule, it has also required the determination of a magistrate on the issue of probable cause and the issuance of a warrant before any search be made. *Id*. Only in exigent circumstances, because of the mobility of automobiles, will the judgment of the police as to probable cause serve as a sufficient authorization for a search.

This Court deems that such exigent probable cause determinations of police must relate to contraband which may reside inside a vehicle. Thus, a warrantless search for marijuana inside a

vehicle is authorized when the odor of marijuana emanates from the auto, where drug paraphernalia is visible and where furtive occupants are present. The probable cause necessary to justify a warrantless search of an automobile is that quantum of proof to establish the likelihood that inside the subject vehicle will be found that "which by law is subject to seizure and destruction". It is never merely the probable cause to establish a past traffic violation, be it speeding, driving on a suspended license, or felonious evading arrest.

Truly, paperwork evidence of ownership, title and registration, as well as maintenance records from named customers is almost always likely to exist inside a citizen's automobile. To claim that the mere presence of probable cause to establish a past traffic infraction, be it a misdemeanor or felony, thereafter could justify a warrantless search would be to open ourselves up, as a society, to warrantless searches of our automobiles anytime we had the misfortune of fracturing one of the innumerable "rules of the road" statutes. In essence, the automobile exception to the search warrant requirement authorizes search and seizure of contraband for an on-going offense once probable cause has been established. This measure of probable cause to justify a warrantless search of an automobile, however, must be related to on-going controversies and contraband articles which make it wholly distinct from the probable cause determination for past traffic offenses. It is the mobility of automobiles which create exigency, whereby the probable cause to believe the presence of contraband inside the vehicle and the opportunity to seize it therefrom would be lost without the immediate search.

Carroll, and its progeny, hold a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway, the car is movable, the occupants are alerted, and the car's contraband contents may never be found again if a warrant must be obtained. Hence an

immediate search in these limited circumstances may be constitutionally permissible. While our courts have recognized a necessary difference between searches of stores, dwelling houses, or other structures where a proper official warrant must be obtained and a search of an automobile for contraband goods, such distinction resets upon the belief that such contraband exists in a vehicle which can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *See generally State v. Reid*, No. M1999-00058-CCAR3CD, 2000 WL 502678, at *6 (Tenn. Crim. App. Apr. 28, 2000).

At bar, the subject vehicle was going nowhere. Requiring the Troopers to obtain a judicially authorized search warrant was not impractical and would not have created any undue hardship. While this BMW was an automobile, exigency is not present. Most importantly, no probable cause existed at bar to believe that contraband evidence existed inside the subject BMW automobile authorizing a warrantless search. Trooper Ryans possessed no probable cause to believe that contraband existed inside this BMW, nor anything else "which by law is subject to seizure and destruction". The only probable cause present in this case is that which established the subject vehicle had recently been used to allow the motorist to effectuate a felonious evading arrest. No other probable cause existed at bar to justify the State's attempted use of the automobile exception to justify this warrantless search and this issue is without merit.

The Exclusionary Rule, Good Faith, and Inevitable Discovery

In the view of this Court, there existed probable cause to believe that the black BMW automobile was used to effectuate a felony evading arrest in this case. In *Horton v. California,* 496 U.S. 128 (1990), the Supreme Court approved the seizure of an entire vehicle itself due to its

potential evidentiary value, a question initially considered in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). In essence, there is some federal precedent for the proposition that if the police held probable cause to believe that the car was an instrument of the crime and, therefore, evidence of the crime, the seizure of the entire automobile itself would be permissible. *See United States v. Cooper,* 949 F.2d 737 (5th Cir.1991); *Ex parte Payne*, 683 So.2d 458 (Ala.1996) (*warrantless seizure of automobile lawful, as it was in plain view, and the police had probable cause to believe that the automobile itself was evidence of the crimes*); *see also Capraro v. Bunt,* 44 F.3d 690 (8th Cir.1995) (*because a vehicle is subject to a warrantless search on probable cause if the vehicle contains evidence of crime, the vehicle should likewise be subject to a warrantless seizure if the vehicle itself is an instrument of crime*). This logic of the automobile itself being evidence of a crime was adopted, in part, by the Tennessee Court of Criminal Appeals in *State v. Reid*, No. M1999-00058-CCAR3CD, 2000 WL 502678, at *7 (Tenn. Crim. App. Apr. 28, 2000). What all of these cases have in common, however, is that they each involved grave underlying criminal offense which included homicides, aggravated robberies, and kidnappings. Needless to say, the government interest to solve such monumentally aggravated offenses is extremely high, whereas at bar the underlying offense appears to be a Class E felony offense -- the lowest felony classification in our law. *See* Tenn. Code Ann.§ 40-35-110 *et seq*.

Furthermore, in recent years the Tennessee Supreme Court has announced multiple new legal rules as it relates to criminal search and seizure authority. By way of example, the community caretaking doctrine is now a recognized category of police-citizen encounter which "is analytically distinct from consensual encounters and may be invoked to validate a search or seizure as reasonable" without a warrant under the Fourth Amendment and article I, section 7 of the

Tennessee Constitution. *State v. McCormick*, 494 S.W.3d 673 (Tenn. 2016). Likewise, Tennessee has now also adopted a good-faith exception to the exclusionary rule. *State v. Reynolds*, 504 S.W.3d 283 (Tenn. 2016) ("*evidence obtained during a police search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule*"). This good-faith exception was expanded to permit the admission of evidence obtained as a result of an officer's reasonable and good faith reliance on a search warrant that he believed to be valid but was later determined to be invalid "solely because of a good-faith failure to comply with" technical flaws in otherwise valid search warrants. *State v. Davidson*, 509 S.W.3d 156, 184 (Tenn. 2016). Truly, the manner in which reviewing courts measure even the validity of a warrant itself has now been relaxed to afford an "illuminat[ing,] [] commonsense [and] practical" approach to the determination of whether probable cause existed to support the warrant's issuance. *State v. Tuttle*, 515 S.W.3d 282 (Tenn. 2017).

Good-faith clerical errors that result in inconsequential variations between the three copies of a search warrant as required by Tenn. R. Crim. P. 41 are, in and of themselves, no longer entitlements affording the moving party suppression of the evidence collected pursuant to such warrants. *State v. Lowe*, 552 S.W.3d 842 (Tenn. 2018). In a similar vein, a good-faith exception now exists to the technical statutory requirement that an officer executing a search warrant leave a copy of the warrant with the person being searched. Even when not delivered a copy of the warrant, his good-faith exception has now been applied to allow the introduction of evidence when the warrant itself was valid and where the accused held actual knowledge of the search itself. *State v. Daniel*, 552 S.W.3d 832, 841 (Tenn. 2018). And finally, the good-faith exception was again recently expanded such "that when police mistakes are the result of negligence ... rather than

systemic error or reckless disregard of constitutional requirements" the exclusionary rule will not apply to suppress the otherwise illegally seized evidence. *State v. McElrath*, No. W201501794SCR11CD, 2019 WL 1122944, at *8 (Tenn. Mar. 12, 2019).

What each of these fluid new developments in the law has in common is the intention of our Tennessee Supreme Court to conform our state law consistent with that of federal precedent and with the enlightened approach of the vast majority of other sovereign state jurisdictions on these issues. *Id*. Such desire for conformity is also consistent with "prior holdings [of the Tennessee Supreme Court] clarifying that Tennessee's search and seizure provisions are 'identical in intent and purpose' with the United States Constitution's Fourth Amendment." *Id*.; *see also State v. Hawkins*, 519 S.W.3d 1, 33 (Tenn. 2017); *State v. Tuttle*, 515 S.W.3d 282, 304 (Tenn. 2017); *Davidson*, 509 S.W.3d at 182; *Reynolds*, 504 S.W.3d at 303; *State v. Willis*, 496 S.W.3d 653, 719 (Tenn. 2016) (*federal cases applying the Fourth Amendment should be regarded as 'particularly persuasive' in Tennessee*). Likewise, all of these recently announced good-faith exceptions bestow upon the government ever greater means to seek the admission of that evidence which until recently would have fallen within the exclusionary rule affording suppression to the citizen accused. Despite these changes in the law, however, our courts continue to give voice to the principle that a warrantless search is presumed unconstitutional.

Having concluded that Trooper Ryans did not possess a lawful basis at bar to search the subject BMW automobile without a warrant and that the contraband evidence was illegally obtained from the interior of Defendant's vehicle without a warrant, the question turns to whether the illegal search of Defendant's property renders the subsequently seized contraband evidence fruit of the proverbial poisonous tree. To frame the issue in other words, this search at bar was

unlawful. However, a substantial amount of narcotics evidence was factually found to exist in the subject BMW automobile as a result of this unlawful and warrantless search. The current question of law has now become whether this narcotics evidence be suppressed pursuant to traditional exclusionary rule authority or whether Trooper Ryans acted pursuant to our newly established "good-faith exception" to the exclusionary rule. Similarly, if the whole automobile itself at issue in this case could have lawfully been taken into evidence as an instrumentality of felonious evading arrest, then the impound of the vehicle and ultimate discovery of narcotics by police would have been inevitable.

"The exclusionary rule may operate to bar the admissibility of evidence directly or derivatively obtained from an unconstitutional search or seizure." *State v. Clark*, 844 S.W.2d 597 (Tenn. 1992). 'May' is the operative word in the preceding sentence given recent developments in case law precedent. Historically, the exclusionary rule acted as a strong prophylactic protecting the rights of the citizenry from police misconduct. Our courts have long recognized that article I, section 7 is identical in intent and purpose to the Fourth Amendment. *State v. McCormick*, 494 S.W.3d 673, 683-84 (Tenn. 2016). Additionally, our courts relied upon the United States Supreme Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914)[3], when adopting the exclusionary rule as a remedy for violations of article I, section 7. *Hughes v. State*, 238 S.W. 588, 594 (Tenn. 1922) (*the State cannot be permitted through its judicial tribunal to utilize the wrong thus committed against the citizen to punish the citizen of his wrong*). Furthermore, like the federal exclusionary rule, the purpose of the state exclusionary rule is to deter police misconduct by

[3] *Weeks* was thereafter overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961), and overruled in part by *Elkins v. United States*, 364 U.S. 206 (1960).

excluding evidence obtained "by means prohibited by the Constitution." *Id*.; *see also State v. Reynolds*, 504 S.W.3d 283 (Tenn. 2016).

Our courts created the exclusionary rule as a remedy for Fourth Amendment violations. *State v. Reynolds*, 504 S.W.3d 283, 309 (Tenn. 2016). The exclusionary rule "is a prudential doctrine" which was "created by [the courts] to compel respect for the constitutional guaranty". *Davis v. United States*, 564 U.S. 229, 236 (2011). The exclusionary "rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved". *United States v. Calandra*, 414 U.S. 338, 348 (1974). In sum, the exclusionary rule has long been available in Tennessee as a judicial, although non-constitutionally rooted, remedy for violations of the federal and state constitutional protections against unreasonable searches and seizures. *See Reynolds*, 504 S.W.3d at 310. At one point, the United States Supreme Court even declared unequivocally that "all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in a state court". *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Thereafter, however, the Supreme Court explained that the exclusionary rule was calculated merely to deter and prevent police misconduct, not to repair past wrongs. *Arizona v. Evans*, 514 U.S. 1, 14 (1995) ("*[T]he exclusionary rule was historically designed as a means of deterring police misconduct*"). Recently, the Supreme Court reaffirmed that "the sole purpose of the exclusionary rule is to deter misconduct by law enforcement", as opposed to being remedial. *Davis*, 564 U.S. at 246.

As the exclusionary rule has transformed into merely a deterrence oriented doctrine under recent precedent, a number of exclusions to the exclusionary rule have arisen, as articulated above herein. As rule transformed into something more akin to guideline, our courts long ago recognized

and applied other doctrines that are in effect exceptions to the exclusionary rule. *See State v. Carter*, 160 S.W.3d 526, 532–33 (Tenn. 2005) (*applying the independent source doctrine and concluding that the exclusionary rule did not require suppression of the illegally seized evidence*); *State v. Huddleston*, 924 S.W.2d 666, 674–75 (Tenn. 1996) (*applying the attenuation doctrine and holding that the exclusionary rule does not require suppression of a confession obtained during a period of unlawful detention so long as the confession was sufficiently an act of free will to purge the taint of the illegality*), *State v. Patton*, 898 S.W.2d 732 (Tenn. Crim. App. 1994) (*whether evidence offered by state is so tainted by improper police conduct as to preclude its admission requires an examination of the nexus between the taint and the subject evidence*); *State v. Jerry Wayne Elliott*, No. W1999–00361–CCA–R3–CD, 2001 WL 13233, at *2 (Tenn.Crim.App., Jackson, Jan. 5, 2001) (*evidence of a defendant's "criminal conduct committed subsequent to an illegal arrest, or even as a result thereof, should not be suppressible under the exclusionary rule"*); *State v. Abernathy*, 159 S.W.3d 601, 604-05 (Tenn. Crim. App. 2004).[4]

Any "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006). Instead, "granting establishment of the primary illegality," only evidence "come at by exploitation of that illegality" is considered fruit of the poisonous tree and subject to suppression. *Wong Sun v. U.S.*, 371 U.S. 471, 488 (1963) (quoting Maguire, Evidence of Guilt, 221 (1959)). Thus, our courts are very mindful that the "substantial social costs" of excluding incriminating evidence in some cases may outweigh the exclusionary rule's benefit "when law enforcement officers have acted in

[4] Federal courts recognize even broader good faith exceptions to allow the admission of unlawfully obtained evidence. *See generally United States v. Leon*, 468 U.S. 897 (1984) (*the exclusionary rule is unwarranted when exclusion "does not result in appreciable deterrence" to police acting unlawfully*).

objective good faith or their transgressions have been minor". *Reynolds*, 504 S.W.3d at 311 (quoting *United States v. Leon*, 468 U.S. 897, 907-08 (1984)).

Returning to the present matter, this Court remains mindful of the high societal cost in the suppression of alleged narcotic evidence as is present at bar. And yet, it was in this case the vehicle to which Defendant held a possessory interest in which law enforcement illegally searched without a warrant. It was Defendant at bar who held a reasonable expectation of privacy inside this vehicle to which he possessed the key and held a possessory interest therein. Further, the nexus between the illegal search and subsequent seizure of the evidence is clear upon examination of the video recording as contained in Exhibit 2. Had a K9 arrived on scene and alerted for contraband, as Trooper Ryans requested through dispatch, intervening probable cause likely would have been established warranting a different conclusion regarding the legality of the search of the BMW. Likewise, this case would have been completely different had a more prudent course been undertaken by police or had the proprietor of the Relax Inn requested the removal of the BMW from the business property. However, as the facts remain before the Court, the illegality of the officers in conducting an unlawful and warrantless search is intrinsically linked to the seizure of the narcotics evidence at issue. As the contraband evidence in this case was the product of the unlawful search of Defendant's property in violation of his Fourth Amendment protections, a strong presumption should exist, in the opinion of this Court, that the evidence be suppressed and declared inadmissible in the trial of this matter pursuant to the exclusionary rule.

However, there are cases as cited herein standing for the proposition that an entire vehicle itself may be seized as an instrumentality of a crime. *Horton v. California,* 496 U.S. 128 (1990); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *United States v. Cooper*, 949 F.2d 737 (5th

Cir.1991); *Ex parte Payne*, 683 So.2d 458 (Ala.1996) (*warrantless seizure of automobile lawful, as it was in plain view, and the police had probable cause to believe that the automobile itself was evidence of the crimes*); *Capraro v. Bunt*, 44 F.3d 690 (8th Cir.1995) (*because a vehicle is subject to a warrantless search on probable cause if the vehicle contains evidence of crime, the vehicle should likewise be subject to a warrantless seizure if the vehicle itself is an instrument of crime*); *State v. Reid*, No. M1999-00058-CCAR3CD, 2000 WL 502678, at *7 (Tenn. Crim. App. Apr. 28, 2000). The inquiry then becomes a balance of interests between whether society is willing to condone the seizure of an entire automobile as evidence for traffic infractions. If the subject BMW automobile at issue in this case could have been lawfully seized as physical evidence of the felony evading arrest offense, then the eventual inventory search of the auto would allow the admissibility of the contraband evidence through inevitable discovery. The Tennessee Supreme Court has held that where police inventory a lawfully impounded automobile, it is proper to open closed containers in trunks, or wherever else found, even in absence of exigent circumstances. *State v. Glenn*, 649 S.W.2d 584 (Tenn. 1983).

Likewise, as stated, the eventual expanse of our newly adopted good-faith exception becomes an issue in this case. As stated herein, federal courts recognize even broader good faith exceptions to allow the admission of unlawfully obtained evidence than the current state of the law in Tennessee. *See generally United States v. Leon*, 468 U.S. 897 (1984) (*the exclusionary rule is unwarranted when exclusion "does not result in appreciable deterrence" to future police misconduct).* Trooper Ryans and Ruskey testified to their belief that the seizure and inventory of the subject BMW was compelled by the "General Orders" as pronounced by the Tennessee Highway Patrol. Questions arise whether the search at issue in this case falls within the good-faith

exception as presently defined under state law or could fall within the outer reaches of the exception as defined by our federal courts. Furthermore, Trooper Ryans can also be overheard on the Exhibit 2 video recording proclaiming that the BMW will make a good seizure for the Tennessee Highway Patrol. It likewise remains an open question to this Court whether any statutory authority then existed authorizing the seizure of an automobile when used to effectuate a felony evading arrest, akin to the laws which existed for the seizure of a conveyance used for trafficking narcotics. Of course, any such seizure authority to which Trooper Ryans may have been acting under would likewise be subject to scrutiny under *Timbs v. Indiana*, 586 U.S. ____, (2019).

All of which is to conclude that the Court cannot yet conclusively determine whether the contraband narcotics evidence at issue should be excluded from further court proceedings as a product of an unlawful vehicle search in the absence of a warrant, or whether such contraband evidence may still be admissible in court despite the illegal search at bar pursuant to a good-faith exception or through other lawful means. As the parties were not prepared for such issues to arise, and had not been afforded an opportunity to argue or brief such issues, fairness dictates that this matter be set for May 10, 2019 for further litigation of these matters. Everything about this case, to date, has been complex from the initial issue of standing to present day. May 10, 2019 will represent the fifth motion hearing date in this case. As indicted, Defendant risks a mandatory prison sentence of confinement if convicted as charged. *See* Tenn. Code Ann. §§ 39-17-417(b), (i), and 40-35-303. This Court has now determined that officers should have pursued a search warrant to gain entry into the subject BMW automobile and that no exception authorized the illegal search in this case, pending further litigation. Thus, the disposition of the narcotics evidence, upon which the State seeks to rely in this prosecution, has now been placed in substantial jeopardy. As such,

this case is ripe for both sides to engage in good-faith negotiations with a heart and mind toward finding an amenable resolution to these matters.[5]

WHEREFORE, under the totality of the circumstances present in this case and upon good cause having been shown, both legal and factual, this Court finds Defendant's Motion to Suppress to contain merit entitling Defendant to relief, pending further litigation. Officers searched an automobile in which Defendant held a possessory interest without a warrant and no exception to the warrant requirement applied to justify the illegal search. Further proceedings in this case are necessary to determine whether any and all evidence found as a product of the warrantless search of the vehicle shall be suppressed and excluded as evidence in this matter.

So ORDERED and entered the 9th day of April, 2019.

_____

Judge Andrew Mark Freiberg
Circuit Court, Part III
Tenth Judicial District

[5] A judge may encourage resolution of disputed cases but may not act in any manner that coerces any party into settlements. *See* Tenn. Sup.Ct. R. 10, Canon 2, Code of Judicial Conduct Rule 2.6.

IN THE CRIMINAL COURT OF MCMINN COUNTY, TENNESSEE

STATE OF TENNESSEE,

VS. **Case No. 15-CR-243**

KENNETH J. HAMPTON,
Defendant.

ORDER

This cause came to be heard on the 16th day of September, 2016, on a Motion to Suppress blood evidence filed on behalf of the Defendant herein.[1] The Court, having taken proof through sworn witness testimony and submitted exhibits by the parties, having heard the arguments of counsel, being fully advised of the issues presented by pleading, and for good cause shown, enters an ORDER denying the Defendant's Motion to Suppress blood evidence.

FINDINGS OF FACT

In reviewing the evidence and scrutinizing both the testimony and credibility of the hearing witnesses, the Court looked to proof of any of the following factors: (1) the general character of the witness; (2) the evidence, if any, of the witness's reputation for truth and veracity; (3) the intelligence and respectability of the witness; (4) his or her interest or lack of interest in the outcome of the proceeding; (5) his or her feelings; (6) his or her apparent fairness or bias; (7) his or her means of knowledge; (8) the reasonableness of his or her statements; (9) his or her appearance and demeanor while testifying; (10) his or her contradictory statements as to material matters, if any are shown; and (11) any and all the evidence in the case tending to corroborate or to contradict the witness.

At the hearing, the Court first heard proof from William Patterson, a nine year veteran with the Tennessee Highway Patrol. Trooper William Patterson testified that on the date in question, he was dispatched to a single vehicle wreck on County Road 360 in McMinn County.

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[1] Prior to the hearing, defense counsel broadened the considerations for the Court to include suppression of the Defendant's statements made to the Trooper and an alleged violation of his right to counsel by oral motion which are additionally discussed herein, in turn.

Once present, Trooper Patterson first made contact with the Defendant still seated behind the wheel of the wrecked automobile in the driver's seat. Trooper Patterson later learned who was identified as the Defendant's uncle was deceased and had been removed from the vehicle prior to his arrival at the scene. The Trooper found the Defendant to be extremely emotional. Specifically, the Defendant was adamant that he not be removed from the wrecked vehicle. The Defendant was argumentative with the personnel present, repeatedly cursing and resisting efforts to be removed from the wreck. At one point, a Deputy Lantz with the McMinn County Sheriff's Department withdrew his Taser and pointed it toward the Defendant in an effort to force compliance, although it was never deployed.

Once the Defendant was removed from the wreck by law enforcement, the Defendant was assisted to the front of the Trooper's patrol vehicle within close proximity to the wreck. Upon contact with the Defendant, Trooper Patterson immediately formed an opinion that the Defendant was extremely intoxicated. Trooper Patterson observed evidence of alcohol consumption present about the scene of the wreck, including an opened can of beer present in the Defendant's lap while seated in the driver's seat prior to his removal from the vehicle. The Trooper found the Defendant's combative behavior, the present odor of alcohol, the Defendant's appearance and demeanor as exhibited by the eyes and speech pattern, and the Defendant's staggered gait which required assistance during travel to be further evidence of the Defendant's impairment.

During conversation at the front of the patrol vehicle, Trooper Patterson confronted the Defendant with his impairment and the Trooper's opinion that the Defendant was intoxicated. The Defendant vehemently denied his impairment and at one point stated, "Fuck you, I'm not drunk." After a brief back and forth between the two, Trooper Patterson informed the Defendant that there was an "easy way" to "check" the alcohol level in the Defendant's blood system and "break the tie" between the differing opinions of the two regarding impairment. After being offered the opportunity of a blood draw the Defendant replied, "Let's do it." At no point during this conversation was there ever any conversation of the implied consent statute, the purported need for mandatory blood extraction, force, search warrant availability, nor anything else of similar ilk.

After the verbal acquiescence to a blood draw, Trooper Patterson escorted the Defendant a short distance to the rear of an ambulance on scene. At this point, the Defendant became

argumentative again and stated, "No, you aren't doing it [blood draw]." The Defendant also requested an opportunity to talk to a lawyer. At that point, Trooper Patterson began to informally discuss the implied consent law with the Defendant. Trooper Patterson did not have the actual implied consent form in his possession at that time. Trooper Patterson explained that since the vehicle wreck resulted in a death, a blood draw to uncover the intoxication level in his blood system was "mandatory". The Trooper explained to the Defendant that, if necessary, a search warrant would be obtained to take his blood. At no point was physical force ever discussed, nor applied to the Defendant. Likewise, the Defendant, while argumentative at the ambulance, never physically resisted as no restraint was ever applied during this second conversation. After listening to Trooper Patterson, the Defendant physically extended his arm to a female EMT present at the ambulance and stated derisively, "Take it, Pussy."[2]

Based upon the voluntary extension of his arm and colorful words used to articulate his submission to the blood draw, the Defendant's blood was, in fact, taken at the rear of the aforementioned ambulance by the female EMT. No restraint of any kind was applied to the Defendant either before or during the blood draw. Furthermore, the Defendant did not in any way resist the removal of his blood from his body by needle. Trooper Patterson witnessed the blood draw and secured the "blood kit" before later dropping the same into evidence in Chattanooga later that same night.

After the Defendant's blood was drawn and secured, Trooper Patterson retrieved a paper copy of Tennessee's Implied Consent Advisement, submitted as exhibit 1 to the Motion hearing. Trooper Patterson filled out the form, checked that the blood draw in the Defendant's case was "Mandatory", and read the Defendant the advisement. The Trooper designated on the form that the Defendant had agreed to provide a blood sample for testing and offered the Defendant to sign the appropriate location affirming the same. At that time, the Defendant refused to sign or talk any further with emergency personnel on scene. As such, Trooper Patterson indicated in writing the Defendant's refusal to sign on the Advisement form. The Defendant was thereafter placed in handcuffs, placed in a law enforcement vehicle, and transported to the McMinn County jail by Deputy Lantz.

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[2] During his testimony, Trooper Patterson used the quotations "Take it, Pussy" and "Poke it, Pussy" interchangeably as being the same comment attributed to the Defendant and directed toward the EMT. While this Court was unable to discern the Defendant's exact phrasing, it was made abundantly clear and was accredited that the Defendant verbally acknowledged his submittal to a blood draw, albeit in a derogatory fashion.

In addition to Trooper Patterson's testimony and the Implied Consent Advisement, a prior statement of William Patterson regarding the facts at issue at bar was submitted as exhibit 3 to the Motion hearing, as well as a Computer Assisted Dispatch (hereafter, "CAD") report from the case submitted as exhibit 2, and an affidavit of complaint charging the Defendant with a crime as drafted and signed by Trooper Patterson submitted as exhibit 4. Without material exception, the exhibited evidence corroborated the hearing testimony of Trooper William Patterson. It was of particular note that the CAD report, made contemporaneously with the events at issue, did confirm that the Defendant refused to speak with law enforcement[3] only after the Defendant's blood sample had been drawn.[4]

The Defendant also elected to testify at the Motion hearing in his own defense. The Defendant presented as a high school graduate of average intelligence. This Court made note of the Defendant's statements that he did not agree or consent to a removal of his blood from his body.[5] However, the Defendant overwhelming answered with one word responses. During the testimony itself, this Court lost count of the number of times the Defendant commented succinctly with a "yes", "yeah", "right", "correct", or "no" in response to questions of counsel. While there was never any objection lodged to leading the Defendant's direct examination, this Court could not help but notice the prolonged pause or hesitation that accompanied nearly every answer whose question by either counsel mandated more than a one word response. The Defendant did not maintain eye contact with either questioning counsel or the Court during these prolonged intermissions, as if searching for answers. This Court finds that the Defendant's testimony added little credible evidence illuminating the issues surrounding the blood draw as he had no clear memory of those particular contemporaneous events.

One particular exchange highlighted the Defendant's hesitation and indecision. During cross examination, the State's attorney pressed whether the Defendant said, "Let's do it", in response to the offer of a blood test. At first, the Defendant denied speaking those words. When asked again, he paused and hesitated before affirming he had, in fact, made such a statement.

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[3] The entry made at 6:40:20p.m. on exhibit 2 noted that law enforcement "DID RETREIVE [*sic*] BAC FROM THE 10-15 SUBJ[ECT]".

[4] The entry made at 8:07:16p.m. on exhibit 2 noted that "10-15 SUBJ[ECT] REFUSED TO SPEAK WITH LAW ENFORCMENT [*sic*]".

[5] The Court noted the following testimonial statements made by the Defendant regarding his purported refusal to submit to a blood draw: "I did not agree"; "I felt I had no choice"; "I felt I never consented"; "He [Trooper] said it was mandatory"; and "I felt we would fight it, or we would take it [blood sample]".

It was not just the Defendant's words, or lack thereof, or his continued hesitation before responding to the questions of counsel, which affected his overall credibility. The Defendant's overall appearance and demeanor detracted from his credibility as well. Contributing to such a finding was the Defendant's lack of eye contact, his hesitation in answering, and what appeared at times to be the Defendant's search for answers. The Defendant's nervousness and indecision was so striking as to compel this Court, at the close of his examination, to ask the Defendant pointedly whether he remembered this incident. The Defendant again hesitated before admitting that he did not remember the exact conversations that took place between himself and the Trooper. When pressed what he did remember about this case, the Defendant responded he remembered the "event"; the "wreck". Defense counsel attempted to rehabilitate the Defendant after these admissions solicited by the Court, to little avail.

This is not to say that Trooper Patterson recalled every word of the conversations between himself and the Defendant. However, the Trooper readily acknowledged in a clear and concise manner what he did and did not remember. Rather than detract from his overall credibility, such honesty actually enhanced the reliability of those substantive events the Trooper did recall with clarity and upon which this Court accredits. As already mentioned, the exhibit evidence did corroborate Trooper Patterson's testimony.

This Court has taken into consideration the Defendant's lack of experience in testifying in Court. A certain degree of nervousness and apprehension is common and expected amongst lay witnesses. However, the Defendant's demeanor and apprehension was to a degree that evinced a bias and interest in this case to testify in a manner to bolster his suppression claims. It was as if the Defendant was under intense pressure to testify in a particular manner, producing such hesitation. Such is understandable in light of the Defendant facing a class A felony offense as indicted which, if convicted, mandates a lengthy prison sentence. In sum, this Court fully accredited the testimony of Trooper William Patterson, finding the witness to be extremely credible and further finding that his testimony contained elements of inherent reasonableness and truthfulness. Given the proof presented, this Court found Trooper Patterson's testimony to be most compelling and resolved any and all factual disputes or conflicts in the proof in favor of the Trooper and, by extension, the State of Tennessee. The exhibit evidence enhanced the Trooper's testimony.

ANALYSIS

The facts presented reveal that a sample of the Defendant's blood was obtained without a warrant. The Fourth Amendment to the United States Constitution guarantees that "the right of the people to be secure [] against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause". Similarly, Article I, section 7 of our Tennessee Constitution guarantees "that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures". The purpose of these constitutional provisions protecting the citizenry from unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasions by government agents and officials.

Accordingly, under both the federal constitution and our state constitution, a search without a warrant is presumptively unreasonable, and any evidence obtained pursuant to such a search is subject to suppression unless the state demonstrates that the search was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. Well settled among the exceptions to the warrant requirement, and the one applicable to the fulcrum issue in the present matter, is consent to search. Trooper Patterson, through personal observations made at the scene of the accident, held, at minimum, a reasonable suspicion to believe that the Defendant had violated Tenn. Code Ann. § 55-8-136, failure to exercise due care, and § 55-8-123, failure to maintain lane, amongst other traffic infractions naturally stemming from the single vehicle wreck.

At the scene, the Trooper found the Defendant situated in the driver's seat and behind the wheel of the wrecked vehicle. The Trooper saw evidence of alcohol consumption on scene, including an opened can of beer in the Defendant's lap as he was situated in the driver's seat. The Trooper noted the present odor of alcohol at the scene, and a distinct appearance of the Defendant's eyes and pattern of speech that was consistent with the Trooper's lay opinion that the Defendant was under the influence of alcohol. Trooper Patterson testified at least twice at the hearing that the Defendant appeared "extremely intoxicated". Given these observations, the Trooper was absolutely justified as a matter of law in requesting the Defendant's blood sample to determine the concentration of alcohol in the Defendant's system.

During the colloquy between the Trooper and the Defendant regarding the propriety of a blood sample, the Defendant was not under formal arrest, although Trooper Patterson did admit

the Defendant was being detained without any physical restraint in the sense that the Defendant would not have been free to merely walk away from the Trooper and the scene of the wreck. Trooper Patterson was one of two officers (Deputy Lantz) present in uniform during this colloquy. *Miranda* warnings were not given. When asked to provide a blood sample, the Defendant replied, "Let's do it"; and separately, after briefly reconsidering the voluntariness of the blood draw, the Defendant extended his arm out toward a female EMT and said, "Take it, Pussy." This all occurred before Trooper Patterson had the opportunity or necessity to read the Defendant the formal Implied Consent Advisement.

Sadly, given the technological age in which we now live, this consent, as orally provided by the Defendant, was not video or audio recorded, nor memorialized by any means beyond the memory of the parties. Given the Defendant's arm actions and oral words, blood was drawn by a female EMT on scene in the Trooper's presence and subsequently collected as evidence by Trooper Patterson. The Defendant was never forcibly restrained during the blood draw, nor did the Defendant ever physically resist. The Defendant was subsequently read the Tennessee Implied Consent Advisement by the Trooper. Each specific issue raised by the facts of this case will be addressed in turn in denying the Defendant's Motion to Suppress. The Defendant voluntarily consented to the extraction of a sample of his blood in this case.

I. Initial Detention

The Tennessee Supreme Court has recognized three categories of police interventions with private citizens: a full scale arrest, which requires probable cause; a brief investigatory detention, requiring reasonable suspicion of wrong-doing; and a brief police-citizen encounter, requiring no objective justification. *State v. Berrios*, 235 S.W.3d 99, 104 (Tenn. 2007); *State v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000). "While arrests and investigatory stops are seizures implicating constitutional protections, consensual encounters are not." *State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn.2006). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni–Ponce*, 422 U.S. 873, 878 (1975) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S.

1, 16–19, (1968)). Reasonableness is the "touchstone of the Fourth Amendment." *Florida v. Jimeno,* 500 U.S. 248, 250 (1991) (*citing Katz v. U.S.*, 389 U.S. 347, 360 (1967)); *see also Skinner v. Ry. Labor Executives' Assn.*, 489 U.S. 602, 619 (1989); *State v. Berrios,* 235 S.W.3d 99, 104–05 (Tenn. 2007); *State v. Scarborough,* 201 S.W.3d 607, 616 (Tenn. 2006). These constitutional protections are designed to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." *State v. Keith,* 978 S.W.2d 861, 865 (Tenn. 1998) (*quoting Camara v. Mun. Court*, 387 U.S. 523, 528 (1967)).

Accordingly, a "seizure" implicating constitutional concerns occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Daniel,* 12 S.W.3d 420, 425–26 (Tenn. 2000); *see also Florida v. Bostick,* 111 S.Ct. 2382, 2387 (1991); *Michigan v. Chesternut,* 486 U.S. 567, 574 (1988); *Florida v. Royer,* 103 S.Ct. 1319, 1326–27 (1983); *U.S. v. Mendenhall,* 100 S.Ct. 1870, 1877 (1980); *State v. Wilhoit,* 962 S.W.2d 482, 486 (Tenn. Crim. App. 1997); *State v. Bragan,* 920 S.W.2d 227, 243 (Tenn. Crim. App. 1995); *State v. Darnell,* 905 S.W.2d 953, 957 (Tenn. Crim. App. 1995). "In order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter." *Daniel*, 12 S.W.3d at 425-26; *Bostick,* 111 S.Ct. at 2389.

Application of this objective standard ensures that the scope of these constitutional protections does not vary depending upon the subjective state of mind of the particular citizen being approached. *Id.* Under this analysis, police-citizen encounters do not become "seizures" simply because citizens may feel an inherent social pressure to cooperate with police. *Daniel*, 12 S.W.3d at 425-26. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Daniel*, 12 S.W.3d at 425-26 (*quoting I.N.S. v. Delgado,* 104 S.Ct. 1758, 1762 (1984)). Some of the factors which are relevant and should be considered by courts when applying this totality of the circumstances test include the time, place and purpose of the encounter; the words used by the officer; the officer's tone of voice and general demeanor; the officer's statements to others who were present during the encounter; the threatening presence of several officers; the display of a weapon by an officer; and the physical touching of the person of

the citizen. *Daniel*, 12 S.W.3d at 425-26; *see also generally Michigan v. Chesternut*, 486 U.S. 108 S.Ct. 1975, 1980 (1988); *Mendenhall*, 100 S.Ct. at 1877; LaFave § 5.1(a).

This test is "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Daniel*, 12 S.W.3d at 425-26; *Chesternut*, 108 S.Ct. at 1979.

Pursuant to these guiding principles, an automobile stop has been consistently held to constitute a "seizure" within the meaning of both the Fourth Amendment to the United States Constitution, *see Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), and article I, section 7 of the Tennessee Constitution, *see State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993). As a general rule, if the police have probable cause to believe a traffic violation has occurred, the stop is constitutionally reasonable. *Whren v. United States*, 517 U.S. 806, 810 (1996). One exception to the probable cause mandate exists "when a police officer makes an investigatory stop based upon reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed." *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000) (*citing Terry v. Ohio*, 392 U.S. 1, 20–21 (1968)). Thus, the constitutional inquiry into the permissibility of a citizen stop or detention by government agent is identical, whatever its general character or mode of transport, by foot or by auto. Determining whether reasonable suspicion existed in a particular case is a fact-intensive and objective analysis. *State v. Garcia*, 123 S.W.3d 335, 344 (Tenn. 2003). The United States Supreme Court has stated that "[i]n determining whether a police officer's reasonable suspicion is supported by specific and articulable facts, a court must consider the totality of the circumstances." *Alabama v. White*, 496 U.S. 325, 330 (1990) (*citing United States v. Cortez*, 449 U.S. 411, 417 (1981)); *see also State v. Garcia*, 123 S.W.3d 335, 344 (Tenn. 2003); *State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997).

In making inquiry into the constitutional permissibility of a detention of a citizen, it is objective facts that guide a reviewing court's analysis. For "[i]t is now clear the subjective intentions or actual motivations of officers are irrelevant to any Fourth Amendment claim, *see Whren v. United States*, 517 U.S. 806, 813 [] (1996), or claim under Tennessee Constitution

Article I, § 7, *see State v. Vineyard*, 958 S.W.2d 730, 736 (Tenn.1997)." *State v. Harton*, 108 S.W.3d 253, 260 (Tenn. Crim. App. 2002). In sum, a detention based upon either probable cause or reasonable suspicion to believe a traffic code has been violated must be supported by object fact to be constitutionally permissible, regardless of the subjective motivation of the police officer making the stop or detention. *Id.*

Of course, the present case does not present a traffic stop in the traditional sense, but rather an officer detention of the Defendant at the scene of a single, motor vehicle accident. Once on scene, Trooper Patterson found a vehicle which had left a McMinn county roadway and wrecked. Trooper Patterson also found the Defendant still positioned in the driver's seat, behind the wheel of the wrecked automobile. Trooper Patterson learned through other officers that the passenger had been removed from the vehicle prior to his arrival with injuries, and was later pronounced dead. Based upon the Trooper's testimony and exhibit evidence, this wreck occurred during the late afternoon hours of March 31, 2015. There were no known and obvious, adverse road or weather conditions present pursuant to the hearing evidence.

Given these facts alone, Trooper Patterson, through personal observations made at the scene of the accident, held a reasonable suspicion to believe that the Defendant had violated Tenn. Code Ann. § 55-8-136, failure to exercise due care, and § 55-8-123, failure to maintain lane, amongst other traffic infractions naturally stemming from the single vehicle wreck. While it is certainly true that automobile accidents can occur without being the product of any violations of law, a wreck involving injury and death is certainly an incident within the concern of a law enforcement officer. As such, Trooper Patterson held a reasonable suspicion, supported by specific and articulable facts, that a criminal offense had been committed resulting in the automobile wreck.

Once Trooper Patterson made contact with the Defendant, the Defendant was not free to leave, and was briefly detained for an investigation to quickly confirm or dispel the Trooper's suspicions that criminal activity had just occurred resulting in the wreck. Thus, the interaction at bar fell within the constitutionally permissible investigative detention, or *Terry* stop, category of police-citizen encounters. Trooper Patterson's act to detain the Defendant upon his removal from the wrecked automobile was justified and lawful.

Moreover, our Tennessee Supreme Court recently crafted a fourth category of police-citizen encounters that may, under certain circumstances, justify a warrantless seizure, known as

the community caretaking exception. *State v. McCormick*, 494 S.W.3d 673, 687–88 (Tenn. 2016). To establish this community caretaking exception, the State must establish: (1) that the officer possessed specific and articulable facts which, viewed objectively and in the totality of the circumstances, reasonably warranted a conclusion that a community caretaking action was needed, such as the possibility of a person in need of assistance or the existence of a potential threat to public safety; and (2) that the officer's behavior and the scope of the intrusion were reasonably restrained and tailored to the community caretaking need. *Id*. "Determining whether police action is objectively reasonable in light of the circumstances requires careful consideration of the facts of each case[,]" including "the nature and level of distress exhibited by the citizen, the location, the time of day, the accessibility and availability of assistance other than the officer, and the risk of danger if the officer provides no assistance." *Id*. (*quoting Moats*, 403 S.W.3d 170, 195–96 (Tenn. 2013) (Clark and Koch, JJ., dissenting)). Our Supreme Court emphasized that when the community caretaking exception is invoked to validate a search or seizure, courts must meticulously consider the facts and carefully apply the exception in a manner that mitigates the risk of abuse. *McCormick*, 494 S.W.3d at 687–88.

While this Court finds that the Defendant was detained for brief investigative purposes at bar, such detention was also justified under this new community caretaking doctrine. An automobile wreck had occurred in which an injured passenger was removed and quickly declared deceased. Meanwhile, Trooper Patterson found the Defendant still seated behind the wheel and the Defendant's actions initially prevented officers and emergency personnel from removing him from the vehicle. The Defendant was found with an opened beer can in his lap. The Defendant was emotional, argumentative, and belligerent with the Trooper and Deputy Lantz. Clearly, the Defendant was exhibiting a high level of distress during what was objectively characterized as an emergency situation requiring officer assistance. The Defendant's distress was to such a degree to prompt Deputy Lantz to draw his Tazer in an effort to force compliance.

The Defendant was physically removed from the wrecked automobile by Trooper Patterson and Deputy Lantz. Trooper Patterson testified to assisting the Defendant as they walked a short distance from the wreck to the front of the Trooper's cruiser vehicle. No guns were drawn on the Defendant. No handcuffs were placed upon the Defendant. The Defendant was not removed any considerable distance from the vehicle wreck. This interaction occurred along the side of a public roadway during late afternoon hours. The Defendant was in the

presence of only two known uniformed officers, Trooper Patterson and Deputy Lantz. The Defendant was not physically restrained in any manner. In sum, the Defendant was not under formal arrest, but was rather lawfully detained for investigative purposes, and to a lesser extent in furtherance of the Trooper's community caretaking authority. It was at this point that the Trooper and the Defendant began to engage in an oral colloquy.

II. Length of Detention

Again, the temporary detention of individuals by police, even if only for a brief period and for a limited purpose, constitutes a "seizure" which implicates the protection of both the state and federal constitutional provisions. U.S.C.A. Const. Amend. 4; Tenn. Const. Art. 1, § 7; *State v. Cox*, 171 S.W.3d 174 (Tenn. 2005). As indicated, the initial detention of the Defendant at bar was constitutionally permissible. The United States Supreme Court has held, however, that "[i]t is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *State v. Berrios*, 235 S.W.3d 99, 105–06 (Tenn. 2007) (*quoting Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *citing U.S. v. Jacobsen*, 466 U.S. 109, 124 (1984)).

The United States Supreme Court has observed that "[t]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *State v. Berrios*, 235 S.W.3d 99, 105–07 (Tenn. 2007) (*quoting Delaware v. Prouse*, 99 S.Ct. 1391 (1979)). The Court has also held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *State v. Berrios*, 235 S.W.3d 99, 105–07 (Tenn. 2007) (*quoting Florida v. Royer*, 103 S.Ct. 1319 (1983)).

In *State v. Cox*, 171 S.W.3d 174 (Tenn. 2005), our Tennessee Supreme Court adopted the rationale of the U.S. Supreme Court in *Royer*, making the following observations:

> "The duration of such a stop, however, must be "temporary and last no longer than necessary to effectuate the purpose of the stop." "The proper inquiry is whether during the detention the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." A stop may be deemed "unreasonable," if the 'time, manner or scope of the investigation exceeds the proper parameters.' "

Id. at 179–80 (citations omitted). Thus, stops and detentions must be designed to be brief investigative measures. *See State v. Troxell*, 78 S.W.3d 866 (Tenn. 2002). Consequently, a police officer's actions in conducting such a stop or detention cannot exceed the scope of the circumstances that justified the stop. *Id.* A reasonable detention or stop can become unreasonable if the "time, manner or scope of the investigation exceeds the proper parameters." *Id.* (*quoting United States v. Childs*, 256 F.3d 559, 564 (7th Cir. 2001)).

In assessing whether a detention is excessive in length, a court must determine if "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *State v. Simpson,* 968 S.W.2d 776, 783 (Tenn.1998). The Defendant's detention at bar begins with his removal from a single vehicle automobile crash. Our courts have ruled that an officer may order and remove occupants out of a vehicle, even during a routine traffic stop without the exigency that was present in this case involving a wreck. *See State v. Berrios,* 235 S.W.3d 99 (Tenn. 2007); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Almost immediately, Trooper Patterson formed the opinion that the Defendant was "extremely intoxicated" during the time that Trooper Patterson was able to observe the Defendant seated in the wrecked vehicle, in assisting the Defendant's removal from the wreck, and in being required to assist the Defendant along a short walk from the wreck to the front on the Trooper's vehicle. Alcohol was present at the scene including an open beer in the Defendant's lap while seated in the wreck behind the wheel of the automobile. Trooper Patterson observed an odor of alcohol about the scene of the wreck. Trooper Patterson found the Defendant to be emotional, argumentative, and belligerent. Trooper Patterson witnessed blood-shot eyes and slurred speech in the Defendant. *See exhibit 3*. Trooper Patterson observed the Defendant unsteady on his feet which required assistance to walk. *Id.*

Given this substantial proof indicating impairment, Trooper Patterson possessed reasonable cause to confront the Defendant with this evidence of intoxication and to request the Defendant submit to test to determine the alcohol content in his system. Thus, Trooper Patterson possessed additional, articulable evidence to extend the investigatory detention to include the offenses of potentially driving under the influence, vehicular assault, and/or vehicular homicide. Once the purpose of the initial detention is accomplished, an officer may not detain the citizen further unless the investigation yields the necessary reasonable suspicion to justify extending the detention. *See State v. Garcia*, 123 S.W.3d 335 (Tenn. 2003); *State v. England,* 19 S.W.3d 762,

767 (Tenn. 2000). Given the nature of the wreck, the evidence of impairment exhibited by the Defendant, and the evidence of alcohol consumption on scene, Trooper Patterson possessed reasonable suspicion to pursue additional evidence and held reasonable grounds, or reasonable cause, to ask for the Defendant's consent in obtaining a blood sample to determine his alcohol consumption.

The total length of the detention from the removal of the Defendant from the wreck until the time of blood extraction and subsequent formal arrest thereafter was reasonable and not excessive. Again, the Defendant was never physically restrained throughout this detention. Both Trooper Patterson and the Defendant testified that all these salient events progressed in quick succession. There were no threats of force to the Defendant or coercive interrogation techniques applied. There is no evidence of an overwhelming show of government force presented to the Defendant. Pursuant to exhibit 3, a prior statement from Trooper Patterson regarding the investigative efforts which occurred during this case, the entire detention until blood withdrawal and arrest at issue extended approximately twelve minutes. Evidentiary value gleaned from exhibit 3 confirms that the entirety of operative events at issue in this case, including the report of the wreck, the initial response by emergency personnel, and efforts to extract the Defendant from the wrecked automobile prior to the actual detention, did not extended longer than approximately one hour.[6]

In sum, the length and manner of the detention at issue at bar were entirely reasonable and constitutionally permissible. Again, reasonableness is the "touchstone of the Fourth Amendment." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Katz*, 389 U.S. at 360); *see also Skinner v. Ry. Labor Executives' Assn.*, 489 U.S. 602, 619 (1989); *State v. Berrios*, 235 S.W.3d 99, 104–05 (Tenn. 2007); *State v. Scarborough*, 201 S.W.3d 607, 616 (Tenn. 2006).

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[6] Trooper Patterson testified that he arrived on scene only after the passenger had been removed from the wreck. While it may appear that the timelines on exhibit 2 and 3 differ considerably, it is apparent that one timeline incorrectly lists the actual time by a one hour difference. For example, the events depicted by hearing testimony and exhibit evidence list the operative facts in the same chronological order. Most pointedly, Trooper Patterson's prior statement submitted as exhibit 3 lists that "[w]hile enroute [*sic*] I was advised that one male subject was 10-70" as occurring at 18:52. Meanwhile, that identical evidence event is depicted on the CAD report as occurring at 5:52:37p.m. on exhibit 2 by entry, stated verbatim with errors, "MCMI CO ADV 10-70 ONE MALE AND ANOTHER IS BEING FLOWN OUT AT THIS TIME". Accounting for this exact one hour difference in exhibit 2 and 3 reveals a consistent timeline of evidentiary fact which corroborates Trooper Patterson's testimony of events. Given this corroboration, this Court accredits not just the testimony of the Trooper, but also the Trooper's prior statement contained in exhibit 3.

Trooper Patterson pursued a means of investigation to quickly confirm or dispel suspicions that the Defendant was operating the wrecked vehicle impaired and under the influence of alcohol. The length of detention in this case was not excessive and extended approximately twelve minutes. Any restraint on liberty of the Defendant during the lawful detention was of a *de minimis* nature. The reasonableness of the detention in character and length at bar is juxtaposed with the considerable evidence of criminality that confronted Trooper Patterson at the scene of the wreck, and the considerable and legitimate government interest in investigating a wreck resulting in death.

III. Miranda

Another issue in this case involves a citizen's constitutional protection against compelled self-incrimination, which "is protected by both the federal and state constitutions." *State v. Blackstock*, 19 S.W.3d 200, 207 (Tenn. 2000). The Self–Incrimination Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the 14th Amendment and *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Our state constitution likewise contains a related provision in Article I, section 9, which guarantees that "in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself." Although "we have traditionally interpreted article I, [section] 9 to be no broader than the Fifth Amendment," *State v. Martin*, 950 S.W.2d 20, 23 (Tenn. 1997), one "significant difference between these two provisions is that the test of voluntariness for confessions under Article I, [section] 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment," *State v. Crump*, 834 S.W.2d 265, 268 (Tenn. 1992) (*citing State v. Smith*, 834 S.W.2d 915 (Tenn. 1992)).

To help insure the protections of the Fifth Amendment in the criminal process, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." As part of these safeguards, the police are required to inform persons being questioned while in custody of the following rights: (1) that they have the right to remain silent; (2) that any statement made may be used as evidence

against them; (3) that they have the right to the presence of an attorney during questioning; and (4) that if they cannot afford an attorney, one will be appointed for them prior to questioning, if so desired. *See Id.* at 444; *see also State v. Bush*, 942 S.W.2d 489, 499 (Tenn. 1997). As the Supreme Court recently re-emphasized, "*Miranda* and its progeny ... govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickerson v. United States*, 530 U.S. 428, 428 (2000).

The requirements of *Miranda* "must be strictly enforced, but only in those situations in which the concerns that motivated the decision are implicated." *State v. Goss*, 995 S.W.2d 617, 629 (Tenn. Crim. App. 1998) (*citing Illinois v. Perkins*, 496 U.S. 292, 296 (1990)). Of course, *Miranda* warnings are not required under every circumstance in which police officers come into contact with citizens. *State v. Walton*, 41 S.W.3d 75, 81–83 (Tenn. 2001). Rather, because "[t]he underpinnings of *Miranda* are to dissipate the compulsion inherent in custodial interrogations, to prevent coerced self-incrimination, and to prevent relevant defendant ignorance," *see State v. Callahan*, 979 S.W.2d 577, 582 (Tenn. 1998), the requirements of *Miranda* come into play only when the defendant is in custody and is subjected to questioning or its functional equivalent, *see Rhode Island v. Innis*, 446 U.S. 291 (1980). Absent either one of these prerequisites, the requirements of *Miranda* are not implicated. *State v. Walton*, 41 S.W.3d 75, 81–83 (Tenn. 2001).

With regard to the issue of custody, the *Miranda* Court defined this requirement as when the defendant is placed under formal arrest or is "otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444; *see also Stansbury v. California*, 511 U.S. 318, 322 (1994) (*The ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest*). The Tennessee Supreme Court has expanded this definition to mean "under the totality of the circumstances, [whether] a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn. 1996). The test is objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question. *Anderson*, 937 S.W.2d at 852.

To aid in determining whether a reasonable person would consider himself or herself in custody, the Tennessee Supreme Court considers a variety of factors, including the following:

the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. *See Anderson,* 937 S.W.2d at 855; *also Walton*, 41 S.W.3d at 81–83.

Without question, Trooper Patterson began to question the Defendant and "interrogate" him as is defined by legal precedent in this case. The Trooper confronted the Defendant with the Trooper's lay opinion that the Defendant was intoxicated and began to question him about the same. However, as articulated above herein, the Defendant was merely detained during this interrogation but was not under formal arrest, nor deprived of freedom of movement to a degree associated with a formal arrest. Therefore, the Defendant's constitutional protections were not implicated and Trooper Patterson was under no legal requirement to provide the *Miranda* advisement.

This colloquy between Trooper Patterson and the Defendant, or interview or interrogation, however it is labeled, extended approximately twelve minutes and occurred along the side of a public roadway during late afternoon hours. The character of the conversation can best be described as a debate, with the Defendant replying to the Trooper's accusation of intoxication with, "Fuck you, I'm not drunk." It is clear that only the Defendant expressed an argumentative, belligerent, and at times an aggressive tone with the Trooper. Trooper Patterson maintained a calm, but firm, demeanor and tone during the colloquy in discussing the Defendant's impairment and blood draw. The Defendant was never physically restrained, nor did the Defendant every physically resist or attempt to end the questioning. The Defendant was only confronted with two known officers in uniform, Trooper Patterson and Deputy Lantz. No weapons were presented to the Defendant during the interrogation, albeit Deputy Lantz pulled a Tazer on the Defendant before the detention and interview as the Defendant was resisting efforts to be removed from the wrecked automobile. No restraint was imposed, nor coercive measures

applied, to the Defendant during the colloquy. The Defendant's lack of known knowledge to refuse cooperation is really the only factor outlined by *Anderson* which favors the Defendant. *Id*.

Given the proof, and under the totality of the circumstances, no reasonable person in the Defendant's position would feel under formal arrest, or its functional equivalent. Every citizen should expect to spend a few minutes along the side of a public roadway answering questions about an automobile wreck. There is no arrest here, or custodial situation, that requires *Miranda* admonishments. Trooper Patterson acted reasonably and appropriately in interviewing the Defendant and confronting him regarding the circumstances surrounding the accident.

Precedent confirms that *Miranda* was not required at bar. The United States Supreme Court, despite its recognition that "a traffic [related] stop significantly curtails the freedom of action of the driver and the passengers, if any, of the detained vehicle" and "constitutes a seizure," *Berkemer v. McCarty,* 468 U.S. 420, 436-37 (1984), has held that "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda.*" *Id.* at 440. In so holding, the Court noted that "two features of an ordinary traffic [related] stop mitigate the danger that a person questioned will be induced to speak where he would not otherwise do so freely." *Id.* at 437 (*quoting Miranda,* 384 U.S. at 467). "First, detention of a motorist pursuant to a [] stop is presumptively temporary and brief." *Id.* "Second, circumstances associated with the typical traffic [related] stop are not such that the motorist feels completely at the mercy of the police." *Id.* at 438. The Court strongly contrasted this type of police-citizen interaction with the often lengthy, "police dominated" questioning occurring in the type of stationhouse interrogation at issue in *Miranda. Id.* at 437-39.

The Supreme Court acknowledged that in some cases it will be difficult to determine the point at which a suspect has been taken into custody within the meaning of *Miranda. See generally State v. Snapp*, 696 S.W.2d 370, 370–71 (Tenn. Crim. App. 1985). The matter at bar is not one of the described difficult cases. It is not disputed that the exchange at issue at bar between the Trooper and the Defendant occurred at the scene of a traffic accident, along a public roadway, involved no restraint or coercion, involved only modest questions asked of, and factual assertions made to, the Defendant, and lasted approximately twelve minutes. As such, the Defendant's statements made in this setting are clearly admissible against him and do not require *Miranda* warnings as a prerequisite. Furthermore, an officer's mere request that a suspect consent to a blood alcohol test is not governed by the *Miranda* rule. *Id*. (*citing South Dakota v.*

Neville, 459 U.S. 553 (1983)). The decision of whether to comply with a blood-alcohol test, while a difficult decision for a citizen, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination. *Neville*, 459 U.S. at 564.

In *Trail v. State*, 552 S.W.2d 757, 758 (Tenn.Crim.App.1976), it was held that an officer may, in the course of an investigation of an automobile accident, make inquiry of a person to determine if they had been operating the vehicle involved in a collision without giving *Miranda* advice. Further, the statement of a person in response to that question by police, revealing them to be the driver of the wrecked vehicle, was held to be admissible and not a violation of *Miranda. Id.* Similarly, in *State v. Snapp,* 696 S.W.2d 370 (Tenn. Crim. App. 1985), an officer investigating an accident asked the defendant whether they were the driver of one of the vehicles and if he had been drinking. When the defendant answered yes, the officer asked him to submit to a field sobriety test. The defendant then consented to a blood alcohol test. *Miranda* warnings were never given. Following the rule in *Berkemer v. McCarty,* the *Snapp* court held that a temporary, public roadside detention is not so police-dominated as to require *Miranda* warnings. *Id*. The case at bar fits squarely within the *Trail* and *Snapp* precedent decisions and Miranda warnings were not required as the Trooper interviewed the Defendant.

Having found that Miranda warnings were not required in this case, a determination as to the voluntariness of the Defendant's statements must also be made as a bar to admissibility. *State v. Crump,* 834 S.W.2d 265 (Tenn. 1992); *State v. Smith,* 834 S.W.2d 915 (Tenn. 1992) (*The test of voluntariness for statements and confessions under Article I, section 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under even the Fifth Amendment*). Confessions that are involuntary, i.e., the product of coercion, whether physical or psychological in character, are not admissible. *Rogers v. Richmond,* 365 U.S. 534, 540 (1961). In order to make the determination, the particular circumstances of each case must be examined. *Monts v. State,* 400 S.W.2d 722, 733 (1966).

In sum, a court determining voluntariness must examine the totality of the circumstances surrounding the giving of a confession, "both the characteristics of the accused and the details of the interrogation." *State v. Climer*, 400 S.W.3d 537, 568 (Tenn. 2013) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). Our courts have set forth the following non-exclusive factors for determining the voluntariness of a confession: the age of the accused; his or her education and intelligence level; the extent of his previous experience with the police; the

repeated and prolonged nature of the questioning; the length of the detention of the accused before providing the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before providing the confession*;* whether the accused was injured, intoxicated or drugged, or in ill health when giving the statement; whether the accused was deprived of food, sleep or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. *See State v. Huddleston*, 924 S.W.2d 666, 671 (Tenn. 1996). In evaluating whether a statement was given voluntarily, "the essential inquiry . . . is whether a suspect's will was overborne so as to render the confession a product of coercion." *Climer*, 400 S.W.3d at 568 (citing *Dickerson*, 530 U.S. 428 at 433-35). A suspect's subjective perception alone is insufficient to support a conclusion of involuntariness of a confession. *State v. Brimmer*, 876 S.W.2d 75, 79 (Tenn. 1994)). Rather, "coercive police activity is a necessary predicate to finding that a confession is not voluntary[.]" *Brimmer*, 876 S.W.2d at 79.

Returning to the present matter, the Defendant's statements at issue were provided voluntarily and are admissible under the totality of all the circumstances surrounding the Defendant's detention and interrogation. At the time of this case, the Defendant is a young adult, aged 26. *See exhibit 1*. The Defendant is a high school graduate and exhibited average intelligence at the Motion hearing. As was elicited during cross examination of the Defendant, the Defendant did possess relevant and recent experience with police and our criminal justice system based upon his previous arrest for driving under the influence that also included a voluntarily provided blood sample. The Defendant admitted to possessing knowledge of his right to refuse such a test under similar circumstances as present at bar. The Defendant had a lawyer to represent him on his previous case which was litigated and the State alleges resulted in a conviction. *See count 2 of indictment herein*. As such, this Court concludes that the Defendant possessed an above average intelligence of his rights related to statements to police and blood alcohol tests under the very similar circumstances as the Defendant found himself on March 31, 2015 in this case, despite the fact that his rights were never explained to him including his right of refusal by Trooper Patterson.

This colloquy lasted approximately twelve minutes, a very modest interaction time. Trooper Patterson's questions and efforts to confront the Defendant with evidence of his impairment were modest and benign. No force was ever applied to the Defendant, nor was any

restraint threatened. Trooper Patterson stating that he would retrieve a search warrant was no threat, but rather a simple assertion of fact. This interaction between the two was brief and involved no coercive measures. Trooper Patterson never questioned the Defendant's lucidity or broad competency as the Defendant clearly understood the Trooper's words and questions as evidenced by the expression of appropriate responses to each line of inquiry. The Defendant was able to articulate cogent responses to government interrogation. In fact, the Defendant was forceful and adamant in expressing his colorful opinions to the Trooper and EMT. Furthermore, while there was ample evidence of impairment, no proof existed either then or now to question whether the Defendant's words and actions were the sole product of his conscious self.

While the result of the blood alcohol analysis was never submitted to the Court, the State is alleging in this case that the Defendant was under the influence of alcohol. There was plenty of evidence of impairment present in this case, notwithstanding the actual quantifiable alcohol result, upon which this Court can conclude affected the Defendant's appearance, walking gait, speech pattern, temperament and judgment. Nevertheless, this Court finds that the Defendant was not impaired to the extent impacting his ability to intelligently understand the issues surrounding his interaction with Trooper Patterson or to cause involuntary action or oral responses.

The rule in this State is that a confession is generally admissible into evidence even though it was made at a time when the accused was suffering from, or was under the influence of, narcotics or drugs, provided the accused was capable of making a narrative of past events, or of stating his own participation in a crime. *Williams v. State*, 491 S.W.2d 862, 866 (Tenn. Crim. App. 1972); *see also State v. Green*, 613 S.W.2d 229, 232–33 (Tenn. Crim. App. 1980) *and State v. Perry*, 13 S.W.3d 724, 738 (Tenn. Crim. App. 1999) (*A statement provided by a suspect who is under the influence of drugs is admissible so long as the statement is coherent*); *Pyburn v. State*, 539 S.W.2d 835 (Tenn. Crim. App. 1976) *and State v. Croscup*, 604 S.W.2d 69, 71 (Tenn. Crim. App. 1980) (*A defendant drinking alcohol does not, in itself, render his statement inadmissible*); *Williams v. State*, 491 S.W.2d 862, 866 (Tenn. Crim. App. 1972) *and Pyburn v. State*, 539 S.W.2d 835, 840 (Tenn. Crim. App. 1976) (*Intoxication is not necessarily a bar to a valid confession*). In the case at bar, the Defendant was able to recount for the Trooper the events preceding the wreck. *See exhibit 3* (*The Defendant stated he had "picked up his buddy because he was staying at his dads (sic) house, you know how it is."*). The Defendant was

able to provide much more than coherent and appropriate answers and statements in response to the Trooper's inquiry, as he was able to vehemently argue and articulate his position that he was not impaired. The Defendant was competent to make a statement and did so voluntarily. The Defendant's statements are admissible.

IV. Right to Counsel

The Fifth Amendment to the United States Constitution, which applies to the states by virtue of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *also State v. Climer*, 400 S.W.3d 537, 556–57 (Tenn. 2013). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination protects persons "in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467.

Fifteen years after *Miranda*, the Supreme Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), determined that once a suspect asks for counsel, "additional safeguards" are necessary to protect the Fifth Amendment right against compelled self-incrimination. *Id.* at 484. Specifically, *Edwards* announced the following bright-line rule: "[A suspect], ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the [suspect] himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484–85. The *Edwards* Court declared: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485. "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *see also State v. Climer*, 400 S.W.3d 537, 557 (Tenn. 2013) (*Tennessee courts have been applying Miranda for over forty years, and Edwards for over thirty years*). Thus, embodied within a citizen's 5th Amendment protections is a right to counsel during police custodial interrogation, in addition to the protections afforded by Article 1, section 9 of the Tennessee Constitution.

For the right to counsel during police interrogation to apply, however, a defendant must be in custody such that he "was subjected to restraints comparable to those associated with a formal arrest." *State v. White*, No. M2010-01079-CCA-R3CD, 2011 WL 2671241, at *6 (Tenn. Crim. App. July 7, 2011) *quoting Berkemer v. McCarty*, 468 U.S. 420, 443 (1984) (*noting that a typical traffic stop is less coercive in nature than a police station interrogation because the stop is presumed to be a brief detention and is in a public place with police behavior in full view*); *see also State v. Snapp*, 696 S.W.2d 370, 371 (Tenn. Crim. App. 1985) (*holding that the defendant was not in custody for purposes of the 5th Amendment when police questioning occurred "at the scene of a traffic accident, on a public road, and before the defendant was transported away in a patrol car."*); *State v. Timothy A. Summers*, No. E2007–02127–CCA–R3–CD, Union County, slip op. at 6 (Tenn. Crim. App. Oct. 13, 2008) (*holding that the defendant was seized but was not in custody when he was stopped by police at a public parking lot, questioned, and asked to perform field sobriety tests*).

At bar, the Defendant did tell the Trooper that he'd welcome the opportunity to talk with his attorney about the necessity or legality of the blood alcohol test at the ambulance at the scene of the wreck prior to extending his arm toward a female EMT and stating, "Take it, Pussy." However, as outlined above herein in discussing the necessity of *Miranda* warnings, the Defendant in this case, while seized, was not in custody. The same facts and analysis cited above apply in holding that the interaction at bar did not constitute a custodial arrest, or its functional equivalent. As such, the Defendant did not possess a constitutional right to counsel in this case, under these facts, during the twelve minute interaction with Trooper Patterson. Therefore, this Court holds that Trooper Patterson's questioning was within the scope of a roadside seizure related to an automobile wreck and that the Defendant was not in custody for purposes of *Miranda* and 5th Amendment protections during said questioning. The Defendant is not entitled to relief on this issue.[7]

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[7] This Court would additionally note that while not of consequence at bar, when determining whether a suspect has invoked the right to counsel and the state constitutional provision on the rights of an accused, Tennessee courts must apply the *Davis* standard set for the by the United States Supreme Court in *Davis v. U.S.*, 512 U.S. 452 (1994), regardless of the timing of the suspect's alleged invocation of the right. *See State v. Climer*, 400 S.W.3d 537 (Tenn. 2013). Under the *Davis* standard, if a suspect during a custodial interrogation makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, questioning need not cease and an officer need not clarify the suspect's intention regarding invocation of the right to counsel. *Id*. The Defendant was not clear and unambiguous at bar.

V. Voluntary Consent

As stated above, the Fourth Amendment prohibits "unreasonable searches," and the Supreme Court has established that the taking of a blood sample is a search implicating constitutional protections. *Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2173 (2016). A similar guarantee is contained in Article I, section 7 of the Tennessee Constitution. While the text of the Fourth Amendment does not specify when a search warrant must be obtained, the Supreme Court has inferred that a warrant must usually be secured to intrude upon the lives of citizens. *See Kentucky v. King,* 563 U.S. 452, 459 (2011); *California v. Acevedo,* 500 U.S. 565, 581 (1991); *State v. Wells*, M2013-01145-CCA-R9CD, 2014 WL 4977356 (Tenn. Crim. App. Oct. 6, 2014). This usual warrant requirement, however, is subject to a number of exceptions. *Ibid; see also Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2173 (2016). Thus, unless a search falls within a specifically established and well-delineated exception, a search conducted without a warrant is *per se* unreasonable. *See Katz v. U.S.*, 389 U.S. 347, 357 (1967); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Rippy v. State*, 550 S.W.2d 636 (Tenn.1977); *State v. Tyler*, 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). When a warrantless search is effectuated, the government bears the burden of demonstrating that the search was conducted pursuant to one the exceptions to the warrant requirement. *State v. Meeks*, 262 S.W.3d 710, 722 (Tenn. 2008).

Recently, the Supreme Court has held that the natural dissipation of alcohol from the bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample (emphasis added). *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). While emphasizing that the exigent-circumstances exception must be applied on a case-by-case basis, the *McNeely* Court noted that other exceptions to the warrant requirement "apply categorically" rather than in a "case-specific" fashion. *Id*, at 1559, n. 3. Again, blood tests are uncontrovertibly a search implicating constitutional protectins as they "require piercing the skin" and extraction of a part of the subject's body. *Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2178 (2016); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989); *see also McNeely*, 133 S.Ct., at 1558-1573 (*Blood draws are a compelled physical intrusion beneath the defendant's skin and into his veins and blood draws are significant bodily intrusions*). However, the *Birchfield* consolidated appeals dealt with drivers who were searched, or told that they were required to submit to a search, after being placed under formal arrest for drunk driving. *Birchfield* at 2174. Therefore, the *Birchfield* opinion which dealt with the search-incident-to-arrest doctrine application to breath

and blood tests, while instructive, is not explicitly binding upon the case at bar dealing with a consensual search during a brief detention following an automobile wreck.

Voluntary consent is a well recognized exception to the rule that warrantless searches are presumptively invalid. *State v. Ingram*, 331 S.W.3d 746 (Tenn. 2011); *State v. Day*, 263 S.W.3d 891 (Tenn. 2008). Pursuant to established law, voluntary consent, such as for a blood draw in this case, requires sufficient intelligence to appreciate the act as well as the consequence of the act agreed to by the defendant. *Thurman v. State*, 455 S.W.2d 177, 180 (Tenn. 1970). Put another way, for consent to pass "constitutional muster," it must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn.1998). Thus, the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. *See State v. Cox*, 171 S.W.3d 174, 184 (Tenn. 2005).

The pertinent question is whether the defendant's act of consenting is the product of an essentially free and unconstrained choice. *Id.* In evaluating the voluntariness of consent, factors which this court considered includes:

1. Time and place of the encounter;
2. Whether the encounter was in a public or secluded place;
3. The number of officers present;
4. The degree of hostility;
5. Whether weapons were displayed;
6. Whether consent was requested; and
7. Whether the consenter initiated contact with the police.

See State v. Cox, 171 S.W.3d 174, 185 (Tenn. 2005). Moreover, consideration was given by this Court to certain personal characteristics of the individual giving consent, including age, education, intelligence, knowledge, maturity, sophistication, life experience, and experience interacting with government agents. *See Id.* Knowledge of the right to refuse consent has also been included as a factor. *See Id*. Particular attention was given to the Defendant's physical and mental condition at the time of consent as a result of the Defendant being involved in a serious motor vehicle accident resulting in the death of the passenger and the evidence of apparent intoxication.

In reviewing the proof, and applying the law as it relates to voluntary consent, this Court finds that the Defendant knowingly, freely, and voluntarily gave consent to have his blood drawn for alcohol content analysis. The Defendant appeared to be of average maturity, intelligence, and overall life experience at the time of consent. The interaction with two officers in uniform, alongside a public roadway during the late afternoon hours, and in the presence of a female EMT was in no way a hostile or coercive environment. The conversation with the Trooper was casual and pleasant, in that it was free from any threats or coercion, with the objective of the conversation being the pursuit for, and exchange of, information. No weapons were drawn during the colloquy. While the Defendant was never advised of his right to refuse consent, he was never physically restrained in any manner. The interaction lasted a mere twelve minutes. Much was made of the Trooper stating the blood draw was "mandatory" in this case based upon the status of the law at the time of the offense. However, the Defendant was never threatened with force, nor ever told he would be held down for extraction upon refusal. To the contrary, the Trooper told the Defendant he would obtain a search warrant if the Defendant refused in the next breath after telling the Defendant of the "mandatory" nature of the blood extraction. This was not any baseless threat, but merely an assertion of fact which actually shades upon an advisement to the Defendant of his right of refusal by implication. The Trooper possessed evidence of impairment and held reasonable cause to request a blood sample as a matter of law. The Trooper explained that the extraction of his blood was "mandatory" a single time and the Trooper stating he would obtain a search warrant, if necessary, was not manipulative or coercive to usurp the Defendant's free will. As many of the legal issues outlined herein overlap, all findings of fact and conclusions of law applicable to the validity of the Defendant's consent apply with equal force and effect throughout this ORDER in holding the Defendant voluntarily assented to the extraction of a sample of his blood.

As outlined above, the Defendant had previous experience interacting with police in extremely similar circumstances, had previously agreed to a blood extraction, and was aware of the impact of such a decision to give a blood sample through his previous driving under the influence prosecution. Based upon his past criminal history, this Court concludes that the Defendant possessed an above average intelligence of his rights related to statements to police and blood alcohol tests under the circumstances as the Defendant found himself on March 31, 2015, despite the fact that his right of refusal was never explicitly outlined by Trooper Patterson.

Notably, the Trooper didn't even get to the formal implied consent advisement, as a result of the Defendant's consent. During a short lapse of time, the Defendant said, "Let's do it" and "Take it, Pussy" to affirm his consent to have his blood drawn, in addition to extending his arm to the EMT to provide access for the extraction. The Defendant never resisted. The Defendant momentarily withdrawing consent and contemplating his legal rights does not, in any way, effect the validity of the consent clearly and voluntarily provided under the totality of these circumstances. *See State v. Mitchell*, No. M2014-01129-CCA-R3-CD, 2015 WL 2453095 (Tenn. Crim. App. May 22, 2015) (*Consent validly given after refusal three separate times and after being told test was "mandatory"; valid consent was not rendered involuntary by threat of "mandatory" blood draw*); State v. McCrary, 45 S.W.3d 36, 43 (Tenn. Crim. App. 2000) (*Initial hesitation in no way established that the subsequent consent was involuntary, but rather reflected defendant's consideration of options*); *State v. Ashworth*, 3 S.W.3d 25, 30 (Tenn. Crim. App. 1999) (*Only baseless threats to obtain a search warrant may render consent involuntary*); *State v. Wells*, No. M2013-01145-CCA-R9CD, 2014 WL 4977356, at *13 (Tenn. Crim. App. Oct. 6, 2014) (*The State may attempt to persuade the accused to submit to a search by providing consequences for a failure to submit to a test ordered upon probable cause*).

While the proof in the case indicated that the Defendant was under the influence of alcohol, this Court finds that the Defendant was not impaired to the extent impacting his ability to intelligently understand the issues surrounding the request for consent and its attendant consequences. It is true that a defendant may be deemed incapable of giving consent to a search due to the influence of drugs or intoxicants on his system. *State v. Jackson*, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993). However, the fact that a defendant was intoxicated at the time of giving consent does not *per se* invalidate it. *Id*. Rather, it is the degree of intoxication that is determinative of the issue. *See Drinkard v. State*, 584 S.W.2d 650, 654 (Tenn. 1979). As the Court in *Drinkard* explained, "one may be mentally competent to give valid consent to a disposition of his or her automobile, and yet be too intoxicated under the statute [] to lawfully operate an automobile." *Id.* at 654. The same rationale applies in the present case. While intoxicated, this Court finds that the Defendant was nevertheless competent to intelligently and voluntarily consent to a blood draw.

Likewise, there was no proof presented to the Court that the Defendant sustained any injuries in the automobile accident compromising his competency to consent. At most, the

Defendant was extremely emotional and belligerent as a result of the passenger dying and coming to rest on the Defendant for a time before removal from the wreck. However, any pain, injuries or emotional state did not rise to deprive the Defendant of his ability to intelligently understand the issues surrounding the request for consent to extract his blood. The Defendant provided detailed and coherent answers to the inquiry by Trooper Patterson. He provided a narrative of events prior to the wreck. The Defendant even debated the necessity of blood draw and his intoxication with the Trooper. The Defendant was able to articulate a denial to the accusation of his impairment. In sum, the Defendant was cognizant, aware and coherent during the colloquy with the Trooper. For the foregoing reasons stated in this Order and those noted on the record, this Court finds that the Defendant was competent and did knowingly, freely, and voluntarily consent to a blood draw upon law enforcement request. As such, the consent of the Defendant in this case is a sufficient basis to admit the evidence as a recognized exception to the warrant requirement. The State has met its necessary burden, and the proof and applicable law rests in favor of the admittance of the blood evidence at trial in this cause.

The Defendant's reliance, in part, on the procedural requirements of Tenn. Code Ann. § 55-10-406 is misplaced as this Court does not view this case as one of implicit consent, but rather explicit consent granted knowingly, freely, and voluntarily. The Defendant consented to his blood extraction long before the Trooper procured the implied consent advisement and formally went over its terms. It is true that the Defendant refused to further cooperate with the Trooper following this consensual extraction of his blood, as was his right, and refused to place his signature on the formal implied consent advisement affirming his consent. *See exhibit1*. Nevertheless, the Defendant's refusals subsequent to the removal of his blood do not affect the validity of his consent given contemporaneously with the extraction. Furthermore, this Court does not view Tenn. Code Ann. § 55-10-406 as imposing on the State additional requirements, or hurdles to be cleared, to the admissibility of blood evidence in cases involving violations of law related to impaired driving beyond traditional constitutional authority when, as in this case, the proof indicates voluntary and affirmative consent. To the contrary, the Tennessee Implied Consent statute provides a framework for potentially additional means to admit into evidence blood results when, even in the absence of voluntary consent, a defendant does not expressly refuse consent. The substantial government interest in ensuring safe automobile travel compelled our legislature to impose an additional condition on the privilege to travel on

Tennessee roadways that we, as motorists, are deemed to have consented to a test to determine the alcohol concentration in our blood upon request of a government agent holding reasonable grounds, or reasonable cause, to suspect a violation of impaired driving statutes. As such, this Court denies Defendant's Motion upon finding the blood evidence admissible pursuant to express, affirmative, and voluntary consensual grounds.

This is not a case in which evidence is being admitted through the requirements and procedures associated with the implicit consent of a motorist traveling on the roadways of Tennessee. A defendant's blood alcohol test results obtained with his consent are not subject to suppression at trial simply because statutory admonition about consequences of refusing to submit to a test was not given prior to administering the test pursuant to Tenn. Code Ann. § 55–10–406. *State v. Huskins*, 989 S.W.2d 735 (Tenn. Crim. App. 1998). Furthermore, the proposition submitted by the Defendant for suppression is against established legal authority. The plain language of the statute does not require an officer to inform a defendant of his right to refuse. Rather, the plain language of the statute requires only that an officer advise a suspect that if the suspect refuses, he may have his license suspended. *See State v. Humphreys*, 70 S.W.3d 752 (Tenn. Crim. App. 2001) (*Upheld the admissibility of a blood test when the officer did not read an implied consent form and told the defendant that the law "required" him to provide a sample*). In other words, the admonishment as to consequences of refusal is not a bar to admissibility, but rather a prerequisite only if a court of competent jurisdiction seeks to suspend a motorist's license as a result such refusal. *See Id*. This issue is without merit. The Implied Consent statutory scheme does not contemplate suppression of lawfully obtained evidence if a driver voluntarily consents to the blood alcohol test, even absent following the procedural mandates. *See State v. Huskins*, 989 S.W.2d 735 (Tenn. Crim. App. 1998) (*evidence admissible despite failure to give license suspension admonition*); *State v. Gilbert*, 751 S.W.2d 454 (Tenn. Crim. App. 1988) (*State is not required to prove compliance with Tenn. Code Ann. § 55-10-406 as a prerequisite to admitting the results of the blood-alcohol test*). The Defendant was competent, aware, and coherent during the conversation with Trooper Patterson. As stated above, this Court finds the Defendant to have intelligently, affirmatively, freely, knowingly, and voluntarily consented to have his blood drawn for testing.

WHEREFORE, based upon the above cited legal and factual grounds, this Court finds that the Defendant's Motion is not well taken and enters an ORDER denying the Defendant's Motion to Suppress.

So ORDERED and entered this 26th day of October, 2016.

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Judge Andrew Mark Freiberg
Circuit Court for McMinn County