Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Ann Claudia Short

Office Address: 712 S. Gay Street
Knoxville, Knox County, Tennessee 37902

Office Phone: 865.637.2142

Facsimile: 865.637.2143

Email Address: ashort@boschlawfirm.com

Home Address: [redacted]

Home Phone: [redacted]

Cellular Phone: [redacted]

INTRODUCTION

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

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

debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney, Associate

The Bosch Law Firm, P.C., a private law firm, 712 S. Gay Street, Knoxville, TN 37902

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

1981

Admitted to practice by Tennessee Supreme Court: January 6, 1982

BPR # 009645

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.

Admitted to practice in Tennessee by the Tennessee Supreme Court: January 6, 1982

BPR# 009645

License is currently active

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

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or

profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1981 to 1983: Attorney with Law Offices of Wilson S. Ritchie, Knoxville, Tennessee

1983 to 1999: Attorney with Law Offices of Herbert S. Moncier, Knoxville, Tennessee

July 2000 to May 2007: Judicial Clerk to the Honorable James Curwood Witt, Jr., Judge, Tennessee Court of Criminal Appeals at Knoxville, Tennessee

June 2007 to Present: Attorney with the Bosch Law Firm, P.C., Knoxville, Tennessee

2011 to 2012: Adjunct Faculty, University of Tennessee College of Law

1996 to 2009: Assistant to the Tennessee Board of Law Examiners (Drafted & Graded Bar Exam questions)

2000 to Present: Director & Vice President, Fayco Lumber & Supply Company, Inc., Oak Hill, West Virginia. Fayco is a small, family owned retail lumber and hardware supply store. My father started the business over 60 years ago.

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.

For slightly more than six months (January to July, 2000), I temporarily ceased the active practice of law to care for my terminally ill husband and to help my young daughter adjust to her father's death. I did continue my work with the Tennessee Board of Law Examiners because of the February 2000 bar examination, and I followed through on grading the examination booklets.

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.

Approximately 98 percent of my present law practice is in the area of criminal defense at all state and federal levels, with an emphasis on appellate representation. The remaining one to two percent of my present practice varies greatly but has included representation of Knox County Commission and specialized Appellate Rules 9 and 10 interlocutory appeals in the civil context.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters

where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Over the course of my legal career, I have been involved in trial and appellate defense of misdemeanors and felonies, DUI cases, narcotics offenses, violent crimes, white collar and fraud-type offenses, state and federal post-conviction proceedings, and state habeas corpus proceedings. I have also worked solely at the appellate level, both as retained and appointed counsel. I have volunteered to author appellate Amicus Curiae Briefs on important criminal law matters, and occasionally, I am retained to consult on criminal cases being defended by other attorneys. I have been qualified and testified three times as an expert on ineffective assistance of counsel.

On the civil side and in the years prior to 2000, I was involved in trial and appellate matters covering a variety of areas, such as personal injury, civil rights violations, workers' compensation, bankruptcy, Public Records Act requests, copyright, real estate covenants and restrictions, property forfeiture and confiscation, and some employment related matters.

In terms of the details of my work, regardless whether a case is civil or criminal, my current office uses a team approach (as did my prior legal employment) for most cases that reach the criminal court level in state court and the initial indictment level in federal court. My responsibilities include issue identification, researching and preparing pretrial motions, arguing pretrial motions, organizing documents and exhibits for trial, preparing proposed jury instructions, helping to formulate trial strategy consistent with relevant legal issues, anticipating likely evidentiary objections, and keeping detailed notes of the trial proceedings to preserve legal and factual issues for post-trial proceedings and appeal, if necessary. At the appellate stage of litigation, I am solely responsible for all research and work in connection with preparing and filing the appellate briefs and any necessary appendices. Depending on the client's wishes, I am either lead counsel at oral argument or co-counsel.

At both the trial and appellate stages, my expertise is in the areas of legal research and writing and issue development. For that reason, my daily work routine includes (either in the morning or last thing in the evening) checking for and reading the newest appellate opinions, which are posted daily on the AOC website. I pay particular attention to decisions by the Tennessee Supreme Court and Court of Criminal Appeals, and I skim the opinions released by the Tennessee Court of Appeals for significant legal developments. I also keep up with opinions that are released daily by the United States Court of Appeals for the Sixth Circuit and with U.S. Supreme Court decisions. For the U.S. Supreme Court, I regularly monitor www.SCOTUSblog.com, which discusses recent developments in Supreme Court jurisprudence, including what writs of certiorari have been granted and what issues have been accepted for

review.

I am proficient in doing on-line legal research through LEXIS, which I access many times a day.

Because I type and do on-line research, I often take work home at night. Even when I was a Judicial Clerk, I took work home. In addition to my office computer, I have a personal laptop and have added a smart phone and iPad to my regular equipment. I have the Tennessee Code Annotated downloaded on my iPhone, and I once negotiated a plea with a prosecutor as we both poured over the T.C.A. software application on our smart phones. I devote whatever time and attention is required to produce a timely, accurate, and well reasoned brief or other pleading. I am not a slave to technology, but I do make it work for me.

In my opinion, it is inevitable that all state appellate filings will be done electronically in the future. I am familiar with the federal courts' electronic document filing system. I know how to electronically file and access federal pleadings and appellate briefs. Because of electronic filing, I am already comfortable reading pleadings and briefs on my computer. Even transcripts are filed electronically in the federal system, and I also read them on my computer. Being able to immediately access a digitally stored record drastically reduces the amount of paperwork carried back and forth from home and office and facilitates being able to work when out of town.

In private practice as well as serving as a Judicial Clerk, I have handled large records efficiently. In the early 1990s, I was involved in the defense of a 401-count federal indictment; that case is reputed to be the largest indictment ever returned in the Eastern District of Tennessee. The case settled, but it required much document management and highly concentrated legal research concerning Fourth Amendment law issues. For the Tennessee Court of Criminal Appeals, the largest records tend to involve appeals from post-conviction proceedings in death penalty cases. The records are large because they consist of the original trial records and exhibits and the transcripts and exhibits from the normally extensive post-conviction proceedings. I am familiar with and comfortable managing those large records.

Last, in terms of my demeanor and respect shown to attorneys and litigants appearing in court, I have been asked throughout the years to sit and judge numerous "moot court" type proceedings, either as the sole appellate judge or part of a 3-member panel. I always prepare in advance, read any available student briefs, attempt to identify the "crux" of the case, and formulate relevant questions. I try to pose my questions in a measured way and to be patient to make sure my questions are clearly understood. I will quickly rephrase a question if it appears confusing. I am a naturally curious person, and I try to convey my interest in whatever issue is being raised and argued. I am also regularly asked to help "moot" colleagues' upcoming oral arguments, and part of that assistance involves anticipating what questions will be asked by the appellate judges and discussing how to directly and succinctly answer those questions.

I strive always to be respectful and courteous to the judges before whom I appear. In terms of arguing motions or other points of law, it is my practice to ask, "May I Respond," before spontaneously countering the arguments of opposing counsel. During trial, I may renew a motion, but I do not argue with the trial judge, debate, or express personal displeasure. I respect that trial judges have the final say unless or until reversed or modified on appeal. With opposing

counsel, I strive always to maintain a professional relationship and to keep lines of communication open. For any active litigation, I exchange all contact information (cell phone number; email address) with opposing counsel. I encourage opposing counsel to text me with any time-sensitive information and developments, and I do likewise. Before seeking Court intervention, I work in good faith to resolve disputes with opposing counsel. I have always had good professional relationships with the attorneys in the criminal division of the State Attorney General's Office who appear for argument before the Tennessee Court of Criminal Appeals and Tennessee Supreme Court.

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

In addition to being admitted to practice in Tennessee, and by virtue of my trial and appellate work, I am also admitted to practice before the following courts:

U.S. District Court, Eastern District of Tennessee: Admitted April 15, 1982
U.S. Court of Appeals for the Sixth Circuit: Admitted February 4, 1985
U.S. Court of Appeals for the Eleventh Circuit: Admitted July 15, 1986
U.S. Army Court of Military Review: Admitted July 25, 1990
(In 1994, the Court was renamed United States Army Court of Criminal Appeals)
U.S. Court of Military Appeals: Admitted July 9, 1991
(In 1994, the Court was renamed United States Court of Appeals for the Armed Forces)
United States Supreme Court: Admitted November 28, 1994

Noteworthy Appellate Work

Tennessee Supreme Court: I have been counsel of record and/or authored the appellate briefs in the following noteworthy cases decided by the Tennessee Supreme Court.

State v. Sherman, 266 S.W.3d 395 (Tenn. 2008). This is the leading case in Tennessee analyzing under what circumstances our criminal code envisions that a person (not a parent or guardian) standing in loco parentis to a child may be subject to criminal liability for child neglect based on the failure to provide medical care to the minor. The trial court had dismissed the indictment finding that the defendant had no legal duty to provide medical care. That ruling was reversed on direct appeal. I drafted both the Rule 11 application to ask the Tennessee Supreme Court to review the case and drafted the opening and reply briefs on behalf of the defendant/appellant. The Tennessee Supreme Court affirmed the decision of the Tennessee Court of Criminal Appeals.

State v. Martin, 950 S.W.2d 20 (Tenn. 1997). The defendant was convicted of voluntary manslaughter. I authored the opening and reply briefs submitted to the Tennessee Court of Criminal Appeals and to the Tennessee Supreme Court. This appeal raised questions of first impression regarding the rights of self-incrimination and to counsel in the context of a court-ordered mental evaluation. The Tennessee Supreme Court held that when a defendant asserts a defense based on his or her mental state, a court-ordered mental evaluation does not violate the

right against self-incrimination, provided any statements made during the evaluation, and any "fruits" derived from such statements, are used by the prosecution only for impeachment or rebuttal of the defense. The Court also held that the defendant does not have the right to counsel during the mental evaluation itself.

Griffin v. City of Knoxville, 821 S.W.2d 921 (Tenn. 1991). This is one of the leading decisions in Tennessee interpreting Tennessee's Public Records Act. The case had an unusual fact pattern. A public official committed suicide; the police investigated and found notes from the official. Journalists sought the notes and the investigative file, but the city refused. The city argued that the police had already concluded that there was a suicide when they took custody of the notes and that they were taken from the home for safekeeping, not for evidentiary purposes. I authored the appellate briefs for the intervening complainant widow to the Tennessee Court of Appeals and to the Tennessee Supreme Court. The Tennessee Supreme Court ruled that the test was whether the notes were obtained pursuant to law or in a transaction involving official business by a governmental agency so as to make them public records. The Court concluded that the notes were taken as a result of an official investigation that was not completed when the notes were found. The notes, therefore, were public records subject to inspection and copying.

Appman v. Worthington, 746 S.W.2d 165 (Tenn. 1987). This case is another leading decision in Tennessee, frequently cited by trial and appellate courts, interpreting Tennessee's Public Records Act. I authored the appellate briefs to the Tennessee Court of Appeals and the Tennessee Supreme Court for the plaintiffs who had requested the records. This case also had an unusual fact pattern and raised a question of first impression. Plaintiffs-Attorneys were representing inmates in connection with criminal charges involving the death of another inmate. Attorneys filed Public Records Acts requests for the Department of Correction's internal-affairs investigative file on the inmate's homicide and were denied access to the file. Although the records were not exempt from inspection under the Public Records Act, the Tennessee Supreme Court held that under Rule 16(a)(2) of the Tennessee Rules of Criminal Procedure, which governs discovery in criminal cases, the materials in the administrative assistant's possession were not subject to inspection.

Allen v. McWilliams, 715 S.W.2d 28 (Tenn. 1986). I authored the Amicus Curiae Brief on appeal on behalf of the Tennessee Association of Criminal Defense Lawyers. The case involved "an issue of great importance to the legal profession and to the public." The Court held that the General Assembly intended compensation for counsel for indigents at all stages of felony proceedings, including those before local committing magistrates such as general sessions or municipal courts. Rule 13 of the Rules of the Supreme Court of Tennessee governing the appointment and compensation of counsel for indigent defendants was stricken in its entirety and rewritten.

Tennessee Court of Criminal Appeals: I have been counsel of record and/or authored the appellate briefs in the following noteworthy cases decided by the Tennessee Court of Criminal Appeals.

State v. McLain, No. E2012-01082-CCA-RM-CD, 2013 Tenn. Crim. App. LEXIS 167 (Tenn. Crim. App., Knoxville, Feb. 26, 2013). I was co-counsel with another law firm on this matter,

representing the defendant. The case had a convoluted procedural history. The defendant's DUI conviction was affirmed by the court of criminal appeals and became final in 2005. Trial counsel, however, misrepresented the result of the appeal, advising the defendant that his conviction had been dismissed and expunged. By the time the defendant learned his appeal had been unsuccessful, the time for seeking permission from the Tennessee Supreme Court to appeal had expired. Moreover, the statute of limitations precluded the filing of a petition for post-conviction relief. I was enlisted to prepare a petition to be filed with the trial court to grant the defendant a "delayed appeal" to the Tennessee Supreme Court. The petition was granted, and I then authored a Rule 11 Application asking the Tennessee Supreme Court to accept the case but then remand it for reconsideration in light of a major change in the law in 2008. The Supreme Court remanded the case, and the court of criminal appeals in 2013 reversed the conviction based on the 2008 change in the law.

State v. Ownby, No. E2011-00543-CCA-R3-CD, 2012 Tenn. LEXIS 274 (Tenn. Crim. App., Knoxville, May 3, 2012). I was enlisted and became co-counsel of record in the first instance to ensure that, following entry of a guilty plea, the defense properly reserved certified questions of law for appellate review, pursuant to Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure. I authored the opening and reply briefs on direct appeal for the defendant/appellant. The decision on appeal was noteworthy because of the frequency with which officers discover sleeping drivers inside their parked vehicles. The concurrence provided guidance thusly: "In James David Moats, the presence of a sleeping or inattentive person in a vehicle that is not parked so as to suggest that an impaired driver parked it did not, without more, justify a reasonable suspicion to seize the person. By contrast, in the present case, the defendant was not only sleeping or unconscious in his vehicle but also had apparently parked it in a manner that suggested his impairment."

State v. Sweet, No. E2008-00100-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 591 (Tenn. Crim. App., Knoxville, July 21, 2009). In this case, the appellate court upheld an order of consecutive sentencing because the record established a statutory basis for consecutive sentencing, even though the trial court erroneously relied on the fact that the case involved more than one victim in imposing the consecutive sentence. The case also contains noteworthy discussions regarding AOC sentencing statistics and allowable victim impact materials. I authored the opening and reply briefs for the defendant/appellant.

State v. Dillmon, No. M1997-00080-CCA-R3-CD, 1999 Tenn. Crim. App. LEXIS 1282 (Tenn. Crim. App., Nashville, Dec. 28, 1999). The court of criminal appeals held that the defendant was not entitled to protection of the "public duty" defense. This is the first and only appellate opinion to have considered T.C.A. § 39-11-610, which provides that "conduct is justified if the person reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other tribunal, or in the execution of legal process." I authored the opening and reply briefs for the defendant/appellant and argued before the Tennessee Court of Criminal Appeals.

State v. Patton, 898 S.W.2d 732 (Tenn. Crim. App. 1994). Both the state and the defendant were granted Rule 9 interlocutory review of issues of first impression. Anderson County officers had "loaned" marijuana to the Kingston Police Department without first acquiring the approval of the

court. The court of criminal appeals held that a violation of T.C.A. § 53-11-451(d)(4) does not preclude the state from introducing marijuana as evidence at trial. The appellate court also held that the act of discarding marijuana during flight from law enforcement does not constitute the crime of evidence tampering. I authored the appellate briefs for the defendant/appellant/ appellee.

State v. Murphy, C.C.A. No. 55, 1987 Tenn. Crim. App. LEXIS 2323 (Tenn. Crim. App., Knoxville, Sept. 9, 1987). This appeal resulted in a holding of first impression that a defendant's deportment as an inmate after imposition of sentence is a proper factor in the consideration of a Rule 35(b) motion to reduce sentence. I authored the appellate brief on direct appeal for the defendant/appellant.

State v. Vineyard, C.C.A. No. 1030, 1986 Tenn. Crim. App. LEXIS 2387 (Tenn. Crim. App., Knoxville, July 18, 1986). This appeal addressed an issue of first impression; the court of criminal appeals concluded that the statute of limitations is not tolled by "retirement" of existing charges. The defendant's conviction was reversed and dismissed. Although not listed as counsel of record, I authored the opening and reply briefs for the defendant/appellant.

Tennessee Court of Appeals: I have been counsel of record and/or authored the appellate briefs in the following noteworthy cases decided by the Tennessee Court of Appeals.

Abraham v. Knoxville Family Television, 757 S.W.2d 8 (Tenn. Ct. App. 1988). This case contains a helpful discussion of the distinction between intended and incidental third-party beneficiaries to a contract in the context of an action for wrongful discharge from employment. I represented the employee and authored the appellate brief to the Tennessee Court of Appeals.

Cunningham v. Golden, 652 S.W.2d 910 (Tenn. Ct. App. 1983) This appeal was significant because it resolved a common law issue of first impression and held that a third party cannot petition to legitimize a child conceived and born to a married woman. I represented the defendant/mother who had been granted summary judgment by the trial court. I authored the appellate brief for the mother/appellee and argued the case on appeal. The Court of Appeals' ruling prevailed until 1997, as explained by then Judge Koch, writing for the court of appeals in State ex rel. Cihlar v. Crawford, 39 S.W.3d 172, 183 (Tenn. Ct. App. 2000): "Tennessee's pre-1997 law governing disputes over the parentage of children born to married women, like the law in many other states, was a curious admixture of ancient, common-law presumptions, statutes, judicial interpretations of these statutes, and legislative acquiescence in the judicial interpretations. Both this court and the Tennessee Supreme Court had recognized the General Assembly's authority to permit putative biological fathers of children born to married women to establish their parentage but had concluded that the General Assembly had chosen not to do so. See Evans v. Steelman, 970 S.W.2d at 434; Cunningham v. Golden, 652 S.W.2d at 911, 913. In 1997, the General Assembly exercised its prerogative to repeal the former paternity and legitimation statutes and to replace them with the current parentage statutes. These new statutes mark a watershed in this state's recognition of the right of putative biological fathers to establish their parentage notwithstanding the marital status of the child's mother." (Citation omitted).

Federal Courts of Appeals: I have been counsel of record and/or authored the appellate briefs

in the following noteworthy cases decided in the federal appellate courts.

United States v. Vonner, 516 F.3d 382 (6th Cir. 2008). I authored the Amicus Curiae Brief on behalf of the National Association of Criminal Defense Lawyers. In this case, the *en banc* Sixth Circuit discussed and analyzed in depth federal sentencing practices in the wake of United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), and Rita v. United States, 127 S. Ct. 2456 (2007).

Schledwitz v. United States, 169 F.3d 1003, 1011 (6th Cir. 1999). This case involved the suppression of exculpatory evidence, the test for which had been set out in the then-recent decision of the United States Supreme Court in Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995). The defendant's mail fraud conviction was vacated, and on remand, the District Court dismissed the prosecution. I represented the defendant/appellant, authored the opening and reply briefs, and argued the case on appeal. The decision has been cited and/or discussed in over 100 cases. It is most frequently cited for the proposition that the government's Brady obligation includes disclosing evidence that could be used to impeach the credibility of a witness. In 2003, I was invited to speak to Assistant U.S. Attorneys in the criminal division of the U.S. Attorney's Office in Nashville about this case and its background; the topic was "Preparing the Prosecution by Understanding the Defense Perspective."

In re Caldwell, 895 F.2d 1123 (6th Cir. 1990). This bankruptcy case made two trips to the Sixth Circuit. My clients were judgment creditors following a Tennessee state court judgment against Caldwell for false arrest, malicious prosecution, and false imprisonment. The judgment was the result of what became known in Knoxville as the "Santa Claus Caper." I authored the appellate briefs for the judgment creditors who were appellees and cross-appellants and argued the case on appeal. The Sixth Circuit held that when the debtor's reorganization plan proposed paying only 36 percent of a debt incurred through his tortious conduct, and when the debt was not dischargeable in liquidation, the debtor did not propose the plan in good faith. The term "good faith" is not statutorily defined, and this case is significant because the Sixth Circuit articulated a list of non-exclusive factors as part of the totality of the circumstances analysis to determine whether a Chapter 13 plan was proposed in good faith.

United States v. Nathan, 816 F.2d 230 (6th Cir. 1987). This case was, at the time, a leading Sixth Circuit decision holding that notes of an interviewing agent, FBI 302s, did not constitute Jencks Act material because the notes were never shown, read or explained to the witness. I authored the appellate brief for the defendant/appellant on appeal.

United States v. Smith, 746 F.2d 1183 (6th Cir. 1984). The Sixth Circuit reversed the defendant's conviction for conspiracy to rob a postal employee. The case discusses the proper procedure for a hearing on a disputed request for Jencks Act material. The case is also significant for its holding that it was improper for the trial judge to have allowed into evidence a hearsay taped confession of the defendant's brother after the brother pleaded guilty and was severed from the case. I authored the appellate brief for the defendant/appellant on appeal.

United States v. SFC Holt, 33 M.J. 400 (C.M.A. 1991). The Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) found that the defendant had received

ineffective assistance of counsel at the sentencing phase of his general court-martial in Germany and ordered a rehearing. SFC Holt's family lived in the East Tennessee area and retained my office to handle the appeal. I authored the appellate briefs and argued before both the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals) and the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces). This appeal required that I quickly learn and orient myself to the Uniform Code of Military Justice. As civilian counsel, I was required to have military appellate co-counsel, but I was responsible for researching and drafting the appellate briefs.

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.

Not applicable.

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

1. In re: Katharine E. Simpson: A guardianship for my minor daughter established after her father's death and filed in 2000 in the Chancery Court for Knox County, Tennessee, Docket No. 146637-2. An Order approving a final accounting was entered on December 18, 2012.

2. In re: Estate of Bettie Short Hawkins, Deceased: A petition for elective share filed by my stepfather in 2001 in the Probate Court of Bedford County, Tennessee, Docket No. 23,200. As Co-Executor of my mother's estate, I signed an Agreed Order in 2001 for my stepfather to be awarded an elective share.

3. Katharine Elizabeth Simpson, b/n/f Ann C.S. Bowers (Parent and Guardian) v. Fort Sanders Regional Medical Center: An action for injuries resulting in the death of my minor daughter's grandmother filed in the Circuit Court for Knox County, Tennessee, Docket No. 2-764-02. As parent and guardian, I approved a Final Settlement Order on Minor's Claim in March 2009.

5. In re: Helen Elizabeth Campbell Simpson: A conservatorship filed in the Chancery Court for Knox County, Tennessee, Docket No. 154564-3. I served as conservator for my mother-in-law during her extended hospitalization and nursing home care. After her death, the conservatorship was closed out in January 2007.

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

When my husband, Bob Simpson, died March 3, 2000, the welfare of my daughter was my paramount concern. I worried that remaining in private practice would not be in my daughter's best interest because of an unpredictable schedule and long office hours that can extend routinely into the evenings. I realized that I had to make a career change, but I wanted to remain current on criminal law issues. I applied for a judicial clerkship with the Tennessee Court of Criminal Appeals located in Knoxville. I interviewed with the two Judges who had not already selected judicial clerks for the upcoming year, and I accepted a clerkship offer from the Honorable James Curwood Witt, Jr. of Madisonville. I did not know Judge Witt prior to interviewing with him. My plan at that time was to clerk for one year and then return to private practice. My work with Judge Witt, however, was so interesting and rewarding that I did not want to leave at the end of my one-year term, and I ended up clerking for Judge Witt from July 2000 until the end of May 2007. I returned to private practice because in late 2006, my daughter applied to attend the Webb School of Bell Buckle, where I had graduated from high school as a day student living in Shelbyville. She was accepted, and knowing that my daughter would be a boarding student, I accepted an offer to practice with the Bosch Law Firm, P.C.

My tenure with Judge Witt provided a close view of the day to day workings of the Tennessee Court of Criminal Appeals. I liked the work, and I did not feel isolated. I interacted with the other Judges in the building, their staff, and those in the Clerk's Office on a regular basis. Each Judge on the Court in the Eastern Section manages his or her office much like a small law firm, and the job description for judicial clerks can and does vary from office to office. I found much to respect about Judge Witt's approach. Every page of an appellate record was read and summarized or abstracted to ensure that an opinion was factually accurate and to identify any procedural irregularities, such as an untimely notice of appeal, an improperly preserved certified question for appeal, or even if an issue could be pursued on direct appeal to the Court of Criminal Appeals. For each issue raised on appeal, the applicable standard of appellate review was identified and noted. Every draft was reviewed and edited by everyone in the office to arrive at a legally sound, clearly communicated opinion, which then was circulated to the other members of the panel for their consideration and critique. New opinions by other members of the Court of Criminal Appeals were reviewed daily, and new Tennessee Supreme Court decisions were discussed immediately to determine if the ruling would impact any pending appeals in the office.

During my time as a Judicial Clerk, I found myself researching legal issues that were new to me, such as lesser-included offenses, consecutive sentencing and sentencing in the post-Blakely legal world, state habeas corpus, and merger of offenses. On other occasions, my prior legal knowledge and experience facilitated my ability to analyze issues involved in an appeal, such as evidence admissibility, search and seizure questions, voluntariness of confessions, ineffective assistance of counsel, and jury instructions. By the time I returned to private practice in 2007, my base of criminal law knowledge had expanded considerably.

Judicial opinion writing is much more complicated than merely citing cases and reciting facts. Through my work with the Tennessee Court of Criminal Appeals, I appreciate that appellate judges should always be mindful of their reading audience. An opinion must be crafted with the litigants foremost in mind, because they are personally affected by the decision. Next, an

opinion should consider the reading public, because citizens deserve a transparent and understandable explanation for the decision. Finally, an opinion should provide guidance to the trial courts and supply a solid factual and legal foundation for the Justices of the Tennessee Supreme Court who may one day review the decision. An opinion must reflect that the authoring judge and the panel members have considered all points of view and that opposing arguments have been understood and seriously evaluated. Every judicial opinion contributes to a greater or lesser degree to the body of existing law and affects the public's perception of and confidence in the judiciary. I respect those principles, tried always to apply them in the work I did while a Judicial Clerk, and would continue to apply them if selected to serve on the Tennessee Court of Criminal Appeals.

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

In August 1992, I submitted an application to the Tennessee Judicial Selection Commission for the position of Judge of the Tennessee Court of Criminal Appeals, at Knoxville. Judge John Byers of East Tennessee had retired from the Court of Criminal Appeals, and the Judicial Selection Commission evaluated the applicants to arrive at a list of three nominees for recommendation to the Governor. I was one of the three nominees recommended to the Governor for that vacancy.

On January 30, 1995, I was interviewed by the Tennessee Judicial Selection Commission for the position of Judge of the Tennessee Court of Criminal Appeals, at Knoxville. A vacancy had occurred when Judge Penny White was appointed to the Tennessee Supreme Court. I was not among the three nominees recommended to the Governor for that vacancy.

I did not apply in 2006 for the opening on the Tennessee Court of Criminal Appeals, at Knoxville, created by Presiding Judge Wade's appointment to the Tennessee Supreme Court. Being employed at that time as a Judicial Clerk for Judge Witt, I did not think it appropriate for me to apply at that time.

EDUCATION

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

Law School: The University of Tennessee College of Law (1978-1981); J.D. degree awarded

Editor-in-Chief of the Tennessee Law Review (1980-1981)

Member of the Giles Sutherland Rich Patent & Copyright Moot Court Team that represented in the College of Law in Chicago, Illinois in 1981

Research and Writing III Student Instructor at the College of Law

Undergraduate Schools: Centre College of Kentucky (1974-1977); B.A. Political Science & Economics

Oxford College, Oxford, England (Summer of 1977)
Summer Course Studies Credited to B.A. degree

Harvard University, Cambridge, Massachusetts (Summer of 1976)
Summer Course Studies Credited to B.A. degree

Vanderbilt University, Nashville, Tennessee (Summer of 1975)
Summer Course Studies Credited to B.A. degree

Other Graduate Schools: Vanderbilt University, Nashville, Tennessee (Fall of 1977)
I was enrolled in a Master's Degree program in Political Science.
No degree was awarded; I preferred to attend law school.

PERSONAL INFORMATION

15. State your age and date of birth.

56 July 16, 1956

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

Excluding my out-of-state undergraduate studies, I have lived continuously in Tennessee for 52 years.

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

35 years

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

Knox County, Tennessee

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

Not applicable

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

No

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

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No

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

Please see Attachment 1. As a result of a Tax Department error, the State of West Virginia filed a tax lien against me that was later released and designated "Vacate From All Records."

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

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you

were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes.

1. Short v. Ferrell, 976 S.W.2d 92 (Tenn. 1988). Many years ago, I was appointed to serve as an "expert" to review trial counsel's performance in a post-conviction case. The trial court's order approved a set amount for my services but did not specify an hourly rate. I filed a petition for writ of certiorari to settle whether an attorney appointed to review the records in a post-conviction proceeding may exceed the maximum allowable rates for attorneys representing indigent defendants. The Tennessee Supreme Court held that an attorney serving as an expert had to obtain prior approval for an hourly rate in excess of the hourly rate provided for attorneys in Rule 13 and that the trial court should have explicitly set forth the approved "expert" hourly rate in its order.

2. Ann Claudia Short Bowers v. Frederick Allen Bowers: I filed for divorce in August 2009 in the Chancery Court for Knox County, Tennessee, Docket No. 175929-2. A final judgment of divorce was entered on April 4, 2011. The only contested issue was division of marital property. I was awarded a monetary judgment because Mr. Bowers dissipated the proceeds from the sale of my separate property. See Bowers v. Bowers, E2011-00978-COA-R3-CV, 2012 Tenn. App. LEXIS 313 (Tenn. Ct. App., Knoxville, May 17, 2012) (monetary judgment affirmed on appeal).

3. Allen Bowers v. Ann C.S. Bowers: Acting pro se, Mr. Bowers filed in 2009 a petition for an order of protection in the Fourth Circuit Court for Knox County, Tennessee. The petition was dismissed without terms on October 29, 2009, and the matter has been expunged. Mr. Bowers and I had verbally argued while on vacation in Florida. Mr. Bowers left during the night and took the car keys to my separate vehicle, which stranded me in Florida until I could have another key made. When I returned to Knoxville, I was served with an ex parte order of protection.

4. State v. Ann C. Bowers: I was arrested on October 21, 2001, in connection with an investigation of Mr. Bowers' reckless boating. I, along with my daughter and two friends, had spent the afternoon on the lake. I was not operating the boat and did not know how to do so. Mr. Bowers docked the boat and left to run an errand. TWRA officers arrived, and when they could not locate Mr. Bowers, they took me off the boat and charged me with public intoxication. Please see Attachment 2, affidavits of witnesses that were provided to prosecution counsel and that attest to my sobriety, demeanor, and the circumstances surrounding the arrest. The charge was dismissed on December 3, 2001, without a hearing and without any conditions, terms or restrictions placed against me as a condition of dismissal. The matter has been expunged.

5. Reynolds et al. v. Eric Holder et al.: A civil rights action filed in the District Court for the Eastern District of Tennessee, Docket No. 3:11-CV-00337, by a former client against me, in my professional capacity as former defense counsel for Mr. Reynolds, and against numerous other individuals, including the Attorney General of the United States, multiple Assistant U.S. Attorneys, and all sitting Magistrate Judges and District Judges in the Eastern District of Tennessee. A Memorandum and Order was entered on March 21, 2012, granting a Rule 12(b)(6) motion to dismiss me from the case.

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

2008 to Present: Board of Trustees, The Webb School, Bell Buckle, TN.
Member, Academic and Student Affairs Committee (2008 to Present)

2010 to Present: Leadership Knoxville, Class of 2010

2001 to Present: Junior League of Knoxville, Sustainer Status

2010 to Present: Board Member, Mariner's Point Homeowners Association

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

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

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

Yes. I am a member of the Junior League of Knoxville, which is an organization of women committed to promoting voluntarism, developing the potential of women and improving the community through the effective action and leadership of trained volunteers. Its purpose is exclusively educational and charitable. Membership is by recommendation and then by invitation only.

If appointed, I would like to remain a member of the Junior League, as it allows me to remain active in educational and charitable endeavors in the community. It also allows me to meet new members of the community.

ACHIEVEMENTS

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

1984 to Present: Tennessee Association of Criminal Defense Lawyers

President (1992 to 1993)
President-Elect (1991 to 1992)
Vice President (1990 to 1991)
Treasurer (1989 to 1990)

CLE Committee Co-Chairperson (1990 to 1991)
Ethics Committee Co Chairperson (1988 to 1989)
Publications Committee Chairperson (1988to 1989)
Amicus Committee Chairperson (1984 to 1986), Member (2011 to Present)

1990 to Present: Member, National Association of Criminal Defense Lawyers

Various Times: Member, Tennessee Bar Association
Criminal Justice Executive Committee Member (2010 to Present)

1982 to Present: Member, Knoxville Bar Association; occasional social photographer for KBA

1991 to Present: Member, Knoxville Defense Lawyers Association

2007 to 2011: Board Member, Tennessee Post Conviction Defender Organization

2007 to Present: Member, Hamilton Burnett American Inn of Court

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

I was privileged to serve (1992 to 1993) as the first female President of the Tennessee Association of Criminal Lawyers, the only statewide association of criminal defense attorneys with over 750 members. As a Past-President, I remain active in the organization and serve on committees as requested by the acting President.

My professional accomplishments also led to my invitation to join Leadership Knoxville, Class of 2010. That year-long program brings together a cross section of community leaders - from business, education, medicine, government, and religion -- who then build common ground through shared experiences and education. The alumni of Leadership Knoxville remain active and interested in the experience and the community.

As reported in the Knoxville CityView Magazine, "Top Attorneys Issue," for each of the past five years, I have been voted by my peers in the Knoxville community as one of the top attorneys in the area of appellate practice.

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

Ann C. Short, Comment, *Criminal Law and Procedure – Fourth Amendment – License and Registration Spotchecks*, 47 Tenn. L. Rev. 447 (1980).

Bethany K. Dumas & Ann C. Short, *Linguistic Ambiguity in Non-Statutory Language: Problems in 'The Search Warrant in the Matter of 7505 Derris Drive,'* Forensic Linguistics: The International Journal of Language and the Law 5.2 (1988) [127-140].

Ann C. Short, *Toward More Persuasive Appellate Presentations*, Knoxville Bar Association DICTA Magazine (March 2009).

Ann C. Short & Stephen Ross Johnson, *Court Appointed Work (Part 2): The Legacy of Gideon v. Wainwright*, Knoxville Bar Association DICTA Magazine (November 2010).

Ann C. Short, *Tennessee's "Preservation of Religious Freedom" Act,* Tennessee Association of Criminal Defense Lawyers FOR THE DEFENSE Magazine (March/April 2011).

Ann C. Short, *"Step Out of the Vehicle" State v. Donaldson*, Knoxville Bar Association DICTA Magazine (December 2012).

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.

1996 to 2009:
The Tennessee Board of Law Examiners governs the examination and admission of attorneys who wish to practice law in Tennessee. In 1996, I was appointed and became an Assistant to the Tennessee Board of Law Examiners, for which I received yearly CLE credit. In my capacity as an Assistant, I drafted twice yearly one of the 12 essay questions that applicants sitting for the bar examination were required to answer in written form. The examination booklets (anywhere from 300 to 800 booklets) were then mailed to me, and I graded on a pass/fail basis each answer to the question I had drafted. The applicants were identified only by a pre-assigned number on each booklet to preserve anonymity in grading. My term of service as an Assistant expired in 2009. Since that time, the Board of Law Examiners has from time to time requested my assistance in proctoring the administration of the examinations.

2011 to 2012:
I taught as an Adjunct Professor at the UT College of Law's Innocence/Wrongful Convictions Clinic. The clinic takes on direct representation of defendants in Tennessee and provides pro bono legal and investigative assistance. Students form teams to investigate inmates' claims, and they commit to a full year of working on one or more clinic cases. Students work in teams of two or three, and they work under the supervision of adjunct professors. During my tenure, I was one of four Adjunct Professors and directly supervised six law students. The students I supervised and taught were involved in two significant appellate cases: Gilley v. State, No. M2010-02447-CCA-R3-PC, 2012 Tenn. Crim. App. LEXIS 899 (Tenn. Crim. App., Nashville,

Oct. 31, 2012), and Miller v. State, No. E2011-00498-CCA-R3-PC, 2012 Tenn. Crim. App. LEXIS 356 (Tenn. Crim. App., Knoxville, May 31, 2012).

August 2011:
CLE Lecture Topic: "Hitting the High Notes in Appellate Advocacy: Return to Sender," TACDL's 38th Annual Meeting & CLE Seminar

March 2010:
Participant, Panel Discussion on Ethical Destructive Devices
Federal Defender Services of Eastern Tennessee

June 2010:
CLE Lecture Topic: "Federal Case Law Update,"
TACDL, Legislative Update and Case Law Review

October 2010:
Participant, Panel Discussion on Appellate Advocacy
LMU, Duncan School of Law

2009:
Panel Moderator, "Ethical and Professional Considerations in High Profile Criminal Defense Representation,"
Hamilton Burnett American Inn of Court

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.

In addition to my answer to Question 13, in July 1990, I applied for the position of United States Magistrate Judge for the Eastern District of Tennessee. A Merit Selection Panel reviewed more than 60 applications. Of the group that applied, only 12 applicants were interviewed by the Panel, and I was one of the 12 selected to be interviewed for the position. I was not, however, selected.

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

No.

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

See Attached Writings.

Attachment 3: DICTA Magazine Article (March 2009), "Toward More Persuasive Appellate Presentations." I was asked by the Knoxville Bar Association to submit an article on appellate practice, and this article reflects my personal research and writing.

Attachment 4: DICTA Magazine Article (December 2012), "Step Out of the Vehicle *State v. Donaldson*." I was asked by the Knoxville Bar Association to submit a cover article on the Tennessee Supreme Court's recent decision, State v. Donaldson, 380 S.W.3d 86 (Tenn. 2012). This article reflects my personal research and writing.

Attachment 5: Rule 11 Application for Permission to Appeal in State v. Sherman, 266 S.W.3d 395 (Tenn. 2008). This application reflects my personal research and writing.

Attachment 6: Opening Brief of Appellant in State v. Steven Q. Stanford. The Tennessee Supreme Court granted Rule 11 review and appointed me to handle the appeal. After briefs were filed, the Court ultimately dismissed the Rule 11 application as improvidently granted. This brief reflects my personal research and writing.

Attachment 7: Comment, *Criminal Law and Procedure – Fourth Amendment – License and Registration Spotchecks*, 47 Tenn. L. Rev. 447 (1980). This Comment was written while I was in law school, and at that time, every law review casenote, prior to publication, was reviewed and edited by a Casenote Editor and a Law Review faculty advisor.

Attachment 8: Supplement to Petition for Grant of Review to United States Court of Military Appeals in United States v. SFC Holt, 33 M.J. 400 (C.M.A. 1991). This petition reflects my personal research and writing, with some assistance in correct military terminology and the procedural aspects of a general court-martial.

Attachment 9: Bethany K. Dumas & Ann C. Short, *Linguistic Ambiguity in Non-Statutory Language: Problems in 'The Search Warrant in the Matter of 7505 Derris Drive,'* Forensic Linguistics: The International Journal of Language and the Law 5.2 (1988) [127-140]. Dr. Dumas, who taught at the University of Tennessee, suggested that she and I co-author this article based on our joint experience in connection with a suppression motion litigated in federal court.

ESSAYS/PERSONAL STATEMENTS

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

My decision to apply is a career-long aspiration that I have been actively pursuing since 1992. From my recent Judicial Clerkship, I know that I can perform the required duties honestly, in a timely fashion, with respect for all colleagues and persons before the Court, and with clarity of the written word from which the appellate judiciary's powers derive. I am ready to accept what I know to be the enormous responsibilities of a Judge of the Tennessee Court of Criminal Appeals. I believe my background, which is immersed in writing and researching both civil and criminal law issues and which is grounded in litigation, uniquely qualifies me to serve on the Tennessee

Court of Criminal Appeals.

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

Throughout private practice, I have represented individuals who I know could not afford to pay a fee but needed legal assistance. I have never charged an initial consultation fee, because I want the individual to leave my office better educated about the legal system, even if that person cannot hire me. I am always willing to "brainstorm" with attorneys who call asking my legal advice, and I freely share legal research, pleadings, and briefs with attorneys asking for help.

I have been active in the areas of legal reform and education. I have organized and spoken at many legal seminars, including a seminar in 1990 devoted entirely to appellate advocacy. I spoke to my daughter's ethics class at Webb about the "How-Can-You-Represent-Those-People" question. From 1994 to 2000, I served at the request of the Tennessee Supreme Court on its Indigent Defense Commission to study the delivery of indigent services in Tennessee and recommend changes.

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 a position on the Tennessee Court of Criminal Appeals, Eastern Section. This 12-member Court consists of four Judges from West Tennessee, four from Middle Tennessee, and four from East Tennessee. They sit in panels of three, and throughout the year, each Judge will sit with every other Judge at least once and will travel to each grand division. This arrangement encourages collegiality and uniformity of decisions. For fiscal year 2011-2012, the 12-member Court had 1,099 appeals filed (excluding interlocutory matters) and disposed of 1,097. This workload requires focused and consistent effort. With my selection and familiarity with the Court's processes, I could begin immediately handling appeals. I personally know some members of the Court; I have appeared before all of them at some point; I respect their work. If selected, I foresee a good working relationship in a joint commitment to equal justice under the law.

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 to lecture and speak to legal groups and citizens about the judicial system and about legal topics of interest. I welcome the opportunity, if asked, to against teach as an Adjunct Professor with the University of Tennessee College of Law, and I will continue to write articles for the Knoxville Bar Association and other organizations. As I indicated previously, I

would like to maintain my Sustainer status with the Junior League of Knoxville to keep in touch with its community activities. I also wish to continue my involvement with Leadership Knoxville and my classmates, which has been invaluable in learning about and exploring the wonderful diversity of my community.

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

I have already explained many of my life experience and talents. I add only that I have a sincere and abiding love of the law and respect for the written word. For 26 years in private practice, I have enjoyed helping people who usually are at the lowest points of their lives. I never found a cookie-cutter method to solve clients' problems. To borrow from Justice Kennedy every case is "a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

I took from my experience as a Judicial Clerk a belief that I am qualified to serve on the Tennessee Court of Criminal Appeals. What I lack in terms of prior judicial experience is not a handicap. I have spent many, many days and weeks of my life "in the trenches." I understand the intricacies of trials and evidentiary hearings and juries and guilty pleas. Coupled with my research and writing skills, that understanding gives me solid footing to serve ably on the Tennessee Court of Criminal Appeals.

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

Yes, I will.

Perhaps the clearest examples I can give are from procedural-driven rules: the requirements and time limits for filing notices of appeal; the time limits for filing new trial motions; the consequences of failing to raise issues in a motion for new trial; and the requirements for appealing a certified question of law. Each of these procedural rules, if not followed, can have disastrous consequences for clients. When I reviewed appellate records as a Judicial Clerk, I would detect such irregularities from time to time. Despite my belief that the rules can, at times, be overly technical and that litigants should not suffer because of their attorneys' mistakes, the rules had to be enforced, and I always brought those irregularities to the Judge's attention.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least

two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Honorable Thomas W. Phillips

United States District Court Judge, Eastern District of Tennessee
800 Market Street, Ste. 145, Knoxville, Tennessee 37902
Office (865.545.4255)

B. Thomas S. Scott, Jr., Attorney at Law

Former Chair, Tennessee Board of Professional Responsibility
550 W. Main Street, Ste. 601, Knoxville, Tennessee 37902
Office (865.525.2150)

C. Donald A. Bosch, Attorney at Law

The Bosch Law Firm, 712 S. Gay Street, Knoxville, Tennessee 37902
Office (865.637.2142)

D. Tammy S. White, President/CEO Leadership Knoxville

17 Market Square, Knoxville, Tennessee 37902
Office (865.523.9137)
twhite@leadershipknoxville.com

E. Foster D. Arnett, Jr., Knox County Clerk

Knox County Courthouse, 300 Main Street, Knoxville, Tennessee 37902
Office (865.215.4719)
foster.arnett@knoxcounty.org

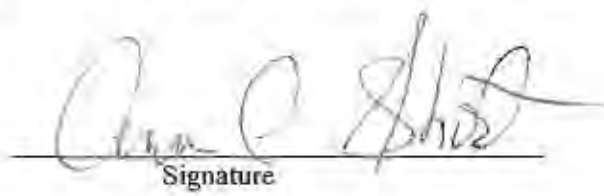
AFFIRMATION CONCERNING APPLICATION

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, Eastern Section, of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 10, 2013.



Signature

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

TENNESSEE JUDICIAL NOMINATING COMMISSION

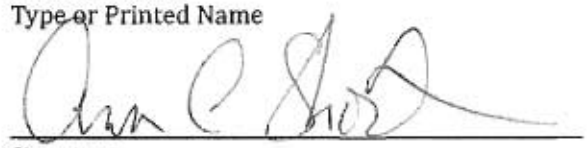
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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

WAIVER OF CONFIDENTIALITY

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

Ann C. Short
Type or Printed Name



Signature

June 10, 2013
Date

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

Tennessee BPR # 009645

009645
BPR #

STATE OF WEST VIRGINIA
State Tax Department, Compliance Division
P.O. Box 2745
Charleston, WV 25330-2745

Earl Ray Tomblin, Governor **Craig A. Griffith, Tax Commissioner**

ALLEN F. BOWERS
3556 NAVIGATOR POINTE
KNOXVILLE TN 37922

Letter ID: **L0867717248**
Issued: **01/07/2011**
Account #: **2165-3941**

Re: Personal Income Tax Inquiry

To Whom It May Concern:

A review of your account indicates that the lien in question (recorded 8/10/06 in book 187, page 986 against Allen and Ann Bowers) was released with "VACATE FROM ALL RECORDS." The Department uses this designation to show that a lien should not be held against the taxpayer in question, either because the lien was filed as a result of a Department error or because the Department has decided that the lien is invalid after further research.

"VACATE FROM ALL RECORDS" means that the lien should be treated as though it never existed, and any credit reporting agency or lender should disregard it. If this lien appears on a credit report in error, you may provide a copy of this letter as verification that the WV State Tax Department does not recognize it as a valid lien or obligation.

Should you need further assistance concerning this matter, please contact Toni Pilato at (304) 558-8696.

Sincerely,

Kevin Carpenter, Unit Manager
Compliance Division

THE BOSCH LAW FIRM
A PROFESSIONAL CORPORATION

DONALD A. BOSCH ▪ ANN C. SHORT-BOWERS
KATHERINE L. HARP ▪ ROBYN JARVIS ASKEW
JAMES H. BEMILLER (OF COUNSEL)
TELEPHONE: 865.637.2142 FACSIMILE: 865.637.2143 WWW.BOSCHLAWFIRM.COM

January 7, 2011

EQUIFAX
Dispute Department

Via Facsimile

Re: Confirmation # 0326016116

Dear Sir or Madam:

I am writing and sending the enclosed attachments in an effort to finally resolve why a tax lien in the State of West Virginia should not be considered valid or reported against me. I have been working on this matter for months, and there have been multiple dispute numbers assigned to my inquiries. The above confirmation number is the latest of December 13, 2010.

Per the suggestion on your December 13 report, I contacted the Kanawha County Court in West Virginia and spoke with one of the persons who respond to Equifax inquiries. I was told that often it seemed Equifax did not understand the answers that the County Court was providing, and that my case was one such example. It was suggested to me to contact the West Virginia Tax Department, which I have done.

Attached is a letter from Kevin Carpenter, Unit Tax Manager, explaining why the lien should be treated as though it never existed. If this letter is not sufficiently clear to resolve this matter, I ask that you forward this letter and the attachments to the Equifax legal department with a request that someone call and speak with me personally.

Do not send me a form email or letter saying that you will get around to resolving this within 45 days. I request immediate attention be given to this matter. I can be reached at the *office number shown on this letterhead.*

Sincerely yours,

Ann C. Short Bowers

AFFIDAVIT

Affiant, after having been duly sworn, deposes and says as follows:

1. That I am an attorney licensed by the state of Tennessee, practicing in Knox County. My office address is 900 S. Gay Street, Suite 1776, Knoxville, Tn, 37902.

2. That on Sunday, October 21, 2001, I received a telephone call at approximately 7:00 P.M. from Ann C. S. Bowers, whom I have known both personally and professionally for twenty-three (23) years.

3. That I was advised by Mrs. Bowers that she was being questioned by an officer of the Tennessee Wildlife Resources Agency with regard to an alleged incident concerning damage to some moored boats reportedly resulting from the wake of the boat in which she had been traveling.

4. That Mrs. Bowers asked me to contact her husband on either his cell phone or the home phone. I attempted to contact Dr. Bowers at that time but was unable to reach him.

5. I called Mrs. Bowers back on her cell phone at which time I heard an officer asking questions of Debbie Sewell, who was also a passenger on the Bowers boat. The statements by Mrs. Sewell were related to the alleged driving of the boat by Dr. Bowers.

6. That after some further conversation with Mrs. Bowers, I asked to speak to the officer. An individual came on the phone and identified himself as Officer Pearce of the Tennessee Wildlife Resources Agency. After some conversation during which I attempted to ascertain the nature of the investigation, the officer handed the phone to Mrs. Sewell. I was advised at that time that Mrs. Bowers had gone on board the boat to get her identification.

7. I advised Mrs. Sewell that I would call right back. When I called back a few minutes later, I first spoke to Mrs. Bowers and then asked to speak to the officer. The individual who had earlier identified himself as Officer Pearce

returned to the phone. I confirmed that I was, in fact, speaking to Officer Pearce. I then asked the officer if I could simply come to the scene and take the people to their respective vehicles and/or homes.

8. Officer Pearce advised me at that time that I could pick up everyone except Mrs. Bowers and that I would be able to pick her up later at Maloneyville Road. I understood the reference to Maloneyville Road to mean the Knox County Sheriff's Detention Facility. I immediately asked the officer on what basis he intended to take Mrs. Bowers into custody and he responded public intoxication.

9. I was then placed on the phone with Mrs. Bowers. I asked her if she had heard the exchange with the officer to which she responded affirmatively. I then heard Mrs. Bowers question the officer regarding his basis for taking her in to custody with specific reference to the fact that she had not been belligerent with him nor was she unable to care for herself. At this point, I heard the officer, with whom I had previously spoken on two occasions, state " Lady, I gave you an opportunity to cooperate with me and you wouldn't.".

10. At that point, after advising Mrs. Bowers of my intentions and ending our conversation, I immediately departed enroute to the Fox Marina where the parties were located. My prior conversations with the various parties had taken approximately thirty minutes. I arrived at the Fox Marina at approximately 7:55 P.M. I observed Mrs. Bowers and Mrs. Sewell standing near a building with two officers nearby. Mrs. Bowers was in handcuffs over which she had placed a denim blouse.

11. I spoke with Mrs. Bowers both to determine the current status and to further observe her condition. I had previously determined, in our telephone conversations, that she was not speaking with any sort of speech impediment such as slurring or stumbling over words. I did not observe any visible signs of intoxication. I specifically looked at her eyes and found them to be clear. I watched her walk in the area and observed that she was not unsteady nor did she stumble. In speaking with her, I observed that her speech was clear and steady. Although I am familiar with the odor resulting when a person has recently consumed an alcoholic beverage, I did not detect any odor of an alcoholic beverage on her breath.

12. I spoke with Officer Pearce at that time and once again asked him on what basis he was taking her in to custody. He advised me that she was charged with public intoxication and that there would likely be additional charges when he

completed his investigation. He refused to discuss these potential charges with me. I advised the officer of my long association with Mrs. Bowers and advised him that I observed no signs of intoxication, to which he responded that that was a judgment call on his part.

13. I advised Officer Pearce that the statutes of Tennessee require that an officer issue a citation in lieu of arrest for a misdemeanor offense such as public intoxication and requested that he do so in Mrs. Bowers case. He advised me that he considered her a danger to herself and indicated that he would not issue a citation. He further indicated that since she was already in custody, he had no authority to issue a citation. I advised him that this was incorrect under Tennessee law. I then, once again, requested that the officer issue a citation and release Mrs. Bowers to my custody stating that I would insure that she got home. The officer refused indicating again that she was in custody and that was where she was going to stay.

14. I then asked for and obtained the number for Officer Pearce's supervisor and placed a call to him. Mr. Ripley returned my call and I explained the situation to him fully, including my request that the officer issue a citation and release Mrs. Bowers to me. After talking with me, Mr. Ripley spoke with Officer Pearce. When the conversation ended, Officer Pearce advised me that nothing was changed and that Mrs. Bowers would be taken to jail.

15. When the Knox County Sheriff's Department van arrived and custody of Mrs. Bowers was transferred, I asked Officer Pearce if he had given the necessary paperwork to the officer for processing so that I could effect Mrs. Bowers release from custody. He advised me that he would have to go to the City-County Building to fill out the warrant. When I asked him if that would be done expeditiously so that Mrs. Bowers would not have to spend any more time in custody than necessary, he advised me that the process would be completed ". . .sometime before the night was over." When I reiterated my desire that this be done expeditiously he again said "As I said, it will be done before the night is over.".

16. This encounter ended at 8:43 P.M. when the van departed the Fox Marina and I followed the van to obtain Mrs. Bowers release from the Knox County Detention Facility.

Further affiant saith not.

James H. Varner Jr

JAMES H. VARNER, JR.

Subscribed and sworn to before me
this 26th day of October, 2001.

Barbara L. Smith

NOTARY PUBLIC
My Comm. Exp.: 9-12-2004

State of Tennessee)
) ss
County of Knox)

AFFIDAVIT OF DENNIS C. SEWELL

I, DENNIS C. SEWELL, after first being duly sworn, say as follows:

My wife, Debbie Sewell, and I were invited by Allen and Ann Bowers to spend Sunday afternoon, October 21, 2001 with them on their boat on Ft. Loudon Lake. We left PJ's Landing Dock around 1:00 p.m.

We grilled on the boat about 2:00 p.m. and had a lunch of pork, steak, baked potatoes, corn, fruit, cheese, and salad. Allen had a glass of wine with lunch. Ann had a mixed drink before lunch but drank diet Coke with her lunch.

After lunch I recall Allen having one beer. Ann did not drink anything after lunch except diet Coke.

We were on the lake until after 5:00 p.m. Allen was going to go to Fox Road Marina to walk up into his subdivision to get his daughter. After we went by Concord Marina, some boaters complained of our wake.

When we got to Fox Road Marian two other people confronted Allen about the Concord Marina matter. Allen told them he was not going to argue with them and proceeded to change clothes to go get his daughter.

After Allen left, my wife, Debbie, Annie Bowers and her daughter, Katie Simpson, were sitting on the boat waiting on Allen to return with his daughter.

A TWRA officer named Pearce came up to the boat and began to question me about whose boat it was. Annie told him it was her husband's. I told them that he had gone to get his daughter. TWRA Officer Pearce asked a number of questions about where Allen was and why he was not back. TWRA Officer Pearce told me to exit the vessel and to go up to his vehicle. I asked Officer Pearce why he was asking the questions, and he said that he was conducting an "incident investigation." He continued to question me about Allen, where he was and when he would be back.

Two other TWRA officers came up. TWRA officer Webb began questioning me, and TWRA Pearce went to the boat to talk to my wife. TWRA Officer Pearce came back up to the truck and said that she, Annie, was not cooperating and that he could make this as hard on her as she chooses.

As I was writing out my statement, TWRA Officer Pearce had Annie step off the boat.

The officers continued to question my wife and me. I wrote out a statement and my wife wrote out a statement. There was discussion between the officers. I again heard TWRA Officer Pearce say that Ann was not cooperating. TWRA Officer Pearce then placed Ann under arrest and handcuffed her.

Ann was not intoxicated. She had nothing to drink since before 2:00 that afternoon. Ann was not a danger to herself or anyone else.

And Affiant further saith no.

DENNIS C. SEWELL

Sworn to and subscribed before me this 23 day of October 2001.

NOTARY PUBLIC

My Commission Expires: 6-26-2002

State of Tennessee)
) ss
County of Knox)

AFFIDAVIT OF DEBRA L. SEWELL

I, DEBRA L. SEWELL, after first being duly sworn, say as follows:

On October 21, 2001 I was with my husband, Dennis, Allen Bowers, Ann Bowers and Ann's daughter, Katie, on Allen Bowers' boat. We left PJ's landing around 1:00 p.m. We had lunch on the boat. I was drinking beer throughout the afternoon. Ann did not have anything to drink to my knowledge after lunch.

There was some issue over the wake our boat made as we went by Concord Marina. We were going to Fox Road Marina for Allen to walk to his neighborhood to get his daughter.

When we got to Fox Road Marina, Allen went to get his daughter. Ann, Dennis, Katie and I sat on the boat. While we were on the boat a TWRA Officer came up and began to ask questions. I learned the TWRA officer's name was Pearce. His attitude was arrogant and cocky.

Officer Pearce was told that Allen owned the boat and had gone to get his daughter. He continued to question my husband and had my husband get off the boat and go up to his vehicle. Two other TWRA officers came up and Officer Pearce came back down to the boat and continued to ask questions.

Officer Pearce asked me to get off the boat and took me up to where my husband was. I filled out a statement.

Officer Pearce then went and got Ann off the boat. I saw Officer Pearce put handcuffs on Ann. I then went to the boat to be with Katie so that Katie would not see them putting handcuffs on Ann.

Ann was not intoxicated.

And Affiant further saith not.

DEBRA L. SEWELL

Sworn to and subscribed before me this 23 day of October 2001.

NOTARY PUBLIC

My Commission Expires: 4-26-2002

State of Tennessee)
) ss
County of Knox)

AFFIDAVIT

I, GWIN BOYER, after first being duly sworn, say as follows:

I live in West Knoxville, Knox County, Tennessee.

I first met Ann Bowers, then Ann Short Simpson, in 1991 when she moved into the Tan Rara Subdivision. At that time, my home was in the same subdivision. Since 1991, I have been in frequent contact with Ann Bowers. I have visited in her home often.

I met Allen Bowers through Ann and her deceased husband, Robert R. Simpson, and I have known Mr. Bowers for several years.

On Sunday evening, October 21, 2001, I received a telephone call from attorney James H. Varner, Jr. Mr. Varner requested that my husband and I meet him at the Fox Road Marina to pick up Ms. Bowers' daughter and to keep her overnight at our home. My husband and I drove to the marina. We arrived between 8:00 and 8:15 p.m. When we arrived, Ms. Bowers was standing handcuffed in the parking lot of the marina. I approached Ms. Bowers to speak with her. I hugged her and reassured her that I would take care of her daughter. I was in close proximity to Ms. Bowers and was able to observe her appearance and hear her speak.

Ms. Bowers was sober and appropriately concerned with the welfare of her daughter. Ms. Bowers, while in my presence, never stumbled and never appeared to have any difficulty whatsoever with her balance. Her words were not slurred or impaired as we spoke, and I did not smell any alcohol on her breath. At no time in my presence did Ms. Bowers act combative, and she did not in any manner pose a danger or threat to herself or anyone else. I was shocked that Ms. Bowers was arrested for public intoxication when she was obviously not intoxicated.

And Affiant further sayth not.

Gwin Boyer
GWIN BOYER

Sworn to and subscribed before me this 23 day of October, 2001.

My Commission Expires: 6-26-2002

NOTARY PUBLIC

TOWARD MORE PERSUASIVE APPELLATE PRESENTATIONS

By: Ann C. Short Bowers
The Bosch Law Firm, P.C.

I have spent most of my attorney life researching and writing, and the best advice I can offer is: Identify your reading audience and then write for them. Bryan A. Garner, Editor in Chief for Black's Law Dictionary, put it thusly: "Until you understand why **brief-readers** should be pitied, you can't possibly write good briefs."[1] I have been both brief writer and brief reader.

The reading audience for this article probably consists of those (a) seeking a non-prescription sleeping aid; (b) cynically believing that nothing new can possibly be said about appellate advocacy; or (c) actually hoping to pick up a valuable tip. With that readership in mind, I will try to surprise the cynics and reward the hopeful. And for those who find the article to be as effective as Ambien, I wish you a restful respite.[2]

Many books are devoted to appellate advocacy. Just last year, Justice Scalia and Bryan Garner authored a small, quite readable book, *Making Your Case: The Art of Persuading Judges.* Much of what I offer is borrowed from such writings and personal experiences. That said, I want to begin with a few suggestions that may not be mentioned routinely on the lecture circuit. Second, I will touch on the persuasive advantage of the "deep issue." Last, I will suggest how to structure visually a persuasive argument.

Suggestions

- Appellate judges read large amounts of material – yes, they actually do. Therefore, with your brief, make every word count. The goal is to write something that takes the reader the shortest time to understand.

- Your brief should highlight its central point(s) within 60 to 90 seconds. Judge Aldisert advises, "You'd better sell the sizzle as soon as possible; the steak can wait."[3] Use the first page of your brief, the Table of Contents, to sell the sizzle. Do not generically list an Argument section with a page reference. Set out on that first page under the Argument heading, the full statement of each **deep** issue/argument. More about this later.

- Become thoroughly familiar with the standard of appellate review. Pure questions of law, reviewed de novo on appeal, permit the broadest appellate inquiries, and no deference is given to the trial court's interpretation of the law.

- Showing trial error is only half the battle. Prejudice flowing from the error is rarely presumed. Dig into the facts (including opening statements and closing arguments) and argue in specific terms how the error poisoned the trial. Create the longest list possible, itemizing every conceivable prejudicial effect.

- Be creative, but only if it facilitates a clearer or quicker understanding for the reader. I once included a book-type "Preface" in a brief to introduce the legal arguments to follow. I also have embedded copies of exhibits into the statement of facts to orient the reader quickly to the layout of an accident scene.

- Read your opponent's brief **as soon as** you receive it. Do not wait until oral argument is upon you. If your opponent claims an issue is waived because the record is incomplete, you should take **immediate** action to supplement the record – thereby avoiding appellate suicide.

- No forms exist for filing applications for discretionary review pursuant to Rules 9, 10, and 11 of the Tennessee Rules of Appellate Procedure. There are no shortcuts, and this is not the time to keep your powder dry. Write the brief that you want the Court to see if it grants review, and then introduce it with thoughtful reasons why review is important. Pay attention to the criteria in Rules 9, 10, and 11.

The "Deep Issue"

Issues are the most crucial pieces of information that attorneys can offer appellate judges. Too often, however, issues are poorly written. Bryan Garner recommends that we forget the idea that an issue should begin with "Whether"; forget the urge to "load all your points into one sentence"; and, by all means, forget making an issue "as abstract as possible."[4] So, what does that leave? Answer: the **deep issue**.

The deep issue "is the ultimate, concrete question that a court needs to answer to decide a point your way."[5] Mechanically, the deep issue is broken into separate sentences, with a premise-premise-question format. Think of presenting the issue as a syllogism. Pertinent facts are included to give context, and only one possible answer is allowed.[6] Ideally, the issue contains 75 words or less.[7]

For example, in a recent criminal sentencing appeal, I constructed the deep issue along the following lines:

> A presumption of correctness for sentencing determinations applies only when the record shows that the trial court considered statutory sentencing principles and all relevant facts and circumstances. In this case, the trial court (a) applied two inapposite enhancement factors; (b) ignored

AOC statistical sentencing information; (c) disregarded the legislative assessment of the offenses; and (d) responded emotionally to the offenses. Is the defendant entitled to a reduction in the length of his sentences?

Taking time to formulate the deep issue results in a clearly focused brief that the appellate reader can then digest in the shortest time.

Visual Persuasion

Most individuals are visual learners, and visually appealing documents communicate more effectively – more persuasively. Space does not allow an extended scientific explanation, but I can summarize for you a few key graphic design principles.[8]

- STOP SCREAMING AT THE READER WITH ALL CAPITAL LETTERS! Studies demonstrate that using ALL CAPS dramatically retards the speed of reading, up to 38 words per minute slower than regular sentence case. The brain thus works approximately 12 to 13 percent harder to grasp the written thought.[9] Judges are busy readers, and creating "more work" for the busy reader equals an unhappy reader.

- For emphasis, use **boldface** instead of underlining or *italics*. Similar studies have shown that *italics* also decrease reading speed, but not nearly as drastically as with ALL CAPS. Even underlining is thought to reduce somewhat the reading rate, because it visually distorts the letters.[10] **Boldface** letters, however, do not measurably decrease the speed of reading[11] and serve well as an emphasis-cuing mechanism.[12]

- This section is presented in "Garmond" serifed font. What???? Graphic design experts recommend using serif fonts – those having a "wing" hanging on the bottom of the letter – for blocks of text. Popular serif fonts are Times New Roman, Courier New, and Garmond.

- On the other hand, boldface sans serif fonts cause headings to stand out and facilitate skimming the brief. Popular boldface sans serif fonts (without the "wings") include **Arial, Verdana,** and **Trebuchet MS**. The heading in this section is in **Verdana**.

- The "size" of the font can affect its visual appeal. Times New Roman 12-point type is painfully scrunched. If you must stick with Times New Roman, try 13-point type or use 12-point Courier New or Garmond.

- "Left justification" of text is considered preferable to "full justification." On this point, I am old school; I like the visual balance of full justification. However, I am warming up to this recommendation.

Conclusion

Next time you draft an appellate brief, try incorporating some of the tips outlined here. You cannot influence whether the appellate judge reads your brief at the office or at home with a slobbering dog, fussy baby, or grouchy spouse.[13] But you can directly affect the amount of time and effort required to understand what you have written.

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[1] Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* ix (2d ed. 2003).

[2] Even brief-readers, i.e. appellate judges, are opinion writers; they also must be mindful of their reading audience. An opinion must be crafted with the litigants foremost in mind, because they are personally affected by the decision. Next, an opinion should consider the reading public, because citizens deserve a transparent and understandable explanation for the decision. Finally, an opinion should supply a solid factual and legal foundation for the Justices of the Tennessee Supreme Court who may one day review the decision.

[3] Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 142 (1992).

[4] Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 55 (2d ed. 2003).

[5] *Id.* at 56.

[6] *Id.* at 55.

[7] "About 98% of the time, if you can't phrase your issue in 75 words, you probably don't know what the issue is." *Id.* at 80.

[8] Of course, be careful to check for any briefing rules or restrictions that apply in your particular court.

[9] *E.g.*, Miles A. Tinker, *Legibility of Print* 57 (Iowa State U. Press 1964) (synthesizing decades of psychological research on typeface and speed of reading).

[10] Miles A. Tinker & Donald G. Paterson, *Influence of Type Form on Speed of Reading*, 12 J. Applied Psychol. 359 (Aug. 1928).

[11] *Id.* at 359.

[12] In reviewing Tennessee Supreme Court opinions, I have noticed that Chief Justice Holder and Justices Wade and Clark underline the style of their case citations. Justice Koch prefers italicized case styles, and Justice Lee uses boldface and italics for the style of her case citations.

[13] Any resemblance to persons, living or dead, is purely coincidental.

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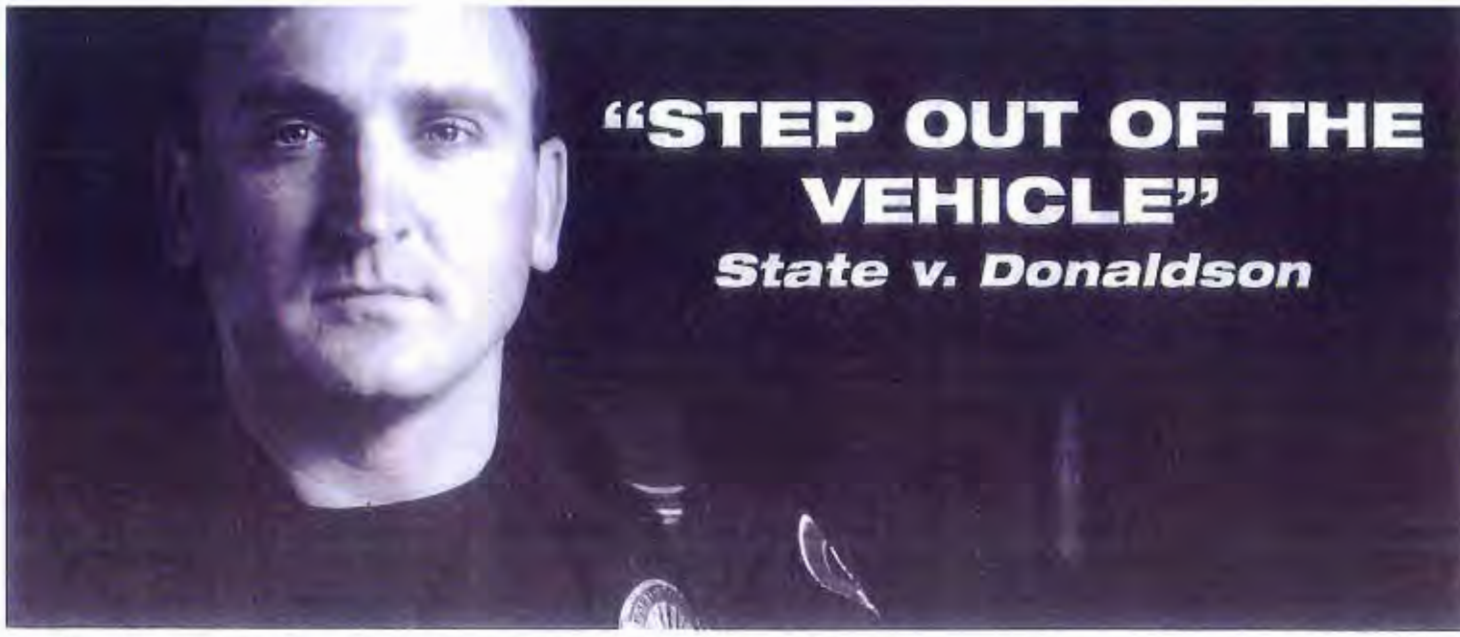
A Monthly Publication of the Knoxville Bar Association | December 2012

DICTA

"STEP OUT OF THE VEHICLE"

State v. Donaldson



"STEP OUT OF THE VEHICLE"

State v. Donaldson

One of the most common fact patterns in criminal cases begins with a traffic stop, which is a "seizure" within the meaning of both the Fourth Amendment and Article I, section 7 of the Tennessee Constitution. Such a seizure is constitutionally permissible as long as the seizing officer has either probable cause or reasonable suspicion of wrongdoing. In Tennessee, an officer's stop of a vehicle by activating emergency lights constitutes a seizure.[1]

For those of us who have been stopped in the past, we know the drill is for the seizing officer to approach the driver's side of the vehicle, direct the driver to lower the window, and request production of a driver's license, proof of insurance, and proof of vehicle registration. What happens next, though, is the stuff of countless appellate opinions, with constitutional pundits aplenty nitpicking the factual scenarios.

The factual scenario of the Tennessee Supreme Court's recent decision in *State v. Donaldson*[2] began as a garden-variety traffic stop for failing to use a turn signal and failing to stop prior to turning. Wayne Donaldson was out past midnight on March 20, 2009, when he made that right-hand turn onto Old Hickory Boulevard in Davidson County. Officer Baker, having viewed the infractions, activated his blue lights, whereupon Mr. Donaldson drove into a nearby Walmart parking lot and stopped his vehicle.

Wayne Donaldson produced the required documents, and Officer Baker walked back to his patrol car to make a records check and to fill out a citation for the traffic offenses. From the records check, Officer Baker learned that Mr. Donaldson had prior DUI and drug-related charges; the officer completed the citation, walked to Mr. Donaldson's vehicle, and directed him to step outside. When Mr. Donaldson complied, the officer saw a bag of cocaine in the floorboard. Mr. Donaldson was then arrested for possession with intent to deliver cocaine. The trial court suppressed the cocaine, and the Court of Criminal Appeals affirmed. The Tennessee Supreme Court, however, reversed the suppression order.

The *Donaldson* arguments for and against suppression begin with *Pennsylvania v. Mimms*.[3] In that case, the United States Supreme Court ruled that once a motor vehicle has been lawfully detained for a traffic violation, the police may order the driver to get out of the vehicle without violating the Fourth Amendment.[4] The State argued that *Mimms* gave Officer Baker carte blanche authority to order Mr. Donaldson out of his vehicle. Mr. Donaldson's "wait-a-minute" response noted language in *Mimms* cautioning that the Supreme Court was not holding that "whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car."[5] Mr. Donaldson pointed out that whereas the driver in *Mimms* was ordered out of his vehicle at the beginning of the stop, Mr. Donaldson was not told to step outside the vehicle until the conclusion of the stop and after the citation had been written.

At first blush, it might appear that the Tennessee Supreme Court sided completely with the State. A closer examination of *Donaldson*, however, reveals a more complex ruling. The Tennessee Supreme Court began by concluding "that Officer Baker was entitled, as a matter of course, to remove the Defendant from the vehicle for a short period of time after making the traffic stop."[6] That conclusion was immediately followed with the qualification that "other circumstances could render the directive impermissible."[7] The "other circumstances" include the duration of the stop, because the law is well settled that the "duration of an investigative detention should last no longer than necessary"; that the detention "should generally end when there is no further reason to control the scene or the driver"[8]; and that "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."[9] In other words, a traffic stop may be deemed "unreasonable," and therefore unconstitutional, if the "time, manner or scope of the investigation exceeds the proper parameters."[10] This rather vague standard, perhaps needless to say, has produced a multitude of intensely fact-driven decisions.[11]

As for Mr. Donaldson, the Tennessee Supreme Court quickly disposed of the situation. "Officer Baker described the stop of the Defendant as 'normal.' Nothing in the record indicates that it lasted more than five minutes. . . . [T]he intrusion was minimal."[12] The inquiry, though, did not end because another circumstance also could render the directive impermissible. The court described it thusly: "Officer Baker's request to have the Defendant exit his vehicle could also have been impermissible if he had asked him to do so after the traffic stop had been concluded."[13] The arguments at this juncture focused on whether Officer Baker had returned Mr. Donaldson's driver's license before or after the directive to step out of the vehicle.

The court sidestepped the trial court's inconsistent findings regarding when the driver's license was returned to Mr. Donaldson. Instead, the court ruled that even had the license been returned prior to the directive to step out of the vehicle, the traffic stop would not have been concluded. In the court's view,

By:
The Bosch Law Firm

"[w]hen a police officer issues a traffic citation or warning and returns a driver's license and registration, a traffic stop ceases to be a seizure . . . and becomes a consensual encounter."[1] For good measure, the court also noted that a person stopped for a traffic infraction and issued a citation is statutorily required to sign the citation.[2] In Mr. Donaldson's case, because the traffic citation had not been issued when he was ordered to exit the vehicle, the traffic stop was not concluded, thereby authorizing the officer's directive.

Donaldson does not establish any bright-line rules. Following *Donaldson*, practitioners will still have to undertake a factually intensive investigation to determine if suppression is a viable issue. Even if the traffic stop is underway when the directive to step out of the vehicle is issued, the time, manner, or scope of the traffic stop may exceed allowable parameters. It is beyond the scope of this article to inventory the multitude of Tennessee cases in which the time, manner, or scope issue has been litigated. Examples are cited in the *Donaldson* court's opinion.[3] From the cases, it is evident that often the suppression issue will turn on the trial court's credibility determinations and the standard of appellate review of the trial court's ruling either suppressing the evidence or allowing its admission.[4]

Following *Donaldson*, practitioners also should not assume that anything that occurs after the citation is issued and the driver's license and registration are returned will result in automatic suppression of later discovered evidence. In this regard, it is critical to keep in mind that when the traffic stop is concluded, it *ceases to be a seizure and becomes* a consensual police-citizen encounter.[5] At that point, the officer is free to "request" that the driver step out of the vehicle or, for example, ask if the driver will "consent" to the search of her vehicle. Cases that deal with these consent-type issues, once again, are beyond the scope of this article. Suffice it to say, those cases also require fact intensive examinations.

Perhaps the most accurate way to view *Donaldson* is not as a groundbreaking search and seizure decision but as a continuing refinement on the allowable law enforcement directives and activities once a legitimate traffic stop has been initiated.

[1] *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

[2] ___ S.W.3d ___, M2010-00690-SC-R11-CD (Tenn. Aug. 24, 2012), *rev'g* M2010-00300-CCA-R3-CD (Tenn. Crim. App., Nashville, Sept. 15, 2011).

[3] 434 U.S. 106 (1977).

[4] Later, in *Maryland v. Wilson*, 519 U.S. 408 (1997), the Supreme Court held that the general rule that police officers may order a driver to get out of the vehicle without violating the Fourth Amendment extended to passengers. *Mimms*, 434 U.S. at 111 n.6. One example of this qualification could arise when an officer approaches a vehicle parked in a public area to speak with the occupant/driver. This type of brief police-citizen encounter requires no constitutional justification. *See State v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000). That said, allowing an officer to order anyone who is lawfully parked and violating no law to get of the vehicle pushes the constitutional envelope perhaps too far. *Of course, if the officer develops reasonable suspicion during the brief* encounter that the citizen is impaired, at that point the officer can pursue an investigatory detention and require the citizen to get out of the vehicle.

[5] *Donaldson*, slip op. at 7.

[6] *Id.*, slip op. at 8.

[7] *Id.*

[8] *Id.* (quoting *State v. Cox*, 171 S.W.3d 174, 179-80 (Tenn. 2005)).

[9] The ruling in *Mimms* was based on statistical concern for officer safety, and the *Donaldson* Court echoed that concern. Twenty-one years after *Mimms*, however, the United State Supreme Court in *Knowles v. Iowa*, 525 U.S. 113 (1998), observed, "The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest." *Id.* at 117.

[10] *Id.*, slip op. at 9.

[11] *Id.*, slip op. at 10.

[12] *Id.* (quoting *State v. McCrary*, 45 S.W.3d 36, 42 (Tenn. Crim. App. 2000) (emphasis in original)).

[13] *Id.*, slip op. at 10 n.9.

[14] *Donaldson*, slip op. at 9 n.8.

[15] *See, e.g., State v. Brown*, 294 S.W.3d 553, 561 (Tenn. 2009).

[16] *McCrary*, 45 S.W.3d at 42.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

STATE OF TENNESSEE, *Appellee*	
v.	**LOUDON COUNTY** **No. E2006-01226-CCA-R3-CD**
ARIEL BEN SHERMAN, *Appellant*	

RULE 11 APPLICATION OF APPELLANT, ARIEL BEN SHERMAN, FOR PERMISSION TO APPEAL

DONALD A. BOSCH
BPR#013168
ANN C. SHORT-BOWERS
BPR# 009145

THE BOSCH LAW FIRM, P.C.
Attorneys for Appellant
712 S. Gay Street
Knoxville, Tennessee 37902
865.637.2142

ENTRY OF JUDGMENT BELOW

The opinion of the court of criminal appeals was filed on July 12, 2007, at which time the corresponding judgment was also entered. No petition for rehearing was filed. This Rule 11 Application for Permission to Appeal has been submitted in a timely fashion. *See* Tenn. R. App. P. 11(b) (application for permission to appeal shall be filed with 60 days after entry of the judgment of the court of criminal appeals).

A copy of the lower court's opinion is appended to this Application as Attachment "A."

Copies of all unpublished opinions cited in this Application are appended hereto as collective Attachment "B." *See* R. Tenn. S. Ct. 4(H).

QUESTIONS PRESENTED FOR REVIEW

I. Whether misdemeanor child neglect can be prosecuted under a theory that a defendant who holds himself out to be the father and/or caretaker of a minor child thereby becomes criminally responsible for the mother's failure to seek medical treatment for her minor child.

II. Whether misdemeanor child neglect can be prosecuted under a theory that a defendant who holds himself out to be the father and/or caretaker of a minor child thereby becomes the child's de facto custodian with a personal duty to seek medical treatment for the minor child.

III. Whether Tennessee Rule of Criminal Procedure 12(b) and (e) and/or this Court's opinion in *State v. Goodman*, 90 S.W.3d 557 (Tenn. 2002), disallows a pretrial determination of a motion to dismiss unless the undisputed facts are established by "formal stipulations."

REASONS SUPPORTING REVIEW BY THE TENNESSEE SUPREME COURT

I. Introduction

In 2003, the Office on Child Abuse and Neglect, within the Children's Bureau, Administration for Children and Families, United States. Department of Health and Human Services, launched a Child Abuse Prevention Initiative to raise awareness of abuse and neglect in a more visible and comprehensive way than had been previously undertaken. This effort has been successful. Increased awareness, however, has brought difficult questions into the legal arena regarding the scope of society's responsibility for minor children. This case illustrates the need to settle important questions of law and public interest in Tennessee regarding child neglect and the scope of permissible prosecutions. In particular, under the lower court's view of a duty-based obligation to minor children, thousands of citizens in this state live in peril of criminal prosecution because the duty envisioned by the lower court is not based on a relationship imposed by statute, assumed by contract, created by perils, or voluntarily assumed and is a duty that Mr. Sherman and other like-situated individuals are prohibited from assuming. The lower court's view of "criminal responsibility" as a basis for a conviction similarly extends beyond the reach of what is intended for that theory of liability.

Procedurally, this case demonstrates the need to provide guidance to trial courts considering Criminal Procedure Rule 12 motions to dismiss. The court of criminal appeals' opinion in this case ostensibly grafted a requirement into Rule 12(a) that undisputed facts must be established by formal stipulations. Nothing in the language of

Rule 12 or this Court's opinion in *State v. Goodman*, 90 S.W.3d 557 (Tenn. 2002), requires "formal stipulations." Just as the procedural requirements for perfecting an appeal of a certified question of law, *see* Tenn. R. Crim. P. 37(b)(2)(A), are plainly set forth and must be strictly observed, the procedural requirements for conducting a hearing on a Rule 12 motion to dismiss should be clear-cut. Disposing of Rule 12 motions to dismiss, in appropriate circumstances, can prevent needless, expensive, and protracted litigation. These tangible benefits may not be realized if procedural uncertainty exists.

II. Viability of a Vicarious Liability Theory of Misdemeanor Child Neglect

At the time of the alleged offense in this case, Code section 39-15-401 proscribed knowingly neglecting a child under eighteen (18) years of age so as to adversely affect the child's health and welfare. *See* T.C.A. § 39-15-401(a) (2003). By way of a bill of particulars, the state in this case advised Mr. Sherman in writing that "it is the State's position that he repeatedly held himself out as her father and one of her caretakers, thereby creating a duty on his part" to seek medical treatment for his co-defendant's minor child. *See State v. Ariel Ben Sherman*, No. E2006-01226-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, July 12, 2007).

Although the state did not raise the issue on appeal, the court of criminal appeals in its opinion theorized that the defendant could be prosecuted and convicted for child neglect pursuant to a non-duty-based theory of criminal responsibility. The court wrote,

> The State apparently could have theorized that Sherman was merely complicit in defendant Crank's neglect of her child, the victim. "A person is criminally responsible for an offense committed by the conduct of another if . . . [a]cting with intent to promote or assist the commission of the offense, . . . the person . . . aids, or attempts to aid another person to commit the offense . . . ." *See* T.C.A. § 39-11-402(2) (2006).

Ariel Ben Sherman, slip op. at 6.[1] The court then questioned whether the state "forfeit[ed]" that theory through its bill of particulars which described the defendant's actions deemed to be criminal in the following fashion: "[I]t is the State's position that he

[1] The court of criminal appeals did not reference subsection (3) of Code section 39-11-402 that applies to a person "[h]aving a duty imposed by law or voluntarily undertaken to prevent commission of the offense." *See* T.C.A. § 39-11-402(3) (2006); *see also State v. Michael Tyrone Gordon*, No. 01C01-9605-CR-00213, slip op. at *18 (Tenn. Crim. App., Nashville, Sept. 18, 1997) ("We do not believe the legislature intended to require every citizen to exercise an affirmative duty ' imposed by law' to prevent the commission of a crime.").

repeatedly held himself out as [the victim's] father and one of her caretakers, thereby creating a duty on his part." *Id.* Concluding that the only possible problem presented by the bill of particulars was notice to the defense, the court declared that "a complicity theory of the offense" remained viable such that the misdemeanor child neglect charge should not be dismissed. *Id.*, slip op. at 7.

Admittedly, an indictment that charges an accused on the principal offense does incorporate all the nuances of the offense, including criminal responsibility. *See State v. Lemacks*, 996 S.W.2d 166, 173 (Tenn. 1999). Likewise, had this case proceeded to trial, the state would not have been – as the lower court wrote -- "immutably resigned to a 'duty' theory of prosecution." *See Ariel Ben Sherman*, slip op. at 7. Even so, had a trial ensued the state would have been dealing with the same factual allegations set forth in its bill of particulars.

There is an undercurrent of speculation in the lower court's opinion that the state will be able to generate facts different from those stated in the bill of particulars. The state's bill of particulars itself, however, contradicts that notion. The particulars are set forth in a letter. After apologizing for the delay in supplying the particulars, prosecution counsel writes, "The open file discovery afforded you will of course flush out this response. The actions that the State allege constitute the offense in question are the failure by either defendant to pursue the medical evaluations and treatments recommended by the Chiropractor and the persons at Physicians's Care." *See* Defendant Sherman's Second Motion to Dismiss and Memorandum of Law, Exhibit 2. In a legal nutshell, the state's theory of prosecution is the failure to obtain medical treatment for the

minor, and the defendant's role, according to the state, involved holding himself out as father and/or caretaker. Consequently, reversing the trial court's ruling as "premature" is unfounded.

The question thus presents itself whether misdemeanor child neglect can be prosecuted under a theory that a defendant who holds himself out to be the father and/or caretaker of a minor child thereby becomes criminally responsible for the mother's failure to seek medical treatment for her minor child. Liability, Mr. Sherman submits, cannot be sustained on that basis.

Clearly, Mr. Sherman's actions, as described by the state, do not qualify as "[a]cting with intent . . . to benefit in the proceeds or results of the offense." *See* T.C.A. § 39-11-402(2) (2006). The remaining criminal responsibility category under subsection (2) is: "Acting with intent to promote or assist the commission of the offense . . . the person solicits, directs, aids, or attempt of aid another person to commit the offense." *See id.* Under any reasonable interpretation of the terms "solicit," "direct," "aid," or "attempt to aid," Mr. Sherman's actions, as described by the state, are well outside the area *defined by the legislature*. An individual's statement that he is a child's parent does not constitute a solicitation of the child's mother to criminally fail to obtain medical treatment for her child. Likewise, such statements do not direct, order, or instruct a parent to commit child neglect. As for aiding or attempting to aid the mother to commit child neglect, the statements have no force or effect.

To be sure, and as Mr. Sherman's counsel conceded at oral argument before the court of criminal appeals, under the state's theory, Mr. Sherman may be guilty of some

form of criminal impersonation if the requisite "intent to injure or defraud" can be demonstrated, *see* T.C.A. § 39-16-301 (2006). Not so, however, in the context of child neglect and criminal responsibility, and because the court of criminal appeals has sua sponte raised the issue, this Court should revisit the role of "criminal responsibility" in our statutory scheme of crimes and offenses.

Criminal responsibility is typically explained in the following fashion:

> [U]nder the theory of criminal responsibility, presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from an individual's participation in the crime may be inferred. *See State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). No particular act need be shown, and the defendant need not have taken a physical part in the crime. *See id.* Mere encouragement of the principal will suffice. *See State v. McBee*, 644 S.W.2d 425, 428 (Tenn. Crim. App. 1982). To be criminally responsible for the acts of another, the defendant must "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting *Hembree v. State*, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)).

See, e.g., State v. Mickens, 123 S.W.3d 355, 390 (Tenn. Crim. App. 2003).

The above language referencing presence and companionship does not state that presence and companionship, without more, are sufficient to support a conviction for criminal responsibility. The mere presence at the scene of a crime is insufficient to support such a conviction. *See Flippen v. State*, 211 Tenn. 507, 365 S.W.2d 895, 899 (1963); *Anglin v. State*, 553 S.W.2d 616, 619 (Tenn. Crim. App. 1977). The language that no particular act need be shown does not mean that "no act need be shown"; rather, no checklist of essential acts required to establish criminal responsibility exists. The

language that the defendant need not have taken a physical part in the crime does not dispense with the requirement that he must have taken "some" part in the crime. Viewed in this fashion, the defendant's action as alleged by the state – holding himself out to be the father and/or caretaker of the minor child – supplies no evidentiary basis that he *associated* himself with *child neglect*, and his words are legally inadequate to establish his knowledge that the offense of child neglect was to be committed or to establish that he shared in a criminal intent of the principal in the first degree. *Cf. State v. Hodges*, 7 S.W.3d 609, 623 (Tenn. Crim. App. 1998) (defendant criminally responsible for conduct of his wife; as victim's step-parent and caretaker, defendant had duty to protect victim from harm and provide emergency attention; defendant's wife had entrusted him to watch over victim on a daily basis).

A profitable comparison appears in *State v. Guadalupe Steven Mendez*, No. E2002-01826-CCA-R3-CD (Tenn. Crim. App., Knoxville, Sept. 12, 2003). In that case, the defendant was convicted of aggravated rape of a minor under a theory of criminal responsibility. The defendant, who was unrelated to the victim, was incarcerated at the time of the offense, and the offense was committed by the victim's grandmother who had "developed a 'pen pal' relationship" with the defendant. *Id.*, slip op. at -1-2. The offense consisted of the grandmother, while on the telephone with the defendant, taking photographs of the unclothed victim and inserting her fingers into the victim's vagina. The grandmother had the photographs developed and sent them to the defendant whereupon correctional officers intercepted the photographs thus leading to the prosecution. *See id.*, slip op. at 2.

Mendez argued, inter alia, that he was not constructively present at the time the offense was committed and certainly was not in a position from prison to render aid to the grandmother. The court of criminal appeals disagreed and explained,

> The Defendant was on the telephone with both Ms. Morgan and the victim during the commission of the crime. Ms. Morgan testified that the Defendant told her "to stick my finger in her." When she told him she did not want to do so, "he told me to stick my damn fingers in there." Ms. Morgan testified that she would not have committed these actions had the Defendant not "talked [her] into it." Thus, the Defendant not only encouraged Ms. Morgan to unlawfully sexually penetrate the victim, he demanded she do so when she hesitated. He was not physically present, but he certainly made his presence felt at the crime scene. In our view, the Defendant did render aid to Ms. Morgan during the commission of the aggravated rape, and the requirement that he aided and abetted her is accordingly satisfied.

Id., slip op. at 4.

Mendez'a criminal liability was tied to verbally encouraging the grandmother and talking her into committing a criminal offense. No similar basis exists to find that Mr. Sherman rendered aid to the commission of child neglect, and criminal responsibility should not be grounded in the representations specified by the state. The state's theory of prosecution and the court of criminal appeals' take on criminal responsibility are issues of first impression warranting close scrutiny by this Court.

III. Duty-Based (non-Vicarious) Theory of Offense

In the last part of its opinion, the court of criminal appeals held that the trial court's dismissal of the charge against Mr. Sherman was unwarranted because the record "did not foreclose the possibility that the prosecution of defendant Sherman is supportable on other bases implicating his duty to the victim." *Ariel Ben* Sherman, slip op. at 9. By "other bases," the court of criminal appeals referenced the "more informal role of a custodian" of the minor child, inasmuch as the undisputed facts and the state's concession proved that Mr. Sherman was not legally connected to the minor child by marriage, adoption, or guardianship. *Id.*, slip op. at 8-9. Mr. Sherman again submits that criminal liability cannot be sustained on the basis theorized by the court of criminal appeals.

The fact pattern in this case is atypical; yet, the implications of the lower court's opinion are far reaching. In the context of child "abuse," the statutory prohibition reaches all individuals, regardless of any prior or current relationship with the minor child, because no one is privileged to physically abuse a minor child. Even a physician commits a medical battery if a procedure is unauthorized. *See Blanchard v. Kellum*, 975 S.W.2d 522, 524 (Tenn. 1998). At any rate, the cases dealing with child abuse most often involve individuals who are parents, step-parents, other relatives, or "significant others," as that term has come to be used. *See, e.g., State v. Loretta A. Wright*, No. M2004-00802-CCA-R3-CD (Tenn. Crim. App., Nashville, Apr. 7, 2005) (defendant charged with child abuse of her granddaughter); *State v. Michael Wayne Poe*, No. E2003-00417-CCA-R3-CD (Tenn. Crim. App., Knoxville, July 19, 2004) (defendant charged with abuse of

biological child); *State v Shelia Ann Jones*, No. M2003-02776-CCA-R3-CD (Tenn. Crim. App., Nashville, Dec. 9, 2004) (defendant lived with boyfriend for three years and charged with aggravated abuse of boyfriend's daughter); *State v. Nicholas O'Connor*, No. W1998-00015-CCA-R3-CD (Tenn. Crim. App., Jackson, Oct. 2, 2000) (live-in boyfriend charged with aggravated abuse and neglect; mother charged with aggravated neglect).

In the context of child "neglect," the issues to date that have received attention are the requirement of an actual, deleterious effect or harm necessary to support a child neglect conviction, *see State v. Mateyko*, 53 S.W.3d 666 (Tenn. 2001); recognition that attempted child neglect is a viable offense, *see id.*; rejection of a requirement that the state elect offenses when several adverse effects have resulted from one period of neglect, *see State v. Adams*, 24 S.W.3d 289 (Tenn. 2000); and the determination that child neglect is a nature-of-conduct offense, *see State v. Ducker*, 27 S.W.3d 889 (Tenn. 2000). None of these decisions has explored who may be targeted for prosecution for child neglect perhaps because each decision involved one or more parents as defendants, and parents have a statutory duty to care for their children, *see* T.C.A. § 34-1-102(a) (2006) (parents are the "joint natural guardians" of their children).

In its brief to the court of criminal appeals, the state advocated that Code section 39-15-401 criminalizes neglect of children by anyone. Under that argument, any individual, possibly knowing that that a child is in physical distress and who fails to intervene and seek medical treatment would be subject to prosecution for misdemeanor child neglect. The idea, however, that the legislature intended to criminalize, as

misdemeanor child neglect, the inaction of strangers or even acquaintances finds no legislative foundation or roots in common sense.

In its opinion, the court of criminal appeals concluded that "the concept of neglect entails an element of duty,"[2] and it analogized the duty component of child neglect to the standard of care that is central to the concept of civil tort negligence. Quoting from *State v. Roger Hostetler*, No. 02C01-9707-CC-00294, slip op. at 9 (Tenn. Crim. App., Jackson, Mar. 27, 1998), the court wrote that "'certain concepts of negligence as used in our tort law inform the analysis' of negligence in the criminal realm." *Ariel Ben Sherman*, slip op. at 8. In a footnote, the court then quotes the statutory definition of "criminal negligence" from Code section 39-11-302(d). *See* T.C.A. § 39-11-302(d) (2006). The aptness of the analogy in this instance is unclear if for no other reason than the offense of child neglect requires proof that a person "knowingly" neglected a child. *See Mateyko*, 53 S.W.3d at 670. Introducing "civil negligence" into the legal dialogue concerning knowing criminal child neglect most likely confuses, rather than elucidates, the issues.

In the final portion of its opinion, the court of criminal appeals reaches into the statutory scheme governing dependent and neglected juveniles to identify responsible individuals who owe a duty relative to dependent and neglected juveniles. From that examination, the court concludes that a duty to provide medical care attaches to a "parent, guardian or custodian." *See* T.C.A. § 37-1-102(b)(12)(D) (2005). Proceeding therefrom,

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[2] Mr. Sherman disputes the court of criminal appeals' initial characterization of the nature of the duty. The court wrote, "Even assuming that the bill of particulars locked the State into a theory that defendant Sherman had a *duty to avoid the neglect of the victim*, we are unconvinced that the basis for dismissal of the charge against him was legally sound." (Emphasis added). The state's case, however, is premised on the theory that Mr. Sherman had a duty *to obtain medical treatment* for the minor and that his failure to do so constituted child neglect.

the court reversed the dismissal of the child neglect charge because the state's concession that Mr. Sherman had no legal relationship to the minor child did not exclude the possibility that Mr. Sherman "occupied the more informal role of a custodian" from which a duty could arise. *Ariel Ben Sherman*, slip. op. at 9.

Even assuming that the statutes governing dependent and neglected juveniles lend a useful backdrop to analyzing the present issues, those statutes do not support the lower court's decision. One definition of a dependent and neglected child is a child "[w]hose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child." T.C.A. § 37-1-102(b)(12)(D) (2005). That same statute defines a custodian as "a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom temporary legal custody of the child has been given by order of a court," *id.* § 37-1-102(b)(7), and defines custody as "the control of actual physical care of the child," which "does not exist by virtue of mere physical possession of the child," *id.* § 37-1-102(b)(8). More specifically, subsection (b)(8) provides, "'Custody,' as herein defined, relates to those rights and responsibilities as exercised either by the parents or by a person or organization granted custody by a court of competent jurisdiction." *Id.* These definitions clearly signify that a custodian occupies a more formal relationship via a juvenile than envisioned by the lower court's opinion.

The court of criminal appeals seized upon the idea that Mr. Sherman might stand "in loco parentis" to the minor child. Legal recognition of an "in loco parentis" relationship, however, has been extended only to a limited number of situations in

Tennessee. The relationship is most frequently encountered when the Department of Children's Services is given the right to place children for adoption and to consent to any adoption in loco parentis. *See, e.g., Dep't of Children's Services v. McClure*, M2005-02433-COA-R3-PT (Tenn. Ct. App., Nashville, July 20, 2006). Historically, Tennessee courts of equity act in loco parentis and as general guardians for minors and persons of unsound mind, doing for them and their property what they themselves would in all probability have done if possessed of good reason and good conscience. *See, e.g., Nashville Trust Co. v. Lebeck*, 197 Tenn. 164, 270 S.W.2d 470, 475 (1954). Teachers stand in the stead, in a somewhat limited sense, of the parent, in loco parentis. *See Marlar v. Bill*, 181 Tenn. 100, 178 S.W.2d 634, 635 (1944). In *Tyler v. Tyler*, 671 S.W.2d 492, 494 (Tenn. Ct. App. 1984), the court recognized and applied the common law rule that

> [o]ne who marries a woman known by him to be enceinte is regarded by the law as adopting into his family the child at its birth. He could not expect that the mother upon its birth would discard the child and refuse to give it nurture and maintenance. The law would forbid a thing so unnatural. The child receiving its support from the mother, must of necessity become one of her family, which is equally the family of the husband. The child, then, is received into the family of the husband, who stands as to it in loco parentis. This being the law, it entered into the marriage contract between the mother and the husband. When this relation is established the law raises a conclusive presumption that the husband is the father of his wife's illegitimate child.

By contrast, in *White v. Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999), the court of appeals declined to apply the concepts of de facto parenthood or in loco parentis to recognize a nonparent's claim to visitation when the nonparent and the child's biological

mother previously maintained a same-sex relationship and even when the nonparent previously provided care and support to the child.

In the context of criminal prosecutions, in loco parentis was discussed briefly in *Guadalupe Steven Mendez*. One of the issues in that case was whether the grandmother used coercion to penetrate the victim. *See Guadalupe Steven Mendez*, slip op. at 3. As used in the aggravated rape statute, coercion includes the use of parental, custodial, or official authority over a child. *See* T.C.A. § 39-13-501(1) (2006). Although the court of criminal appeals concluded that custodial authority had been demonstrated, it did not base that finding merely upon the grandmother's biological relationship to the minor child.

> "Custodial authority" is not defined in our criminal code. We can, however, look to other legislative provisions for guidance. Our juvenile code defines "custodian" as "a person, other than a parent or legal guardian, who stands in loco parentis to the child." *Id.* § 37-1-102(b)(7). The same statute defines "custody" as "the control of actual physical care of the child and includes the right and responsibility to provide for the physical, mental, moral and emotional well-being of the child." *Id.* § 37-1-102(b)(8). The victim testified that she spent as many weekends as she could with her grandmother at her uncle's house. Apparently, Ms. Morgan lived at that residence, because she referred to the location where the photographs were taken as "my bedroom." That is also the residence at which the Defendant telephoned Ms. Morgan. Ms. Morgan was the victim's natural grandparent, the mother of the victim's mother. Obviously, the victim's parent(s) entrusted the care and custody of their daughter to the grandmother on frequent occasions. We think this proof is sufficient to establish that Ms. Morgan was standing in loco parentis to the victim on the date in question.

Guadalupe Steven Mendez, slip op. at 3.

The outer limits of criminal liability based on a duty to act were explored in *State v. Jeffrey Lloyd Winders*, No. 88-142-III (Tenn. Crim. App., Nashville, Sept. 14, 1989), an unreported two-to-one decision, involving a child neglect prosecution and conviction. Judge Scott wrote the majority opinion which was joined in by Special Judge Cornelius. Then court-of-criminal-appeals Judge Reid filed a dissenting opinion.

The defendant in *Winders* drove a female companion and her two daughters from Kentucky to Tennessee for the purpose of visiting the children's grandmother. According to the opinion, the group arrived in Waverly at 5:00 a.m. The children were removed from the vehicle and "left at the Ecol Gasoline Station in Waverly, which was closed at the time." *Id.*, slip op. at *1-2. A short time later, a gas station attendant found the children, who were upset and cold, and called the police department. *See id.*, slip op. at *2.

The defendant was convicted of child neglect, and on appeal Judge Scott briefly touched upon the question whether the defendant had a legal duty toward the children. Without elaboration, he wrote, "[The duty to act] can be based on a relationship imposed by statute, assumed by contract, created by perils or voluntarily assumed. It is clear in this case by agreeing to bring the children and their mother to Waverly [the defendant] voluntarily assumed responsibility for their care." *Id.*, slip op. at *6. Judge Reid sharply disagreed; he wrote,

> [The defendant] was convicted of criminal neglect. Before there can be a finding of criminal neglect there must be proof of a legal duty. The rule is stated in W. LaFave & A. Scott, Criminal Law § 3.3(a), at 203 (2d ed. 1986): "Duty to Act. For criminal liability to be based upon a failure to act it must first be found that there is a duty to act

> - a legal duty and not simply a moral duty." Then follows a discussion of the situations which may give rise to the duty to act: duty based upon relationship; duty based upon statute; duty based upon contract; duty based upon voluntary assumption of care; duty based upon creation of the perils; duty to control conduct of others; and duty of a landowner. Essentially the same situations in which failure to act may constitute breach of a legal duty are set forth in *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962), in which the court found as reversible error the trial court's failure to instruct that the jury was required to find the defendant was under the legal duty to supply necessities to a child before she could be found guilty of manslaughter. In *Ronk v. State*, 544 S.W.2d 123 (Tex. Crim. App. 1976), indictments alleging that defendants failed and refused to secure proper medical treatment for a child but failed to allege any relationship between defendants and the child which would place defendants under a statutory duty to secure medical treatment failed to charge a statutory offense. See other cases annotated in 1 A.L.R.4th 38 (1980), Penal Statutes Prohibiting Child Abuse.
>
> The record shows that the children were under the control of their mother. There is no evidence of a relationship between [the defendant] and the children requiring him to interpose himself between the mother and her children. [The defendant] was not legally related to the children, nor was his relationship with the mother such that he was in loco parentis with the children. [The defendant] was under no contractual obligation to care for the children; the transportation was a gratuitous accommodation. There is no evidence that [the defendant] assumed the care of the children or that he was obligated to control the conduct of the mother. The statute under which [the defendant] was convicted only imposes liability for neglect of a duty. No duty or statutory obligation of care has been alleged or proven.

Id., slip op. at *16-18 (Reid, J., dissenting).

It is undisputed in this case that Mr. Sherman is not legally connected to the minor child by marriage, adoption, or guardianship. He does not qualify as a legal custodian or someone acting in loco parentis, and he was under no contractual obligation to care for

the minor child. Without more, the state's theory of holding himself out to be the father and/or caretaker does not impose an obligation to intervene between the mother and the child and does not constitute a voluntary assumption of responsibility. Any contrary conclusion leads to unprecedented criminal liability and opens the door to the creation of heretofore unrecognized civil rights regarding minor children.

Furthermore, the state's theory of prosecution paradoxically creates criminal liability for failing to do an act that Mr. Sherman is legally incapable of performing. Securing medical treatment for a minor child is more complex than merely delivering the child to a physician's office or hospital and requesting treatment. Whereas practically anyone can purchase and provide some necessities, such as flood, clothing, or shelter to a child in need, consent for medical treatment of a minor child cannot be supplied by just any adult. Except in certain well defined situations, medical treatment of a minor requires parental consent. *See, e.g.*, T.C.A. §§ 63-6-220 (physician may treat juvenile drug abusers without prior parental consent); -223 (any person licensed to practice medicine may provide prenatal care to a minor without the knowledge of consent of the parents or legal guardian); *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn. 1987) (recognizing mature minor exception to common law requirement of parental consent for medical treatment). In the context of emergency treatment of minors, physicians are authorized to provide treatment when necessary to save the minor's life or prevent further deterioration of a life threatening condition; however, even then, the "treatment shall be commenced only after a reasonable effort is made to notify the minor's parents or guardian, if known or readily ascertainable." T.C.A. § 63-6-222(a), (b).

Mr. Sherman was not the minor child's parent or guardian, and he did not have the authority to consent on the minor's behalf to medical treatment. Holding him criminally liable for failing to obtain medical treatment when he could not consent to such treatment clearly would be improper.

IV. Motions to Dismiss and Formal Stipulations

Procedurally and as indicated at the beginning of this Rule 11 Application, this case illustrates the need for this Court to provide guidance on how to view and consider Criminal Procedure Rule 12 motions to dismiss. The rule itself provides,

> (b)(1) *Motions That May Be Made Before Trial.* A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.
>
> . . . .
>
> (e) **Ruling on Motion**. The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict.

Tenn. R. Crim. P. 12(b)(1), (e).

The court of criminal appeals in this case punctuated its remarks about bills of particulars with a citation to this Court's opinion in *State v. Goodman*, 90 S.W.3d 557, 561-62 (Tenn. 2002) and with an added parenthetical, "(approving a pretrial motion to dismiss that 'presented a question of law which was "capable or determination without the trial of the general issue,"' when the 'resolution of the defendant's motions required the trial court to interpret a statute and apply the statute to undisputed facts,' which were established by formal *stipulations*)." Nothing, however, in the language of Rule 12 or *Goodman* requires "formal stipulations."

The lower court's opinion grafts a procedural requirement that has not been previously recognized. Trial courts should be encouraged to consider and dispose of Rule 12 motions to dismiss, and those courts should be guided by clear-cut procedures to

avoid unnecessary procedural defaults. Measured by the language contained in the lower court's opinion, those procedures are now uncertain.

CONCLUSION

For the foregoing reasons, Mr. Sherman submits that his case contains substantive and procedural issues meriting discretionary review by this Court to settle important questions of law, public interest, and judicial efficiency. The trial court correctly dismissed the indictment charging Mr. Sherman with misdemeanor child neglect. The court of criminal appeals' opinion, if allowed to stand, opens unprecedented and unwarranted avenues of prosecution against those having no legal, formal, or heretofore recognized relationships with minor children. Accordingly, Mr. Sherman asks this Court to exercise is discretion to review the lower court's decision.

Respectfully submitted this the 10 day of September, 2007.

THE BOSCH LAW FIRM, P.C.

Donald A. Bosch (BPR 013168)
Attorney for Ariel Ben Sherman
712 South Gay Street
Knoxville, TN 37902
865.637.2142

Ann C. Short-Bowers (BPR 009145)
Attorney for Ariel Ben Sherman
712 South Gay Street
Knoxville, TN 37902
865.637.2142

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Rule 11 Application for Permission to Appeal has either been hand-delivered or placed in the United States Mail, postage prepaid to the following counsel of record:

Elizabeth B. Marney
Senior Counsel, Criminal Justice Division of the Attorney General's Office
P.O. Box 20207
Nashville, Tennessee 37202

Frank Harvey
9th Judicial District Attorney General's Office
1008 Bradford Way
Kingston, Tennessee 37763

Gregory P. Isaacs
Counsel for Jacqueline P. Crank
The Arcade Building, Suite 300
618 S. Gay Street
Knoxville, Tennessee 37902

This the 10 day of September, 2007.

THE BOSCH LAW FIRM, P.C.

By: _____
Donald A. Bosch

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
	)	NO. E2010-01917-SC-R11-CD
	)	
vs.	)	
	)	Campbell County Circuit Court
	)	No. 14163
	)	
	)	
STEVEN Q. STANFORD,	)	
	)	
Appellant.	)	

OPENING BRIEF OF APPELLANT, STEVEN Q. STANFORD

ANN C. SHORT (BPR # 009645)
THE BOSCH LAW FIRM, P.C.
712 S. Gay Street
Knoxville, Tennessee 37902
865.637.2142
ashort@boschlawfirm.com

Counsel for Appellant Stanford

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, Appellee, vs. STEVEN Q. STANFORD, Appellant.	)	NO. E2010-01917-SC-R11-CD Campbell County Circuit Court No. 14163

OPENING BRIEF OF APPELLANT, STEVEN Q. STANFORD

ANN C. SHORT (BPR # 009645)
THE BOSCH LAW FIRM, P.C.
712 S. Gay Street
Knoxville, Tennessee 37902
865.637.2142
ashort@boschlawfirm.com

Counsel for Appellant Stanford

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II. Whether this Court should rule as a matter of plain error that Mr. Stanford received an unauthorized sentence of 30 years as a Persistent, Range III Offender because (1) the record clearly shows that the state filed no legally effective recidivist sentencing notice; (2) the law is settled that the state's discovery responses, such as appear in this case, are inadequate to discharge its obligation to file a notice of enhanced punishment; (3) defense counsel prior to and at sentencing did not waive notice of enhanced punishment for tactical purposes; (4) the unauthorized 30-year sentence adversely affects a substantial right of Mr. Stanford; and (5) remedying this error is in the interest of substantial justice.

STATEMENT OF THE CASE

A Campbell County grand jury on July 6, 2009, returned a two-count indictment against the defendant, Steven Q. Stanford, charging initiation of a process to manufacture methamphetamine, T.C.A. § 39-17-435, and possession of drug paraphernalia with intent to deliver, T.C.A. § 39-17-425. (T.R. Vol. I at 1-2). The charges were tried before a jury on January 14 and 15, 2010, and Mr. Stanford was found guilty of the charged offense of initiation of a process and of the lesser-included offense of possession drug paraphernalia with intent to use. (T.E. Vol. II, Motion for New Trial, Exhibit 3 at 327, 329; T.R. Vol. I at 55-56).

Mr. Stanford was sentenced on February 22, 2010. (T.E. Vol. II, Motion for New Trial, Exhibit 4). The trial court imposed concurrent sentences of 30 years and 11 months and 29 days for the respective convictions. (T.R. Vol. II at 55-56). On March 9, 2010, Mr. Stanford filed a motion for new trial and raised three grounds related to different aspects of the sufficiency of the evidence. (T.E. Vol. I at 57). The trial court heard arguments on the new trial motion on August 16, 2010, and orally denied the motion at the conclusion of the hearing. (T.E. Vol. II at 23-24). On September 10, 2010, Mr. Stanford filed a premature Notice of Appeal. (T.R. Vol. I at 59). On January 24, 2011, the trial court then entered a written Order overruling the defense motion for new trial. (T.R. Vol. I at 60-B).[1]

On direct appeal, the Tennessee Court of Criminal Appeals ruled on the briefs submitted and affirmed Mr. Stanford's judgments of conviction. *See State v. Steven Q. Stanford*, No.

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[1] Inasmuch as Mr. Stanford's motion for new trial was filed prior to his premature notice of appeal, no *Lethco* issue presents itself. *See State v. John Anthony Lethco*, No. E2010-00058-CCA-R3-CD (Tenn. Crim. App., Knoxville, May 9, 2011), *perm. app. granted* (Tenn., Sept. 22, 2011), *motion to dismiss on abatement by death* (Dec. 5, 2011).

E2010-01917-CCA-R3-CD (Tenn. Crim. App., Knoxville, July 11, 2011) (copy attached). Mr. Stanford, proceeding pro se, filed a timely application with this Court for Rule 11 review. On October 25, 2011, this Court granted Mr. Stanford's application for permission to appeal, and this matter is now properly before the Court for consideration and disposition.

STATEMENT OF FACTS

The Tennessee Court of Criminal Appeals summarized in its opinion on direct appeal the evidence presented at trial in the following fashion:

> On April 21, 2009, the LaFollette Police Department received an alert regarding a reckless driver, who was possibly armed, driving a red Monte Carlo. Officer Pam Jarrett recognized the description of the vehicle and suspected that it belonged to the defendant. After verifying that it was the defendant's vehicle, she proceeded to travel to the address where the defendant resided. When she traveled by the home, she noted that the defendant's vehicle was not there. At the same time, Officer Jason Marlowe was also on the lookout for the vehicle in the defendant's neighborhood. He eventually stopped the car about one hundred and fifty feet from the residence.[2] The defendant and a female passenger were inside the vehicle. Once the defendant was removed from the car, he gave consent for the vehicle to be searched. Officer Marlow found a lithium battery, fully intact, inside the glove box of the car.[3]
>
> Meanwhile, Officer Jarrett, a trained methamphetamine technician, had also returned to the scene. She approached the house and encountered the defendant's brother, Tamra Rasnick, and David Allen. Officer Jarrett asked the group if anyone had been cooking methamphetamine, and they responded in the negative. She also asked for permission to search the home, which was given by Rasnick and Allen, who stated that they were staying at the house while they were repairing it. After entering

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[2] The record reflects no pretrial motions or trial objections on Tennessee Evidence Rules 404(b) or 403 grounds to alleged reckless driving conduct by Mr. Stanford or to Officer Marlow's testimony that he knew Mr. Stanford through the officer's "employment" at the police department. (T.E. Vol. II, Motion for New Trial, Exhibit 3 at 133). The problem/prejudice was magnified when Officer Marlow later testified (and the state argued in closing) that he drew his gun when he approached Mr. Stanford's vehicle, that according to the "officer's [anonymous hearsay] alert bulletin" Mr. Stanford was "possibly armed with a handgun" and had been "producing Methamphetamine," and that it is "well known [the Stanford brothers] don't like police." (T.E. Vol. II, Motion for New Trial, Exhibit 3 at 139-40, 143; Exhibit 4 at 299).

[3] From Officer Marlow's trial testimony, it is arguable that Mr. Stanford was illegally seized either when the officer activated his blue lights for the traffic stop or when Mr. Stanford was taken into custody/arrested at the scene of the stop – in either event, calling into serious question his later "consent" to the search of his vehicle. (T.E. Vol. II, Motion for New Trial, Exhibit 3 at 138-44). No defense challenge to the seizure or consent appears in the record.

the home, officers found nothing in plain view. However, when Officer Jarrett searched the outside perimeter of the home, she discovered a still smoldering burn pile.[4]

Based upon her experience, the materials she saw in the burn pile appeared to be of the type used in the manufacture of methamphetamine. She discovered coffee filters, four bottles which were melted down, measuring cups, lithium strips, a Walden-D allergy congestion pill box, blister packs, and plastic bags. She testified that the used lithium strips were consistent with coming from the type of battery found in the defendant's car. Officer Jarrett was also able to determine that one of the plastic bottles had been used as a "gas generator," which is classified as drug paraphernalia, to make methamphetamine and that, based upon her training, the process began no more than twelve hours previously. In the area, she also found tubing which tested positive for methamphetamine. Finally, in the burn pile, she discovered an AT&T telephone bill addressed to the defendant at that location. All the people present were detained for questioning after the discovery.

Based upon that discovery, Officer Jarrett returned to the inside of the house. In the trash can, she found a container of Morton salt, pseudoephedrine blister packs, measuring utensils and cups, more coffee filters, and a Walgreen's receipt showing the purchase of the allergy medication. She also discovered Drano and a dismantled cold-pack, known to contain ammonia nitrate, both known ingredients in the manufacture of methamphetamine. According to the testimony of Officer Jarrett, based upon the presence of personal care items and of men's and women's clothing, it was apparent that people were living in the residence. She made clear in her testimony that it appeared that both of the residence's bedrooms were occupied. The defendant, Tamra Rasnick, and David Allen were arrested.

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[4] The record reflects no pretrial motion or trial objection that the search of the backyard of the residence exceeded the scope of the alleged consent given to search the home. Even if consent is voluntary, evidence seized in a search will not be admissible if the search exceeds the scope of the consent given. *See State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002). Also it is arguable that the discovery and search of the "burn pile" occurred within the curtilage of the residence, which is entitled to the same state and federal constitutional protections against ground entry and seizure as the home. *See State v. Talley*, 307 S.W.3d 723, 729 (Tenn. 2010).

> Subsequently, the three were indicted by a Campbell County grand jury for initiation of a process to manufacture methamphetamine and for felony possession of drug paraphernalia. A joint trial was held in January 2010, at which Officers Jarrett and Marlowe testified to the above-mentioned facts. At the trial, a third officer testified that late on the night before this incident, he had taken a deputy to the residence because he knew that to be the address at which the defendant lived. When they approached the house, they were greeted by the defendant and a half-clothed female inside the residence.
>
> In his defense, the defendant called his mother, Josie Carter, the owner of the house, to testify. She stated that the defendant was not, and had not been, living in the house despite the fact that the phone, water, and electric bills were in his name. Ms. Carter testified that she had hired the defendant, Rasnick, and Allen to repair the home, which had been empty since the renter moved out in February. She further testified that the burn pile had been there since February 17, 2009, and was used only to burn things left by the previous tenant. A neighbor was also called to testify and stated that she believed that the house was vacant, although she did acknowledge seeing the defendant working on the home on the previous day.

Steven Q. Stanford, slip op. at 1-3 (copy attached).

The jury found Mr. Stanford's co-defendants, David Allen and Tamra Rasnick, guilty of attempt to commit initiation of Methamphetamine manufacture and possession of drug paraphernalia with intent to use. (T.E. Vol. II, Motion for New Trial, Exhibit 3 at 328-30).

The trial court sentenced Mr. Stanford on February 22, 2010. Trial counsel expressed confusion about Mr. Stanford's prior criminal history. The trial court attempted to cure the problem by disregarding the criminal history set out in the presentence investigative report and allowing the state to prove the relevant convictions at the sentencing hearing. (T.E. Vol. II, Motion for New Trial, Exhibit 4 at 8-9). The state offered records related to five felony convictions and multiple misdemeanor convictions. (T.E. Vol. II, Motion for New Trial, Exhibit 4

at 13-16). The trial court sentenced Mr. Stanford as a persistent offender to a maximum 30-year sentence on the initiation of Methamphetamine manufacture conviction with concurrent sentencing on the misdemeanor possession conviction. (T.E. Vol. II, Motion for New Trial, Exhibit 4 at 41).

ARGUMENT

I. MEASURED BY BOTH THE FEDERAL STANDARD FOR CONSIDERING CIRCUMSTANTIAL EVIDENCE, AS ADOPTED IN *STATE V. DORANTES*, AND THE STATE STANDARD THAT PREDATED *DORANTES*, THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. STANFORD'S CONVICTIONS AS THE STATE FAILED TO IDENTIFY WHERE A "KNOWING" INITIATION OCCURRED AND FAILED TO IDENTIFY WHO IT WAS THAT ENGAGED IN A "KNOWING" INITIATION AND POSSESSED DRUG PARAPHERNALIA WITH INTENT TO DELIVER OR USE.

It is settled that the standard of appellate review in assessing a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979). In making that determination, the appellate court affords the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom. *See State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010). In determining the sufficiency of the evidence, the appellate court does not reweigh the evidence, *see State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000), because questions regarding witness credibility, the weight to be given the evidence, and factual issues raised by the evidence are resolved by the jury, as the trier of fact. *See Majors*, 318 S.W.3d at 857. The defendant has the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict. *See State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). A jury verdict, however, "may not be based alone upon conjecture, guess, speculation of mere possibility." *State v. Tharpe*, 726 S.W.2d 896, 900 (Tenn. 1987) (quoting *Sullivan v. State*, 513 S.W.2d 152, 154 (Tenn. 1974)).

It is an offense "to knowingly initiate a process intended to result in the manufacture of any amount of methamphetamine." T.C.A. § 39-17-435(a). With respect to the mens rea element of "knowingly," our legislature has declared that a defendant "acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." *Id.* § 39-11-302(b). Unlike possessory offenses whereby possession can be actual or constructive, *e.g., State v. Transou,* 928 S.W.2d 949, 955-56 (Tenn. Crim. App. 1996), Code section 39-17-435(a) requires the knowing initiation of a process.

The state in this case had no evidence even identifying where the alleged knowing initiation occurred. Methamphetamine manufacturing produces, inter alia, distinctive odors. On the day of the arrests, when the officers initially searched the residence, nothing alerted them either in plain view or by plain smell, that a process had been initiated inside the house intended to result in the manufacture of methamphetamine. (T.E. Vol. II, Motion for New Trial, Exhibit 1 at 61-62). Moreover, there was no evidence that any of the individuals arrested that day appeared to be under the influence of some narcotic or that methamphetamine was found on anyone's person. According to Deputy Dennis Chadwell, who testified for the state in rebuttal, he was one of the law enforcement officers who went to the residence the previous evening. Deputy Chadwell testified that Mr. Stanford allowed Detective Goins "to look through the house." (T.E. Vol. II, Motion for New Trial, Exhibit 2 at 225-27). Deputy Chadwell agreed that Mr. Stanford was not charged with any offense that night. (T.E. Vol. II, Motion for New Trial, Exhibit 2 at 227). It is sheer speculation, consequently, to conclude that

methamphetamine initiation took place anywhere on the property; discarded items in a "burn pile" do not establish where the items were used or who used them.

Likewise, the state had no direct testimony in this case identifying who it was that initiated a process intended to result in the manufacture of methamphetamine. The state did pursue an "everybody-knows-where-Steve-Stanford-lives" approach, but at the close of the state's case-in-chief, the only relevant evidence that had been introduced connecting Mr. Stanford with the residence was an AT&T billing statement that Officer Jarrett found in the "burn pile." (T.E. Vol. II, Motion for New Trial, Exhibit 1 at 82-83). Even factoring into the evidence-sufficiency equation Officer Marlow's objectionable and grossly prejudicial testimony that according to the "officer's [anonymous hearsay] alert bulletin" Mr. Stanford was "possibly armed with a handgun" and had been "producing Methamphetamine," and that it is "well known [the Stanford brothers] don't like police," (T.E. Vol. II, Motion for New Trial, Exhibit 3 at 139-40, 143; Exhibit 4 at 299), the evidence at that stage was legally insufficient to sustain a conviction either for initiation of a process to manufacture methamphetamine or possession of drug paraphernalia with intent to deliver on April 21, 2009.[5]

Respectfully the deficiencies in the state's case-in-chief were not then overcome by its proof in rebuttal that Mr. Sanford was seen by law enforcement officers at the residence the evening before the arrests on April 21, 2009. If anything, that testimony established that an *evening search of the residence failed to uncover any evidence of initiation of a process to*

[5] Given the abysmal condition of the state's case when it rested, it is curious to say the least why defense counsel did not stand upon his motion for judgment of acquittal at the conclusion of the state's proof. A defendant who presents proof in his defense at trial thereby waives his or her motion for judgment of acquittal at the conclusion of the state's proof. *Finch v. State*, 226 S.W.3d 307, 313 (Tenn. 2007).

manufacture methamphetamine or possession of drug paraphernalia, and no basis existed to arrest Mr. Stanford that evening. Furthermore, Mr. Stanford was nowhere on the premises when Officer Jarrett discovered a still smoldering burn pile, "hot to the touch," (T.E. Vol. II, Motion for New Trial, Exhibit 1 at 62), but Mr. Stanford's co-defendants were at the house.

The court of criminal appeals struggled with the evidence sufficiency question. The bulk of its analysis focused on the evidence tending to show that Mr. Stanford resided at the house. As for Mr. Stanford being the one who initiated a process to manufacture methamphetamine, however, the court of criminal appeals wrote only,

> [T]he proof further established that the processing of the methamphetamine began no more than twelve hours prior to the officer's discovery of the burn pile. The proof established that the defendant was present during that time period, as he was seen there by two officers the previous evening. While we agree that his presence alone is insufficient to support the convictions, we must conclude that the totality of the circumstantial evidence presented, included the fact that a lithium battery was found in his car when he was stopped by police, was sufficient to allow a rationale juror to conclude beyond a reasonable doubt that the defendant was guilty of the crimes.

Steven Q. Stanford, slip op. at 6. Evidence legally sufficient to support the convictions in this case, like ambition in the Shakespearean sense, must be made of "sterner stuff" than a lithium battery. *See* William Shakespeare, Julius Caesar Act 3, scene 2, 91–94.

What the case law in this area discloses is that these types of prosecutions are troubling and particularly fact-intensive when it comes to examining the legal sufficiency of the convicting evidence. For example, in *State v. Eric Shane Heller*, No. W2007-01455-CCA-R3-CD (Tenn. Crim. App., Jackson, July 24, 2008), the court of criminal appeals reversed on evidence-sufficiency grounds a conviction for initiating a process to manufacture methamphetamine.

The defendant in that case was arrested at an automobile shop that he did not own. The court of criminal appeals explained,

> . . . We do not dispute that the prosecution was able to demonstrate several of the required statutory elements for initiating the manufacture of methamphetamine. . . .
>
> However, the prosecution failed to establish that the defendant was the individual responsible for violating the statute. First, the defendant had no possessory interest in the shop where the substances and drug-making materials were discovered. Second, no drugs, drug manufacturing materials or other items were found on the defendant's person. Third, and perhaps most importantly, no proof was presented that showed that the recovered substances and drug materials were in the defendant's actual or constructive possession or that he was involved in any preparation, modification, or extraction process to manufacture methamphetamine. *See State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981); *see also* [*State v.*] *Cooper*, 736 S.W.2d [125] at 129 [(Tenn. Crim. App. 1987)]. Fourth, testimony and other evidence offered at trial implicated Mr. Ferrell, the actual owner of the property where the commercial precursor products and semi-liquid, methamphetamine substance were discovered. Any inference of possession arising from the recovered materials should be imputed to Mr. Ferrell rather than to the defendant. *See* [*State v.*] Transou, 928 S.W.2d [949] at 956 [(Tenn. Crim. App. 1996)]. Fifth and finally, the evidence demonstrated that Mr. Ferrell may have initiated the methamphetamine manufacturing process in the woods prior to the arrival of police officers, and without any involvement by the defendant. Because the record is devoid of evidence establishing the defendant possessed the substances found or participated in a process to manufacture methamphetamine[, t]he prosecution failed to prove the defendant's guilt pursuant to Tennessee Code Annotated section 39-17-435.

Eric Shane Heller, slip op. at 11-12.

Despite the foregoing, should this Court regard the evidence as sufficient in this case, a final matter arises. That is, by what standard is the evidence sufficient. Is the evidence sufficient as measured by the circumstantial evidence instruction given the jury in this case,

which predated this Court's decision in *State v. Dorantes*, 331 S.W.3d 370 (Tenn. 2011)? Is there a different result if the evidence is assessed pursuant to *Dorantes*? Mr. Stanford submits that the evidence, as discussed above, is legally insufficient under either elaboration of how to treat circumstantial evidence, but it is clearly deficient as viewed pre-*Dorantes*.

Following *Dorantes*, this Court (without elaboration) has applied *Dorantes* to cases that were tried prior to the ruling in 2011. *See, e.g., State v. Parker*, 350 S.W.3d 883 (Tenn. 2011); *State v. Sisk*, 343 S.W.3d 60 (Tenn. 2011). Mr. Stanford regards it as significant that this Court has remarked that "as a practical matter, there was little difference between the federal standard and the 'reasonable hypothesis' language used in [*State v.*] *Crawford*, [470 S.W.2d 610 (Tenn. 1971)]" but that, "depending on the nature of the circumstantial evidence presented at trial, the adoption of the federal standard of proof could result in a different outcome in some cases." *Sisk*, 343 S.W.3d at 66. Indeed, this Court cautioned that the very situation in *Dorantes* "may qualify as one of those rare instances where the application of the federal and state standards could result in a different outcome." *Dorantes*, 331 S.W.3d at 381.

Mr. Sanford respectfully requests that this Court review the sufficiency of the convicting evidence under both federal and state standards that existed before *Dorantes*. That review should, Mr. Stanford predicts, lead to the conclusion that the evidence is insufficient under both standards, but most assuredly is insufficient under the state standard that prevailed prior to *Dorantes*.

II. THIS COURT SHOULD RULE AS A MATTER OF PLAIN ERROR THAT MR. STANFORD RECEIVED AN UNAUTHORIZED SENTENCE OF 30 YEARS AS A PERSISTENT, RANGE III OFFENDER BECAUSE (1) THE RECORD CLEARLY SHOWS THAT THE STATE FILED NO LEGALLY EFFECTIVE RECIDIVIST SENTENCING NOTICE; (2) THE LAW IS SETTLED THAT THE STATE'S DISCOVERY RESPONSES, SUCH AS APPEAR IN THIS CASE, ARE INADEQUATE TO DISCHARGE ITS OBLIGATION TO FILE A NOTICE OF ENHANCED PUNISHMENT; (3) DEFENSE COUNSEL PRIOR TO AND AT SENTENCING DID NOT WAIVE NOTICE OF ENHANCED PUNISHMENT FOR TACTICAL PURPOSES; (4) THE UNAUTHORIZED 30-YEAR SENTENCE ADVERSELY AFFECTS A SUBSTANTIAL RIGHT OF MR. STANFORD; AND (5) REMEDYING THIS ERROR IS IN THE INTEREST OF SUBSTANTIAL JUSTICE.

Mr. Stanford was improperly sentenced as a Persistent, Range III offender to serve 30-years' incarceration on his Class B felony conviction for initiation of a process to manufacture methamphetamine. As Mr. Stanford shall explain, no legally effective recidivist sentencing notice was ever filed in this case. This Court should notice as plain error the improper sentence and resentence Mr. Stanford to eight-years' incarceration as a Range I offender.

A. Recidivist Notice Requirements in Tennessee

Nearly 30 years ago, Tennessee overhauled its sentencing scheme with the Tennessee Criminal Sentencing Reform Act of 1982. *See* Tenn. Pub. Acts ch. 868 § 1. The Act dramatically altered the analytical framework for how sentences are computed and imposed and altered notice provisions for recidivist sentencing. The subsequent Criminal Sentencing Reform Act of 1989 introduced no major changes to the requirements or the methods for providing notice of recidivist sentencing.

B. Death Penalty and Life Without Parole Notices

For the state's intention to seek the death penalty or imprisonment for life without the possibility of parole, Code section 39-13-208 and Tennessee Rule of Criminal Procedure 12.3(b) control the timing and method for seeking such punishment. Rule 12.3(b) provides,

> When the indictment or presentment charges a capital offense and the district attorney general intends to ask for the death penalty, he or she shall file notice of this intention not less than thirty (30) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.

Tenn. R. Crim. P. 12.3(b)(1).

Code section 39-13-208 specifies in relevant part,

> (a) Written notice that the state intends to seek the death penalty, filed pursuant to Rule 12.3(b) of the Tennessee Rules of Criminal Procedure, shall constitute notice that the state also intends to seek, as a possible punishment, a sentence of imprisonment for life without possibility of parole.
>
> (b) Where a capital offense is charged in the indictment or presentment and the district attorney general intends to ask for the sentence of imprisonment for life without possibility of parole, written notice shall be filed not less than thirty (30) days prior to trial. If the notice is filed later than this time, the trial judge shall grant the defendant, upon motion by the defendant, a reasonable continuance of the trial. The notice shall specify that the state intends to seek the sentence of imprisonment for life without possibility of parole, and the notice shall specify the aggravating circumstance or circumstances the state intends to rely upon at a sentencing hearing. Specification may be complied with by a reference to the citation of the circumstance or circumstances. Such notice shall be in writing and filed with the court and served on counsel.
>
> (c) If notice is not filed pursuant to subsection (a) or (b), the defendant shall be sentenced to imprisonment for life by the court, if the defendant is found guilty of murder in the first degree.

T.C.A. § 39-13-208(a), (b), & (c).

In the leading case, *State v. Gilliland*, 22 S.W.3d 266 (Tenn. 2000), this Court held that the state's withdrawal of its original notice of intention to seek the death penalty, without more, also operated to withdraw notice of its intention to seek a sentence of life without

parole. Absent a properly filed notice, the defendant was sentenced to life imprisonment upon his conviction for first degree murder. *Id.* at 275-76. *See also State v. Dych*, 227 S.W.3d 21 (Tenn. Crim. App. 2006) (applying *Gilliland* and holding state's failure to file required notice required modification of sentence to life with the possibility of parole, even though the defendant did not object to the timing of the notice).

C. Repeat Violent Offender Notice

The recidivist notice requirements for sentencing as a repeat violent offender are set forth in Code section 40-35-120(i)(2), which provides,

> The district attorney general shall file a statement with the court and the defense counsel within forty-five (45) days of the arraignment pursuant to Rule 10 of the Rules of Criminal Procedure that the defendant is a repeat violent offender. The statement, which shall not be made known to the jury determining the guilt or innocence of the defendant, shall set forth the dates of the prior periods of incarceration, as well as the nature of the prior conviction offenses. If the notice is not filed within forty-five (45) days of the arraignment, the defendant shall be granted a continuance so that the defendant will have forty-five (45) days between receipt of notice and trial.

T.C.A. § 40-35-120(i)(2).

This recidivist notice provision was before the Court in *State v. Cooper*, 321 S.W.3d 501 (Tenn. 2010). The state's notice in that case, according to this Court, failed to state that the defendant was a repeat offender and failed to set forth the nature of the prior conviction and the dates of the prior periods of incarceration. *Id.* at 506. Because of "these omissions . . . the [state's] filing did not qualify as notice pursuant to the repeat violent offender statute." *Id.*

This Court in *Cooper* then considered an appropriate remedy and found its analysis in *Gilliland* to be instructive and persuasive.

> Although the repeat violent offender statute does not have a provision mandating a remedy similar to that of Tennessee Code Annotated section 39-13-208(c), we believe that the severity of the sentence in this case--a mandatory sentence of imprisonment for life without parole--requires a similar result. We therefore conclude that the sentence of imprisonment for life without the possibility of parole was not authorized because the only substantially compliant notice was filed after trial and therefore was ineffective. We hold that the unauthorized sentence adversely affected a substantial right of Mr. Cooper and that remedying this error is in the interest of substantial justice. We therefore remand this case for re-sentencing in accordance with the notice filed on May 12, 2003, to seek enhanced punishment as a multiple, persistent, or career offender pursuant to Tennessee Code Annotated section 40-35-202.

Cooper, 321 S.W.3d at 507-08 (finding sentence as a repeat violent offender was plain error).

D. Multiple, Persistent or Career Offender Notice

The most commonly encountered recidivist notice provisions are found in Code section 40-35-202(a) and Criminal Procedure Rule 12.3(a). Code section 40-35-202(a) provides in relevant part,

> If the district attorney general believes that a defendant should be sentenced as a multiple, persistent or career offender, the district attorney general shall file a statement thereof with the court and defense counsel not less than ten (10) days before trial or acceptance of a guilty plea; provided, that notice may be waived by the defendant in writing with the consent of the district attorney general and the court accepting the plea. The statement, which shall not be made known to the jury determining the guilt or innocence of the defendant on the primary offense, must set forth the nature of the prior felony *convictions, the dates of the convictions and the identity of the* courts of the convictions. The original or certified copy of the court record of any prior felony conviction, bearing the same name as that by which the defendant is charged in the primary offense, is prima facie evidence that the defendant named in the record is the same as the defendant before the court, and is prima facie evidence of the facts set out in the record.

T.C.A. § 40-35-202(a).

Criminal Procedure Rule 12.3(a) provides,

> If the district attorney general intends to seek an enhanced punishment as a multiple, persistent, or career offender, the district attorney general shall file notice of this intention not less than ten (10) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.

Tenn. R. Crim. P. 12.3(a). The foregoing notice provisions are implicated in Mr. Stanford's case.

It is settled that Code section 40-35-202(a)'s notice provision "is a sentencing statute, and it clearly places an affirmative burden on the State to expressly notify the defendant of its intentions regarding sentencing." *State v. Benham*, 113 S.W.3d 702, 705 (Tenn. 2003). "It requires no request from the defendant." *Id.* The notice requirement is intended "to provide the defendant with 'fair notice' that he is exposed to something other than standard sentencing . . . [and] to facilitate plea bargaining, to inform plea discussions, and to assist with trial strategy." *Id.* (citing *State v. Adams*, 788 S.W.2d 557, 559 (Tenn. 1990)).

In *Benham*, this Court accepted review to consider whether the state's response to the defense discovery response complied with the statutory mandate of Code section 40-35-202(a). In that case, the state provided to the defense as discovery a computer printout of the defendant's criminal record, and as part of its discovery response stated, "The defendant, based on his overall record, is a career offender." *Benham*, 113 S.W.3d at 703.

This Court ruled that the state's "casual allusion to the notice statute in its response to a Rule 16(a)(1)(B) request amounted to an 'empty notice' because it did not include all the information required by section 40-35-202(a)." *Benham*, 113 S.W.3d at 705. Construing the plain language of the statute, this Court emphasized that a notice to be compliant must set

contain: "1. the nature of the convictions; 2. the dates of the convictions; and 3. the identity of the courts of the convictions." *Id.* The Court then explained,

> In this case, the State, in its discovery response pursuant to Tennessee Rule of Criminal Procedure 16(a)(1)(B), stated that "the defendant, based on his overall record, is a career offender." The State then attached to the discovery response a photostatic copy of the defendant's record of criminal offenses. The record contains the charges, the identity of the courts in which the convictions occurred, and the dates of disposition. Missing, however, is any indication of the nature of the prior felony convictions. Under these circumstances, we hold that the Court of Criminal Appeals erred when it affirmed the trial court's finding that the state had substantially complied with Tennessee Code Annotated section 40-35-202(a).

Benham, 113 S.W.3d at 705.

Three years after *Benham*, this Court took the opportunity in *State v. Livingston*, 197 S.W.3d 710 (Tenn. 2006), to re-emphasize the mandatory notice requirements.

> To reiterate, the notice provision of Tenn. Code Ann. § 40-35-202(a) requires, at a minimum, that the State file: (1) written notice, (2) clearly expressing the State's intention to seek sentencing outside of the standard offender range, (3) setting forth the nature of the prior felony conviction, the dates of the convictions, and the identity of the courts of the convictions.

Livingston, 197 S.W.3d at 713-14 (footnote omitted).

E. No Effective Notice of Intent to Seek Enhanced Punishment Ever Filed in This Case

The record in this case reveals that the Campbell County District Attorney General's Office responded to a defense request for discovery and inspection by filling out a form entitled, "Response to Discovery Request & Pre-Trial Notices, Request, & Demands." (T.R. Vol. I at 29). The form appears in the appellate record in the following fashion:

IN THE CRIMINAL COURT FOR CAMPBELL COUNTY, TENNESSEE

COPY

STATE OF TENNESSEE

VS.

Steven Q. Stanford CASE # 14463

Response to Discovery Request & Pre-Trial Notice, Request, & Demands

In response to the defendant's request for discovery pursuant to Rule 16 of Tennessee Rules of Criminal Procedure, the State hereby provides or makes available as indicated the items shown on the Inventory of Discoverable Materials and responds to specific defense requests for production of materials as follows:

I. Statements

A. Written or recorded statements of the defendant. ☒ None known to exist. ☐ See item(s) ____ of the Inventory.

B. Substance of oral statements made before or after arrest in response to interrogation by any person then known to the defendant to be a law enforcement officer. ☐ None known to exist. ☐ See item(s) ____ of the Inventory. ☒ Provided by preliminary hearing testimony.

C. Statements of co-defendants. ☐ Not applicable. ☐ None known to exist. ☒ See item(s) 11 of the Inventory.

D. There is no recorded testimony of the defendant or any co-defendant before a Grand Jury which relates to the charges in this case.

II. Criminal Record of the Defendant

	Court	Case#	Date	Offense	Class
1	Crim. Ct. Campbell Co.	3991	5/9/97	Reckless Endangerment	E(F)
2.	"	3996	5/8/97	"	E(F)
3.	"	3996	5/8/97	Evading	D(F)
4.	Crim. Ct. Campbell Co.	9330	2/18/98	Agg. Assault	C(F)
5.	"	"	"	Felony Evading	D(F)
6.	Crim. Ct. Campbell Co.	9332	2/18/98	DUI - 2nd	A(M)
7.	"	9340	2/18/98	P.I.	C(M)
8.	"	"	2/18/98	Evading	A(M)
9.	Crim. Ct. Campbell Co.	11320	11/7/03	Assault	B(M)
10.	"	"	"	Contrib. Delinq. Minor	A(M)
11.	"	"	"	Assault	B(M)
12.	"	"	"	Contrib. Delinq. Minor	A(M)
13.	Camp. Co. Crim. Ct.	11496	3/3/04	Assault	A(M)
14.	"	"	3/3/04	Vand.	A(M)
15.	(Continued on Attachment "A")				

* The State intends to use the conviction to impeach the defendant pursuant to Rule 609 of the Tennessee Rules of Evidence.
** If less than 10 years have elapsed from defendant's release from confinement.

III. Documents and Tangible Objects, Reports of Examinations, and Tests

A. A copy of all books, papers, documents, photographs, reports of mental or physical examinations, reports of scientific tests or experiments material to the preparation of the defense or intended for use by the State as evidence in chief at trial are shown on the inventory and are hereby provided to the defendant. The actual materials in the possession of the State from which the said copies were made may be inspected by contacting the District Attorney General, Asst. District Attorney General, or investigator providing this discovery.

B. Tangible objects which the State intends to introduce in evidence in its case in chief or which may be material to the preparation of the defense are listed on the Inventory. These tangible objects may be inspected by contacting the District Attorney General, or investigator providing this discovery. (or the following law enforcement officers: ____)

IV. Electronic Surveillance

☒ None conducted. ☐ See item(s) ____ of the Inventory.

V. Pre-Trial Identification Procedures

☒ None conducted. ☐ See item(s) ____ of the Inventory.

Attachment "A"

(Cont.)

State of Tennessee
vs.
Steven Q. Stanford

#14163

II. Criminal Record of the Defendant

	Court	Case #	Date	Offense	Class
a.	Crim. Ct. Campbell Co.	12469	2/3/05	Agg. Burglary	C(F)
b.	" "	"	"	Agg. Burglary	C(F)
c.	" "	"	"	Assault	A(M)
d.	" "	"	"	Assault	A(M)
e.	" "	"	"	Assault	A(M)
f.	" "	"	"	Assault	A(M)
g.	" "	"	"	DEL	A(M)
2.	Crim. Ct. Campbell Co.	13672	9/13/07	Felony Evading	E(F)
3.	G.S. Campbell Co.	CAN17205	9/17/02	Assault	A(M)
4.	G.S. Campbell Co.	CAN8496,540	5/13/03	Theft < $500	A(M)
5.	" "	" "	"	Vandl. < $500	A(M)
6.	G.S. Campbell Co.	115201-103-73	1/4/02	DWI - 1st	A(M)
17.	" "	117977-102-470	10/24/01	Inhaling Paint	B(M)

Attachment "A"

The form tracks the categories of discovery set forth in Criminal Procedure Rule 16, such as subsection I of the form address "Statements" of the defendant or codefendants; subsection II of the form covers "Criminal Record of the Defendant"; subsection III references "Documents and Tangible Objects, Reports of Examinations, and Tests"; subsection IV is labeled "Electronic Surveillance"; and subsection V is labeled "Pre-Trial Identification Procedures." (T.R. Vol. I at 29).

Subsection II of the form covering "Criminal Record of the Defendant" has handwritten entries with case numbers, offenses, courts, and dates. (T.R. Vol. I at 29). The classifications for the offenses are listed with accompanying single and/or double asterisks. Printed on the form is the following explanation for the asterisks:

> * The State intends to use the conviction to Impeach the defendant pursuant to Rule 609 of the Tennessee Rules of Evidence.
> ** Less than 10 years have elapsed from defendant's release from confinement.

(T.R. Vol. I at 29). Nowhere does the form recite or suggest that the state is providing notice of enhanced sentencing, nor is the nature of the prior convictions set forth.

Ostensibly in response to subsection II of the form listing offenses with a single asterisk, the defense filed on December 7, 2009, a Motion for Hearing on State's Notice of Intent to Impeach Defendant for Prior Convictions. (T.R. Vol. I at 9). No ruling appears in the record.

Mr. Stanford's case was tried on January 14 and 15, 2010. The state filed nothing about sentencing prior to that time. Then, on February 19, 2010, three days prior to sentencing, the state filed a form entitled, "Sentencing Notices and Recommendations." (T.R. Vol. I at 25-30). That form appears in the appellate record in the following fashion:

IN THE CRIMINAL COURT FOR Campbell COUNTY, TENNESSEE

STATE OF TENNESSEE

VS. CASE # 14163

Steven Q. Stanford

SENTENCING NOTICES AND RECOMMENDATIONS

On Jan 15, 2010, the defendant was convicted in this Court of the offense (s) listed below:

CASE #	COUNT	OFFENSE	FELONY CLASS	FINE
14163	1	Initiation of Meth. Manuf.	B(F)	
	2	Poss. Drug Para. w/Intent to Use	A(M)	

FILED
CRIMINAL COURT -- CAMPBELL COUNTY, TN
DATE 2-19-10 TIME 3:31 P.M.
BOBBY W. VANN CLERK
[signature]
DEPUTY CLERK

I. TABLE OF FELONY PUNISHMENTS

CLASS	MINIMUM/MAXIMUM PUNISHMENT FOR CLASS	STANDARD (RANGE I 30%)	MULTIPLE (RANGE II 35%)	PERSISTENT (RANGE III 45%)	CAREER (60%)	FINE	DRUG OFFENSE FINES
A	15-60	15-25	25-40	40-60	60	$50,000	$500,000
(B)	(8-30)	8-12	12-20	(20-30)	30	$25,000	$100,000
C	3-15	3-6	6-10	10-15	15	$10,000	$100,000
D	2-12	2-4	4-8	8-12	12	$5,000	$50,000
E	1-6	1-2	2-4	4-6	6	$3,000	$5,000

[illegible]

II. OFFENDER STATUS

[1] Prior to trial, the State filed an enhancement notice pursuant to Tennessee Code Annotated §40-35-202 that the defendant as a result of the prior convictions and marked with an asterisk in the Table of Prior Convictions below should be sentenced as to (all) counts ______ as a:

- ☐ multiple, Range II, (35%) offender (Tennessee Code Annotated §40-35-106)
- ☑ persistent, Range III, (45%) offender (Tennessee Code Annotated §40-35-107)
- ☐ career, maximum sentence, (60%) offender (Tennessee Code Annotated §40-35-108)

☐ The defendant should be sentenced as to (all) count(s) ______ as a standard, Range I (30%) offender pursuant to Tennessee Code Annotated §40-35-105 as there are insufficient prior convictions to enhance the sentence into a higher range and the defendant does not qualify to be found to be an especially mitigated offender, pursuant to Tennessee Code Annotated §40-35-109, for the following reason(s):

- ☐ the defendant has a prior felony conviction;
- ☐ enhancement factors as set forth herein exist;
- ☐ no mitigating factors exist.

☐ As the conviction offense in (all) count(s) ______ is second degree murder aggravated or especially aggravated kidnapping, especially aggravated robbery, aggravated rape, rape, aggravated sexual battery, aggravated arson, aggravated child abuse, the defendant must serve at least 85% of the sentence pursuant to Tennessee Code Annotated §40-35-501. The defendant is a Range ______ offender as to these offenses.

☐ As the conviction offense(s) on (all) count(s) ______ [illegible] rape or [illegible] conviction(s) for rape or aggravated rape which makes the defendant a multiple rapist as he has now been twice convicted of either rape or aggravated rape or a combination of the offenses. The defendant must serve 100% of the sentence pursuant to Tennessee Code Annotated §39-13-523. The defendant is a Range ______ offender as to these offenses.

III. DEFENDANT'S PRIOR CRIMINAL CONVICTIONS

COURT	CASE #	COUNT	DATE	OFFENSE	CLASS	ENHANCING CONVICTION

See Attachment Exhibit "A".

Additional convictions may be discovered and shown on the Pre-Sentence Report.

IV. NOTICE OF SENTENCING FACTORS

The State of Tennessee pursuant to Tennessee Code Annotated §40-35-20, (b) hereby provides notice of the enhancement factors set forth in Tennessee Code Annotated §40-35-114 and mitigating factors set forth in Tennessee Code Annotated §40-35-113 which are appropriate for the Court's consideration in sentencing the Defendant:

ENHANCEMENT FACTORS

- [✓] The defendant has a prior history of criminal convictions or behavior in addition to those necessary to establish the appropriate range as shown on the table of prior convictions above.
- [✓] The defendant was a leader in the commission of an offense involving two or more actors.
- [ ] The offense involved more than one victim.
- [ ] The defendant treated or allowed a victim to be treated with exceptional cruelty during commission of the offense.
- [ ] The victim(s) of the offense was/were particularly vulnerable because of age or physical or mental disability.
- [ ] (The personal injuries inflicted upon the victim) or (The amount of damage sustained by or taken from the victim) was particularly great.
- [ ] The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement.
- [✓] The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in community.
- [ ] The defendant possessed or employed (a firearm) (an explosive device) or (a _____) a deadly weapon) during the commission of the offense.
- [ ] The defendant had no hesitation about committing a crime when the risk to human life was high.
- [ ] The felony resulted in death or bodily injury or the threat of to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury.
- [ ] During the commission of the felony, (the defendant willfully intentionally bodily injury upon another person) or (the defendant's actions resulted in the death or serious bodily injury to a victim or person other than the intended victim).
- [✓] The felony was committed while the defendant was on the following release status from the indicated prior felony conviction:
  [ ] B.I.I. [ ] Parole [✓] Probation [ ] Work Release [ ] Community Corrections [ ]
  Applicable Prior Felony Conviction(s): Felony Evading, E(F), Campbell Co. Crim. Court #13672
- [ ] The felony was committed while (on escape status from _____) (incarcerated in _____) for a felony conviction.
- [ ] The defendant (abused a position of public or private trust) or (used a professional license in a manner that significantly facilitated the commission or fulfillment of the offense).
- [ ] The victim of the aggravated assault was a (law enforcement officer)(fire fighter)(probation officer)(parole officer)(correctional officer)(security officer)(employee of the Department of (Corrections)(Children's Services))(emergency medical worker, technician, or paramedic)(emergency rescue worker) performing an official duty and whose status was known or should have been known by the defendant.
- [ ] The defendant committed the offense on the grounds or facilities of a pre-kindergarten through 12th grade of a public or private institution of learning when minors were present.
- [ ] The defendant was adjudicated to have committed the following delinquent act or acts as a juvenile that would constitute a felony if committed by an adult: _____

☐ The defendant intentionally selected the person against whom the crime was committed or selected the property that was damaged or otherwise affected by the crime in whole or in part because of the defendant's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or the owner or occupant of that property.

☐ The offense was an act of terrorism, or was related to an act of terrorism.

☐ The defendant, convicted of the offense of rape, sexual battery, or rape of a child, caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance.

☐ The defendant, convicted of the offense of aggravated rape, rape, rape of a child, or statutory rape, knew or should have known that at the time of the offense that he/she was HIV positive.

☐ The defendant, convicted of the offense of aggravated arson or vandalism caused damage or destruction to a religious structure, whether temporary or permanent in nature, used as a place of worship and the defendant knew or should have known that it was a place of worship.

MITIGATING FACTORS

☑ No statutory mitigating factors exist.

☐ The defendant's criminal conduct neither caused nor threatened serious bodily injury.

☐ The defendant acted under strong provocation.

☐ Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.

☐ The defendant played a minor role in the commission of the offense.

☐ Before detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained.

☐ The defendant, because of youth or old age, lacked substantial judgement in committing the offense.

☐ The defendant was motivated by a desire to provide necessities for his family or himself.

☐ The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense; however, voluntary use of intoxicants does not fall within the purview of this factor.

☐ The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses.

☐ The defendant assisted the authorities in locating or recovering any property or person involved in the crime.

☐ The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct.

☐ The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime.

☐ Other. _____

V. CONSECUTIVE SENTENCING

Pursuant to Rule 32 of the Tennessee Rules of Criminal Procedure, the Court should impose consecutive sentences in the multiple counts in this case and/or order that the sentence(s) in this case be served consecutively to sentences in the cases listed below for the reason(s) set forth below.

Prior convictions for Which Sentences are not Fully Served

COUNT	CASE#	DATE	OFFENSE	CLASS	SENTENCE	STATUS OF DEFENDANT

A.

☐ Grounds for Discretionary Consecutive Sentencing (Tenn. Code Annotated §40-35-115)

☐ The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood

☐ The defendant is an offender whose record of criminal activity is extensive. (Use table of convictions)

☐ The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with needless indifference to consequences.

☐ The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life was high; the circumstances of the commission of the offense were aggravated; confinement for an extended period is necessary to protect society and to protect the public against further criminal conduct by the defendant; and the aggregate length of the sentences reasonably relate to the severity of the offenses committed.

☐ The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between unlawful sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

☐ The defendant is sentenced for an offense committed while on probation.

B.

☐ Consecutive Sentencing with Foreign State or Federal Convictions

The sentence(s) in this case shall be ordered to be served consecutively to the less-severely served sentence in the above (other State) or (federal) court(s) as there is no good cause to run the sentences concurrently. Rule 32(c)(2) of the Tennessee Rules of Criminal Procedure.

C.

☐ Mandatory Consecutive Sentencing

Pursuant to Rule 32(c)(3)(C) of the Tennessee Rules of Criminal Procedure, the sentencing in this case must be ordered to be served consecutively to prior convictions shown above for the following reason:

☐ The conviction is for the felony committed while on parole for the felony of _____ above.

☐ The conviction is for escape.

☐ The conviction is for a felony committed while on escape.

☐ The conviction is for a felony committed while on release on bail for the felony offense(s) of _____ for which he was convicted as shown above.

VI. The State recommends the following sentence in this case:

Ct. 1 - Manuf. Meth., B(F), Persistent Offender, Range III @ 45%, 30yrs TDOC

Ct. 2 - Poss. Drug Para. w/ Intent to Sell, A(M), 11/29 @ 75%

Ct. 1 & 2 to run Concurrent for an effective 30yr. sentence to be served in TDOC Custody. This case to be Consecutive to Case #13672.

NOTE: Defendant has a pending VOP in case #13672 w/a 2yr. sentence. State would recommend that he be found in violation, ordered to serve the sentence w/credit since 4/21/

This the 19th day of February, 20 10

Scarlett O. Ellis
Assistant District Attorney General

CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing document has been served upon defense counsel or pro se by hand delivery or by mail

This the 19th day of February, 20 10

Scarlett O. Ellis
Assistant District Attorney General

IN THE CRIMINAL COURT FOR CAMPBELL COUNTY, TENNESSEE

COPY

STATE OF TENNESSEE

VS.

Steven Q. Stanford CASE # 14163

Response to Discovery Request & Pre-Trial Notices, Request, & Demands

In response to the defendant's request for discovery pursuant to Rule 16 of Tennessee Rules of Criminal Procedure, the State hereby provides or makes available as indicated the items shown on the Inventory of Discoverable Materials and responds to specific defense requests for production of materials as follows:

I. Statements

A. Written or recorded statements of the defendant. ☒ None known to exist. ☐ See item(s) ____ of the Inventory.

B. Substance of oral statements made before or after arrest in response to interrogation by any person then known to the defendant to be a law enforcement officer. ☐ None known to exist. ☐ See item(s) ____ of the Inventory. ☐ Provided by preliminary hearing testimony.

C. Statements of co-defendants. ☐ Not applicable. ☐ None known to exist. ☒ See item(s) 1-11 of the Inventory.

D. There is no recorded testimony of the defendant or any co-defendant before a Grand Jury which relates to the charges in this case.

II. Criminal Record of the Defendant

	Court	Case#	Date	Offense	Class
1	Crim. Ct. Campbell Co.	3996	5/3/97	Reckless Endangerment	CL(F)
2.	" "	3996	5/3/97	"	CL(F)
3.	" "	3996	5/3/97	Evading	D(F)
4.	Crim. Ct. Campbell Co.	9330	2/12/98	Agg. Assault	C(F)
5.	" "	"	"	Felony Evading	D(F)
6.	Crim. Ct. Campbell Co.	9332	2/12/98	DUI - 2nd	A(M)
7.	" "	9340	2/12/98	P.I.	C(M)
8.	" "	"	2/12/98	Evading	A(M)
9.	Crim. Ct. Campbell Co.	11220	11/7/03	Assault	B(M)
10.	" "	"	"	Contrib. Delinq. Minor	A(M)
11.	" "	"	"	Assault	B(M)
12.	" "	"	"	Contrib. Delinq. Minor	A(M)
13	Camp. Co. Crim. Ct.	11196	3/5/04	Assault	A(M)
14.	" "	"	3/5/04	Vand.	A(M)
15	Continued on Attachment "A"				

* The State intends to use the conviction to impeach the defendant's testimony pursuant to Rule 609 of the Tennessee Rules of Evidence.
** Less than 10 years have elapsed from defendant's release from confinement.

III. Documents and Tangible Objects, Reports of Examinations, and Tests

A. A copy of all books, papers, documents, photographs, reports of mental or physical examinations, reports of scientific tests or experiments material to the preparation of the defense or intended for use by the State as evidence in chief at trial are shown on the inventory and are hereby provided to the defendant. The actual materials in the possession of the State from which the said copies were made may be inspected by contacting the District Attorney General, Asst. District Attorney General, or investigator providing this discovery.

B. Tangible objects which the State intends to introduce in evidence in its case in chief or which may be material to the preparation of the defense are listed on the inventory. These tangible objects may be inspected by contacting the District Attorney General, or investigator providing this discovery. (or the following law enforcement officers: ____)

IV. Electronic Surveillance

☒ None conducted. ☐ See item(s) ____ of the Inventory.

V. Trial Identification Procedures

None conducted. ☐ See item(s) ____ of the Inventory.

Attachment "A"

(Cont.)

State of Tennessee
vs.
Steven Q. Stanford

#14163

II. Criminal Record of the Defendant

	Court	Case #	Date	Offense	Class
..	Crim. Ct. Campbell Co.	12469	7/?/05	Agg. Burglary	C(F)
1.	" "	"	"	Agg. Burglary	C(F)
7.	" "	"	"	Assault	A(M)
6.	" "	"	"	Assault	A(M)
1.	" "	"	"	Assault	A(M)
9.	" "	"	"	Assault	A(M)
11.	" "	"	"	D.R.L.	A(M)
2	Crim. Ct. Campbell Co.	13672	4/16/07	Felony Evading	E(F)
3.	G.S. Campbell Co.	CM117205	4/17/02	Assault	A(M)
4.	G.S. Campbell Co.	CM14494, 540	5/13/03	Theft < 500	A(M)
5.	" "	" "	"	Vand. < 500	A(M)
6.	G.S. Campbell Co.	118201-103-78	1/14/92	DWI - 1st	A(M)
17.	" "	117577-102-470	10/24/91	Inhaling Paint	B(M)

Attachment "A"

03

On the first page of that February 19, 2010 form, under subsection II, entitled "Offender Status," the state marked it as follows:

> ☑ Prior to trial, the State filed an enhancement notice pursuant to Tennessee Code Annotated § 40-35-202 that the defendant as a result of the prior convictions and marked with an asterisk in the Table of Prior Convictions below should be sentence as to (all) counts _____ as a:
>
> . . . .
>
> ☑ persistent, Range III, (45%) offender (Tennessee Code Annotated § 40-35-107)

(T.R. Vol. I at 25). Contrary, however, to the box marked by the state, no enhancement notice pursuant to Tennessee Code section 40-35-202 had ever been filed. Appended to the February 19, 2010 form as "Attachment Exhibit 'A'" was the "Response to Discovery Request & Pre-Trial Notices, Request, & Demands." (T.R. Vol. I at 29). At least in *Benham*, the state made a passing reference as part of its discovery response that the defendant was a career offender. *Benham*, 113 S.W.3d at 703. No mention of Persistent Offender status, passing or otherwise, appears in the state's discovery responses herein.

Any question or ambiguity about what the state relied on was answered fully at sentencing, when the state announced, "Notice was given to Defense counsel when discovery was completed December the 14th of 2009, and copies of all these convictions were given to him at that time, but I do have copies for him today." (T.E. Vol. II, Motion for New Trial, Exhibit 4 at 13).

The remaining question is whether this Court should grant Mr. Stanford plain error relief, and he submits that his situation squarely falls within the criteria for plain error review. As set forth in Rule 36(b) of the Tennessee Rules of Appellate Procedure, "[w]hen necessary to

do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." The following five elements must be satisfied before an alleged error qualifies for review as plain error:

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

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

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

(d) the accused did not waive the issue for tactical reasons; and

(e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (citations and footnotes omitted); *see also State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (adopting the *Adkisson* five-element test). Your review of an issue under the plain error doctrine is contingent upon all five of these elements having been satisfied, and if any one of the elements is not met, the Court need not consider the other four in denying relief.

The record in this case shows us unequivocally what occurred in the trial court or, in this instance, what did not occur. The state never filed the required notice of enhanced punishment and never even alluded to Persistent Offender status in its discovery responses. The first time the state mentioned Mr. Stanford's offender status was in its Sentencing Notices *and Recommendations, but those were not filed until three days prior to sentencing.*

Pursuant to *Benham* decided in 2003, the state was on specific notice that discovery responses, containing information about a defendant's prior criminal history, -- even those that

allude to a defendant's offender status – do not comply with the statutory mandate of Code section 40-35-202(a). Thus, the state breached a clear and unequivocal rule of law.

From the difference between a 30-year sentence as a Persistent Offender and an eight to 12-year sentence as a Range I standard offender, it should be self evident that a substantial right of Mr. Stanford was adversely affected.

Defense counsel did not object to the Persistent Offender sentencing and did not raise the issue on direct appeal. The issue was waived, but it is inconceivable that some "tactical" reason informed the waiver.

Last, consideration of the error, which Mr. Sanford himself raised pro se, is "necessary to do substantial justice" in this case.

Mr. Stanford's unauthorized sentence must be reversed and set aside. The state cannot, at this juncture, cure the lack of notice on remand. Notice is required prior to trial, and Mr. Stanford has already been tried. Mr. Stanford asks this Court to impose a Range I, eight-year sentence for his initiation conviction; alternatively, he asks this Court to remand to the trial court with instructions that the trial court conduct a further hearing to determine where within the eight to 12-year range Mr. Stanford should be sentenced.

CONCLUSION

Wherefore, for the foregoing reasons Mr. Stanford asks the Court to set aside his unauthorized sentence as constituting "plain error" and either to resentence him to eight years as a Range I offender or remand for the trial court to resentence him as a Range I offender.

At the very least, Mr. Stanford is entitled to be resentenced. He also, however, insists that the convicting evidence in this case is legally insufficient to support the convictions. The evidence is insufficient whether viewed through the lens of *Dorante* or the state standard previously applied.

Respectfully submitted this 4th day of January, 2012.

ANN C. SHORT (BPR # 009645)
The Bosch Law Firm, P.C.
712 S. Gay Street
Knoxville, Tennessee 37902
865.637.2142
ashort@boschlawfirm.com

TENNESSEE LAW REVIEW

Criminal Law and Procedure—Fourth Amendment—License and Registration Spotchecks

Delaware v. Prouse, 440 U.S. 648 (1979).

Defendant, indicted for illegal possession of a controlled substance, sought to suppress the introduction of marijuana that was seized when a Delaware patrolman in a police cruiser randomly stopped defendant's automobile[1] for a documents inspection and found the marijuana in plain view.[2] At the hearing on defendant's motion to suppress the evidence,[3] the patrolman testified that his sole reason for stopping the vehicle was to conduct a " 'routine' "[4] check for driver's license and car registration. The trial court held that the stop violated the fourth amendment[5] and granted the

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1. Whether Prouse was driving the automobile at the time of the stop is uncertain. The automobile, however, was registered to Prouse. Delaware v. Prouse, 440 U.S. 648, 650 n.1 (1979).

2. Under the plain view doctrine, if a police officer has a right to be in a position to view an object, his observations will not ordinarily violate the fourth amendment. But Katz v. United States, 389 U.S. 347 (1967), may create an exception to this general rule by requiring not only that the officer's vantage point be lawful but also that his observations, or visual searches, not violate the individual's "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring). Once an officer seizes an item in plain view, however, the seizure must be reasonable. The Supreme Court has stated that "plain view *alone* is never enough to justify the warrantless seizure of evidence," Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971), and is limited by a requirement that the discovery be "inadvertent," *id.* at 469. An exception to the inadvertency requirement is when contraband, stolen, or dangerous items are involved. *Id.* at 471.

3. In the instant case whether the police officer expected to find marijuana is irrelevant since under the contraband exception to the inadvertency requirement, the marijuana could be properly seized. *See* note 2 *supra*. Consequently, defendant sought to suppress the evidence seized by attempting to impugn the officer's initial justification for being in a position to see the marijuana before any seizure occurred. State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978).

4. 440 U.S. at 650. The patrolman was acting on his own initiative when he stopped Prouse's automobile. He apparently was following no officially-formulated regulations or standards for conducting document spotchecks. When testifying about his reasons for stopping Prouse's car, the officer stated, "I saw the car in the area and was not answering any complaints so I decided to pull them off." *Id.* at 650-51.

5. The right of the people to be secure in their persons, houses, papers,

motion to suppress.[6] The Delaware Supreme Court affirmed the trial court, holding random motorist stops unconstitutional "in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred."[7] On certiorari to the United States Supreme Court, *held*, affirmed.[8] Stopping a motorist driving on a public highway to check his driver's license and vehicle registration is an unreasonable seizure under the fourth amendment when performed at the unconstrained discretion of police officers and when unaccompanied by at least an articulable and reasonable suspicion of a motor vehicle violation or other violation of the law. *Delaware v. Prouse*, 440 U.S. 648 (1979).

The concern for highway safety[9] has generated comprehensive legislation governing the operation of motor vehicles upon

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and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

6. The right to have excluded from trial evidence seized in violation of the fourth amendment is enforceable against the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

7. 382 A.2d at 1364.

8. 440 U.S. at 663. Initially, the United States Supreme Court had to decide whether it had jurisdiction. The Delaware Supreme Court had held that the random motorist stop violated not only the fourth amendment to the United States Constitution but also section 6 of article 1 of the Delaware Constitution. 382 A.2d at 1361-62. If the judgment of the Delaware Supreme Court had been independently based on the State constitution, no federal question would have been raised for the Supreme Court to resolve. The Supreme Court believed, however, that the Delaware Supreme Court did not intend to ground its decision solely on the State constitution. The Court pointed out that the Delaware Supreme Court in *State v. Prouse* had indicated that it interpreted its State constitution as liberally as the fourth amendment. Consequently, every police violation of the fourth amendment would likewise be a violation of the Delaware Constitution. 440 U.S. at 652. The Delaware Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

DEL. CONST. art. 1, § 6.

9. "In 1895 there were only two cars in the whole state of Ohio. They collided." J. TRAIN, REMARKABLE OCCURRENCES 51 (1978).

public roads.[10] One method adopted by many state and local law enforcement officials to ensure compliance with these regulatory schemes required the random stopping of motorists to check their drivers' licenses and car registrations. This common police procedure has been challenged as constituting an unreasonable sei-

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10. ALA. CODE tit. 32, §§ 32-1-1 to -18-8 (1975 & Supp. 1979); ALASKA STAT. §§ 28.01.010-.35.270 (1978 & Supp. 1979); ARIZ. REV. STAT. ANN. §§ 28-101 to -2136 (1976 & Supp. 1979); ARK. STAT. ANN. §§ 75-101 to -2404 (1979); CAL. VEH. CODE §§ 1-42275 (West 1971 & Supp. 1979); COLO. REV. STAT. §§ 42-1-101 to -16-107 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. §§ 14-212 to -296b (West 1970 & Supp. 1979); DEL. CODE ANN. tit. 21, §§ 2101-6902 (1974 & Supp. 1978); D.C. CODE ANN. §§ 40-102a to -1007 (1973 & Supp. V 1978); FLA. STAT. ANN. §§ 318.11-325.33 (West 1975 & Supp. 1979); GA. CODE ANN. §§ 68-101 to 68E-401 (1975 & Supp. 1979); HAW. REV. STAT. §§ 286-1 to 294-41 (1976 & Supp. 1978); IDAHO CODE §§ 49-101 to -3005 (1967 & Supp. 1978); ILL. ANN. STAT. ch. 95 ½, §§ 1-100 to 20-402 (Smith-Hurd 1971 & Supp. 1979); IND. CODE ANN. §§ (9-1-4-61-1 to (9-9-1.6-19)-7 (Burns 1976 & Supp. 1978); IOWA CODE ANN. §§ 321.1-322A.17 (West 1966 & Supp. 1979); KAN. STAT. ANN. §§ 8-101 to -2323 (1975 & Supp. 1978); KY. REV. STAT. §§ 186.005-189.993 (1971 & Supp. 1978); LA. REV. STAT. ANN. §§ 32:1-1517 (West 1963 & Supp. 1979); ME. REV. STAT. ANN. tit. 29, §§ 1-2525 (1978 & Supp. 1979); MD. TRANSP. CODE ANN. §§ 1-101 to 27-105 (1977 & Supp. 1979); MASS. GEN. LAWS ANN. ch. 89, §§ 1-11, ch. 90, §§ 1-34K (West 1969 & Supp. 1979); MICH. COMP. LAWS ANN. §§ 257.1-.1626 (1967 & Supp. 1979); MINN. STAT. ANN. §§ 168.011-171.41 (West 1960 & Supp. 1980); MISS. CODE ANN. §§ 63-1-1 to -23-11 (1972 & Supp. 1979); MO. ANN. STAT. §§ 300.010-304.780 (Vernon 1972 & Supp. 1979); MONT. REV. CODES ANN. §§ 32-1110 to -1145, 32-2101 to -21-165, 53-101 to -908 (1961 & Supp. 1977); NEB. REV. STAT. §§ 60-101 to -2307 (1978 & Supp. 1979); NEV. REV. STAT. §§ 482.010-486.381 (1977); N.H. REV. STAT. ANN. §§ 260:1 to 269-C:29 (1977 & Supp. 1979); N.J. STAT. ANN. §§ 39:1-1 to 12-14 (West 1973 & Supp. 1979); N.M. STAT. ANN. §§ 64-1-1 to -36-11 (1972 & Supp. 1975); N.Y. VEH. & TRAF. LAW §§ 100-530 (McKinney 1970 & Supp. 1979); N.C. GEN. STAT. §§ 20-1 to -372 (1978 & Supp. 1979); N.D. CENT. CODE §§ 39-01-01 to -25-08 (1972 & Supp. 1979); OHIO REV. CODE ANN. §§ 4501.01-4551.99 (Page 1973 & Supp. 1979); OKLA. STAT. ANN. tit. 47, §§ 1-101 to 961 (West 1962 & Supp. 1979); OR. REV. STAT. §§ 481.005- 487.925 (1977); PA. STAT. ANN. tit. 75, §§ 101-8122 (Purdon 1977 & Supp. 1979); R.I. GEN. LAWS §§ 31-1-1 to -46-5 (1968 & Supp. 1979); S.C. CODE §§ 56-1-10 to -23-90 (1976 & Supp. 1979); S.D. CODIFIED LAWS ANN. §§ 32-1-1 to -36-10 (1976 & Supp. 1979); TENN. CODE ANN. §§ 59-101 to -2002 (1968 & Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 6701d (Vernon 1977 & Supp. 1979); UTAH CODE ANN. §§ 41-1-1 to -20-7 (1970 & Supp. 1979); VT. STAT. ANN. tit. 23, §§ 1- 2507 (1978 & Supp. 1979); VA. CODE §§ 46.1-1 to -555.10 (1974 & Supp. 1979); WASH. REV. CODE §§ 46.01.010 to -.90.950 (1976); W. VA. CODE §§ 17-1-1 to 17-D-6-7 (1974 & Supp. 1979); WIS. STAT. ANN. §§ 341.01- 350.99 (West 1971 & Supp. 1979); WYO. STAT. §§ 31-1-101 to -16-131 (1977 & Supp. 1979).

zure[11] prohibited by the fourth amendment[12] because of the broad discretion exercised by the police in deciding which motorists to stop.[13] In addressing this issue, the Supreme Court had to decide whether the degree of intrusion into personal privacy attending this kind of seizure outweighed the interest of the state in promoting highway safety.

Traditionally, the reasonableness requirement of the fourth amendment has been measured strictly in terms of probable cause.[14] The courts were not required to balance the interests involved in any particular fact situation because "the requisite 'balancing' [had] been performed in centuries of precedent and [was] embodied in the principle that [searches and] seizures are 'reasonable' only if supported by probable cause."[15] Consequently, the only substantial uncertainty in the area of fourth amendment law concerned what constituted a search or a seizure. At one extreme, an arrest was clearly a seizure of the person;[16] for anything falling short of an arrest, however, the courts were unsure whether the government activity amounted to a seizure. At one point, the Supreme Court attempted to clarify the issue by broadly defining an arrest as the restriction of an individual's

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11. The fourth amendment does not prohibit all seizures, only unreasonable ones. Elkins v. United States, 364 U.S. 206, 222 (1960); *see* note 5 *supra*.

12. Legal challenges to routine document-inspection stops usually have been raised to suppress evidence confiscated as a result of these stops. *See, e.g.*, People v. Russo, 38 Misc. 2d 957, 239 N.Y.S.2d 374 (Crim. Ct. 1963) (firearms discovered in defendant's car); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973) (police officers shone flashlight in defendant's vehicle and saw burglary tools on the floor of the car); Cox v. State, 181 Tenn. 344, 181 S.W.2d 338 (1944) (officer viewed bootleg whiskey in defendant's car). *But see* Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959) (action to enjoin document inspections at roadblock).

13. Consistently, the Supreme Court has been critical of the unlimited discretion of state officials to invade the privacy of individuals. "The basic purpose of [the fourth amendment], as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

14. Dunaway v. New York, 442 U.S. 200, 208 (1979). Probable cause requires that a law enforcement officer reasonably believe that criminal activity has been or is being committed. *See* Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

15. 442 U.S. at 214.

16. Henry v. United States, 361 U.S. 98, 100 (1959).

liberty of movement."[17] This definition as applied to driver's license and car registration spotchecks equated these motorist stops with arrests. Notwithstanding the Supreme Court's pronouncement, document spotchecks were routinely upheld by state[18] and federal[19] courts. That unanimity of opinion primarily reflected widespread reluctance among the courts to characterize all motorist stops as arrests.[20] The courts, however, usually qualified their holdings with the proviso that law enforcement officers

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17. The Supreme Court, in Henry v. United States, 361 U.S. 98 (1959), held that federal officers lacked probable cause to arrest defendant when they stopped his automobile. On two occasions FBI agents had observed defendant drive into an alley, leave his car, and later return with several cartons. The agents subsequently stopped defendant's vehicle and searched it. They confiscated the cartons and took defendant and his accomplice to the local FBI office. Only later when the agents discovered that the cartons contained stolen merchandise was defendant formally arrested. At defendant's trial, the prosecutor conceded that an arrest occurred when the federal agents stopped defendant's car. *Id.* at 103. Justice Douglas, writing for the Court, noted the prosecution's concession and agreed that "[w]hen the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." *Id.* The Court then invalidated the arrest because the record indicated that the agents did not have probable cause to believe defendant had committed a crime when they halted his car. *Id.*

18. One of the earliest cases upholding random stops of motorists to check drivers' licenses and vehicle registrations was decided many years prior to *Henry*, *see* note 17 *supra*. In Cox v. State, 181 Tenn. 344, 181 S.W.2d 338 (1944), the court held that a highway patrolman had the unrestricted authority, conferred by statute, to demand the exhibition of any motorist's driver's license. The court did characterize the authority as "exceptional" but said that it was necessary "to promote the safety of the traveling public." *Id.* at 348, 181 S.W.2d at 340 (Neil, J., concurring).

19. United States v. Lepinski, 460 F.2d 234 (10th Cir. 1972) (stopping of vehicle necessary in carrying out the New Mexico statute regulating motor vehicles); D'Argento v. United States, 353 F.2d 327 (9th Cir. 1965) (officer entitled to stop car for routine license check); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965) (momentary detention of motorist to check driver's license not an arrest); Mincy v. District of Columbia, 218 A.2d 507 (D.C. 1966) (no arrest until motorist failed to show driver's permit); People v. Isaac, 36 Misc. 2d 1018, 239 N.Y.S.2d 624 (Sup. Ct. 1963) (motorist must produce driver's license and vehicle registration on demand).

20. The courts that addressed this issue implicitly insisted that not all such encounters between policemen and motorists rise to the level of an arrest. *See, e.g.*, Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); Mincy v. District of Columbia, 218 A.2d 507 (D.C. 1966).

could not stop automobile drivers and examine their licenses and vehicle registrations as a pretense, pretext, or subterfuge for searching without a valid search warrant.[21]

In 1968, in the landmark decision of *Terry v. Ohio*,[22] the Supreme Court articulated an objective standard based upon less than probable cause to govern specific police intrusions into an individual's freedom of movement.[23] Defendant in *Terry* moved to suppress the introduction of a revolver seized by a plain clothes detective who, acting on a suspicion that defendant was planning to commit an armed robbery, stopped defendant on the street and frisked him.[24] The trial court and the appellate court denied defendant's motion on the basis that a stop and frisk is a lesser intrusion on privacy than an arrest and search.[25] The Supreme

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21. Mincy v. District of Columbia, 218 A.2d 507 (D.C. 1966) (routine spotchecks reasonable when not used as substitute for searching for evidence of crime unrelated to possession of driver's permit); Byrd v. State, 80 So. 2d 694 (Fla. 1955) (pre-*Henry* case denouncing stop as pretext to search for moonshine). *Contra*, Cameron v. State, 112 So. 2d 864 (Fla. Dist. Ct. App. 1959) (officer's motive for stopping motorist immaterial).

22. 392 U.S. 1 (1968).

23. The Court explained the standard in this way:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assesament it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action was appropriate?

Id. at 21-22.

24. At the hearing on defendant's motion to suppress, the detective, a veteran policeman, testified that while patrolling the downtown streets of Cleveland he began to suspect that three men, one of whom was defendant, were planning to rob a store. After observing the men repeatedly walk past a store and look into the window, the detective walked over to the men, stated that he was a policeman, and asked their identities. The men "mumbled something" in reply, and the detective "grabbed" defendant, "patted down the outside of his clothing," and discovered a revolver in defendant's overcoat. *Id.* at 6-7.

25. *Id.* at 10. The trial and appellate courts proposed a three-tier scheme of police action. If an officer suspects that a person is involved in criminal

Court rejected as artificial the lower courts' distinctions between stops and arrests and between frisks and searches.[25] Regarding frisks, the Court stated that to imply that a person has not been searched when an officer puts his hands all over the person's clothing and body to locate weapons is "sheer torture of the English language."[27] As for stops, the Court declared that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[28]

Terry signalled a willingness of the Supreme Court to define certain encounters between policemen and citizens as something more than "petty indigni[ties]"[29] and something less than " 'technical arrest[s].' "[30] The novel fourth amendment standard announced by the Court to regulate the stop and frisk tactics of the police concentrated on the reasonableness of the search and seizure as determined by balancing the individual's interest in privacy against the state's interest in crime detection and prevention.[31] Although departing from the more stringent evidentiary requirements of probable cause,[32] the *Terry* Court de-

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activity, he should be authorized to stop and question that individual. If the officer further suspects that the person is armed, then he should be authorized to frisk the person for weapons. Finally, if the stop and frisk create probable cause to believe that the person has committed or is committing a crime, the officer may arrest the person. *Id.*

26. The *Terry* Court stated that the proscriptions of the fourth amendment cannot be avoided by employing different terminology. Calling a search and seizure a stop and frisk does not preclude constitutional scrutiny of police action. " 'Search' and 'seizure' are not talismans," the Court observed. *Id.* at 19.

27. *Id.* at 16.

28. *Id.* This language was reminiscent of that previously used to describe an arrest. *See* note 17 *supra*.

29. *Id.* at 10, 17.

30. *Id.* at 19.

31. The *Terry* Court took judicial notice of the fact that many criminals are armed and that many police officers, while performing their duties, are killed by these criminals. *Id.* at 23. As the trial court observed, the frisk is essential to the officer's performance of his investigative duties, "for without it 'the answer to the police officer may be a bullet.' " *Id.* at 8.

32. The *Terry* decision was not the first in which the Supreme Court upheld a search or seizure on less than probable cause. In Camara v. Municipal Court, 387 U.S. 523 (1967), *see* note 49 *infra*, the Supreme Court recognized a lower standard of probable cause for certain administrative inspections and, for the first time, injected some flexibility in the probable cause standard to take

nounced seizures and searches based on the "inarticulate hunches"[33] and " 'subjective good faith' "[34] of police officers. To comply with the Court's standard of reasonableness, an officer must have an "articulable"[35] suspicion of criminal activity based on facts that would " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate."[36]

Because the record did not clearly indicate whether the detective had seized defendant by "physical force or show of authority"[37] prior to frisking him for weapons,[38] the *Terry* Court specifically declined to address the constitutionality of the seizure of a person on less than probable cause solely to question and detain him regarding possible criminal behavior.[39] Four years later, however, in *Adams v. Williams*,[40] the Supreme Court extended *Terry* and held that an investigative seizure is permissible if justified according to the requirements of reasonable suspicion set out in *Terry*.[41] Interpreting *Terry*, the Court in *Adams*

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into account the nature of the activity involved. "[T]here can be no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." 387 U.S. at 536-37. The balancing test of *Camara* became the basis for the Court's ruling in *Terry*. 392 U.S. at 21 (quoting Camara v. Municipal Court, 387 U.S. at 536-37 (1967)). *See generally* 3 W. LaFave, Search and Seizure § 9.2 (1978).

33. 392 U.S. at 22.

34. *Id.* (quoting Beck v. Ohio, 379 U.S. 89 (1964)). In *Beck* defendant was driving his automobile when he was stopped by police officers and arrested. The Court stated that the arrest could be valid, absent a warrant, only if the officers had probable cause to believe a crime had been or was being committed. 379 U.S. at 96-97.

35. 392 U.S. at 21.

36. *Id.* at 22.

37. *Id.* at 19 n.16.

38. *Id.* Because the Court was unable to separate the search from the seizure, it assumed that no fourth amendment activity had preceded the frisk of defendant. *Id.*

39. *Id.*

40. 407 U.S. 143 (1972).

41. In *Adams* defendant was sitting in a parked automobile on the passenger's side when a police officer, acting pursuant to an informant's tip, approached the vehicle and asked defendant to open the car door. Instead, defendant rolled down the car window. The officer then reached into the car and seized a gun from the waistband of defendant's trousers. The gun had not been visible to the officer, but it was located exactly where the informant had indicated. Defendant was arrested for illegal possession of a handgun. *Id.* at 145. The Supreme Court held that the pistol was properly admitted into evidence at

recognized that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable [under the fourth amendment] in light of the facts known to the officer at the time."[42]

In the aftermath of *Terry* and *Adams*, some lower courts retracted their approval of random license and registration spotchecks.[43] Although neither case involved a motorist stop, an

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defendant's trial since the officer's forcible stop of defendant and seizure of the gun were justified under the requirements of reasonable suspicion set out in *Terry*. *Id.* at 148.

42. *Id.* at 146. In *Terry* the Court had stated that "a police officer may in appropriate circumstances and in an appropriate manner *approach* a person for purposes of investigating possibl[e] criminal behavior even though there is no probable cause to make an arrest." 392 U.S. at 22 (emphasis added). The *Terry* Court also, however, had reserved the question of an investigative seizure upon less than probable cause to arrest. *See* text accompanying note 39 *supra*. Perhaps the Court was distinguishing a criminal investigation that involves a constitutional seizure of the person from the mere "personal intercourse between policemen and citizens" that does not rise to the level of a seizure. 392 U.S. at 19 n.16.

43. By the time the United States Supreme Court granted certiorari to hear *Delaware v. Prouse*, eleven jurisdictions had ruled on the permissibility of motorist stops on less than reasonable suspicion, and a six-five split of authority had resulted. Delaware v. Prouse, 440 U.S. 648, 651 (1979). Among the decisions invalidating motorist stops in the absence of reasonable suspicion, only Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973), dealt with a bona fide license and registration spotcheck based upon no prior suspicion of wrongdoing. In each of the other decisions, something about either the motorist or his vehicle had piqued the arresting officer's curiosity and prompted the stop. *See* United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977) (officer observed defendant drive through the same neighborhood several times and look around suspiciously); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (officers patrolling highly trafficked narcotics area spotted black man leaving pool hall and entering Cadillac bearing out-of-state license plates); State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441 (1975) (defendant's automobile matched a stolen motor vehicle profile); People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975) (defendant was driving a vintage 1949 Ford). Among the six decisions upholding license and registration stops on less than reasonable suspicion, four involved random spotchecks. *See* United States v. Jenkins, 528 F.2d 713 (10th Cir. 1975) (patrolman testified that stop of defendant's car was random and that nothing suspicious about the car or driver prompted the stop); Myricks v. United States, 370 F.2d 901 (5th Cir.), *cert. dismissed*, 386 U.S. 1015 (1967) (defendant was stopped for a routine driver's license inspection); State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975) (officer made random spotcheck

analogy was drawn between the seizures in *Terry* and *Adams* and those situations in which a motorist "is 'accosted' on the public highway by the flashing lights of a patrol car and 'restrained' by a police officer while a document or equipment check is conducted."[44]

While the lower courts were struggling with *Terry* and *Adams* in the context of license and registration spotchecks, in 1973 the Supreme Court embarked on a new line of cases that would ultimately impact on the problem; those cases involved the smuggling of illegal aliens and contraband into this country from Mexico.[45] Ordinarily when travelers are stopped at an international boundary, or its functional equivalent,[46] and their belongings are searched, government officials are not required to demonstrate probable cause because "national self-protection reasonably [requires] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[47] When, however, the government sets up permanent checkpoints removed from the border or directs roving patrols to police areas near the border, the question arises whether the officers must comply with probable cause before stopping or searching a vehicle. The United States Border Patrol had employed both techniques to aid in the detection of illegal aliens and contraband. The Supreme Court, in reviewing cases dealing with automobile searches by checkpoint officers and roving patrols,[48] held that absent consent or probable cause that a

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pursuant to state statute); Leonard v. State, 496 S.W.2d 576 (Tex. Crim. App. 1973) (statute authorized and court upheld random spotcheck for driver's license). In two of the decisions, however, the spotchecks were conducted in response to suspicious behavior. *See* Palmore v. United States, 290 A.2d 573 (D.C. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973) (defendant was driving a rented car); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973) (officers observed defendants run from behind bushes and get into parked car).

44. People v. Ingle, 36 N.Y.2d 413, 418, 330 N.E.2d 39, 43, 369 N.Y.S.2d 67, 72 (1975).

45. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

46. An example of a functional equivalent of a border search would be the search of airline passengers departing in St. Louis from a flight from Mexico City. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

47. Carroll v. United States, 267 U.S. 132, 154 (1925).

48. United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

particular vehicle contained illegal aliens, the searches were invalid and unreasonable under the fourth amendment.[49] Because the intrusion on individual privacy attending the searches was so substantial and because the Border Patrol exercised such great

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49. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), defendant was stopped twenty-five miles north of the Mexican border by a roving division of the United States Border Patrol. His car was searched, and a generous quantity of marijuana was uncovered. Defendant appealed his conviction for transporting marijuana, arguing that the search of his automobile was unconstitutional. On certiorari, the Supreme Court held that absent consent or probable cause that defendant's car contained illegal aliens, the search was invalid. *Id.* at 273. Initially, the Court reaffirmed the rule that a moving vehicle can be legally stopped and searched without first obtaining a warrant because of the highly mobile nature of the automobile and the practical impossibility of obtaining a warrant before a car eludes the police or leaves the jurisdiction. *Id.* at 269 (quoting Carroll v. United States, 267 U.S. 132, 153 (1925)). The Court stressed, however, that probable cause to stop and search the vehicle is firmly retained in those circumstances. *Id.* The Court also acknowledged that exceptions to the warrant and probable cause requirements had been carved out in situations involving administrative inspections. *Id.* at 270-74. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Camara v. Municipal Court, 387 U.S. 523 (1967). *See generally* 46 TENN. L. REV. 446 (1979). For example, when administrative inspections were aimed at detecting housing code violations of private premises, the Court held that the inspections, or searches, could be conducted on the basis of less than probable cause if, prior to the inspection, consent was obtained or an area warrant was issued by a magistrate. Camara v. Municipal Court, 387 U.S. 523 (1967). Moreover, when pervasively regulated commercial businesses were inspected without a warrant, the Court upheld these searches as reasonable. United States v. Biswell, 406 U.S. 311 (1972) (firearms dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor retailer). *Cf.* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (warrant required for OSHA inspection). The Court in *Almeida-Sanchez*, explaining that businessmen involved in pervasively regulated industries "accept the burdens as well as the benefits of their trade," 413 U.S. at 271, rejected the contention that defendant, as an automobile driver, was involved in a regulated commercial business and had consented to having his travel prescribed. *Id.* at 271-72.

In United States v. Ortiz, 422 U.S. 891 (1975), defendant was stopped for a routine immigration search by United States Border Patrol officers at the San Clemente checkpoint sixty miles north of the Mexican border. Officers, discovering three aliens in the trunk of defendant's car, arrested him for knowingly transporting illegal aliens. *Id.* at 891. The officers had no warrant to search and no suspicion that the car contained illegal aliens. The Court followed its holding in *Almeida-Sanchez* and declared that consent or probable cause to search was required before a search of an automobile could be made at a traffic checkpoint. *Id.* at 897.

discretion in selecting which automobiles to search,[50] the Court was unwilling to relax the requirement of probable cause.[51]

Although the Supreme Court was adamant in its insistence on probable cause for searches of automobiles, in *United States v. Brignoni-Ponce*[52] the Court held that mere investigative stops by roving patrols could be justified by a lesser standard.[53] In *Brignoni-Ponce* defendant and his passengers were stopped by a roving patrol and were questioned about their citizenship. When the officers discovered that the passengers were illegal aliens, defendant was arrested for knowingly transporting aliens.[54] The officers attempted to justify the stop by explaining that defendant and his passengers looked like Mexicans.[55] The Court held that officers on roving patrol in the Mexican border area must have at least a reasonable suspicion that a particular automobile contains illegal aliens before that vehicle can be stopped or seized and the occupants questioned about their citizenship. The Court further held that apparent Mexican ancestry, without more, was not an adequate basis for formulating a reasonable

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50. In *Ortiz*, *see* note 49 *supra*, although the Government urged that the officers at the checkpoint exercised less discretion in selecting the automobiles to search, the Court did not accept the argument as adequate justification for obviating the need for probable cause to search at the checkpoint. The Court was not convinced that the checkpoint officers' discretion was limited to any significant extent. The Court noted that not all cars passing through the checkpoint were stopped, and of those cars that were stopped, not all were searched. Therefore, the Court concluded, the checkpoint searches were just as random and discretionary as searches conducted by roving patrols. 422 U.S. at 896.

51. The *Ortiz* Court suggested that the distinctions between roving patrols and traffic checkpoints might be important in the future for assessing the "propriety" of the stops separate from the searches since the stops were inherently less intrusive than the searches. 422 U.S. at 895. The Court, however, declined to treat the question whether probable cause would be necessary for border patrol agents to stop motorists for questioning or interrogation at checkpoints. *Id.* at 897 n.3.

52. 422 U.S. 873 (1975).

53. *Id.* at 885-87.

54. *Id.* at 875.

55. The officers' account of why they stopped defendant's automobile is at best suspect. The officers were on roving patrol at the time they stopped defendant because the San Clemente checkpoint was closed because of bad weather. The road was dark, and the officers had to use their headlights to spot passing cars. *Id.* at 874-75. Under these conditions, it is difficult to appreciate how the officers were able to discern that the motorists were Mexicans.

suspicion that defendant and his passengers were aliens illegally in this country.[56]

The Court distinguished its decision to require probable cause for automobile searches by pointing out that in *Brignoni-Ponce* the officers asserted the right only to question motorists about their citizenship.[57] To determine the reasonableness of the seizure in *Brignoni-Ponce*, the Court weighed the government and individual interests implicated. The Court emphasized that the stop and detention were brief, that a search of the car was not involved,[58] and that no practical alternatives were available for curbing the flow of aliens into this country.[59] Moreover, the Court stated that the government's interest in preventing illegal entry into this country was as important as the state's interest in protecting the public and preventing crime had been in *Terry*.[60] The Court was thus unwilling to require that investigative stops be supported by probable cause.[61] Nonetheless, the Court was reluctant to allow the Border Patrol to stop motorists randomly in the border area without some legal justification. Shifting its focus from the intrusion on individual privacy to the "interference with lawful traffic,"[62] the Court stated that "the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Govern-

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56. *Id.* at 885-87.

57. *Id.* at 874.

58. Although technically no search of the automobile was made, the intrusion into the motorist's privacy was more substantial than the Court was willing to admit. While questioning the occupants of an automobile, the officers also have the opportunity to inspect the car's interior and to detect other crimes unrelated to the smuggling of aliens. *See generally* Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666, 670-73 (1974).

59. 422 U.S. at 881.

60. While the general state interest in *Terry* was public safety and crime prevention, the more specific state interest, and the interest that more accurately reflects the reasonable-suspicion holding in that case, was in protecting law enforcement officials from being harmed by criminals who are armed and dangerous. *See* note 31 *supra* and accompanying text. Insofar as *Terry* carved out a narrow exception to the general rule that a search must be made pursuant to a warrant or probable cause, the Court in *Brignoni-Ponce* expanded that exception and paved the way for reasonable suspicion to become the standard for police conduct in nonarrest situations even when the officer's life is not directly jeopardized.

61. 422 U.S. at 880.

62. *Id.* at 883.

ment."[63] Consequently, the Court held that roving patrols could stop motorists only if the officers reasonably suspected that the vehicles contained illegal aliens.[64]

In *United States v. Martinez-Fuerte*[65] the Supreme Court held that no individualized suspicion was necessary to justify the questioning of motorists at permanent checkpoints[66] because the intrusion on personal privacy was minimal[67] and because the method adopted to detect illegal aliens required "less discretionary enforcement activity."[68] The Court explained that in both a roving-patrol and checkpoint stop, the "objective intrusion"[69] upon the motorist is the same: the motorist is stopped, questioned, and visually examined. The Court further explained that the "subjective intrusion"[70] upon the motorist differs, however, for roving-patrol and checkpoint stops because checkpoint stops are less likely to worry or frighten the motorist.[71] Taking into

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63. *Id.* at 882.

64. *Id.* at 881. Perhaps wishing to underscore the unique aspects of the illegal alien problem, the Court explained further,

> Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. *Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registrations, truck weights, and similar matters.*

Id. at 883 n.8 (emphasis added). This statement stimulated much discussion at the state and federal level, and some courts interpreted it as a declaration that license and registration spotchecks are reasonable under the fourth amendment. *See* United States v. Jenkins, 528 F.2d 713 (10th Cir. 1975); State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975). Another court read the statement more cautiously as merely reserving the question. *See* United States v. Montgomery, 561 F.2d 875, 881 (D.C. Cir. 1977).

65. 428 U.S. 543 (1976).

66. *Id.* at 562, 565.

67. *Id.* at 559.

68. *Id.*

69. *Id.* at 558.

70. *Id.*

71. *Id.*

account the objective and subjective qualities of checkpoint stops, the Court concluded that the attendant intrusion upon the motorist was "minimal"[72] and that neither probable cause nor reasonable suspicion was constitutionally required. To support its extreme position the Court also relied heavily upon the less arbitrary manner by which the checkpoint was operated as compared with roving patrols.[73] "[S]ince field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops."[74]

In *Delaware v. Prouse*[75] the United States Supreme Court squarely addressed the constitutionality of license and registration spotchecks by roving patrols and held that the practice was unreasonable under the fourth amendment. While not entirely circumscribing police authority to stop motorists, the Court sharply curbed the "unbridled discretion"[76] of police officers by ruling that document spotchecks must be justified according to the *Terry* standard of reasonable suspicion.[77] *Prouse* involved only a random stop by a policeman on roving patrol; however, the Court suggested that roadblocks could be used to check the drivers' licenses and car registrations of all passing motorists.[78] That method would not permit an officer to exercise arbitrary discretion. In addition, the Court indicated that the states were free to develop any other system of spotchecking that did not place unlimited discretion in the hands of the police.[79]

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72. *Id.* at 562.

73. The permanent checkpoint in *Martinez-Fuerte* was the same San Clemente checkpoint involved in *Ortiz*, *see* note 49 *supra*. Consequently, the Court's characterization of the amount of discretion exercised by the officers at the checkpoint should have been the same in both cases. In *Ortiz* the Court stated that the officers' discretion was too broad to be sustained, *see* note 50 *supra*. In *Martinez-Fuerte*, however, the Court distinguished the cases in part because of the strict restraints on official discretion inherent in the checkpoint system. *See* text accompanying note 74 *infra*.

74. 428 U.S. at 559.

75. 440 U.S. 648 (1979).

76. *Id.* at 661, 663.

77. *Id.* at 663.

78. *Id.* In a concurring opinion, Justice Blackmun proposed a method that would involve halting every tenth car, for example, passing a particular spot. *Id.* at 664 (Blackmun, J., concurring) (Justice Powell joined this opinion).

79. *Id.* at 663. Viewed solely in terms of the holding in *Brignoni-Ponce*, the

The singular importance of *Prouse* arises from the Court's detailed analysis of the central role that police discretion plays in the reasonableness of a search or seizure. The Court had traditionally been concerned with the evils of discretion because of its potential for harassment of citizens. In *Prouse* the Court approached the issue from a different standpoint. Beyond an inquiry into the state and individual interests, a remaining crucial issue was whether the random motorist spotcheck was a "sufficiently productive mechanism"[80] to justify the intrusion upon the motorist's privacy. Whenever probable cause or reasonable suspicion was lacking, the Court believed, a police officer could not possibly decide that "stopping a particular driver for a spot check would be more productive than stopping any other driver."[81] The positive net effect on highway safety under a system of discretionary spotchecks was "marginal at best"[82] because such a large number of law-abiding motorists were inevitably stopped in order to detect even a single violator.[83] Consequently, because of the poor results achieved by random spotchecks, the Court was persuaded that policemen should not have the unlimited discretion to seize any vehicle on a public road.

Unfortunately, the Court's analysis of the insufficiently productive results of random spotchecks in limiting police discretion does not support its approval of traffic roadblocks. Assuming that roadblocks restrain police discretion in selecting which automobiles and motorists to stop,[84] roadblock or checkpoint stops are

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result reached by the Court in *Prouse* is unremarkable. Since, however, the Court intimated in *Brignoni-Ponce*, 422 U.S. at 883 n.8, that brief motorist stops to enforce the laws regulating drivers' licenses and vehicle registrations would be treated differently from similar stops to detect the presence of illegal aliens, the holding in *Prouse* is actually rather surprising. *See* note 64 *supra*. In *Prouse* the Court stated that the question of the constitutionality of license and registration spotchecks had been reserved in *Brignoni-Ponce*. 440 U.S. at 656 n.13. Justice Rehnquist, dissenting in *Prouse*, firmly maintained that *Brignoni-Ponce* expressly recognized a distinction between random stops to uncover the presence of illegal aliens and random stops to promote highway safety. *Id.* at 665 (Rehnquist, J., dissenting).

80. *Id.* at 659.

81. *Id.* at 661.

82. *Id.* at 660.

83. *Id.*

84. Setting up a roadblock does not necessarily guarantee less police discretion in selecting motorists to stop. When not all motorists passing through a

not likely to reveal a greater number of license and registration violations than do the random spotchecks held unconstitutional in *Prouse*. In both instances a large number of motorists are stopped before a single violation is discovered. Minimizing discretion, therefore, does not guarantee sufficiently productive results. Consequently, roadblocks can be justified only under the reasoning proposed in *Martinez-Fuerte*.

The Court's sufficiently productive means test, if taken literally, would make the constitutionality of police procedures turn on their effectiveness. Notwithstanding the utilitarian language in *Prouse*, the Court seemed simply to be asking whether the method adopted to promote highway safety is likely to advance that goal. The Court may have been concerned that highway safety was only a secondary interest of the state and that the state's primary motive in conducting random checks was the circumvention of safeguards against discretion (probable cause and reasonable suspicion) to further the detection of crimes unrelated to motor vehicle violations.[85] Clearly, the Court recognized that highway safety is a valid state interest when it indicated the availability of reasonable alternatives that effectively promote highway safety and intrude less upon individual privacy.[86] For example, the Court stated that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is [by] acting upon observed violations."[87] The Court noted that motor vehicle laws are frequently violated, and the police have ample opportunities to check licenses and vehicle registrations when they stop motorists for these infractions.[88] Justice Rehnquist, who supported the random spotcheck in *Prouse*, criticized the Court's viewpoint: "The whole point of enforcing motor vehicle safety

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roadblock are required to stop and produce valid drivers' licenses and vehicle registrations, the officers may exercise considerable discretion in choosing which cars to stop and which cars to wave through the roadblock. Moreover, even if all motorists are stopped at the roadblock, the very location of the roadblock may discriminate against a particular class of persons. But in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court "assume[d] that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id.* at 559.

85. *See* note 12 *supra*.
86. 440 U.S. at 659-61.
87. *Id.* at 659.
88. *Id.*

regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away."[89] Because the facts in *Prouse* indicate no harassment of plaintiff and no other official abuse of discretion, Justice Rehnquist's concern for preventive safety fairly overshadows the Court's anxiety regarding the "'grave danger' of abuse of discretion."[90] *Prouse* may not have been the best case for the Court to voice its fears about discretion; a case that clearly involved police abuse of discretion would have more forcefully supported the Court's condemnation of discretionary spotchecks. Nonetheless, because proving actual harassment is so difficult, a per se rule better protects fourth amendment interests.

Prouse represents a refinement of the balancing approach to fourth amendment issues. In addition to balancing the state interest against the degree of intrusion upon personal privacy, the decision requires an examination of the degree to which a police method advances the public interest.[91] In close cases when the state interest is paramount and the intrusion upon privacy is limited but not minimal, the effectiveness of the procedure will determine whether discretion will be proscribed—and to what degree—in favor of the individual's interests.

ANN C. SHORT

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89. *Id.* at 666 (Rehnquist, J., dissenting).

90. *Id.* at 662 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)).

91. That the Supreme Court in *Prouse* was adding a third factor to be balanced in determining the reasonableness of the seizure became obvious in Brown v. Texas, 99 S. Ct. 2637 (1979). In *Brown* the Court stated, "Consideration of the constitutionality of . . . seizures involves a weighing of the gravity of the public concerns served by the seizure, *the degree to which the seizure advances the public interest*, and the severity of the interference with individual liberty." *Id.* at 2640 (emphasis added).

IN THE UNITED STATES COURT OF MILITARY APPEALS

U N I T E D S T A T E S	)	
	)	
Appellee,	)	
	)	
V.	)	ACMR 8800780
	)	
Sergeant First Class TALLIE E. HOLT, JR., 413-90-3193 United States Army,	)	
	)	
Appellant.	)	

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

HERBERT S. MONCIER
Civilian Appellate Counsel

ANN C. SHORT
Civilian Appellate Counsel

JAMES KEVIN LOVEJOY
Captain, JAGC
Appellate Defense Counsel

MICHAEL P. MORAN
Captain, JAGC
Appellate Defense Counsel

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IN THE UNITED STATES COURT OF MILITARY APPEALS

U N I T E D S T A T E S	)	SUPPLEMENT TO PETITION
	)	FOR GRANT OF REVIEW
Appellee,	)	
	)	
V.	)	ACMR 8800780
	)	
Sergeant First Class TALLIE E. HOLT, JR., 413-90-3193 United States Army,	)	
	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

Issues Presented

I

AT THE CLOSE OF ITS PROOF IN CHIEF, SHOULD THE GOVERNMENT HAVE BEEN REQUIRED TO ELECT THE PARTICULAR INCIDENT OF ALLEGED SODOMY AND THE PARTICULAR INCIDENT OF COMMITTING AN INDECENT ACT UPON WHICH A VERDICT OF GUILTY WOULD BE SOUGHT.

II

DO THE RECORD AND EVIDENCE IN THIS CASE FAIL TO DEMONSTRATE THAT THE OFFENSES WERE PROSECUTED WITHIN THE APPLICABLE PERIODS OF LIMITATIONS AND ARE THE RECORD AND EVIDENCE INSUFFICIENT TO SUPPORT THE CONVICTIONS FOR SODOMY AND INDECENT ACTS.

III

DID THE EXPERT OPINION TESTIMONY GIVEN BY GOVERNMENT WITNESSES IN THIS CASE EXCEED THE PROPER SCOPE AND BOUNDS OF ADMISSIBLE EVIDENCE IN CHILD SEXUAL ABUSE PROSECUTIONS.

IV

WAS IT PREJUDICIAL ERROR TO PERMIT GOVERNMENT WITNESSES TO REPEAT HEARSAY STATEMENTS OF THE ALLEGED VICTIM, WHICH DID NOT CONSTITUTE EXCITED UTTERANCES UNDER MRE 803(2) OR

STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATEMENT UNDER MRE 803(4).

V

WAS IT PREJUDICIAL ERROR TO ADMIT EXTRINSIC OFFENSE EVIDENCE OF PRIOR PHYSICAL ABUSE OF THE ALLEGED VICTIM AND THE BATTERED CHILD SYNDROME, THE PROBATIVE VALUE OF WHICH WAS NOT ESTABLISHED AND WHICH WAS UNDULY PREJUDICIAL, CONFUSING AND MISLEADING.

VI

WAS IT PREJUDICIALLY IMPROPER TO PERMIT SFC HOLT TO BE CROSS EXAMINED TO ELICIT HIS OPINION OF THE VERACITY OF OTHER WITNESSES AND TO PERMIT A REBUTTAL GOVERNMENT WITNESS TO EXPRESS HIS OPINION THAT OTHER CHILDREN IN THE HOLT FAMILY HAD BEEN COACHED.

VII

WAS THE TESTIMONY OF THE VICTIM AT SENTENCING THAT SHE WOULD FEEL BETTER IF SFC HOLT APOLOGIZED AND VICTIM IMPACT TESTIMONY ABOUT BEING THE SCAPEGOAT OF A DYSFUNCTIONAL FAMILY HIGHLY INFLAMMATORY AND PREJUDICIALLY IMPROPER.

VIII

DID THE SERVICES AND REPRESENTATION OF CIVILIAN DEFENSE COUNSEL IN CONNECTION WITH SFC HOLT'S GENERAL COURT-MARTIAL TRIAL FALL BELOW THE LEVEL OF PERFORMANCE REQUIRED BY THE SIXTH AMENDMENT, THEREBY DEPRIVING SFC HOLT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Statement of the Case

Sergeant First Class TALLIE E. HOLT, JR., has served with distinction in the United States Army for seventeen years. He has no prior convictions, and his evaluation reports consistently recognize his potential and ability as Command Sergeant Major material.

In 1987, while SFC Holt was serving in Heidelberg, Germany, charges of sodomy and indecent acts against his stepdaughter were preferred against him. The Article 32 Officer, after an investigation and hearing, recommended that charges not be referred for trial. The convening authority, however, referred the charges to a general court-martial.

On 18 March and 21 March through 1 April 1988, SFC Holt was tried by general court-martial in Germany. He was represented by Edward J. Bellen, civilian defense counsel, and by Captain Julie K. Hasdorff, who did not participate on the record at trial. SFC Holt was found guilty of both charges in violation of Uniform Code of Military Justice, articles 125 and 134. He was sentenced to a dishonorable discharge, confinement for fifteen years, forfeiture of pay, and reduction to Private E1. The sentence was approved, and except for the dishonorable discharge, was executed.

On 5 October 1990, the Army Court of Military Review affirmed the findings and sentence. (Appendix A). SFC Holt then timely petitioned for reconsideration and suggestion for reconsideration en banc. That petition was denied by the Army Court of Military Review on 29 November 1990. (Appendix B).

Before this Court, SFC Holt is represented by civilian appellate defense counsel, Herbert S. Moncier (former Captain JAGC 1971-1974) and Ann C. Short of Knoxville, Tennessee, and by military appellate defense counsel, James Kevin Lovejoy, Captain JAGC, and Michael P. Moran, Captain JAGC, who hereby enter their appearance.

Statement of Facts

Those facts necessary to a disposition of the issues presented are set forth in the argument, infra.

Issues Presented and Argument

I

AT THE CLOSE OF ITS PROOF IN CHIEF, SHOULD THE GOVERNMENT HAVE BEEN REQUIRED TO ELECT THE PARTICULAR INCIDENT OF ALLEGED SODOMY AND THE PARTICULAR INCIDENT OF COMMITTING AN INDECENT ACT UPON WHICH A VERDICT OF GUILTY WOULD BE SOUGHT.

In United States v. Vidal, 23 M.J. 319 (C.M.A.), cert. denied 481 U.S. 1052 (1987), decided prior to SFC Holt's court-martial, this Court made the following important announcement:

> We recognize that usually where several but separate offenses are involved, the judge should require the prosecution to elect which offense is being prosecuted. Otherwise, an accused may have difficulty in preparing his defense; may be exposed to double jeopardy; and may be deprived of his right to jury concurrence concerning his commission of the crime. . . . However, an election has not been required where offenses are so closely connected in time as to constitute a single transaction.

Id. at 325 (citations omitted). Since Vidal, there have been no reported military appeals raising or enforcing the election rule. *SFC Holt's case is highly significant* because (1) it represents a classic example of when the prosecution should be required to elect which of several, but separate, offenses is being prosecuted, and (2) it demonstrates the enormous prejudice to a

defendant facing such charges when the prosecution is not required to elect.

The first charge against SFC Holt cited a violation of Article 125, UCMJ. One specification was alleged.

> In that Sergeant First Class Tallie E. Holt Jr., US Army, Headquarters and Headquarters Company, United States Army Element, Central Army Group, on active duty, did at Fort Polk, Louisiana and Heidelberg, Federal Republic of Germany, on divers occasions, between 20 November 1984 and 3 September 1986, commit sodomy with Aree-Rut Wanawak [Patti], a child under the age of sixteen years.

The second charge cited a violation of Article 134, UCMJ. Again, only one specification was alleged.

> In that Sergeant First Class Tallie E. Holt Jr., US Army, Headquarters and Headquarters Company, United States Army Element, Central Army Group, on active duty, did at Heidelberg, Federal Republic of Germany, on divers occasions, between 20 November 1985 and 3 September 1986, commit indecent acts upon the body of Aree-Rut Wanawak, a female under sixteen years of age, not the wife of the said Sergeant First Class Holt, by touching her on the breasts and vaginal area with the intent to gratify the sexual desires of the said Sergeant First Class Holt.

(R. 8-9)(Appendix C).

Government Trial Counsel predicted in opening statements that the proof would show multiple acts. (R. 48-49). When the complainant testified, she enlarged upon the number of incidents involved. Patti related two fondling incidents in Nuernberg. (R. 124-25). At Ft. Polk, Louisiana, she claimed there was one fondling act and an incident of anal sodomy, when her Mother was having a baby, Mary. (R. 126-34). Patti claimed that SFC Holt fondled her twice in Tennessee. (R. 136-40). When the family

moved to Heidelberg, she testified there was one incident of oral sodomy, and two additional fondling acts. (R. 140-46).

At the close of the proof, the Military Judge instructed the court members with regard to Charge I that one of the elements was "that at Fort Polk, Louisiana and Heidelberg, Federal Republic of Germany, on divers occasions between 20 November 1984 and 3 September 1986," SFC Holt engaged in unnatural carnal copulation with Patti "by placing his penis in the mouth or anus" of the victim. (R. 364)(emphasis added). In regard to Charge II, the court members were instructed that one of the elements was "that at Heidelberg, Germany, on divers occasions between 20 November 1985 and 3 September 1986," SFC Holt committed "certain acts upon the body of [Patti] by touching her on the breast and vaginal area." (R. 364).

At no time was the Government ever required to elect which of the several incidents under each Charge was being sought for a conviction, nor were the court members ever instructed that at least two-thirds of the members must unanimously agree beyond a reasonable doubt that SFC Holt committed the same specific criminal act under each Charge.

As this Court pointed out in Vidal, there are several compelling and constitutional reasons for requiring the election of a specific act. First, an election enables the accused to prepare for and make his defense to a specific charge. Second, it protects the accused from double jeopardy by individualization of the issue. Foremost, election ensures that some jurors do not convict on one offense and others on a separate offense,

therefore protecting a defendant's right to a unanimous verdict. See, e.g., United States v. Vidal, 23 M.J. at 325; Burilson v. State, 501 S.W.2d 801, 803 (Tenn. 1973)(cited in Vidal). Finally, although not specifically mentioned in Vidal, another real danger when election is not required is "that jurors will be swayed by the quantum of proof introduced as to all the acts when, in fact, there has been insufficient proof on any one of the alleged acts standing alone." State v. Bailey, 475 A.2d 1045, 1052 (Vt. 1984).

The election rule is well recognized and strictly enforced in numerous jurisdictions.[1] The rule is "fundamental, immediately touching the constitutional rights of an accused, and should not depend upon his demand thereof." Burilson v. State, 501 S.W.2d at 804 (cited in Vidal).

The substantial prejudice to SFC Holt from the failure to require the prosecution to elect is readily apparent. First, SFC

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[1] E.g., Reed v. State, 512 So.2d 804 (Ala. Crim. App. 1987); Covington v. State, 703 P.2d 436 (Alaska App.), on rehearing, 711 P.2d 1183 (1985); Kogan v. People, 756 P.2d 945 (Colo. 1988) (En Banc); People v. Estorga, 612 P.2d 520 (Colo. 1980)(En Banc); Adjmi v. State, 154 So.2d 812 (Fla. 1963); State v. Kinkade, 43 N.W.2d 736 (Iowa 1950); Ball v. Commonwealth, 128 S.W.2d 176 (Ky. Ct. App. 1939); Commonwealth v. Farrell, 78 N.E.2d 697 (Mass. 1948); State v. Wise, 745 S.W.2d 776 (Mo. Ct. App. 1988); Crawford v. State, 688 P.2d 347 (Okl. Crim. App. 1984); State v. Pace, 212 P.2d 755 (Or. 1949)(En Banc); State v. Brown, 762 S.W.2d 135 (Tenn. 1988); Burilson v. State, 501 S.W.2d 801 (Tenn. 1973); O'Neal v. State, 746 S.W.2d 769 (Tex. Crim. App. 1988); Crawford v. State, 696 S.W.2d 903 (Tex. Crim. App. 1985)(En Banc); State v. Bailey, 475 A.2d 1045 (Vt. 1984); State v. Kitchen, 756 P.2d 105 (Wash. 1988)(En Banc); State v. Koch, 189 P.2d 162 (Wyo. 1948). See 23A C.J.S. Criminal Law § 1214 (1989).

Holt unquestionably was hampered in formulating and presenting an effective defense in this case. As part of his defense, SFC Holt attempted to reconstruct his whereabouts and duty days over a four-year period of time. (Defense Ex. AA, BB, CC, DD). Without, however, a specific incident on which to focus, this scatter-shot effort was never destined to succeed.

Also, it is impossible to tell whether two-thirds of the court members agreed as to his guilt beyond a reasonable doubt in regard to a single offense. Government Trial Counsel emphasized in closing argument that "there are at least two incidents of sodomy that occurred within the charged time period from November '84 to October '86." (R. 371)(emphasis added). There is no assurance that at least two-thirds of the court members agreed upon which incident of sodomy to convict, and some just may have concluded that he was at least guilty of one of the two.

Likewise, regarding Charge II, Government Trial Counsel argued in closing that "he touched her constantly" and that "he touched her constantly for years." (R. 371)(emphasis added). Again, it is impossible to tell which touching constituted the basis for the verdict, and the Government was "clearly attempting to submit several different incidents to the jury without specifying upon which incident a conviction was sought." Reed v. State, 512 So.2d 804, 809 (Ala. Crim. App. 1987). Indeed, this composite guilt argument created the serious danger, identified in State v. Bailey, 475 A.2d at 1052, that the court members would "be swayed by the quantum of proof introduced as to all the

acts when, in fact, there has been insufficient proof on any one of the alleged acts standing alone."

The failure to require the Government to elect created a another problem that substantially prejudiced SFC Holt. The specification for Charge II alleges that indecent acts were committed at Heidelberg, between 20 November 1985 and 3 September 1986. At trial, Patti related fondling acts that allegedly took place while the family was visiting in Tennessee within the time period alleged in the Charges. (R. 136-40).

The court members received no limiting instructions about the admission of the Tennessee incidents. Without such an instruction, influenced by Government Trial Counsel's argument of "constant" touching, and since the prosecution was not required to elect, some court members may well have voted to convict SFC Holt based on the alleged Tennessee incidents, which were completely outside the scope of the Charges in this case.

The Army Court of Military Review, in affirming the findings and sentence of SFC Holt's general court-martial, analyzed the issue as follows:

> The appellant's assignment of error poses two distinct legal questions. The first involves the long-standing rule of military procedure against duplicious pleading of criminal offenses. . . .
>
> . . .
>
> The second question involves uncertainty as to whether the court members concurred in the findings.

(Appendix A, at 5, 6). As a result, despite that Appellant's entire argument focused on whether the Government should have

been required to elect in his case, the Army Court never addressed the election rule.

The Army Court's analysis of dupliciousness is puzzling. At pages 15 and 16 of SFC Holt's original Assignment of Error, the issue is framed in the following fashion:

> SFC Holt does not contest the prosecutorial discretion to bring two charges, containing single specifications covering a broad period of time. SFC Holt does, however, insist that when an accusatory pleading charges a violation of a criminal statute and the evidence shows more than one unlawful act, the prosecution must elect at the close of its case-in-chief the specific act relied upon for a conviction.

Thus posed, there was no need for the Army Court to discuss duplicious pleadings. After its decision, SFC Holt filed a petition asking the court to reconsider and pointing out that he did not claim the Charges against him were duplicious. That petition was denied without explanation or comment.

Review by this Court is needed to correct the confusion created by the Army Court's decision. Dupliciousness and election are entirely distinct concepts. Further confusion has been introduced because in the context of discussing duplicious pleadings, the Army Court ruled that the disparate acts in this case were part of a single course of conduct. The implications of that ruling on the exception to election for closely connected incidents are substantial.

Unlike the facts in Vidal, the various alleged incidents in this case were not so closely connected as to consitute a single transaction. Vidal involved two acts of rape with a kidnapped victim in a vehicle. The decisions cited in Vidal for this

exception to election also illustrate the degree of closeness required. See People v. Mota, 171 Cal. Rptr. 212 (1981)(many continuous acts within an hour's time in back of a van); Watson v. State, 197 S.W.2d 802 (Tenn. 1946)(continuing, concerted criminal enterprise by 3 defendants involving abduction and rape of female lasting 2 and 1/2 hours).

In this case, the two alleged incidents of sodomy were separated by a considerable period of time and occurred at completely different locations, Louisiana and Germany. The alleged fondling incidents similarly occurred over a lengthly period of time. The Charges, themselves, cover a period of time from November 1984 until September 1986. Any suggestion that these events constituted a single transaction results in the exception totally swallowing the election rule. Consequently, unless reviewed by this Court, the dupliciousness gloss given by the Army Court to the Vidal opinion will reduce the election requirement to a legal nullity.

The Army Court's treatment of the jury unanimity problem is likewise flawed and equally confusing. In every case, plausible arguments could be devised why a particular defendant was or was not deprived of his right to jury concurrence. The only definitive way to settle the dispute would be to interview the court members post-trial. That solution has obvious drawbacks and sets a dangerous precedent. The election rule, by contrast, avoids needless speculation and subjective second-guessing and has the added benefit of ease of application.

Jury concurrence, furthermore, is not simply a question whether accurate instructions were given to the court members. Accordingly, the Army Court's decision also misses the mark in its analysis concerning special findings and instructions. The election rule has nothing to do with instructing court members. It is only when the prosecution should have been required to elect but did not do so, that a special jury unanimity instruction may be held sufficient to avoid reversible error. This proposition, followed by some courts, is known as the "either/or" rule. That is, "either" the prosecution must elect the specific act relied upon to prove the charge "or" the jury must be instructed that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific criminal act. E.g., Covington v. State, 703 P.2d 436 (Alaska App.), on rehearing, 711 P.2d 1183 (1985); State v. Kitchens, 756 P.2d 105 (Wash. 1988)(En Banc); State v. Petrich, 683 P.2d 173 (Wash. 1984). When the prosecution fails to make a proper election and the trial court fails to instruct the jury on unanimity, "there is constitutional error." State v. Kitchens, 756 P.2d at 109.

The "or" portion of the "either/or" rule, it should be emphasized, is useful only to protect jury unanimity in multiple acts cases. The other problems in such cases -- defense preparaton, double jeopardy, and composite guilt findings influenced by the mere quantum of proof -- cannot be remedied or addressed by a specific jury unanimity instruction; the prejudice from these problems still calls for the prosecution to elect,

which although raised, was never addressed by the Army Court in this case.

To say, as the Army Court did in this case, that no unanimity instruction was required is unresponsive to the fundamental inquiry: should the prosecution have been required to elect? Also, to say, as did the Army Court, that Appellant waived a special instruction does not dispose of his assignment of error. Whatever may be said about the failure to request an instruction, the election rule is "fundamental, immediately touching the constitutional rights of an accused, and should not depend upon his demand thereof." See Burilson v. State, 501 S.W.2d 801, 804 (Tenn. 1973)(emphasis added)(cited in Vidal).

Moreover, the Army Court's reasoning that Appellant's all-or-nothing trial strategy was inconsistent with special instructions is unpersuasive. (Appendix A, at 8). First of all, when a defendant advances an all-or-nothing strategy, that defense does not eliminate the need for an election or a unanimity instruction; when neither occurs, there is constitutional error. The question then becomes whether the error was harmless beyond a reasonable doubt. To answer the harmless error question, some courts have examined whether the case is one in which the jury's verdict necessarily implies that it did not believe the only defense offered. See, e.g., People v. Gordon, 165 Cal. App.3d 839, 855-57 (1985); State v. Kitchen, 756 P.2d 105, 109-10 (Wash. 1988)(En Banc). Consequently, any discussion of SFC Holt's defense stragegy in this case necessarily assumes, in the first instance, that constitutional

error occurred and, second, that the question is whether the error is harmless beyond a reasonable doubt.

This is not a case where the court members' verdict implies that it did not believe the only defense offered. Certainly, SFC Holt denied that he ever committed sodomy or indecent acts on his stepdaughter. For example, however, with the alleged sodomy incidents, more than one defense was presented. Regarding the alleged anal sodomy, SFC Holt offered a lack of opportunity defense by testifying that when his daughter, Mary, was born he was with his wife and assisted in delivering the baby at the hospital. (R. 309). He also offered proof from Dr. Gerhard Braeunig that he found no evidence of trauma to her genital area and found no scarring in the anal area and that Patti denied to him that any anal intercourse had occurred. (R. 283-87). The incident of oral sodomy allegedly occurred while the other children in the family were present, watching cartoons on television. (R. 140-42). The children testified on SFC Holt's behalf that they never had any indication of sexual involvement between SFC Holt and Patti and that SFC Holt never showed a sexual interest in them. (R. 226-29, 231-34, 236-38, 241-43).

Some court members may have doubted the testimony about the oral sodomy, concluding it was implausible that the other children in the room would not have noticed and heard something or concluding it was unlikely SFC Holt committed this act in the presence of witnesses. Other court members may have believed Dr. Braeunig's medical testimony and SFC Holt's lack of opportunity defense to the alleged act of anal sodomy. There being more than

one defense offered, Appellant submits that the findings in this case simply do not establish beyond a reasonable doubt that the court members rejected the same or only defense offered. See, e.g., People v. Gordon, 165 Cal.App.3d 839, 855-57 (1985); State v. Kitchen, 756 P.2d 105, 109-10 (Wash. 1988)(En Banc).

Finally, this is not a case involving nonspecific, generic testimony where the victim typically testifies to repeated acts occurring over a substantial period of time, which lack any meaningful point of reference and are devoid of specific details, dates or distinguishing characteristics as to individual acts. In that limited situation, the difficulty or inability of the prosecution to identify a specific act to support a conviction may create an exception to requiring the prosecution to elect. See People v. Jones, 792 P.2d 643 (Cal. 1990); Thomas v. People, No. 89 SC 25 (Colo. 1990). Because, however, a defendant's constitutional rights are implicated by the inability to elect, in that situation, the jurors must be instructed "that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged." Thomas v. People, op. at 23-24. See People v. Jones, 792 P.2d at 658-59. In addition, "special verdicts may be advisable to provide assurance that a verdict is supported by unanimous jury agreement." Thomas v. People, op. at 24.

In this case, although Patti's testimony was rambling and disjointed, it was oriented in time, dates and details, such as

when family members were born, the children were watching television, and when the family was living in Louisiana, Tennessee and Germany. Under her testimony, the prosecution clearly could and should have been required to identify and elect specific acts to support the charges. Furthermore, in any event, the failure to give a specific unanimity instruction is fatal.

WHEREFORE, because of the exceptionally important questions about the election rule, its proper interpretation and application, and the substantial prejudice to SFC Holt because election was not required, Appellant requests this Court to grant review and order a rehearing on the charges and specifications.

II

DO THE RECORD AND EVIDENCE IN THIS CASE FAIL TO DEMONSTRATE THAT THE OFFENSES WERE PROSECUTED WITHIN THE APPLICABLE PERIODS OF LIMITATIONS AND ARE THE RECORD AND EVIDENCE INSUFFICIENT TO SUPPORT THE CONVICTIONS FOR SODOMY AND INDECENT ACTS.

SFC Holt submits that the Charges in this case are barred by the statute of limitations; therefore, the findings and sentence must be set aside and the Charges dismissed, either wholly or in part. This issue has the following legal and factual aspects, which will be discussed separately.

A. The applicable three-year statute of limitions barred prosecution by sworn charges in 1987 for the sodomy incident related by the victim to have occurred at Ft. Polk when her sister was born on 5 March 1983.

B. Even if prosecution for the second incident of sodomy related by the victim was not time barred, because the Government was not required to elect which incident was

being sought for a conviction, SFC Holt's conviction under Charge I cannot stand.

C. The command listed on the Charge Sheet that received the sworn charges in this case did not exercise summary court-martial jurisdiction, and the Government failed to prove, as required by Article 43, UCMJ, 10 U.S.C. § 843, that the statute of limitations was tolled by the receipt of sworn charges by an officer exercising summary court-martial jurisdiction over the command.

D. The Army Court's conclusion that the Artile 32 investigation was completed before 18 December 1987 is clearly erroneous because the documents demonstrate that the Article 32 investigation convened at 0918 hours on 5 January 1988.

E. Contrary to the Army Court's conclusions, the documents and allied papers do not establish that sworn charges were received by the proper summary court-martial authority on 18 November 1987, and the "dates" on the allied papers, relied on by the Army Court, represent the date of the original correspondence and not the dates that the endorsements, themselves, were prepared.

As an initial matter, it is crucial to understand the purpose and policy served by a statute of limitations in a criminal prosecution. In United States v. Marion, 404 U.S. 307 (1971), the United States Supreme Court pointed out that such statutes of limitations provide "the primary guarantee against bringing overly stale criminal charges." Id. at 322 (quoting United States v. Ewell, 383 U.S. 116, 122 (1966)). The Supreme Court had noted earlier in Toussie v. United States, 397 U.S. 112 (1970),

> Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment

> because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Id. at 114-15. Accordingly, statute of limitations protections are to be liberally construed in favor of the accused. See United States v. Habig, 390 U.S. 222 (1967).

SFC Holt seeks review by this Court because his case is a perfect illustration of the foregoing reasons and need for statute of limitations in criminal prosecutions. Additionally, the statute of limitations questions in this case affect his substantial rights and determine whether he spends fifteen years incarcerated at Leavenworth or continues to serve his country faithfully and honorably as he as done for seventeen years.

A. Three Year Statute of Limitations: Charge I

Both charged offenses in this case were allegedly committed prior to November 14, 1986, the effective date for the amendments to 10 U.S.C. § 843, Article 43, UCMJ, which specifies the applicable statute of limitations for military offenses. For the instant charges, there was a three-year statutes of limitations for an Article 125, UCMJ sodomy offense. 10 U.S.C. § 843(b), Article 43(b), UCMJ. For an Article 134, UCMJ indecent acts offense, there was a two-year statute of limitations. 10 U.S.C. § 843(c), Article 43(c), UCMJ.

The specification for the sodomy charge against SFC Holt alleges that the offense occurred between 20 November 1984 and 3 September 1986. At trial, SFC Holt's stepdaughter related two

incidents of sodomy. The first involved anal sodomy. She testified that this act occurred while the family was living at Ft. Polk, Louisiana and when her mother was at the hospital giving birth to her sister, Mary. (R. 133-35).

The evidence in this case is uncontradicted that Mary was born 5 March 1983. SFC Holt so testified, (R. 309-10), and Patti, herself, agreed on cross examination that at the time of SFC Holt's court martial [in 1988] Mary was five years old, (R. 151), placing her birth year in 1983. From the unrefuted evidence, this incident, if it occurred at all, is not only outside the time period alleged in Charge I (20 November 1984 to 3 September 1986), but also is barred by the three-year statute of limitations. For this offense to have been timely charged, sworn charges would have had to been received in 1986. No action was taken against SFC Holt, however, until 1987.

The Army Court never addressed this contention, but the Government has argued that the alleged anal sodomy occurred at Ft. Polk in the summer of fall of 1985. Answer to Assignment of Errors at 14. To support that contention, the Government cites to the record at pages 132 through 136 and Defense Exhibit AA at page 1. The record, however, contradicts this claim.

Patti testified on direct at pages 132 through 136. At page 132 Government Trial Counsel asks a leading question about Ft. Polk: "Now we're getting later on in time at Ft. Polk, getting close to the time that you left. What else happened? Do you remember any other incidents." (R. 132). Patti started explaining about a time when the family was watching cartoons,

but interrupted herself and said that time happened in Germany and "I said the wrong one." (R. 132-33). She was asked if she remembered anything else at Ft. Polk. Patti then related the alleged incident of anal sodomy and specifically said it occurred when "my mom was having my sister, Mary." (R. 133)(emphasis added). After saying what happened, she was asked about the next time something occurred and responded it was when they were living in Tennessee. (R. 136).

Regarding Defense Exhibit AA, which the Government cites, that documents shows that in August 1985 SFC Holt took the children to his parents in Tennessee and returned with his wife to Ft. Polk where he and his wife stayed until mid October 1985. Consequently, although the Government claims the alleged anal sodomy occurred at Ft. Polk in the summer or fall of 1985, SFC Holt's children were in Tennessee and not even with him for most of the summer and fall of 1985.

Appellant, therefore, respectfully urges the Court to accept review of this issue and find that the alleged anal sodomy offense is time barred by the statute of limitations and outside the time period alleged in Charge I.

B. Charge I: The Election Problem

The second alleged incident of sodomy supposedly occurred in 1985 in Heidelberg around Christmas. (R. 140-42). With sworn charges having been made in 1987, arguably this incident may not have been time barred by the three-year statute of limitations. It is no answer, as the Government has suggested, however, that a

conviction for this offense renders harmless any conviction on a time-barred offense because any error did not aggravate the maximum possible sentence or aggravate the facts on sentencing. See Answer to Assignment of Errors at 15. This argument holds water only if the court members found SFC Holt guilty of Charge I based on the second claimed incident of sodomy.

Because the Government was never required to elect which of the two alleged acts of sodomy was being sought for a conviction under Charge I, there are no assurances of jury unanimity on Charge I. Some members may have voted to convict SFC Holt for the time-barred anal sodomy in 1983; others may have voted to convict on the oral sodomy in 1985; and some may have simply reasoned that he was guilty of one or the other and voted to convict without naming a specific incident.

Appellant submits that at the very least, this prejudice requires that his conviction on Charge I be reversed.

C. Tolling of the Statute of Limitations

In addition to the foregoing, there is another, more fundamental statute of limitations issue in this case. Article 43, UCMJ, 10 U.S.C. § 843 is very specific that the statute of limitations is tolled by "the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." Section IV of the Charge Sheet in this case reflects that the sworn charges were received at "1300 hours, 18 November 1987 at HQ, USAE CENTAG, APO New York 09099." (Appendix C).

After SFC Holt's court-martial, his case was forwarded to the Staff Judge Advocate, who prepared a Memorandum on 16 August 1988 recommending that the sentence be approved. Of particular significance are the following remarks:

> (2) The Charge Sheet, Section IV, incorrectly lists HQ, USAE, CENTAG, APO New York 09099, as the command exercising summary court-martial jurisdiction. HQ, USAE, CENTAG, does not exercise summary court-martial jurisdiction. HQ, 26th Support Group, exercises both summary and special court-martial jurisdiction. The Article 32 report notes that the Article 32 IQ, who was appointed by 26th Support Group, was notified of his appointment on 17 November 1987. The allied papers has an undated letter of appointment that references the forwarding of the charges to 26th Support Group on 18 November 1987. In these circumstances it appears 26th Suport Group received sworn charges by not later than 18 November 1987. The error on the Charge Sheet was therefore an administrative oversight that did not prejudice the substantial rights of the accused.

(Appendix D)(emphasis added).

Contrary to these remarks, Appellant submits that it does not appear that 26th Support Group received sworn charges no later than 18 November 1987. First, the Article 32 report does not indicate when Major Harris was notified of his appointment. (Appendix E). An unsigned Chronology document lists 17 November 1987 as "Notified of appointment as Investigating Officer," but that document does not give the appointing source. (Appendix F).

Second, the SJA mentioned the allied papers had an "undated" letter of appointment. That letter does not, however, reference the forwarding of the charges to the 26th Support Group on 18 November 1987. (Appendix I). Moreover, this letter is under the

signature of Major Kettleson, who signed as receiving the sworn charges for HQ, USAE CENTAG, APO New York 09099, which the SJA noted did not exercise summary court-martial jurisdiction.

Concerning the Charge Sheet, the Army Court made two contradictory statements in its opinion. In the second sentence on page 3 of its decision, the court states,

> The charge sheet reflects that after preferral of charges by the appellant's unit commander, the charges were forwarded to the Commander, CENTAG, where they were received by that command's adjutant (Major Kettleson) at 1300 hours, 18 November 1987.

That statement accurately reflects what is shown on the Charge Sheet. Then, later on page 3 in the first sentence of the second paragraph, the Army Court states,

> On its face, the charge sheet indicates that MAJ Kettleson, acting in his official capacity as adjutant to the Commander, 26th Support Group, received the charges on 18 November 1987.

This statement is directly contradicted by the Charge Sheet; it nowhere indicates MAJ Kettleson was acting as adjutant to 26th Support Group Commander. Under Section IV. Receipt by Summary Court-Martial Convening Authority, Major Kettleson clearly signed as Adjutant for the Commander as receiving the charges for USAE CENTAG, which did not exercise summary court-martial jurisdiction. (Appendix C). SFC Holt filed a petition asking the Army Court to reconsider and pointing out the foregoing inconsistency and inaccuracy. That petition was denied without explanation.

The question what the Charge Sheet shows or fails to show is not a matter committed to judicial discretion. The conclusion

that according to the Charge Sheet Major Kettleson received the charges on 18 November 1987 as adjutant to 26th Support Group Commander is clearly erroneous, and Appellant requests that this Court grant review to correct this mistake that affects his substantial rights.

D. Date of Article 32 Investigation

On page 3 of its decision, the Army Court states,

> On 18 December 1987, after the Article 32 investigation was completed, the Commander, 26th Support Group, forwarded the charges to the general court-martial convening authority with a recommendation that the charges be referred to trial by general court-martial.

As with the previous discussion, the documents in this record contradict that the Article 32 investigation was completed before 18 December 1987. The Article 32 Investigating Officer's Report, DD Form 457 was not signed until 15 January 1988. (Appendix E). Additionally, the first typewritten page outlining the proceedings at the Article 32 investigation states that the Article 32 investigation "convened at 0918 hours on 5 January 1988." (Appendix L).

Appellant submits that any assumption by the Army Court that the charges are not time barred because the Article 32 investigation was completed before 18 December 1987 is unfounded and is erroneous. SFC Holt asked the Army Court to reconsider its position on this point as it may have affected the court's analysis of the statute of limitations question, but the Army Court declined.

E. Dated and Undated Documents

The Army Court's analysis of the statute of limitations gives the misleading impression that the Appellant's copy of the record and the court's record are different. Specifically, footnote 2 on page 3 of the court's decision recites,

> [2] Appellate defense counsel have stated that the charge sheets and allied documents in their copies of the record of trial are undated. The record presented to this court, however, contain documents which are dated.

From its "dated" documents, the Army Court held that "[t]he documents contained in the record and the allied papers establish that the charges were received by the summary court-martial convening authority on 18 November 1987, two days prior to the running of the statute of limitations." (Appendix A, at 3).

Based upon footnote 2, appellate defense counsel were obviously concerned whether the record before the Army Court was different from appellate defense counsel's copies. As a result, military appellate defense counsel compared the allied papers that appear in the court's record with the allied papers in appellate defense counsel's copies of the record. From that comparison, it appeared that the records are identical. Appellant then petitioned the Army Court to reconsider and attached copies of the relevant documents from appellate defense counsel copies of the record. That petition was denied without confirming or denying that the records are identical.

When this Court compares the records, Appellant submits that it will agree that they are identical and that the Army Court's decision, therefore, is premised on an incorrect belief; i.e.,

that the date of the basic correspondence was the date the endorsement was actually prepared. The inquiry does not end, however. Assuming that the documents in the court's record and Appellant's copy of the record are identical, the issue then becomes one of correctly interpreting what certain notations (dates) in the documents actually signify. An accurate interpretation can be obtained by consulting Army Regulation 340-15, "Preparing and Managing Correspondence." which was effective at the time of the charges against SFC Holt and his court-martial. (Appendix M).

Chapter 2, Section II of Army Regulation 340-15 specifies the use and format for an endorsement, which is "a reply or a forwarding statement added to a memorandum." AR 340-15, §2-7. Subsections c., d., and g. of paragraph 2-8. of AR 340-15 provide in pertinent part,

> c. Type the symbol of the office or action officer preparing the endorsement at the left margin on the eighth line from the top of the page followed by the office symbol and date of the basic correspondence in parentheses. Type the endorsement number two spaces after the parentheses.
>
> d. Place the writer's name, initials of the typist, and telephone number of the action office on the same line as the endorsement number, ending approximately at the right margin. . . .
>
> g. The address of the endorsing office serves as a return address. Type it at the left margin on the second line below the subject. Stamp or type the date of the endorsement approximately three spaces after the ZIP Code of the endorsing office.

(Emphasis added). Also included in AR 340-15 is an example of the format for preparing an endorsement.

The documents in this record show four endorsements to the basic or original correspondence denoted as ACCT-HHC (27-10e) and dated 18 Nov 87. The basic correspondence is attached in Appendix G . The first endorsement is attached in Appendix H; the second endorsement, in Appendix I; the third endorsement, in Appendix J; and the fourth endorsement, in Appendix K. On each document, the reference to the office symbol and date of the basic correspondence has been highlighted in yellow.

The date of the basic correspondence has been handwritten as 18 Nov 87. When this document is read in conjunction with the four endorsements, it plainly appears that the "dates" highlighted in yellow in the Appendices are referring back to the original memorandum that appears in Appendix G. These "dates" do not represent when the endorsements, themselves, were prepared, as apparently believed by the Army Court.

The date of the endorsement should, according to AR 340-15 ¶2-8. g., appear on the second line below the "Subject" approximately three spaces after the ZIP Code of the endorsing office. On the first endorsement (Appendix H), no date for when that endorsement was prepared appears. Likewise, on the second endorsement (Appendix I), no date for when it was prepared appears. The third endorsement (Appendix J), was prepared and is dated 18 DEC 1987 and is highlighted in green. And, finally, the fourth endorsement (Appendix K), was prepared and is dated by stamp 5 FEB 1988 and highlighted in green. An additional date stamp also appears on the fourth endorsement, highlighted in

pink, which is not required by AR 340-15, indicating that the document was received on 09 FEB 1988.

Pursuant to the foregoing analysis, Appellant respectfully submits that he is correct that some of the critical allied papers and documents in this record are, indeed, "undated" such that it cannot be determined when the document, itself, was prepared. In urging the Army Court to grant a rehearing, Appellant presented the foregoing analysis; the petition, nevertheless, was denied.

Appellant urges this Court to grant review to correct the Army Court's finding that the documents in this record establish that sworn charges were received by the proper authority on 18 November 1987. The endorsement first encountered in this record that is "dated" and that reflects the proper command exercising summary court-martial authority knew of the charges is the "3rd End" (Appendix J), which bears the date stamp 18 DEC 1987. Measured from that date, Appellant respectfully submits that the charges are time barred and must be set aside and dismissed. This date, first of all, does not dispose of the problems with the anal sodomy charge. Second, using that date, the proof in insufficient to demonstrate that the indecent acts charge was timely. The standard of review requires that the statute of *limitations be liberally construed in favor of the accused.* See United States v. Habig, supra. The stepdaughter's testimony was very vague. She related fondling in the Fall of 1985 and near Christmas 1985. Absent any proof that the incidents "near"

Christmas actually occurred on or after 18 December 1985, they are time barred under the two-year statute of limitations.

Finally, on the basis of the entire record in this case, Appellant submits tht the evidence is insufficient to find that he is guilty beyond a reasonable doubt. The Government built an entirely circumstantial case against SFC Holt based on "expert" testimony from child advocate witnesses who had a clear predisposition to believe allegations of child sexual abuse. The stepdaughter's testimony was rambling and disjointed, and the Article 32 Officer had recommended no charged be referred.

In many instances, the stepdaughter's testimony was simply incredible, as when SFC Holt supposedly performed oral sodomy while the other children were in the room watching television. Equally incredible was her fondling claim when Atisha was born, although Patti was living in Tailand at the time. Likewise, the anal sodomy, which should have been the most traumatic event, was the one she had the most trouble remembering. At trial, she completely skipped over that incident, hesitated and then remarked, "I said the wrong one." (R. 133).

The medical proof in this case was also ambiguous and completely insufficient to substantiate sexual abuse. Further, whatever LTC Parker thought he saw, he testified the "scar" was at least six months old and less than two years. (R. 88). The uncontradicted proof was that <u>if</u> the alleged anal intercourse happened, it occurred in 1983 when Mary was born, more than four years before LTC Parker's examination.

WHEREFORE, Appellant requests that this Court grant review and set aside the findings and sentence in his case and order that the charges be dismissed as barred by the statute of limitations or on the basis of insufficient evidence.

III

DID THE EXPERT OPINION TESTIMONY GIVEN BY GOVERNMENT WITNESSES IN THIS CASE EXCEED THE PROPER SCOPE AND BOUNDS OF ADMISSIBLE EVIDENCE IN CHILD SEXUAL ABUSE PROSECUTIONS.

The question of expert and quasi-expert testimony concerning the behavior of sexually abused children was first addressed by this Court in United States v. Snipes, 18 M.J. 172 (C.M.A. 1984). This Court found no error in admitting certain conclusions about alleged behavioral patterns of sexually abused children.

> If a qualified expert offers to give testimony on whether the reaction of one child is similar to the reaction of most victims of familial child abuse, and if believed this would assist the jury in deciding whether a rape occurred, it may be admitted.

Id. at 178. The concurrence in Snipes, however, voiced grave reservations about such opinion testimony and warned of the hazard "that an expert witness' testimony may be allowed to outrun the scope of his expertise." Id. at 180.

These warnings were prophetic, as SFC Holt's case illustrates. The "expert" testimony admitted in this case far exceeds in scope, content and subject matter any previous such testimony reviewed by this Court. SFC Holt's prosecution vividly demonstrates the crucial need to grant review to set forth clear limitations on the admission of snydrome-type testimony.

The first "expert" in this case was LTC Parker. At the time he testified, no attack had been made on the stepdaughter's credibility, and the defense had not opened the door. The problems developed immediately when he gave his "diagnosis."

> A. My diagnosis was that the patient showed indications that she had been sexually molested in the past by an adult male.
>
> Q. And did you make any assessment at all as far as any child abuse syndrome, or anything like that?
>
> A. Under that, she did fit under the category of a physically abused child, battered child syndrome, because of the nature of the injuries that involved the trauma, plus due to past history of trauma.

(R. 66)(emphasis added).

Neither this Court nor the scientific community has ever recognized some all-encompassing "child abuse syndrome." See Diagnostic and Statistical Manual of Mental Disorders (DSM III). Even asking, as Government Trial Counsel did, about such a syndrome was grossly misleading. Then, LTC Parker did nothing to correct this notion. Indeed, he added to the confusion and misinformation by testifying that Patti fit under the category of the "battered child syndrome."

LTC Parker was never qualified or proffered as an expert on the battered child syndrome. Most importantly, though, the battered child syndrome was wholly irrelevant to the question of SFC Holt's guilt or innocence on the charges of sodomy and indecent acts -- that is, child sexual abuse. This testimony, additionally, was irrelevant in light of LTC Parker's later

testimony that sexual abuse is a crime of sexual gratification, not violence. (R. 69-70).

LTC Parker also exceeded the scope of his expertise when he disgressed into the separate discipline of psychiatry, testifying about the Electra and Oedipal complex. (R. 93). LTC Parker was never qualified as an expert in psychiatry; the ease with which he shifted from one area of expertise to another, however, further credits the warnings expressed in the Snipes concurrence.

Additionally, the scope of LTC Parker's testimony improperly broadened out to include perpetrator "profile" testimony, the mental state and intent of perpetrators, and other family members. (R. 67-91). This case is not the first to raise a so-called "child sexual abuser profile." See United States v. August, 21 M.J. 363, 364 n.1 (C.M.A. 1986); United States v. Arruza, 26 M.J. 234, 235 n.2 (C.M.A. 1988). In SFC Holt's case, yet a third, and completely different "profile" was suggested. Like in August, the source of the information does not appear, and no evidence was offered that the characteristics described by LTC Parker were reasonably relied upon by psychologists or by any significant segment of that discipline. See United States v. August, 21 M.J. at 364-65. If anything, the wide disparity among the profiles outlined in August, Arruza and this case plainly demonstrate that there is no body of specialized knowledge about a typical profile of a child sexual abuser.

The use of profile evidence in a criminal prosecution is fraught with great dangers. This testimony is nothing more than glorified character evidence; it purports to show a person's

propensity to act in a certain way. See Comment, "Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future?", 8 St. Louis U. Public L. Rev. 207, 224 (1989). Character evidence about a defendant is not admissible to prove that he acted in conformity therewith, unless the defendant puts his own character in issue. Military R. Evid. 404(a). When LTC Parker testified, SFC Holt had not placed his character in issue. See United States v. August, 21 M.J. at 364.

The expert testimony problems in this case were not confined to LTC Parker. Nancy Tate was offered as an expert in child sexual abuse, (R. 178), and introduced an entirely novel syndrome: the "damaged goods syndrome," (R. 182-83). Counsel for SFC Holt have been unable to find any scientific or legal support for the existence of such a syndrome. It is no excuse that perhaps Ms. Tate indulged in a little psychological hyperbole. Her "expert" authority projected an aura of special reliability that undoubtedly impressed and misled the court members.

Ms. Tate was also asked to comment on the frequency of sexual abuse between stepfathers and daughters. (R. 181). It is highly questionable that statistical information has any probative value in a criminal trial, and her testimony prejudicially invited the court members to conclude that the odds were better than one in four that Patti was telling the truth.

The prejudice to SFC Holt from the admission of this improper testimony cannot be minimized. The lodestar for admitting expert testimony is that the average juror lacks experience dealing with a particular subject, and the testimony

would, therefore, be helpful. E.g., United States v. Carter, 22 M.J. 771, 775 (A.C.M.R. 1986). Jurors, naturally, will place particular emphasis on expert testimony about a subject foreign to their common experience. When the "expert," therefore, is confused about the topic of his testimony or strays from his area of expertise, the average juror cannot be expected to profit from the information conveyed or to properly apply that information.

None of the customary arguments why the error might be harmless apply in this case. There was no prior confession by the defendant and no eyewitnesses. The medical evidence was conflicting, and the stepdaughter's own testimony was rambling, disjointed and confused -- just as the Article 32 investigating officer had described in recommending that charges not be referred to trial by court martial. In closing argument, Government Counsel even argued that Patti's memory is "awful" and that what the court members should look for is evidence that corroborates her story. (R. 371, 375).

This Court's decision in Snipes did not open Pandora's box to any thoughts that "experts" may wish to voice about child sexual abuse or child abuse in general. The Army Court's opinion, however, falls dangerously close to adopting such a position. The Army Court never mentions Appellant's complaints about the unqualified battered child syndrome and psychiatric testimony or about the profile and statistical "expert" testimony. It does mention (without ever defining or discussing what it is) Ms. Tate's "damaged goods syndrome," but then holds, incorrectly,

that such testimony was admissible under this Court's decisions in Snipes and United States v. Carter, 26 M.J. 428 (C.M.A. 1988).

Each case must turn on its own facts and on the "content" of the expert's testimony. The Army Court, however, treated the question as if the substance of the expert testimony was irrelevant and all that was required was an expert on child sexual abuse. No one simply reading the Army Court's decision could possibly determine what opinions were given in this case. Once, however, the actual expert opinions are identified and analyzed, they cannot be approved under or reconciled with this Court's prior opinions.

The expert testimony in SFC Holt's case went far beyond the limited conclusions described in Snipes, and the undue prejudice requires that the findings be set aside and a rehearing ordered. Because of the serious problems, SFC Holt would also ask the Court to reconsider seriously if such testimony really helps the fact finder and is appropriate.[2] There is much disagreement about using the child sexual abuse syndrome, which was developed as a therapeutic aid, as a lie detector device in the courtroom.

Before the military courts become inundated with a proliferation of vague and unscientific syndromes (such as the "damaged good syndrome"), caution should be exercised in this area. Just because someone calls an array of unreliable symptoms a "syndrome" or "profile" does not mean that it has any scientific or logical support.

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[2] It is particularly disturbing that after spending only an hour and a half with the stepdaughter, LTC Parker diagnosed, separate from the physical examination, that she showed

IV

WAS IT PREJUDICIAL ERROR TO PERMIT GOVERNMENT WITNESSES TO REPEAT HEARSAY STATEMENTS OF THE ALLEGED VICTIM, WHICH DID NOT CONSTITUTE EXCITED UTTERANCES UNDER MRE 803(2) OR STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT UNDER MRE 803(4).

Three Government witnesses were permitted to repeat hearsay statements of the stepdaughter complaining of sexual abuse. None of the statements were admissible under the hearsay exceptions in the Military Rules of Evidence, and the admission of these statements was prejudicial error, meriting review by this Court.

A. Linda Reddick

Linda Reddick testified that in September 1987 she received a call from Patti's foster parents, and talked with Patti the following day. At trial, Ms. Reddick related what Patti said. (R. 106). Since Ms. Reddick testified before Patti, she was not offered to rehabilitate Patti's credibility.

There is no evidence in this record that Patti's statements were excited utterances. See United States v. LeMere, 22 M.J.

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2 (cont'd) indications of sexual molestation. (R. 66). That diagnosis could not have been based on anything other than her statements. For example, taking as Ms. Tate suggested, (R. 180), that one of the supposed "indicators" or symptoms of child sexual abuse is the way a child dresses, what could LTC Paker have concluded by seeing the child once, in one set of clothes? Only if a person has a basis for comparison can any valid opinions be formed. Poor school performance was another indicator mentioned by Ms. Tate. (R. 179). LTC Parker never testified that he learned anything about Patti's school performance. Moreover, even if she told him about her school performance, that fact should be independently verified before an "expert" diagnosis is made.

61 (C.M.A. 1986); United States v. Ansley, 24 M.J. 926 (A.C.M.R. 1987). Cf. United States v. Arnold, 25 M.J. 129 (C.M.A. 1987). The statements were made two months after Patti had been away from her family.

Likewise, the statements do not fall under Military Rules of Evidence 803(4). This exception requires "the moving party to show not only that the medical person was treating or diagnosing the patient, but also that the patient furnishing the information was seeking such help." United States v. Williamson, 26 M.J. 115, 118 (C.M.A. 1988). There is no evidence that Patti's statements were for a medically related purpose. See United States v. Oldham, 24 M.J. 662 (A.F.C.M.R. 1987)(contact with victim intitiated as automatic response to report of sex abuse).

Accordingly, the defensed maintains that it was clear error to permit Ms. Reddick to testify about statements Patti made to her of sexual abuse by SFC Holt.

B. Nancy Tate

Nancy Tate, a social worker, dealt with Patti in a weekly group session. (R. 178, 185). Ms. Tate had heard Patti tell her story to the group "somewhere between 13 and 17 times." (R. 186). The story telling is "routine," (R.185), and

> really serves more than one function, certainly one that has nothing to do with the therapy for that individual girl; but one is to make it more comfortable and easier for the new girl coming it.

(R. 186) (emphasis added).

Ms. Tate then gave a lengthy account of Patti's allegations. (R. 187-91). The record is unclear whether Ms. Tate was supposedly recounting statements made by Patti on one or more occassions, or whether her testimony represented an interpretative summary of many different statements made at seperate times.

The medical diagnosis or treatment hearsay exception in Rule 803(4) is not so broad as to cover every conceivable encounter between an alleged victim and medical personnel. E.g., United States v. White, 25 M.J. 50, 51 (C.M.A. 1987). "[T]he statments must have been elicited under circumstances which made it apparent to the patient that the psychiatrist desired truthful information and that only by speaking truthfully would he receive the desired benefits from the psychiatric consultation." United States v. Deland, 22 M.J. 70, 73 (C.M.A. 1986).

There is no evidence that Patti's statements were made for medical diagnosis. On the contrary, the group conducted by Ms. Tate is "specifically for victims of child sexual abuse." (R. 178). Patti's membership in the group was pre-determined by some prior diagnosis. Regarding medical treatment, the Rule 803(4) exception similarly is not met. Patti testified that she told her story "[s]o everybody will know our story, and it won't make it so hard for us like when we have to go to court, or anything." (R. 123)(emphasis added). See United States v. Deland, 22 M.J. at 74 (exception hinges on attitude of declarant). Clearly, therefore, the requirements of Rule 803(4) were not fulfilled.

C. LTC Parker

The third witness who testified about Patti's statements was LTC Parker. After his initial contact with Patti on September 11, 1987, he had no other specific contact with her. (R. 65, 95-96). Her statements, therefore were unrelated to medical treatment. The only remaining question is whether they were reasonably pertinent to a medical diagnosis under Rule 803(4).

No showing was made that Patti's statments "were elicited under circumstances which made it apparent to the patient that [he] desired truthful information and that only by speaking truthfully would [she] receive the desired benefits from the psychiatric consultation." United States v. Deland, 22 M.J. at 73. Rather, LTC Parker testified,

> Well, initially, I greeted her and I asked her if she understood why she was there. And, she indicated that she did know, and I asked her to explain to me exactly what had happened to her in her own words.

(R. 73). LTC Parker never stated what Patti's "understanding" was. Also, he testified, "Typically, I usually begin my approach as a believer who is open and accepting." (R. 75). Importantly, Patti herself never testified what she understood the purpose to be of seeing LTC Parker. Cf. United States v. Nelson, 25 M.J. 110, 112 (C.M.A. 1987), cert. denied, 108 S.Ct. 1016 (1988)(premise of Rule 803(4) that patient has incentive to be truthful to facilitate doctor's task).

Unlike the child in Deland, Patti never expressed any relationship between problems she was having and talking with LTC Parker. No incentive to tell the truth can be found and, indeed,

all indications point to the opposite conclusion. On prior occasions, Patti claimed she had lied about sexual experiences and kidded around to make her friend jealous. (R. 172-73). When, however, she told Aimee that SFC Holt had sexually abused her, Aimee "urged," (R. 217--18), her to tell the Constantines. Patti's story snowballed quickly. To admit lying to impress Aimee or just kidding around would jeopardize her foster placement. By the time Patti saw LTC Parker, she had already repeated her story to four people. Any incentive at that time was to tell the same story, whether or not it was true.

D. Collective Prejudice

The prejudice to SFC Holt from the admission of Patti's seperate hearsay statements was substantial; the collective effect was devastating. Patti's own testimony was rambling, disjointed and confused -- just as the Article 32 investigating officer had described in recommending that charges not be referred. Having trained, articulate adults interpret and then relate her statements in an organized, coherent fashion for the court members obviously carried undue weight and created a false impression of detailed and consistent accuracy completely lacking when Patti testified.

Wherefore, Appellant requests that this Court set aside the findings and sentence in his case, and order a rehearing.

V

WAS IT PREJUDICIAL ERROR TO ADMIT EXTRINSIC OFFENSE EVIDENCE OF PRIOR PHYSICAL ABUSE OF THE ALLEGED VICTIM AND THE BATTERED CHILD SYNDROME, THE PROBATIVE VALUE OF WHICH WAS NOT ESTABLISHED AND WHICH WAS UNDULY PREJUDICIAL, CONFUSING AND MISLEADING.

Throughout the court-martial, references were improperly made by LTC Parker and Ms. Reddick to physical child abuse. (R. 66, 75, 104). None of the charges against SFC Holt related to physical, battering-type abuse, and it appears that those uncharged instances related to SFC Holt's wife. This testimony constituted improper and unduly prejudicial extrinsic offense evidence under Military Rules of Evidence 404(b).

In SFC Holt's case, no relevancy was suggested for evidence, nor were the court members instructed on how to consider this evidence. Neither Patti nor SFC Holt had testified when the evidence came in through LTC Parker and Ms. Reddick. See United States v. Brooks, 22 M.J. 441 (C.M.A. 1986) (materiality may not arise until accused asserts lack of criminal intent or other defense). Even after SFC Holt presented his defense, this evidence was not relevant. SFC Holt's intent and knowledge were not in issue; he denied committing the charges altogether, and the evidence was not similar to the charged offenses. He did not assert mistake or accident as a defense, and his identity was not an issue. His motive also was irrelevant, and at any rate beating someone is not a motive for then sexually abusing that person. So, too, there was no proof that beating Patti was part of some common scheme or plan. In fact, according to LTC Parker,

sexual abuse is a crime of sexual gratification, not violence. (R. 69-70). Last, the record does not show that SFC Holt was the perpetrator. See United States v. White, 23 M.J. at 87 (evidence of prior injuries relevant only if defendant had inflicted them).

Regarding unfair prejudice, the evidence made Patti appear much more victimized and sympathetic, appealing to the emotions of the court members. Everything Patti did was caused by physical or sexual abuse: lying, stealing, bad grades. This evidence also generated confusing and misleading collateral proof. In rebuttal, the Government called LTC Richard Bachman, over defense objection. (R. 334-35). The Government represented that witness would impeach Mrs. Holt and show that Patti's bruises could not be sustained from falling "on" a skateoard. (R. 335).

LTC Bachman testified that on July 10, 1987 he examined Patti and noted multiple bruising. Government Trial Counsel commented that "it's been stated that Patti fell off her skateboard." (R. 337). Defense counsel objected, which was sustained, but the military judge permitted a hypothetical question whether a person who had fallen "off" a skateboard would receive "these" type of injuries. (R. 337). LTC Bachman stated that he "would need more information," but normally falling "off" skateboard would not induce such injuries. (R. 337).

This testimony was not probative, even for impeachment. Two incidents of physical abuse were mentioned: one in December 1986, involving a bruise on Patti's arm, and another in July 1987 when she was taken from the Holt home. When SFC Holt testified, he explained about the December 1986 incident when he heard a bang

against the wall and found two girls in Patti's room. One of the girls told him later that Patti had been jumping on the bed, and when she jumped she hit a skateboard and then hit the wall. SFC Holt had no knowledge of bruises on Patti's back on July 10, 1987. (R. 301-04).

The whole predicate for LTC Bachman's testimony was that the bruises could not have been caused by falling on a skateboard. His examination of Patti, however, related to the July 1987 incident. The only testimony about a skateboard was the December 1986 incident. Additionally, the hypothetical was grossly inaccurate because no one claimed Patti fell "off" a skateboard. The girl told SFC Holt that Patti had been jumping on the bed, and "hit" a skateboard and then "hit" the wall. (R. 301-04).

Finally, the extrinsic offense evidence prejudicially suggested a verdict for the wrong reasons -- to keep Patti from her family. By convicting and sentencing SFC Holt to a long term of incarceration, the chances of returning Patti to her family would be slight. Indeed, this very concern was expressed by one court member who inquired during sentencing what could be recommended "as protection for the other children from the mother who appears to be comfortable with violence." Appellate Exhibit XVIII. (See R. 436).

The issue in a court-martial is whether the Government has proven beyond a reasonable doubt the accused's guilt of the charges and specifications. In this case, through the admission of improper extrinsic offense evidence, the trial of SFC Holt was diverted from its principal function, and SFC Holt's family was,

in effect, put on trial. Wherefore, Appellant respectfully requests that this Court set aside the findings and sentence in his case, and order a rehearing thereon.

VI

WAS IT PREJUDICIALLY IMPROPER TO PERMIT SFC HOLT TO BE CROSS EXAMINED TO ELICIT HIS OPINION OF THE VERACITY OF OTHER WITNESSES AND TO PERMIT A REBUTTAL GOVERNMENT WITNESS TO EXPRESS HIS OPINION THAT OTHER CHILDREN IN THE HOLT FAMILY HAD BEEN COACHED.

On cross examination, the Government repeatedly asked SFC Holt to comment on the testimony of LTC Parker and Dr. Braeunig. For example: "Do you think he's [LTC Parker] made up the fact that he sees a scar there?"; "And you think he's not telling the truth"; and "Of the two men, wouldn't you sure like to believe Dr. Braeunig rather than Dr. Parker?". (R. 321-22). Clearly, Government Trial Counsel was pressuring SFC Holt to say that LTC Parker was lying and that Dr. Braeunig was telling the truth.

The credibility of witnesses and the weight to be given their testimony rest exclusively with the jury, who is "the lie detector in the courtroom," State v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974). Asking a witness if he believes or disbelieves another witness invades the jury's province and violates Military Rules of Evidence 608(a). Under that Rule, the credibility of a witness may be attacked or supported only by opinion or reputation evidence that refers to the witness's character for truthfulness or untruthfulness.

Asking SFC Holt if he would like to believe Dr. Braeunig was clearly improper. The answer is tantamount to an expression of

belief as to how the case should be decided, which is prejudicial and no value to the fact finder. See United States v. Price, 722 F.2d 88, 90 (5th Cir. 1983)(testimony that agent believed witnesses was reversible error). The flip-side of asking if SFC Holt thought LTC Parker was not telling the truth was likewise improper for the same reasons and also called for an incompetent answer under Rule 602; one witness will not necessarily have personal knowledge of whether another witness is actually lying or simply perceiving or remembering an event differently.

Requiring a witness to characterize a government agent's testimony as right or wrong, or as a lie or a mistake is prejudicially improper. E.g., United States v. Mazzilli, 848 F.2d 384, 388-89 (2d Cir. 1988); United States v. Victoria, 837 F.2d 50, 55 (2d Cir. 1988). "[C]ross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper." United States v. Richter, 826 F.2d 206, 208 (2d Cir. 1987). It prejudicially invites the jury to view an acquittal as tantamount to finding that government agents who are servants of the people have committed perjury. See id. at 209.

Another example of improper opinion testimony came from Chief Warrant Officer 2 Lauer, who interviewed two of the Holt children. Regarding their answers, Officer Lauer was asked, "How did this strike you?" (R. 339). Civilian defense counsel objected, which was sustained. (R. 339). Despite the ruling, Government Trial Counsel persisted, and was able to elicit the following opinion: "Well, sir, after interviewing the two

children, and getting the immediate responses that I get, it was my personal opinion that the children were coached." (R. 340).

This testimony constituted a direct attack on the credibility of the Holt children in violation of Rule 608(a). Officer Lauer's opinion did not refer to the children's character for untruthfulness but, instead, commented on their truthfulness on a particular occasion. See, e.g., United States v. Earley, 505 F.Supp. 117 (S.D. Iowa), aff'd, 657 F.2d 195 (9th Cir. 1981).

Furthermore, his opinion was objectionable under Rule 701, which limits lay opinions to those rationally based on the perception of the witness and that are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. In the United States v. Dotson, 799 F.2d 189 (5th Cir. 1986), Government agents testified that in their opinion the defendant and his witnesses were not of truthful character and not to be believed under oath. The Fifth Circuit found reversible error. "In the absence of some underlying basis to demonstrate that the opinions were more than bare assertions that the defendant and his witnesses were persons not to be believed, the opinion evidence should not have been admitted." Id. at 193.

Officer Lauer was Chief of the Economic Crime Team, (R. 338), and no evidence was introduced to validate his conjecture that children who immediately answer questions have been coached to lie. Certainly, if the opinions of polygraph operators are not admissible, opinions based on even more subjective factors such as body language and response times should be excluded.

The precautions and limitations for admitting opinion testimony were woefully ignored in this case to the substantial prejudice of SFC Holt. Review is warranted by this Court to reaffirm the requirements for opinion testimony under the Military Rules of Evidence.

VII

WAS THE TESTIMONY OF THE VICTIM AT SENTENCING THAT SHE WOULD FEEL BETTER IF SFC HOLT APOLOGIZED AND VICTIM IMPACT TESTIMONY ABOUT BEING THE SCAPEGOAT OF A DYSFUNCTIONAL FAMILY HIGHLY INFLAMMATORY AND PREJUDICIALLY IMPROPER.

At sentencing, Patti and Ms. Tate testified in aggravation. Their testimony, Appellant submits, was highly inflammatory and improper. During findings, never once did Patti express feelings about what had happened or the effect on her. Patti was almost fifteen years old at the time of the court-martial. (R. 115). Even at the sentencing, Patti never related how she had been affected by the events. Instead, she said she felt sorry for her sisters. Then she was asked what she wanted from SFC Holt. She responded that she wanted him to apologize and admit what he had done because "I would feel much better." (R. 415-16).

Even if victim impact evidence may be a legitimate aggravating circumstance for sentencing, see United States v. Pearson, 17 M.J. 149 (C.M.A. 1984), there are necessary limits on what can be introduced under the rubric of victim impact. The philosophy behind victim rights recognizes that the needs of victims have not always been fairly considered. This case, by

contrast, focused exclusively on Patti. The details of her life were developed in great detail by Government witnesses.

Having Patti testify that she would feel better if SFC Holt apologized was nothing more than an emotional appeal; an apology was not a loss that could be redressed through the military courts. Just as the "fundamental sanctity of the court-martial" in United States v. Pearson was violated by the victim's father commenting on the findings of the court and when Gunnery Sergeant implied that the unit was hanging on the trial's outcome, the environment of fairness and objectivity was not maintained in this case. Her testimony equated to "the bloody shirt being waved," id. at 153, and obviously accomplished its intended purpose as reflected in the severe sentence adjuged in this case.

Ms. Tate, at sentencing, made fleeting references to the impact on Patti, but her testimony was largely argumentative and speculative. She could not project Patti's therapy need and and guessed about treatement cost because "I really don't know." (R. 413). Ms. Tate spoke in generalities about the importance to victims of perpetrators acknowledging guilt, but when asked about Patti her answer was unintelligible. "You know, I know that it's ... that Patty says it's important to her, so I ... I know that it is. I do have ... I believe that there's some difference in that there's been so much emotional estrangement from that family anyway ..." (R. 414-13). See United States v. Hammond, 17 M.J. 218, 221 n.6 (C.M.A. 1984)(testimony must relate to victim).

Furthermore, the way Ms. Tate lumped together all of Patti's problems, it was impossible to make an objective assessment of

the harm attributable to SFC Holt. In aggravation, Ms. Tate again referred to the physical abuse and Patti needing to work through rejection, and the emotional abuse and trauma she had experienced since age five. (R. 412-13). Inviting the court members to punish SFC Holt for all of Patti's problems, whether or not related to his own conduct, was improper and prejudicial.

Finally, allowing Ms. Tate to characterize Patti as the "scapegoat" of her "dysfunctional family," and argue against returning her to her family or living in Thailand exceeded permissible sentencing aggravation. (R. 413). While to Ms. Tate, the entire "dysfunctional" Holt family may have been on trial, the family was not indicted. Nor was sentencing an appropriate time to advance the public cause of child protection. See United States v. Pearson, 17 M.J. at 153 (desires of society or any particular segment cannot be allowed to interfere with court's independent functions). Her testimony, nonetheless, had a significant impact, prompting one court member to inquire what could be recommended to protect the other children from the mother. Appellate Exhibit IVIII. (See R. 436).

Although defense counsel did not object, the improprieties that occurred affected the court's independent function. The military judge has the primary responsibility to maintain a fair and neutral environment for impartial sentencing, and when appropriate to sua sponte take corrective action. This case called for such corrective action.

Review is needed to confirm the proper boundaries at sentencing. Appeals to sympathy, emotion and fear devoid of

factual substance and directed against an entire family cannot result in a sentence objectively and rationally related to the charges or the defendant. When that happens, as in this case, the sentence should be set aside a rehearing ordered.

VIII

DID THE SERVICES AND REPRESENTATION OF CIVILIAN DEFENSE COUNSEL IN CONNECTION WITH SFC HOLT'S GENERAL COURT-MARTIAL TRIAL FALL BELOW THE LEVEL OF PERFORMANCE REQUIRED BY THE SIXTH AMENDMENT, THEREBY DEPRIVING SFC HOLT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

"The right of an accused to counsel is beyond question a fundamental right." Kimmelman v. Morrison, 91 L.Ed.2d 305, 320 (1986). The right to counsel is needed to protect the fundamental right to a fair trial, "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland v. Washington, 80 L.Ed.2d 674, 692 (1984).

The constitutional guarantee of counsel, however, "cannot be satisfied by mere formal appointment." Avery v. Alabama, 308 U.S. 444 (1940). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Id. at 692. Accordingly, the constitutional right to counsel embodies the right to the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 395-96 (1985); United States v. Cronic, 466 U.S. 648, 658 (1984); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

In the leading decision, Strickland v. Washington, 80 L.Ed.2d 674 (1984), the United States Supreme Court addressed the constitutional requirement of effective assistance of counsel. "The benchmark for judging any claim of ineffectiveness," the Supreme Court wrote, "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 692-93. Therefore, "[a] criminal defendant who obtains relief under Strickland does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result." Kimmelman v. Morrison, 91 L.Ed.2d at 331 (Powell, J., concurring).

Under the Strickland guidelines, a claim of ineffective assistance of counsel has two components.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

80 L.Ed.2d at 693. Regarding prejudice, the question is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 698. These guidelines and standards were specifically adopted by this Court in United States v. Scott, 24 M.J. 186 (C.M.A. 1987), as

applicable to practice before courts-martial under the Uniform Code of Military Justice.

In the instant case, SFC Holt submits that the the services and representation at the general court-martial of his civilian defense counsel, Edward J. Bellen, fell below the level of performance required by the Sixth Amendment, thereby critically undermining the fairness of his trial and the reliability of the findings. From the beginning, Mr. Bellen's actions demonstrated that he was not functioning as the counsel guaranteed by the Sixth Amendment; he initially waived an Article 32 hearing, but the appointing authority, nevertheless, required a hearing. At the Article 32 hearing, Mr. Bellen conducted no examination of any of the government witnesses and presented no proof. (See Article 32 Report). Then, when the court-martial trial convened on March 18, 1988, Mr. Bellen failed to conduct any voir dire of the court members. (R. 39-46).

No tactical reasons can justify Mr. Bellen's conduct. The opportunity provided by an Article 32 hearing to observe the complainant's demeanor and learn the details of the charges is invaluable to the defense. Similarly, foregoing an opportunity to examine government witnesses under oath to elicit information favorable to the defense or to clarify and pin down a witness' testimony is unreasonable performance expected of a competent defense attorney. Then, moreover, to abdicate questioning the court members during voir dire of a trial concerning the explosive issue of sex with children and when SFC Holt was facing 27 years of confinement on the charges, defies common sense.

The failure to conduct voir dire was not part of any valid strategy. Rather, it appears that Mr. Bellen customarily foregoes this critical stage of the proceedings, as verified by the comments of the Military Judge at the court-martial.

> ATC: Your Honor, we have our witnesses scheduled for 1300 because we thought this would go for a while depending on voir dire. If you want, we could call them and have them here earlier if we --
>
> MJ: Well, definitely do that, because my experience with voir dire with Mr. Bellen, it doesn't take very long.
>
> IDC: Your recollection is accurate, Your Honor.

(R. 28).

Mr. Bellen's neglect and inattention extended to numerous other areas, which severely compromised the adversarial process. SFC Holt's case was tried in 1988, after United States v. Vidal, 23 M.J. 319 (C.M.A. 1987), was decided, and a reasonably competent defense attorney should have raised the election issue in this case. Given the important goals that election serves, no serious argument can be advanced that a tactical decision was made to expose a client to double jeopardy, to make it more difficult to present a defense, or to deprive a client of his right to jury concurrence. And no amount of optimism that a case can be "won on the facts" excuses the failure to raise appropriate legal issues to protect fundamental rights.

Also, moving to require election in this case would have had no negative impact on the defense; it, for example, would not have opened the door for the prosecution to introduce unfavorable information; election would not have prejudicially highlighted

the prosecution's case; and a motion requiring election would not have been repetitive or cumulative. The attorney's performance, consequently, resulted in a trial whose result and findings are completely unreliable.

As with election, no tactical reason can be advanced why defense counsel failed to question whether the charges were time barred by the statute of limitations. Even assuming that prior to trial nothing reasonably placed Mr. Bellen on notice of a problem, he certainly had actual notice of the problem when the Staff Judge Advocate conducted a post-trial review on August 16, 1988, made a written recommendation, and in paragraph 2. (2) outlined the problem.

At that point, if not sooner, Mr. Bellen had an affirmative duty to inquire and made a reasonable investigation whether the error in the receipt of sworn charges by the wrong command prejudiced the substantial rights of SFC Holt. See United States v. Polk, 27 M.J. 812 (A.C.M.R. 1988) (defense counsel's post-trial duties carry significant responsibility); United States v. Zapata,12 M.J. 689 (N.M.C.M.R. 1981) (incumbent on defense counsel to vigorously and loyally represent accused during post-trial phase of the proceedings). At this crucial post-trial stage, Mr. Bellen, however, essentially abandoned his representation of SFC Holt, declining further action in the case. The Staff Judge Advocate's August 16, 1988 memorandum reflects that "[t]his recommendation has been served on the defense counsel. The defense response, if any, has been enclosed for

your consideration." A Memorandum for Record dated August 17, 1988 and prepared by Sergeant Robinette then relates,

> The SJAR was ready to be served on civilian defense counsel 17 August 1988. Per telephone conversation between the undersigned and Mr. Edward J. Bellen's secretary, Mr. Bellen indicated that no comments will be submitted.

Had Mr. Bellen been functioning as the counsel guaranteed by the Sixth Amendment and had he undertaken even a cursory review of the Allied Papers and relevant documents, he would have realized that the statute of limitations problem was far more serious than indicated by the Staff Judge Advocate. How this issue is resolved will determine whether SFC Holt spends 15 years incarcerated at Levinworth or continues to serve his country faithfully and honorably as he has done for 17 years.

Civilian defense counsel's deficient performance in connection both with the election issue and the statute of limitations problem was devastating to the adversarial process in this case and undermines confidence in the outcome and findings in this case. These deficiencies are not trivial matters, but directly impact of SFC Holt's fundamental rights concerning double jeopardy, two-thirds jury concurrence, ability to defend, and the right not to be tried or convicted for offenses barred by the statute of limitations.

Mr. Bellen's ineffectiveness also extended to other areas, notably those issues presented for this Court's review. In particular, civilian defense counsel's failure to object to the introduction of the alleged "expert" testimony in this case and

the enormous amount of hearsay testimony and his performance at sentencing constituted ineffective assistance of counsel.

The question of expert testimony in child sexual abuse prosecutions remains highly controversial. The sheer volume of reported military decisions dealing with this issue attests that such expert testimony receives considerable judicial attention at trial and on appeal, and can and does result in a rehearing being ordered. E.g., United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985). A competent attorney under a professional duty to keep informed and educated about the potential "legal" issues involved in a case certainly would have realized that the interjection of "expert" testimony about child abuse into SFC Holt's case presented a significant legal issue, which merited at least an objection for the record.

Additionally, no tactical reason justified the failure to object. Mr. Bellen, for example, asked for five minutes to cross examine LTC Parker, (R. 95), and conducted no cross examination of Nancy Tate, (R. 194). He, therefore, was not pursuing a strategy of allowing the testimony to come in so he could expose through vigorous cross examination the fallacies and unreliability of the "expert" opinions being advanced. Civilian defense counsel demonstrated no legal or factual familiarity with the child sexual abuse syndrome; indeed, Mr. Bellen asked no questions at all on cross examination about the syndrome.

Given the dramatic and powerful nature of this expert testimony and the amount of it introduced at trial, objecting to it could not have prejudiced SFC Holt by somehow highlighting its

importance to the jury or opening up a dangerous area. The testimony, itself, stood out like a spotlight shining through a wide open door. Any suggestion that by not objecting or challenging the testimony, the court members would be lulled into regarding the evidence as minor or inconsequential is utterly naive or completely insincere. See United States v. Wolf, 787 F.2d 1094 (7th Cir. 1986)(tactic of never objecting is forensic suicide; shifts main responsibility for defense from defense counsel to judge). And even if there was a concern that by objecting the court members might think the defense was trying to hide the truth, that problem easily could have been remedied by a pretrial motion to exclude the testimony or a request for a jury-out hearing to object to admissibility when offered at trial.

The same arguments apply with equal force to the failure to object to the large amount of hearsay introduced concerning the stepdaughter's out of court statements. Here, again, the admissibility of such statements in child abuse prosecutions has been the subject of considerable attention by the military courts, and the issue frequently is discussed in reported decisions. The leading decision on the issue was decided in 1986, see United States v. Deland, 22 M.J. 70 (C.M.A. 1986), well prior to SFC Holt's trial.

No tactical decision for not objecting appears. Defense counsel did not cross examine the witnesses about the hearsay statements to draw out any inconsistencies. Mr. Bellen asked for five minutes to cross examine LTC Parker. (R. 95). The cross

examination consisted of asking how long his interview with Patti lasted, how long the physical exam took, whether children ever lie to him, and asking about photographs of the alleged scar. (R. 95-97, 99-100). The cross examination of Linda Reddick was similarly brief. He asked only about the stepdaughter's volunteer work at ACS and about her not wanting to be sent to Thailand. (R. 107-08, 109-10). No questions were asked about Patti's statements to Ms. Reddick. Furthermore, Mr. Bellen did not cross examine Ms. Tate. (R. 194).

The prejudice of not challenging LTC Parker, Reddick and Tate has been discussed previously. Permitting educated, articulate adults to interpret Patti's statements and present them in an organized fashion was powerful and persuasive evidence. These hearsay statements related by adults along with the expert opinions submitted provided critical support for the stepdaughter's otherwise uncertain and disjointed testimony.

Civilian defense counsel's representation of SFC Holt during sentencing represents another breakdown in the adversarial process. The defense called no witnesses, and SFC Holt made no statements. (R. 410). Mr. Bellen registered no objections to Ms. Tate's testimony and did not cross examine her. (R. 411-15). No objections were made to Patti's testimony, and the only question on cross examination was whether she had said she wanted to put SFC Holt in jail, which she denied. (R. 416).

Civilian defense counsel's sentencing argument was then relatively brief and ineffective. He called the verdict conscientious and honest. (R. 429). Next, he offered some

"hoped-for residual doubt," previously seen from Mr. Bellen and held to be ineffective in United States v. Dorsay, ACMR 8802148, slip op. at 7 (A.C.M.R. 29 June 1990). In SFC Holt's case, Mr. Bellen argued, "And this is the time that that doubt, even though it's lower than the legal requirement to acquit, is to be resolved." (R. 429). Although defense counsel had submitted some of SFC Holt's military records in mitigation, they were never explored or emphasized. (R. 429). Finally, Mr. Bellen asked the members to rationalize imposing no punishment because

> if you worst case the case in a cynical way against Sergeant Holt, and take what Patty says one hundred percent, everything stopped in 1986. So the purpose of punishment is to correct him from doing this. Obviously from her own testimony, that's out of the picture.

(R. 430).

The severe penalty of 27 years incarceration facing SFC Holt warranted a thoughtful and comprehensive mitigation case. What was offered, SFC Holt, submits was deficient and ineffective. Especially in light of Ms. Tate assault on the whole "dysfunctional," (R. 413), Holt family, witnesses and evidence -- not oratory -- were essential for effective representation.

Even without recalling witnesses, SFC Holt's military records could have been emphasized effectively to this end. For example, page 25 of Defense Exhibit EE contains a letter to Mrs. Holt and her family thanking them for "the warm hospitality that your family showed to us all." SFC Holt's Evaluation Report of November 1987, at pages 12 and 13 of Defense Exhibit EE, recommends "When eligible, he should be selected for attendance at First Sergeant's Course"; that same Report emphasizes SFC

Holt's "deep concern for his troops, German as well as American." His October 1986 Evaluation Report, at pages 10 and 11 of Defense Exhibit EE, likewise, refers to "his deep concern for the welfare of his subordinates" and commends his wisdom, maturity, tact and sound judgment. An earlier 1983 Evaluation Report, at page 8 of Defense Exhibit EE, has the Indorser's Evaluation, "Absolutely Command Sergeant Major material."

With this kind of evidence readily available and highly favorable to SFC Holt, there can be no excuse for not capitalizing, exploiting and emphasizing this mitigation evidence at sentencing. The failure to do so, coupled with how the entire sentencing was handled, represents a serious breakdown in the adversary process requiring a rehearing.

Whether considered separately or collectively, civilian defense counsel's failures and omissions resulted in a serious breakdown of the adversary process that renders the result of SFC Holt's trial unreliable. From the beginning, Mr. Bellen's approach to his defense was deficient, as seen by the attempt to waive the Article 32 hearing and the nonexistent voir dire.

The failure to raise crucial issues and object to highly prejudicial matters also reflect less than competent preparation. "[C]ourtroom experience is no substitute for thorough pretrial investigation and preparation in every case." Pickens v. Lockhart, 714 F.2d 1455, 1460 (8th Cir. 1983). This obviously includes a thorough legal preparation of possible issues that might arise.

Through the Article 32 hearing, which Mr. Bellen attempted to waive, he was placed on notice of the vague and multiple incidents of abuse that Patti was claiming, the type of "expert" testimony about child sexual abuse that the government might offer, the questions raised about physical abuse, and her statements regarding abuse made to various abuse. From that, civilian defense counsel should have recognized and been prepared to deal with the issues about which SFC Holt raises on appeal to this Court. The failures and omissions detailed herein simply cannot be professionally justified, for which SFC Holt respectfully petitions for review and requests a rehearing on the charges and specifications.

Conclusion

As detailed above, this case raises many substantial issues, some of first impression and application, warranting exercise of this Court's review. Appellant respectfully requests that this Court grant his Petition for Grant of Review for good cause stated herein.

DATE: February 19, 1991

HERBERT S. MONCIER
Civilian Appellate Defense Counsel
1210 First American Center
507 Gay Street
Knoxville, Tennessee 37902
(615) 546-7746

ANN C. SHORT
Civilian Appellate Defense Counsel
1210 First American Center
507 Gay Street
Knoxville, Tennessee 37902
(615) 546-7746

JAMES KEVIN LOVEJOY
Captain, JAGC
Appellate Defense Counsel

MICHAEL P. MORAN
Captain, JAGC
Appellate Defense Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered or mailed to Appellate Government Counsel on the ____ day of February, 1991.

MICHAEL P. MORAN
Captain, JAGC
Appellate Defense Counsel

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Linguistic ambiguity in non-statutory language: problems in 'The search warrant in the matter of 7505 Derris Drive'

Bethany K. Dumas and Ann C. Short, Esq.***

**The University of Tennessee, Knoxville*
***Law Office of Herbert S. Moncier, Knoxville, Tennessee*

ABSTRACT When a motion to suppress was filed in a federal prosecution, this question arose: Did the search warrant authorize the FBI to seize the evidence sought to be suppressed? The warrant described certain items that could be seized, including both accounting documents and items such as notes and memoranda. A linguist testified about the current meanings of the non-accounting terms and the scope of the modifying clauses, 'which will disclose the sale and receipt of automobiles, both rebuilt and salvage' and 'which will reveal the identities and location of co-conspirators'. This article summarizes the implications and context of those questions, presents the linguist's answers, and reports the judicial response.

KEYWORDS lexical ambiguity, scope, syntactic ambiguity, expert testimony, search warrant, suppression hearing

INTRODUCTION

In late August of 1994, defence attorneys in Knoxville, Tennessee, asked Bethany K. Dumas to review the 'Search Warrant in the Matter of 7505 Derris Drive', of 31 March 1990, and the 'Report and Recommendation' of Magistrate Judge Robert P. Murrian in *U.S. v. Westwood Enterprises, Inc., et al.*, with particular attention to the categories listed in the search warrant that referenced specific types of written documents that were authorized to be seized.[1] Later, Dumas was also asked to study the seventy-nine-page 'Affidavit supporting the Search Warrant' and additional documents. According to the warrant, the following types of documents could be seized:

> bills of sale for automotive parts and rebuilt automobiles sold to businesses and to private individuals; automobile titles, including completed titles, blank titles, and open titles; payroll records, accounts receivable and accounts payable documents, which will disclose the sale and receipt of automobiles, both rebuilt and salvage; receipts from salvage yards and auction companies; daily receipts and Federal Express mailing receipts; telephone logs, address books, diaries, hand-

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> written notes and memoranda, which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators; travel records and itineraries

The case, *United States of America v. Westwood Enterprises, Inc., et. al.*, was long running and well publicized. It was the only one that had been brought in East Tennessee at that time under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., and the indictment was the largest ever returned in the federal district (401 counts of criminal wrongdoing). The prosecution had its genesis in an FBI investigation of a Knoxville used automobile dealer, Roy Clark, who was suspected of conducting a large commercial automobile theft and chop-shop operation.

On 31 March 1990, FBI Special Agent Sam H. Allen, III, had applied for and obtained a warrant to search the premises of Roy Clark's business. After the search, Roy Clark was arrested and charged with RICO violations. Out on bail, Mr Clark learned that his brother-in-law had been the 'snitch' in the case. The brother-in-law was shot and killed before the RICO case against Mr Clark could be tried. Mr Clark was prosecuted for the murder and convicted by a jury, thereby ensuring his life-long incarceration. In 1994, the government was still pursuing the RICO case against Carol R. Clark, former wife of convicted felon Roy Clark. Eventually, Mrs Clark entered into a plea agreement with the government.

UNREASONABLE SEARCHES AND SEIZURES

To protect against unreasonable searches and seizures, the Fourth Amendment to the United States Constitution forbids the issuance of an exploratory search warrant. The command of the Fourth Amendment is that no warrants shall issue except those 'particularly describing the ... things to be seized' (U. S. Const. amend. IV). This particularity requirement serves two purposes: to prevent general searches and to prevent the seizure of objects under the mistaken assumption that they fall within the authorization of the magistrate who approved the search warrant. (*Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74 (1927): '[T]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.')

Armed with the 'Search Warrant in the Matter of 7505 Derris Drive', federal agents had confiscated/seized a staggering amount of evidence from the premises of Roy Clark's business, including 24 052 individual documents. Defence attorneys filed a motion to suppress evidence on the basis that most of these documents were not authorized to be seized

pursuant to the description contained in the search warrant of property subject to seizure.

The motion to suppress was assigned to be heard by the same United States Magistrate Judge who had originally authorized the search warrant. Presumably Magistrate Judge Murrian had approved and understood the language used in the search warrant to describe what property could be lawfully seized.

Linguistic issues

Initially, Dumas was asked whether a linguist would be an appropriate expert witness on the issue of whether all of the 24 052 individual documents seized fell within the categories listed in the warrant. She responded that a linguist would be an appropriate expert witness with respect to the 'telephone logs, address books, diaries, handwritten notes and memoranda', though not necessarily with respect to the accounting terms, with respect to which an accountant would be an appropriate expert. Dumas stated that a linguist has training and research experience in the nature, function, and identification of written text types and also has knowledge about and quick access to reference materials and other research results on how such terms as, for instance, 'memoranda', are used by various social groups at particular times in history.[2]

Later, Dumas also addressed some issues of syntactic ambiguity, specifically those of *restrictive* versus *nonrestrictive* clauses and the *scope* of modifying clauses.[3] In edited American English, strict compliance with prescriptive usage rules requires that one introduce restrictive clauses with 'that', nonrestrictive clauses with 'who' or 'which'. Further, nonrestrictive clauses are generally set off with commas, while restrictive clauses are not so punctuated (Quirk *et al.* 1985: 365–7, Wardhaugh 1995: 104–8). Compare 'This is the book that influenced me greatly' and 'This is the book, which influenced me greatly'. In the first example, the fact that the book influenced me greatly is definitive; in the second example, it is incidental. Two clauses in the search warrant qualify to be treated as nonrestrictive clauses both because they are introduced by the relative pronoun 'which' and because they are set off by commas. Each of the following clauses is preceded by a comma:

1 which will disclose the sale and receipt of automobiles, both rebuilt and salvage
2 which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators

The court and counsel for the defence chose to read the clauses as restrictive clauses, in spite of the use of the word 'which' and the punctuation,

possibly because, in ordinary usage, such prescriptive rules are not consistently followed. The government did not challenge that reading. Thus, one possible linguistic issue was essentially waived (see below for the consequences of that waiver).

The issue of scope arose with respect to the modifying clauses, 'which will disclose the sale and receipt of automobiles' and 'which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators'.

Two questions were thus addressed:

1 What is the scope of the two modifying clauses?
2 What is the nature of documents identified as 'telephone logs, address books, diaries, handwritten notes and memoranda'?

Modifier scope

The first question, that of modifier scope, was discussed at length during the evidentiary hearing. That discussion was initiated by defence counsel's introduction of a chart reproducing the categories of documents listed in the warrant, according to the defence's reading of that document. In that chart, each discrete item was individually listed, together with its modifying phrases and clauses. Accordingly, a modifying phrase or clause with broad scope was repeated for each discrete item. The items from the chart that are relevant to this paper are reproduced below; the material in brackets represents broad scope text. For the reader's convenience, the relevant language of the search warrant is reproduced first, and the items listed in the chart are renumbered to reflect the fact that two categories of documents are involved:

1 those 'which will disclose the sale and receipt of automobiles, both rebuilt and salvage' and
2 those 'which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators'.

The first category contains three subcategories: payroll records, accounts receivable [documents], and accounts payable documents. The second category contains the five subcategories addressed by Dumas: telephone logs, address books, diaries, handwritten notes, and memoranda.

Relevant search warrant language

'Payroll records, accounts receivable and accounts payable documents, which will disclose the sale and receipt of automobiles, both rebuilt and salvage; receipts from salvage yards and auction companies; daily re-

ceipts and Federal Express mailing receipts; telephone logs, address books, diaries, handwritten notes and memoranda, which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators'

Defence counsel's exhibit

1(a) payroll records [which will disclose the sale and receipt of automobiles, both rebuilt and salvage]
1(b) accounts receivable ... documents [which will disclose the sale and receipt of automobiles, both rebuilt and salvage]
1(c) accounts payable documents, which will disclose the sale and receipt of automobiles, both rebuilt and salvage
2(a) telephone logs [which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators]
2(b) address books [which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators]
2(c) diaries [which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators]
2(d) handwritten notes [which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators], and
2(e) memoranda which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators

The chart introduced by counsel for the defence at the evidentiary hearing proposed one of the two possible interpretations for the sentence containing the clause, 'which will disclose the sale and receipt of automobiles, both rebuilt and salvage'. The other possible reading involves restricting the scope of the modifying *which* clause to the noun phrase closest to it. In that reading, the categories contained in the first part of the search warrant language quoted above would be these:

1 payroll records
2 accounts receivable [documents?]
3 accounts payable documents, which will disclose the sale and receipt of automobiles, both rebuilt and salvage

It was to the advantage of the defence for the scope of the modifying clause to be extended to the preceding noun phrases 'payroll records' and 'accounts receivable [documents?]. It was to the advantage of the government for the scope of that modifying clause to be restricted to the immediately preceding compound nominal, 'accounts receivable and accounts payable documents', and not extend to the nominal, 'payroll records'.

Meanings of document terms

Similarly, the chart proposed one of the two possible interpretations for the sentence containing the clause, 'that will reveal the identities and location of co-conspirators'. Again, it was to the advantage of the defence for the scope to be extended to all preceding nominals ('telephone logs, address books, diaries, handwritten notes and memoranda'), while it was to the advantage of the government for the scope of the modifier to be restricted to the immediately preceding nominal, 'memoranda'. The chart thus sought ratification of a theory of interpretation with respect to the two questions of possible ambiguity.

What was that theory based on? It was based upon the linguistic reality that the English language permits great flexibility in modifier placement. The two *which* clauses in the search warrant have an adjectival function; they modify preceding noun phrases. Such adjectival clauses often modify all individual items in a series of noun phrases. However, a sentence containing a series of noun phrases plus a following adjectival clause is sufficiently ambiguous that misunderstanding is possible. In speech, intonation may resolve the ambiguity. In writing, punctuation may provide information about the intended meaning.

The government took the position that *all* payroll records, accounts receivable documents, accounts payable documents, telephone logs, address books, diaries, hand-written notes, and memoranda could be seized under the language of the search warrant. Counsel for the defence said that the only payroll records, accounts receivable documents and accounts payable documents that could be seized were those that would 'disclose the sale and receipt of automobiles, both rebuilt and salvage' and that the only telephone logs, address books, diaries, hand-written notes, and memoranda that could be seized were those that would 'reveal the scope of the illegal enterprise and [would] reveal the identities and location of co-conspirators'. Counsel for the defence may have achieved a crucial tactical advantage when it presented a large chart with its reading of the search warrant spelled out clearly, on the recommendation of Dumas. The government had no such visual display to point to during discussion, but had to rely on oral readings of the language in the search warrant.

With respect to questions of both syntactic and lexical ambiguity, the court took the position that the defendant, who objected strenuously, had the 'burden of showing that items were seized outside the scope of the Search Warrant'. Further, the court ruled that an affidavit by defendant Carol R. Clark and attorney Ann C. Short, counsel for the defendant, offering unsubstantiated opinions that the records seized were outside the scope of the warrant, was insufficient to meet the burden of showing that the items seized were outside the scope of the warrant. According to United States Magistrate Judge, Robert P. Murrian:

> It is the defendant's burden not just to render an opinion that the item is outside the scope of the search warrant; but rather, the defendant must tell the court *why* the item is outside the scope of the search warrant. For example, one of the Bates-numbered items was an invoice from National Linen Service to one of Mr Clark's businesses.[4] It is not enough for Ms Clark and Ms Short to opine that that invoice is outside the scope of the search warrant. Exhibits such as this one may demonstrate who paid the bills in the business and therefore who was active in the business, and some of the categories of items to be searched for as expressed in the search warrant were telephone logs, address books, diaries, hand-written notes and memoranda, which will reveal the scope of the illegal enterprise and will reveal the identities and location of co-conspirators, and the government argues that any expenditures during the relevant period of time by businesses of Mr Clark tend to show the scope of the enterprise. The undersigned is of the opinion that it is the defendant's burden to put a witness on the stand to tell the court why a particular item is beyond the scope of the items or category of items stated in the search warrant. The government will then have the opportunity to cross-examine that witness and to present evidence of its own if it desires. (Report and Recommendation of Judge Robert P. Murrian in *U.S. v. Westwood Enterprises, Inc., et al.* (26 May 1994)

In his Report and Recommendation, Judge Murrian discussed cogent examples. The body of documents seized under the warrant, however, contained many items much less relevant than invoices from the National Linen Service, discussed above. For instance, in its Objections to Magistrate Judge's Report and Recommendations Filed 26 May 1994 (DOC. 469) (June 3, 1994),[5] counsel for the defence described the absurdity of having to put a witness on the stand to explain why a Dogwoods Art Festival brochure (Bates-number 6665) is not a listed item: 'The defence can, if required, call a witness and establish that the brochure is not a bill of sale for automotive parts, is not an automobile title, is not a payroll record, etc., and similarly cover all of the items listed in the search warrant. Surely, however, this time-consuming ceremony accomplishes little' (DOC 469, at p. 9).

The evidentiary hearing continued for close to a full week. The Magistrate Judge's rulings on the disputed grammatical constructions were made early during the week, but then revised throughout the week. In his first ruling on the question of scope, for instance, Judge Murrian concluded that a 'common-sense reading' would suffice and would prove superior to a reading based on 'linguistic nit-picking'. He held that the scope of the modifying clause, 'which will disclose the sale and receipt of automobiles, both rebuilt and salvage', was restricted to the immediately preceding compound nominal, 'accounts receivable and accounts

payable documents', and said that it did not extend to the nominal, 'payroll records'. The legal implication of that ruling was that items 1(a), 1(b), and 1(c) from the chart of counsel for the defence above would be read as items 1 and 2 below:

1(a) payroll records
1(b) accounts receivable ... documents [which will disclose the sale and receipt of automobiles, both rebuilt and salvage]
2 accounts payable documents, which will disclose the sale and receipt of automobiles, both rebuilt and salvage;

Such a reading assisted the government in its effort to preserve as many of the seized documents as possible for later introduction at trial.

Thus the analysis seemed to pit 'linguistic nit-picking' against 'common sense'. The common sense reading assumed that payroll records do not ordinarily disclose the sale and receipt of automobiles, rebuilt or salvage. What does the linguistic analysis offer? The signals of the text as written are contradictory. The isolated text of the nominals reads thus: 'payroll records, accounts receivable and accounts payable documents'. The text occurs in a series of compound items, each set off from others in the series by semicolons. One might argue that modifiers embedded within the text isolated by semicolons are intended to modify all parallel items contained within the semicolons. If it had been intended that the modifier 'which will disclose the sale and receipt of automobiles, both rebuilt and salvage' not modify the nominal 'payroll records', then 'payroll records' could have been isolated by another semicolon. Could the FBI have been done in by an ill-chosen punctuation mark? One agent thought so, for he was heard to mutter later in the week, 'This is the first time I've ever been overruled by a linguist'.

It might also be argued that the absence of a comma after 'accounts receivable' and the presence of only the coordinating conjunction 'and' between the other two nominals increases the likelihood that the ambiguous modifier was designed to modify only the last two of the three nominals in the series. Is the ambiguity created by the tension between the punctuation marks and the use of an 'unpunctuated', as it were, coordinating conjunction?

By week's end, Judge Murrian apparently thought so, for he found an additional reason to uphold his earlier ruling. In his Conclusion to the Affidavit supporting the search warrant, Special Agent Allen had punctuated the sentence differently; he had inserted a semicolon, rather than a comma, after the words 'payroll records'. Thus, the comma after 'payroll records' was ultimately treated as a typographical error. This seems appropriate, for the law is clear that it is the intent of the warrant that controls and that the intent may be spelled out in an accompanying

affidavit, particularly since a search warrant is a brief document intended only to list items, not explain the rationale under which those items are to be seized.

However, in the absence of any such evidence with respect to the second modifying clause, Judge Murrian reversed his earlier ruling and stated by week's end that he had not written the search warrant and did not intend to rewrite it. He ruled that the only 'telephone logs, address books, diaries, hand-written notes and memoranda' that would be admissible under the warrant would be those that '[would] reveal the identities and location of co-conspirators'.

This also seems appropriate, for the affidavit clarifies the reason, for instance, for seizing payroll records; the government hoped to use them to prove the low 'legitimate' pay which Clark provided to his employees. The affidavit, however, also contains language suggesting that the government was to some extent on a fishing expedition (though Judge Murrian did not mention this in his final ruling on this matter): 'CLARK also maintains an office in Building "C", and there most likely will be business records, telephone logs, notes and memoranda in the office area' (Affidavit at p. 76).

But what about the meanings of all those nouns? There sat the government with 24 052 individual documents. There sat counsel for the defence, eager to challenge each of the 24 052 individual documents. There sat Magistrate Judge Murrian, frustrated that the government had not pared down its 12(d)(2) designation of evidence in the case:[6]

> In looking through some of its 12(d)(2) designations at the 25 May 1994 hearing, the undersigned found ridiculous exhibits like bills for cutting the lawn at the Clark business and numerous, duplicative invoices for car parts that the Clark businesses had bought. Counsel for the government revealed that the prosecutor had not even looked at all of the documents in the government's 12(d)(2) designation. I am confident that the trial judge is not going to allow into evidence a lot of semi-relevant, duplicative, cumulative exhibits. (Report and Recommendation, at p. 8)

Was it left to counsel for the defence to call a linguist to examine each of 24 052 individual documents, and pass linguistic judgment on whether each document did or did not fall within one of the categories listed in the warrant? Were defence counsel going to have to call an accountant to deal with each document that the linguist declined to testify about? Such a procedure had actually been contemplated earlier, in May, after Judge Murrian ruled that an affidavit by the defendant and her attorney was insufficient to meet the burden of showing that the items seized were outside the scope of the warrant. Lead counsel for the defendant predicted at that time the scenario that might ensue:

> If we want to reconvene tomorrow morning, we'll have a witness here tomorrow morning, we'll work 24 hours, we'll be ready to go, we'll put it on; but I'm telling the Court as well as I can tell the Court that we're talking about a 60-day hearing for a witness to get up there and look at a document and then and then [sic] consider each one of the 10 categories and say it's not a duck, and it's not an elephant, and it's not a dog, it's not anything. ... Judge Jarvis is going to go bananas when he sees lawn mowing things. ... I'm telling the Court right now that that process is going to result in an extraordinary trial in this case, when we have to put a witness on the stand and say that a lawnmowing [receipt] to cut grass is not within any of the categories of this search warrant. It's going to be something else and the record in this case is going to be extensive. (Herbert Moncier, Esq., 'Suppression Hearing' transcript of 25 May 1994, at pp. 74–7)

Mr Moncier was prescient; the record in the case was extensive. Dumas was on the witness stand for more than two and a half days during the week of the evidentiary hearing, and the accountant was on the witness stand for over a day. During the first hours of the linguistic testimony, Dumas described the procedure whereby she had collected dictionary definitions of the labels for documents used in the warrant, then collected a large database of contemporary quotations containing those terms in use, and constructed a lexicon of words and definitions based on all that evidence. Since the language to be construed was non-statutory language, she had concentrated on non-judicial sources, making heavy use of current newspapers and magazines, partly through commercial online services. (She began with the Brown Corpus, but discovered that it contained too few relevant citations to be useful.)

Following that testimony and extensive cross-examination, Dumas then submitted and had received into evidence her compilations and definitions. Finally, she examined several hundred documents and stated her opinion as to whether each was within any of the relevant categories of the warrant. That took most of one day.

Space limitations preclude discussing all the terms in detail. Consider, though, the term 'memorandum'. This was the single term from which the government expected to get the greatest mileage, for it proposed that anything written or printed constituted a memorandum. And, indeed, it is possible to find dictionary definitions that support that position. However, contemporary usage of the term in edited American English is restricted by and large to two general senses, a formal one and an informal one (we are not here addressing technical or specialized senses, such as those that occur in legal terms such as 'Memorandum Opinion').

A formal memorandum is a (usually brief) communication typically written for interoffice circulation on paper headed memorandum. An

informal memorandum is either a written record of something an individual wishes to remember or preserve for future use, i.e., a note to help jog the memory (possibly one of the notes in a diary), or a written communication that contains directive, advisory, or informative matter.

As used in general edited American English, the word 'memorandum' is restricted to documents that are focused narrowly on a single topic or closely related set of topics. Further, the term tends to collocate with indications of goal, author, recipient, purpose, and limited subject matter. Some examples that were offered in testimony are listed below; all were located on the Internet in 1994:

1–4 Following some congressmen's criticism of the US Government for ignoring the events in Algeria, a few days ago the US Government sent a *memorandum* to the Algerian Government spelling out its stand on these events. The *memorandum* contains four points: The need to make the government in Algeria more democratic, to resume the election process, and to introduce more economic reforms and respect for human rights. Simultaneously to this *memorandum*, the US Government offered $2 billion in loans to the Algerian oil and gas sector. It also offered short-term guarantees for private US banks to help US companies sell agricultural products to Algeria. The US *memorandum* describes the security situation in Algeria as graver than it was six months ago. (*Time* Online 14 August 1994. Emphasis added.)

5 Reed wrote a *memorandum* on how the new group should be run. Nine months later, he was putting that prospectus into practice as Christian Coalition's executive director. (*Time* Online 13 September 1993 'PROFILE: FIGHTING FOR GOD AND THE RIGHT WI...'. Emphasis added.)

6 Defense officials said in a July 12 *memorandum* to Congress that they want to turn over the law enforcement placement program to the Justice Department, which has been placing people in police jobs for years. (*Navy Times* Online 1 August 1994 'Issue: DOD: LET WHEELS OF JUSTICE TURN TROOPS INTO COPS' by Rick Maze. Emphasis added.)

7 It was a tough week for both Democrats and baseball fans. Nevertheless, George Mitchell, retiring Senate majority leader and rumored commissioner-of-baseball-in-waiting, remained unfazed. On a pivotal day in the battle for health-care reform, the even-tempered former judge kept his optimistic demeanor intact from dawn to well past dusk. How does a seasoned politician fight what is per-

> haps the biggest – and last – legislative battle of his career? A play-by-play:
>
> 6:30 a.m. Out of bed. Reads Washington Post and health-care *memorandums*. Prepares for a round of early morning television interviews before arriving on Hill at 8:30.
>
> (*Time* Online [date not available] 'WITH MITCHELL IN THE TRENCHES BY JULIE JOHNSON/IN WASHINGTON'. Emphasis added.)

Midweek during the Clark hearing, just before court recessed for lunch, government attorney Steve Cook revealed that he had been spending some of his spare time with the Oxford English Dictionary (OED). He read aloud the following OED definition of *memorandum*, with which he proposed to get into evidence every piece of writing that mentioned money or finances: 'A record of a pecuniary transaction'. Asked to respond to Mr Cook's introduction of this definition and his argument that it must permit the introduction into evidence of any document mentioning money or financial matters, Dumas reminded the court of the historical nature of the OED and asked to be excused from responding until after she had consulted the dictionary and her notes. Then she spent her lunch hour with the CD-ROM version of the OED, with which she was able to establish that the most recent citation of the word 'memorandum' in the OED in the sense 'record of a pecuniary transaction' was in Charles Dickens' novel, *Our Mutual Friend,* published in 1865! Counsel for the defence enjoyed the first few minutes after lunch, when court resumed and Dumas shared this information with the court.

CONCLUSION

We have summarized some analytic procedures for identifying syntactic and lexical ambiguity in English in the context of a search warrant and we have sketched a tentative and partial outline of the ways in which linguistic ambiguities in non-statutory language are actually resolved by criminal courts in the US. In this case, early rulings were eventually rendered moot, for after a full week of the hearing, the Magistrate Judge suspended the suppression hearing. Clearly frustrated by the prospect of weeks of testimony relating to each item seized pursuant to the warrant, the Magistrate Judge announced that he would issue guidelines for interpreting the categories listed in the search warrant. The defence and the government were then ordered to meet privately, to go through all of the 24 052 documents and, for each document, reach an 'agreement' on whether it fell within one of the categories listed in the warrant. Shortly after the Magistrate Judge announced this unorthodox procedure for

conducting a suppression hearing, a plea agreement between Mrs Clark and the government was reached. The suppression motion, consequently, was rendered moot.

NOTES

1 *U. S. v. Westwood Enterprises, Inc., et al.* (U.S.D.C., E. D. Tn . CR 3–92–115) (testimony tendered August 1994 in a Suppression Hearing). An earlier version of this article was presented by Bethany K. Dumas at The Second International Association of Forensic Linguists Meeting, University of New England, Armidale, New South Wales, Australia, 10 July 1995.

2 Discussion of lexical semantic issues can be found in Butters (1993); Cunningham (1988); Dumas (1991); Shuy (1986); Solan (1993a); and Solan (1993b). Other issues implicit in the case will not be discussed here; they include numbering discrepancies, organizational difficulties, and problems in the identification of original documents (e.g., automobile titles), as distinguished from copies. From the photocopies provided by the government, counsel for the defence could not tell, for instance, whether the government had seized automobile titles or copies of automobile titles; this is significant because, while titles were listed in the warrant, copies of titles were not so listed. In Tennessee, at least, a copy of an automobile title is not a title.

3 Detailed discussion of issues of syntactic ambiguity can be found in Solan (1993b) and Cunningham *et. al.* (1994).

4 Because of the unusually large volume of evidence seized, a procedure had to be devised so that each item could be identified easily. By agreement of the parties, a mechanism called a Bates device was used to stamp every item of evidence with a unique, identifying number.

5 In federal criminal prosecutions, motions are often referred to a Magistrate Judge for 'recommended' rulings. Those rulings become final unless the aggrieved party timely files written 'objections' asking the District Judge to review what the Magistrate Judge has recommended.

6 Rule 12(d)(2) of the Federal Rules of Criminal Procedure provides a mechanism whereby the government is required to give notice of the specific evidence that it intends to use in its case-in-chief at trial. To the extent that particular items of evidence are not listed in this notice, issues of admissibility and suppression, for instance, need not be addressed in most instances. In this case, by not paring down its 12(d)(2) notice, the government was forcing the court to deal with tens of thousands of records, many of which would never end up being offered as exhibits at trial.

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