The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Staff Attorney, Tennessee Court of Appeals, Eastern Division

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

2007, BPR No. 25824

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

Tennessee, BPR No. 25824 (Active) January 2007

Florida, Bar No. 83186 (Inactive – see Answer #4) July 1996

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).

During the time I have lived and worked in Tennessee, I have elected at times to be an inactive member of The Florida Bar in order to pay a reduced annual licensure fee but maintain my membership.

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).

Staff Attorney, Tennessee Court of Appeals (Knoxville, TN)
December 2012 – Present
Staff Attorney, Tennessee Court of Criminal Appeals and Court of Appeals (Knoxville, TN)
February 2009 – November 2012
Capital Case Attorney, Second Judicial Circuit (Knoxville, TN)
April 2007 – January 2009
Associate, Butler, Vines & Babb, PLLC (Knoxville, TN)
May 2006 – April 2007
Career Attorney, First District Court of Appeal of Florida (Tallahassee, FL)
(Chambers of the Honorable James R. Wolf)

January 2005 – April 2006
Staff Attorney (Clerk's Office), Supreme Court of Florida (Tallahassee, FL)
February 2002 – December 2004
Career Attorney, First District Court of Appeal of Florida (Tallahassee, FL)
(Chambers of the Honorable James R. Wolf)
April 1997 – February 2002
Central Staff Attorney, First District Court of Appeal of Florida (Tallahassee, FL)
October 1996 – April 1997
Trial Court Law Clerk, Seventh Judicial Circuit of Florida (Daytona Beach, FL)
October 1995 – September 1996
Post-GraduateLegal Intern, Volunteer Lawyers' Resource Center (VLRC) (Tallahassee, FL)
June 1994 – July 1995

I have never engaged in any occupation, business or profession other than the practice of law. I began my college education immediately after high school and attended law school immediately following my graduation from college. As most students do, I worked both part-time and full-time in various jobs at restaurants, in mail rooms, at print shops, in retail stores, and the like while in high school, college and law school. While in college, I was a runner for a law firm for a period of time. While in law school, I worked in both paid and unpaid clerkships and internships for various attorneys in Florida as well as a non-profit legal services organization. I also was awarded a competitive, paid legal internship, funded by The Florida Bar, with the trial courts of the Sixteenth Judicial Circuit of Florida (Key West, FL), which I held during the summer of 1993.

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

Not applicable.

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

Currently, I am the Staff Attorney for the Eastern Division of the Tennessee Court of Appeals. My job duties require me to focus 100% of my time on appellate practice and procedure. I review all applications for interlocutory and extraordinary appeals filed in the Eastern Division of the Court pursuant to Rules 9 and 10 of the Rules of Appellate Procedure and make recommendations to the Court regarding whether to grant or deny said applications. I review for jurisdictional defects all records transmitted by the trial court clerks for every civil appeal filed in the Eastern Division of the Court. In those cases where the Notice of Appeal was not timely filed or the appeal is premature as a result of all claims not having been disposed of by the trial court prior to the filing of the Notice of Appeal, I prepare proposed panel opinions dismissing said appeals on jurisdictional grounds. I review all Petitions for Recusal Appeal initiating expedited interlocutory appeals as of right from orders denying motions to recuse or disqualify a trial court judge from presiding over a case, said appeals being governed by Rule 10B of the Rules of the Supreme Court of Tennessee. Because such appeals are to be decided on an expedited basis, I prepare proposed panel opinions for the judges of the Court disposing of such appeals within days of the filing of the Petitions initiating such appeals. I am responsible for reviewing all motions filed in pending appeals in the Eastern Division of the Court and drafting proposed orders for the judges disposing of said motions. I am also responsible for recommending show cause orders on the Court's own motion designed to move a case to disposition when the parties are not complying with deadlines established by the Tennessee Rules of Appellate Procedure. I also audit claims for attorneys' fees and expenses filed by court-appointed appellate counsel in parental termination appeals prior to said claims being submitted to the judges for review and approval. Finally, I am responsible for responding on a daily basis to general inquiries from attorneys, trial court clerks, and the lay public regarding pending appeals and appellate practice in general.

My current position requires me to have a general working knowledge of all areas of civil law including, but not limited to, personal injury, medical malpractice, contracts, probate, property, corporate structure, bankruptcy (to the extent the filing of federal bankruptcy petitions automatically stay certain state court appeals), parental termination, dependency and neglect, divorce, statutory interpretation and constitutional law, just to name a few. More importantly, both my present position and my lengthy history of working for the appellate and trial courts in both Tennessee and Florida on civil and criminal cases, including death penalty cases, has given me the ability to think and write from the perspective of a judge.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work

background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Through my work with the courts of Tennessee and Florida, I have assisted trial and appellate court judges on literally thousands of criminal and civil cases by performing complex legal research and writing extensive legal memoranda and proposed decisions with minimal supervision.

For a little over three years, I was the Staff Attorney for the Eastern Divisions of both the Tennessee Court of Criminal Appeals and the Tennessee Court of Appeals. I was the only Staff Attorney in Tennessee during that time to simultaneously work on a daily basis for two appellate courts. My responsibilities as a Staff Attorney for the Court of Criminal Appeals were similar to my present duties as a Staff Attorney for the Court of Appeals, as outlined above in answer to Question #7, the only difference being that I was responsible for accomplishing the tasks required for both courts at the same time. For instance, as a Staff Attorney for the Court of Criminal Appeals, I provided the same assistance with regard to applications for interlocutory and extraordinary appeals filed pursuant to Rules 9 and 10 of the Rules of Appellate Procedure, Petitions for Recusal Appeal, motions, show cause orders, and claims for attorneys' fees and expenses by court-appointed counsel, as well as communications with attorneys, trial court clerks, and the lay public regarding pending appeals and appellate practice in general. In addition, I was responsible for reviewing, and making recommendations as to disposition, all applications for permission to appeal from orders denying motions to re-open prior post-conviction proceedings, which applications are filed in the Court of Criminal Appeals pursuant to Rule 28 of the Rules of the Supreme Court of Tennessee. I also reviewed, and made recommendations as to disposition, all motions filed pursuant to Rule 8 of the Rules of Appellate Procedure seeking appellate review of orders granting, denying, setting or altering the conditions of a defendant's release from incarceration pending trial or appeal. I also provided substantial assistance to the Court of Criminal Appeals in drafting opinions in those cases in which memorandum opinions were appropriate pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. By far the most important and time-consuming work I performed for the Court of Criminal Appeals was the preparation of extensive bench memoranda and proposed opinions in direct and collateral post-conviction appeals in capital cases. This work required me to meticulously review the records in each capital appeal and provide a cogent legal analysis for the Court of all issues raised by counsel in these cases. Working on death penalty cases was, by no means, new to me.

For almost two years prior to working as the Staff Attorney for the Court of Criminal Appeals and Court of Appeals, I was one of five Capital Case Attorneys in Tennessee responsible for assisting trial court judges with the legal issues that arise in death penalty trials and post-conviction proceedings. In that capacity, I regularly drafted legal memoranda and proposed orders for the judges, prepared certain questions for use by the trial courts during jury selection, and assisted in preparing the jury instructions for capital trials. I would often attend pretrial, trial and post-conviction hearings upon request of the trial judges presiding over such cases. My

duties also included preparing and filing monthly reports with the Tennessee Administrative Office of the Courts (AOC) on the status of pending trial court proceedings in capital cases. Through my work as a Capital Case Attorney, I was privileged and honored to be able to meet and work with most of the trial court judges who handle criminal cases in the 9th, 10th, 11th, 12th, 13th and 31st Judicial Districts, including the Honorable E. Eugene Eblen, as well as many of Tennessee's retired senior judges who were designated to preside over some of the cases on which I provided assistance.

Other than the year I spent working at a civil litigation firm upon my arrival in Tennessee, which provided me with invaluable experience in terms of Tennessee trial practice and procedure, my entire career as a licensed attorney before I began working for the Tennessee Judicial Department was spent in service to the Florida State Courts System. I was the first attorney ever to hold the position of Clerk's Office Staff Attorney at the Supreme Court of Florida. The primary purpose of my position was to manage and monitor the status of cases involving related issues and/or parties, including death penalty appeals. In that capacity, I helped develop a plan for efficiently handling the loss of counsel in numerous capital appeals following the legislative abolition of the state-funded collateral post-conviction advocacy office charged with representing death row inmates convicted and sentenced in the northern region of the state. My duties as a Staff Attorney for the Supreme Court of Florida also included reviewing and providing recommendations for the disposition of pre-assignment motions and extraordinary writ petitions over which the Court has constitutional jurisdiction. I also assisted the deputy clerks in processing all *pro se* filings and correspondence as well as identifying those cases appropriate for administrative dismissal. Where necessary and requested, I prepared for the Clerk of the Court and the assigned administrative justice legal memoranda on different issues that arose in the context of the day-to-day operations of the Clerk's Office (e.g., public records requests, court record privacy issues, clarification of the Court's jurisdictional jurisprudence, etc.). I also assisted in the development of appellate jurisdiction training materials for court staff attorneys and law student interns, drafted amendments to the Court's Internal Operating Procedures, spearheaded the formation of a *Pro Se* Case Processing Committee at the Court, and supervised unpaid law student interns at the Court.

Both before and after working at the Supreme Court of Florida, I was for many years a Career Staff Attorney at the First District Court of Appeal, one of five intermediate appellate courts in Florida. In that capacity, I prepared bench memoranda and proposed opinions on hundreds of appeals, both criminal and civil. Unlike Tennessee, Florida's intermediate appellate courts have general jurisdiction over specific geographic regions of the state. As a result, the First District Court of Appeal, which is the largest of the five intermediate appellate courts, hears all criminal and civil appeals emanating from the northern region of the state. The First District also is unique in that, by statute, it has statewide jurisdiction over all workers' compensation appeals in the state. Thus, the appeals I worked on as a Career Staff Attorney at the First District included criminal direct and collateral post-conviction appeals, appeals from the denial of habeas corpus petitions, appeals from final decisions of administrative agencies, all manner of extraordinary writ petitions over which the appellate courts in Florida have jurisdiction (i.e., mandamus, habeas corpus, quo warranto, prohibition and certiorari), workers' compensation appeals, and appeals from final judgments in civil actions involving all areas of civil practice (e.g., personal injury, medical malpractice, contracts, property, corporate structure, tax, divorce, parental

termination, dependency and neglect, etc.). As a Central Staff Attorney at the First District, I also screened criminal and civil cases for jurisdictional defects and recommended summary disposition for those cases over which the Court did not have jurisdiction.

In working for the trial court judges of the Seventh Judicial Circuit of Florida, and as a paid legal intern during law school for the trial court judges of the Sixteenth Judicial Circuit of Florida, I often prepared draft orders that included detailed findings of fact and conclusions of law in criminal and civil cases. Similar to my work as a Capital Case Attorney in Tennessee, I often attended pretrial and trial proceedings in criminal and civil cases, including many high-profile death penalty cases.

Working on death penalty cases can be daunting; however, I was prepared for the enormity of the work by the very first position I held upon the completion of my law school education. Upon my graduation from law school, I accepted a position with the Volunteer Lawyers' Resource Center (VLRC), a non-profit entity responsible for recruiting *pro bono* counsel for death row inmates. The mission of VLRC was to engage in direct representation for these capital clients while simultaneously attempting to find them permanent *pro bono* counsel. As a result, I often drafted portions of pleadings for state and federal courts in collateral post-conviction proceedings involving the clientele of VLRC. I also conducted client interviews and field investigations, often utilizing public records requests to compile necessary data pertaining to clients. During this time, I performed legal work to varying degrees on the capital cases of many inmates, four of whom I regularly met with in prison.

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

As an employee of the court systems of both Tennessee and Florida, I have become a creative problem solver and have very often successfully proposed innovative ways of more efficiently processing cases, thereby delivering better service to the public. For example, I was involved in the beginning stages of the on-going project in the Florida State Courts System of "going paperless" in terms of e-filings and the digital circulation of memoranda and draft opinions. In Tennessee, I have continued to be involved in the nationwide trend of state appellate courts utilizing technology to better deliver service. For instance, I assisted the Eastern Divisions of the Court of Criminal Appeals and Court of Appeals in transitioning to the electronic filing and processing of claims for attorneys' fees and costs by court-appointed appellate counsel. I have also participated in the appellate courts' transition to the new CTRACK docketing system that ultimately will function more like the PACER system of the federal courts and lead to Tennessee having the capacity for the electronic filing of documents at the appellate level.

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.

Not applicable.

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

Over the past several years, I have assisted family members with probate and other legal matters attendant to the passing of our loved ones. In 2009, two of my maternal aunts passed away within the same thirty-day period leaving no heirs other than my grandmother. One of them lived in California at the time of her death and had no will. In 2012, my grandmother passed away and I assisted my mother, who was named the executor of my grandmother's estate, in probating the will. That probate proceeding closed in April of 2013. In May of 2013, my sister passed away here in Tennessee and I assisted my brother-in-law in closing out her affairs. No attorney has been utilized, or will be utilized, in handling any of these matters other than me.

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

In June of 2013, I submitted an application to the Council's predecessor, the Judicial Nominating Commission, for a position on the Tennessee Court of Criminal Appeals. The Commission met on June 27, 2015. My name was not submitted for the Governor's consideration.

EDUCATION

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

UNIVERSITY OF MIAMI SCHOOL OF LAW, Coral Gables, Florida 1991 - 1994
Juris Doctor (J.D.) *Cum Laude*
- University of Miami Law Review
- Order of the Coif

- Honor Council
- International Legal Fraternity of Phi Delta Phi (Bryan Inn)
- Paul B. Anton Merit/Leadership Scholarship Recipient (Full Tuition for Two Years)
- American Jurisprudence Book Award, Federal Civil Procedure
- Vice President, Forum for Women & the Law 1992 - 1993

UNIVERSITY OF CALIFORNIA, SAN DIEGO, La Jolla, California 1987 - 1991
Bachelor of Arts (B.A.) Political Science (Dual Minors: History / Law)
- Provost's Honor list (4 of 12 trimesters)

PERSONAL INFORMATION

15. State your age and date of birth.

I am 46 years old. My date of birth is August 16, 1969.

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

9 years, 6 months

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

9 years, 6 months

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

Loudon 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.

I have never served in the military. However, my adult son currently is serving active duty as an enlisted service member in the United States Army. He is studying at the Defense Language Institute in Monterey, California to become an Arabic interpreter.

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

No, with the possible exception of paying citations for minor traffic infractions and parking tickets.

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

No.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

Not applicable.

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.

Barclays Bank Delaware v. Porsche Lyn Shantz, Case No. 10-CV-1335 (General Sessions Court of Loudon County) – This civil warrant was served upon me in November of 2010, after I had already negotiated a settlement with this company for an outstanding debt on a closed credit card and begun making payments pursuant to that settlement agreement. The civil action was voluntarily dismissed in February of 2011, after I filed an answer explaining the mistake and spoke to the attorneys representing Barclays. Apparently, I was not the only person against whom Barclays had initiated wrongful collection actions. In May of 2012, I received a cash payment in the amount of $100.00 as a result of the settlement reached in *Gutierrez v. Barclays*, Case No. 10-CV-1012 DMS BGS (S.D. Cal.), a class action instituted against Barclays based upon its alleged wrongful debt collection practices.

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

On March 31, 2005, I filed with my now former husband a joint Voluntary Petition for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Florida. The case style and number were as follows: *In Re: Ian Lamar Haigler & Porsche Lyn Shantz*, Case No. 05-40376-LMK (Bankr. N. D. Fla.). The order of discharge was entered on July 12, 2005.

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.

Other than the proceedings listed in answer to Questions #23 & #24, the only other legal proceeding in which I have been a party was my divorce. The case style and number were as follows: *Porsche Lyn Shantz v. Ian Lamar Haigler*, Case No. 10991 (Chancery Court for Loudon County). The final judgment was entered on April 16, 2007. Our divorce was amicable. We continue to work together in parenting our youngest child who is a minor.

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

Member, Loudon County Republican Women

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

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

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

Yes. I was a member of the Girl Scouts of America in my youth. It is my understanding that only females may become members of this organization.

ACHIEVEMENTS

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

I have been a member, off and on, of the Tennessee Bar Association (TBA) and the Knoxville Bar Association (KBA) since becoming a licensed attorney in Tennessee. I cannot recall the exact dates of my membership in either organization.

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

In 2014, I was appointed by Chief Judge Charles D. Susano, Jr. to serve on the CTRACK Phase 2 Workgroup. The mission of the workgroup was to assist the CTRACK vendor for Tennessee's appellate courts (Thompson Reuters) in developing the electronic processes necessary for paperless opinion and order processing, including those required to maintain the confidentiality of electronically routed court documents.

In 2005, I was appointed by the President of The Florida Bar to serve until 2008 on the Appellate Court Rules Committee of Florida. During my tenure on the Committee, I served on the Criminal Rules, Family Law and Original Proceedings Subcommittees and assisted in the drafting of several proposed amendments to the Florida Rules of Appellate Procedure that have since been adopted by the Supreme Court of Florida. For instance, I drafted with other Criminal Law Subcommittee members what became the 2009 amendments to Rules 9.142 and 9.200 of the Florida Rules of Appellate Procedure pertaining to the content of the record in death penalty cases.

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

I co-authored the Tennessee Capital Case Bench Book (2007 ed.) published by the Tennessee Administrative Office of the Courts for use by Tennessee's trial court judges in handling death penalty trials and post-conviction proceedings.

I also provided substantial research and editorial assistance on the following publications authored by others: James R. Wolf, *Judicial Discipline in Florida: The Cost of Misconduct*, 30 Nova L. Rev. 349 (2006); Harry Lee Anstead, Gerald Kogan, Thomas D. Hall and Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431 (2005); and Philip J. Padovano, Florida Civil Practice (1999 ed.).

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.

"Appellate Update," Tennessee Clerks of Court Conference, June 12, 2014.
This presentation was designed to provide trial court clerks an update on changes to the Tennessee Rules of Appellate Procedure and helpful hints on how best to discharge their duties relative to the processing of appeals.

While not in the last five years, I also participated in the following CLEs and seminars as an invited presenter:

• Managing the Capital Case in Tennessee (Break-Out Discussion Group Leader) - August 2007

This was a three-day program for Tennessee trial court judges held in Nashville, Tennessee. It was sponsored by the Tennessee Administrative Office of the Courts and the National Judicial College. I functioned as a break-out discussion group leader at that conference.

• "Communicating Effectively with a Condemned Client" - April 2007
University of Tennessee Criminal Law Society, Lunch Series
This talk was sponsored by the Criminal Law Society of the University of Tennessee. I discussed my past experience interviewing death row inmates as part of the legal team representing said inmates.

• "Unwritten Rules of the Florida Supreme Court" - October 2004
5th Annual Florida Advanced Capital Cases Seminar
The entire seminar was a three-day program. It was sponsored by the Commission on Capital Cases of the Florida Legislature.

• Death Penalty Roundtable - July 2004
28th Annual Seminar of the Council of Appellate Staff Attorneys (CASA)

32. List any public office you have held or for which you have been a candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I am currently a member of the Industrial Development Board (IDB) of the City of Lenoir City. I was appointed to that position by the Lenoir City Council in April of 2014, upon recommendation of Lenoir City Mayor Tony R. Aikens. My term on the Board expires in March of 2016.

On July 16, 2015, I submitted an application to the Loudon County Commission for appointment to a newly created General Sessions judgeship in Loudon County. The Commission met on August 3, 2015, and I was not selected for the position.

On February 16, 2010, I submitted a completed Candidate Nominating Petition for the purpose of being placed on the ballot for the Republican Party primary as a candidate for the position of General Sessions Judge of Loudon County. I subsequently withdrew my candidacy prior to the primary because, upon checking my personal records, I would not have lived in the State of Tennessee for five (5) years on the date I would have had to assume office.

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

No.

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

reflects your own personal effort.

I have attached two samples of my writing from my work as an attorney for the courts of Tennessee. The first is a compilation of legal analyses in two different fact patterns similar to what I produced on a daily basis as the Staff Attorney for the Tennessee Court of Criminal Appeals. However, it is 100% my own work and does not represent any actual court memoranda or order, except for similarities to legal analyses contained in actual court documents. The second writing sample is one of the chapters I prepared (Chapter 7) for the Tennessee Capital Case Bench Book (2007 ed.) noted in my answer to Question #30.

In addition, I would note that I provided substantial drafting assistance on the following death penalty direct appeal opinion in Tennessee: State v. Nickolus L. Johnson, No. E2010-00172-CCA-R3-DD, 2012 WL 690218 (Tenn. Crim. App., Knoxville, Mar. 5, 2012), *aff'd*, 401 S.W.3d 1 (Tenn. 2013).

ESSAYS/PERSONAL STATEMENTS

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

My grandfather came to Tennessee from North Carolina in 1944 as a carpenter for the work that was available in building the infrastructure for the City of Oak Ridge that, at the time, was part of the Manhattan Project. I was born in Washington, D.C., where my mother, who grew up in Oak Ridge, found a career in public service with the federal government and met my father, who by the time he met her was also a career public servant after serving in the United States Navy. My parents taught me the value of public service as we moved about the country when I was a child. Throughout it all, the one place that was constant for me was Tennessee. My parents moved to Loudon County in 1988 when my father retired, and East Tennessee has been home to me every day since. It would be my honor to continue my life in public service by serving my fellow Tennesseans as the next Criminal Court Judge of the 9th Judicial District.

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

I believe that my work history speaks for itself in terms of my commitment to equal justice under the law and public service. Upon my graduation from law school, I committed myself to public service even though I was heavily recruited by large law firms in both Florida and New York. In furtherance of my commitment, I accepted a position representing death row inmates in collateral post-conviction proceedings. I have consistently pursued a career in public service with the courts of Florida and now Tennessee based upon that experience.

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 appointment as the Criminal Court Judge for the 9th Judicial District. This position serves as the only Criminal Court Judge adjudicating those cases arising in the four counties comprising the District (Loudon, Meigs, Morgan, and Roane) in which a grand jury has issued an indictment or the District Attorney General's office has filed an information charging a defendant with a misdemeanor or felony offense. The criminal court caseload of the District runs the gamut from minor offenses to serious crimes, including death penalty cases. The individual who serves this District as its Criminal Court Judge must understand the diverse population of these counties, must be respectful of all those who appear before the court, must be willing and able to travel the extensive geographic area of the District to serve the needs of the citizens of all counties, and be flexible in scheduling in order to accommodate the increasingly large criminal court dockets in the District. The District is also home to the Morgan County Correctional Complex (MCCX), resulting in a heavy caseload of petitions for writs of habeas corpus from the inmate population. The Criminal Court Judge serving this District must be prepared to address these petitions. My experience makes me the ideal candidate to assume all of these responsibilities fairly and efficiently. My appointment would also provide the District with a Criminal Court Judge capable of assisting it in transitioning to the predominantly electronic environment that is the future of courts nationwide.

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)***

It always has been my belief that those who work for the judicial branch should promote public confidence in the rule of law by giving back to their community in the form of service. To that end, even though I have been a working mother for virtually my entire legal career, I have tried in small ways to give my time in service to my community.

For instance, in December of 2011, I organized a visit to the Knoxville Supreme Court building for Loudon County Girl Scout Troop 20654. The girls were able to meet Supreme Court Justice Sharon Lee and Court of Criminal Appeals Judge Norma Ogle, and earned credit toward their government badges for learning from the judges how appellate courts work. I also participated in Career Day when my youngest daughter was in elementary school. While still in Florida, I volunteered as a Moot Court Judge at the Florida State University College of Law and regularly participated in elementary and high school law-related education activities. To me, it cannot be overstated how valuable it is to show the youth and children of my community that there are no limits to what they can achieve. I would like to continue these efforts as a judge by becoming more active in the Boys & Girls Club of the Tennessee Valley and the Girl Scout Council of the Southern Appalachians.

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

The entirety of my life has made me the ideal candidate for this judicial position. As previously

stated, I did not become a lawyer for financial gain or prestige. The choices that have shaped the path of my career have been driven by the need to serve the public, and particularly those who cannot afford legal services. I was not born into wealth, nor was I born into a family of lawyers or legal professionals. I discovered the law as a passion by being a student of history. Judges must never forget that their decisions have life-altering consequences for those who are subject to their pronouncements. The law is about people. To me, the practice of law has been a calling, and I have always pursued it as such. In my career as a court law clerk and staff attorney, I have never forgotten the faces of the condemned men I met personally in the early days of my career. I remember them, not because they were innocent or worthy of mercy or pity, but to remind me that it is always a life that a court adjudicates every time it acts.

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)***

"A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Tenn. Sup. Ct. R. 10, RJC 2.2. I understand and have upheld as a staff attorney for the courts of two states this particular provision of the Code of Judicial Conduct. Personally, I have been constrained by the law to recommend the granting of relief on occasion on what the lay public terms "technicalities" because application of the substance of the law required such results. I understand that this is not really an example of upholding the law despite my personal disagreement with it. Instead, it is an example of applying the law to reach a result that may not comport with my personal sense of justice. It is my belief that it should be a rare circumstance in which a judge would find himself or herself in a position of "disagreeing" with the actual substance of the law. I understand that, as citizens, we elect representatives to enact laws that we feel are wise and comport with our personal beliefs. However, a judge is not at liberty to "disagree" with the substance of the law because the law, as duly enacted, represents the will of the people.

REFERENCES

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

A. Hon. Thomas R. "Skip" Frierson, II (Judge), Tennessee Court of Appeals,
B. Hon. D. Kelly Thomas, Jr. (Judge), Tennessee Court of Criminal Appeals,
C. Leon F. Shields, Vice Chairman, Loudon County Republican Party Executive Committee,
D. Jim Shields, Lenoir City Councilman,
E. Christopher A. Johnson, Master Sergeant (Ret.), United States Marine Corps / Department of Defense GS-13 Civilian Retiree,

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] Criminal Court for the 9th Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: September 4, 2015.

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

Porsche Lyn Shantz
Type or Print Name

Porsche Lyn Shantz
Signature

9/4/2015
Date

25824
BPR #

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

The Florida Bar, Bar No. 83186

WRITING SAMPLES
submitted by Porsche Shantz

DISCLOSURE: The following writing samples are fictionalized to conceal any names associated with actual cases; however, they may reflect legal analyses similar to that utilized in actual court orders.

Analysis of a Rule 9 Application for Permission to Appeal

Pursuant to Rule 9 of the Rules of Appellate Procedure, counsel for the Defendant has filed an application for permission to appeal from the trial court's denial of his motion to dismiss the presentment charging him with first degree premeditated murder. The State of Tennessee opposes the application on grounds that: (1) the trial court properly denied the speedy trial claim presented in the motion to dismiss; and (2) speedy trial issues have been held to be inappropriate for interlocutory review. For the reasons that follow, we disagree with the State and conclude that interlocutory review of the challenged order is appropriate under the unique circumstances presented in this case.

The Defendant was arrested on May 1, 1985, and charged with having sexually assaulted a three-year-old. On May 7, 1985, jail personnel responded to a fire in the Defendant's cell at the County Jail. John Smith, the Defendant's cellmate, was found hanging from the ceiling and burning. In response to questioning, the Defendant gave a complete statement and admitted to having hung and set fire to Smith. The Defendant was arrested on May 8, 1985, and charged by General Sessions Warrant with first degree murder in connection with the death of Smith. The Defendant was held without bond on that charge. Later that month, the General Sessions Court entered an order directing an in-patient mental health evaluation to determine the Defendant's competence to stand trial and mental condition at the time of the alleged murder. The results of that evaluation were that the Defendant was not competent to stand trial on any of the charges against him. The evaluation team indicated that the Defendant met the criteria for judicial commitment to the Mental Retardation Secure Facility at Middle Tennessee Mental Health Institute pursuant to Tenn. Code Ann. § 33-5-305 (1984), which was replaced in 2000 by Tenn. Code Ann. § 33-5-403 (2000).

On July 1, 1985, the Grand Jury returned indictment number 115 charging the Defendant with two counts of aggravated rape for the sexual assaults on the three-year-old. Within days of the return of that indictment, the State filed a complaint, pursuant to the recommendation of the mental health evaluation team, seeking the involuntary commitment of the Defendant to a secure facility until such time as he is capable of standing trial on both the charges pending in that case and the first degree murder charge still then pending in the General Sessions Court. The complaint initiated a case independent from the pending

criminal cases. On July 17, 1985, an order was entered in that case committing the Defendant to the Mental Retardation Secure Facility at Middle Tennessee Mental Health Institute. In the order of commitment, the Trial Court found "by clear, unequivocal, and convincing evidence" that the Defendant "is mentally retarded and, because of this mental retardation, poses a likelihood of serious harm" to both himself and others.

The Defendant has remained incompetent to stand trial since his commitment. In 1988, the Director of the Mental Retardation Secure Facility reported to the Trial Court that the Defendant remained incompetent to stand trial and was "not likely to become competent in the foreseeable future." In 1990, the director of that same facility, now known as the Harold W. Jordan Habilitation Center ("HJC"), reported to the Trial Court that the Defendant remained incompetent to stand trial, but was "being transferred from a secure to a non-secure status" in the transitional program located at the Middle Tennessee Mental Health Institute based on his "encouraging improvements." The Defendant remained in non-secure developmental centers from 1991 until 1999. At that point, he was transferred back to secure status at HJC based on an incident that occurred on October 5, 1999, in which he apparently attacked his roommate and threatened to kill him. In 2003, the Trial Court was informed that the Defendant remained incompetent to stand trial and that competency restoration training services had been discontinued in May of 2000 after it was determined that the Defendant "was incapable of attaining competency to stand trial due to his cognitive limitations, specifically mental retardation." The Trial Court received another status report dated March 1, 2005, indicating that the Defendant remained incompetent to stand trial, that he had participated in sex offender treatment, and that he still met the criteria for commitment because he continued to pose a substantial likelihood of serious harm to himself or others.

In a status report dated September 1, 2005, the Trial Court was advised that the Defendant remained incompetent to stand trial and "will not ever be competent in any foreseeable future." However, the report also stated:

> [The Defendant] has primary psychiatric diagnoses (DSM-IV) of Mild Mental Retardation and Personality Disorder, Not Otherwise Stated. He is not prescribed any psychotropic medications.
>
> While at HJC, [the Defendant] has had the opportunity to participate in sex offender treatment and in supplemental social skills strengthening groups. While he shows an occasional minor misbehavior, [the Defendant] generally abides with center rules and is peaceable with peers. [The Defendant] denies all charges against him.
>
> We have completed our forensic obligations for [the Defendant] and wish to

> transition him to a suitable supervised living situation outside of a secure setting. An Independent Professional Evaluation (Quality Review Panel) conducted March 9, 2005 at Clover Bottom Developmental Center indicated that [the Defendant] could be recommended for community placement as the benefits from institutional care have largely been maximized.
>
> As [the Defendant] no longer meets the commitment standards under which he was originally admitted to [HJC], and in accord with T.C.A. 33-5-410, we are notifying the court of our plans to transition [the Defendant] to a suitable residential or community placement. This letter is to serve as notification of our intention to transition [the Defendant] from a secure facility to an appropriate residential, mental health, or community placement based upon his needs for treatment and supervision. Upon release, [the Defendant] will no longer be under the custodial care of the Department of Mental Retardation. It is our understanding that if the court does not set a hearing and notify the facility within fifteen (15) days of its receipt of this notice, the facility shall release the person from involuntary commitment.

On September 13, 2005, the State filed in case number 115 a motion in opposition to the Defendant's release into the community and requested a hearing, pursuant to Tenn. Code Ann. § 33-5-410 (2000), for the purpose of determining whether the Defendant continued to meet the criteria for judicial commitment set forth in Tenn. Code Ann. § 33-5-403 (2000). The State also filed a motion for an independent mental health evaluation in case number 115, which the Trial Court granted. The results of this forensic evaluation indicated that the Defendant was now competent to stand trial. As such, in April of 2006, the State filed a motion for a competency hearing to determine whether the Defendant had finally attained the competency necessary to stand trial on the charges pending against him.

In November of 2006, defense counsel filed a motion to dismiss the indictment in case number 115, which substantively sought dismissal of the murder charge still pending against the Defendant in General Sessions Court, on grounds that the length of time that charge had remained pending against the Defendant, while he remained incompetent to stand trial, violated his due process and speedy trial rights as recognized in Jackson v. Indiana, 406 U.S. 715 (1972). Pursuant to a subsequent referral for a determination of the Defendant's competence to stand trial on all criminal charges pending against him, it was determined by an evaluator at HJC that the Defendant "is not competent to participate in his own defense and is not restorable to competency related to cognitive deficits consistent with mild mental retardation, including his lack of retention capacity, limited vocabulary, and poor reasoning ability." This report indicates that the Defendant's history of diagnostic testing reflects the following full scale IQ scores over the course of his lifetime: 1971 (age 10) - 45; 1977 (age

15) - 45; 1979 (age 18) - 56; 1996 (age 35) - 67; 1999 (age 38) - 67; 2004 (age 43) - 52; 2006 (age 44) - 59. This report also stated that the Defendant "will be eligible for Division of Mental Retardation Services (DMRS) community services once he is discharged from HJC," but cautioned:

> He should continue to be provided with stress management skills to help him identify triggers for anger and stress and develop coping skills for handling stressors. Once released from HJC, he would benefit [from] a continuously supervised living situation due to his poor judgment, limited reasoning skills, and remote history of lack of self control and aggression. He is at risk for future acting-out behavior that may involve the legal system if he is inadequately placed and monitored in the community.

On September 12, 2007, the Grand Jury returned indictment number 116 charging the Defendant with one count of first degree premeditated murder in connection with the death of John Smith on May 7, 1985. At a hearing in August of 2008, the Trial Court considered defense counsel's motion to dismiss as having been filed in case number 116 and denied the motion. On May 18, 2009, the Trial Court entered a written order confirming the denial of the motion to dismiss as well as a written order granting the Defendant permission to appeal from the denial of the motion to dismiss pursuant to Rule 9 of the Rules of Appellate Procedure. In granting permission to appeal, the Trial Court noted that, if the Defendant proceeded to trial on the murder charge, there was a strong likelihood that he would be convicted based upon his written statement implicating himself in the death of Smith. The Trial Court reasoned therefore that the need to prevent needless, expensive and protracted litigation supported the granting of an interlocutory appeal under the circumstances.

Relying primarily on Jackson and this Court's decision in Cox v. State, 550 S.W.2d 954 (Tenn. Crim. App. 1976), defense counsel argues in the application for permission to appeal that immediate review of the Trial Court's order denying the motion to dismiss should be granted because the Trial Court clearly ignored these applicable precedents in denying the motion to dismiss. We agree that, under the circumstances presented in this case, an interlocutory appeal of the Trial Court's order denying the motion to dismiss is warranted.

We acknowledge, as the State asserts in its response, that our Supreme Court has held that "a defendant is not entitled to interlocutory review of speedy trial claims." State v. Hawk, 170 S.W.3d 547, 556 (Tenn. 2005) (affirming the denial by this Court of an application for interlocutory appeal pursuant to Rule 9 from an order rejecting a claimed speedy trial violation). However, as the Supreme Court commented in Hawk, the reason such claims are inappropriate for interlocutory review is that such appellate review "would frustrate the very right the Speedy Trial Clause of the Sixth Amendment seeks to

protect—the timeliness of prosecution." Id. at 554. In this case, the prosecution of the Defendant already has been delayed for over twenty (20) years. If anything, immediate review of the challenged order "will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed" as contemplated by Rule 9(a) of the Rules of Appellate Procedure.

We also disagree with the State on the Defendant's probable success on the merits of his challenge to the order denying the motion to dismiss. In Jackson, the United States Supreme Court held "that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." Jackson, 406 U.S. at 738. In reaching this conclusion, the Supreme Court noted that "[t]here is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time." Id. at 726. The Defendant in Jackson was described by the Supreme Court as "a mentally defective deaf mute with a mental level of a pre-school child." Id. at 717. In Cox, this Court held that the trial court in that case "was in error in failing to grant the defendant's motion to dismiss the indictment because the accused had been denied his right to a speedy trial for the reasons set out in Jackson v. Indiana." Cox, 550 S.W.2d at 955. Notably, the defendant in Cox had been charged, like the Defendant in this case, with first degree murder. See id. at 955. However, unlike the Defendant in this case, who appears to have no foreseeable hope of being restored to competence as reflected in the numerous mental health evaluations conducted since his judicial commitment, the defendant in Cox ultimately was determined to be competent to stand trial and obtained reversal of his criminal conviction on direct appeal based upon the trial court's denial of his motion to dismiss the charge while he remained incompetent. See id. at 956, 958. In reversing the defendant's first degree murder conviction in that case, this Court commented that the ten-year period that it took to restore the defendant to competence "was perhaps the longest ever to come to the attention of this Court." Id. at 956. The twenty-four (24) years that have now elapsed since the Defendant in this case was arrested, declared incompetent to stand trial, and judicially committed pending the restoration of his competence far exceeds what this Court determined in the 1976 decision in Cox to have been the "longest" ever to come to the attention of the Court.

Accordingly, the application for permission to appeal is GRANTED. The record on appeal shall be transmitted to this court within the time provided by Rule 9(e) of the Rules of Appellate Procedure. This appeal shall then proceed in accordance with the Rules of Appellate Procedure and the rules of this Court. The proceedings in the Trial Court are hereby STAYED pending the outcome of this appeal.

Analysis of a Rule 28 Application for Permission to Appeal

The Petitioner filed a timely *pro se* application for permission to appeal from an order denying his motion to re-open his prior post-conviction proceeding to consider a new claim of constitutional error. See Tenn. Code Ann. § 40-30-117(c); see also Tenn. S. Ct. R. 28, § 10(B). The State of Tennessee filed a response in opposition to the application. Upon due consideration of the arguments presented in both the application and response, together with applicable law, we conclude that the Petitioner has not demonstrated that an appeal from the order denying the motion to re-open is warranted.

The Petitioner is currently serving a twenty-five (25) year sentence for second degree murder, a Class A felony. The offense occurred on December 14, 1996. Pursuant to the Sentencing Reform Act of 1989, as it existed before its 2005 amendments, the Petitioner's presumptive sentence for the murder was enhanced by the Trial Court to twenty-five (25) years' imprisonment based on enhancement factors (1), (8), and (9). These factors were:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
> . . .
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; [and]
> (9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense[.]

Tenn. Code Ann. § 40-35-114(1), (8) and (9) (1995). On direct appeal, this Court affirmed the Petitioner's conviction and his enhanced sentence. See State of Tennessee v. Thomas Smith, No. 13, slip op. (Tenn. Crim. App., Knoxville, Oct. 18, 1999), *perm. to appeal denied* (Tenn. Apr. 15, 2000). In 2003, this Court affirmed the Trial Court's denial of the Petitioner's petition for post-conviction relief which complained only that trial counsel had been ineffective in failing to present certain favorable defense witnesses and in denying the Petitioner the right to testify in his own defense. See Thomas Smith v. State of Tennessee, No. 14, slip op. (Tenn. Crim. App., Knoxville, Feb. 14, 2003), *perm. to appeal denied* (Tenn. May 1, 2003). This Court also affirmed the dismissal of the Petitioner's petition for a writ of error coram nobis in which he claimed, among other things, that "certain enhancement factors were erroneously applied." Thomas Smith v. State of Tennessee, No. 15, slip op. at 2 (Tenn. Crim. App., Knoxville, Jan. 2, 2004), *perm. to appeal denied* (Tenn. Apr. 5, 2004).

On May 21, 2009, the Petitioner mailed to the Trial Court a motion to re-open his post-conviction proceeding. In both his motion and application for permission to appeal filed in this Court, the Petitioner claims he is entitled to relief from his enhanced sentence based

on the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which he alleged had been held, in Butler v. Curry, 528 F.3d 624 (9th Cir. 2008), to be retroactively applicable to cases which were not final when Apprendi was decided. The Petitioner alleges that his conviction and sentence did not become final on direct review until July 14, 2000, the deadline upon which he could have filed a petition for writ of certiorari in the United States Supreme Court. The Petitioner also specifically points out that Apprendi was decided on June 26, 2000, before his conviction and sentence became final on direct review.

The Post-Conviction Procedure Act of 1995 provides that a motion to re-open a prior post-conviction proceeding may raise a claim "based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). "The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]" Id. "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122. The Trial Court denied the Petitioner's motion to re-open on grounds that it had not been filed within one (1) year of the date upon which Apprendi was decided by the United States Supreme Court. The State argues in response to the application that the Trial Court properly determined that the motion to re-open had not been filed timely and that, even if the claim were considered on the merits, the Petitioner would still not be entitled to relief because this Court has held repeatedly that Apprendi and its progeny cannot be applied to cases on collateral review. The Petitioner contends in a reply to the State's response that the State waived the arguments it now makes by not filing a response to the motion below. We disagree and conclude, consistent with the position taken by the State in its response, that the motion to re-open was not filed timely and was without merit.

In Apprendi, the Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court expanded the reach of Apprendi by holding that,

> [T]he "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding

additional facts, but the maximum he may impose *without* any additional findings.

Id. at 303-04 (emphasis in original). Our Supreme Court's decision in State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007) ("Gomez II"), issued on remand after reconsideration in light of Cunningham v. California, 549 U.S. 270 (2007), confirms that Apprendi and Blakely provide a basis for relief from enhanced sentencing under the Sentencing Reform Act of 1989, as it existed before the 2005 amendments. However, as the State asserts in its response to the application, this Court has held repeatedly that neither Apprendi nor Blakely can be retroactively applied to cases on collateral review. See, e.g., Jeffrey Owen Walters v. State of Tennessee, No. M2008-01806-CCA-R3-PC, slip op. at 7 (Tenn. Crim. App., Nashville, Oct. 20, 2009); Tony Martin v. State of Tennessee, No. W2008-01361-CCA-R3-PC, slip op. at 2 (Tenn. Crim. App., Jackson, May 21, 2009); Travis J. Woods v. State of Tennessee, No. E2007-02379-CCA-R3-PC, slip op. at 15 (Tenn. Crim. App., Knoxville, Mar. 18, 2009), *perm. to appeal denied* (Tenn. Aug. 17, 2009). In reaching this conclusion, this Court has utilized the Teague v. Lane, 489 U.S. 288 (1989) analysis for determining retroactivity, see, e.g., Donald Branch v. State of Tennessee, No. W2003-03042-CCA-R3-PC, slip op. at 10-11 (Tenn. Crim. App., Jackson, Dec. 21, 2004), *perm. to appeal denied* (Tenn. May 23, 2005), which our Supreme Court instructed in Meadows v. State, 849 S.W.2d 748 (Tenn. 1993), was the test to be applied when determining the retroactivity of a new federal rule of law. See id. at 754 ("[S]tates are bound by federal retroactivity analysis when a new federal rule is involved."). While it is true that the United States Supreme Court held in Danforth v. Minnesota, 552 U.S. 264 (2008), that the states are no longer required to apply the Teague analysis when determining whether to give retroactive effect to a new federal rule of law, we are bound to follow the Supreme Court's directive in Meadows as to the retroactivity analysis to apply to new federal rules until the Supreme Court decides otherwise. See State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995).

Accordingly, the application for permission to appeal from the order of the Trial Court denying the Petitioner's motion to re-open his prior post-conviction proceeding is hereby DENIED. Because the record reflects that the Petitioner is indigent, costs on appeal are taxed to the State of Tennessee.

Tennessee Capital Case

Bench Book

2007

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Chapter 7

Penalty Phase

CHAPTER 7

Penalty Phase

A. PRELIMINARY MATTERS

Following the return of a verdict of guilty, the jury in a first degree murder case in Tennessee determines in a separate sentencing hearing whether the defendant "shall be sentenced to death, to imprisonment for life without possibility of parole, or to imprisonment for life." Tenn. Code Ann. § 39-13-204(a). The separate sentencing hearing, or penalty phase of the trial, shall be conducted "as soon as practicable before the same jury that determined guilt" following the return of the verdict in the guilt phase, unless the defendant is being retried as to penalty as a result of a finding of error in the initial penalty phase by the trial court "or any other court with jurisdiction to do so." Tenn. Code Ann. §§ 39-13-204(a), (k). Retrials as to penalty are governed by the same requirements discussed in this chapter, subject only to those limitations, exceptions, and additions discussed in Chapter 9.

1. Statutory Changes

This Chapter discusses the law applicable to penalty phase proceedings as it currently exists. As also discussed in Chapter 9, all penalty phase proceedings must be held in accordance with the law in effect at the time of the commission of the offense. See State v. Cauthern, 967 S.W.2d 726, 732 (Tenn. 1998) (citing State v. Brimmer, 876 S.W.2d 75, 82 (Tenn. 1994)). As a result, cases involving older offense dates will require review and application of prior law.

2. Waiver of Penalty Phase Jury

Tenn. Code Ann. § 39-13-205(b), (c):

> **(b) After a verdict of first degree murder is found, the defendant, with the advice of the defendant's attorney and the consent of the court and district attorney general, may waive the right to have a jury determine punishment, in which case the trial judge shall determine punishment as provided by this part.**
> **(c) Reference to a jury in § 39-13-204 shall apply to a judge if the jury is waived.**

Tenn. R. Crim. P. 23(b)(1), (2):

> **(1) Timing. — The defendant may waive a jury trial at any time before the jury is sworn.**
> **(2) Procedures. — A waiver of jury trial must:**
> **(A) be in writing;**
> **(B) have the consent of the district attorney general; and**
> **(C) have the approval of the court.**

See also Tenn. Code Ann. § 40-35-203(c). To the extent that Rule 23 is in conflict with the statute in terms of when the defendant may file his or her written waiver of a penalty phase jury, the statute controls. See State v. Reid, 981 S.W.2d 166, 169-70 (Tenn. 1998).

The filing of a written waiver of a penalty phase jury is not all that is necessary to accomplish an effective waiver. Because the United States Supreme Court held in Ring v. Arizona, 536 U.S. 584 (2002), that a capital defendant has a constitutional right to have a jury engage in the fact-finding necessary to support a sentence of death, any waiver of the right to a penalty phase jury must be knowing and voluntary. See generally Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). As a result, an on-the-record colloquy should be conducted with the defendant to ensure that his or her waiver of a penalty phase jury is knowing and voluntary.

B. OPENING STATEMENTS

Tenn. Code Ann. § 39-13-204(b):

> **In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement; provided, that the waiver of opening statement by one party shall not preclude the opening statement by the other party.**

1. State's Opening

A prosecutor's opening statement during the penalty phase in a capital case cannot limit whether otherwise properly noticed aggravating circumstances can be considered by the jury. See State v. Robinson, 146 S.W.3d 469, 526 (Tenn. 2004). In Robinson, the Tennessee Supreme Court rejected the defendant's argument that the trial court had improperly permitted the State to rely upon the two aggravating circumstances set forth in the pretrial notice of intent, where the prosecutor had indicated during his opening statement that he was relying upon only one of those aggravating circumstance. See id.

A more exhaustive approach to what has been deemed improper argument in a capital case will be taken up in subsection G of this Chapter entitled "Closing Argument." For now, it is enough to note that the Tennessee Supreme Court has condemned a prosecutor's use of epithets to characterize the defendant in a penalty phase opening statement in a capital case. See, e.g., State v. Thomas, 158 S.W.3d 361, 413-14 (Tenn. 2005) (determining that prosecutor's repeated use of phrase "greed and evil" during opening statement in reference to defendant was improper).

2. Defense Opening

A defense attorney's decision not to present an opening statement during the penalty phase of a capital trial will not be considered ineffective assistance of counsel because "[t]here is no requirement

that an opening statement be made." Johnson v. State, No. 02C01-9707-CR-00292, 1999 WL 608861, * 20 (Tenn. Crim. App. 1999).

C. EVIDENTIARY ISSUES

1. Standards at Sentencing

Tenn. Code Ann. § 39-13-204 (c):

> **In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted.**

See State v. Berry, 141 S.W.3d 549 (Tenn. 2004); State v. Stout, 46 S.W.3d 689 (Tenn. 2001); Owens v. State, 13 S.W.3d 742 (Tenn. Crim. App. 1999).

2. Accomplice Testimony

Corroboration of accomplice testimony, which is required to prove guilt during the guilt phase of a trial, is not required to prove an aggravating circumstance during the penalty phase of the trial. State v. Bane, 57 S.W.3d 411 (Tenn. 2001).

3. Photographs

In State v. Faulkner, 154 S.W.3d 48 (Tenn. Crim. App. 2005), the court discussed the various standards related to the introduction of photographs in a capital trial in Tennessee:

Tennessee courts follow a policy of liberality in the admission of photographs in ... criminal cases. See State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "the admissibility of photographs lies within the discretion of the trial court" whose ruling "will not be overturned on appeal except upon a clear showing of an abuse of discretion." Id.; see also State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000). Notwithstanding, a photograph must be found relevant to an issue that the jury must decide before it may be admitted into evidence. See State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1988), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551 (1999); State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); see also Tenn. R. Evid. 401. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. Additionally, the admissibility of evidence at a capital sentencing hearing is controlled by section 39-13-204(c), Tennessee Code Annotated, which allows the admission of any evidence "the court deems relevant to the punishment . . . regardless of its admissibility under the rules of evidence." See Hall, 8 S.W.3d at 601. In essence, section 39-13-204(c) permits introduction of any evidence relevant to sentencing in a capital case, subject only "to a defendant's opportunity to rebut any hearsay statements and to constitutional limitations." See Hall, 8 S.W.3d at 601.

Notwithstanding this broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. Banks, 564 S.W.2d at 950-51. Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it may have upon the trier of fact. Vann, 976 S.W.2d at 103; Braden, 867 S.W.2d at 758; see also Tenn. R. Evid. 403. In this respect, we note that photographs of a murder victim are prejudicial by their very nature. However, prejudicial evidence is not per se excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. Rather, what is excluded is evidence which is "unfairly prejudicial," in other words, that evidence which has "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." See Vann, 976 S.W.2d at 103 (citations omitted).

...

Photographs depicting a victim's injuries have been held admissible to establish torture or serious physical abuse under aggravating circumstance (i)(5). See, e.g., State v. Smith, 893 S.W.2d 908, 924 (Tenn.1994) (photographs depicting the victim's body, including one of the slash wound to the throat, which was "undeniably gruesome," were relevant to prove that the killing was "especially heinous, atrocious, or cruel" and were admissible for that purpose); State v. McNish, 727 S.W.2d 490, 494-95 (Tenn .1987) (photographs of the body of the victim who was beaten to death were relevant and admissible to show the heavy, repeated and vicious blows to the victim and to prove that the killing was "especially heinous, atrocious, or cruel").

Faulkner, at 68-69.

In addition, in State v. Odom, 137 S.W.3d 572, 587 (Tenn. 2004), the court held that

[a]t a resentencing hearing, both the State and the defendant are entitled to offer evidence relating to the circumstances of the crime. A trial court is afforded broad discretion in determining whether to admit photographs of the deceased in a number prosecution.

(Citations omitted).

NOTE: Photographs of the victim while alive are not admissible as issues such as identity for which the photograph might be relevant are not issues at sentencing. State v. Keen, 31 S.W.3d 196 (Tenn. 2000).

4. Defendant's Character

In State v. Thacker, 164 S.W.3d 208 (Tenn. 2005), the court discussed the issue of evidence related to the defendant's character at a capital sentencing hearing.

Evidence is not excluded at a capital sentencing hearing merely

because it is otherwise inadmissible under the Rules of Evidence. See Tenn. Code Ann. § 39-13-204(c); State v. Stout, 46 S.W.3d 689, 702 (Tenn. 2001). In a capital sentencing hearing, any evidence relevant to the circumstances of the murder or to the aggravating or mitigating circumstances is admissible in determining punishment if it has probative value. See Teague, 897 S.W.2d at 250. Further, due to the constitutional requirement that capital sentencing be conducted in an individualized manner, evidence regarding the defendant's character and background is admissible regardless of its relevance to any aggravating or mitigating circumstances. Sims, 45 S.W.3d at 13. Nevertheless, a trial court has the discretion to exclude any evidence that would render the trial fundamentally unfair, or whose probative value is outweighed by its prejudicial effect. See Tenn. R. Evid. 403; State v. Burns, 979 S.W.2d 276, 282 (Tenn. 1998).

Generally, Rule 404 prohibits the use of character evidence to prove action on a particular occasion in conformity with the character trait. See Tenn. R. Evid. 404. Rule 404(b) specifically serves to filter out evidence of prior bad acts if offered to infer conduct in conformity with a character trait; however, such evidence may be admissible for other purposes. Tenn. R. Evid. 404(b). In cases where character evidence is admissible, Tennessee Rule of Evidence 405 provides that "inquiry on cross-examination is allowable into relevant specific instances of conduct." Tenn. R. Evid. 405(a). However, before inquiring into specific instances of conduct, the trial court must hold a hearing outside the presence of the jury and determine whether a factual basis for the inquiry exists and whether "the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues." Id.

In State v. Sims this Court analyzed the relationship between Rule 405 and Tennessee Code Annotated section 39-13-204(c), focusing on the precise issue of whether section 39-13-204(c) precluded application of Rule 405 during a capital sentencing hearing. 45 S.W.3d at 13. We concluded that section 39-13-204(c) provides trial judges with wider discretion than normally permitted under the Rules of Evidence and that trial judges are not required to strictly

follow Rule 405 in determining whether the State should be allowed to question a defendant's witness regarding the defendant's prior convictions. Sims, 45 S.W.3d at 14. We have provided the following principles:

> *The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.*
>
> *Id.; see also Stout, 46 S.W.3d at 703.*
>
> *We also concluded that the issue should not be whether testimony is character evidence under Rules 404 and 405. Rather, the proper focus in a capital sentencing hearing should be whether the testimony is relevant to the mitigating factors presented by the defendant and on the relevance of the defendant's prior bad acts to refute those mitigating circumstances. Sims, 45 S.W.3d at 14. We further noted that when evidence of prior convictions is admitted in a capital sentencing hearing, the trial court should instruct the jury that the evidence is to be considered solely to rebut mitigating testimony related to the defendant's character. Id. at 15.*

In Sims, the prosecution was allowed to cross-examine a witness regarding the defendant's prior burglary and theft convictions in

order to rebut mitigating evidence that the defendant was not by nature an aggressive person. Id. at 14-15. Likewise, in State v. Stout, evidence of prior convictions for aggravated burglary, theft, reckless endangerment and robbery was allowed to rebut mitigation evidence that the defendant was a "fine, active Christian." 46 S.W.3d at 703.

Thacker, at 226-28.

5. Confessions

In State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), the court held that the defendant's confession was admissible at sentencing in that it described the nature and circumstances of the crime.

6. Hearsay

If relevant, hearsay is admissible during the penalty phase of a capital murder case. Tenn. Code Ann. § 39-13-204(c); State v.Austin, 87 S.W.3d 447 (Tenn. 2002). Although our statute does permit the introduction of hearsay evidence, it requires that "the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted." Id.

7. State's Rebuttal Proof

In certain circumstances the State will be allowed to rebut the mitigation offered by the defendant at a capital sentencing hearing. The test is whether the probative value outweighs the prejudicial effect. State v. Sims, 45 S.W.3d 1 (Tenn. 2001). In the penalty phase, the focus is on relevance as opposed to a strict application of the rules of evidence. Id.

EXAMPLES:

State v. Thompson
189 S.W.3d 260 (Tenn. Crim. App. 2005).

When a defendant relies on the no prior criminal history statutory mitigating circumstance, the State may rebut this factor through not only proof of prior convictions, but through any evidence of criminal activity. Additionally, the court held that the State was properly allowed to offer rebuttal regarding the defendant's lack of remorse to refute his alleged religious conversion and remorsefulness.

State v. McKinney
74 S.W.3d 291 (Tenn. 2002).

Trial court properly allowed the State to impeach a defense witness, who portrayed the defendant as a peaceful, non-violent person, with the defendant's juvenile adjudication for aggravated assault.

NOTE: It such instances, it is appropriate for the trial court to give a limiting instruction informing the jury that prior convictions should be considered solely for the purpose of rebutting the mitigating testimony relating to the defendant's character as a non-aggressive person. See State v. Sims, 45 S.W.3d 1 (Tenn. 2001).

State v. Bane
57 S.W.3d 411 (Tenn. 2001)

State was properly permitted to rebut proposed mitigation. Defendant introduced mitigating evidence regarding his family background, marriage and two sons. State properly rebutted this evidence with proof of defendant's relationships with other women.

8. Polygraphs

Evidence of polygraph examination results, testimony on such results, or testimony related to a defendant's willingness or refusal

to submit to a polygraph examination is not admissible during a capital or non-capital sentencing hearing. State v. Pierce, 138 S.W.3d 820, 826 (Tenn. 2004); see also State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001).

D. AGGRAVATING CIRCUMSTANCES

Tenn. Code Ann. § 39-13-204(i) reads in part that:

> **No death penalty or sentence of imprisonment for life without possibility of parole shall be imposed, except upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which are limited to the following:**

The United States Supreme Court held in Zant v. Stephens, 462 U.S. 862, 877 (1983), that, in order for a state to impose the death penalty without violating the Eighth Amendment, it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." In Tennessee, as in many other states, this "narrowing" is accomplished through the use of statutory aggravating circumstances.

1. (i)(1) - Murder Committed by Adult Against Child Under Twelve

Tenn. Code Ann. § 39-13-204(i)(1):

> **The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older;**

This aggravating circumstance can be applied in any case in which the victim is less than twelve years of age. While this aggravator also requires proof that the defendant was eighteen years of age or older at the time of the offense, it should be noted that any issue

regarding proof on this point should be a mere formality since a defendant under eighteen years of age at the time of the offense is ineligible for the death penalty. See Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"); see also Tenn. Code Ann. § 37-1-134(a)(1) (forbidding the imposition of a death sentence on a juvenile).

NOTE: The factors listed in Tenn. Code Ann. § 39-13-204(i) are the same factors relied upon by the State in first degree murder cases where the death penalty is not sought but life without the possibility of parole is. Minors are eligible for life without the possibility of parole, and therefore, the age of the defendant would be very relevant in that type of a case as it relates to this factor.

The (i)(1) aggravating circumstance can even be used to support imposition of the death penalty in a case where the conviction is for felony murder in the perpetration of aggravated child abuse. See State v. Godsey, 60 S.W.3d 759, 778-81 (Tenn. 2001). In Godsey, the Tennessee Supreme Court held that the (i)(1) aggravating circumstance "sufficiently and meaningfully" narrowed the class of death-eligible defendants, even in cases where the defendant had been convicted of felony murder in the perpetration of aggravated child abuse, because, unlike the (i)(7) felony murder aggravating circumstance at issue in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), the (i)(1) aggravating circumstance "does not by its terms apply to all aggravated child abuse murderers." Godsey, 60 S.W.3d at 780. This is true, the Court reasoned, because felony murder by aggravated child abuse can be committed against a child under eighteen but older than twelve years of age, while the (i)(1) aggravating circumstance applies only where the victim was less than twelve years of age at the time of the crime. See id.; see also State v. Hodges, 7 S.W.3d 609, 629 (Tenn. Crim. App. 1998) (reaching same conclusion in life without parole case).

NOTE: It should be noted that in Godsey, where the

defendant had been the first and only person in Tennessee to receive a death sentence based solely on the (i)(1) aggravating circumstance, the Court, following a lengthy statutory comparative proportionality analysis, concluded that the sentence of death was disproportionate in that case and affirmed the Court of Criminal Appeals' modification of the sentence to life imprisonment without the possibility of parole. See Godsey, 60 S.W.3d at 781-93.

2. (i)(2) - Prior Violent Felonies

Tenn. Code Ann. § 39-13-204(i)(2):

> **The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;**

Tenn. Code Ann. § 39-13-204(c) (in part):

> **In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor.**

NOTE: Prior to 1989, the language of this aggravating circumstance was as follows:

> *The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.*

Tenn. Code Ann. § 39-2-203(i)(2) (1981). For pre-1989 offenses,

case law construing this prior language should be consulted.

a. Burden of Proof

A certified copy of a prior criminal judgment, bearing the name of the defendant, without more, is insufficient alone to establish the identity of the defendant as the same person convicted of the prior felony for purposes of the (i)(2) aggravating circumstance. See State v. Williams, No. 03C01-9302-CR-00050, 1996 WL 146696, * 5 (Tenn. Crim. App. Apr. 2, 1996); see also Lowe v. State, 805 S.W.2d 368, 371-72 (Tenn. 1991) (holding that a certified copy of a judgment merely creates a permissive inference of identification). However, in State v. Dellinger, 79 S.W.3d 458, 472 (Tenn. 2002), the Tennessee Supreme Court held that the State sufficiently carried its burden of proof as to the (i)(2) aggravating circumstance in that case where the introduction of certified copies of prior criminal judgments was coupled with testimony from a witness who had been present at the time of entry of the prior conviction and who identified the defendants as the same persons convicted of the prior felonies reflected in the judgments.

b. Timing of Prior Conviction(s)

The Tennessee Supreme Court has "held on numerous occasions that so long as a defendant is *convicted* of a violent felony *prior* to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable." State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997) (emphasis in original) (citing State v. Nichols, 877 S.W.2d 722, 736 (Tenn.1994), and State v. Caldwell, 671 S.W.2d 459, 464-65 (Tenn. 1984)).

Practically speaking, this means that the "prior" offense may occur after the date of the commission of the capital offense so long as the defendant is convicted of the "prior" offense

before the capital sentencing or resentencing hearing.

c. Validity of Prior Conviction(s)

The United States Supreme Court held in Johnson v. Mississippi, 486 U.S. 578 (1988), that it violates the Eighth Amendment prohibition against cruel and unusual punishment for a death sentence to be based on a prior conviction that has been vacated. In State v. Shepherd, 902 S.W.2d 895, 906-07 (Tenn. 1995), the Tennessee Supreme Court held that application of the (i)(2) aggravator could not stand where after the conclusion of the defendant's capital trial, the prior conviction relied on by the State in support of (i)(2) had been reversed and the case remanded for a new trial.

d. Nature of Prior Conviction(s)

The Tennessee Supreme Court has held that, for purposes of determining whether a prior conviction constitutes a prior violent felony for purposes of the (i)(2) aggravating circumstance, "the trial judge must necessarily examine the facts underlying the prior felony" to ascertain whether it involved violence against a person if the statutory elements of the offense are such that it could have been committed "with or without proof of violence." State v. Sims, 45 S.W.3d 1, 12 (Tenn. 2001). "If the trial court determines that the statutory elements of the prior offense involved the use of violence, the State may introduce evidence that the defendant had previously been convicted of the prior offenses," and the trial court "then would instruct the jury that those convictions involved the use of violence to the person." State v. Powers, 101 S.W.3d 383, 400-01 (Tenn. 2003).

There have been several cases analyzing the statutory elements of certain particular offenses to determine whether they involved the use of violence to the person. A discussion of each of these cases is beyond the scope of these materials at

this time. If there is any question as to whether a particular offense involved the use of violence to the person, case law should be consulted to ensure that the offense can be used to support application of the (i)(2) aggravator.

3. (i)(3) - Great Risk of Death to Two or More Persons

Tenn. Code Ann. § 39-13-204(i)(3):

> **The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;**

The Tennessee Supreme Court has held that the (i)(3) aggravating circumstance " 'contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.' " State v. Henderson, 24 S.W.3d 307, 313 (Tenn. 2000) (quoting State v. Burns, 979 S.W.2d 276, 280 (Tenn. 1998), quoting State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984)). The Court in Henderson, quoting from Burns, noted that the (i)(3) aggravating circumstance " 'most often has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present.' " Id. at 313-14 (quoting Burns, 979 S.W.2d at 280).

In State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984), the Tennessee Supreme Court expressed its doubt as to whether the evidence in that case was sufficient to support application of this aggravating circumstance. The court in Cone explained its reasoning on this point as follows:

> *It is clear from the record that on the afternoon of August 9, 1980, the accused shot two persons and attempted to shoot a third in escaping from an armed robbery after a high-speed automobile chase. On the next morning he terrorized [another person] and some hours later killed [the victims of the charged murders]. There is considerable logic and plausibility to the finding of the jury that the acts of murder were committed during the course of an attempted escape*

from this crime spree, and certainly more than two persons were in danger.

We are of the opinion, however, that generally the statute does not contemplate an extended criminal episode, but contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.

Id. (footnote omitted).

NOTE: It should be noted that, despite its view regarding the sufficiency of the evidence supporting the (i)(3) aggravator, the court in Cone nevertheless upheld the death sentence in that case, concluding that any error in application of (i)(3) was harmless beyond a reasonable doubt given the other three aggravating circumstances which were found by the jury and supported by the record. See Cone, 665 S.W.2d at 95.

The court in Johnson v. State, 38 S.W.3d 52 (Tenn. 2001), noted that, "[i]n many of the cases upholding application of the (i)(3) aggravator, the defendant fired random shots with others present or nearby, the defendant engaged in a shoot-out with other parties, or the defendant actually shot people in addition to the murder victim." Johnson, at 60 (footnotes omitted). In support of its conclusion that this aggravator cannot be vicariously applied, the court explained that

[u]nlike other aggravating circumstances, such as the (i)(5) aggravator, the statutory language of the (i)(3) aggravating circumstance simply does not permit application of this aggravating circumstance unless the defendant "knowingly created" the "great risk of death," either by his or her own actions or by directing, aiding, or soliciting another to do the act, i.e., to shoot the gun, that creates the great risk of death. Without some proof that the defendant in some way "knowingly created" the "great risk of death," this aggravating circumstance does not apply, even though a great risk of death may have been created by someone during the course of the criminal episode. Because this

> *aggravating circumstance focuses more upon the defendant's actions and intent rather than upon the actual circumstances surrounding the killing, we decline to accept the State's invitation to vicariously apply the (i)(3) aggravating circumstance . . . .*

Id. at 63.

Cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include: Henderson, 24 S.W.3d at 314 (death sentence based on (i)(3), (i)(6), (i)(7), and (i)(9) aggravating circumstances); Burns, 979 S.W.2d at 280-81 (sole aggravating circumstance); State v. Johnson, 632 S.W.2d 542, 548 (Tenn. 1982) (death sentence as to one victim based on (i)(3) and (i)(6) aggravating circumstances).

4. (i)(4) - Murder for Hire

Tenn. Code Ann. § 39-13-204(i)(4):

> **The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;**

Application of this aggravating circumstance requires "proof of payment or promise of payment as a motive for the murder." State v. Stephenson, 195 S.W.3d 574, 587 (Tenn. 2006).

Cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include: Stephenson, 195 S.W.3d at 593 (sole aggravating circumstance); State v. Austin, 87 S.W.3d 447, 467 (Tenn. 2002) (sole aggravating circumstance); State v. Stevens, 78 S.W.3d 817, 841 (Tenn. 2002) (death sentence based on both (i)(2) and (i)(4) aggravating circumstances); State v. Hutchison, 898 S.W.2d 161, 175 (Tenn. 1994) (sole aggravating circumstance); State v. Wilcoxson, 772 S.W.2d 33, 40 (Tenn. 1989) (death sentence based on (i)(2), (i)(4), and (i)(5) aggravating circumstances); State v.

Porterfield, 746 S.W.2d 441, 449 (Tenn. 1988) (death sentence based on both (i)(4) and (i)(5) aggravating circumstances as to defendant who solicited murder, and (i)(2), (i)(4), and (i)(5) aggravating circumstances as to actual killer); State v. Coker, 746 S.W.2d 167, 175 (Tenn. 1987) (death sentence based on both (i)(2) and (i)(4) aggravating circumstances); State v. Groseclose, 615 S.W.2d 142, 148-50 (Tenn. 1981) (death sentence based on both (i)(4) and (i)(5) aggravating circumstances).

5. (i)(5) - Heinous, Atrocious, or Cruel (HAC)

Tenn. Code Ann. § 39-13-204(i)(5):

> **The murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death;**

NOTE: Prior to 1989, the language of this aggravating circumstance was as follows:

> *The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.*

Tenn. Code Ann. § 39-2-203(i)(5) (1981). For pre-1989 offenses, case law construing this prior language should be consulted.

An in-depth discussion of the history of this aggravating circumstance and all the cases either construing or upholding application of it, as it has been worded over time, is beyond the scope of these materials.[1] This section will, therefore, focus only on those Tennessee cases necessary to an understanding of how this aggravating circumstance, as it is presently worded, may be applied in specific circumstances in order to remain a constitutionally

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[1]For a comprehensive discussion of the history and constitutionality of this aggravating circumstance, see Note, The Constitutionality of the "Heinous, Atrocious, or Cruel" Aggravating Circumstance in Death Penalty Cases and its Interpretation by Tennessee Courts, 31 U. Mem. L. Rev. 939 (2001).

permissible narrowing device. It should be noted that the constitutional validity of this aggravating circumstance depends upon the limiting construction given to its language by the Tennessee Supreme Court. See generally Godfrey v. Georgia, 446 U.S. 420 (1980) (construing Georgia's similar aggravating circumstance); Maynard v. Cartwright, 486 U.S. 356 (1988) (construing Oklahoma's similar aggravating circumstance).

This aggravating circumstance may be applied if the evidence is sufficient to support a finding of *either* "torture" *or* "serious physical abuse beyond that necessary to produce death." See State v. Rollins, 188 S.W.3d 553, 572 (Tenn. 2006); State v. Suttles, 30 S.W.3d 252, 262 (Tenn. 2000).

The Tennessee Supreme Court has defined "torture," as used in this aggravating circumstance, as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." Rollins, 188 S.W.3d at 572; State v. Pike, 978 S.W.2d 904, 917 (Tenn. 1998); State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985).

In defining the phrase "serious physical abuse beyond that necessary to produce death," the court has explained that "serious" refers "to a matter of degree, and that physical, rather than mental, abuse must be 'beyond that' or more than what is 'necessary to produce death.' " Rollins, 188 S.W.3d at 572; see also State v. Nesbitt, 978 S.W.2d 872, 887 (Tenn. 1998); State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996). The court has defined the word "abuse," as used in this aggravator, as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.'" Odom, 928 S.W.2d at 26 (quoting Black's Law Dictionary 11 (6th ed. 1990)); see also State v. Hugueley, 185 S.W.3d 356, 381 (Tenn. 2006).

Finally, because this aggravating circumstance "focuses upon the nature and circumstances of the crime, rather than the actions, intent, and conduct of the defendant," it may be vicariously applied to a

defendant who did not personally commit the murder. State v. Robinson, 146 S.W.3d 469, 500 (Tenn. 2004).

6. (i)(6) - Murder of a Witness or to Avoid Prosecution

Tenn. Code Ann. § 39-13-204(i)(6):

> **The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;**

This aggravating factor focuses on the defendant's motives for committing a murder and is not limited to the killings of eyewitnesses who know or can identify the defendant. State v. Terry, 46 S.W.3d 147, 162 (Tenn. 2001). In addition, the defendant's desire to avoid arrest or prosecution need not be the sole motive for the killing; instead, it may be just one of the purposes motivating the defendant to kill. Id.; see also State v. Bush, 942 S.W.2d 489 (Tenn. 1997). "However, ... there must be some 'particular proof' in the record to support this aggravating circumstance." State v. Powers, 101 S.W.3d 383, 399 (Tenn. 2003) (citing State v. Hartman, 42 S.W.3d 44, 58 (Tenn. 2001)). "Mere plausibility of the theory that avoiding arrest or prosecution was one of the motives of the murder is insufficient." Id.

Numerous cases have found this factor applicable. E.g. State v. Rollins, 188 S.W.3d 553 (Tenn. 2006); State v. Ivy, 188 S.W.3d 132 (Tenn. 2006); State v. Reid, 164 S.W.3d 286 (Tenn. 2005); State v. Thacker, 164 S.W.3d 208 (Tenn. 2005); State v. Powers, 101 S.W.3d 383 (Tenn. 2003); State v. Bane, 57 S.W.3d 411 (Tenn. 2001); State v. Hall, 976 S.W.2d 121 (Tenn. 1998).

NOTE: In Powers, the court also addressed an issue related to the presentation of evidence of the underlying facts of another crime in establishing this factor. The example here was where a defendant has priors where he was identified by the victim and went to jail and then in the instant case the victim was murdered. The implication is that the murder was to avoid prosecution. The court indicated that

any such evidence must be very narrowly tailored to the issue.

NOTE: Such evidence of prior bad acts would most likely be the subject of either a jury -out or pretrial motion hearing and should be carefully considered before admission.

7. (i)(7) - Felony Murder

Tenn. Code Ann. § 39-13-204(i)(7):

> **The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;**

NOTE: Prior to 1995, the language of this aggravating circumstance was as follows:

> *The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.*

Tenn. Code Ann. § 39-13-204(i)(7) (Supp. 1990). For pre-1995 offenses, case law construing the former wording of this aggravator, particularly State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), should be consulted.

The 1995 amendments to the language of this aggravator were made in response to the Tennessee Supreme Court's decision in Middlebrooks, wherein the court, construing the former wording of this aggravator, held that it could not constitutionally be used as an aggravating circumstance to support imposition of the death penalty in a case where the defendant's first degree murder conviction had

been based solely on felony murder. See Middlebrooks, 840 S.W.2d at 346. But see State v. Butler, 980 S.W.2d 359, 363 (Tenn. 1998) (holding that (i)(7) aggravator, as previously worded, could be used to enhance a sentence to life without the possibility of parole in a case where the defendant's first degree murder conviction was based solely on felony murder).

As recognized by the court in Middlebrooks, "[t]he minimum standards for determining whether a sentence of death may be constitutionally imposed under the United States Constitution for felony murder" are set forth in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). Middlebrooks, 840 S.W.2d at 337. In Enmund, the United States Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who merely "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797. In Tison, the United States Supreme Court refined the position it took in Enmund and held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death" was "a highly culpable mental state" capable of supporting the imposition of the death penalty. 481 U.S. at 157.

As presently worded, the (i)(7) aggravator "is applicable where the murder 'was *knowingly* committed, solicited, directed, or aided by the defendant, while the defendant had a *substantial* role in committing or attempting to commit [a specific enumerated felony].'" State v. Reid, 91 S.W.3d 247, 306 (Tenn. 2002) (appendix) (quoting current language of aggravator and emphasizing 1995 statutory changes); see also State v. Rogers, 188 S.W.3d 593, 618 (Tenn. 2006). As a result, this aggravating circumstance, as presently worded, may be constitutionally applied in cases where the defendant's first degree murder conviction is based solely on felony murder. See id.

8. (i)(8) - Defendant's Custodial or Escape Status

Tenn. Code Ann. § 39-13-204(i)(8):

> **The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;**

The definition of "lawful custody" or "lawful confinement" for purposes of this aggravating circumstance is fairly straightforward and includes any lawful custodial status at the time of the murder. As a result, this aggravating circumstance has been upheld in cases where the defendant was serving a sentence in a correctional facility for a prior offense at the time of the murder, see, e.g., State v. Hugueley, 185 S.W.3d 356, 364 & 382 (Tenn. 2006); State v. Sutton, 761 S.W.2d 763, 767 (Tenn. 1988), where the defendant was in the custody of the local sheriff in a "trusty" status at the time of the murder, see, e.g., State v. Hartman, 42 S.W.3d 44, 59 n. 13 (Tenn. 2001), and where the defendant committed the murder while attempting to flee the custody of a law enforcement officer immediately after having been placed under arrest. See, e.g., State v. Workman, 667 S.W.2d 44, 48-49 (Tenn. 1984).

The meaning of the phrase "during the defendant's escape" from lawful custody or confinement has been more problematic. In State v. Odom, 928 S.W.2d 18, 27 (Tenn. 1996), the State proved that the defendant had escaped on March 28, 1991, from a Mississippi jail where he had been serving a life sentence for murder. The murder for which the State sought the death penalty was not committed until May 10, 1991. See id. at 21. The Tennessee Supreme Court held in Odom that the defendant's status as an "escapee" was not enough to support application of the (i)(8) aggravator. See id. at 27. The Court reasoned:

> *Our rationale is simple–"during" as used in this statute means "throughout the continuance of." The end of the escape marks the beginning of one's status as an "escapee."*

> *Although [the defendant] was, assuredly, an "escapee," by no stretch can we say that the murder occurred during the defendant's escape from lawful custody or from a place of lawful confinement. When he committed the murder, [the defendant's] escape was an accomplished face–a fait accompli.*

Id.

However, the decision in Odom does not mean that any lapse in time between the beginning of the escape and the murder, even one spanning several days, makes the (i)(8) aggravating circumstance inapplicable; the crucial question is not the lapse of time, but whether the "escape" from custody or confinement has been completed or is still on-going. See State v. Hall, 976 S.W.2d 121, 134 (Tenn. 1998). In Hall, the Court concluded that, in contrast to the facts present in Odom, the following facts were sufficient to support application of the (i)(8) aggravator:

> *[T]hese murders were committed only four days after the defendants fled confinement in Kentucky and while the defendants were in the process of obtaining the [victims'] automobile–a means of transportation to further their escape. Indeed, the proof shows that the escapees had remained in an area approximately two miles in diameter until they were able to steal automobiles to further their escape. Moreover, law enforcement officers were actively canvassing this small area for the defendants, searching with helicopters, tracking dogs, and four-wheel drive vehicles in an attempt to locate the escapees . . . . Clearly, the defendants were still in the process of escaping from Kentucky to Mexico. These murders were simply a step toward accomplishing this end.*

Id.

9. (i)(9) - Law Enforcement or Emergency Services Victim

Tenn. Code Ann. § 39-13-204(i)(9):

> **The murder was committed against any law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that the victim was a law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter engaged in the performance of official duties;**

Application of this aggravating circumstance requires proof that the defendant "knew or reasonably should have known" of the victim's status as a law enforcement officer, corrections worker, or emergency services worker. See State v. Hugueley, 185 S.W.3d 356, 382 (Tenn. 2006) (determining that jury instruction on this aggravator omitted the required knowledge element, but concluding that error was harmless beyond a reasonable doubt given the overwhelming evidence supporting application of this aggravator).

Cases in which imposition of the death penalty has been upheld based in part upon application of this aggravating circumstance include: Hugueley, 185 S.W.3d at 383 (death sentence based on (i)(2), (i)(5), (i)(8), and (i)(9) aggravating circumstances); State v. Henderson, 24 S.W.3d 307, 314 (Tenn. 2000) (death sentence based on (i)(3), (i)(6), (i)(7), and (i)(9) aggravating circumstances); State v. Workman, 667 S.W.2d 44, 47-49 (Tenn. 1984) (death sentence based on (i)(3), (i)(6), (i)(7), (i)(8), and (i)(9) aggravating circumstances).

10. (i)(10) - Judge or Attorney Victim

Tenn. Code Ann. § 39-13-204(i)(10):

> **The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general, due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;**

While this aggravating circumstance has never been applied in a death penalty case in Tennessee, it seems logical to conclude that it should be applied in a manner consistent with the (i)(9) and (i)(11) aggravating circumstances given that these aggravators are similarly designed to narrow the class of death-eligible murders to those where the defendant's knowledge of the victim's status as a public official or government employee was the motivating factor behind the killing.

11. (i)(11) - Publicly Elected Official

Tenn. Code Ann. § 39-13-204(i)(11):

> **The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;**

This aggravating circumstance has only been construed in one case in Tennessee. In the non-capital case of State v. Looper, 118 S.W.3d 386 (Tenn. Crim. App. 2003), the jury found evidence sufficient to support application of this aggravating circumstance and sentenced the defendant to life without the possibility of parole. On appeal, the defendant argued that the evidence presented at trial had been insufficient "for a rational trier of fact" to conclude that the victim, a state senator, had been murdered "due to or because of" his official duties or status as a state senator. Id. at 437. The defendant argued on appeal that the evidence, even when viewed in the light most favorable to the State, showed "at most" that the state senator had

been killed "not because of his official duties or status," but because he was at the time running for re-election to his official office. Id. at 437-38. The Court of Criminal Appeals rejected this argument with the following reasoning:

> *The fact is that the victim was both the incumbent state senator for the district and a candidate for reelection, and his death would create a vacancy for this office. The record fully supports the determination of the jury that the defendant killed the victim to create a vacancy in the position for which the defendant was a candidate.*

Id. at 438.

12. (i)(12) - Mass Murder

Tenn. Code Ann. § 39-13-204(i)(12):

> **The defendant committed "mass murder," which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period;**

In State v. Bobo, 727 S.W.2d 945, 955 (Tenn. 1987), the first case to construe this aggravator, the Tennessee Supreme Court held that (i)(12) may be constitutionally applied only if the triggering offenses are shown by convictions entered prior to the capital sentencing hearing. The Court specifically stated that, for this aggravator to be utilized, "the State must show beyond a reasonable doubt (1) that the defendant had been *convicted* of three or more murders, including the one for which he has just been tried, (2) within the State of Tennessee, (3) within a period of forty-eight (48) months, (4) perpetrated in a similar fashion, and (5) in a common scheme or plan." Bobo, at 956-57 (emphasis in original). The Court in Bobo ultimately concluded that the (i)(12) aggravator had not been properly applied to the defendant "because he did not have a sufficient number of triggering convictions for the murders 'of three or more persons within the State of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a

common scheme or plan.' " Id. at 955.

NOTE: The Court in Bobo, after determining that the (i)(12) aggravator should not have been applied in the case, nevertheless determined that the death sentence should be upheld because the error in applying the (i)(12) aggravator was harmless beyond a reasonable doubt in light of the other aggravating circumstances, which were (i)(2) and (i)(7), clearly established by the evidence presented at the sentencing hearing. See Bobo, 727 S.W.2d at 956.

In State v. Black, 815 S.W.2d 166, 184 (Tenn. 1991), the second case to construe the (i)(12) aggravator, the Court added that this aggravating circumstance also "encompasses a situation where a defendant is simultaneously tried, as in the present case, for a series of separate but related homicides committed as part of a common scheme or plan." The Court explained:

> *The language of the subsection "within a period of forty-eight (48) months," would be applicable to the kinds of serial murders committed by Wayne Williams in Atlanta, by the "Son of Sam" in New York, or by Theodore "Ted" Bundy in Florida. The language would also be applicable to multiple murders such as those committed by Charles J. Whitman by sniper fire from the tower on the University of Texas campus. The term "mass murderer" as used in the statute can apply to multiple murders committed close in time or multiple murders committed singly over a longer period of time, not to exceed four years.*

Black. at 183-84.

Cases in which imposition of the death penalty has been upheld based in whole or in part upon application of this aggravating circumstance include: State v. Reid, 213 S.W.3d 792, 816-17 (Tenn. 2006) (death sentences based on (i)(2), (i)(6), (i)(7), and (i)(12) aggravating circumstances); State v. Holton, 126 S.W.3d 845, 865 (Tenn. 2004) (sole aggravating circumstance as to one of the victims; death sentences as to remaining three victims based on (i)(1) and

(i)(12) aggravating circumstances); State v. Smith, 868 S.w.2d 561, 581-82 (Tenn. 1993) (death sentences as to one victim based on (i)(5) and (i)(12) aggravating circumstances; death sentences as to two remaining victims based on (i)(5), (i)(6), (i)(7), and (i)(12) aggravating circumstances); State v. Van Tran, 864 S.W.2d 465, 478 (Tenn. 1993) (death sentence based on (i)(5) and (i)(12) aggravating circumstances); Black, 815 S.W.2d at 182-84 (death sentence based on (i)(1), (i)(2), (i)(5), (i)(6), (i)(7), and (i)(12) aggravating circumstances).

13. (i)(13) - Mutilation of the Body

Tenn. Code Ann. § 39-13-204(i)(13):

> **The defendant knowingly mutilated the body of the victim after death;**

In two cases involving sentences of life without the possibility of parole, the Tennessee Court of Criminal Appeals defined the concept of mutilation, as used in this aggravating circumstance, as more than "just the destroying or severing of body parts." State v. Thompson, 43 S.W.3d 516, 526 (Tenn. Crim. App. 2000); see also State v. Price, 46 S.W.3d 785, 827 (Tenn. Crim. App. 2000). According to the Court of Criminal Appeals, the definition of mutilation also includes "to cut up or alter radically so as to make imperfect," Thompson, 43 S.W.3d at 526; Price, 46 S.W.3d at 827, and "incineration of the victim" after death. Price, 46 S.W.3d at 827. As determined by the Court of Criminal Appeals, the legislative intent underlying this aggravator is "to discourage corpse desecration." Thompson, 43 S.W.3d at 526 (quoting Price, 46 S.W.3d at 828).

The factual scenarios that have been determined sufficient to support application of this aggravating circumstance include the following:

State v. Davidson,
121 S.W.3d 600, 610 (Tenn. 2003) (death sentence):

[The medical examiner] observed that the skin at the front and back

of the neck had been cut; the trachea exhibited a clean, sharp cut; the hyoid bone, which is located in the upper throat, had also been cut; and there was clear disarticulation of the cervical vertebral column. In addition, the torso, including the breast bone, had been cleanly cut open with some type of sharp instrument. This incision ran almost the entire length of the torso from the sternum to the navel and exposed the internal organs. Several superficial cuts had been made in the soft tissue next to the large incision. [The medical examiner] opined that both the major incision and the lesser cuts were inflicted after death.

State v. Thompson,
43 S.W.3d 516, 526 (Tenn. Crim. App. 2000):

After the victim died, the defendant stabbed him four times in the back with a knife, slit his throat, cut his forehead and legs, and fractured both of his legs by exerting great pressure from behind.

State v. Price,
46 S.W.3d 785, 827 (Tenn. Crim. App. 2000):

[T]he defendant caused flash burns to the victim's face, which [the medical examiner] testified occurred after death.

14. (i)(14) - Victim Age 70 or Over, or Vulnerable to Due Handicap or Disability

Tenn. Code Ann. § 39-13-204(i)(14):

> **The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability;**

The first part of this aggravating circumstance is similar to the (i)(1) aggravator in that it does not require the defendant to have known, or reasonably should have known, the age of the victim at the time

of the homicide. See State v. Rollins, 188 S.W.3d 553, 571 (Tenn. 2006) (holding that uncontested testimony from prosecution witnesses, that victim was 81 years old at the time of murder, was sufficient to support application of (1)(14) aggravating circumstance).

In contrast, the second part of this aggravating circumstance may only be applied in those cases where it is proven that the victim was particularly vulnerable due to a mental or physical handicap or disability *and* that the defendant "knew or reasonably should have known" of the victim's condition. However, to date, there have been no cases in which the (i)(14) aggravator has been applied based solely on this alternative language. In State v. Leach, 148 S.W.3d 42, 47 (Tenn. 2004), one of the victims, who was 70 years old at the time of the murder, also had diminished mental capabilities and partial paralysis in her right hand and right leg. The Tennessee Supreme Court upheld application of the (i)(14) aggravator in Leach, concluding that the State had proven beyond a reasonable doubt that the elderly victim "was seventy years of age or older or was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder [the defendant] knew or reasonably should have known of such handicap or disability." Leach. at 59.

15. (i)(15) - Act of Terrorism

Tenn. Code Ann. § 39-13-204(i)(15):

> **The murder was committed in the course of an act of terrorism.**

There is currently no Tennessee case applying this factor.

E. VICTIM IMPACT EVIDENCE

1. Generally

Both the Tennessee and United States Supreme Courts have held that victim impact evidence is constitutional. Payne v. Tennessee, 501 U.S. 808 (1991). Its admissibility, however, is not unrestricted. "Victim impact evidence may not be introduced if (1) it is so unduly prejudicial that it renders the trial fundamentally unfair; or (2) its probative value is substantially outweighed by its prejudicial impact." State v. Thacker, 164 S.W.3d 208, 252 (Tenn. 2005).

Pursuant to Tenn. Code Ann. § 39-13-204(c),

> **...The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose....**

Our courts have held that this statute does not expressly limit the introduction of other types of victim impact evidence authorized by prior case law. State v. Young, 196 S.W.3d 85, 108-09 (Tenn. 2006); State v. McKinney, 74 S.W.3d 291, 309 (Tenn. 2002). In State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998), the Tennessee Supreme Court held that

> *...Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.*

Victim impact evidence is also limited to the current offense and victim impact evidence of another homicide, even if committed by the defendant, is not admissible. Id. at n. 11 (citing State v. Bigsbee, 885 S.W.2d 797, 812 (Tenn 1994)).

In Nesbit, the court established various procedures and standards to govern the admissibility of victim impact evidence and argument.

2. Procedure

a. State must notify the trial court of its intent to produce victim impact evidence.

b. The trial court must hold a hearing outside the presence of the jury to determine the admissibility of the evidence.

NOTE: Victim impact evidence should not be admitted until the trial court determines that evidence of one or more aggravating circumstances is already present in the record.

3. Scope and Standards

a. Victim impact should be limited to information

i) designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed;

ii) the contemporaneous and prospective circumstances surrounding the individual's death; and

iii) how those circumstances financially, emotionally, psychologically, or physically impacted upon members of the victim's immediate family.

NOTE: Evidence regarding the emotional impact on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and the risk of undue prejudice, particularly if no proof is offered on the other types of victim impact-----but there is no bright-line test; it is a case-by-case analysis.

b. The state is not required to prove that a defendant has specific knowledge about a victim's family to secure admissibility of the victim impact evidence.

> **NOTE**: But the trial court may consider the defendant's specific knowledge of the family when evaluating the probative value of the victim impact proof on the appropriateness of the death penalty and when determining if probative value is substantially outweighed by prejudicial effect. The defendant's specific knowledge can be important in analyzing probative value.

4. Argument

a. Argument is permissible, but restraint should be exercised. Do not argue what is little more than an appeal to the emotions of the jurors as such argument may be unduly prejudicial. The jury should not be given the impression that emotion may reign over reason.

b. Argument on relevant, though emotional, considerations is permissible, but inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely emotional response to the evidence is not permissible and should not be tolerated by the trial court.

c. Argument should not characterize victim impact evidence as an aggravating circumstance to weigh against mitigation proof.

F. MITIGATING CIRCUMSTANCES

Mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586 (1978). Article I, section 16 of the Tennessee Constitution, and the Eighth Amendment of the United States Constitution require the sentencing body in a capital case to consider mitigating evidence. See e.g. State v. Carter, 114 S.W.3d 895, 905 (Tenn. 2003).

Pursuant to Tenn. Code Ann. § 39-13-204(c), evidence tending to establish any mitigating factor is admissible in a capital sentencing hearing. Id. Hearsay mitigating evidence is admissible during the penalty phase as well. State v. Austin, 87 S.W.3d 447 (Tenn. 2002); State v. Odom, 928 S.W.2d 18 (Tenn. 1996).

1. Statutory Mitigating Circumstances

Tenn. Code Ann. § 39-13-204(j):

(j) In arriving at the punishment, the jury shall consider, pursuant to the provisions of this section, any mitigating circumstances, which shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances that the defendant reasonably believed to provide a moral justification for the defendant's conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment; and

(9) Any other mitigating factor that is raised by the evidence produced by either the prosecution or defense, at either the guilt or sentencing hearing.

2. Burden of Proof

The Tennessee statute on capital sentencing does not contain a burden of proof requirement as to mitigating circumstances; stated differently, the defendant does not have the burden of proving a mitigating circumstance. Tenn. Code Ann. § 39-13-204; State v. Hodges, 944 S.W.2d 346, 353-54 (Tenn. 1996). The trial court should charge the jury to consider any mitigating factor "raised by the evidence." Tenn. Code Ann. § 39-13-204(e)(1).

There is also no requirement of jury unanimity as to any particular mitigating circumstance, or that jurors agree on which mitigating circumstances apply. State v. Hodges, 944 S.W.2d 346 (Tenn. 1996); State v. Odom, 928 S.W.2d 18 (Tenn. 1996); State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994).

NOTE: The state does not have a burden of proof to disprove mitigating circumstances. Hodges, at 354-55.

3. Statutory vs. Non-statutory

The statute specificity allows consideration of mitigating circumstances other than those listed in Tenn. Code Ann. § 39-13-204(j)(1)-(8). Tenn. Code Ann. § 39-13-204(j)(9).

"Jury instructions on specific non-statutory mitigating circumstances are not constitutionally mandated." Hodges, at 351-52: see State v.

Odom, 928 S.W.2d 18, 30 (Tenn. 1996); State v. Hutchison, 898 S.W.2d 161, 173-74 (Tenn. 1994). "Therefore, the right to such instructions, as well as the form and content of the instructions, derives solely from the statute." Hodges, at 352. [Penalty phase jury instructions are discussed later in this chapter].

Pursuant to current statutory and case law, a capital defendant is entitled to have the jury consider all statutory and non-statutory mitigating circumstances which are raised by the evidence. Tenn. Code Ann. § 39-13-204(j); State v. Harris, 839 S.W.2d 54 (Tenn. 1992).

4. Hodges Hearing

In State v. Hodges, 944 S.W.2d 346 (Tenn. 1996), the Tennessee Supreme Court addressed various issues related to its prior decision in Odom and mitigating circumstances in capital sentencing hearings. The procedures the courts follow in considering motions related to charging mitigating circumstances to a jury is often referred to as a Hodges hearing.

Under the current statute, a trial court has no duty, absent a timely and proper request from the defense, to include instructions on non-statutory mitigating circumstances. State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996). Moreover, **when the defense proffers a requested instruction which is overly specific, it is incumbent upon the trial court to revise and generalize the instruction to conform to the evidence and the law.** Id. Instructions on non-statutory mitigating circumstances must not be fact specific and should not imply to the jury that the judge had made a finding of fact. Instead, instructions on non-statutory mitigating circumstances must be "drafted so that when they are considered by the jury, the statutory mitigating circumstances are indistinguishable from the non-statutory mitigating circumstances." Hodges, 944 S.W.2d at 352 (citing State v. Odom, 928 S.W.2d 18, 32 (Tenn. 1996)). The trial judge is precluded from revealing to the jury that a request was made and from identifying the party making the request. Odom, 928 S.W.2d at 32.

As previously stated, the statute requires jurors to consider those statutory or non-statutory mitigating circumstances which have been "raised by the evidence." Tenn. Code Ann. § 39-13-204(e)(1).

As previously stated, the statute does not impose a burden of proof as to mitigating circumstances. Therefore, to comply precisely with the statute, a trial court should *only* instruct the jury to consider those statutory and non-statutory mitigating circumstances which had been *raised by the evidence*. Hodges, 944 S.W.2d at 353. It has also been previously noted that there is no provision in the capital sentencing scheme that requires the State to disprove mitigating circumstances beyond a reasonable doubt.

For a discussion of a pre-1989 case, see State v. Austin, 87 S.W.3d 447 (Tenn. 2002).

5. Specific Types of Mitigating Evidence

a. No Significant History of Prior Criminal Activity [(j)(1)]

When a defendant relies upon this factor, "he inevitably becomes subject to rebuttal evidence offered by the prosecution showing prior criminal activity. Neither the prosecution nor the defense is limited ... to proof of prior convictions." State v. Stephenson, 195 S.W.3d 574, 600 (Tenn. 2006); State v. Mann, 666 S.W.2d 41, 44 (Tenn. 1984). "The fact that the Defendant had not been convicted or even arrested for this offense is irrelevant." Stephenson, at 600.

b. Extreme Mental or Emotional Disturbance [(j)(2)]

1) Notice Required

A capital defendant must file pretrial notice of intent to present expert testimony regarding mental condition as

mitigation evidence at the sentencing phase of the trial. State v. Reid, 981 S.W.2d 166 (Tenn. 1998); State v. Huskey, 964 S.W.2d 892 (Tenn. 1998); State v. Martin, 950 S.W.2d 20 (Tenn. 1997). This notice is often referred to as the "Reid" notice.

2) Procedure Once "Reid" Notice is Filed

Once notice is filed, the trial court, upon request of the State, may order the defendant to undergo a psychiatric evaluation by a mental health expert selected by the State. See Tenn. Code Ann. § 33-7-301.

The defense will be afforded access to any expert reports prior to trial.

The State will be afforded access to the reports only after a jury returns a verdict of guilty and the capital defendant confirms his or her intent to offer expert mental condition evidence in mitigation.

A more detailed discussion of the Reid notice and its requirements and procedures may be found in Chapter 4, supra.

3) Challenges to the Language of the Statute

The Tennessee Supreme Court has rejected challenges to the wording of this mitigating factor. In particular the Court has rejected challenges to the word "extreme" as a modifier. State v. Mann, 959 S.W.2d 503 (Tenn. 1997); State v. Hall, 958 S.W.2d 679 (Tenn. 1997).

c. **Victim Consented to Offense**
(j)(3)

In State v. Becton, 2002 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. 2002), the victim was a gang member in the same gang as the codefendants. The court held that the trial court's refusal to charge this mitigating factor was not error where the defendant alleged the victim had consented to the offense by virtue of his membership in the gang.

d. **Youth or Advanced Age of Defendant**
[(j)(7)]

In State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), the court held that this factor need not be charged where the defendant was a 28-year-old, high school graduate, with an honorable discharge from the military.

e. **Substantially Impaired Mental Ability**
(j)(8)

The Tennessee Supreme Court has also rejected challenges to the wording of this mitigating factor. In particular the Court has rejected challenges to the word "substantially" as a modifier. State v. Mann, 959 S.W.2d 503 (Tenn. 1997); State v. Hall, 958 S.W.2d 679 (Tenn. 1997).

If an individual unsuccessfully raises the issue of mental retardation, this factor may still be relied upon at sentencing.

> **If the issue of mental retardation is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence to the trier of fact of diminished capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).**

Tenn. Code Ann. § 39-13-203(e).

f. "Catch-All"
[(j)(9)]

In State v. Reid, 164 S.W.3d 286 (Tenn. 2005), counsel failed to object when the trial court failed to charge the "catch-all" mitigating circumstance in Tenn. Code Ann. § 39-13-204(j)(9). The court held that failure to charge the "catch-all", while error, did not constitute plain error. Id. (Appendix).

g. Disadvantaged Background

"Evidence of a defendant's background and character are considered relevant because defendants who come from a disadvantaged background or who have emotional or mental problems may be less culpable than defendants who have no such excuse." State v. Odom, 928 S.W.2d 18, 38-39 (Tenn. 1996).

h. Co-defendant's Sentence

In State v. Austin, 87 S.W.3d 447 (Tenn. 2002)(Appendix), the court held that failure to charge a codefendant's sentence as a mitigating circumstance was not error. This was a pre-1989 act case and thus the law in effect at the time of the offense did not require that the jury be charged on non-statutory mitigating circumstances. The court, however, was specific in its holding that it was to the pre-1989 act case only.

> *Although we find it unnecessary to address the Appellant's contention that sentences received by co-defendants are a valid non-statutory mitigating circumstance, a determination of whether the circumstance is mitigating would be a cognizable issue had the 1989 Criminal Sentencing Act been applicable. See generally Odom, 928 S.W.2d at 30-32. Additionally, while we take no position as to this determination, the Appellant is correct that under the Federal Death Penalty Act the circumstance that "another defendant or defendants, equally culpable in the crime, will*

not be punished by death" is a statutorily enumerated mitigating factor. 18 U.S.C.S. § 3592(a)(4).

Austin, appendix at footnote 22.

i. Sympathy

In State v. Keen, 31 S.W.3d 196 (Tenn. 2000) (Appendix), the defendant challenged the trial court's denial of the his motion to instruct the jury that it could consider sympathy as a mitigating circumstance. In addition, the defendant asserted that the combined anti-sympathy charge given by the judge in combination with this denial was a violation of the Eighth Amendment by limiting his mitigation evidence. The charge given read as follows:

> *You should in no case allow mere sympathy or prejudice solely to influence your verdict but should look to the law and all the facts and circumstances proven in the evidence to determine the verdict.*

Id. The court in Keen held that the trial court properly instructed the jury that it could not consider sympathy. Id.

j. Residual Doubt

Although the Eighth Amendment of the United States Constitution does not require a lingering or residual doubt instruction, the Tennessee Supreme Court has determined that it is a non-statutory mitigating circumstance. State v. Thomas, 158 S.W.3d 361, 402-03 (Tenn. 2005); see also State v. McKinney, 74 S.W.3d 291, 307 (Tenn. 2002); State v. Hartman, 42 S.W.3d 44 (Tenn. 2001). Thus, where raised by the evidence, a jury instruction is appropriate. Id.

Polygraph exam results or testimony related thereto is not admissible under the theory of lingering or residual doubt. State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001).

k. Mercy

Capital defendant's frequently request a "mercy" charge. Our Appellate courts have repeatedly held that such an instruction is not required in a capital sentencing hearing. E.g., Thacker, 164 S.W.3d at 255. Some courts, however, have permitted mercy to be charged as a non-statutory mitigating circumstnce.

6. Waiver of Mitigation

A defendant may waive the right to present mitigation proof so long as the defendant is competent. To aid trial courts in determining whether defendants are competent and fully informed at the time a waiver is given, we set forth the following procedure for use in prospective cases:

> *[C]ounsel must inform the trial court of these circumstances on the record, outside the presence of the jury. The trial court must then take the following steps to protect the defendant's interests and to preserve a complete record:*
>
> > *1. Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial;*
> >
> > *2. Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and*
> >
> > *3. After being assured the defendant understands the importance of mitigation, inquire of the defendant whether he or she desires to forego the presentation of mitigating evidence.*

Zagorski v. State, 983 S.W.2d 654, 660-61 (Tenn. 1998). In State v.

Smith, 993 S.W.2d 6 (Tenn. 1999), the court reiterated its holding in Zagorski and held that

> *a competent defendant who knowingly and voluntarily chooses a defense strategy will not late be able to complain about the detrimental consequences which result from the decision.*

G. CLOSING ARGUMENT

Tenn. Code Ann. § 39-13-204(d).

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

Tennessee appellate courts have recognized that closing argument is a valuable privilege for both the State and the defense; thus, trial courts should allow wide latitude to counsel in arguing their cases to the jury. See State v. Bigbee, 885 S.W.2d 797, 807 (Tenn. 1994). However, closing argument is subject to the discretion of the trial judge, and must be temperate, predicated on evidence introduced during the trial, and relevant to the issues being tried. State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994).

In addition to offering curative instructions upon an objection by one of the parties, where the trial court finds an argument to be highly inflammatory, even if there is no objection, a trial court may sua sponte intervene to prevent prejudice. See Sparks v. State, 563 S.W.2d 564, 567 (Tenn. Crim. App. 1978).

1. Victim Impact

Victim impact evidence is not an aggravating circumstance to be weighed against mitigation proof, and prosecutors should not characterize it as such. State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998). During closing argument, the prosecution may ask the jury to "consider" victim impact evidence but may not ask the jury to "weigh it." State v Reid, 91 S.W.3d 247 (Tenn. 2002); see also State v.

Burns, 979 S.W.2d 276 (Tenn. 1998) (holding that the State's argument regarding the impact the victim's death had on the entire community exceeded the scope of victim impact argument under Nesbit).

2. Deterrence/Community Conscience Arguments

Prosecutors should avoid arguing specific deterrence during the penalty phase because it is not relevant to an aggravating circumstance. State v. Sims, 45 S.W.3d 1 (Tenn. 2001); State v. Blanton, 975 S.W.2d 269 (Tenn. 1998); State v. Cauthern, 976 S.W.2d 726 (Tenn. 1998), State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988).

In Sims the Court found that the following statement by the prosecutor was improper:

> *The only verdict that is proper in this case . . . [t]he only proper verdict that this defendant has earned, that he deserves, that all his life he's been crying out for, sentence me to death, because if you don't stop me, I'm going to take somebody else away from you. I'm going to take away a valued member of this community if you don't stop me.*

Likewise, in State v. Cauthern, 976 S.W.2d 726 (Tenn. 1998), the Court held that

> *the prosecutor's statements that the jury should "do its duty" and that its verdict should send a message to the community constituted a plea for general deterrence, which has no application to either aggravating or mitigating factors. The Court further found that the argument impermissibly suggested to the jury that the defendant, as an incarnation of "the evil one," should be sentenced to death not only for the offense charged but also for other heinous offenses committed by "the evil one" in the form of other notorious murderers.*

3. Biblical References

References to the Bible during closing argument are inappropriate. See State v. Reid, 164 S.W.3d 286, 347 (Tenn. 2005)(citing State v. Cribbs, 967 S.W.2d 773, 783 (Tenn. 1998)); see also State v Middlebrooks, 995 S.W.2d 550, 559 (Tenn. 1999); see also State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998) (holding that the prosecution's reference to the Lord's Prayer and its requests for the jury to "combat and destroy" the "evil one," amounted to the use of biblical passages that the Court repeatedly has held to be improper and inflammatory.); State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994); State v. Bates, 804 S.W.2d 868, 881 (Tenn.), cert. denied, 502 U.S. 841 (1990).

4. Epithets

It is improper for the prosecutor to use epithets to characterize a defendant. In State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998), the Tennessee Supreme Court held that the frequent references to the defendant as the "evil one," used as epithets to characterize the defendant, were improper and potentially appealed to the bias and passion of the jury. see also State v. Thomas, 158 S.W.3d 361 (Tenn. 200_) (holding that the prosecutors' references to the defendants as "greed" and "evil" was improper); Darden v. Wainwright, 477 U.S. 168, 179, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (holding it improper to refer to the defendant as an "animal"); Bates, 804 S.W.2d at 881 (holding it was improper to refer to the defendant as a "rabid dog"); State v. Ladonte Montez Smith, 1999 Tenn. Crim. App. LEXIS 1276, No. M1997-00087-CCA-R3-CD, 1999 WL 1210813, at * 12 (Tenn. Crim. App., Nashville, Dec. 17, 1999) (holding prosecutor's reference to defendant as a guilty dog was improper); State v. Joel Guilds, 1999 Tenn. Crim. App. LEXIS 511, No. 01C01-9804-CC-00182, 1999 WL 333368, at * 5 (Tenn. Crim. App., Nashville, May 27, 1999) (holding that the prosecutor referring to the defendant as "this clown" was improper).

5. Victim's Family Asks For Death Penalty

"Admission of a victim's family members' characterizations and opinions about the crimes, the defendant, and the appropriate sentence violates the Eighth Amendment." Nesbit, 978 S.W.2d at 888, n.8; Middlebrooks, 995 S.W.2d at 558.

6. Future Dangerousness

In Tennessee, future dangerousness may be argued if the defendant first presents proof or argues to the contrary. State v. Hall, 976 S.W.2d 121 (Tenn. 1998).

7. "Mercy"

It was error for the prosecutor to argue that the jury should show the defendant the same mercy that he showed the victims. State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994).

8. Caldwell v. Mississippi

It is constitutionally impermissible to lead a capital sentencing jury to believe that the responsibility for the defendant's death rests elsewhere. Caldwell v. Mississippi, 472 U.S. 320 (1985).

9. For Other Offense

It was inappropriate for a prosecutor to argue that the death sentence was appropriate to punish the defendant for the current offense and for a previous murder for which the defendant had already received a life sentence. State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994).

H. PENALTY PHASE INSTRUCTIONS

TENN. CODE ANN. § 39-13-204(e)(1).

> **(e) (1) After closing arguments in the sentencing hearing, the trial judge shall include instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i), which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing, or both, which shall include, but not be limited to, those circumstances set forth in subsection (j). These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations. However, a reviewing court shall not set aside a sentence of death or of imprisonment for life without the possibility of parole on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not enumerated in subsection (j).**
>
> **(2) The trial judge shall provide the jury three (3) separate verdict forms, as specified by subdivisions (f)(1), (f)(2), and (g)(2)(B). The jury shall be instructed that a defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of the sentence. The jury shall also be instructed that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole.**

1. Life With the Possibility of Parole[2]

A trial court may instruct the jury that the earliest release eligibility date for a person convicted of first degree murder was fifty-one years. See State v. Charles Golden, 1998 Tenn. Crim. App. LEXIS 873, No. 02C01-9709-CR-00362, 1998 WL 518071, at * 7 (Tenn. Crim. App., at Jackson, Aug. 21, 1998), *no perm. app. filed* (citing Attorney General Opinion 97-098 (7-1-97)); see also Drummer v. State, 6 S.W.3d 520, 522 (Tenn. Crim. App. 1999).

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[2]Defendants who commit offense prior to July 1, 1993, are not entitled to instruction on life without the possibility of parole. State v. Austin, 87 S.W.3d 447 (Tenn. 2002); State v. Keen, 31 S.W.2d 196 (Tenn. 2000); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998).

2. Defendant's Right Not to Testify

A defendant has a constitutional right to a no-adverse-inference instruction, when properly requested, at both the guilt and penalty phases of a criminal trial. State v. Munn, 56 SW.3d 486 (Tenn. 2001).

3. Effect of Failure to Reach a Verdict

Tennessee Code Annotated § 39-13-204(h) requires the trial court and the litigants to refrain from commenting on the effect of the failure to reach a verdict and the Tennessee Supreme Court has held that this practice is constitutional. See State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994). The supreme court has repeatedly held that a jury instruction that the jury must unanimously agree in order to impose a life sentence without an instruction regarding the effect of a non-unanimous verdict does not offend constitutional standards. See State v. Davidson, 121 S.W.3d 600 (Tenn. 2003), State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000); State v. Cribbs, 967 S.W.2d 773, 796 (Tenn. 1998); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994).

4. Jury Questions

The Constitution is not violated when an trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigation evidence. Weeks v. Angelone, 120 S.Ct. 727 (2000); see also State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (holding that, in response to the jury's questions regarding the meaning of possible punishments and the role of the jury in sentencing, the trial judge properly referred a jury to the instructions provided in the charge).

I. DYNAMITE CHARGE

In Kersey v. State, 525 S.W.2d 139, 144-45 (Tenn. 1975), the Tennessee Supreme Court held that it is impermissible under Tennessee law to give the so-called Allen or "Dynamite" charge in a criminal case to a deadlocked jury. The court explained its reasoning as follows:

> *The so-called Allen or Dynamite charge had its origin in Commonwealth v. Tuey, 62 Mass. 1 (1851). It achieved national prominence and the name by which it is generally known through Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)....*
>
> *The Tennessee version of the Allen charge originated in Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955), wherein this Court approved a charge identical with that given in the case at bar....*
>
> *Reference to various text treatments will validate the assertion that the Allen charge, in one form or another, has tantalized the criminal defense bar, tortured the trial bench and tormented the appellate courts throughout the nation....*
>
> *In our view the Allen charge and the Allen-Simmons charge operate to embarrass, impair and violate the constitutional right of trial by jury. Any undue intrusion by the trial judge into this exclusive province of the jury, is an error of the first magnitude. We recognize that the trial judge has a legitimate concern in the administration of justice and that he labors under a duty to lend guidance to the jury through instructions as to the governing principles of the law. However, when the effort to secure a verdict reaches the point that a single juror may be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted. We view these charges as being tantamount to a judicially mandated majority verdict which is impermissible under Tennessee law.*
>
> *Moreover, there is an inherent inconsistency in these charges in that the dissenters are urged to reconsider their verdict and simultaneously are reminded to make their decisions based upon their own convictions which they are cautioned not to sacrifice. They ask the dissenters to consider shifting their opinions, because the majority is of a different persuasion. We find no merit to any suggestion that might necessarily makes right....*
>
> *We conclude that the interests of justice demand the rejection of the 'dynamite' charge. Under the statutory and inherent supervisory power of this*

Court, we direct that trial courts in Tennessee, when faced with deadlocked juries, comply with the ABA Standards Relating to Trial by Jury, Sec. 5.4, which are as follows:

> *5.4 Length of deliberations; deadlocked jury.*
> *(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:*
>
> > *(i) that in order to return a verdict, each juror must agree thereto;*
> > *(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;*
> > *(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;*
> > *(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and*
> > *(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.*
>
> *(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.*
> *(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.*

The instruction contemplated in Sec. 5.4(a) may be given as a part of the main charge and should be given in the following form:

> *The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.*
>
> *It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself,*

but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

If given as a part of the main charge, it may be repeated should a deadlock develop.

Judicial economy and uniformity demand these results. Strict adherence is expected and variations will not be permissible.

Id. at 141-42, 144-45.

Whether to administer the Kersey charge during the sentencing phase of a capital murder trial is a fact-specific decision that will vary from case to case. Post-Kersey case law indicates that the key factors for a trial court to consider in determining whether to give a Kersey charge to a penalty phase jury include:

(1) the length of time that the jury has been deliberating;

(2) whether the jury is equivocal or unequivocal about the deadlock; and

(3) whether the jury expresses, in response to the court's inquiry, that further deliberations might be successful.

EXAMPLE WHERE APPROPRIATE:

Giving the *Kersey* charge during the sentencing phase of a capital murder trial was appropriate under these circumstances. Jury had been deliberating for only three (3) hours, and jury sent a note that it was divided 11 to one with no foreseeable agreement. Court brought jury back and gave *Kersey* charge without further inquiry. Two hours later, the jury returned a verdict of death. The Supreme Court held that the Legislature's inclusion of the adverb "ultimately" in § 39-2-203(h) indicated an awareness that a tentative inability to agree on a verdict may routinely occur. *Note: The*

Supreme Court pointed out that the jury's note did not express an unequivocal deadlock. State v. Caruthers, 676 S.W.2d 935, 942 (Tenn.1984).

EXAMPLE WHERE ERROR:

Kersey instruction under the circumstances of this case was error. After six (6) hours, the jury sent a note to the Court that they were deadlocked 11 to one, and that the one in favor of life without parole "would not change his mind." Over objections, the Court brought the jury back, and without inquiring whether further deliberations might be productive, gave the *Kersey* charge. One hour later, the jury came back with a death sentence. The Supreme Court held that the jury expressed an unequivocal deadlock, and the trial court should have instructed the jury that it should decide between life imprisonment without parole or a life sentence. *State v. Torres*, 82 S.W.3d 236, 257-58 (Tenn. 2002).

J. ALLOCUTION

"[T]here is no statutory, common-law, or constitutional right to allocution in a capital case." State v. Stephenson, 878 S.W.2d 530, 554 (Tenn. 1994).

K. HUNG JURY AS TO PUNISHMENT

Tenn. Code Ann. § 39-13-204(h)

(h) If the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreperson of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and the judge shall impose a sentence of imprisonment for

life. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

L. VERDICT

Tenn. Code Ann. § 39-13-204(e),(f),(g) (in part):

(e)(2) The trial judge shall provide the jury three (3) separate verdict forms, as specified by subdivisions (f)(1), (f)(2), and (g)(2)(B). . . .
(f)(1) If the jury unanimously determines that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, the sentence shall be imprisonment for life. The jury shall then return its verdict to the judge upon a form provided by the court . . . .

(2) If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or to imprisonment for life. . . . In its verdict, the jury shall specify the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and shall return its verdict to the judge upon a form provided by the court . . . .

(g)(1) The sentence shall be death, if the jury unanimously determines that:

(A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and

(B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt.

(2)(A) If the death penalty is the sentence of the jury, the jury shall:

(i) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(ii) Signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

(B) These findings and verdict shall be returned to the judge upon a form provided by the court . . . .

NOTE: The statutorily mandated verdict forms are reproduced in Volume 7 of Tennessee Practice (TPI). See Tenn. Code Ann. § 39-13-204(f)(1), (f)(2), (g)(2)(B).

The Tennessee Supreme Court has "never held" that a jury's verdict in the sentencing phase of a capital case include "an exact or verbatim statement of the statutory aggravating circumstances" found in support of the sentence. State v. Davidson, 121 S.W.3d 600, 618 (Tenn. 2003); State v. McKinney, 74 S.W.3d 291, 303 (Tenn. 2002); see also State v. Bland, 958 S.W.2d 651, 661 n. 6 (Tenn. 1997) ("The failure of the verdict to repeat the language of the statute defining the aggravating circumstance does not invalidate the jury's findings."). While "a verbatim statement may be the preferred practice," the jury's verdict need only be "sufficiently clear" to "indicate that the jury has found the elements of the aggravated circumstance or circumstances relied upon by the prosecution." McKinney, 74 S.W.3d at 303; see also Davidson, 121 S.W.3d at 600. In fact, "[i]f the jury has returned an incorrect or imperfect verdict, the 'trial court has both the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict.'" McKinney, 74 S.W.3d at 303 (quoting State v. Harris, 989 S.W.2d 307, 314 n. 7 (Tenn. 1999)).

The following case demonstrates the issue: In Harris, a case involving imposition of a sentence of life without possibility of parole, the Court held that the jury's penalty phase verdict stating only that it had found that "[t]he murder was especially heinous and atrocious" was an incomplete verdict with respect to the (i)(5) aggravating circumstance. See Harris, 989 S.W.2d at 313, 318. However, the Court determined that the error in the penalty phase verdict was harmless because another valid aggravating circumstance had been found by the jury in support of the sentence. See id. at 317-18.

M. SENTENCE

Tenn. Code Ann. § 40-23-114. Death by lethal injection - Election of electrocution.

> **(a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.**
>
> **(b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.**
>
> **(c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.**
>
> **(d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution. No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Tennessee or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.**

Tenn. Code Ann. § 40-23-116(a). Manner of executing sentence of death - Witnesses.

> **(a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it is the duty of the sheriff of the county in which the sentence of death has been passed to remove the person so sentenced to death from that county to the state penitentiary in which the death chamber is located, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the death sentence. On the date fixed for the execution in the judgment and mandate of the court, the warden of the state penitentiary in which the death chamber is located shall cause the death**

sentence to be carried out within an enclosure to be prepared for that purpose in strict seclusion and privacy....