

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. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally, you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to laura.blount@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Currently I am the Director of the Appellate Division for the Tennessee District Public Defenders Conference.

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

2012 – BPR # 031405

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 (031405)

Licensed in October 2012 (active)

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

No.

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

Aug. 2019–present	Tennessee District Public Defenders Conference <i>Director, Statewide Appellate Division</i>
Jan. 2017–Jan. 2020	East Tennessee Appellate Litigation, PLLC <i>Founder & Managing Attorney, Regional Law Firm</i>
Aug. 2015–July 2019	Lincoln Memorial University, Duncan School of Law <i>Assistant Professor of Law, Knoxville TN</i>
Aug. 2012–Aug. 2015	Tennessee Supreme Court, Justice Gary R. Wade <i>Judicial Law Clerk, Knoxville TN</i>

Relevant work experience prior to completing my legal education:

While in the Honors College at Louisiana State University, I held several on-campus jobs in the Dean's Office and Sociology and Political Science Departments, including a semester spent working on the collection and analysis of voting data for demographic studies. When I became interested in the possibility of going to law school, I spent my final undergraduate summer at the District Attorney General's Office in St. Tammany Parish, Louisiana. There I worked for the victim-witness coordinator, attended criminal court, inventoried and organized discovery, reviewed trial court pleadings, and assisted one of the senior prosecutors in the preparation and presentation of a murder trial.

At 20 years old, after graduating from college in three years, I accepted employment as a legal assistant and was soon promoted to Office Manager at a multi-state civil law firm based in New Orleans. Some of my first assignments included updating the firm's database as we transitioned from paper filing to electronic case management software and working closely with a senior partner to develop and implement a new disaster recovery plan following the devastation caused by Hurricane Katrina. Because of my continued interest in law school, I also worked for several different attorneys in their various practice areas. I was assigned federal and state cases ranging from debt collection and replevin suits on behalf of banks and credit card companies to asbestos and construction litigation on behalf of large and small businesses. I gained experience in case management for both electronic and paper files, legal research and writing, invoice and billing requirements, deposition preparation, courtroom presentation, and business-client relationships. I continued to perform part-time remote work for the law firm after I moved to Knoxville to attend the University of Tennessee Winston College of Law in 2009, and I returned to the law firm as a full-time summer clerk after completing my first year of law school.

As a full-time law student, I also held a Graduate Assistant position for all three years that required me to work a set number of hours in a designated on-campus role in addition to completing my legal education. To meet this requirement, I worked in the law school's Center for Advocacy & Dispute Resolution and as a Teaching Assistant in two legal writing courses. These job responsibilities were separate from and in addition to the outside employment I gained during the summers and the unpaid externships I completed at various off-campus locations during the fall and spring semesters.

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

I have been continuously employed since the completion of my legal education.

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.

As the Appellate Director for the Tennessee District Public Defenders Conference (DPDC), my role involves nearly every facet of criminal law practice across the state. The statewide Appellate Division currently consists of 10 employees, including me. In addition to my caseload, I supervise seven lawyers, one office manager/legal secretary, and one forensic social worker. I handle criminal cases appealed to the Tennessee Court of Criminal Appeals and Tennessee Supreme Court on behalf of indigent clients represented by public defenders (and sometimes private attorneys) at the trial level in all but three of Tennessee's 32 judicial districts. The public defenders' offices in the three largest districts—consisting of Knox, Davidson, and Shelby Counties—handle their own appeals through assistant public defenders employed by those offices, but I often share resources and consult with those attorneys on individual cases and broader criminal law issues. This means that, in one way or another, I have worked on criminal cases arising from the general sessions or criminal circuit court in every judicial district in the state of Tennessee.

My current legal practice is 100% criminal defense and largely consists of direct representation of indigent defendants by researching and writing appellate briefs and presenting oral arguments in the Tennessee Court of Criminal Appeals and, from time to time, in the Tennessee Supreme Court. I also provide support for public defenders at the trial level, which frequently involves researching, drafting, and editing pretrial motions and assisting with the development of trial records and the preservation of important legal issues in anticipation of later appeals.

As the Director, I am also responsible for overseeing the administration and management of the Appellate Division, training all new employees we hire, tracking and reporting on legal issues that are important to public defenders and their clients across the state, and providing professional development opportunities and CLE programs for the criminal defense bar and their support staff. I have developed and implemented the Appellate Division's policies and practices, and I have presented at numerous conferences on issues related to criminal law and appellate practice.

Within the DPDC more generally, I do not have the same rights or responsibilities as the elected District Public Defenders, but I am an *ad hoc* or *ex officio* member of several executive and administrative committees, including our Education Committee and Long-range Strategic Planning Committee. I regularly meet with other attorneys, social workers, and administrators to discuss individual cases, statewide training opportunities, and new or changing laws that impact the criminal justice system.

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.

Civil and Criminal Appeals as a Supreme Court Clerk (Aug. 2012–Aug. 2015)

I began my legal career as a law clerk for Tennessee Supreme Court Justice Gary R. Wade. The original employment arrangement was a two-year clerkship in which I would start as the junior clerk for my first year and would be promoted to the senior clerk position in my second year. However, I was given the senior clerk duties shortly after joining Justice Wade’s chambers in August 2012. I also accepted his subsequent offer to extend my employment for a third year.

During this clerkship, my primary duties were to review the hundreds of applications for permission to appeal filed with the Tennessee Supreme Court in civil and criminal cases; read and annotate all briefs filed by the parties in cases that were accepted for review; prepare bench briefs for Justice Wade ahead of oral arguments; and research, draft, and edit judicial opinions involving a variety of issues and subject matters, including capital cases and workers’ compensation appeals. In addition to drafting and editing opinions for Justice Wade, I also read all the other justices’ draft opinions and suggested both substantive and non-substantive edits that I discussed with Justice Wade during the circulation process.

In our meetings, Justice Wade often referred to Chief Justice John Roberts’ speech from his United States Supreme Court confirmation hearing:

Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it’s my job to call balls and strikes, and not to pitch or bat.

United States Courts, “Chief Justice Roberts Statement - Nomination Process,” *available at* <https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/nomination-process/chief-justice-roberts-statement-nomination-process> (excerpted from “Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States,” Hearings before the Committee on the Judiciary, United States Senate, 109th Congress, U.S. Government Printing Office, 2005, pp. 55–56).

As a state supreme court clerk, I was taught to follow those same judicial principles. I never carried a preconceived notion about a case or its outcome. I was always careful to ensure that the facts in a judicial opinion were drafted objectively and were grounded in the record. I learned to love the canons of statutory construction, and I approached legal writing like a formal logic problem—by following the applicable rules and demonstrably valid deductions, I let the facts and the law lead my analysis to its logical end, no matter the result.

In addition to the typical research and writing duties of a judicial law clerk, my senior clerk duties meant I was responsible for preparing internal case lists and agendas for weekly meetings, maintaining court databases for review and auditing, and handling various administrative duties as assigned. During the two years that Justice Wade served as the Chief Justice for the Tennessee Supreme Court, my duties expanded to include updating the supreme court's pending cases report, drafting press releases for the supreme court's opinions, and recommending cases to be heard on special dockets held at law schools and undergraduate universities to promote student awareness and engagement with the court. I also periodically reviewed and made recommendations for changes to the appellate courts' procedural rules, supervised law student interns, and worked on special projects such as updating a historical summary of death penalty cases in Tennessee and reviewing proposals for new recovery courts and veterans' treatment courts across the state.

While the majority of my clerkship was spent working on cases and projects in Justice Wade's chambers, I also routinely collaborated with other judicial clerks, court clerks, judges, and staff attorneys on the Tennessee Supreme Court, Court of Appeals, and Court of Criminal Appeals. Justice Wade, especially as Chief Justice, sought consensus whenever possible. From my very first days as a law clerk in 2012, I appreciated the mentorship and friendship of those around me at the Supreme Court Building in Knoxville. Many of the people I saw almost every day as a clerk are still working there now, and it still feels like home every time I return for an oral argument.

Legal Writing and Experiential Learning for Law Students (Aug. 2015–July 2019)

When Justice Wade retired from the bench in August 2015, I accepted employment as a legal writing professor at Lincoln Memorial University Duncan School of Law. During my first semester in the fall of 2015, I taught four sections of objective and persuasive legal writing courses while helping Justice Wade finalize his last few judicial opinions. I also began working closely with program directors in the areas of legal writing, academic success, and bar exam preparation.

During the spring and summer semesters of 2016, a colleague and I voluntarily undertook the task of revamping the law school's legal writing program. Our proposed new curriculum was approved by the faculty and adopted by the law school. In the fall of 2016, in addition to carrying a full teaching load, I served as the law school's Moot Court Board advisor and coached a two-

student team that won “Best Petitioner’s Brief” and placed among the top 10 oralists in the National Criminal Procedure Tournament hosted by the University of San Diego School of Law.

In 2017 and 2018, I continued teaching legal writing, academic success, and bar exam preparation courses covering a wide array of subjects while assisting LMU’s administrative team with the ABA accreditation process. To earn and maintain ABA accreditation, law schools are required to write voluminous reports, explain education-driven data, and satisfy specific rule-based metrics and criteria. I wrote and edited various portions of LMU’s accreditation documents; I represented the law school in Los Angeles along with the University President, Vice President, and several law school deans who met with the ABA accreditation committee; and I ensured compliance with ABA standards in every course that I taught.

During that incredibly busy and stressful time, I also developed and founded my own law firm dedicated to appellate advocacy in Tennessee, which is described more fully below. In 2018 and 2019, while teaching a reduced courseload and supervising law students who worked on appeals for indigent clients, I also served as the law school’s Director of Experiential Learning. These varied but overlapping endeavors fueled my desire to help law students discover their full potential and passion for their careers by connecting them with real clients and real lawyers in the communities where they wanted to practice after graduation.

Private Practice with a Purpose (Jan. 2017–Jan. 2020)

In early 2017, while working full-time at LMU Duncan School of Law, I sought and received approval from the school’s Administration to start my own law firm dedicated to appellate practice in Tennessee. My goal in creating East Tennessee Appellate Litigation (ET AL) was to deliver excellent written and oral advocacy through direct representation of clients in criminal and civil appeals; to provide ghostwriting and editing services to other lawyers and law firms handling their own appeals; and to offer advice and guidance in any case where a lawyer or litigant requested consultation or assistance with navigating the appellate process and procedures in Tennessee courts.

As an independent contractor, I researched and wrote numerous substantive trial court pleadings and appellate briefs for solo practitioners and lawyers at small- to medium-sized firms in Tennessee. I also consulted with attorneys at several larger, top-rated firms in East Tennessee, including Bass, Berry & Sims PLC; Kramer Rayson LLP; Ritchie, Johnson & Stovall, P.C.; and Woolf, McClane, Bright, Allen & Carpenter, PLLC. I was hired by individuals, businesses, lawyers, and non-profit organizations. My projects ranged from construction litigation and property disputes to contract interpretation and statutory analysis in civil and criminal matters. In one of my most unique cases, I worked with a Chicago-based attorney from an international law firm that represented a billion-dollar company and needed advice on pending litigation in Tennessee.

Because I was still employed by the law school and contracted to provide legal services for other lawyers and law firms, I intentionally placed myself in a position where I could accept criminal

and civil cases either *pro bono* or for a significantly reduced fee in order to meet the needs of clients who would not otherwise be able to hire an attorney in an appellate matter. Some of my most meaningful appeals in private practice involved representing a business owner who was wrongfully sued by his former clients, a rural East Tennessean who had rightful ownership of a one-acre parcel that his neighbors tried to claim, and a singer/songwriter who was forced to defend her contractual and ownership rights to a website and online business in a contentious probate matter. All of those clients were referred to me by well-respected trial lawyers who appreciated the quality of my appellate work and knew that I would be willing and able to provide “low bono” services if needed.

I also knew from my time as a Tennessee Supreme Court law clerk that the Court of Criminal Appeals and the Administrative Office of the Courts needed qualified attorneys to handle criminal appeals on behalf of indigent defendants. LMU Duncan School of Law did not have a formal legal clinic at that time, so I offered to represent indigent defendants in appellate cases through ET AL, and I supervised law students who worked on those cases with me. This had the dual benefit of providing much-needed legal services on behalf of indigent defendants in the appellate courts while giving law students practical experience and *pro bono* opportunities.

While in private practice, I was just as honored to consult with experienced attorneys and sophisticated business parties in multi-million-dollar civil lawsuits as I was to represent indigent defendants in criminal appeals to which I was directly appointed by the Tennessee Court of Criminal Appeals. I truly enjoyed every aspect of my practice—so much so that I resigned from LMU and intended to keep teaching as an adjunct professor while operating and growing the law firm as my full-time job beginning in July 2019. However, that was not to be, as my enthusiasm for appellate practice and my dedication to serving the community serendipitously aligned with a new legislative directive.

Statewide Development of Appellate Public Defense (Aug. 2019–present)

The State of Tennessee prosecutes criminal cases at the trial level through the District Attorneys General in each judicial district and handles criminal appeals through the statewide Attorney General’s Office. For decades, the Tennessee District Public Defenders Conference (DPDC) did not have an equivalent appellate office, so the assistant public defenders at the trial level either handled their own appeals or contracted out their appeals to private attorneys willing to work the case for a reduced fee. As might be expected, the quality of appellate representation on behalf of indigent defendants varied widely under that system.

That all changed when the Tennessee General Assembly created and funded a statewide Appellate Division for the DPDC, effective July 1, 2019, which allotted positions for six attorneys and two legal secretaries. Several assistant public defenders and appellate court personnel contacted me about the new office and encouraged me to apply. After meeting with the Executive Director of the DPDC, I accepted employment as one of the first attorneys hired into the inaugural Appellate Division. A few months later, I was designated the DPDC’s Appellate Director.

In addition to my current legal practice described above in question #7, my experience as the Appellate Director, especially outside of the courtroom, has been broad and varied. After moving my primary residence to establish the Appellate Division's office in Franklin, Tennessee, I was tasked with setting up the physical office, creating SOPs, training two legal secretaries, and supervising four attorneys. As a result of sheer volume and need from the trial level, we started taking appellate cases almost immediately. Our very first assignment was a first degree murder appeal that involved numerous pretrial pleadings, over 1600 pages of transcripts, and hours of recorded interviews. When the multiple boxes of files were unexpectedly sent to our office, we did not yet have a scanning or filing system in place, so I used the size and complexity of that case to train our administrative staff and attorneys in proper file-naming, saving, and organizing techniques.

I will never forget the experience of accompanying one of our newly hired lawyers on his visit to Trousdale Turner Correctional Complex to meet with that very first Appellate Division client. Despite the challenges presented by traveling to the remote areas of Tennessee where most of our prisons are located, I firmly believe that in-person client visits are essential to building trust, earning respect, and developing the attorney-client relationship. The same is true of relationships with colleagues. Because of the value I place on this kind of communication and connection, while representing clients and managing a new office with all new employees, I set myself a goal of personally visiting every public defender's office to meet as many colleagues as possible, assess their needs, and discuss ways to collaborate for the benefit of our clients and the legal system.

Eight months into the life of the Appellate Division, the office was staffed with five attorneys (including me) and two legal secretaries. At that time, I made the decision as the Director to delay hiring an attorney for the sixth funded position because our caseloads did not yet justify expending state resources. That decision proved fortuitous when the COVID-19 pandemic shut down most Tennessee courts and offices in March 2020. During the pandemic, I had to reevaluate and restructure the way we connected with our clients, the way we showed up for court, and the way we worked with each other. I led our office through a variety of in-person, remote, and hybrid work schedules; PPE requirements that seemed to change daily; limited or no access to incarcerated clients; and virtual appellate oral arguments.

As trials eventually started to resume, more appeals were filed and more District Public Defenders turned to the Appellate Division for help. In late 2020, I hired an appellate attorney to fill the sixth funded position as our caseloads started to rapidly increase. Over the next few years, the demand for assistance from the Appellate Division increased even more. Some national standards recommend that an appellate attorney handle no more than 25 appeals per year; by comparison, the DPDC's Appellate Division regularly carries 130 to 160 open cases at any given time. These numbers do not include the countless phone calls and emails our appellate attorneys routinely receive from trial-level attorneys all across the state requesting a response with legal research and advice on substantive and procedural criminal law issues.

Thus, if limited to the six legislatively funded positions in our enabling statute, the Appellate Division would routinely run the risk of exceeding the recommended caseload standards for constitutionally effective appellate representation. As the leader of a state-funded office with a limited number of positions, I have had to be creative in expanding resources to address this constitutional dilemma. Over the past two years, while respecting the constraints of state budgets and appreciating the needs of other state agencies, I have grown the Appellate Division from six attorneys to eight attorneys through partnerships with the District Public Defenders and Vanderbilt Law School, which funds a one-year Fellowship to place a newly licensed attorney in our office upon approval by both entities.

As the Appellate Director, I am constantly evaluating the resources and efficiency of the office to ensure high-quality legal services and fiscal responsibility. This includes meeting the needs of not only our clients but also the judicial districts in collaboration with other stakeholders in the criminal justice system. For example, several of our District Public Defender offices have received grant-funded or state-funded positions to hire forensic social workers—a position that was not included in the Appellate Division’s enabling legislation. In 2022, I converted one of our legal secretary positions to a forensic social worker position to better address the rehabilitation and reentry needs of our clients. This has proven to be an invaluable resource for our attorneys, our clients and their families, our prison system, and our state as we support people returning to their communities and strive to reduce recidivism rates.

In summary, I have ensured the Appellate Division’s fiscal responsibility and sustained incremental growth without sacrificing quality legal representation through my deliberate conservation of resources and reallocation of positions, all while personally representing over 140 indigent clients in Tennessee’s Supreme Court and Court of Criminal Appeals.

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

Tennessee Supreme Court – Judicial Law Clerk

First as a student–intern and later as a judicial clerk, I worked on several high-profile opinions authored by Justice Wade during his tenure on the Tennessee Supreme Court, including:

- *State v. Bise*, 380 S.W.3d 682 (Tenn. 2012): Adopting abuse-of-discretion standard of appellate review for trial courts’ sentencing decisions
- *State v. McCoy*, 459 S.W.3d 1 (Tenn. 2014): Upholding constitutionality of child forensic interview statute
- *State v. White*, 362 S.W.3d 559 (Tenn. 2012): Holding that due process requires a properly instructed jury to determine whether a victim’s removal or confinement was

essentially incidental to an accompanying felony offense as necessary to support a conviction for kidnapping or false imprisonment

- *State v. Crank*, 468 S.W.3d 15 (Tenn. 2015): Upholding constitutionality of spiritual treatment exemption in child abuse and neglect statute
- *In re Baby*, 447 S.W.3d 807 (Tenn. 2014): Striking down certain contractual provisions that circumvented the statutory procedures for terminating parental rights in a surrogacy arrangement based on existing law, while recognizing that “the General Assembly is the more appropriate branch of government to address the regulation of surrogacy agreements in a comprehensive fashion”
- *Payne v. CSX Transportation*, 467 S.W.3d 413 (Tenn. 2015): Granting a new trial limited to the issue of damages after evaluating the trial court’s gatekeeping role in the admissibility of expert testimony
- *Hood v. Jenkins*, 432 S.W.3d 814 (Tenn. 2013): Holding that insurance company acted in good faith when it disbursed life insurance proceeds pursuant to a facially valid trial court order
- *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013): Upholding constitutionality of Tennessee Voter Identification Act

Tennessee Supreme Court – Advocate

The Tennessee Supreme Court’s docket is largely discretionary, meaning the litigants generally must request permission to appeal. In Fiscal Year 2023–2024, the supreme court received 528 applications for permission to appeal; 21 (less than 5%) were granted for review. This means that an application seeking permission to appeal to the Tennessee Supreme Court must be extremely persuasive and carefully crafted to address a specific issue or issues of interest to the court. While in private practice operating ET AL, I was often hired by other lawyers to advise them on how to increase the chances of getting their clients’ cases heard by the Tennessee Supreme Court. Since the start of the DPDC’s Appellate Division in 2019, I have personally written and filed 40 applications for permission to appeal in the Tennessee Supreme Court; four (10%) were granted for review. Just a few months ago, the Tennessee Bar Association asked me to discuss this topic as a panelist for a CLE seminar along with a complex-litigation attorney from Baker Donelson, a Tennessee Supreme Court staff attorney, and Tennessee Supreme Court Chief Justice Jeffrey Bivins.

During my career as an advocate, I have argued six cases before the Tennessee Supreme Court on behalf of criminal defendants. Four of those cases involved issues of statutory construction and interpretation, and the other two involved constitutional issues of due process and procedure. All six are described below:

- *State v. Dagnan*, 641 S.W.3d 751 (Tenn. 2022) (Page, C.J., unanimous op.)
 - Marion County
 - Issues: Interpretation of probation revocation statutes; trial court fact-finding duties; appellate court standards of review
 - Tenn. Sup. Ct. accepted review of Defendant’s appeal “to clarify and bring uniformity to the standards and principles applied by the trial courts and appellate courts in probation revocation proceedings”
 - Adopted Defendant’s proposed two-step inquiry for trial courts to follow when ruling on a probation revocation so that appellate review is both efficient and meaningful
 - “[E]xpound[ed] upon [the appropriate] standard [of review for probation revocation appeals] in light of Defendant’s persuasive arguments pertaining to the importance of trial courts’ factual findings.”

- *State v. Sokolosky*, 721 S.W.3d 215 (Tenn. 2025) (Wagner, J., unanimous op.)
 - Smith County
 - Issues: Due process; justiciability (mootness); *stare decisis*
 - Tenn. Sup. Ct. accepted review of Defendant’s appeal to decide whether her due process challenge in a probation revocation case was rendered moot by the expiration of her sentence while the appeal was pending
 - Agreed with Defendant that “[b]ecause [her] probation violation ‘may have adverse consequences after the completion of [her] term of commitment, the doctrine of mootness does not apply.’”
 - Applying principles of *stare decisis*, Tenn. Sup. Ct. agreed with Defendant that there was no compelling reason to overturn the legal precedent she relied upon, which presented nearly identical circumstances and compelled a conclusion in Defendant’s favor

- *State v. Keese*, 591 S.W.3d 75 (Tenn. 2019) (Page, J., unanimous op.)
 - Knox County
 - Issues: Statutory construction of theft offenses and punishments; application of general criminal savings statute to sentencing
 - Tenn. Sup. Ct. agreed with Defendant “that the Criminal Savings Statute is generally applicable to the amended theft grading statute”
 - Defendant did not get the benefit of a lesser sentence in this case because his sentencing hearing was held after the amended theft grading statute was enacted but before it went into effect

- *State v. DeBerry*, 651 S.W.3d 918 (Tenn. 2022) (Campbell, J., unanimous op.)
 - Madison County
 - Issues: Statutory construction of motor vehicle offenses; application of general criminal savings statute to sentencing
 - Tenn. Sup. Ct. granted State’s appeal after trial court and Court of Criminal Appeals vacated Defendant’s sentence based on the legislature’s repeal of a statute
 - Reinstated Defendant’s sentence based on the statute in effect prior to repeal

- *State v. Curry*, 705 S.W.3d 176 (Tenn. 2025) (Page, J., unanimous op.)
 - Madison County
 - Issues: Statutory construction; jury instructions
 - Tenn. Sup. Ct. accepted review of Defendant’s appeal “to consider whether robbery is encompassed within the statutory definition of ‘crime of violence’” for purposes of felon-in-possession-of-firearms convictions
 - Agreed with Defendant that (1) robbery (at that time) was not among the list of statutorily enumerated “crimes of violence”; (2) robbery may or may not be a “crime of violence” depending on the way it was committed; and (3) “whether robbery is a ‘crime of violence’ in a particular unlawful possession of a firearm case is a question for a properly instructed jury, not the trial judge”

- *State v. Washington*, --- S.W.3d ---, 2025 WL 2847585 (Tenn. Oct. 8, 2025) (Bivins, C.J., majority op.; Tarwater, J., concurring)
 - Madison County
 - Issues: Second Amendment; Fourth Amendment; Fifth Amendment
 - Tenn. Sup. Ct. granted review “to determine the legality of [an] officer’s warrantless seizure of [a] firearm” from a vehicle driven by Defendant, who was not provided *Miranda* warnings but admitted that he had a prior felony conviction
 - Majority opinion held “that the seizure [of the firearm] was constitutionally permissible under the plain view doctrine”
 - Concurring opinion “further address[ed] the plain view doctrine’s ‘immediately apparent’ requirement that has caused confusion and consternation among both federal and state courts”
 - Legal issue pending on Defendant’s petition for writ of certiorari filed in the United States Supreme Court:
 - Whether information obtained in violation of the Fifth Amendment’s Self-Incrimination Clause can establish the probable cause necessary to authorize a Tennessee police officer’s warrantless seizure of a firearm from a vehicle under the Fourth Amendment’s plain view

exception when the illegal nature of the firearm is not “immediately apparent” absent the *Miranda* violation.

Tennessee Supreme Court – Amicus Curiae

While in private practice, I also wrote several briefs in the Tennessee Supreme Court as *amicus curiae*, two of which are described below:

- *Ray v. Madison County*, 536 S.W.3d 824 (Tenn. 2017) (Clark, J., unanimous op.)
 - On certified question from U.S. District Court for Western District of Tennessee
 - Amicus curiae on behalf of Tennessee Sheriffs’ Association
 - Issues: Interpretation of criminal statutes and rules of criminal procedure; authority and jurisdiction of local sheriffs
 - “[C]onsidering all the statutes, relevant authorities, and the arguments of the parties, as well as those of the amici curiae, we are convinced that the Sentencing Act implicitly authorizes trial courts to establish the percentage of a felony split confinement sentence that a defendant must serve in actual confinement before becoming eligible to earn work sentencing credits.”
 - “Certainly, sheriffs may seek clarification of judgments and orders when necessary to fulfill their duty to see that court orders are enforced, but they have no duty to challenge an improper or potentially improper sentence.”
 - Tenn. Sup. Ct. opinion is consistent with the statutory and rules-based analysis in my amicus brief, which was based on a plain reading of the applicable texts **(amicus brief attached as writing sample)**

- *In re Bentley D.*, 537 S.W.3d 907 (Tenn. 2017) (Bivins, C.J., unanimous op.)
 - Washington County
 - Amicus curiae on behalf of appellate practitioners and litigants in Tennessee courts
 - Issues: Interpretation of civil statutes and rules of appellate procedure; jurisdiction in termination-of-parental-rights appeals
 - “Because section 36-1-124(d) does not require the appellant to sign ‘personally’ the notice of appeal and does not distinguish the appellant from his or her attorney, we conclude that the word ‘appellant’ includes an attorney specifically authorized to file a notice of appeal on the appellant’s behalf.”
 - Tenn. Sup. Ct. conclusion is consistent with the statutory and rules-based analysis in my amicus brief, which was based on a plain reading of the applicable texts

Tennessee Court of Criminal Appeals

I have personally represented over 100 indigent clients in the Tennessee Court of Criminal Appeals. In addition to the six cases I argued in the Tennessee Supreme Court, I have appeared at oral argument at least 50 times in the Court of Criminal Appeals. Although I do not have exact

data, I have likely filed more than 200 briefs or substantive pleadings in the Court of Criminal Appeals in the last six years. As discussed above, I regularly carry an appellate caseload that meets constitutional standards in addition to managing a statewide office. By comparison, most attorneys never file a single appeal in their career, and even experienced attorneys in private practice simply do not handle a comparable volume of criminal appeals in Tennessee state courts. To the best of my knowledge, the only attorneys in the state of Tennessee who match or exceed my annual number of filings and appearances in the Court of Criminal Appeals are the other attorneys I supervise in the DPDC's Appellate Division and the appellate prosecutors in the Tennessee Attorney General's Office.

As a statewide appellate public defender, I routinely handle many of the common issues that come before the Court of Criminal Appeals from trial courts all across Tennessee, such as **legal sufficiency of the evidence, sentencing, admission or exclusion of evidence during trial, and jury instructions**. The cases listed below represent some of the other issues I have successfully litigated on behalf of indigent defendants in the Tennessee Court of Criminal Appeals:

➤ **Due Process, Right to Counsel, and Access to Justice**

- *State v. Steen*, No. E2024-01919-CCA-R8-CO (Tenn. Crim. App. Feb. 12, 2025) (Order) (Hixson, Montgomery, Greenholtz, JJ.)
 - Anderson County
 - Agreeing with Defendant that trial court erred when it summarily revoked his bond without satisfying constitutional and statutory due process requirements as announced by the Tennessee Supreme Court
- *Starks-Twilley v. State*, No. W2024-00455-CCA-R3-PC, 2025 WL 784914 (Tenn. Crim. App. Mar. 12, 2025) (Campbell, Wedemeyer, Wilson, JJ.)
 - Shelby County
 - Agreeing with Defendant, and conceded by the State, that trial court erred by summarily denying Defendant's pro se post-conviction petition without appointing counsel or holding an evidentiary hearing
- *State v. McBrien*, No. W2021-00158-CCA-R3-CD, 2022 WL 1025068 (Tenn. Crim. App. Apr. 6, 2022) (Dyer, McMullen, JJ.; Williams, P.J.)
 - Madison County
 - Agreeing with Defendant that his right to a speedy trial was violated and that trial court abused its discretion in denying his motion to dismiss
- *State v. Bradford*, No. E2023-00922-CCA-R3-CD (Tenn. Crim. App. July 28, 2023) (Order) (Greenholtz, Montgomery, Hixson, JJ.)
 - Bradley County
 - Agreeing with Defendant that trial court erred by ordering him to immediately begin serving his misdemeanor sentence in confinement, without the opportunity to post a reasonable bond, which violated the plain language and intent of the applicable statutes and procedural rules for appealing misdemeanor convictions

➤ **Trial Courts' Fact-Finding and Rule-Following**

- *State v. Gordon*, No. W2021-01190-CCA-R3-CD, 2023 WL 2375707 (Tenn. Crim. App. Mar. 7, 2023) (Dyer, McMullen, Campbell, JJ.)
 - Madison County
 - Agreeing with Defendant that trial court's sentencing decision was not based on adequate proof and did not comply with statutes or prior case law
- *State v. Ross*, No. E2023-00381-CCA-R3-CD, 2024 WL 2954404 (Tenn. Crim. App. June 12, 2024) (Greenholtz, Hixson, JJ.; Montgomery, J., concurring & dissenting)
 - Sevier County
 - Agreeing with Defendant that trial court erred by imposing a sentence without having or considering the results of a validated risk and needs assessment, which is mandated by the Tennessee General Assembly
(appellate brief attached as writing sample)
- *State v. Greene*, No. E2019-01877-CCA-R3-CD, 2020 WL 6744084 (Tenn. Crim. App. Nov. 17, 2020) (Montgomery, Ogle, Thomas, JJ.)
 - Hamblen County
 - Agreeing with Defendant that trial court abused its discretion in its sentencing decision by departing from statutory procedures and by making findings that were not supported by the record
(appellate brief attached as writing sample)
- *State v. Thomas*, No. E2020-00044-CCA-R3-CD, 2021 WL 246184 (Tenn. Crim. App. Jan. 26, 2021) (Thomas, Witt, Montgomery, JJ.)
 - McMinn County
 - Agreeing with Defendant that trial court erred by ordering restitution without requiring the State to introduce sufficient proof regarding valuation of loss

➤ **Accomplice Liability and Criminal Responsibility for the Conduct of Others**

- *State v. Porter*, No. E2023-00864-CCA-R3-CD, 2025 WL 691667 (Tenn. Crim. App. Mar. 4, 2025) (Ayers, Greenholtz, Hixson, JJ.)
 - Loudon County
 - Agreeing with Defendant that his convictions must be vacated and that he would be entitled to a new trial even if the charges were not being dismissed
 - State failed to provide legally sufficient evidence that Defendant was responsible for another person's commission of criminal offenses, and trial court erred by allowing certain hearsay evidence at trial
- *State v. Coplin*, No. W2019-01593-CCA-R3-CD, 2021 WL 3148887 (Tenn. Crim. App. July 26, 2021) (Williams, P.J., McMullen, J.; Dyer, J., concurring & dissenting)
 - Madison County
 - Agreeing with Defendant that his conviction for tampering with evidence must be reversed and remanded for a new trial because the trial court gave an erroneous jury instruction on "criminal responsibility" for another person's actions

➤ **Mental Health Issues**

- *State v. Yancey*, No. W2022-00131-CCA-R3-CD, 2022 WL 6257321 (Tenn. Crim. App. Oct. 10, 2022) (Dyer, Ayers, Campbell, JJ.)
 - Madison County
 - Agreeing with Defendant that appellate court had jurisdiction to hear the case and that trial court failed to follow statutory procedures and thus erred by modifying Defendant's mandatory outpatient treatment plan

Tennessee Court of Appeals

While in private practice, I handled a variety of civil matters in the Tennessee Court of Appeals and Tennessee Supreme Court either through direct representation of clients or in consultation with other lawyers and law firms. As a consultant, two of my most complex cases involved advising a large physician–healthcare organization and an international telehealth company as they navigated multi-million-dollar lawsuits in Tennessee. Three of the civil appeals in which I was counsel of record are described below:

- *Elliott v. Robbins*, No. E2017-01440-COA-R3-CV, 2018 WL 3084300 (Tenn. Ct. App. June 21, 2018) (Claiborne County): Successfully represented real property owner in deed reformation suit to transfer a disputed acre of property based on mutual mistake, contract interpretation, and good-faith business dealings
- *Hobbs v. Leonard*, No. M2018-00317-COA-R3-CV, 2019 WL 652967 (Tenn. Ct. App. Feb. 15, 2019) (Coffee County): Successfully represented business owner in breach-of-contract action against a lawyer and former clients who violated the parties' valid settlement agreement (**appellate brief attached as writing sample**)
- *In re Allyson P.*, No. E2019-01606-COA-R3-PT, 2020 WL 3317318 (Tenn. Ct. App. June 17, 2020) (Blount County): Successfully represented Mother in her termination-of-parental-rights appeal; the petition to terminate parental rights was dismissed by the Court of Appeals based on finding that termination was not in the child's best interests

Trial Courts

- As a contracted ghostwriter for a small law firm in East Tennessee, I wrote a number of successful motions to dismiss, motions for summary judgment, and memoranda of law on behalf of construction-related businesses
- As a private attorney appointed to represent a criminal defendant in Morgan County Circuit Court, I successfully argued for dismissal of my client's reckless endangerment convictions as a matter of law based on statutory interpretation
- As a public defender representing a criminal defendant in Bradley County Circuit Court, I successfully secured my client's transfer to a more appropriate prison where he could receive the rehabilitative services ordered by the trial court that were not being provided at the facility where he was initially incarcerated

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.

I have never served as a mediator, arbitrator, or judicial officer.

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

I have not yet served as a guardian ad litem, conservator, or trustee. However, I am the named executrix, personal representative, fiduciary, primary trustee, or guardian in several family members' last wills and testaments.

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

National Representation of Tennessee Legal Standards

In 2018, the Tennessee Board of Law Examiners asked me to participate in the development of a new Tennessee-specific portion of the Uniform Bar Exam (UBE). When the Tennessee Supreme Court adopted the UBE to be administered for the first time in February 2019, it set a passing score for the multi-state portion of the exam and required examinees to complete a jurisdiction-specific course on Tennessee law. In collaboration with expert practitioners, law school administrators, and the Board of Law Examiners, I helped create the criminal law portion of the course to ensure that newly licensed Tennessee attorneys would have an appropriate level of understanding to begin practicing law in this state.

In November 2024, the Tennessee Supreme Court and Tennessee Board of Law Examiners nominated me to represent our jurisdiction in a nationwide standard-setting study conducted by the National Conference of Bar Examiners (NCBE) for the development of the NextGen bar exam set to launch in 2026. The criteria for nominations “ensure[d] broad representation among various relevant factors, including employment setting and job function, time in practice, geographic distribution, field of practice/expertise, experience supervising or training newly licensed lawyers, and other demographic and professional attributes.”

I was one of two lawyers from Tennessee selected by the NCBE to participate in the nationwide standard-setting study. In May 2025, for two and a half days in Chicago, participants from all over the country reviewed, analyzed, and debated both the content of the new bar exam and the performance of examinees who had taken a full-length prototype exam. Our recommendations

were forwarded to our respective jurisdictions for consideration in establishing best practices and setting the passing score for future examinees taking the new bar exam.

LSAT Instructor and Tutor

In 2017 and 2018, in addition to running my own law firm and working full time at LMU Duncan School of Law, I taught LSAT Prep Courses for Kaplan at night and on weekends. In order to be hired at that time, Kaplan teachers were required to score in the 95th percentile on the LSAT, record and upload a video of themselves teaching a selected LSAT question, and pass multiple rounds of interviews with a variety of experienced Kaplan professionals. My Kaplan manager described me as a natural teacher who submitted one of the best application videos he had ever seen. I was first hired as an in-person group classroom instructor and later became an individual tutor and online teaching assistant.

Mentorship

Throughout my career, I have always welcomed opportunities to work with, speak to, and mentor students in law schools, master's programs, and undergraduate universities. I am honored that the Tennessee Supreme Court and Court of Criminal Appeals regularly invite me to participate in special oral argument dockets at educational institutions through the SCALES Program as an example of quality appellate representation.

As a Tennessee Supreme Court law clerk, I supervised the interns and externs who were placed in Justice Wade's chambers by the University of Tennessee Winston College of Law and LMU Duncan School of Law. When I started ET AL, I encouraged three exceptional law students to work on *pro bono* and "low bono" criminal and civil appeals with me. One of those students went on to open and operate his own highly successful law firm; another worked for me at the DPDC's Appellate Division before clerking for a judge on the Tennessee Court of Appeals and then joining the U.S. Attorney's Office; and the third is now an experienced trial and appellate attorney who has worked for a District Attorney General and a District Public Defender and intends to pursue a judicial position during his career.

As the DPDC's Appellate Director, I have continued to seek interns and externs from all six law schools in the state of Tennessee. We typically host two or three law students during the fall and spring semesters, and we have hosted as many as five students from undergraduate universities and law schools during the summer semester. Over the years, we have supervised interns and externs from Belmont Law School, LMU Duncan School of Law, Nashville School of Law, the University of Tennessee Winston College of Law, Vanderbilt Law School, and Vanderbilt's Undergraduate University. Third-year law students who work in our office and meet the requirements to obtain a limited license have the opportunity to put their name on an appellate brief and argue a case in the Tennessee Court of Criminal Appeals.

I also accept invitations from the University of Tennessee Winston College of Law to judge mock trials, moot courts, and other advocacy competitions as often as I am able. Each year, the law school hosts an internal moot court competition called Advocates' Prize. This event gives

second- and third-year law students the opportunity to argue a mock appellate case to several different panels of judges in a multi-night, tournament-style setting. The cases and issues vary each year and may be civil or criminal. I was an Advocates' Prize competitor when I was in law school, and I have returned as an Advocates' Prize appellate judge for several years since graduation.

In addition, I served as a mentor for two years in The Appellate Project, which is a national non-profit organization that connects qualified law students with appellate practitioners and judges. I also hosted an objective legal writing workshop for The Appellate Project participants in 2021.

Access to Justice

I was a Board Member with Tennessee Alliance for Legal Services (TALS) for four years (Jan. 2020–Dec. 2023). TALS is a “statewide nonprofit organization that builds tools and partnerships to strengthen the delivery of civil legal services for low-income and elderly Tennesseans.” As a Board Member, I worked with TALS, LMU Duncan School of Law, and the Tennessee Bureau of Workers' Compensation to develop a free legal clinic for unrepresented workers' compensation claimants. Through a Tennessee Legal Initiatives Fund Grant from the Tennessee Bar Foundation, we collaborated to create and deliver substantive legal training on the workers' compensation process to law students and attorneys. The clinic materials included educational information about the workers' compensation trial and appellate courts, the process for filing and litigating claims, and the basic requirements for completing forms, pleadings, and other paperwork. The goal of our free legal clinic was to make the workers' compensation process as easy as possible to navigate so that unrepresented claimants had better access to justice without overwhelming the Bureau's Ombudsmen who assist employees, employers, and any other party to a workers' compensation claim who is not represented by an attorney. Once trained, the clinic's law students and attorneys had the tools they needed to meet with participants to discuss their workers' compensation cases and help them navigate the new administrative law courts, thereby filling a gap in the system and meeting the needs of both the community and the Bureau.

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

This is my first application for judgeship in any capacity.

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.

Fall 2009–Spring 2012

University of Tennessee Winston College of Law

Doctor of Jurisprudence, May 2012

Graduated *magna cum laude*; 8/145 students; High Honors

Completed Concentration in Advocacy & Dispute Resolution

Co-founded Tennessee Journal of Race, Gender & Social Justice

International Academy of Trial Lawyers Student Advocacy Award

Cunningham Excellence in Legal Research Award

Admitted to Tennessee Bar and Order of the Coif

Fall 2004–Spring 2007

Louisiana State University, Honors College

Bachelor of Arts, May 2007

Graduated *cum laude*; 4.0 GPA in core curriculum

Sociology major; Political Science minor

PERSONAL INFORMATION

15. State your age and date of birth.

I am currently 38 years old. My date of birth is [REDACTED] 1987.

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

Other than a few months in 2010 and 2011 when I returned to work in New Orleans during my 1L and 2L summers of law school, I have lived continuously in the State of Tennessee since 2009.

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

Aside from the summer months noted above, I lived continuously in Knox County from early 2009 to late 2019. I lived continuously in Williamson County from late 2019 to early 2023 before splitting my time between Hamblen and Williamson Counties in 2023 and 2024. I then returned to Knox County where I have lived continuously since late 2024.

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

Knox County, Tennessee.

19. Describe your military service, if applicable, including branch of service, dates of active

duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

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

No.

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

No.

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

To the best of my knowledge, no one has ever alleged a breach of ethics or unprofessional conduct by me through a formal complaint to any court or to the Board of Professional Responsibility. As best I can recall from my 13+ years of practice, I have been the subject of two referrals to the Tennessee Consumer Assistance Program (CAP) by incarcerated clients requesting additional information or materials. In both instances, I promptly provided the requested updates or documents. It is my understanding that CAP letters are not formal disciplinary complaints and are not on my record with the Board of Professional Responsibility, but I am self-reporting these out of an abundance of caution.

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.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC,

corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes. A mutual, uncontested divorce in *Wingerter v. Wingerter* was granted on February 27, 2015, by the Superior Court of the District of Columbia, Family Court Docket No. 2014 DRB 3627. There were no children involved, and neither party requested alimony.

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.

- University of Tennessee Winston College of Law, Alumni Reunion Committee (2017, 2022)
- Rucker Park Homeowners Association Board, Member & Secretary (2020–2023)
- Friends of Great Smoky Mountains National Park, Member
- Smokies Life, Park Keeper
- Episcopal Church, Member
 - I was an acolyte, Eucharistic Minister, Youth Group leader, lector, and sound-system operator for St. James Episcopal Church in Knoxville during and after law school (2010–2014), but I have not held a church office or position within the last five years as I have moved back and forth between Middle and East Tennessee.
- YMCA of East Tennessee, Member
- Tennessee Farm Bureau, Member

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.

I have never belonged to any organization, association, club, or society that limits its membership to a particular race, religion, or gender.

ACHIEVEMENTS

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

- Tennessee Bar Association
 - Member, 2022
 - TBA Leadership Law, Class of 2022
- Knoxville Bar Association
 - Member, 2012–2019
 - I discontinued my KBA membership when I moved to Williamson and Hamblen Counties, but I intend to rejoin now that I have settled back in Knoxville
- National Association of Criminal Defense Lawyers
 - Member, 2019–present
 - Reporter for the 17th Annual State Criminal Justice Network Conference, 2018–19
- National Association for Public Defense
 - Member, 2019–present
- Tennessee Association of Criminal Defense Lawyers
 - Member, 2019–present
- Tennessee Alliance for Legal Services
 - Board Member, January 2020–December 2023
 - Workers’ Compensation Access to Justice Free Legal Clinic, 2020
- The Appellate Project
 - Mentor, 2021–2022
 - Legal Writing Workshop, 2021

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.

- Tennessee Bar Association – **Claudia Jack Award** (2022) “In recognition of outstanding and dedicated service as assistant public defender and appellate director”
- Tennessee Association of Criminal Defense Lawyers – **Indigent Defense Award** (2022–2023) “For her outstanding defense of the indigent”
- Tennessee District Public Defenders Conference – **Clara Shortridge Foltz Award** (2023) “In special recognition of your unrivaled dedication and tireless efforts on behalf of the District Public Defenders to improve indigent defense”
- Tennessee Association of Criminal Defense Lawyers – **Massey McGee Trial Advocacy Award** (2024–2025) “For having the honesty to consider her own advocacy, the courage to learn new trial methods, and the bravery to take her new skills to the courtroom”
- LMU Duncan School of Law – **Dedication to Moot Court Team** (2016–2017)

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

I have not published a book or scholarly legal article such as a law review submission. However, in 2018, the National Association of Criminal Defense Lawyers (NACDL) asked me to serve as the Reporter for their 17th Annual State Criminal Justice Network Conference. This national conference brought together diverse stakeholders to discuss moral principles and economic innovations aimed at improving the criminal justice system through legislative reform, executive action, and restoration of rights at the state level. As the Reporter, I attended every session of the three-day conference, took detailed notes, and wrote a comprehensive analysis of the various collateral consequences faced by individuals with criminal convictions as they return to being productive members of their communities. My report was published by NACDL and is available to download as a PDF through their website at <https://www.nacdl.org/Document/ShatteringtheShacklesofCollateralConsequences>.

Also in 2018, I was asked to appear on a local news station, WVLT Channel 8, as a legal analyst to discuss a pending execution and some of the Tennessee laws surrounding lethal injection and the electric chair. That videorecorded interview is available through WVLT’s website at <https://www.wvlt.tv/content/news/Gov-Haslam-delays-Zagorski-execution--497037251.html>.

Prior to starting law school, I spent the summer of 2009 working as a copyeditor for the *Tennessee Capital Case Handbook*, which is a two-volume, 24-chapter, 1140-page book published by the Tennessee Association of Criminal Defense Lawyers in 2010 and updated in 2013–14 and 2024. In each edition of the *Handbook*, I was recognized for my copyediting services in the 2010 and 2013–14 publications.

On a more light-hearted note, I have co-authored an article about being a judicial law clerk that was published in Cityview Magazine (Summer 2015, “Behind the Scenes,” p.34); my pursuit of excellence and love for the law were featured in DICTA, the monthly publication of the

Knoxville Bar Association ([Aug. 2017, p.14](#)); and I was a guest co-host on BarBuzz, the award-winning podcast produced by the Tennessee Bar Association ([Sept. 2022, available on Spotify](#)).

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.

University of Tennessee Winston College of Law (Adjunct Professor)

- Legal Process II
(Spring 2021)
 - Persuasive legal writing class taught to first-year law students
- Introduction to Legal Reasoning & Communication
(Fall 2021, Spring 2022, Fall 2022, Spring 2023)
 - Objective and foundational legal writing class taught to students in the law school's Master of Legal Studies program
 - After the first semester, I met with the program directors to improve upon the course content and assignments based on the students' feedback and my experience as a full-time legal writing professor at LMU Duncan School of Law
- Collaboration Between Lawyers & Forensic Social Workers
(Spring 2024, Spring 2025)
 - This is a master's level course that I conceptualized and created with significant input from the Appellate Division's Forensic Social Worker. I co-teach this simulation course using redacted and amended versions of real case files to teach law students (J.D.), social work students (MSSW), and legal studies students (MLS) about the role of social work in criminal legal proceedings.
 - Course description: This course introduces law students and non-JD graduate program students to several post-trial resources and remedies in the criminal legal system. The course combines substantive law, legal theory, and forensic social work while explaining the roles of prosecutors, defense attorneys, judges, and prison officials after someone has been convicted of a crime and sentenced. The course assignments will provide opportunities for learning the basics of criminal sentencing laws in Tennessee, advocating from various perspectives, critical thinking, problem solving, and reflecting on theories of criminal justice and the purposes and principles of incarceration and alternatives to incarceration.
 - Topics for the course include: (1) overview of criminal legal systems and processes; (2) recognizing client needs and identifying potential avenues for relief in the criminal legal system during and after sentencing; (3) legal and non-legal research; (4) written and verbal communication; (5) expungements and collateral consequences of convictions; and (6) ethics and professionalism.

Past CLE seminars

- TACDL Annual Conference, Dec. 2020 (Storytelling for an Appellate Audience)
- TACDL Capital Defense Seminar, Apr. 2021 (State Capital Case Law Update)
- DPDC Annual Conference, Oct. 2021 (Annual Case Law Update)
- DPDC Annual Conference, Oct. 2021 (Navigate, Litigate, Advocate)
- TACDL Capital Defense Seminar, Mar. 2022 (State Capital Case Law Update)
- DPDC Annual Conference, Oct. 2022 (Preparing for Appeal Before Trial Begins)
- TACDL Capital Defense Seminar, Mar. 2023 (State Capital Case Law Update)
- DPDC Annual Conference, Oct. 2023 (Alternative Sentences and Resentencing)
- TACDL Capital Defense Seminar, Mar. 2024 (State Capital Case Law Update)
- Tennessee Bar Association Court Square, July 2024 (Criminal Law Update)
- Knoxville Bar Association Wellness Conference, Sept. 2024 (Support for the Compassionate Lawyer: Understanding the Effects of Trauma and Compassion Fatigue)
- Nashville Bar Association Government Practice Institute, Oct. 2024 (Criminal Practice Panel)
- TACDL Capital Defense Seminar, Mar. 2025 (State Capital Case Law Update)
- TACDL Capital Defense Seminar, Mar. 2025 (Death Penalty for Non-homicide Crimes)
- Tennessee Bar Association Rule 11 Webinar, Nov. 2025 (Strategies for Seeking Permission to Appeal in the Tennessee Supreme Court)

Upcoming CLE presentations

- National Association of Legal Investigators Annual Conference, Feb. 2026 (Post-Conviction Investigations from an Appellate Perspective)
- TACDL Capital Defense Seminar, Mar. 2026 (State Capital Case Law Update)

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

I have never held nor applied for any public office before now.

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

I have never been a registered lobbyist.

34. Attach to this application at least two examples of legal articles, books, briefs, or other

legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

The first five attachments are legal writings that are entirely my own work in the Tennessee Supreme Court, Tennessee Court of Criminal Appeals, or Tennessee Court of Appeals:

- (1) *Ray v. Madison County* – I have attached a copy of the *amicus curiae* brief that I filed on behalf of the Tennessee Sheriffs’ Association in the Tennessee Supreme Court. This is an example of **statutory and rules-based analysis in the context of criminal law and procedure**. I advocated for a **plain-language interpretation of the statutes and rules at issue, which was supported by existing case law and regulatory policies**. The Tennessee Supreme Court agreed with my analysis, and its opinion includes some language that is nearly identical to my brief.
- (2) *State v. Dagnan* – I have attached a copy of the Rule 11 application for permission to appeal that I filed on behalf of the criminal defendant and appellant in the Tennessee Supreme Court. This case was granted for review and heard on a **SCALES docket** at Columbia Central High School. Rather than attach the merits brief, I have attached the Rule 11 application to highlight my **identification and presentation of a statewide criminal law issue that was ultimately resolved by the supreme court in the way I proposed**. In addition, my Rule 11 application relied upon the legislative and executive initiatives recommended by Governor Lee’s 2019 Criminal Justice Investment Task Force, illustrating my commitment to **consensus and deference among the three branches of government** whenever possible.
- (3) *State v. Ross* – I have attached a copy of the principal brief that I filed on behalf of the criminal defendant and appellant in the Tennessee Court of Criminal Appeals. This is an example of **requiring trial courts to follow the directives of the legislature when the word “shall” is used in a statute**. A majority panel of the Court of Criminal Appeals agreed with me that the **trial court erred by not adhering to the mandates of the General Assembly**.
- (4) *State v. Greene* – I have attached a copy of the principal brief that I filed on behalf of the criminal defendant and appellant in the Tennessee Court of Criminal Appeals. This is an example of **requiring trial courts to follow legislative directives, to put sufficient findings on the record, and to ensure appropriate sentencing**. A unanimous panel of the Court of Criminal Appeals agreed with me that the **trial court committed multiple legal errors** and therefore remanded the case for resentencing.
- (5) *Hobbs v. Leonard* – I have attached a copy of the response brief that I filed on behalf of the plaintiff–businessman and appellee in the Tennessee Court of Appeals. This is an example of **contract interpretation and public policy analysis in the context of a civil dispute between a businessman and an attorney**. The Court of Appeals ruled in my favor, upholding the judgment awarded to the plaintiff–businessman by the trial court. I also successfully opposed the defendant–attorney’s request for permission to appeal in the Tennessee Supreme Court, and I was awarded my appellate attorney’s fees.

(6) The NACDL Conference Report discussed above in question #30 is attached. Aside from the text on pages 1–5, the Appendices, and the Endnotes, the substantive writing in the Report is my own. I am very grateful to the NACDL Board and staff members who edited every section, added pictures and call-out quotes, and brought it all to life.

ESSAYS/PERSONAL STATEMENTS

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

I believe in a qualified and impartial judiciary that gives every litigant—whether the State or the defendant—their day in court. Equal access to justice was a primary reason I started an appellate law firm and then dedicated my skills to the statewide Public Defenders’ Appellate Division. Now that I have established and grown that office, I am ready to broaden my legal experience, and in this judicial position, I will offer my unique perspective as someone who fully understands the depth and breadth of the criminal law issues arising in trial and appellate courts all across Tennessee. If I am selected, it will be my honor to faithfully apply the law in well-researched, thoughtfully written judicial opinions that consider every angle of the parties’ arguments and account for each decision’s impact on the litigants, the lawyers, the trial courts, and the citizens of Tennessee.

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

My entire career demonstrates a commitment to equal justice under the law. In addition to currently representing indigent clients as my full-time job, I was recognized in private practice as a “tireless advocate” who frequently handled appeals on a *pro bono* basis. I was featured in the KBA Spotlight as an Access to Justice Advocate for my *pro bono* services on behalf of minor children in East Tennessee, and the parental rights case that I won in the Court of Appeals was handled *pro bono* because it was important to reunite another East Tennessee family. While in law school, I helped people submit housing and job applications at Knox Area Rescue Ministries, and I participated in the Alternative Spring Break Program to serve Meals on Wheels in rural communities. Since graduation, I have also donated my time and expertise through multiple free legal clinics and Tennessee Free Legal Answers.

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

I am uniquely qualified for this position because I have devoted my career to legal writing and appellate practice in Tennessee state courts. My experience is heavy on criminal law but also informed by working on complex civil cases for the Tennessee Supreme Court and in private practice. I will bring several new perspectives to the Court of Criminal Appeals, which has 12 judges, all of whom are former prosecutors and/or trial judges. As a law professor, I know how

to mentor student-interns and newly licensed lawyers who will start their careers as judicial clerks. As a public defender and experienced administrator, I know how to manage the hundreds of criminal cases this court hears each year. As a current appellate practitioner and former judicial law clerk, I know how Tennessee courts operate from both sides of the bench, and I will have no learning curve for this job.

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

I have always been drawn to community service that involves providing food and fellowship to people in need. My parents and I spent many Thanksgivings not only preparing meals for our own family but also boxing up vegetables, bread, and canned goods to donate at our church and food pantries. On weekends, I went with my grandmother to the local nursing home where she played piano as I sang with the residents. When I was a Eucharistic Minister, I volunteered to carry prayers and communion to homebound parishioners.

I continued these ministries in law school, and I intend to expand upon them if selected for this judicial position. As a law student, I chose Meals on Wheels as my Alternative Spring Break Program so I could provide a friendly face while visiting and serving homebound neighbors. When I was clerking for Justice Wade, several appellate judges drove regularly scheduled routes for Meals on Wheels. If appointed to the Court of Criminal Appeals, I will continue their legacy of service in the Eastern Division.

As a judge, I will also expand my community involvement into areas of civic education by participating in Constitution Day and similar events at local schools. Having been a Youth Group leader and law professor, I connect with students of all ages. I thoroughly enjoy each time I am selected to participate in SCALES events with the Tennessee Supreme Court and Court of Criminal Appeals, and I will advance additional educational opportunities as a judge.

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)*

My comprehensive legal knowledge, industrious ability to research and apply the law, profoundly relevant legal experience, and lifelong commitment to public service are all embodied in my chosen career path and are represented above. Integrity, impartiality, and temperament are also essential judicial characteristics. Because I have not yet held judicial office, I am unable to point to my oath and time on the bench as tangible expressions of those qualities. However, as a law professor, my actions reflected those same moral principles when students violated the Code of Academic Integrity.

Each time I suspected a violation, I interviewed the student or students involved and filed a report with the Academic Integrity Committee when warranted under the Code—one for plagiarism, one for securing or giving information about an examination without authorization, and several for knowingly failing to report other students' misconduct. This was not difficult under the rules, but it was extremely difficult for me personally because I felt like some students were more culpable than others, and one was a top student with an otherwise unblemished record. But I could not and would not give preferential treatment to any student, so I let the disciplinary process run its course for each of them. I later recommended two of the students for their character and fitness examinations and for subsequent employment offers based on their sincere showings of remorse, acceptance of responsibility, and resolution to improve.

I will bring this same moral agency to the Tennessee Court of Criminal Appeals.

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

Yes. I already uphold the law as an attorney and will continue to do so as a judge. As an advocate, I make persuasive arguments on behalf of my clients, up to and including good-faith requests for changes in the law. And the Tennessee Supreme Court may, from time to time, see fit to depart from certain legal precedent if doing so does not violate the Constitution. But that is not the role of a judge on the Court of Criminal Appeals. Intermediate state appellate court judges must impartially apply the law as written by the legislature and as interpreted by the state and federal supreme courts, even if they disagree with that law or how it has been interpreted by higher courts.

As a public defender, I am often asked, "How can you represent that person, knowing what they did?" But it is not my job to defend or excuse the unlawful actions of my clients. My job is to defend and protect the constitutional rights of all Tennessee citizens. As an example, I advocated for a client's release from prison after some of his convictions were overturned by the Court of Criminal Appeals. Personally, I was appalled by the nature of the crimes, but the law clearly and unequivocally required dismissal because the State had prosecuted the offenses after the statute of limitations had expired, which it cannot do. If selected as a Court of Criminal Appeals judge, I will continue holding both sides accountable to the law.

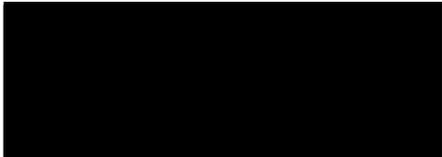
REFERENCES

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. Courtney Orr, *Deputy Attorney General (Criminal Appeals Division)*
Office of Tennessee Attorney General



B. Patrick Frogge, *Executive Director*
Tennessee District Public Defenders Conference



C. Ann Jarvis Pruitt, *Executive Director (ret.)*
Tennessee Alliance for Legal Services



D. Christina Graham, *Chief Financial Officer for Business and Finance*
East Tennessee State University
Business and Finance



E. Dr. W. Warren Gill, Ph.D., *Professional Animal Scientist (ret.)*
Department Chair (ret.) Agriculture, Middle Tennessee State University
Professor Emeritus, University of Tennessee



AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: February 16, 2026.

s/ Brennan M. Wingerter

Signature

When completed, return this application to Laura Blount at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

RECEIVED
FEB 21 2017
Clerk of the Courts
Rec'd By Fred A. 2/2017

LN
FILED
FEB 22 2017
Clerk of the Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JASON RAY,
Plaintiff/Petitioner,

v.

MADISON COUNTY, TENNESSEE,
Defendant/Respondent.

On Certified Question from the
United States District Court,
Western District (East Div.) of Tennessee,
No. 15-1015

No. M2016-01577-SC-R23-CV

BRIEF OF AMICUS CURIAE, TENNESSEE SHERIFFS' ASSOCIATION

Respectfully submitted by:

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INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to Tennessee Rule of Appellate Procedure 31 and Order of this Court, the Tennessee Sheriffs' Association (the "Association") submits this brief as an amicus curiae. The Association does not seek to participate in oral argument. As permitted by Tennessee Rule of Appellate Procedure 27(b), the Association defers to the jurisdictional statement, the statement of the issues, the statement of the case, the statement of the facts, and the standard of review as set forth in the principal and supplemental briefs of the parties, Jason Ray (Plaintiff/Petitioner) and Madison County, Tennessee (Defendant/Respondent).

The Tennessee Sheriffs' Association was founded in 1971 as a registered non-profit educational organization comprised of sheriffs across the state. As a non-profit educational organization, the Association exists for the benefit of all law-abiding citizens of Tennessee. Specifically, the goals of the Association are to promote effective law enforcement; maintain a high level of ethical conduct on the part of all sheriffs, their deputies, and their jail administrators; provide a forum for the exchange of knowledge and experience among all sheriffs; establish the highest degree of association and cooperation among law-enforcing agencies across the state; educate all sheriffs about the laws of Tennessee pertaining to the apprehension and prosecution of persons violating the laws of Tennessee; improve and encourage efficiency in the administration of sheriffs' offices; and protect the welfare and interest of the members of the Association. The Association's mission is carried out by a director under the supervision of an executive committee.

In this case, the Association has an interest in securing a level of "flexible uniformity" across the state in relation to the calculation of sentence credits that may be earned by persons who have violated the laws of Tennessee and have been committed to the authority and supervision of the sheriffs of the various counties. In addition, the Association has an interest in maintaining the

authority of the state's sheriffs to oversee the day-to-day operations of the various jails and workhouses in accordance with sentencing judgments and orders issued by the state's trial court judges. The Association, through its sheriffs, deputies, and jail administrators, is uniquely able to inform this Court as to how the sentencing statutes and trial court judgments are currently being carried out by the various sheriffs' departments and to advise this Court how its decision may affect law-enforcing agencies across the state. Finally, the Association can assist the Court in understanding why the circumstances of this case do not warrant any changes to the current system that is operating effectively between the trial courts and the sheriffs.

SUMMARY OF THE ARGUMENT

The Tennessee Sheriffs' Association respectfully requests the Court's consideration of its positions on the two certified issues identified in the Court's Order of December 21, 2016:

1. Tennessee sentencing courts possess the ultimate authority to determine the eligibility of a felon sentenced to serve a split confinement sentence in a local jail or workhouse to participate in a trusty work program and, therefore, be entitled to work credits under Tennessee Code Annotated sections 41-2-146 or 41-2-147.
2. In the event a Tennessee sentencing court issues an improper or potentially improper sentence, a sheriff does not have a duty under Rule 36.1 of the Tennessee Rules of Criminal Procedure or any other Tennessee law to challenge the sentence.

The Association takes no position on the additional underlying issues raised by the Court in its Order; however, the Association will explain to the Court how Tennessee sheriffs are fulfilling and will continue to fulfill their duty to exercise their ultimate authority over the state's jails and workhouses in accordance with the sentencing judgments and orders issued by Tennessee courts.

ARGUMENT

The certified questions presented in this case are not entirely new. In a 2009 decision, this Court thoroughly addressed the respective duties of Tennessee sheriffs and Tennessee trial courts in relation to the enforcement and calculation of split confinement sentences when an inmate is incarcerated in a local jail or workhouse:

We accepted a question of law certified by the United States District Court for the Western District of Tennessee: whether Tennessee Code Annotated section 8-8-201(a)(3) imposes any duty upon a Tennessee sheriff to calculate the release date and order the release of a Tennessee Department of Correction (“TDOC”) prisoner who is serving a period of incarceration in a county jail. We answer that question in the negative. We also conclude that, notwithstanding erroneous information contained in the relevant judgment orders of conviction entered against Plaintiff, the trial court imposed a sentence of split confinement on Plaintiff. See Tenn. Code Ann. § 40-35-306(a) (2006). Sentences of split confinement are required by Tennessee Code Annotated section 40-35-314(a) to be served in a local jail or workhouse. Plaintiff was not, therefore, a TDOC prisoner. We hold that Tennessee Code Annotated section 8-8-201(a)(1) & (3) does impose a duty upon the sheriff to calculate the release date and order the release of prisoners sentenced to a sentence of split confinement.

Shorts v. Bartholomew, 278 S.W.3d 268, 270-71 (Tenn. 2009). The Court reached this conclusion distinguishing between the roles of trial courts (imposing sentences of split confinement) and sheriffs (calculating release dates for prisoners sentenced to split confinement) despite its acknowledgement that “the existing statutes are inconsistent and overlapping, while at the same time leaving gaps concerning the responsibility for sentence calculation and release in all situations.” Id. at 282.

There can be no question that the existing statutes are still inconsistent and overlapping, and are still a source of confusion for litigants and courts. That said, the Supreme Court has successfully navigated this area of the law before, and now has the opportunity to again clarify the responsibilities of Tennessee sheriffs when faithfully carrying out the sentencing judgments and orders of Tennessee trial judges. The standard canons of statutory construction that guided the

Court in Shorts should be employed in this case to reach a similar conclusion: once a Tennessee trial court imposes the terms of a split confinement sentence, the responsible sheriff has various duties related to keeping and maintaining the prisoner in accordance with the judgment order of the court. The sheriffs across the state are already fulfilling these statutory duties and should not be burdened with the additional responsibility of challenging an improper or potentially improper sentence.

I. Tennessee trial court judges have the ultimate authority to impose a split confinement sentence, including the defendant's eligibility to participate in "work release, furlough, trusty status or related rehabilitative programs."

It is well settled that Tennessee trial courts have broad discretion in fashioning sentences so long as they are within the applicable range and consistent with the overall purposes and principles of sentencing set forth in the Tennessee Code. State v. Bise, 380 S.W.3d 682, 706-07 (Tenn. 2012). Although the particular sentencing statutes at issue in this case are less clear, the Association agrees with the statutory analysis presented in the principal and supplemental briefs of the Defendant/Respondent, Madison County, leading to the conclusion that trial courts do have the authority to restrict (but not eliminate) an inmate's eligibility for "work release, furlough, trusty status or related rehabilitative programs." See Tenn. Code Ann. §§ 40-35-211, 40-35-212, 40-35-302, 40-35-306, 40-35-314, 41-2-123, 41-2-146, 41-2-147, 41-2-150. The Association will not burden the Court by asserting duplicative arguments on this point.

II. Tennessee sheriffs have the ultimate authority to determine whether to allow an inmate to participate in "work release, furlough, trusty status or related rehabilitative programs," so long as the inmate is eligible for such programs pursuant to a trial court order.

While Tennessee courts have the ultimate authority to determine the length, range, and manner of service of a defendant's sentence, see Bise, 380 S.W.3d at 708, Tennessee sheriffs have

the ultimate authority to oversee the implementation and calculation of that sentence once the defendant becomes an inmate in a Tennessee jail or workhouse, see Tenn. Code Ann. § 8-8-201; Shorts, 278 S.W.3d at 281-82. This authority of the sheriffs to maintain the day-to-day operations of their facilities necessarily includes their discretion to put inmates to work or to keep them in continuous confinement. The sheriffs' decisions in this regard are based upon a multitude of considerations, including but not limited to the trial court's sentencing judgment or order; the inmate's prior history, if any, of behavior during incarceration; the nature of work, work-related, trusty, or rehabilitative programs, if any, that are offered at a particular facility; and the availability of jobs in, around, or outside a particular facility. Simply put, there is no "one-size-fits-all" method for how an inmate's sentence should be implemented or calculated by the sheriffs.

In light of the need for "flexible uniformity" throughout the various Tennessee sheriffs' departments, the Association respectfully sets forth three reasons why the sheriffs should retain their statutory authority to exercise discretion in implementing and calculating the sentences imposed by Tennessee courts. First, while the split confinement and misdemeanor statutes clearly contemplate that a sentencing court may restrict an inmate's eligibility for "work release, furlough, trusty status or related rehabilitative programs" as a prerequisite to actually participating in such programs, the statutes and case law are equally clear that Tennessee sheriffs can choose whether to allow an otherwise eligible inmate to participate in any of these programs. Second, the "eligibility" referred to in the sentencing statutes is directly tied to "work release, furlough, trusty status or related rehabilitative programs"; thus, an inmate's eligibility for the specified programs, as determined by the sentencing court, has no bearing on the sheriffs' authority over all other aspects of their facilities, including the discretion to allow (or not allow) an inmate to perform tasks in and around the jail without earning work credits. Finally, nothing about the facts or nature

of this case requires this Court to change the status quo for the sheriffs' implementation or calculation of inmates' sentences and work credits pursuant to the trial courts' judgments or orders.

A. Once an inmate becomes eligible for work release, trusty status, or another work-related program, nothing prohibits a sheriff from exercising his or her discretion to allow or prohibit the inmate from participating in such programs and earning work credits.

This Court has repeatedly recognized a sheriff's broad statutory duties and general authority to "[t]ake charge and custody of the jail of the sheriff's county, and of the prisoners therein; [and to] receive those lawfully committed, and keep them personally, or by deputies or jailer, until discharged by law." Tenn. Code Ann. § 8-8-201(a)(3); see, e.g., Renteria-Villegas v. Metro. Gov't of Nashville & Davidson Cnty., 382 S.W.3d 318, 321-22 (Tenn. 2012) (referencing over 100 sections of the Tennessee Code that detail the sheriffs' "broad general powers"); Shorts, 278 S.W.3d at 276-77 ("[I]t is without question that the sheriff is a constitutional officer and the Tennessee Constitution grants such officers the control of the county jail and the custody of prisoners."). Likewise, numerous statutes grant the sheriffs discretion in the exercise of their duties, particularly as to the implementation and calculation of sentences and sentence credits. See, e.g., Tenn. Code Ann. § 40-35-302(c) ("[N]othing in this section shall be construed as prohibiting a defendant, *in the discretion of the workhouse superintendent or sheriff*, from participating in work crews during the time the defendant is to be continuously confined." (Emphasis added.)); id. § 40-35-302(d) ("When the defendant has served the required percentage, the administrative authority governing the rehabilitative program shall have the authority, *in its discretion*, to place the defendant in the programs as provided by law." (Emphasis added.)); id. § 40-35-501(a)(1) ("[N]othing in this section shall be construed as prohibiting the offender, *in the discretion of the commissioner or sheriff*, from participating in work crews that are under direct guard supervision." (Emphasis added.)); accord id. § 41-21-236(a)(3) ("Sentence credits shall not be earned or credited

automatically, but rather shall be awarded on a monthly basis to an inmate *at the discretion of the responsible warden* in accordance with the criteria established by the department” (Emphasis added.)).

As relevant to this case, the statutory discretion awarded to Tennessee sheriffs includes the decision whether to allow an otherwise eligible inmate to actually participate in the program or programs for which he has become eligible. The statute pertaining to felons sentenced to less than one year in a county jail or workhouse (as Mr. Ray was in this case) provides that “[u]pon the defendant becoming eligible for work release, furlough, trusty status or related rehabilitative programs as specified in [section] 40-35-302(d), the defendant *may* be placed in the programs by the sheriff or administrative authority having jurisdiction over the local jail or workhouse.” *Id.* § 40-35-211(3) (emphasis added). The statute pertaining to misdemeanor sentences similarly provides that after a defendant has served the fixed percentage of continuous confinement as designated in a trial court’s judgment order, “the defendant shall be *eligible for consideration for* work release, furlough, trusty status and related rehabilitative programs.” *Id.* § 40-35-302(d) (emphasis added). The same subsection further provides for a sheriff’s discretion “to place the defendant” in a program for which he is eligible. *Id.* Likewise, the general statute entitled “Eligibility; credits; calculation” acknowledges that once an inmate “has become eligible for work related programs,” the sheriff who has custody over that inmate is then “authorized to permit” the inmate to participate in such programs. *Id.* § 41-2-147; see also *id.* § 41-2-146 (authorizing sheriffs “to permit” prisoners to participate in work programs through an agreement with the Tennessee Department of Correction).

Perhaps most importantly, the specific statute governing “Work programs; required participation; exceptions” first provides that any person serving time in a county jail or workhouse

“shall be required to participate in work programs during the period of the person’s incarceration,” *id.* § 41-2-150(a); the very next subsection of the statute, however, explicitly reserves a sheriff’s authority to prevent an inmate from participating in work programs if such restriction, “in the opinion of the sheriff,” is necessary, *id.* § 41-2-150(b). Section 40-35-314, governing “Local jails or workhouses,” provides a nearly identical statutory scheme: inmates serving felony sentences in a county jail or workhouse are generally required, as part of the sentence imposed by the trial court, “to participate in any work program operated by the jail or workhouse in which the defendant is incarcerated,” *id.* § 40-35-314(g)(1), except that “[t]he sheriff may opt the county out of [these] requirements . . . if the sheriff’s local jail or workhouse does not operate a work program or . . . if . . . the increased number of inmates participating would exceed the sheriff’s ability to provide security, transportation, or requested work projects,” *id.* § 40-35-314(g)(2).

The fact that a sheriff is not even required to operate a work program at all, coupled with the numerous other statutes referencing the sheriffs’ broad discretion and authority to consider, permit, or place their prisoners in programs for which they may be eligible, demonstrates the legislature’s intent to leave the day-to-day operations of the county jails and workhouses solely in the hands of our capable sheriffs. This conclusion, while amply supported by the plain language of the statutes read either in isolation or in combination, is further supported as a practical matter by at least one decision of this Court. Reviewing a similar situation between the Tennessee Department of Correction (“TDOC”) and the Tennessee Board of Probation and Parole (“TBPP”), this Court has recognized the distinction between parole-*eligibility* and parole-*release*. *Shorts*, 278 S.W.3d at 278. The Court explained that

[e]arly release for . . . prisoners [who are eligible for parole] is not automatic; rather, whether an inmate who becomes eligible for parole is actually released on parole is a decision entrusted to the sole discretion of the TBPP, an entity independent of the TDOC. . . . [A]lthough the TBPP is responsible for making the decision of whether

or not to grant parole to an eligible inmate, it is the TDOC that is responsible for determining whether a parole-eligible defendant has reached that point of time at which he may be considered for release on parole.

Id. The Court went on to hold that, after reading all of the relevant statutes in pari materia, the TDOC was clearly entrusted with determining a prisoner's release eligibility, whereas the TBPP retained the ultimate authority "to decide whether to actually grant parole." Id. at 279.

Although this part of the Court's analysis in Shorts was related to the TDOC's responsibilities of implementing and calculating parole-eligible sentences for purposes of parole-release decisions made by the TBPP, the same logical reasoning should apply to the Tennessee sheriffs' responsibilities of implementing and calculating split confinement sentences pursuant to the eligibility requirements set forth in sentencing judgments and orders of Tennessee trial courts. Both scenarios contemplate a prisoner's eligibility for probation, parole, trusty status, furlough, or work-release programs as a prerequisite to a decision being made as to whether that prisoner will actually be released and given probation, parole, trusty status, furlough, or work-related responsibilities in the community. When a TDOC prisoner is involved, the TDOC is responsible for determining whether the prisoner has become eligible for parole; notably, however, it is the TBPP that is then authorized to exercise its discretion in determining whether an eligible prisoner will be paroled. Similarly here, when a prisoner is sentenced to a Tennessee jail or workhouse, the sentencing judge is responsible for determining whether the prisoner must serve a percentage of time in continuous confinement prior to becoming eligible for work release, trusty status, or related programs; the responsible sheriff then calculates the prisoner's day-to-day service and ultimately exercises his discretion in determining whether an eligible prisoner can or should be placed in a work release, trusty, or related position.

This combination of statutory and case law clearly supports the Association's position, echoed in the principal and supplemental briefs of Madison County, that Tennessee sheriffs possess significant and sole discretion in deciding whether eligible prisoners will be allowed to participate in programs that entitle them to earn two-for-one work credits. Simply put, the mere fact that a prisoner may be *eligible* for work release, furlough, trusty status, or a related program in no way *requires* a sheriff to grant the prisoner leave to participate in such programs.

B. Regardless of an inmate's eligibility to participate in work release, trusty status, or other work-related programs, nothing prohibits a sheriff from exercising his or her discretion to allow or prohibit the inmate from "working" in a role that does not require work release or trusty status and does not entitle the inmate to receive work credits.

Just as a sheriff is not required to allow an *eligible* prisoner to participate in work release, trusty, or similar work-related programs, nor is a sheriff prohibited from requiring or allowing an otherwise *ineligible* prisoner from "working" in and around the jail or workhouse in roles that do not require trusty status, release into the community, or even release into the facility's general population. The Association recognizes there is a somewhat *fine-line* distinction between "work release, furlough, trusty status or related rehabilitative programs"—all of which require some level of eligibility prior to participation and may entitle a participating inmate to earn two-for-one sentencing credits—and general in-house "work crews," "work detail," or other "work" duties that do not require prior eligibility through a court order, do not require release into the community, and do not entitle a participating inmate to earn two-for-one sentencing credits. The sheriffs who operate our county jails and workhouses are in the best (and only) position to determine whether to allow an inmate to perform tasks in and around their facilities, under direct guard supervision, without releasing the inmate into the community or otherwise authorizing the inmate to participate

in any type of program that would infringe upon the trial court's authority to restrict the inmate's eligibility for "work release, furlough, trusty status or related rehabilitative programs."

In the various statutes cited by the parties in this case, the inmate's "eligibility" that may be restricted by a trial court's sentencing decision is directly tied to probation, parole, general release, or formal "work release, furlough, trusty status or related rehabilitative programs." See, e.g., Tenn. Code Ann. § 40-35-211(3) (eligibility of felons serving less than one year in a county jail or workhouse to participate in "work release, furlough, trusty status or related rehabilitative programs"); id. § 40-35-212(b)(2) (eligibility for probation under split confinement); id. § 40-35-302(d) (eligibility of persons serving misdemeanor sentences to participate in "work release, furlough, trusty status or related rehabilitative programs"); id. § 40-35-302(e) (eligibility for misdemeanor probation); id. § 40-35-306 (eligibility for split confinement or "shock probation"); id. § 40-35-307 (eligibility for probation and periodic confinement); id. § 40-35-314(b)(1) (eligibility "for all *programs* except parole" (emphasis added)); id. § 40-35-314, Tennessee Sentencing Commission cmts. ("Subsection (b) . . . permits the trial judge to specify an earlier *eligibility date for all rehabilitative programs* except for parole." (Emphasis added.)); id. § 40-35-314, Tennessee Sentencing Commission cmts. ("Subsection (f) permits the court to specify an earlier percentage of *eligibility for rehabilitative programs*, other than parole" (Emphasis added.)); id. § 40-35-314(c) (eligibility for probation); id. § 40-35-501 (eligibility for parole, probation, and general release); id. § 41-2-147 (eligibility for "work related programs" pursuant to sections 40-35-302, -306, -307, and -314).

Notably, several of those same statutes, while setting forth certain eligibility requirements for probation, parole, general release, and formal "work release, furlough, trusty status or related rehabilitative programs," also provide the caveat that sheriffs are not prohibited from requiring all

inmates to “work” during their period of confinement. See, e.g., Tenn. Code Ann. § 40-35-302(c) (“[N]othing in this section shall be construed as prohibiting a defendant, in the discretion of the workhouse superintendent or sheriff, from participating in work crews”); id. § 40-35-501 (“[N]othing in this section shall be construed as prohibiting the offender, in the discretion of the commissioner or sheriff, from participating in work crews that are under direct guard supervision.”). These general “work crews,” which may take any number of forms depending on the particular facility, are distinguishable from specific “work release” programs, which “include[] any assignment to a work crew *in which a prisoner is permitted to go out into the community, whether supervised or unsupervised.*” Id. § 40-35-315(b)(2) (emphasis added). Although an eligible inmate is entitled to receive two-for-one work credits when allowed to participate in formal “work release” or “work related programs,” no other type of “work” performed by an inmate implicates the two-for-one sentencing credits. See id. §§ 41-2-146(b) (providing that when a prisoner is authorized to participate in “work programs” through a sheriff’s agreement with the TDOC, “[w]ork performed by the prisoner *under this section* shall be credited toward reduction of the prisoner’s sentence” on a two-for-one basis), -147(b) (providing that when a prisoner is authorized to participate in “work related programs” requiring prior eligibility or release into the community, “[w]ork performed by the prisoner *under this section* shall be credited toward reduction of the prisoner’s sentence” on a two-for-one basis). (Emphases added.)

Although these statutes may appear contradictory at first glance, they actually complement each other by recognizing the sheriffs’ statutory duty to implement and calculate sentences imposed by trial courts while retaining the sheriffs’ discretion to oversee the day-to-day operations of their jails and workhouses. As noted above, the key distinction here is between the formal “work release, furlough, trusty status or related rehabilitative programs”—all of which require some level

of eligibility prior to participation and may entitle a participating inmate to earn two-for-one sentencing credits—and general in-house “work crews,” “work detail,” or other “work” duties that do not require prior eligibility through a court order, do not require release into the community, and do not entitle a participating inmate to earn the two-for-one credits. Thus, even if an inmate is *ineligible* for work release, trusty status, or another work-related program due to restrictions set forth in a trial court’s sentencing judgment, nothing in the statutory scheme prohibits a sheriff from requiring that inmate to perform tasks such as cleaning his cell, changing a light bulb, taking out the trash, etc. Furthermore, only “work release,” trusty status, or formal “work programs” entitle the inmate to earn work credits as a reduction of his sentence. Thus, so long as the work is performed by the inmate under direct guard supervision and does not require prior eligibility or release into the community, the sheriffs have the statutory authority and discretion to “work” the inmate without providing two-for-one work credits and without infringing upon the sentencing judgments and orders of Tennessee trial courts.

C. Tennessee sheriffs are already complying with their duty to implement and calculate split confinement sentences in such a way that does not conflict with the judgments and orders issued by Tennessee trial courts.

This Court has previously determined that Tennessee sheriffs have a statutory duty “to enforce the terms of a judgment ordering a sentence of split confinement.” Shorts, 278 S.W.3d at 282 (citing Tenn. Code Ann. § 8-8-201(a)(3)). “This duty includes noting the term of confinement *provided for in the judgment order*, crediting the prisoner for time served *as indicated on the judgment order*, calculating any credits that *may* be earned, and timely releasing the prisoner at the conclusion of the period of confinement *ordered*.” Id. (emphases added). Mr. Ray relied on Shorts in the district court to argue that “Tennessee sheriffs and their designees ha[ve] an obligation to calculate credits earned by inmates serving split confinement sentences, apply those

credits[,] and release them in a timely fashion.” Ray v. Madison Cnty., No. 15-1015, 2016 WL 1056598, at *8 (W.D. Tenn. Mar. 16, 2016). According to Mr. Ray, therefore, the Madison County Sheriff’s “officers should have applied the [two-for-one work] credits despite Judge Allen’s instruction.” Id. at *9.

As the district court properly noted, however, Mr. Ray’s reliance on Shorts actually undermines his own argument, misconstrues the Court’s holding in that case, and contradicts well-established practices between the various sheriffs and trial courts of this state. Several actions by the Madison County Sheriff in this case illustrate how a sheriff’s calculation (or even miscalculation) of a split confinement sentence can be reconciled with a trial court’s order restricting the inmate’s eligibility for certain programs. According to the terms of Judge Allen’s sentencing order, Mr. Ray was sentenced to split confinement and was not entitled to earn work credits until he had served 75% of his sentence. However, the disposition sheet received by the sheriff (and signed by Judge Allen) did not include any restrictions against trusty status or work release eligibility, and Mr. Ray was subsequently placed in a trusty role. When it later became known to the sheriff that the disposition sheet did not accurately reflect the trial court’s judgment order, the sheriff sought clarification from Judge Allen and, upon learning that Mr. Ray was not yet eligible for trusty status or work credits, agreed that Mr. Ray would no longer receive work credits so that the sheriff’s calculation of Mr. Ray’s sentence would be in compliance with Judge Allen’s order, as opposed to the inaccurate disposition sheet.

In summary, this case provides factual evidence that Tennessee sheriffs are aware of their duty to calculate sentences in accordance with the terms of trial court judgment orders, they understand the difference between eligible and ineligible prisoners, and they are faithfully exercising their authority over the local jails and workhouses of this state. Although mistakes may

happen on rare occasions, one aberrant error should not rouse a statewide inquisition of established policies and procedures that have been developed through years of statutory authorization, judicial interpretation, and law-enforcement education.

III. Tennessee sheriffs do not have any duty to challenge an inmate's improper or potentially improper sentence.

As this Court has acknowledged, there are more than 100 statutes in the Tennessee Code that set forth the duties of the sheriffs in this state. Renteria-Villegas, 382 S.W.3d at 321-22. Not one of those statutes, however, imposes on sheriffs a duty to challenge an improper or potentially improper sentence. To the contrary, the sheriffs have a “duty to see that the orders of the courts, including judgment orders, are enforced.” Shorts, 278 S.W.3d at 281 (citing Tenn. Code Ann. § 8-8-201(a)(1)). As discussed at length above, this same statute

impose[s] a duty upon a Tennessee sheriff to enforce the terms of a judgment ordering a sentence of split confinement. This duty includes noting the term of confinement provided for in the judgment order, crediting the prisoner for time served as indicated on the judgment order, calculating any credits that may be earned, and timely releasing the prisoner at the conclusion of the period of confinement ordered.

Id. at 282 (citing Tenn. Code Ann. § 8-8-201(a)(1)).

These statutes and cases fully support the Association's position that sheriffs are neither obligated nor expected to challenge the authority of a court to impose a sentence. In fact, the closest that this Court has come to even considering such a duty lends further support to this conclusion. Referring to an opinion of the United States District Court for the Western District of Tennessee, this Court has commented in dicta that “a jailer *might* have some obligation to investigate a *claim* of illegal detention.” Id. at 273 (emphases added). Thus, even if a sheriff would have an obligation to *investigate* a claim that a sentence is improper—an obligation that has never been recognized in this state—the fact that a *claim* must exist in the first place indicates that the sheriff would not be

required to raise such a challenge sua sponte. Moreover, as evidenced by this case, even without a duty to “challenge” an improper or potentially improper sentence, Tennessee sheriffs are already carrying out their responsibilities to oversee the proper implementation of sentencing judgments and orders by contacting prosecutors, defense attorneys, or judges for clarification when necessary. See Ray, 2016 WL 1056598, at *2 (“If there are discrepancies between the forms or questions about the sentence, the attorneys or the judge are contacted for clarification.”). Nothing in the sheriffs’ statutory duties, nor any of the case law interpreting those duties, requires the sheriffs to do anything more.

Finally, just as the statutes and case law are silent as to a sheriff’s duty to challenge an improper or potentially improper sentence, so too is Tennessee Rule of Criminal Procedure 36.1, which sets forth the appropriate procedures for correcting an illegal sentence. Notably, “Rule 36.1 was adopted to provide a mechanism *for the defendant or the State* to seek to correct an illegal sentence.” Tenn. R. Crim. P. 36.1, Advisory Commission cmt. (emphasis added). Every section of the rule identifying the parties permitted to file a motion to correct an illegal sentence refers to the criminal defendant and the State of Tennessee. Tenn. R. Crim. P. 36.1(a)(1), (d), (f). The language of the rule further contemplates that the motion will be filed by the specific defendant who was a party to the proceedings “in the trial court in which the judgment of conviction was entered.” Tenn. R. Crim. P. 36.1(a)(1). Once the trial court rules on the motion, both the defendant and the State are permitted to seek an appeal. Tenn. R. Crim. P. 36.1(f).

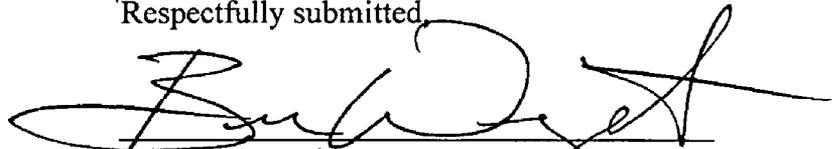
Not only does Rule 36.1 omit any reference to a sheriff or any other person or government entity, it explicitly limits its terms to criminal defendants and the State of Tennessee as the prosecuting authority. To somehow read into Rule 36.1 a duty on sheriffs to challenge an improper

or potentially improper sentence would directly contradict the plain language of the rule and the abundant statutory and case law requiring sheriffs to enforce the judgment orders of the courts.

CONCLUSION

The Tennessee Sheriffs' Association respectfully requests this Court's consideration of its position in this case and as it relates to the statutory discretion and authority of the state's sheriffs in general. Most importantly, while the Association acknowledges the authority of Tennessee trial courts to impose sentences of split confinement, including restrictions on a prisoner's eligibility for certain work-related programs, Tennessee sheriffs must be permitted to exercise their ultimate duty and authority to oversee the day-to-day operations of local jails and workhouses. The sheriffs' duties necessarily include the discretion to calculate sentences and sentence credits in any manner that does not conflict with the judgment order of a court. Thus, so long as a sheriff is in compliance with a sentencing court's order, nothing in the statutes, cases, or rules obligates or even permits the sheriff to challenge the judgment of the court.

Respectfully submitted,



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No. _____

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

STATE OF TENNESSEE,

Respondent/Appellee,

v.

CRAIG DAGNAN,

Applicant/Appellant.

**Rule 11 Application Seeking
Permission to Appeal from a
Final Decision of the
Tennessee Court of
Criminal Appeals**

No. M2020-00152-CCA-R3-CD

Marion County Circuit Court

**APPLICATION FOR PERMISSION TO APPEAL
BY CRAIG DAGNAN**

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***If the Application is granted, a supplemental brief may be filed
and oral argument will be requested on the merits***

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JURISDICTIONAL STATEMENT

The Court of Criminal Appeals issued its majority and concurring opinions on January 28, 2021. *State v. Dagnan*, No. M2020-00152-CCA-R3-CD, 2021 WL 289010 (Tenn. Crim. App. Jan. 28, 2021). No petition to rehear was filed by either party. This Application is timely and properly before the Court. See [Tenn. R. App. P. 11\(b\)](#).

INTRODUCTION

Criminal defendants whose probation has been revoked have the right to appeal the trial court's revocation decision to the Court of Criminal Appeals. This right appears to include appellate review of two issues: (1) whether the trial court erred in determining that a probation violation occurred, and, if the violation itself is supported by substantial evidence in the record, then (2) whether the trial court erred in imposing the consequence for that violation. The Court of Criminal Appeals (citing the Tennessee Supreme Court) has, at times, described these two facets of the probation revocation process as requiring two separate exercises of discretion by the trial court.

In Mr. Dagnan's case, however, the three judges on this Court of Criminal Appeals panel did not agree that the "second exercise of discretion" or second facet of the revocation process—a hearing to determine the appropriate consequence for a probation violation—is required. This ever-widening split in the Court of Criminal Appeals deters defendants and defense attorneys from pursuing the right of appeal in probation revocation cases because a loss is essentially guaranteed regardless of the standard that is applied. For those cases that are appealed, there is no guarantee that the particular panel of appellate judges will apply the abuse of discretion standard to the second facet of the probation revocation process. And even when the abuse of discretion standard is applied to the second facet, appellate review is effectively meaningless because the Court of Criminal Appeals has never held that a trial court acted arbitrarily, failed to make an intelligent and

conscientious decision, reached an illogical conclusion, or caused an injustice in determining that full revocation and total incarceration was the appropriate consequence for a probation violation—regardless of the individual defendant’s characteristics or the particular circumstances leading to the violation.

As a result, the current system has given probation violators a right without a remedy and has immunized trial courts’ revocation decisions from any meaningful appellate scrutiny. This is causing a massive waste of money in Tennessee’s judicial and prison systems, and enormous amounts of frustration among criminal defendants, their attorneys, the attorneys for the State, and the judges on the Court of Criminal Appeals. This Court should grant review to settle the debate over what the right of appeal really means for probation violators, to guide the lower courts in deciding and reviewing the appropriate consequences for probation violations, and to exercise its supervisory authority over the role of the judiciary in implementing the recommendations of the Criminal Justice Investment Task Force commissioned in 2019 by Governor Bill Lee.

QUESTIONS PRESENTED FOR REVIEW

The Presiding Judge of the Court of Criminal Appeals recently commented that most probation revocation appeals are Rule 20 opinions, that there has never been a reversal for abuse of discretion in a probation revocation case, and that the Interim Report published by Governor Lee’s Criminal Justice Investment Task Force cannot be used to guide revocation decisions because it does not have the force of law. *State v. White*, No. W2020-00857-CCA-R3-CD (heard Dec. 4, 2020), available at <https://www.youtube.com/watch?app=desktop&v=H2PM5Z04DOY&t=801s>. The Presiding Judge then expressed hope that the Tennessee Supreme Court “takes [this up] and straightens it out.” *Id.* at 10:00–13:45.

In Mr. Dagnan’s case, another Court of Criminal Appeals judge wrote in a concurring opinion that “once a determination is made that a defendant has violated the conditions of his or her probation, neither an additional hearing nor any additional findings are statutorily mandated of a trial court to determine the manner in which the original sentence should be served.” *Dagnan*, 2021 WL 289010, at *3 (Easter, J., concurring).

The following three questions encompass the issues debated in Mr. Dagnan’s case and in a number of other probation revocation cases currently moving through the appellate pipeline:

- I. Whether a criminal defendant’s right to appeal from an order revoking probation includes the right to meaningful appellate review of the consequence imposed by the trial court.

- II. Whether a trial court is required to make findings and place its reasoning on the record before selecting one of the statutorily available consequences for a probation violation, and in turn whether this selection, as a matter of law, can ever be an abuse of discretion.
- III. Whether Tennessee courts should consider the recommendations of the Governor's Criminal Justice Investment Task Force when determining the appropriate consequences for probation violations, particularly for first-time or non-violent violations that do not involve the commission of new offenses.

STATEMENT OF THE FACTS AND OPINION BELOW

The Marion County Circuit Court revoked and reinstated Mr. Dagnan's probation several times before furloughing him to an inpatient rehabilitation program where he could address the underlying addiction issues that were the root of his criminal behavior. (I: 17–18, 25, 38, 57, 68–70; Ex. 3.) After a few months in the program at Freedom House Ministry, Mr. Dagnan was kicked out and ordered to leave the premises. Although the dismissal letter indicates that Mr. Dagnan was discharged due to racism and recruiting other residents for the Aryan Brotherhood, the rest of the documents and testimony in the record show that Mr. Dagnan should not have been dismissed from Freedom House Ministry. (Ex. 1–3; II: 24, 27, 30, 34.)

Specifically, the director of operations for Mountain Movers Addiction Recovery, which is affiliated with Freedom House Ministry, testified that the former director of Freedom House Ministry did not have the authority or permission to remove Mr. Dagnan from the program. (II: 24, 27.) In fact, the former director had since been relieved of his duties at Freedom House Ministry. (II: 23.) In addition to this testimony, the founder and executive director of Freedom House Ministry, Pastor Sonny Warmath, confirmed all of this information in a letter submitted by email and presented to the trial court at Mr. Dagnan's revocation hearing. (II: 26–27; Ex. 2.) Pastor Warmath indicated that Mr. Dagnan had violated the policies of Freedom House Ministry by giving a tattoo to another resident, but this behavior should *not* have resulted in his dismissal from the program. (Ex. 2.)

According to Pastor Warmath, Mr. Dagnan had passed all drug tests and was in compliance with all aspects of the program except for the incident with the tattoo. (Ex. 2.) Even the trial court agreed, “based upon some things I know,” that there was “probably a lot of merit to” Mr. Dagnan’s argument that he should not have been dismissed from the program. (II: 34.) Nevertheless, the trial court found that the State had proved the violation against Mr. Dagnan by a preponderance of the evidence because Mr. Dagnan did not go back to the Marion County Jail within four hours of leaving Freedom House Ministry. (II: 17, 34.)

The trial court then went on to address the purposes and principles of sentencing in deciding what the consequence of the violation should be. (II: 34–38.) The court began its analysis by laying out two options: either revoke in full and order Mr. Dagnan to serve the balance of his sentence, or give Mr. Dagnan another chance and put him “back on probation or some kind of treatment facility.” (II: 35.) Although the trial court claimed to be “all about recovery,” it never addressed the option to return Mr. Dagnan to Freedom House Ministry or a similar inpatient rehabilitation program. (II: 36.)

This omission in the trial court’s ruling is particularly noteworthy in light of Pastor Warmath’s letter, which informed the trial court that the pastor had already sent Mr. Dagnan an acceptance letter “for our other program that is a 1 year long term inpatient type of treatment program” at Mountain Movers Addiction Recovery. (Ex. 2.) Pastor Warmath described Mountain Movers as a highly structured and secure in-house program where the residents attend multiple daily classes and

meetings, receive counseling, and go through a 12-step program for recovery. (Ex. 2.)

Without ever discussing Mountain Movers Addiction Recovery or Freedom House Ministry, the trial court concluded that it had “no choice but to deny any possibility of probation and just revoke [Mr. Dagnan] to serve [his] sentence in full in the Tennessee Department of Corrections.” (II: 38; *see* II: 35–37.) The trial court’s decision was based upon Mr. Dagnan’s criminal history and his prior unsuccessful terms of probation and Community Corrections supervision. (II: 38.)

The Court of Criminal Appeals affirmed. The majority opinion’s analysis consists of just two paragraphs:

A trial court’s revocation of a probation is subject to an abuse of discretion standard of review. *State v. Harkins*, 811 S.W.2d 79, 80 (Tenn. 1991). Upon a finding by a preponderance of the evidence that a defendant has violated a condition of probation, a trial court may revoke probation and order the imposition of the original sentence. *State v. Kendrick*, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005) (citing *Tenn. Code Ann. §§ 40-35-310* (a), -311 (e)(1) (2019)).

After being furloughed to a drug treatment program, Defendant absconded and fled to Georgia. He was charged with escape. There was overwhelming evidence to support the trial court’s decision to fully revoke probation. The trial court had on numerous occasions partially revoked Defendant’s probation and allowed Defendant to be reinstated after service of less than the entire sentence. The trial court acted properly by ordering Defendant to serve the balance of his six-year sentence in incarceration. The trial court did not abuse its discretion.

Dagnan, 2021 WL 289010, at *2–3. Despite briefing and oral argument to address the circumstances of Mr. Dagnan’s departure from Freedom House Ministry and his re-acceptance into another year-long rehabilitation program, the Court of Criminal Appeals made no mention of these facts in its analysis. *See id.*

The concurring opinion authored by Judge Easter is also two paragraphs:

I concur fully with the conclusion reached by the majority that there was overwhelming evidence to support the trial court’s decision to revoke Defendant’s probation and to order Defendant to serve the balance of his six-year sentence in incarceration. I write separately to simply express my belief that once a determination is made that a defendant has violated the conditions of his or her probation, neither an additional hearing nor any additional findings are statutorily mandated of a trial court to determine the manner in which the original sentence should be served. Thus, there is no opportunity for an abuse of discretion when a “second exercise of discretion” is not required by either sections 40-35-310 or 40-35-311 of Tennessee Code Annotated.

By taking this position, I do not mean to suggest that a trial court has unfettered discretion to do as he or she pleases after a probation violation is found. Furthermore, I am aware that the practice of having an additional hearing to assist the trial court in reaching the ends of justice is commonplace in Tennessee trial courts. I do not believe such inquisition is wrong or ill-advised. Every circumstance is different and every defendant’s achievements and failures are noteworthy. I simply just do not see that the statutes mandate such an additional hearing.

Dagnan, 2021 WL 289010, at *3 (Easter, J., concurring) (footnote omitted).

The majority and concurring opinions illustrate the split that exists in our Court of Criminal Appeals as to whether a trial court is required to conduct a second or separate exercise of discretion when determining the consequence for a probation violation. The concurring opinion further begs the question presented in these probation revocation appeals: if a trial court is not required to hold a hearing or put any findings on the record when selecting a consequence for the violation, how are the appellate courts supposed to assess whether a trial court is exercising “unfettered discretion to do as [it] pleases after a probation violation is found”?

STANDARD OF REVIEW

Appellate courts review a trial court's revocation of probation under an abuse of discretion standard. *State v. Farrar*, 355 S.W.3d 582, 585 (Tenn. Crim. App. 2011); *see also State v. Caudle*, 388 S.W.3d 273, 278–79 (Tenn. 2012). What this standard actually means is the focal point of this appeal.

REASONS SUPPORTING REVIEW

Mr. Dagnan is one of the thousands of criminal defendants who violate their probation in a given year. He is also one of the thousands of Tennesseans battling substance use disorders. After several probation violations, Mr. Dagnan was finally sent to an inpatient rehabilitation facility where he could receive much-needed treatment for his addictions. But barely three months into his year-long program, Mr. Dagnan was ordered to leave. Although Mr. Dagnan violated his probation by not timely reporting to the local jail, there is no dispute that Mr. Dagnan was wrongfully discharged from the inpatient rehabilitation facility in the first place. Then, rather than return Mr. Dagnan to the treatment he should have been receiving all along, the trial court ordered Mr. Dagnan to serve the balance of his original six-year sentence in the custody of TDOC.

The Court of Criminal Appeals affirmed, despite the trial court's recognition that Mr. Dagnan had been wrongfully terminated and discharged from the inpatient rehabilitation facility, and despite the evidence in the record that the facility had already re-accepted Mr. Dagnan into one of their year-long treatment programs and was ready to take him back. One appellate judge also wrote a concurring opinion to emphasize his view that trial courts are not statutorily required to hold a hearing before imposing a consequence for a probation violation. These separate decisions highlight the ever-widening split in the Court of Criminal Appeals that continues to weaken the right of appeal in probation revocation cases.

I. The Court should grant this Rule 11 Application to secure uniformity in the scope of appellate review from an order revoking probation.

Over the years, the Court of Criminal Appeals has applied a variety of standards for reviewing a trial court’s probation revocation decision. Although all probation revocation appeals cite the familiar abuse of discretion standard, different panels of appellate judges have applied that standard in different ways. The following is a non-exhaustive but nonetheless illustrative list of the three different approaches the Court of Criminal Appeals has taken in probation revocation appeals:

(1) **“The One-Step Analysis”** – In these cases, the Court of Criminal Appeals affirms the order revoking probation so long as there is substantial evidence in the record to support the violation itself. The court does not review the second facet of the revocation process (the consequence imposed for the violation), and the court may even file a Rule 20 memorandum opinion. *See* [Tenn. Ct. Crim. App. R. 20](#). Examples include:

- *State v. Pulliam*, No. E2018-00434-CCA-R3-CD, 2019 WL 1753059, at *3 (Tenn. Crim. App. Apr. 17, 2019): “[T]he Defendant fails to actually acknowledge that upon finding that a probation violation had occurred, the trial court had discretion to order him to serve the rest of his sentences incarcerated Despite the Defendant’s arguments to the contrary, the trial court has only abused its discretion if the record on appeal contains no substantial evidence that a probation violation has occurred.”
- *State v. Emler*, No. 01C01-9512-CC-00424, 1996 WL 691018, at *2 (Tenn. Crim. App. Nov. 27, 1996): “When a probation revocation is challenged, the appellate courts have a limited

scope of review Because the defendant readily admitted the violations, the revocation was neither arbitrary nor capricious.”

- *State v. Taylor*, No. W2019-01246-CCA-R3-CD, 2020 WL 5088736, at *2 (Tenn. Crim. App. Aug. 27, 2020): “The record contains sufficient evidence that the defendant violated the terms of his probation as he admitted to the same. Accordingly, the trial court acted within its discretion in ordering the defendant to serve the original sentence of three years in the Tennessee Department of Correction.”
- *State v. Young*, No. M2019-01221-CCA-R3-CD, 2020 WL 3791503, at *3 (Tenn. Crim. App. July 7, 2020): “There is substantial evidence in the record to support the trial court’s finding that Defendant violated the conditions of his probation. Therefore, the trial court did not abuse its discretion by revoking Defendant’s probation and ordering him to serve his sentence.”
- *State v. Kemp*, No. E2019-01784-CCA-R3-CD, 2020 WL 4193701, at *2 (Tenn. Crim. App. July 21, 2020): “The law is well-settled, however, that the trial court does not abuse its discretion by choosing incarceration from among the options available after finding that the defendant has violated the terms of his probation.”
- *State v. Carter*, No. M2019-00454-CCA-R3-CD, 2020 WL 6779972, at *2 (Tenn. Crim. App. Nov. 18, 2020) (memorandum opinion) (affirming “the trial court’s order requiring the Defendant to serve his sentence in confinement” because that “decision was well within its statutory authority”).

(2) **“The True Two-Step Analysis”** – In these cases, the Court of Criminal Appeals reviews both the probation violation itself and the consequence imposed. The frequency of this true two-step analysis is the rarest among the three approaches taken by the appellate court; yet this is the approach that gives the most meaning to the probation violator’s right of appeal. Even under this approach, however, the Court of

Criminal Appeals has never found an abuse of discretion in the second facet of the trial court’s revocation decision. Examples include:

- *State v. Fleming*, No. E2017-02352-CCA-R3-CD, 2018 WL 6787580, at *2 (Tenn. Crim. App. Dec. 26, 2018) (citing *State v. Reams*, 265 S.W.3d 423, 430 (Tenn. Crim. App. 2007)): “The determination of the proper consequences of the probation violation embodies a separate exercise of discretion.” In affirming the trial court’s decision to impose incarceration as the appropriate punishment for the defendant’s probation violation, the Court of Criminal Appeals reviewed all the evidence relied upon by the trial court (not just the evidence of the probation violation itself) and evaluated the trial court’s determination of whether the “the beneficial aspects of probation were being served,” in conjunction with the totality of the circumstances. *Id.* at *3–4.
- *State v. Fulton*, No. W2019-02269-CCA-R3-CD, 2020 WL 5944230, at *1 (Tenn. Crim. App. Oct. 6, 2020) (quoting *Fleming*, 2018 WL 6787580 at *2): “The determination of the proper consequences of the probation violation embodies a separate exercise of discretion.” In affirming the trial court’s decision to impose incarceration as the appropriate punishment for the defendant’s probation violation, the Court of Criminal Appeals determined that the trial court had properly considered the defendant’s prior criminal history and underlying conviction, victim impact statements, and the defendant’s amenability to continued probation, in the context of the case as a whole, to determine whether the beneficial aspects of probation were still being served. *Id.* at *2.
- *State v. Elrod*, No. M2019-01399-CCA-R3-CD, 2020 WL 1071342, at *2 (Tenn. Crim. App. Mar. 6, 2020) (citing *State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999)): “The determination of the proper consequence of a probation violation embodies a separate exercise of discretion.” In affirming the trial court’s decision to order confinement, the court noted that this was the defendant’s fourth violation, that partial confinement had been

tried previously, and that the defendant had previously tested positive for drugs while on house arrest. *Id.*

- *State v. Amonette*, No. M2001-02952-CCA-R3-CD, 2002 WL 1987956, at *3 (Tenn. Crim. App. Aug. 29, 2002): After first acknowledging that the defendant conceded the violation, the court stated, “Thus, the only question we must answer is whether the [trial] court abused its discretion in ordering the defendant to serve the remainder of his sentence in the county jail.” *Amonette*, 2002 WL 1987956, at *3. In analyzing the trial court’s decision to order confinement, the Court of Criminal Appeals discussed the trial court’s consideration of the general need for deterrence but held that more individual characteristics such as “the defendant’s amenability to rehabilitation, sincerity, and the like,” are also necessary considerations. The case was remanded with instructions for the trial court to make appropriate factual findings before ruling “upon the defendant’s bid for further probation.” *Id.* at *4.

(3) “The Hybrid Analysis” – In these cases, the Court of Criminal Appeals cites the two-prong inquiry requiring it to review both the violation itself and the consequence imposed by the trial court, but the appellate court does not actually analyze anything that the trial court did before selecting a consequence. In other words, these cases appear to acknowledge the two-step analysis but then do not apply it, thus rendering this level of review no more meaningful than the one-step analysis. Examples include:

- *State v. Meriweather*, No. M2019-01779-CCA-R3-CD, 2020 WL 4530690, at *3 (Tenn. Crim. App. Aug. 6, 2020): “The determination of the proper consequences of the probation violation embodies a separate exercise of discretion.” *Id.* (citing *Reams*, 265 S.W.3d at 430). “[B]ecause the trial court found that a violation had occurred, it acted well within its discretion to order confinement.” *Id.* (citing *State v. Brawner*, No. W2013-

01144-CCA-R3-CD, 2014 WL 465743, at *2 (Tenn. Crim. App. Feb. 4, 2014)).

- *State v. Brennan*, No. E2019-01186-CCA-R3-CD, 2020 WL 3056501, at *4 (Tenn. Crim. App. June 9, 2020) (citations and internal quotation marks omitted): “To find an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. . . . Such a finding reflects that the trial court’s logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case.” In affirming the trial court’s decision to order full incarceration, the Court of Criminal Appeals merely recounted the defendant’s probation violations and held, “We cannot say the trial court abused its discretion in fully revoking probation due to the Defendant’s failure to abide by the terms of his probationary sentence.”
- *State v. Paul*, No. E2019-00256-CCA-R3-CD, 2019 WL 5168653, at *3 (Tenn. Crim. App. Oct. 15, 2019): “[W]e conclude that the trial court correctly found that the Defendant had violated her probation and then, in its discretion, properly determined the consequence of the violation.” In affirming the trial court’s decision to order a term of split confinement before returning the defendant to supervised probation, the Court of Criminal Appeals merely recounted the various probation violations to which the defendant had admitted. *Id.* at *1, *3.
- *State v. Martin*, No. W2011-00409-CCA-R3-CD, 2011 WL 5903927, at *2 (Tenn. Crim. App. Nov. 21, 2011) (citing *Hunter*, 1 S.W.3d at 647; *Reams*, 265 S.W.3d at 430): “The determination of the proper consequence of the probation violation embodies a separate exercise of discretion. . . . [T]he trial court did not abuse its discretion by ordering Martin to serve the sentences in custody, as incarceration was clearly one of the options available to the trial court upon finding that a violation occurred.”

These variations in the level of appellate scrutiny applied to probation revocation decisions have appeared in Tennessee case law for more than two decades.¹ Recently, however, several judges on the Court

¹ When the Court of Criminal Appeals has acknowledged the two-step analysis, it usually cites the source as *State v. Hunter*, 1 S.W.3d 643 (Tenn. 1999). See, e.g., *Paul*, 2019 WL 5168653, at *3 (citing *Hunter*, 1 S.W.3d at 647) (“The determination of the proper consequence of a probation violation embodies a separate exercise of discretion.”); *Amonette*, 2002 WL 1987956, at *3 (citing *Hunter*, 1 S.W.3d at 647) (“The decision of the proper consequence embodies a separate exercise of discretion from the initial finding that a violation has occurred.”). Many of the one-step and hybrid cases cite their source as *State v. Harkins*, 811 S.W.2d 79 (Tenn. 1991). It is debatable whether either of these Supreme Court opinions support the propositions for which they have been cited. In fact, *Hunter* appears to be more of a one-step case, while *Harkins* appears to be more of a two-step case. Compare *Hunter*, 1 S.W.3d at 647, with *Harkins*, 811 S.W.2d at 84. In any event, regardless of its origin, the split in the Court of Criminal Appeals lives on.

For the State’s fiscal year 2018–19, a Westlaw search for the term “probation revocation” returned 57 case results. Of those 57 cases, 42 were direct appeals of probation revocations. Of those 42 cases, only one was reversed: the defendant appealed pro se and successfully argued that he had been denied the right to counsel at his revocation hearing. Of the 41 cases that were affirmed, 32 used the one-step analysis; six used the hybrid analysis; one used the true two-step analysis; and two were Rule 20 memorandum opinions.

For fiscal year 2019–20, a Westlaw search for the term “probation revocation” returned 59 case results. Of those 59 cases, 45 were direct appeals of probation revocations. Of those 45 cases, one was partially reversed (two probationary periods had expired so those revocations were reversed and dismissed; a third revocation was affirmed without any analysis); one was reversed based on the trial court’s violation of the Code of Judicial Conduct; and one was reversed because of the trial court’s failure to conduct a new sentencing hearing before increasing the

of Criminal Appeals have expressed disbelief that a two-step analysis is appropriate or required, or even that it exists. Many of the judges continue to insist that only the violation itself matters, and they do not believe that a trial court can ever abuse its discretion in selecting one of the statutorily available consequences for the violation. In fact, if a defendant concedes that a violation occurred, many Court of Criminal Appeals judges consider that concession to end the case entirely. In Mr. Dagnan's case, one judge even wrote separately to express his opinion that criminal defendants are not statutorily entitled to a hearing on the consequence in the trial court, which would effectively eliminate appellate review of the probation revocation altogether.²

defendant's sentence upon revocation of community corrections. This means there were three reversals out of 45 total cases, but none of the reversals were based on a finding that the trial court abused its discretion in imposing a consequence for a probation violation. Of the 42 cases that were affirmed, 26 used the one-step analysis; nine used the hybrid analysis; seven used the true two-step analysis; and one was a Rule 20 memorandum opinion.

From July 1, 2020 through December 11, 2020, a Westlaw search for the term "probation revocation" returned 28 case results. Of those 28 cases, 23 were direct appeals of probation revocations. Of those 23, two were reversed because the defendants did not receive due process. Of the 21 that were affirmed, 12 used the one-step analysis; four used the hybrid analysis; two used the true two-step analysis; two were Rule 20 memorandum opinions; and one was affirmed on resentencing after revocation of community corrections, so it involved a different analysis entirely.

² The majority of criminal defendants who appeal from an order revoking their probation are appealing from the trial court's decision to order the original sentence into execution ("full incarceration"). As a result, the

This Court should grant review to settle the ongoing debate over what the right to appeal from a probation revocation order really means, to secure uniformity among the Court of Criminal Appeals panels in how they review probation revocation orders, and to provide clarity and predictability for litigants and their attorneys who currently do not know what their rights entail.³

majority of criminal defendants who appeal from an order revoking their probation are asking the Court of Criminal Appeals to apply the true two-step analysis and to meaningfully review the second facet of their revocation hearing: the consequence imposed by the trial court. A full discussion of how the current system guts the right of appeal in probation revocation cases is available at <https://www.youtube.com/watch?v=6hpmnTaVhU8&t=10s>, oral argument in *State v. Dagnan*, No. M2020-00152-CCA-R3-CD (heard Dec. 9, 2020).

³ While the Court of Criminal Appeals is ultimately responsible for the standard and scope of review applied in its opinions, it does not help that the Attorney General's Office has taken different positions on this issue. In one recent case, the State acknowledged the two-step analysis and argued the second facet of the revocation process. *See State v. Ferguson*, No. E2019-02218-CCA-R3-CD (heard Dec. 16, 2020), oral argument available at https://www.youtube.com/watch?v=QhwDIyelaRE&feature=emb_logo. In most cases, however, the State either acknowledges the two-step analysis but argues under the hybrid analysis, or it commits to the one-step analysis and argues that once a violation has occurred, the trial court's selection of a consequence is not subject to appellate review at all. The split of authority that pervades probation revocation case law has thus affected the Attorney General's Office in much the same way it has affected the Court of Criminal Appeals: the standard to be applied depends—not on the law—but on whichever attorneys and judges are assigned to the case. This creates uncertainty in the standard and scope of review every time a probation revocation order is appealed, and this Court should grant review to settle the debate once and for all.

II. The Court should grant this Rule 11 Application to decide, as a matter of law, whether it is ever possible for a trial court to abuse its discretion when imposing punishment for a probation violation, and specifically whether the trial court must support its decision by making any findings or placing its reasoning on the record.

This case also presents the Court with the opportunity to answer two important questions of law: (1) does appellate review of an order revoking probation include a meaningful analysis of the consequence imposed by the trial court? and, if so, (2) what does the abuse of discretion standard actually mean in this context? The current state of probation revocation case law signals to criminal defendants and their attorneys that exercising the right to appeal from an order revoking probation is inevitably fruitless. Probation revocation orders are affirmed nearly automatically by the Court of Criminal Appeals, regardless of the standard that is applied. This may be because there is very little guidance on how to apply the abuse of discretion standard in probation revocation appeals.

First, there is no dispute that a trial court's revocation decision is a discretionary one. Upon finding that a defendant violated his probation, "a trial court can: (1) order incarceration; (2) cause execution of the judgment as it was originally entered; (3) return the defendant to probation on appropriate modified conditions; or (4) extend the defendant's probationary period by up to two years." *State v. Felton*, No. M2014-02333-CCA-R3-CD, 2015 WL 4514996, at *3 (Tenn. Crim. App. July 27, 2015) (citing Tenn. Code Ann. §§ 40-35-308 (a), -308(c), -310, -311; *Hunter*, 1 S.W.3d at 648). The decision to revoke probation and

impose incarceration can involve partial revocation with a period of confinement for less than one year (“split confinement”), or it can involve full revocation with execution of the balance of the defendant’s original sentence (“total or full incarceration”).

Second, the trial court’s decision to revoke a defendant’s probation is “best tested by whether such an action would serve the ends of justice and be in the best interest of both the public and the defendant/appellant.” *State v. Giles*, No. E1999-02236-CCA-R3-CD, 2000 WL 1100329, at *3 (Tenn. Crim. App. July 31, 2000) (citing *State v. Mitchell*, 810 S.W.2d 733, 736 (Tenn. Crim. App. 1991)).

Beyond these considerations, however, there is currently no guidance on how (or even whether) a trial court may abuse its discretion when selecting a consequence from among the statutorily available options. The amorphous “ends of justice” and “best interest” tests, if cited at all, have done nothing to aid the Court of Criminal Appeals in determining whether a consequence of full revocation and total incarceration can ever be an abuse of the trial court’s discretion. In fact, to date, it appears that the intermediate appellate court has never reversed a trial court on this basis.⁴

⁴ Several Court of Criminal Appeals judges have recently commented during oral arguments that the court has *never* found an abuse of discretion when a trial court selects incarceration from among the available consequences for a probation violation. Aside from the reversal and remand in *Amonette*, 2002 WL 1987956—which was based on the trial court’s failure to put appropriate factual findings on the record—these anecdotal observations appear to be correct.

Because the Court of Criminal Appeals has never found an abuse of discretion in the second facet of the probation revocation process—and because the Court of Criminal Appeals often declines to review the second facet at all—trial courts in Tennessee have been given a presumption of infallibility when determining the appropriate consequence for a probation violation. This perceived infallibility does not square with a criminal defendant’s right to appeal from an order revoking probation, which is subject to the abuse of discretion standard of review. See *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (explaining that, although “[t]he abuse of discretion standard of review envisions a less rigorous review of the lower court’s decision,” it “does not . . . immunize [the] lower court’s decision from any meaningful appellate scrutiny”).

The presumption of infallibility and insulation from review that has emerged in probation revocation appeals is also inconsistent with the application of the abuse of discretion standard in other contexts. In sentencing appeals, for example, trial courts are afforded a presumption of reasonableness only if they place their findings and conclusions on the record. Even then, a trial court’s discretionary sentencing decision may be overturned if the court applied an incorrect legal standard, relied upon a clearly erroneous assessment of the facts, or caused an injustice to the complaining party.

As with any other discretionary decision reviewed on appeal, there must be standards for the Court of Criminal Appeals to apply to a trial court’s order revoking probation. Likewise, the trial court should be required to place its findings and reasoning on the record so the appellate court can assess whether the trial court’s selection of incarceration from

among the available alternatives is consistent with the facts and the law, serves the ends of justice, and is in the best interest of both the public and the defendant. *See Amonette*, 2002 WL 1987956, at *4 (reversing the trial court’s revocation order and remanding with instructions for the trial court to make the appropriate factual findings regarding the defendant’s amenability to rehabilitation, sincerity, believability, supportive family, and other individual facts of the case before ruling on “the defendant’s bid for further probation” rather than incarceration). Currently, however, no such requirements exist in probation revocation cases, and—despite case law acknowledging and sometimes applying the “true two-step analysis”—the Court of Criminal Appeals has largely refused to apply any meaningful standard of review to the consequence imposed by the trial court.

The effect of this lack of guidance for trial and appellate courts is apparent in Mr. Dagnan’s case, which resulted in a split decision. A majority of the Court of Criminal Appeals panel affirmed Mr. Dagnan’s revocation order on the basis of his violation and multiple prior failed attempts after reinstatement to probation. *Dagnan*, 2021 WL 289010, at *3. The concurring judge, however, affirmed on the basis of Mr. Dagnan’s violation alone, and expressed the opinion that a hearing on the consequence to be imposed was not statutorily required and thus not subject to review at all because there is no “second exercise of discretion.” *Id.* (Easter, J., concurring).

In summary, a criminal defendant’s right to appeal from an order revoking probation will always be a right without a remedy unless it includes the right to meaningful appellate review of the trial court’s

entire decision—the finding of a violation itself, which is often conceded at the revocation hearing, and the imposition of a consequence for that violation. This Court should grant review to clarify the scope of appellate review from an order revoking probation, and—if that review includes meaningful scrutiny of the consequence imposed—to provide criteria or factors to guide the trial court’s exercise of its discretion and the appellate court’s review of that discretionary decision.

III. The Court should grant this Rule 11 Application to supervise the role of Tennessee trial and appellate courts in reducing the state’s prison population, which is overburdened with probation violators.

One obvious resource for measuring a trial court’s discretion in probation revocation cases is the Interim Report published on December 19, 2019 by Tennessee’s Criminal Justice Investment Task Force (“CJITF”). The CJITF was chaired by Brandon Gibson, a Senior Advisor to Governor Bill Lee and former Court of Appeals Judge. Subcommittee chairs who contributed to the report include the Honorable John Campbell of the Shelby County Criminal Court; Tennessee Department of Correction Commissioner Tony Parker; Tennessee Department of Safety and Homeland Security Commissioner Jeff Long; Tennessee Department of Children’s Services Commissioner and former Shelby County Criminal Court Judge Jennifer Nichols; Deputy Counsel Clark Milner of the Office of the Governor; and Tennessee Department of Mental Health and Substance Abuse Services Commissioner Marie Williams. Criminal Justice Investment Task Force, Interim Report p. 4,

<https://www.tn.gov/content/dam/tn/governorsoffice-documents/governor-lee-documents/CJInvestmentTaskForceReport.pdf>.

The CJITF was formed to review “all aspects of Tennessee’s criminal justice system” because Tennessee’s incarceration rate was 10 percent above the national average, with a high recidivism rate, and “its communities [were] no safer for it.” *Id.* p. 5. Among other things, the Report includes recommendations for limiting periods of incarceration imposed as consequences for probation violations. The Report also includes recommendations relating to mental health and substance use disorders—two issues that too often plague probation violators who have not received the treatment they need.

To date, however, it does not appear that any Tennessee court has adopted, implemented, or otherwise considered the CJITF Report as part of its review in probation revocation cases—despite the fact that the discretionary revocation decision is “best tested by whether such an action would serve the ends of justice and be in the best interest of both the public and the defendant/appellant.” *Giles*, 2000 WL 1100329, at *3 (citing *Mitchell*, 810 S.W.2d at 736). There is no better measure—in fact, there is no other measure at all—against which a court may assess its decision as to whether a particular defendant needs to go to prison because all other efforts to curb recidivism have failed. Because case law provides no guidance on what constitutes an abuse of discretion in imposing punishment for a probation violation, this resource is the only litmus test to determine whether a court’s decision serves the interests of justice, the public, and the defendant.

Unless this Court grants review to exercise its supervisory authority over the judicial system in Tennessee, the trial and appellate courts will likely continue to ignore the CJITF's Interim Report because it does not yet carry the weight of law. This case thus presents an opportunity for the Court to consider whether the Report's statistical data and recommendations should play a role in probation revocation decisions, which would be a concrete step toward implementing the executive branch's criminal justice reform initiatives.

CONCLUSION

This Court should grant review of Mr. Dagnan's appeal to bring uniformity and clarity to the standard and scope of review in probation revocation cases, and to provide guidance for trial and appellate courts in deciding appropriate punishments for probation violations. In light of Judge Easter's concurring opinion, this case squarely presents the ever-widening split in the Court of Criminal Appeals as to how probation revocation cases are reviewed.

s/ Brennan M. Wingerter

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Rule 11 Application consists of 6613 words and complies with the requirements set forth in Section 3, Rule 3.02 of Tennessee Supreme Court Rule 46.

I further certify that the Tennessee Attorney General's Office (c/o Benjamin A. Ball, ben.ball@ag.tn.gov) is a registered user of the e-filing system and will automatically receive electronic service of this document pursuant to Section 4, Rule 4.01 of Tennessee Supreme Court Rule 46.

s/ Brennan M. Wingerter

Brennan M. Wingerter
Assistant Public Defender
Appellate Director

APPENDIX

Copies of the Court of Criminal Appeals' majority and concurring opinions are appended to this Application as required by Rule 11(b) of the Tennessee Rules of Appellate Procedure.

APPENDICES INTENTIONALLY OMITTED
FOR SUBMISSION OF WRITING SAMPLE

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE**

STATE OF TENNESSEE,

Appellee,

v.

ANTHONY JARED ROSS,

Appellant.

No. E2023-00381-CCA-R3-CD

Judge Rex H. Ogle

Trial # 22-CR-698

**ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE SEVIER COUNTY CIRCUIT COURT**

**PRINCIPAL BRIEF OF APPELLANT,
ANTHONY JARED ROSS**

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ORAL ARGUMENT REQUESTED

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Tenn. Code Ann. § 40-35-210 12, 16

STATEMENT OF THE ISSUES

- I. Tennessee law requires the preparation of a presentence report, including a Strong-R validated risk and needs assessment, before a defendant is sentenced for a felony conviction. At Mr. Ross's sentencing hearing, the State submitted a presentence report that lacked the Strong-R assessment, which would have been highly relevant to the trial court's determination of the length and manner of service of Mr. Ross's sentence. Did the trial court err in sentencing Mr. Ross to serve nine years in prison without receiving or considering the statutorily mandated Strong-R assessment?

- II. If the lack of a Strong-R validated risk and needs assessment is not reversible error in itself, did the trial court err when it denied Mr. Ross's request for an alternative sentence of split confinement followed by rehabilitative treatment for his drug addiction?

STATEMENT OF THE CASE

Anthony Jared Ross, the Appellant, was indicted in Sevier County for one count of carjacking and one count of theft over \$10,000. (I: 13–14.) On December 8, 2022, Mr. Ross pleaded guilty to carjacking, a Class B felony. (I: 15–16.)¹ Mr. Ross’s plea agreement noted that he faced sentencing between 8 and 12 years as a Range I Offender, and that, by statute, his “parole release eligibility date is 75%.” (I: 16.) The plea agreement left the “[l]ength, method and manner of [service] to be determined by the [trial] [c]ourt at a sentencing hearing.” (I: 16.)

At the conclusion of Mr. Ross’s guilty plea hearing, the trial court accepted the plea agreement, “order[ed] a presentence investigation,” and scheduled a sentencing hearing. (II: 19.) The sentencing hearing was held on February 22, 2023. (III.) At the conclusion of the hearing, the trial court ordered Mr. Ross to serve a nine-year sentence of incarceration and to pay \$500 in restitution. (III: 26–27, 29.) The trial court further noted that Mr. Ross’s earliest eligibility for release onto parole would not occur until November 16, 2028. (III: 27–28.)

The trial court’s final judgments were filed on February 22, 2023, and Mr. Ross timely filed his notice of appeal in this Court on March 14, 2023. (I: 30–36.)

¹ The theft charge appears to have merged into the carjacking conviction, but no conviction or other disposition was entered for the theft charge when the judgments were filed. (I: 30–33.) The plea agreement also does not indicate how the theft charge was disposed. (I: 15–16.) At the plea hearing, the State told the trial court that Mr. Ross was pleading guilty to “[j]ust the carjacking.” (II: 18.)

STATEMENT OF THE FACTS

The facts of this case were recited quite simply by the State during Mr. Ross's guilty plea hearing:

Your Honor, the facts of this case would show that if we would have gone to trial, that on February 4th of 2022, Ms. Trentham and her boyfriend had stopped at the Pilot at 1257 on the Parkway here in Sevier County. The boyfriend got out, who was driving, and went into the gas station. This defendant, who there was [sic] at the gas station, entered the vehicle while Ms. Trentham was still in the vehicle. It was her vehicle. He told her to get out of the car. He said, "Get the F out of the car now, I'm not playing."

She left the car. He took off in the car, and they reported it to law enforcement.

He was picked up shortly after in Monroe County by the Tennessee Highway Patrol in the vehicle. And this was captured on the video surveillance.

(II: 17–18.) Based on this recitation of the facts, the trial court adjudicated Mr. Ross guilty of one count of carjacking, a Class B felony carrying a mandatory release eligibility of 75%. (I: 15–16; II: 18–19; III: 27–28.)

At Mr. Ross's sentencing hearing, the State did not call any witnesses but submitted a presentence report and a criminal history report. (I: 17–29.) Mr. Ross's mother testified about his criminal record, his history of drug addiction, and the efforts he had made during short-term periods of sobriety and rehabilitation. (III: 9–16.) Mr. Ross also testified at the sentencing hearing (III: 17–21), including an apology:

I want to apologize to the Court and to the community. I really wanted to say I'm sorry to the victim, but she's not here. I made a terrible mistake, and I wish there was -- there's no

justifying what I did. You know, it was wrong. It was wrong. I could say, you know, I was scared. I was calling and wanting to get back home and I was trying to get high. Which all that's true but it still doesn't make it right, to me. I just think, you know, maybe I needed just a little bit more help.

Right now, I've been locked up for a year, and that's the longest -- I've been a year clean for the whole time that I've been locked up, and that's the longest that I've been sober in a long time. So I've got a good jump start on it, but I think I just need some more rehabilitation, to be honest. And I don't know, I just apologize for all this.

(III: 18.)

The State requested a 10-year sentence to be “serve[d] . . . in the penitentiary.” (III: 23–24.) According to the State, Mr. Ross was “a danger to the community” because he would “rather have the drugs,” and “his own family, although good intentioned, [was] not going to be able to deal with [his] . . . drug issue.” (III: 24.) During its argument, the State appears to have relied on enhancement factors 1 (criminal history), 3 (more than one victim), and 8 (prior violations of release into the community). (III: 22–24.) *See* Tenn. Code Ann. § 40-35-114. No written enhancement factors were filed with the trial court clerk or made an exhibit at the sentencing hearing. (*See* I, III.)

Mr. Ross did not argue for a particular sentence length but requested that the trial court impose split confinement with “the opportunity to show that he is capable of rehabilitation” by going to “a sober living house or some sort of continued treatment to ensure that he stays on the path that he’s already on.” (III: 25.) By the time of the

sentencing hearing, Mr. Ross had been incarcerated for about a year, which was “the longest that [he’d] been sober in a long time.” (III: 18.)

After hearing these arguments, the trial court first stated “that the enhancement factors that have been filed by the State have been shown by the record,” and then ruled “that a sentence of nine years is appropriate” “based upon the totality of the evidence and the enhancement factors that the [c]ourt has heard.” (III: 26.) Regarding the manner of service of the sentence, the trial court ruled:

[T]he [c]ourt thinks, based upon all the facts and circumstances of this case, the high risk of harm to the victims in this case, there was more than one victim, and he was on - - he’s been on probation and that didn’t work, he’s had violations of probation and the [c]ourt just thinks that based upon all the facts and the totality of the circumstances that it would depreciate the seriousness of this offense and the facts of this particular case if he did not execute the sentence. And, therefore, the [c]ourt orders the nine-year sentence to be executed.

(III: 26–27.) After discussing Mr. Ross’s release eligibility, the trial court added, at the very end of the hearing: “And as part of the findings, the [c]ourt also did consider the victim impact statement, the fact that the young lady suffers from post traumatic stress disorder and has had to attempt to get counseling in this case.” (III: 29.) Although the presentence report indicated that any victim impact statements would be submitted to the court as an addendum, no such addendum appears in the record, and no such statement was made an exhibit at the sentencing hearing. (I: 21; *see* III.) The victim also did not testify at the sentencing hearing. (III: 7.)

STANDARD OF REVIEW

Sentences imposed by a trial court that are within the appropriate statutory range and based upon the purposes and principles of sentencing are reviewed under “an abuse of discretion standard with a ‘presumption of reasonableness.’” *State v. Bise*, 380 S.W.3d 682, 707–09 (Tenn. 2012). The same standard of review applies for “questions related to probation or any other alternative sentence.” *State v. Trent*, No. E2018-02239-CCA-R3-CD, 2020 WL 1899610, at *11 (Tenn. Crim. App. Apr. 17, 2020) (citing *State v. Caudle*, 388 S.W.3d 273, 278–79 (Tenn. 2012)).

“A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.” *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010). The abuse of discretion standard, while deferential to the trial court, “does not . . . immunize [the] court’s decision from . . . meaningful appellate scrutiny.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)).

ARGUMENT

The trial court's order of nine years' incarceration was based on incorrect legal standards and an erroneous assessment of the proof because no Strong-R assessment was completed or provided for the court's consideration. As a result, the trial court did not have all the information it was statutorily required to consider before determining the length and manner of service of Mr. Ross's felony sentence. Mr. Ross's judgments should therefore be reversed, and this Court should remand for a new sentencing hearing following the completion of a presentence report that includes a Strong-R validated risk and needs assessment. In the alternative, if this Court does not remand due to the lack of the mandatory Strong-R assessment, the judgments still should be reversed because the trial court's sentencing decision is not supported by the record or the purposes and principles of sentencing.

I. This case must be remanded for a new sentencing hearing because the Strong-R assessment was not prepared as part of the presentence report.

Before imposing any type of sentence, a trial court must consider, at a minimum:

(1) The evidence, if any, received at the trial and the sentencing hearing; (2) ***The presentence report***; (3) The principles of sentencing and arguments as to sentencing alternatives; (4) The nature and characteristics of the criminal conduct involved; (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ [40-35-113](#) and [40-35-114](#); (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in

Tennessee; (7) Any statement the defendant wishes to make on the defendant’s own behalf about sentencing; *and* (8) ***The result of the validated risk and needs assessment . . . contained in the presentence report.***

Tenn. Code Ann. § 40-35-210(b) (emphasis added). “A sentence *must* be based on evidence in the record of the trial, the sentencing hearing, ***the presentence report, the validated risk and needs assessment,*** and the record of prior felony convictions” *Id.* § 40-35-210(f) (emphasis added).

It is mandatory that a presentence report be prepared after a defendant is found guilty of a felony. *Id.* § 40-35-205 (mandating that a trial court “***shall***, in the case of a felony . . . direct the presentence service officer to make a presentence investigation and report” (emphasis added)). Although there is a minor exception to this rule for sentences that are fully agreed upon in every aspect, “[t]here ***shall be a presentence report*** and hearing ***on any issue of sentencing not agreed upon*** by the parties and accepted by the court.” *Id.* § 40-35-203(b) (emphasis added). The presentence report, along with the validated risk and needs assessment contained in the report, are two of the eight factors that a trial court must consider when determining the defendant’s sentence. *Id.* § 40-35-210(b).

This Court has held that the failure to prepare a comprehensive presentence report is reversible error that requires a remand for resentencing in felony cases. *State v. Rice*, 973 S.W.2d 639, 642 (Tenn. Crim. App. 1997); *see also State v. Anderson*, No. E2019-01156-CCA-R3-CD, 2021 WL 98914, at *4 (Tenn. Crim. App. Jan. 12, 2021), *no perm.*

app. filed; State v. Marshall, No. W2012-01011-CCA-R3-CD, 2013 WL 257050, at *3–4 (Tenn. Crim. App. Jan. 23, 2013). Moreover, the requirement of a presentence report is not waivable because the report “allows the [trial] court to follow the sentencing principles required under [Tennessee law] and is necessary for appellate review.” *Marshall*, 2013 WL 257050, at *4.

Here, a presentence report was provided to the trial court, but it was incomplete. A presentence report “shall” include:

- (1) The characteristics and circumstances of the offense committed by the defendant;
- (2) The defendant’s physical and mental history and condition, family history and background, education, occupation and personal habits;
- (3) Information relating to enhancement or mitigating factors asserted by the parties and its source;
- (4) The defendant’s record of prior convictions, including any juvenile court findings or adjudications that the defendant committed an act as a juvenile that would constitute a Class A or Class B felony if committed by an adult;
- (5) Information relating to any enhancement or mitigating factors that may affect the sentence imposed although not asserted by the parties and the source from which the information was obtained;
- (6) ***If a sentence not involving confinement is likely or is sought by an eligible defendant, information to assist the court in deciding whether to grant probation and in imposing conditions for any probation supervision that may be ordered, including the nature and extent of programs and resources available to assist in rehabilitation of the defendant;***

(7) If requested by the court, information to assist the court in imposing a fine or restitution, including the financial resources of the defendant, the financial needs of the defendant's dependents and the gain derived from or loss caused by the criminal activity;

(8) Any statement relating to sentencing submitted by the victim of the offense or the investigative agency;

(9) ***Information to assist the court in deciding whether to sentence an eligible defendant to an available and appropriate community-based alternative to incarceration as provided in chapter 36 of this title and in imposing the terms and conditions for any such sentence;***

(10) ***The results of the validated risk and needs assessment;*** and

(11) Any other matters the court directs to be included.

Tenn. Code Ann. § [40-35-207](#)(a) (emphasis added); *see also Anderson*, 2021 WL 98914, at *4 (reversing and remanding for a new sentencing hearing because the “specific data report” prepared in that case did not include all the content that is statutorily required for a presentence report).

The presentence report that the State submitted at Mr. Ross's sentencing hearing does not include all the information that is required to be included in a presentence report. Most importantly, the presentence report does not include a Strong-R validated risk and needs assessment. (See I: 17–27.) A “validated risk and needs assessment” is “a determination of a person's risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool . . . that assesses the dynamic and static factors that

drive criminal behavior.” *Id.* § 40-35-207(d). This research-based assessment tool is critical to identifying defendants who may have a lower risk of reoffending if certain needs are addressed—which is directly relevant to determining whether someone is an appropriate candidate for alternative sentencing, particularly through treatment-based resources in the community.

At Mr. Ross’s sentencing hearing, a significant portion of the testimony and arguments of counsel all related to Mr. Ross’s history of struggling with drug addiction and needing rehabilitative treatment to address the underlying factors driving his criminal behavior. (III: 10, 13–21, 23–24, 25–26.) Therefore, a validated risk and needs assessment was not only statutorily required, but it was also directly relevant and crucial to this case. Because a Strong-R assessment was not prepared, its absence directly undermined the trial court’s ability to apply the purposes and principles of sentencing before ordering Mr. Ross to serve nine years in prison.

As a matter of law, the trial court’s judgments must be reversed, and the case must be remanded for a new sentencing hearing following the completion of a presentence report that includes the requisite Strong-R validated risk and needs assessment.

II. The trial court’s order of nine years’ incarceration is not supported by the record or by the purposes and principles of sentencing.

It is impossible for a trial court to consider the purposes and principles of sentencing for a felony offense without an accurate and comprehensive presentence report. *See* Tenn. Code Ann. §§ 40-35-

203, -205, -207, -210; *Anderson*, 2021 WL 98914, at *4; *Marshall*, 2013 WL 257050, at *4. But even if this Court does not remand for a new sentencing hearing based solely on the lack of the mandatory Strong-R validated risk and needs assessment, the judgments should still be reversed because the record does not support the trial court’s decision to order Mr. Ross’s entire nine-year sentence to be served in confinement.

Before granting or denying an alternative sentence, the “trial court must consider (1) the defendant’s amenability to correction, (2) the circumstances of the offense, (3) the defendant’s criminal record, (4) the defendant’s social history, (5) the defendant’s physical and mental health, and (6) the deterrence value to the defendant and others.” *Trent*, 2020 WL 1899610, at *11 (citing *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (concluding that the same factors used to determine whether to impose judicial diversion are applicable in determining whether to impose probation)); see also *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). “[A] defendant’s criminal history is a critical factor to consider in evaluating his or her amenability to correction” and is one of the most relevant factors to a defendant’s potential for rehabilitation. *State v. Thompson*, 189 S.W.3d 260, 266–67 (Tenn. Crim. App. 2005). Courts should also consider a defendant’s remorse and acceptance of responsibility. See, e.g., *State v. Taylor*, No. M2015-02142-CCA-R3-CD, 2017 WL 2179952, at *13 (Tenn. Crim. App. May 16, 2017).

When considering alternative sentences, trial courts may order “[a] community-based alternative to incarceration as a condition of probation, such as participation in a day reporting center program, a recovery and treatment program, or another appropriate community-based program.” Tenn. Code Ann. § 40-35-104(c)(9). “The potential or lack of potential for the rehabilitation or treatment of the defendant should [also] be considered in determining the sentence alternative . . . to be imposed.” *Id.* § 40-35-103(5).

If, after considering all the evidence, the trial court rejects alternative sentencing options, the court’s decision to impose a sentence involving incarceration must be based upon at least one of the following circumstances:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense, or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the Defendant[.]

Id. § 40-35-103(1). “In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.” *Id.* § 40-35-102(5).

In this case, the trial court’s decision to impose a sentence of nine years’ incarceration is not supported by the record or the purposes and principles of sentencing. As an initial matter, the trial court erred by finding that “the enhancement factors that have been filed by the State have been shown by the record.” (III: 26.) No enhancement factors were “filed by the State.” (*See* I, III.) In any event, two of the three enhancement factors argued by the State at the sentencing hearing are not supported by the record, and a fourth enhancement factor applied by the trial court *sua sponte* was also in error.

First, although Mr. Ross’s criminal history report includes some serious charges, the only prior dispositions identified in the record were for following too closely, a violation of probation, a bond revocation, two convictions for possession of controlled substances, violations of the seatbelt law and financial responsibility law, reckless driving, public drunkenness, and failure to comply with requests of an officer. (I: 28–29.) The more serious charges that were emphasized by the State and trial court in this case, however—aggravated assault, evading arrest, and aggravated robbery—are listed only as “disposition unknown” in Mr. Ross’s criminal history report. (I: 28–29; III: 6, 14–15, 21–22.) In addition, Mr. Ross and his mother both stated that they were unaware of any arrest or charge for aggravated robbery. (III: 6, 10, 14.) Mr. Ross further testified that most of his charges had been dismissed, and that his only prior Tennessee conviction “should be the simple possession.” (III: 6, 21.) The State, by failing to include anything beyond the ineffectual criminal history report, failed to prove that Mr. Ross had an extensive criminal record and failed to prove that Mr. Ross had been convicted of

any serious or violent offenses. Therefore, the trial court erred in the extent to which it weighed Mr. Ross's criminal history against him as enhancement factor 1.

Second, the trial court erred in applying enhancement factor 3 because there was only one victim involved in the carjacking offense. To support the application of this enhancement factor, the State's theory was that "[t]his car was owned by the mother and had damage. The car was in the possession of the daughter, who was the victim of the carjacking. So there's two victims in it." (III: 23.) But the mother's ownership of the car and any damage it sustained related to the theft charge, and Mr. Ross was not convicted of theft. (I: 15–16, 30–33; II: 18.) And even if Mr. Ross had been convicted of theft, the mother's alleged victimization through the theft and damage to the car was irrelevant to the daughter's victimization through the carjacking. Regarding the carjacking offense to which Mr. Ross pleaded guilty, only the daughter who was in possession of the car at the time was a victim. The trial court therefore erred when it found that there was more than one victim in this case, and this factor should not have been used either to enhance Mr. Ross's sentence or to deny an alternative sentence. (III: 27.)

Third, the trial court erred in applying enhancement factor 10, which was neither relied upon by the State nor established by the proof in the record. *See* Tenn. Code Ann. § 40-35-114(10) ("The defendant had no hesitation about committing a crime when the risk to human life was high."). As an initial matter, this enhancement factor is supposed to be applied only when there is "some evidence of an actual risk to individuals *other than the victim.*" *State v. Dinguss*, No. E2020-01459-CCA-R3-

CD, 2021 WL 3418842, at *3 (Tenn. Crim. App. Aug. 5, 2021) (emphasis added) (citing *Trent*, 533 S.W.3d at 294). Thus, the trial court’s application of this enhancement factor to the victim in this case was error. Moreover, contrary to the trial court’s finding that there was a “high risk of harm to the victims in this case,” there was no proof that Mr. Ross ever had a weapon or that he ever used any force or violence to take the car. He did not threaten harm to the victim aside from sternly ordering her to get out of the car, which she promptly did. (II: 17–18.) Therefore, the trial court erred when it found that “the high risk of harm to the victims in this case” justified the denial of alternative sentencing options. (III: 26–27.)

Fourth, the circumstances of the offense, as committed in this case, are not reflected in the trial court’s ruling. The State’s summation of the proof at the plea hearing was relatively mundane. (II: 17–18.) There was no proof or even an allegation that Mr. Ross possessed any kind of weapon at any time during this incident. There was also no proof or even an allegation that Mr. Ross used any amount of force or violence to commit this offense. And yet the trial court, at the sentencing hearing, focused on much more serious and dangerous circumstances existing in *other* carjacking cases it had “read about”:

I mean, these cases can, *by the facts of the particular case*, involve a high risk of death or serious bodily injury to people. And they scare people. You know, we read about -- *and it obviously doesn’t apply here*, but we read about people, you know, stopping at ATMs and getting out -- or trying to get money and people sitting there or watching them or surveilling them *and robbing or even killing people*. I’ve read cases in the state of Tennessee where that’s happened.

(III: 26 (emphasis added).) The trial court erred by focusing on such dangerous circumstances from other cases that “obviously [did not] apply” to the circumstances of the offense as committed in this case. (III: 26.) By the trial court’s own admission, a sentence of incarceration was neither appropriate as a deterrence nor necessary to avoid depreciating the seriousness of the offense in this case.

Finally, the trial court’s ruling does not account for Mr. Ross’s acceptance of responsibility through his guilty plea nor his genuine remorse and apology at the sentencing hearing. When asked if there was anything he wanted to tell the trial court for it to consider in sentencing, Mr. Ross replied:

Just that, you know, I want to apologize to the Court and to the community. I really wanted to say I’m sorry to the victim, but she’s not here. I made a terrible mistake, and I wish there was -- there’s no justifying what I did. You know, it was wrong. It was wrong. I could say, you know, I was scared. I was calling and wanting to get back home and I was trying to get high. Which all that’s true but it still doesn’t make it right, to me. I just think, you know, maybe I needed just a little bit more help.

Right now, I’ve been locked up for a year, and that’s the longest -- I’ve been a year clean for the whole time that I’ve been locked up, and that’s the longest that I’ve been sober in a long time. So I’ve got a good jump start on it, but I think I just need some more rehabilitation, to be honest. And I don’t know, I just apologize for all this.

(III: 18.) The trial court did not discredit Mr. Ross but instead appears to have simply disregarded or overlooked his apology altogether.

In summary, the trial court’s sentencing decision was based on incorrect legal standards and an erroneous assessment of the proof. All of the enhancement factors were applied in error, and the circumstances of this case do not warrant a nine-year sentence of incarceration with the earliest possible release eligibility not occurring until November 2028. Mr. Ross’s amenability to correction and desire for long-term drug rehabilitation further support an alternative sentence.

CONCLUSION

For all the above reasons, this Court should reverse the trial court’s judgments and remand Mr. Ross’s case for a new sentencing hearing following the completion and submission of a Strong-R validated risk and needs assessment, as required by Tennessee’s felony sentencing statutes.

s/ Brennan M. Wingerter

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief consists of 4691 words and complies with the requirements set forth in Section 3, Rule 3.02 of Tennessee Supreme Court Rule 46.

I further certify that the Tennessee Attorney General's Office (c/o Katherine C. Redding, katherine.redding@ag.tn.gov) is a registered user of the e-filing system and will automatically receive electronic service of this document pursuant to Section 4, Rule 4.01 of Tennessee Supreme Court Rule 46.

s/ Brennan M. Wingerter

Brennan M. Wingerter
Assistant Public Defender
Appellate Director

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE**

STATE OF TENNESSEE,

Appellee,

v.

CARL RECTOR GREENE,

Appellant.

No. E2019-01877-CCA-R3-CD

**Hon. John F. Dugger, Jr.
Trial # 18-CR-363**

**ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE HAMBLLEN COUNTY CRIMINAL COURT**

**PRINCIPAL BRIEF OF APPELLANT,
CARL RECTOR GREENE**

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STATEMENT OF THE ISSUES

- I. Whether the trial court erred by setting a contingent restitution award without consideration of Appellant's present and future ability to pay.

- II. Whether the trial court erred by denying full probation on Appellant's Range I sentence for a nonviolent theft offense involving an estate.

STATEMENT OF THE CASE

On May 30, 2019, Appellant Carl Rector Greene pleaded guilty as charged to one count of theft over \$60,000, a Class B felony. (I: 1, 9–10, 60; II: 3–12.) The victim of the theft was the Estate of Kyle Judge Greene. (I: 1.) As a Range I Standard Offender, Mr. Greene faced a sentence range of 8 to 12 years, with length, manner of service, and restitution to be determined by the trial court. (I: 9–10; II: 5, 10–11.)

The trial court allowed some testimony regarding sentencing and restitution to be heard at the plea hearing on May 30, 2019, but then accepted Mr. Greene’s plea and reserved its decision on sentencing until July 12, 2019. (II: 28–31). The July hearing was later continued to September 30, 2019. (I: 4; III.)

At the September hearing, the trial court sentenced Mr. Greene to nine years, with 365 days to be served in confinement, followed by Community Corrections supervision for eight years. (III: 52–54.) The trial court also set restitution at \$83,457.60, but ordered that this amount may be reduced if the estate beneficiary is able to recover funds from another source. (I: 61; III: 53–56.)

The trial court entered its final judgment on September 30, 2019, and Mr. Greene timely appealed. (I: 60–61, 77.)

STATEMENT OF THE FACTS

At the time of his plea to a nonviolent theft charge, Mr. Greene was 76 years old and had only a few minor driving offenses on his record. (I: 12; May Ex. 2 at 1, 7–8; III: 50–51.)¹

A. Plea Hearing and Initial Proceedings

The facts presented by the prosecutor at the plea hearing were straightforward:

Carl Greene established an account at Home Trust Bank, Morristown, Tennessee. The account was named “Kyle Judge Greene Estate. Carl R. Greene, Administrator.” From the initial deposits deposited into the account there was \$101,394.02. On January 4, 2016, the account was closed by a final cash withdrawal of \$569.40.

....

Between October 7, 2014, and January 4th, 2016, Carl R. Greene spent \$34,836.42 on the estate matters[,] leaving a deficit of \$66,957.60 spent on non-estate matters. Mr. Greene also collected rent money in the amount [of] \$16,000 that belonged to the estate. The total loss to the Kyle Judge Greene estate was \$83,457.60.

(II: 13.) The record includes a detailed “Numbers Adjustment” that shows how the State reached the total calculated loss of \$83,457.60 and how much of the estate money had been spent by Mr. Greene for personal use. (May Ex. 4.)

¹ The record includes two volumes of exhibits, but neither volume is numbered. The exhibit index for May 30, 2019—the exhibits introduced during the plea hearing—will be cited as “May Ex. __.” The exhibit index for September 30, 2019—the exhibits introduced during the sentencing hearing—will be cited as “Sept. Ex. __.”

The trial court, however, insisted on getting “some more facts” about the connection between Mr. Greene and the Kyle Judge Greene Estate, the State’s investigation of the case, “the facts, the relationship, just everything [the State’s investigator] found out about this.” (II: 13–14.) Recognizing that its request was “kind of spur of the moment,” the trial court—not the prosecutor—conducted a direct examination of the State’s investigator. (II: 14–21.)

Eventually, the trial court accepted Mr. Greene’s plea but reserved its sentencing decision because it had “a lot of unanswered questions.” (II: 24, 28.) Rather than acknowledge the State’s burden to provide the factual basis for the offense, the trial court put the burden on defense counsel to talk to Mr. Greene and provide more information about the case. (II: 23, 25–27.) Specifically, the trial court insisted on knowing how Mr. Greene had obtained legal authorization to set up a bank account for the estate, how the probate proceedings had transpired, and how Mr. Greene had spent the money from the estate’s bank account. (II: 15–17, 24–25, 28.) Defense counsel reiterated several times that some of the money had been used by Mr. Greene for personal expenses and that none of the estate money remained available for restitution. (II: 21, 25.) The trial court acknowledged that the amount of restitution was in dispute but asked how Mr. Greene would pay the amount, whatever it may be. (II: 27.) Defense counsel responded that the court should “set [restitution] at an amount that [Mr. Greene] could afford” and informed the court that Mr. Greene was “prepared to show the affidavits as to his assets. That’s what the law contends must be done in this type of case.” (II: 27.)

The trial court did not determine what amount, if any, Mr. Greene could pay, and instead *sua sponte* continued the case until July. (II: 28.) The July hearing was later continued upon motion by Mr. Greene because the beneficiary of the victim estate was “in active litigation with the insurance company that . . . Mr. Greene contracted with for a bond when setting up the . . . estate.” (I: 4.) In that motion, Mr. Greene admitted that the loss to the estate was \$66,957.60—the deficit calculated by the State but not including the additional \$16,000 allegedly collected in rent payments. (I: 4; *see also* II: 27; III: 13.) Mr. Greene also recognized that the ongoing civil litigation on the bond would reduce his potential restitution responsibility by a significant amount because the beneficiary of the estate would likely recover \$60,000 from the bonding company. (I: 4.)

B. Sentencing Hearing with Testimony and Exhibits

The sentencing hearing was finally held on September 30, 2019. (III.) By that time, Mr. Greene was 77 years old, and the outcome of the estate beneficiary’s civil suit on the bond was still unknown. (III: 9, 12, 41; Sept. Ex. 1 at 1.) At the September hearing, the trial court continued to insist on knowing “where [the money] went.” (III: 55.) Defense counsel submitted Mr. Greene’s affidavit of income and property showing that he does not have any assets. (III: 34–36; Sept. Ex. 5.) The presentence report likewise reflects Mr. Greene’s poor financial situation: he is retired, he lives alone in a rented trailer, he draws Social Security, and he does not own a vehicle. (Sept. Ex. 1 at 10–12.)

Defense counsel also reported that he had met with Mr. Greene as ordered by the court after the plea hearing, and that Mr. Greene, who suffers from dementia, had “sworn an affidavit to the best of his recollection as to where [the estate] money went to.” (III: 33–34; Sept. Ex. 4.) In that affidavit, Mr. Greene detailed twelve expenses that he could recall to the best of his ability. (Sept. Ex. 4, ¶ 5.) He also swore that “Kyle J. Greene told me on his deathbed that I could have all his property.” (Sept. Ex. 4, ¶ 6.) Finally, Mr. Greene apologized for the trouble he had caused and acknowledged that, despite Kyle Judge Greene’s telling him that he could have all the property, he did not have a legal defense in his theft case because there was a will giving the estate property to Kyle Judge Greene’s daughter. (Sept. Ex. 4, ¶¶ 7–8.)

Kyle Judge Greene’s estranged daughter, the beneficiary of the estate, testified at Mr. Greene’s September sentencing hearing. (III: 37–46.) Although the beneficiary claimed to be “devastated” by the loss of everything from the estate, leaving her with nothing of financial or sentimental value, she admitted that she “didn’t know anything about [her] father.” (III: 38, 41, 42.) During the 21 years that the beneficiary lived out of state, she was in contact with her family only “[o]ccasionally.” (III: 42.) She was unaware that her father had gone into a nursing home. (III: 42.) She did not attend her mother’s funeral. (III: 42–43.) She did not attend her father’s funeral. (III: 43.) In fact, the beneficiary did not even know that her father had died until she returned to her hometown, “started calling around the court systems,” and learned that he was deceased and that his estate had been “turned over to an attorney.” (III: 44–45.) At that point, the beneficiary suddenly became “worried about

[her parents] because [she] knew they had stuff . . . [and] knew they had a will.” (III: 45.)

Consistent with the beneficiary’s investigation, the record includes the “Petition for Probate of Will” that was filed by Mr. Greene with the assistance of counsel in the Hamblen County Chancery Court on October 3, 2014. (Sept. Ex. 3.) According to the beneficiary, neither Mr. Greene nor his attorney in the probate case were aware that a prior will existed, and Mr. Greene and his attorney had been in the process of setting up a new will at the time of Kyle Judge Greene’s death. (III: 45.)

C. Trial Court’s Ruling on Sentencing and Restitution

Mr. Greene requested that his “sentence be set at a minimum and [that] he be sentenced to an alternative form of probation considering his health conditions and it’s a property offense and . . . [he] at least made an attempt to comply with the probate rules although he was not successful” in doing so. (III: 14–15; Sept. Ex. 2.) Mr. Greene specifically argued for the application of two mitigating factors. (III: 13–14.) The State admitted that no enhancement factors applied. (III: 16.) Nevertheless, after applying one mitigating factor and two enhancement factors, and giving “great weight” to its finding that Mr. Greene had “abused a position of trust,” the trial court ordered Mr. Greene to serve a nine-year sentence. (III: 47–52.) The court then explained that the sentence would be “a split-confinement sentence,” ordering Mr. Greene to “serve 365 days, one year,” and then putting Mr. Greene “on house arrest, community corrections, for the next eight years.” (III: 52–53.)

In ordering Mr. Greene to serve 365 days in confinement, the trial court relied upon two findings: (1) that confinement was necessary to avoid depreciating the seriousness of the offense, and (2) that confinement was necessary to deter others likely to commit similar offenses. (III: 49, 52.) The trial court’s ruling in this regard depended entirely upon two facts: (1) that Mr. Greene had been entrusted to administer an estate, and (2) that the beneficiary of the estate had been deprived of her inheritance. (III: 49–50, 52.) The trial court emphasized these same two facts throughout its ruling at the sentencing hearing. (III: 49–53.) In addition, the trial court noted the presentence report, Mr. Greene’s physical condition and age, his medical records and social history, the facts and circumstances of the offense, and Mr. Greene’s lack of prior criminal history. (III: 50–51.) While many of these factors weighed in favor of a sentence of full probation, the trial court ordered split confinement after repeatedly giving “great weight” to the same two facts: that Mr. Greene was a fiduciary to the estate and that the estranged beneficiary had lost her inheritance. (III: 50–53.)

The trial court then addressed the amount of restitution. (III: 53–56.) Despite the fact that defense counsel had filed a well-researched motion explaining all the trial court’s duties regarding restitution awards, the court referenced only one case, *State v. Burkes*, No. E2017-00079-CCA-R3-CD, 2018 WL 2194013 (Tenn. Crim. App. May 14, 2018), which it dismissed out of hand: “And he cites some case law and says, ‘It’s paramount that restitution be reasonable,’ in one case that he says that it be reasonable. Well, what’s reasonable when you lost your entire inheritance?” (III: 53; *see also* I: 40–41.) The trial court further

distinguished *Burkes* based on the irrelevant fact that the victim in that case was the Department of Revenue. (III: 54.) The trial court then praised the State’s investigator in this case for his “excellent job documenting everything.” (III: 53.) Although Mr. Greene was willing to stipulate to a loss amount of \$66,957.60, the trial court accepted the investigator’s total loss calculation of \$83,457.60 and set restitution at that amount. (I: 4; III: 53.)

When the prosecutor asked whether the court would set a minimum monthly payment on the restitution, the trial court replied, “After he -- when he’s released. But all of that is subject to change based on the . . . civil lawsuit and that it may turn out to be [\$]23,000 over the remaining time. Right now that is contingent.” (III: 55.) The trial court acknowledged that its contingent restitution award was “going to make this a little bit unusual” because the restitution was set at \$83,457.60, “but if [the victim] collects 60 from the bond that’s going to be reduced by court order to be \$23,457.60 that [Mr. Greene’s] got to pay.” (III: 55.)

The trial court then went on to reiterate its frustration with not knowing where the money had gone, apparently ignoring the two affidavits and the presentence report, which indicated that Mr. Greene was indigent and could pay only about \$100 a month toward restitution. (III: 35–36, 55–56; Sept. Exs. 1, 4, 5.) Without making any findings as to Mr. Greene’s ability to pay some amount, and without establishing any form of payment schedule, the trial court entered a final judgment setting restitution at \$83,457.60 but noting in the special conditions box that the restitution would be reduced if the beneficiary of the estate was able to recover funds from the bonding company. (I: 60–61.)

Mr. Greene now appeals the trial court's judgment with regard to the contingent restitution award and the manner of service of his sentence.

STANDARD OF REVIEW

“Any sentence that does not involve complete confinement is an alternative sentence.” *State v. Dotson*, No. M2018-00657-CCA-R3-CD, 2019 WL 3763970, at *10 (Tenn. Crim. App. Aug. 9, 2019) (citing *State v. Fields*, 40 S.W.3d 435 (Tenn. 2001)). Payment of restitution and sentences of split confinement are specifically identified as alternative sentencing options. [Tenn. Code Ann. § 40-35-104\(c\)\(2\)–\(4\)](#). Similar to probation, a Community Corrections sentence is also an available alternative for eligible defendants who meet specific criteria for avoiding incarceration in a correctional institution. See [Tenn. Code Ann. § 40-36-106](#); *State v. Anderson*, 7 S.W.3d 100, 103 (Tenn. Crim. App. 1999) (acknowledging that Community Corrections is sufficiently similar to probation for purposes of the standard of review on appeal).

“The standard of review for questions related to probation or any other alternative sentence is an abuse of discretion with a presumption of reasonableness.” *State v. Trent*, No. E2018-02239-CCA-R3-CD, 2020 WL 1899610, at *11 (Tenn. Crim. App. Apr. 17, 2020) (citing *State v. Caudle*, 388 S.W.3d 273, 278–79 (Tenn. 2012)). “A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.” *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010).

ARGUMENT

The trial court’s judgment should be reversed for two reasons. First, the trial court erred when it set a contingent amount of restitution at \$83,457.60 without considering whether Mr. Greene could reasonably pay that amount (or any other amount) during the eight-year period of his Community Corrections supervision. Second, the trial court erred when it imposed a Range I sentence of split confinement and ordered Mr. Greene to serve 365 days of incarceration for his nonviolent theft offense.

I. The trial court’s restitution judgment should be reversed because the court failed to consider whether Mr. Greene—then 77 years old—could pay \$83,457.60 within eight years.

This Court has repeatedly held—and the State has repeatedly conceded—that a trial court commits reversible error when it fails to consider a defendant’s financial resources and future ability to pay restitution. *See, e.g., State v. Labrecque*, No. M2018-01587-CCA-R3-CD, 2019 WL 5395717, at *2–4 (Tenn. Crim. App. Oct. 22, 2019); *State v. Lane*, No. W2017-01716-CCA-R3-CD, 2018 WL 4340230, at *6–7 (Tenn. Crim. App. Sept. 10, 2018); *State v. Nelson*, No. E2010-01288-CCA-R3-CD, 2011 WL 1642638, at *6–8 (Tenn. Crim. App. Apr. 29, 2011). Here as well, the trial court’s restitution order must be reversed for failure to follow the appropriate procedure for awarding restitution.²

² Tennessee law governing restitution payments is well settled, but the standard of review for these cases is not. In several unreported decisions, this Court has held that the *Bise* standard—abuse of discretion with a presumption of reasonableness—should apply to a trial court’s restitution decision. *See, e.g., State v. Summers*, No. M2017-01030-CCA-

The purpose of restitution in a criminal case is not only to compensate the victim but also to “punish and rehabilitate” the defendant. *State v. Johnson*, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997); *see also* [Tenn. Code Ann. § 39-11-118](#) (identifying payment of restitution to the victim as additional punishment as part of the defendant’s sentence); [Tenn. Code Ann. § 40-38-106\(2\)](#) (providing victims of property crimes with the right to “[r]estitution ordered as a condition of probation or a suspended sentence or parole”). Accordingly, the Criminal Sentencing Reform Act of 1989 grants trial courts the authority

R3-CD, 2018 WL 2230728, at *6 (Tenn. Crim. App. May 16, 2018), perm. app. denied (Tenn. Sept. 14, 2018); *State v. Moffitt*, No. W2014-02388-CCA-R3-CD, 2016 WL 369379, at *4 (Tenn. Crim. App. Jan. 29, 2016), perm. app. denied (Tenn. June 24, 2016). It appears that many—if not all—of these cases cite back to the Court’s unreported decision in *State v. Bohanon*, No. M2012-02366-CCA-R3-CD, 2013 WL 5777254, at *5 (Tenn. Crim. App. Oct. 25, 2013), from which no permission to appeal was filed. Assuming that the *Bise* standard of review applies, the law governing restitution orders is akin to the law governing judicial diversion, because some restitution orders are mandatory, and in all restitution cases there are specific findings that the trial court is required to make on the record before entering its judgment. *See* [Tenn. Code Ann. § 39-11-118](#) (identifying offenses for which restitution is either discretionary or mandatory); *State v. Dodson*, No. M2018-01087-CCA-R3-CD, 2019 WL 3946097, at *3 (Tenn. Crim. App. Aug. 21, 2019) (applying the *Bise* standard of review but concluding that “the trial court abused its discretion by not following the proper procedure when awarding restitution”); *accord State v. King*, 432 S.W.3d 316, 326 (Tenn. 2014) (holding that *Bise* “did not abrogate the requirements set forth in *Parker* and *Electroplating*, which are essential considerations for judicial diversion”). Therefore, even under the *Bise* standard, the trial court’s restitution order should be reversed when the court fails to apply well-established restitution principles, thereby abusing its discretion.

to order restitution payments as part of the defendant’s judgment and as one of the many alternative sentencing options. See [Tenn. Code Ann. §§ 40-35-102\(3\)\(D\), -103\(6\), -104\(c\)\(2\)–\(3\)](#).

Although there is no set formula for determining the amount of restitution ordered as part of the defendant’s sentence, there are several mandatory considerations:

(b) Whenever the court believes that restitution may be proper . . . , the court ***shall order*** the presentence service officer to include in the presentence report ***documentation regarding the nature and amount of the victim’s pecuniary loss***.

••••

(d) In determining the amount and method of payment or other restitution, the court ***shall consider the financial resources and future ability of the defendant to pay*** or perform.

Id. § 40-35-304(b), (d) (emphasis added). In addition, “the amount ordered to be paid does not have to equal or mirror the victim’s precise pecuniary loss.” *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

Ultimately, after considering the victim’s pecuniary loss and “the financial condition and obligations of the defendant,” as well as the defendant’s “future ability to pay,” the trial court must set an amount of restitution that is appropriate and reasonable. *State v. Mathes*, 114 S.W.3d 915, 919 (Tenn. 2003) (“The trial court simply should have set the restitution at an amount it believed [the defendant] could reasonably pay.”); *Smith*, 898 S.W.2d at 747 (remanding the case so that restitution could be set in an amount that the defendant could reasonably pay during

the time he was within the trial court’s jurisdiction); *see also* [Tenn. Code Ann. § 40-35-303\(d\)\(10\)](#).

As for the method of payment, Tennessee law requires the trial court to “specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim.” [Tenn. Code Ann. § 40-35-304\(c\)](#). The court “may permit payment or performance in installments,” but the court cannot “establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision . . . imposed for the offense.” *Id.* [§ 40-35-304\(c\), \(g\)\(2\)](#); *see also Mathes*, 114 S.W.3d at 919 (“[P]ayment of restitution must not extend beyond the probation period.”).

In this case, the trial court’s restitution order must be reversed because the court did not consider Mr. Greene’s present or future ability to pay, did not specify the amount or time of payment of the restitution, and did not establish a payment schedule for the restitution.

First, despite the inclusion of Mr. Greene’s financial information in two affidavits and the presentence report, the trial court failed to consider whether Mr. Greene had any ability to pay some or all of the restitution ordered. The trial court appears to have shirked this responsibility based on its finding that Mr. Greene had “been deceptive” about his dementia and inability to remember how or where he had spent the money from the estate. (III: 55.) However, defense counsel and Mr. Greene had complied with the court’s requests to provide as much information about the money as possible. (Sept. Exs. 1, 4, 5.) In fact, it appears that the sentencing hearing was continued twice so that the court could receive more information about the restitution. (I: 4; II: 28–

31.) During that time, if the State felt that the two affidavits and the presentence report were insufficient for the trial court to make the proper financial determination, then the prosecutor could have subpoenaed Mr. Greene's bank records. Likewise, the estate beneficiary's attorney in the civil lawsuit could have explored the details of the money trail through discovery.

In this criminal case, however, the only thing for the trial court to decide was how much Mr. Greene could reasonably pay each month toward restitution while on probation. Mr. Greene provided ample evidence for the court to make this determination; he even admitted to a loss amount of \$66,957.60 and acknowledged that he could pay \$100 a month toward restitution. (I: 4; III: 36, 55; Sept. Exs. 1, 4, 5.) The trial court ignored this information. (III: 54–56.) Because the trial court failed to consider Mr. Greene's ability to pay some or all of the restitution, the judgment must be reversed.

Second, although the judgment reflects a restitution amount of \$83,457.60, the trial court stated at the sentencing hearing that this amount was “contingent” on whether the beneficiary of the victim estate would be able to recover a \$60,000 bond in the civil lawsuit. (I: 61; III: 55–56.) According to the trial court, “[w]hat’s going to make this a little bit unusual is the restitution is \$83,457.60, but if [the beneficiary] collects 60 from the bond that’s going to be reduced by court order to be \$23,457.60 that [Mr. Greene’s] got to pay.” (III: 55.) At the time of the sentencing hearing and at the time the judgment was entered, no one—not even the trial court—could say what total amount of restitution Mr. Greene was required to pay. (III: 56.) To this day, in fact, no one knows

what that amount may be. The restitution judgment, therefore, must be reversed.

Third, neither the judgment nor the sentencing hearing transcripts reflect any type or amount of payment schedule for the restitution. Nor could they, considering the trial court's recognition that the \$83,457.60 amount was completely contingent on the outcome of the separate civil lawsuit. (III: 55–56.) Because of the contingency as to the total amount of the restitution, and because of the trial court's failure to establish a payment schedule while awaiting the outcome of the civil lawsuit, the \$83,457.60 is a nullity that cannot be enforced or collected in any amount. Therefore, even if the trial court's entry of a totally contingent restitution award could be upheld, the restitution order still must be reversed for failure to establish any method, amount, or timing of partial payments.

For all these reasons, the trial court's entry of a contingent restitution award of \$83,457.60, without any consideration of Mr. Greene's ability to pay restitution in whole or in part, was neither appropriate nor reasonable. The judgment, therefore, must be reversed.

The only remaining question on restitution is whether this Court should direct the entry of an amended judgment or should remand for reconsideration. Based on the affidavits and presentence report in the record, this Court could find that Mr. Greene is unable to pay more than \$100 per month toward restitution and direct the entry of judgment accordingly. (III: 36, 54; Sept. Exs. 1, 4, 5.) *See Labrecque*, 2019 WL 5395717, at *4 (reversing a \$500,000 restitution order and remanding for the entry of amended judgments reflecting \$0 restitution based on the defendant's indigency and inability to pay); *State v. Howard*, No. E2011-

00598-CCA-R3-CD, 2012 WL 3064653, at *11–13 (Tenn. Crim. App. July 30, 2012) (reducing a \$96,000 restitution order to \$48,000 based on the evidence in the record). In the alternative, this Court could remand the case with instructions for the trial court to hold another hearing and enter a total restitution amount that Mr. Greene can reasonably pay in monthly installments while he is being supervised by Community Corrections.

II. The trial court’s judgment should be reversed because the court improperly sentenced Mr. Greene to serve nine years in split confinement for a nonviolent theft offense.

The trial court sentenced Mr. Greene to a total of nine years, with 365 days to be served in confinement, followed by eight years under the supervision of Community Corrections. Because incarceration in a detention facility is supposed to be reserved for violent felony offenders, the split-confinement sentence imposed by the trial court in this case does not reflect the purposes and principles of sentencing. *See* Tenn. Code Ann. §§ 40-35-102, 40-35-103, [40-36-103](#). Mr. Greene, a 77-year-old nonviolent first-time felony offender, should have received a fully suspended sentence.

The length and manner of service of any sentence imposed by the trial court must be within the correct sentence range and must comply with the purposes and principles of the Sentencing Reform Act. *State v. Caudle*, 388 S.W.3d 273, 278–79 (Tenn. 2012); *State v. Bise*, 380 S.W.3d 682, 709–10 (Tenn. 2012). Although a within-range sentence is presumed reasonable and is reviewed for an abuse of discretion, even this post-*Bise* standard cannot “immunize [the trial] court’s decision from . . .

meaningful appellate scrutiny.” See *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)).

Before imposing any type of sentence, the trial court must consider, at a minimum:

(1) The evidence, if any, received at the trial and the sentencing hearing; (2) The presentence report; (3) The principles of sentencing and arguments as to sentencing alternatives; (4) The nature and characteristics of the criminal conduct involved; (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114; (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) Any statement the defendant wishes to make on the defendant’s own behalf about sentencing; and (8) The result of the validated risk and needs assessment . . . contained in the presentence report.

[Tenn. Code Ann. § 40-35-210\(b\)](#).

In addition, before granting or denying an alternative sentence, the “trial court *must consider* (1) the defendant’s amenability to correction, (2) the circumstances of the offense, (3) the defendant’s criminal record, (4) the defendant’s social history, (5) the defendant’s physical and mental health, and (6) the deterrence value to the defendant and others.” *Trent*, 2020 WL 1899610, at *11 (emphasis added) (citing *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (concluding that the same factors used to determine whether to impose judicial diversion are applicable in determining whether to impose probation)); see also *State v. Electroplating*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v.*

Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). With regard to a defendant’s amenability to correction, courts typically consider the defendant’s remorse, acceptance of responsibility, and criminal history. See, e.g., *State v. Taylor*, No. M2015-02142-CCA-R3-CD, 2017 WL 2179952, at *13 (Tenn. Crim. App. May 16, 2017), perm. app. denied (Tenn. Sept. 21, 2017). The defendant’s criminal history, in particular, carries great weight in the alternative sentencing analysis. *State v. Thompson*, 189 S.W.3d 260, 266–67 (Tenn. Crim. App. 2005) (holding that “a defendant’s criminal history is a critical factor to consider in evaluating his or her amenability to correction” and is one of the most relevant factors to a defendant’s potential for rehabilitation).

If, after considering all the evidence, the trial court rejects alternative sentencing options, the court’s decision to impose a sentence involving incarceration must be based upon at least one of the following circumstances:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1). When the trial court’s decision to require confinement is based upon section 40-35-103(1)(B), the record must contain proof that “(1) a need to deter similar crimes is present in the

particular community, jurisdiction, or in the state as a whole, and (2) incarceration of the defendant may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.” *State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). Similarly, when the trial court’s imposition of confinement is based on the seriousness of the offense, it must “be clear that the criminal act, as committed, would be described as especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,” and it must also “be clear that . . . the nature of the offense, as committed, outweighed all other factors . . . which might be favorable to a grant of probation.” *State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981).

In this case, the trial court denied a sentence of full probation based on its conclusion that confinement was necessary to avoid depreciating the seriousness of the offense and that confinement would be an effective deterrence to others. (III: 52.) *See* Tenn. Code Ann. § 40-35-103(1)(B). The trial court’s decision to require a period of confinement should be reversed for three reasons.

First, Mr. Greene’s sentence of split confinement does not rationally serve as a deterrent to others because of the unique and unusual facts and circumstances of this case. Mr. Greene is a 77-year-old man with no prior criminal history who pleaded guilty to Class B felony theft involving the estate of a person who Mr. Greene believed had given him authority to take possession of the estate’s money and property. (I: 9–10, 60–61; Sept. Exs. 1, 4.) Though the beneficiary of the estate was deprived of the inheritance she expected, she is hardly a sympathetic figure considering she had no contact with her father before he died, did not attend her

mother's or father's funeral, and did not express any interest in her family until she learned from a friend that she might be able to benefit from her parents' wills. (III: 42–45.) Moreover, while the trial court expressed a general concern that theft from estates by fiduciaries should be deterred, there was no proof in the record of a need to deter this specific type of theft in the Morristown community, the 3rd Judicial District, or even the state as a whole. Likewise, there was no proof in the record that the general deterrent effect of arrest, prosecution, restitution, probation, and all the other unpleasant consequences following a conviction would be insufficient without also requiring a period of confinement.

Second, despite the requirement that trial courts heavily weigh a defendant's lack of criminal history in favor of granting alternative sentences, here the only facts the trial court gave "great weight" to were Mr. Greene's position as the administrator of the estate and the estranged beneficiary's loss of her inheritance. (III: 49, 50, 52.) The trial court recited these two facts when discussing the enhancement and mitigating factors, the presentence report, the circumstances of the offense, the seriousness of the offense, the deterrence value of the punishment, and the general purposes and principles of sentencing. (III: 48–53.) The record thus reflects that, despite Mr. Greene's lack of criminal history, his advanced age, his poor health, and his acceptance of responsibility by pleading guilty as charged, the trial court's entire sentencing decision was driven by the same two facts it repeated throughout the hearing.

The trial court's tunnel vision caused it to ignore all the relevant factors and purposes and principles of sentencing that weighed in favor of suspending Mr. Greene's entire sentence to Community Corrections. The most basic principle ignored by the trial court is that confinement is supposed to be reserved for violent felony offenders and those who commit "the most severe offenses." *See* Tenn. Code Ann. §§ 40-35-102(5), 40-36-103(1). The trial court also failed to give any weight to Mr. Greene's amenability to correction, stating only that, "[a]t 76, he could possibly be rehabilitated." (III: 51.) Likewise, the trial court failed to assign any weight to Mr. Greene's lack of criminal history, noting only that "he just has traffic" offenses. (III: 51.) And finally, the trial court failed to explain why the plan for Community Corrections supervision as outlined in the presentence report was insufficient to achieve the goal of punishing Mr. Greene's actions. (*See* Sept. Ex. 1 at 12.) Simply put, there was no evidence in the record to explain why Mr. Greene's theft offense, as committed, outweighed all other factors in favor of granting full probation.

Third, these deficiencies in the court's analysis are exacerbated by the additional punishment imposed through the large restitution order. Because restitution compensates the victim while also punishing the defendant, the trial court should have considered the overall effect of sentencing Mr. Greene to a one-year period of confinement *and* ordering him to pay \$83,457.60 during an eight-year period of probation. There is no reason to believe that a nine-year period of probation with an appropriate restitution order would not have achieved the desired goal of punishing Mr. Greene while compensating the victim estate as much as

possible. In fact, the trial court's judgment is contrary to the desired effect because the one year that Mr. Greene is required to serve in confinement is one more year that the beneficiary of the estate will not receive any money from Mr. Greene. Common sense indicates that this is exactly why the combination of probation or Community Corrections supervision and restitution is available and encouraged: to impose additional punishment on the nonviolent theft offender while compensating the victim and reserving confinement and detention facilities for severe, repeat, and violent offenders.

In summary, there is no personal or social justice that results from sending a 77-year-old nonviolent first-time felony offender to serve a year in confinement, especially when that person pleads guilty as charged, has significant health issues, and has no prior criminal record. Mr. Greene is willing to comply with the stricter requirements of Community Corrections supervision rather than probation for the entirety of his nine-year sentence, and he is willing to pay monthly restitution at an amount he can afford, but he should not have to spend even one day in confinement.

CONCLUSION

For the foregoing reasons, the trial court's sentencing decision should be reversed. The Court should either reduce the restitution award based on the record, or remand the case with instructions for the trial court to enter an appropriate and reasonable restitution award after considering Mr. Greene's financial condition and ability to pay. In addition, upon remand, Mr. Greene should be ordered to serve his entire sentence under the supervision of the Community Corrections program.

s/ Brennan M. Wingerter

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief consists of 6177 words and complies with the requirements set forth in Section 3, Rule 3.02 of Tennessee Supreme Court Rule 46.

I further certify that the Tennessee Attorney General's Office (c/o Nicholas W. Spangler, nick.spangler@ag.tn.gov) is a registered user of the e-filing system and will automatically receive electronic service of this document pursuant to Section 4, Rule 4.01 of Tennessee Supreme Court Rule 46.

s/ Brennan M. Wingerter

Brennan M. Wingerter
Assistant Public Defender
Appellate Director

No. M2018-00317-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

ERNEST HOBBS,

Plaintiff-Appellee,

v.

RUSSELL L. LEONARD, et al.,

Defendants-Appellants.

On Appeal from an Order and Judgment
in the Coffee County Circuit Court,
No. 43,271; Hon. Vanessa A. Jackson

RESPONSE BRIEF OF PLAINTIFF-APPELLEE, ERNEST HOBBS

Respectfully submitted by:

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STATEMENT OF THE ISSUES

Restatement of Appellant's issue 1:

- I. Whether the trial court's order should be affirmed because the Defendants-Appellants breached a valid settlement agreement that does not violate any public policy recognized in Tennessee.

Restatement of Appellant's issue 2:

- II. Whether the trial court's order should be affirmed because the Defendants-Appellants are liable for all compensatory damages and attorney's fees caused by their breach of the parties' settlement agreement.

STATEMENT OF THE CASE

On November 16, 2015, Plaintiff-Appellee Ernest Hobbs filed a lawsuit in the Coffee County General Sessions Court against Defendants-Appellants Russell Leonard, Laura Houghtaling, Dustin Frazier, and Tiffany Chrisulis Frazier (collectively, “Defendants”) for breach of contract and defamation. R. at 61. After the case was first transferred to Chancery Court and then to Circuit Court, Mr. Hobbs obtained a \$16,000 default judgment against Defendant Houghtaling. R. at 321. Defendants Dustin and Tiffany Frazier, acting pro se, filed an answer placing all blame for the breach on their prior attorney and co-defendant, Russell Leonard. R. at 317–20; *see also* Ex. 7, 8, 9.

On December 5, 2016, Defendant Leonard filed an answer in which he took sole responsibility for the actions causing the breach and denied that his former clients and co-defendants were liable for Mr. Hobbs’ damages. R. at 80–82. Defendant Leonard asserted several affirmative defenses to justify or excuse his actions. R. at 82–83. None of the other defendants appeared at trial or offered any defense aside from blaming Defendant Leonard. R. at 317–20, 372.

After a one-day bench trial, the court rejected all of Defendant Leonard’s affirmative defenses and entered a Final Order in favor of Mr. Hobbs. R. at 368–74. Two weeks later, the trial court ordered Defendant Leonard to pay Mr. Hobbs his reasonable attorney’s fees and expenses. R. at 382–83. Defendant Leonard timely filed a notice of appeal on February 21, 2018.¹ Defendant Leonard’s principal appellate brief was filed on July 11, 2018, and undersigned counsel respectfully submits this timely response brief on behalf of Mr. Hobbs.

¹ The appellate record includes a copy of Defendant Leonard’s appeal bond for costs, which was filed in the trial court. *See* R. at 385. The notice of appeal filed in this Court is available through the public case history.

STATEMENT OF THE FACTS

Mr. Hobbs is a long-time homeowner residing in Coffee County, Tennessee. R. at 61. As a businessman who buys and leases houses and real estate, Mr. Hobbs is periodically (and unsurprisingly) involved in lawsuits with his tenants and lessees. Tr. 44, 84, 151. In October 2014, after Mr. Hobbs filed a detainer action to evict three of his tenants for failure to pay rent, the tenants filed a lawsuit relating to the property located at 63 JD Neil Road, Tullahoma, Tennessee 37388. R. at 144–50, 180–81; Tr. 44. The two actions were consolidated and ultimately settled when all parties signed a General Release (the “Release”) in December 2014. Tr. 43–44.² The parties to the Release were the Defendants in this action—Laura Houghtaling, Dustin Frazier, and Tiffany Frazier—and Mr. Hobbs. R. at 22–27. Defendant Leonard, as the attorney for Laura Houghtaling and the Fraziers, also signed the Release. R. at 27.

The Release required the Defendants to pay Mr. Hobbs a total of \$1,680.00. R. at 24. In return, Mr. Hobbs agreed that, once he received the money, he would extinguish Defendant Houghtaling’s rental obligations and would allow the Fraziers to remain on the property. R. at 24; Tr. 44–45. The stated purpose of the Release was “to settle any and all claims and potential claims” arising out of the consolidated lawsuit and to return all parties to their prior positions. R. at 22, 24; *see also* Tr. 45 & Ex. 7, 8, 9. The Release included standard settlement terms requiring the Defendants—including their agents, successors, assigns, legal representatives, and affiliates—to relinquish and forgo any further action related to the claims raised in their underlying lawsuit against Mr. Hobbs.³ R. at 22–23 (¶ 1), 23–24 (¶¶ (a)–(d)), 25 (¶ 5). The parties also agreed to

² A copy of the Release is included in the Appendix for the Court’s convenience.

³ The causes of action included fraud, misrepresentation, and deceptive trade practices all related to allegations that Mr. Hobbs was unjustly enriching himself by buying and selling real estate without a license. R. at 145–47. Mr. Hobbs has repeatedly denied these allegations. Tr. 51–52, 56–57, 84–85, 107.

dismiss the underlying lawsuit with prejudice. R. at 25 (¶ 8). The Release was finalized on December 17, 2014. R. at 26.

Less than two months after signing the Release, in a letter dated January 29, 2015, Defendant Leonard told the Tennessee Real Estate Commission (the “Commission”) that Mr. Hobbs was “reaping huge profits” by buying and selling properties without a license and “operating as a realtor without a realtor’s license.” R. at 74.⁴ Defendant Leonard claimed that Mr. Hobbs’ actions were “nothing short of unjust enrichment.” R. at 74. As “proof” of his allegations, Defendant Leonard attached to his letter “the original complaint and copies of the leases and option contracts” that were the basis of the lawsuit that had been dismissed with prejudice and settled by the Release. R. at 74; Tr. 129–30. As a result of Defendant Leonard’s letter, the Commission ordered Mr. Hobbs to pay \$6,000.00. Tr. 53–54 & Ex. 2; R. at 81.

Mr. Hobbs then sued the Defendants for breach of contract and sought his compensatory damages, the remaining amounts owed to him under the Release, and his attorney’s fees as provided by the terms of the Release. R. at 23, 66. In his answer, Defendant Leonard admitted that he “**lodged a complaint** against Hobbs with the Real Estate Commission in an effort to prevent Hobbs from again engaging in **the same real estate practices** by which he harmed and took advantage of the other named defendants.” R. at 81 (¶ 12) (emphasis added). He further admitted that “he **made a formal complaint** against Hobbs to the Real Estate Commission, **as a result of which** Hobbs agreed to pay a fine of \$6,000.00.” R. at 81 (¶ 13) (emphasis added). While admitting to his own breach of contract and the resulting damages to Mr. Hobbs, Defendant Leonard expressly absolved his former clients and co-defendants from any complicity in his wrongdoing. R.

⁴ Copies of Defendant Leonard’s letter and attachments are in the Appendix for the Court’s convenience.

at 81 (¶¶ 11–13); Tr. 101; *see also* R. at 317–20 & Ex. 7, 8, 9 (answers and depositions of co-defendants denying any knowledge of the letter to the Commission and placing all blame for the breach on Defendant Leonard).

Defendant Leonard’s asserted justification for his breach is that the Release is void as against public policy. R. at 82 (¶ 1); Appellant’s Br. iii, 7. According to Defendant Leonard, the Release is invalid because it prevented him from reporting illegal conduct to a state regulatory agency. Appellant’s Br. 9. In support of his position, Defendant Leonard relies exclusively upon California case law and the Consent Order signed by Mr. Hobbs and the Commission to settle the administrative complaint filed by Defendant Leonard. R. at 192–99; Appellant’s Br. 1–2, 6, 9–10, 12–13. This Consent Order, however, was stricken from the record because it was irrelevant to the breach of contract claim. R. at 213–14, 244, 265 (¶ 2); Tr. 60–64, 66–67, 81, 86, 167, 177.

After striking the Consent Order from the record, the trial court held that the Release does not violate public policy. R. at 373–74. Based on the Defendants’ indefensible breach, the court awarded Mr. Hobbs his compensatory damages and attorney’s fees. R. at 374, 383.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's award of compensatory damages and attorney's fees to Mr. Hobbs as caused by the Defendants' breach of the Release. The Release was a standard settlement agreement intended to resolve legal disputes filed in Coffee County Court between Mr. Hobbs and the Defendants. Defendant Leonard breached the terms of that agreement when he re-initiated identical claims with the Tennessee Real Estate Commission less than two months after settling the underlying lawsuit and signing the Release. Defendant Leonard has admitted his breach and the resulting monetary damages to Mr. Hobbs, which the trial court properly awarded. The only argument raised on appeal is whether Defendant Leonard's breach is justified by his contention that the Release is void as against public policy.

Defendant Leonard has not cited any Tennessee authority establishing the public policy he asserts in this case. If, as Defendant Leonard contends, it should be the public policy of Tennessee to invalidate any settlement agreement that prevents the re-initiation of settled claims, then the validity of every settlement agreement in Tennessee would be in question. The express purpose of a settlement agreement is to conclude the litigation without going to trial and to preclude any further action relating to the settled issues or claims. Although Defendant Leonard insists that California law supports his public policy defense, none of his California cases involved a legally binding settlement agreement that was negotiated and signed after the initiation of a lawsuit. Instead, the "secret agreements" that were invalidated in the California cases involved confidentiality clauses and other types of contracts that were specifically intended to cover up or prevent the reporting of illegal conduct. That is simply not the case here.

This Court should affirm the trial court's Final Order in favor of Mr. Hobbs and award Mr. Hobbs all attorney's fees incurred at trial and on appeal.

STANDARD OF REVIEW

In civil actions, the appellate court reviews the trial court's findings of fact de novo with a presumption of correctness. Tenn. R. App. P. 13(d). Under this standard, the appellate court cannot overturn the trial court's factual findings unless the evidence preponderates against them. *Thompson v. Hensley*, 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003). When the trial court has had the ability to observe and assess firsthand the credibility and demeanor of witnesses, the appellate court accords significant deference to the trial court's findings. *Id.* at 930. Although the trial court's legal conclusions are reviewed de novo, the appellate court should not disturb the trial court's credibility determinations without clear and convincing evidence to the contrary. *Id.* at 929–30.

ARGUMENT

By misconstruing the Release and continuing to rely on the Consent Order, which was stricken from the record, Defendant Leonard has grossly distorted what should be a straightforward breach of contract case. The only two issues for this Court are (1) whether the Defendants breached the Release when they re-initiated identical claims that were the subject of a previously settled lawsuit, and (2) whether the Defendants are liable for the compensatory damages and attorney's fees incurred by Mr. Hobbs as a result of the breach. Defendant Leonard has admitted his breach, and he cannot avoid the consequences of his actions unless this Court finds that the Release is void as against public policy.⁵ Because the Release does not violate public policy, it is valid and thus Defendant Leonard is responsible for all damages caused by his breach.

I. This Court should affirm the trial court's ruling that the Release is valid because it does not inherently violate any public policy and has not resulted in any public detriment. (See Appellant's Br. 7-13.)

The Tennessee Supreme Court "has often 'held that public policy is best served by freedom of contract.'" *Baugh v. Novak*, 340 S.W.3d 372, 383 (Tenn. 2011) (quoting *Chazen v. Trailmobile, Inc.*, 384 S.W.2d 1, 3 (Tenn. 1964)). Because of this strong interest in enforcing the agreements freely negotiated by individuals, courts will not invalidate a contract on public policy grounds unless three conditions are met: (1) the violation of public policy must be clearly established; (2) the violation of public policy must be inherent in the contract itself, not collateral thereto, or the contract's purpose must be tainted with illegality; and (3) a clear public detriment must be likely to occur as a result of the contract, or the object of the contract must tend to injure

⁵ The trial court rejected Defendant Leonard's argument that he was not bound by the terms of the Release. R. at 83 (¶ 3), 372. As the trial court properly held, the Release includes clear language prohibiting Laura Houghtaling, the Fraziers, and "their legal representative, Leonard," from soliciting, encouraging, assisting, or inciting the re-initiation of the allegations asserted in the underlying lawsuit. R. at 22-24, 372. Defendant Leonard has not challenged this ruling on appeal.

the public. *Id.* at 383–84. The court should exercise judicial restraint particularly when the party seeking to invalidate the contract has already received the benefit of the bargain and would be unjustly permitted to avoid his own promise. *Id.* at 384 (citing *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 465 (Tenn. Ct. App. 2009)).

Here, the trial court’s order should be affirmed because the Defendants, who have already received the benefit of their bargain in the Release, have failed to prove any of the three conditions necessary to invalidate the Release on public policy grounds. The true public policies at issue here are the freedom of contract and the enforcement of legally binding settlement agreements, which require the Release to be upheld.

1. The Defendants have not clearly established which provision of the Release is alleged to offend public policy.

A party seeking to invalidate a contract on public policy grounds first must clearly establish the alleged violation of public policy. *Baugh*, 340 S.W.3d at 383. In this case, the alleged violation of public policy has not been clearly established because Defendant Leonard has not identified the specific provision he seeks to have elided from the Release. Reading between the lines, it appears that the provision with which Defendant Leonard takes issue is:

1. By the execution of this **Release**, the **PLAINTIFFS**, for themselves and their family, heirs, next-of-kin, executors, administrators, agents, legal representatives, estates, affiliates, successors, assigns, subrogees and for any partnerships, corporations, sole proprietorships or entities affiliated with, related to, owned, or controlled by them, do hereby forever and fully remise, release, acquit and discharge the **DEFENDANTS**, their family, heirs, next-of-kin, executors, administrators, agents, legal representatives, estates, affiliates, successors, assigns, subrogees and for any partnerships, corporations, sole proprietorships or entities affiliated with, related to, owned or controlled by them, (hereinafter referred to collectively as the **RELEASED PARTIES**) of and from any and all actions, causes of action, suits, debts, sums of money, accounts, covenants, contracts, agreements, arrangements, promises, obligations, warranties, trespasses, torts, injuries, losses, damages, claims, demands, and other relief of any nature whatsoever, whether known or unknown, whether absolute, fixed or contingent, whether in law, in equity or before administrative agencies or departments, that **PLAINTIFFS** ever had, now have or hereafter can, shall or may have, by reason of or arising out of any matter, cause or event alleged or which could have been alleged in the above-referenced action in the Chancery Court of Coffee County, Tennessee, Case #2014-CV-170, which will be dismissed on the merits with full prejudice and the Court costs, but not the discretionary costs, will be taxed to the **PLAINTIFFS**.

See Appellant’s Br. 4 (misquoting a portion of this paragraph from the Release). In his Statement of Facts, Defendant Leonard also mentions “a lengthy indemnification provision,” which by context clues appears to reference the following paragraph in the Release:

(d) That **PLAINTIFFS** and his counsel shall not solicit, encourage, assist, or incite the initiation by any other person or entity of any claims or demands against the **RELEASED PARTIES** arising from or relating to any allegations contained in the above-referenced action from the beginning of the world to the date of the Release; and

See Appellant’s Br. 4.

None of these provisions support Defendant Leonard’s assertion that the Release prohibited him from reporting suspected violations of Tennessee law to an administrative agency. As the trial court held, this Release “contains the standard terms and conditions found in contracts that provide for the settlement of lawsuits and release of the parties from liability.” R. at 373. The court also found it “perplexing that the defense of violation of public policy ha[d] been raised because the evidence established that [Defendant] Leonard reviewed the . . . Release before he and his clients signed it.” R. at 373. At trial and on appeal, Defendant Leonard was and continues to be unable to explain which provisions of the Release clearly establish a violation of public policy. Defendant Leonard is an experienced attorney who negotiated the terms of this Release with Mr. Hobbs’ trial attorney before advising his former clients to sign it and then signing it himself. He then breached the clear terms of their settlement agreement when—just two months after signing the Release—he filed a letter with the Commission that raised allegations identical to his former clients’ legal claims against Mr. Hobbs, including copies of the original complaint and other documents from the previously settled lawsuit.

Rather than identify which provision of the Release is supposed to have violated public policy by preventing people from reporting illegal conduct, Defendant Leonard has continuously manipulated this breach of contract case into a personal attack on Mr. Hobbs and his business practices.⁶ The Court should not be distracted by the Defendant's red herring about the Commission's Consent Order because it does nothing to meet his burden of clearly establishing that a violation of public policy occurred in the making of the Release, which was intended to settle a legal dispute between Mr. Hobbs and Defendant Leonard's former clients.

2. The Release is valid because it does not have an illegal purpose and does not inherently violate any public policy recognized in Tennessee.

A party seeking to invalidate a contract on public policy grounds also must show that a violation of public policy is inherent in the contract itself or that the contract was made with an illegal purpose. *Baugh*, 340 S.W.3d at 383–84. “[A] contract will not be deemed to violate public policy unless it tends to . . . conflict with Tennessee’s constitution, laws[,] or judicial decisions.”

⁶ Defendant Leonard has insisted that none of his former clients were aware of his letter to the Commission, despite his statements in the letter that:

- (1) “I am an attorney . . . and represent Mr. Dustin Frazier, . . . Mrs. Tiffany Frazier, . . . as well as Laura Houghtaling.”
- (2) “These people asked me to forward a formal complaint to you”
- (3) “We were previously involved in legal action with Mr. Hobbs”
- (4) “Our fear is that”

R. at 74. Defendant Leonard also attached official complaints and affidavits bearing the signatures of his former clients; he has since admitted that he did so without their permission. R. at 74–79, 81 (¶¶ 11–13). Defendant Leonard has unabashedly characterized his breaches of contract and client confidentiality as unfortunate mistakes by his secretary. Tr. 101, 126–27, 131–32; Appellant’s Br. 5. Also troubling is Defendant Leonard’s claim that he revised his letter after the Release was executed but that his secretary mistakenly printed the original version of the letter (drafted in November 2014, before the Release was signed), which he signed and mailed without reviewing. Tr. 100–01. If that were true, the “revised” letter would not have referenced a “previous” involvement in legal action with Mr. Hobbs; in November 2014, the parties were still actively engaged in the underlying lawsuit. Tr. 115, 130. The only logical conclusion is that Defendant Leonard was fully aware that the letter he sent to the Commission in February 2015 included the names and signatures of his former clients without their permission, and he then tried to cover up his unethical practices by lying and blaming his secretary. *See* R. at 371 (trial court’s credibility finding that Defendant Leonard’s testimony about the letter was “confusing and somewhat inconsistent”).

Vintage Health, 309 S.W.3d at 465 (citing *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991)); *see also Baugh*, 340 S.W.3d at 384 (“To assess Tennessee’s public policy, the courts look to the Constitution of Tennessee, the statutes enacted by the General Assembly, the common law, and prior court decisions.”). When there is no Tennessee law governing the public policy dispute, this Court has recognized that it cannot invalidate a contract on public policy grounds:

The defendants do not call our attention to any statute, rule of procedure, or Tennessee appellate case authorizing a trial court to issue the type of order now before us. Both sides make public policy arguments. Some are compelling, but, generally speaking, it is not for us to make public policy. We are an error-correcting intermediate appellate court. It is for the General Assembly and the Supreme Court to deal with public policy.

Alsip v. Johnson City Med. Ctr., No. E2004-00831-COA-R9-CV, 2005 WL 1536192, at *7 (Tenn. Ct. App. June 30, 2005) (citing *Smith v. Gore*, 728 S.W.2d 738, 746–47 (Tenn. 1987)), *affirmed by* 197 S.W.3d 722 (Tenn. 2006) (holding that public policy did not require the court to void an implied confidentiality clause in a physician–patient relationship).

Here, Defendant Leonard admits that no Tennessee law exists to invalidate a settlement agreement on public policy grounds if the agreement prevents people from reporting identical conduct to regulatory enforcement agencies. *See* Appellant’s Br. 9. On this basis alone, the trial court’s order should be affirmed. *See Baugh*, 340 S.W.3d at 384; *Vintage Health*, 309 S.W.3d at 465; *Alsip*, 2005 WL 1536192, at *7. To the extent they are relevant at all, the two California cases upon which the Defendant relies are easily distinguished.

First, in *Cariveau v. Halferty*, the California Court of Appeals invalidated a confidentiality clause in an investor–agent agreement that “expressly prohibited disclosure of the facts underlying the agreement to ‘any public or private person or entity, or to any administrative, law enforcement

or regulatory agency.’” 83 Cal. App. 4th 126, 134 (2000). In contrast to the *Cariveau* agreement, which was not created to settle a lawsuit, the Release signed by Defendant Leonard required him to “remise, release, acquit and discharge” Mr. Hobbs from any action and relief arising out of the underlying lawsuit that was the subject of the settlement agreement. R. at 22–23. Unlike the contract at issue in *Cariveau*—which was a “hush job” drafted by a securities agent who refused to refund her investor’s money unless the investor agreed not to report the agent’s securities fraud—the contract at issue in this case is a standard settlement agreement between two parties who were represented by counsel while involved in arms-length negotiations of a lawsuit. Nothing prohibited Defendant Leonard from disclosing the underlying facts of their agreement or reporting future instances of alleged misconduct; he was simply prohibited from bringing another claim or initiating any further action that was directly related to the claims asserted in the previously settled lawsuit. As the trial court found, these are standard settlement terms that do not inherently violate any public policy. R. at 373.

Second, in *Agricultural Labor Relations Board v. Richard A. Glass Co.*, the California Court of Appeals ordered the trial court to allow discovery by an administrative agency into the business records of a unionized company alleged to have violated various labor standards. 175 Cal. App. 3d 703, 707–08 (1985). The heart of that dispute was whether the company could refuse to produce its records in an administrative hearing because its union contract protected its trade secrets. *Id.* at 712–13. Citing the importance of protecting publicly unionized workers, the appellate court concluded that any agreement purporting to restrict the administrative agency’s access to the company’s records would be void as against public policy. *Id.* at 716. Here, Defendant Leonard’s reliance on *Glass* is wholly misplaced because nothing in the Release restricted the ability of the

Commission to independently investigate any alleged misconduct by Mr. Hobbs. Unlike the discovery proceedings initiated by the administrative agency in *Glass*, here the Commission was not a party to the underlying lawsuit and had not requested any of Mr. Hobbs' business records. The Release did not and does not prevent discovery of Mr. Hobbs' records in an administrative hearing with the Commission; it simply prevented any further action by the Defendants to hold Mr. Hobbs responsible for the claims that had been raised and settled in the underlying lawsuit, which is why the trial court found Defendant Leonard liable for breach of contract when he initiated his identical claims with the Commission less than two months after signing the Release. R. at 372–74.

Moreover, even if these California cases can somehow be read to establish the public policy of Tennessee, neither of the Release provisions assumed to be the subject of Defendant Leonard's argument were intended as a blanket prohibition on administrative reporting or investigating of every potential instance of misconduct by Mr. Hobbs. *Cf.* Appellant's Br. 10–13. In *Cariveau*, for example, the settlement agreement was invalidated because the court found that the confidentiality clause itself "was **expressly intended** to cover up [the agent's] improper actions and allow the [illegal conduct] to continue for a period of four years." 83 Cal. App. 4th at 135 (emphasis added). Here the trial court made no such finding as to an illegal purpose in Mr. Hobbs' negotiation of any term in the Release. Instead, the purpose of the Release was to settle a legal dispute between Mr. Hobbs and Defendant Leonard's former clients. There was no confidentiality clause like the one in *Cariveau* that operated to "cover up" any allegedly illegal activities or prevented Defendant Leonard from reporting any allegedly illegal activities in the future.

The fundamental distinction between the contracts in *Cariveau* and *Glass* and the Release in this case is further elucidated by the case of *D'Arrigo Bros. of California v. United Farmworkers of America*, 224 Cal. App. 4th 790 (2014). The *D'Arrigo* case involved a breach of contract claim by the plaintiff company against the defendant union, which represented the company's workers. *Id.* at 794. The union had filed charges of unfair labor practices against the company under the jurisdiction of the Agricultural Labor Relations Board ("ALRB"). *Id.* at 794-95. During the administrative proceedings, the union agreed to dismiss two of its charges against the company. *Id.* at 795-96. Despite the parties' agreed dismissal, the General Counsel for the ALRB later used some of the evidence obtained in the administrative proceedings to continue investigating the company for unfair labor practices that were the subject of the dismissed charges. *Id.* at 797. The California Court of Appeals cited *Cariveau* and *Glass* with approval, noting that a "secret agreement" to hide misdeeds and prevent investigations by regulatory agencies would violate California's public policy. *Id.* at 805-06. Considering this policy, the court in *D'Arrigo* allowed the General Counsel to use the evidence and ruled that the union had not breached its agreement "because it did not **refile** either" of the previously dismissed charges. *Id.* at 802.

Unlike the union in *D'Arrigo*, Defendant Leonard breached the terms of the Release when he "re-filed" his former clients' complaints against Mr. Hobbs by asserting the exact same claims with the Commission that had been raised and dismissed with prejudice in the previously settled lawsuit. R. at 74, 371-72. He did not merely provide evidence in an independent investigation; his letter to the Commission specifically referenced his participation in prior legal action against Mr. Hobbs and included a copy of the original complaint filed by his former clients. R. at 74-79, 371-72. The Release, which settled a public lawsuit between parties represented by counsel, was not a

“secret agreement” like the forced monetary settlement between the investor and agent in *Cariveau*. Nor was it a private contract—like the one in *Glass*—used by a company to manipulate its employees and circumvent the investigatory responsibilities of its regulatory agency. Because the Release does not implicate any of the concerns expressed in *D’Arrigo*, *Cariveau*, or *Glass*, Defendant Leonard’s reliance on these California cases is misplaced.

In summary, the California cases cited by Defendant Leonard do not provide him any relief from the trial court’s judgment because the standard settlement terms in the Release do not violate any public policy in Tennessee and were not created for any illegal purpose.

3. The Release does not violate public policy because it has not caused and will not cause any public detriment.

The third and final element of the public policy analysis requires proof that a clear public detriment is likely to occur as a result of the contract sought to be invalidated. *Baugh*, 340 S.W.3d at 384. In this regard, Defendant Leonard asserts only one conclusory sentence that “enforcing the [R]elease as written would cause a ‘clear public detriment’ to occur, as the provision certainly ‘tends to injure the public.’” Appellant’s Br. 12 (quoting *Baugh*, 340 S.W.3d at 383–84). This argument again fails to identify which provision of the Release is being challenged as “certainly” invalid. Rather than specify which provision of the Release is at issue, Defendant Leonard relies solely on the Commission’s Consent Order as proof of Mr. Hobbs’ “guilt” and admission that he signed the Consent Order “in the public interest.” Appellant’s Br. 12. The Consent Order, however, is not the legal document at issue in this breach of contract case and is not relevant to the Defendant’s public policy defense regarding the Release. Because the trial court ruled that the Consent Order was irrelevant and must be stricken from the record, it is not a part of this appeal

and cannot be considered by this Court. R. at 213–14, 244, 265 (¶ 2); Tr. 60–64, 66–67, 81, 86, 167, 177.⁷

Even if the Court could consider the Consent Order in its analysis, the trial court’s ruling should still be affirmed because nothing in the Consent Order or the record proves that Mr. Hobbs illegally bought and sold property after the Release was signed. First, as to the Consent Order, the three factual findings made by the Commission were related to properties bought and sold in 2013 and early 2014; the Release was not signed until December 2014. R. at 26–27, 194–95 (¶¶ 4, 7, 12, 14). In any event, the Consent Order was executed by Mr. Hobbs—not as an admission of guilt—but “for the purpose of avoiding further administrative action.” R. at 192 (¶ 2). Second, as to the actual record on appeal, Defendant Leonard admitted at trial that he had a “suspicion” but did not have any proof that Mr. Hobbs was acting as an unlicensed real estate agent after December 2014. Tr. 153–54. Defendant Leonard also conceded at trial that he had not proffered any “evidence” of his “suspicion,” which he could have done by presenting the results of the Google searches he alleged would have shown that Mr. Hobbs was acting illegally. Tr. 102–04.

As a result, the trial court properly concluded that Defendant Leonard “did not offer any credible evidence to support his suspicion” that Mr. Hobbs “was continuing to engage in alleged wrongful practices.” R. at 371–72. Because Defendant Leonard “did not cite to the Tennessee Real Estate Commission any wrongful conduct by [Mr.] Hobbs, other than the conduct alleged” in the previously settled lawsuit, the trial court also properly concluded that Defendant Leonard breached the terms of the Release. R. at 372–74. Defendant Leonard’s lack of evidence that Mr. Hobbs engaged in any misconduct after December 2014 supports the trial court’s conclusion that

⁷ None of the Defendants have challenged the trial court’s decision to strike the Consent Order from the record; therefore, this issue is waived, and any reliance on the Consent Order in this appeal is improper.

the Release is not against public policy because no public detriment has occurred as a result of the parties signing the Release. The Release simply achieved its intended goal of settling a legal dispute between Mr. Hobbs and Defendant Leonard's former clients. This Court should uphold the parties' settlement agreement and affirm the decision of the trial court in favor of Mr. Hobbs.

II. This Court should affirm the trial court's award of compensatory damages and attorney's fees to Mr. Hobbs because all of his losses were caused by the Defendants' breach of the Release. (See Appellant's Br. 13-15.)

The trial court properly awarded all damages and attorney's fees to Mr. Hobbs because the Defendants breached the terms of their settlement agreement as memorialized in the Release. "A settlement agreement made during the course of litigation is a contract between the parties, and as such, contract law governs disputes concerning the formation, construction, and enforceability of the settlement agreement." *Waddle v. Elrod*, 367 S.W.3d 217, 222 (Tenn. 2012). A claim for breach of contract requires proof of (1) a valid and enforceable contract, (2) a deficiency in performance amounting to a breach, and (3) damages caused by the breach. *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011).

On appeal, Defendant Leonard challenges only the third element: Mr. Hobbs' proof that his damages were caused by the Defendants' breach of the Release. *See* Appellant's Br. 13-15. As with his public policy argument, Defendant Leonard's damages argument improperly relies on the Consent Order, which was ordered by the trial court to be stricken from the record. R. at 213-14, 244, 265 (¶ 2); Tr. 60-64, 66-67, 81, 86, 167, 177. Consent Order aside, Defendant Leonard admits that he alone was responsible for reporting Mr. Hobbs to the Commission, which was a breach of the Release. *See* Appellant's Br. 14; R. at 81. At trial, Mr. Hobbs presented evidence of his damages through copies of the checks he wrote to the Commission, which totaled \$6,000.00. Tr. 53-54 & Ex. 2. As provided by the terms of the Release, Mr. Hobbs' trial attorney also filed an affidavit of

reasonable attorney's fees, which were awarded by the trial court. R. at 116–17, 375–89. Defendant Leonard's admitted breach caused the Commission to fine Mr. Hobbs \$6,000; Mr. Hobbs then incurred attorney's fees when he rightfully sued Defendant Leonard for breach of contract. Because these damages and fees are a direct and proximate result of Defendant Leonard's admitted breach, he alone is liable to Mr. Hobbs.⁸

Despite this clear causal connection between the admitted breach and proven damages, Defendant Leonard makes two statements on appeal that purport to justify his breach and thereby absolve him from liability. First, Defendant Leonard claims that when he reported Mr. Hobbs to the Commission he was "acting as a concerned citizen." Appellant's Br. 14. Defendant Leonard was not merely a concerned citizen. He was (and is) an attorney who negotiated and signed a settlement agreement that prohibited his clients and their legal representatives from initiating any action against Mr. Hobbs that arose out of the allegations that were the subject of the underlying lawsuit. Defendant Leonard deliberately and maliciously breached those terms of the Release when he forwarded a copy of the original complaint and accompanying documents to the Commission just two months after settling the lawsuit. And even if Defendant Leonard had simply been a "concerned citizen," there has never been any proof that Mr. Hobbs violated any real estate standards after signing the Release in December 2014, which means that all of Mr. Hobbs' damages are a result of Defendant Leonard's letter to the Commission.

Second, Defendant Leonard asserts that "[a] law violator should not be able to admit his guilt, pay a fine, and then recover that fine from the persons who lawfully reported him."

⁸ As noted in the Statement of the Case, Mr. Hobbs also obtained a default judgment against Defendant Houghtaling, and all the Defendants were found jointly and severally liable in the trial court's Final Order. R. at 373–74. Defendant Leonard, however, is the only one who filed an appeal, and he has admitted that he is solely responsible for causing the breach of contract. R. at 81; Tr. 101.

Appellant's Br. 15. This assertion is both factually and legally flawed. As to the facts, the Consent Order—which is not a part of this record and cannot be considered by the Court—was not an admission of guilt by Mr. Hobbs, who has repeatedly professed his honest belief that he was not violating any real estate standards. As to the law, neither the Defendants nor anyone else has ever “lawfully reported” Mr. Hobbs to the Commission. Defendant Leonard **unlawfully** reported Mr. Hobbs through his letter to the Commission because his re-initiation of the exact same claims settled by the Release was a breach of contract, as Defendant Leonard has admitted. He is, therefore, responsible for paying all damages and fees caused by his admitted breach.

CONCLUSION

This Court should affirm the trial court's award of compensatory damages and attorney's fees as caused by the Defendants' breach of contract. In addition, this Court should award Mr. Hobbs his attorney's fees incurred on appeal.⁹

Respectfully submitted,

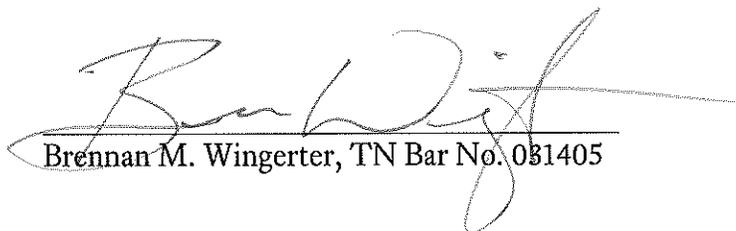


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⁹ According to subsection (c) on page 2 of the Release, the Defendants “shall” be responsible for “any loss, claim, demand, damage, suit, cost or expense of any nature whatsoever (including attorneys’ fees) arising from or relating to” a breach of the Release. R. at 23; see *Eberbach v. Eberbach*, 535 S.W.3d 467, 474 (Tenn. 2017) (awarding appellate attorney’s fees to party who prevailed at trial and on appeal because “parties who have prevailed in litigation to enforce their contractual rights are entitled to recover their reasonable attorney’s fees once they demonstrate that the contract upon which their claims are based contains a provision entitling the prevailing party to its attorney’s fees”). Undersigned counsel has attached an affidavit of reasonable fees.

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, a true and exact copy of this appellate brief has been forwarded by U.S. Mail, postage prepaid, to Mr. Donald Capparella, 1310 6th Avenue North, Nashville, TN 37208.


Brennan M. Wingerter, TN Bar No. 031405

cc: Mr. Ernest Hobbs
407 Carter Blake Road
Tullahoma, TN 37388

APPENDIX

Appendix A: General Release

Appendix B: Letter to Tennessee Real Estate Commission (with attachments)

Appendix C: Affidavit of Attorney's Fees on Appeal

APPENDICES INTENTIONALLY OMITTED
FOR SUBMISSION OF WRITING SAMPLE

(6) NACDL Conference Report

- Aside from the text on pages 1–5, the Appendices, and the Endnotes, the substantive writing in the Report is my own
- I am very grateful to the NACDL Board and staff members who edited every section, added pictures and call-out quotes, and brought it all to life

NACDL CONFERENCE REPORT

SHATTERING THE SHACKLES OF COLLATERAL CONSEQUENCES:

Exploring Moral Principles
and Economic Innovations to
Restore Rights and Opportunity

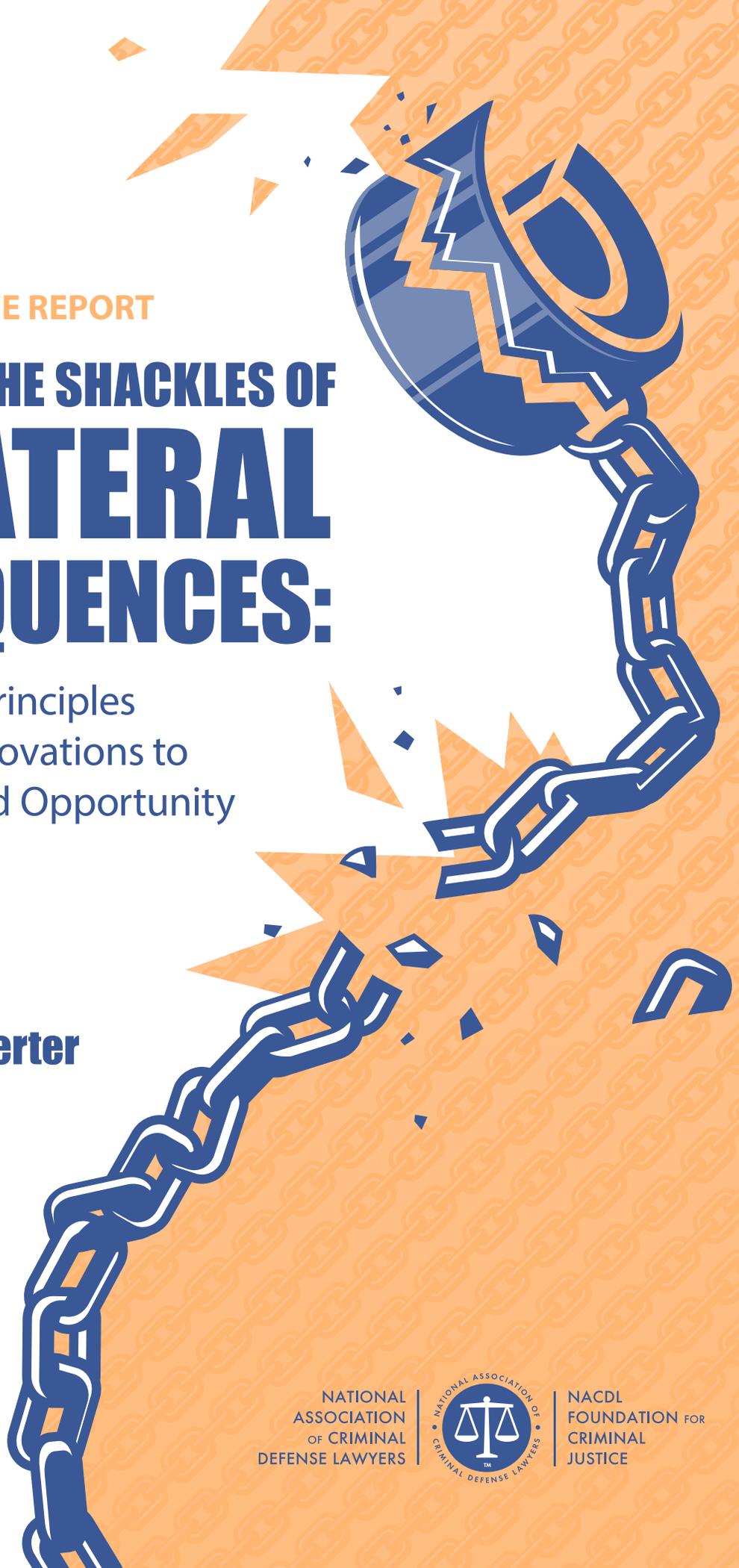
Brennan M. Wingerter

Reporter

NATIONAL
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of CRIMINAL
DEFENSE LAWYERS



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JUSTICE



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NACDL CONFERENCE REPORT

SHATTERING THE SHACKLES OF COLLATERAL CONSEQUENCES

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About NACDL and the NACDL FCJ

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense bar to ensure justice and due process for persons accused of crime or other misconduct. NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal justice system. NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

Founded in 1958 as the professional bar association of the nation's criminal defense attorneys, NACDL's direct membership now includes thousands of direct members in 28 countries, along with 90 state, provincial, and local affiliate organizations totaling approximately 40,000 attorneys, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, judges and others whose work evinces a commitment to preserve fairness within America's criminal justice system.

The NACDL Foundation for Criminal Justice (NFCJ) is a 501(c)(3) non-profit entity that supports NACDL's charitable efforts to promote reform and to preserve core constitutional principles by providing resources, training, and advocacy tools for the public, the criminal defense bar, and all those who seek to promote a fair, rational, and humane criminal justice system.

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Foreword

The United States not only imprisons people at far higher rates than any other democracy, but it also leads the world in imposing a vast network of life-altering consequences on the millions of individuals who pass through the nation's criminal justice system each year. The nation's criminal defense bar is determined to reverse these policies. Accordingly, in August of 2018, as I started my term as President of the National Association of Criminal Defense Lawyers (NACDL), NACDL, with support from the NACDL Foundation for Criminal Justice, convened a three-day conference — *Shattering the Shackles of Collateral Consequences: Exploring Moral Principles and Economic Innovations to Restore Rights and Opportunity*.

This gathering was a combination of NACDL's 17th Annual State Criminal Justice Conference and its 2nd Presidential Summit and Seminar. Each year for nearly two decades, NACDL has brought together criminal justice advocates from across the nation, many of whom are not lawyers, to prepare for the next year of criminal justice reform advocacy on the state level. This is a key programmatic event sponsored by NACDL for the benefit of its State Criminal Justice Network (SCJN). Separately, Immediate Past President Rick Jones launched the first-ever NACDL Presidential Summit to focus on a key agenda item that he set for his tenure as NACDL President. That inaugural Presidential Summit — *Race Matters: The Impact of Race on Criminal Justice* — was held in Detroit in 2017.

A key reform item at the top of my agenda for my term as NACDL President has been the issue of the often life-long debilitating impact of the collateral consequences of arrest and conviction on millions of people in the United States. The purpose of this joint SCJN Conference and Presidential Summit was to look closely at the systemic injustice that affects the millions of people who have paid their debt to society and elicit reform recommendations from stakeholders from across the system and across the ideological spectrum. To do that, the conference brought together numerous formerly incarcerated people, prosecutors, judges, defense lawyers, criminal justice advocates, social workers, probation officers, and more.

This conference and summit was also a continuation of critical NACDL efforts concerning the collateral consequences of arrest and conviction. That work extends from the establishment of NACDL's Task Force on Restoration of Rights and Status After Conviction in 2012 and the 2014 release of NACDL's groundbreaking report — *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime — A Roadmap to Restore Rights and Status After Arrest or Conviction*, to the publication by NACDL Press of the treatise *Collateral Consequences of Criminal Convictions: Law, Policy and Practice*, by Margaret Colgate Love, Jenny Roberts & Wayne Logan, and NACDL's ongoing involvement in the Restoration of Rights Project. NACDL's reform efforts in this area will continue so long as this terrible problem persists.

NACDL was extremely fortunate to have Brennan M. Wingerter as the official reporter for this conference. Brennan is the Founder and Managing Attorney at East Tennessee Appellate Litigation, PLLC (ET AL), based in Knoxville, Tennessee. She served as a judicial clerk to the Honorable Gary R. Wade on the Tennessee Supreme Court for three years and has taught legal writing at LMU Duncan School of Law in Knoxville, where she continues as an adjunct professor. It was Brennan's selfless, pro bono efforts that made this excellent conference report a reality. NACDL is tremendously grateful for her outstanding work.

I recommend this conference report to you and encourage you to visit www.NACDL.org/ShatteringtheShackles, where you can watch and listen to the panels and presentations from the August 2018 conference. And one more thing, join NACDL, the NACDL Foundation for Criminal Justice, and our allies in working to shatter the shackles of collateral consequences. Justice and liberty demand it.



Drew Findling, NACDL President

Acknowledgements

NACDL would like to thank the NACDL Foundation for Criminal Justice for their support of the Summit and Brennan M. Wingerter for drafting this report. Additional support for the Summit was provided by the following generous sponsors: Alamo Records, the State Bar of Georgia, Aric Cramer, Drew Findling, Pete Law, Jo Ann Palchak, and Michael S. Reeves. The following partners also contributed significantly to the success of the Summit: The Association of Prosecuting Attorneys, the Anti-Recidivism Coalition, Ebenezer Baptist Church, and Georgia-Pacific.

Special recognition goes to Drew Findling, President, National Association of Criminal Defense Lawyers, for his vision, support and contributions to the Summit; Norman L. Reimer, Executive Director, for indispensable planning assistance; and Angelyn Frazer-Giles, Special Projects Consultant, for her expert input and skillful execution of the Summit.

This report would not have been possible without the insightful contributions of our esteemed Summit panelists, identified throughout the report and in Appendix B. We would also like to thank the following NACDL staff for their careful editing and helpful suggestions: Norman L. Reimer, Executive Director; Kyle O'Dowd, Associate Executive Director for Policy; and Ivan J. Dominguez, Senior Director of Public Affairs & Communications; and Cathy Zlomek, NACDL Art Director, and Julian Giles, Junior Graphic Designer, for the design of the report.

Sincerest gratitude goes to the following individuals, who worked behind the scenes to make the Summit possible: Monica Reid, Director of Advocacy; Shuli Carroll, National Affairs Assistant; Lisa Schrade, former National Affairs Associate; Gerald Lippert, Associate Executive Director for Legal Education and Professional Development; and Koichi Take, Manager, Multimedia Production and Sales. Additional on-site support was provided by Bonnie Hoffman, Director of Public Defense Reform and Training; Renee Spence, former Training and Reform Counsel; Jumana Musa, Director, Fourth Amendment Center; Jessica DaSilva, Resource Counsel; and Ian Nawalinski, Public Affairs and Communications Assistant.

Executive Summary

On August 23–25, 2018, NACDL hosted its 17th Annual State Criminal Justice Network Conference and Presidential Summit in Atlanta, Georgia.¹ The Conference — *Shattering the Shackles of Collateral Consequences: Exploring Moral Principles and Economic Innovations to Restore Rights and Opportunity* — examined the destructive effect that a vast network of penalties, debarments, and disabilities following a criminal conviction has on the millions of people who have come in contact with the criminal justice system. The Conference also explored the disparate impact that these collateral consequences have on communities of color. At the same time, the Conference highlighted the groundbreaking work that is helping people break free from the shackles while providing a roadmap for national reform.²

NACDL’s Executive Director, Norman L. Reimer, described the path to reform as following the emerging consensus that we must restore humanity to our criminal justice system. In pursuit of that goal, the Conference included more than just criminal defense lawyers; it brought together a community of prosecutors, judges, formerly incarcerated people, probation officers, social workers, and activists.³ The 60th President of NACDL, Drew Findling, welcomed this diverse group of Conference participants and attendees to “an incredible congregation of people [who] all care about one thing: justice.” These common grounds of justice and humanity formed the basis and set the tone for the entire Conference.

To facilitate the human narrative of justice through shared stories and lived experiences, every panel at the Conference included at least one person who was previously incarcerated in America. Most panels included more than one formerly incarcerated person, and a few panels consisted entirely of formerly incarcerated people. While there was some disagreement about the best terminology, resources, and methods to use in the fight against collateral consequences, the Conference represented an inclusive, humanistic approach to discussing the difficult topics of racism, morality, and social responsibility within the criminal justice system and the public at large. Some of the broad recommendations for reducing the impact of collateral consequences included:

- Building up resources in communities of color
- Funding better education systems
- Protecting and asserting the right to vote
- Increasing awareness of mental health issues
- Reforming law enforcement education to foster improved community relations
- Building coalitions at the local, state, and national levels
- Rehabilitating and educating people while they are incarcerated
- Making prisons and prosecutions more transparent
- Banning the box on employment applications that asks about prior criminal records
- Providing more employment opportunities for people getting out of prison
- Sharing success stories and changing the narrative about people who have been incarcerated

This report is intended to facilitate more discussion and to inspire further action on these issues so that anyone — not just the Conference attendees and participants — can work to shatter the shackles of collateral consequences.

Introduction

Language is a constant exchange of “input” and “output” — people absorb information from their surroundings (input) and then express that information to others (output). Sometimes the output is an exact replica of the input; an example might be using a direct quote of one sentence from a book. But more often, the output differs from the input; the narrator adds or subtracts details, consciously or subconsciously alters facts, shifts the perspective, or misstates or misquotes the source. If two artists were asked to recreate the same vase of flowers, the abstract painter would produce something very different than what is produced by the marble sculptor. And yet, the artists started with the same subject — the same input.

The same dichotomy between input and output exists in terms of analyzing the collateral consequences of criminal convictions. Every person creates their own “output”: their preferred narrative of how collateral consequences impact society. And these narratives describe a wide variety of emotions and beliefs — ranging from abstract denial and outright indifference to righteous indignation and palpable racism — even though they are all addressing the same criminal justice system: the same “input.” This is because their perspectives come from many different sources: people who were formerly incarcerated, people who are currently incarcerated, people who write or enforce laws, people who have never been incarcerated, people who advocate for criminal justice reform, people who advocate against criminal justice reform, people who vote Republican, and people who vote Democrat. Despite the differences in each person’s input and output, though, there can still be a collaborative discussion. That is because these people — these storytellers, like the panelists at the Conference — all have one thing in common: their humanity.

As demonstrated time and again by panelists and attendees during the Conference, human stories of lived and shared experiences can be the most powerful connection between individuals. Meaningful communication does not require that people agree with each other; it just requires that people listen to each other. To facilitate the discussion of collateral consequences, there are two things that must be understood at the outset. First, the definition of “collateral consequences” includes more than the thousands of specific legal restrictions that local, state, and federal governments place on people after they have completed a sentence for a criminal conviction. While collateral consequences, by their nature, are very technical, legal restrictions, they have a profound, real-life, human impact. The magnitude and nature of collateral consequences extend to people’s families and the generalized discrimination and social stigma that they endure long after they are released from incarceration. Second, the terms that are used when talking about collateral consequences are extremely important. For example, people who have served time in prison or jail should not be referred to as ex-offenders, ex-cons, or former inmates. They are simply people. Yes, they are people who were formerly incarcerated, but they have always been, and will always be, people.

With these simple concepts in mind, everyone — regardless of political ideology, socioeconomic status, or justice involvement — should be able to share their human stories, shatter the shackles of collateral consequences, and pursue the common goal of improving the lives of all.

Ways to Start the Discussion of Criminal Justice Reform and the Devastating Impact of Mandatory Collateral Consequences

The first panel of the Conference was probably along the lines of what most people expected: an open discussion about the moral, economic, and racial arguments for and against the imposition of collateral consequences. But the identities of the panel members introduced an unusual level of diversity in terms of color, career, and political creed. Rick Jones — NACDL’s immediate Past President and Executive Director of the Neighborhood Defender Service of Harlem — moderated the discussion between Marc Levin, Teresa Hodge, and Mark Holden.

Marc Levin is the Vice President of Criminal Justice Policy at the Texas Public Policy Foundation. Marc is also an attorney and author for Right on Crime, “a national campaign of the Texas Public Policy Foundation, in partnership with the American Conservative Union Foundation and Prison Fellowship, that supports conservative solutions for reducing crime, restoring victims, reforming offenders, and lowering taxpayer costs.”⁴



Photo by Koichi Take

(Left to Right) Mark Holden, Teresa Hodge, Marc Levin, and Rick Jones

Teresa Hodge is the Co-Founder and Director of Strategy and Innovation at Mission: Launch, a Maryland not-for-profit organization that supports individuals and families affected by mass incarceration through financial literacy, inclusive entrepreneurship, and community engagement.⁵ Teresa witnessed firsthand the need for criminal justice reform when she was sentenced to serve more than 80 months in federal prison for a white-collar, non-violent, first-time offense.⁶

Mark Holden is General Counsel and Senior Vice President of Koch Industries, the multi-billion-dollar corporation owned by brothers Charles and David Koch, who are known for their active role in funding certain conservative political and libertarian causes. Koch Industries is the parent organization of 11 companies ranging from the fashion industry to the food industry.⁷

Other panelists who contributed to the discussion of the moral, economic, and racial impact of collateral consequences included social scientists and legislative activists like Mary Price, Dr. Divine Pryor, and Ngozi Ndulue; a rap artist by the name of Dominique “Lil Baby” Jones; former U.S. Deputy Attorney General Sally Yates; prosecutors like Stephanie Woodard and David LaBahn; and a Georgia state judge, the Honorable Shawn LaGrua.

So where do these diverse individuals stand on the issue of collateral consequences? The following sections will explore how their surprisingly similar views may provide a path toward long-term criminal justice reform that transcends the political spectrum and shatters the boundaries between people on all sides of the debate.

Enhancing Public Safety

If there was one thing that everyone at this Conference agreed on, it was the need to maintain public safety. No one advocated the immediate closure of all prisons or the immediate release of all incarcerated people without regard for potential violence and recidivism. Teresa Hodge, who spent more than 5 years in federal prison, acknowledged that people with criminal histories are also in favor of public safety. Protecting the public, however, does not require locking up everyone who is accused of committing a crime.

The United States is home to only about 5% of the world’s population but houses about 25% of the world’s prisoners. Many of the people who occupy America’s prisons were convicted of non-violent crimes, and yet

when they are released they face many of the same crippling collateral consequences as people who were convicted of violent crimes. According to a 2016 report by the Brennan Center for Justice, nearly 40% of people incarcerated in the U.S. are being held behind bars “with no compelling public safety reason.”⁸

For some people, there may be good reason to impose strict collateral consequences as conditions of their release from jail. Two scenarios illustrated by Marc Levin, while playing Devil’s Advocate, were that a person who is a proven child sex offender should not be provided a job in a daycare center and a person who was convicted of insurance fraud should not be given a job selling insurance. “But we’ve gone way too far,” Marc said. Housing restrictions in Florida, for example, are so strict that hundreds of people carrying convictions for sex crimes are forced to live in makeshift tent camps, under bridges, and in open fields — which may be even more dangerous for both the public and the formerly incarcerated people.⁹

The question thus becomes: How can society secure public safety without irrationally burdening an entire segment of the population? Any solution must, of course, strike a balance. Panel members agreed that mandatory, across-the-board collateral consequences “don’t make sense,” so they made a few proposals for compromise:

- Impose only temporary post-incarceration restrictions; no lifetime collateral consequences
- Provide formerly incarcerated people with community resources and peer assistance programs
- Implement a process for waiving and appealing the imposition of collateral consequences
- Utilize the least restrictive means necessary to reduce a person’s chances of re-offending

These proposals can be collectively described as implementing “discretionary collateral consequences.” The common goal is to create a system that allows for individualized sentences and certain carefully circumscribed post-incarceration restrictions while enhancing public safety and maximizing the number of people who can contribute to the economy.

Building Coalitions

If the creation of discretionary collateral consequences or any other type of criminal justice reform is going to be a success, the discussion simply cannot be one-sided. Criminal defense lawyers and liberal community activists

must be careful not to alienate supportive conservative groups whose constituents and leaders often control the mechanisms of the justice system. Both sides should develop strategic alliances and work in coalitions to reach different audiences so that compromises on issues and tactics can lead to real solutions. Building these coalitions is certainly a challenge, but it is not impossible.

Legislators

For example, it was a “right and left meeting of the minds” that culminated in Maryland’s elimination of mandatory minimums for drug offenses. Mary Price, who is General Counsel of FAMM — a group that works “to create a more fair and effective justice system” through “public education and targeted advocacy” — explained how the Maryland initiative used “gateway legislation” to bring liberals and conservatives to the same table for a discussion on meaningful sentencing reform. Mary spoke as a panel member for “The Road to Re-Entry: Navigating Systems Players and Building Coalitions,” where she was joined by Ngozi Ndulue from the National Association for the Advancement of Colored People (NAACP) and Dr. Divine Pryor from the Center for NuLeadership on Urban Solutions. Here is the approach that Mary outlined for other states to follow:

1. FAMM began reaching out to Republican legislators and conservatives four or five years before the Justice Reinvestment Act was passed in 2016.
2. In 2013, FAMM worked with the American Legislative Exchange Council (ALEC) to develop model legislation for changing mandatory minimums. ALEC is “America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism” — in other words, ALEC is a politically conservative group.¹⁰
3. By putting the focus on public safety and fiscal conservatism, ALEC works in partnership with its allies to create “carefully crafted” legislation designed to “maximize taxpayer dollars . . . while preventing overcriminalization and unnecessary prison stays.”¹¹
4. Before tackling the elimination of mandatory minimums altogether, FAMM developed a key compromise in the proposed legislation with ALEC: create a safety valve for judges to waive mandatory minimums when certain conditions have been met.

5. The safety valve was the first part of the legislation to pass.
6. When the rest of the legislation passed, the Justice Reinvestment Act eliminated mandatory minimums altogether for future convictions, and the safety valve was made retroactive for everyone who had already received a mandatory minimum sentence.
7. This success would not have been possible if FARM had not been willing to compromise some of its issues, acknowledge the powerful role of fiscal conservatism, and build the discussion upon a common ground: public safety.



Photo by Ivan Dominguez

(Left to Right) Dr. Divine Pryor, Ngozi Ndulue, Mary Price, and Roberta "Toni" Meyers

Ngozi Ndulue echoed Mary's emphasis on the need to reach the ears of conservative groups by focusing on public safety and the economic impact of lengthy sentences and collateral consequences. Ngozi is the Senior Director of Criminal Justice Programs at the NAACP, and she attributes meaningful reform to the grassroots movements that strengthen people on the state and local levels. When legislation like the Justice Reinvestment Act is on the table, individual voters need to hold their elected officials accountable through the polls and town hall meetings. Arguments about race and the criminal justice system are inevitable, Ngozi said, but she encouraged activists to start the discussion with something that their "traditional friends" and "traditional enemies" could agree on: the fact that "it makes so little economic sense to continue down th[e] mass incarceration path."

In this way, traditional friends and traditional enemies can become unexpected allies. And the conversation does not have to stop with the legislators and their constituents. Just as Republicans and Democrats can work together to develop better laws, so too can defense attorneys work with police officers, prosecutors, and judges to improve the system that applies those laws.

Prosecutors & Judges

To help facilitate this coalition, NACDL invited a panel of prosecutors and judges to speak on the topic of "Justice for All." Dr. Divine Pryor — a social scientist who was previously incarcerated — moderated the panel. Dr. Pryor is currently the Executive Director of the Center for NuLeadership on Urban Solutions, "an independent research, training and advocacy think tank that applies Human Justice to achieve public safety, racial equity, community investment, human development and well-being in society."¹² Dr. Pryor's panel participants included Stephanie Woodard, David LaBahn, and the Honorable Shawn LaGrúa.



Photo by Koichi Take

(Left to Right) Stephanie Woodard, David LaBahn, Hon. Shawn LaGrúa, and Dr. Divine Pryor

Stephanie Woodard is a seasoned prosecutor who has worked in several district attorneys' offices in a variety of Georgia counties. She is currently the Solicitor General of Hall County, Georgia, where she prosecutes misdemeanor offenses. Stephanie is an advocate for alternative sentencing courts and substance abuse rehabilitation programs.

Dave LaBahn is President and CEO of the Association of Prosecuting Attorneys, a national organization that provides training and technical assistance to prosecutors throughout the United States. Dave enjoys collaborating with all criminal justice partners, and he frequently speaks about criminal justice reform.

Judge Shawn LaGrúa was appointed to the Superior Court of the Atlanta Judicial Circuit in December 2009. Since that time, she has been a pioneer in fostering rehabilitation and reintegration as opposed to simply enforcing harsh prison sentences.

These panel members agreed that meaningful criminal justice reform requires changes to the culture within the system itself. Prosecutors and judges — the system players who hold all the power and make all the decisions — can singlehandedly change the course of a person's life, and with this power comes great responsibility.

As the Solicitor General of Hall County, Georgia, Stephanie is an elected official who takes her responsibilities seriously as she makes decisions about prosecuting misdemeanors. For example, Stephanie reported that half of the attorneys who work in her office have prior criminal records, which is a deliberate hiring practice designed to teach new prosecutors how to see the human beings in the system. Expressing her philosophy behind this practice, Stephanie said, “I don’t think that someone should be involved in prosecution if they don’t understand what it feels like to be prosecuted.” She instructs her prosecutors not to look at the snapshot of a person’s life in their worst moment, but to look beneath the surface for the root of the problem so they can address the real issues and help people reintegrate with their communities and support systems.

For Dave LaBahn, who trains lawyers in district attorneys’ offices across the country, his role in changing the system is to make sure that prosecutors learn to “do the right thing for the right reasons to the right person.” One way that Dave accomplishes this goal is to lead by example: although he supports long-term incarceration for people convicted of violent crimes, he has helped secure the early release of several people who were serving life sentences for non-violent drug offenses. Dave also discussed the importance of screening people for their risks and needs so they can be provided with a defense attorney “right away” and be diverted or deflected away from the criminal justice system through educational and treatment programs.

As the final decisionmaker, Judge LaGrua plays her part by overseeing a Re-Entry Court — which uses close supervision, mental health and substance abuse treatment, education, and job-training to help integrate people back into the community after they have served a period of incarceration — and the “My Journey Matters” program, which diverts young people accused of violent crimes away from prison. “My Journey Matters” is an innovative alternative court program that praises young people for obtaining good report cards and clean drug screens while helping them learn how to create budgets and résumés. The program also requires monthly check-ins with the court to make sure that the youth are on track to earn their GED or high school diploma and graduate from the program with a marketable skill. The ultimate goal of Judge LaGrua’s alternative court is to make sure the young people who go through My Journey Matters are “educated, stable, and not coming back.”

Law Enforcement Officers

While these voices from the bench and bar offered an insider’s perspective, the panel also acknowledged that systemic change must begin even before an individual is accused of a crime and enters a courtroom. Law

enforcement plays a critical role in determining whether the gears start to turn in the first place, and police officers are often the front line in shaping the narrative of a person’s life.

Coalitions with law enforcement should start with on-the-ground training and community involvement. For example, the People’s Police Academy has connected with the New York Police Department through a community-led program in which civilian experts (including formerly incarcerated people and former gang members) train NYPD officers without intervention by the NYPD’s administration.¹³

One of the primary goals of these local-level training sessions is to help officers become more sensitive to the needs of the community so that people can be diverted into mental health and substance abuse treatment programs before they are arrested and prosecuted for non-violent offenses.

Summary

With these kinds of broad coalitions being developed at every level of the criminal justice system, the “tough on crime” policies of old can start to transform into a more modern approach that is “smart on crime.” This idea has been embraced even by the highest-ranking prosecutor in the United States: former Attorney General Eric Holder. Sally Q. Yates — the former United States Deputy Attorney General who delivered the keynote address at NACDL’s Conference — spoke about Holder’s

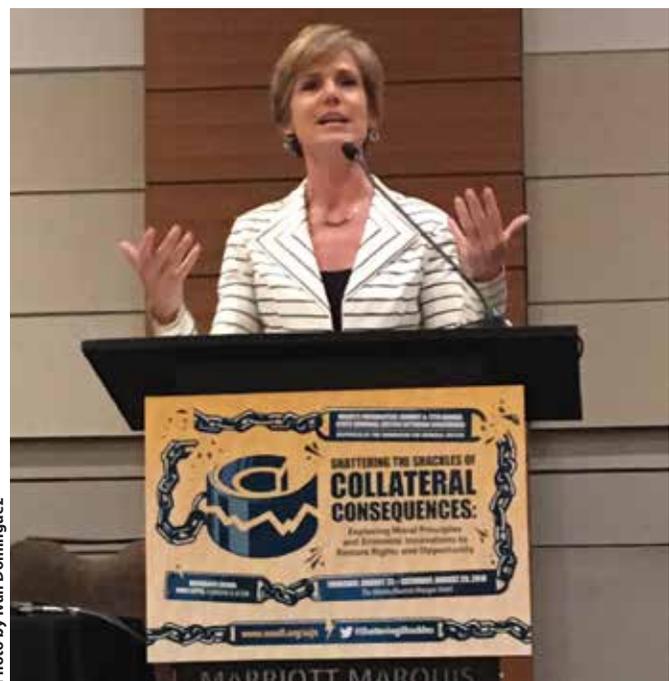


Photo by Ivan Dominguez

Former U.S. Deputy Attorney General Sally Q. Yates (recipient of Champion of Justice Restoration of Rights Award) delivering Keynote Address at Shattering the Shackles summit

commitment to focusing on people rather than punitive policies. During their time in office, Holder and Yates embraced a comprehensive approach to prosecution that placed equal emphasis on the enforcement of laws, prevention of incarceration, and development of meaningful re-entry initiatives. The Department of Justice eliminated the use of private prisons, created literacy and educational programs for people who were incarcerated, and assisted people who were re-entering their communities by providing them with personal identification cards, resource handbooks, and social security cards.

But Sally Yates informed Conference participants that many of the advancements she made with Eric Holder have been undermined or outright eliminated by the current federal administration. Private prisons are again supported by U.S. Department of Justice, and, according to Yates, most education programs have disappeared. The administration appears to have shifted its focus by prosecuting lower-level drug offenses and immigration offenses while imposing harsher punishments. Yates has also perceived an increased tendency to distance people who are incarcerated from their families and support systems.

There are a number of negative consequences that flow from these dramatic policy changes, and their impact will certainly be felt more by communities of color.

Seeing & Talking Color

No discussion of America's war on crime is complete without the topics of racial inequality, disparity, and injustice. As one panel moderator, Roberta "Toni" Meyers, explained: "No one working on criminal justice reform can do this work effectively and with integrity without considering how racism drives criminal justice policy and practice." While these issues were raised and debated throughout the Conference, several panelists addressed head-on the continuing problem of racism in the nation's criminal justice system.

Panelist Mary Price and several Conference attendees mentioned the importance of the 2016 documentary "13th" (in reference to the Thirteenth Amendment), which explores the direct connection between slavery and imprisonment as the perpetual criminalization of black people. Moderator and panelist Dr. Divine Pryor also referred to "13th" and noted the role that the Thirteenth Amendment¹⁴ and various legislative measures — like voting laws, vagrancy laws, and literacy laws — have played in reinforcing the enslavement of a particular group of people. Panelist Dominique "Lil Baby" Jones, who served two years in prison before becoming an overnight rap sensation, placed the blame

for internalized, systemic racism on society in general: "It's people, period. Black youth are being profiled, but not just by white people."

The imposition of mandatory collateral consequences ensures that racial oppression will continue long after a person has served his or her time. Disenfranchisement and employment and housing restrictions, in particular, prevent formerly incarcerated people from exercising their voices and reintegrating into their communities as productive, taxpaying citizens. As activists work to shatter the shackles of these collateral consequences, it may help to break some of the barriers to discussion by sharing human stories through films like "13th" and by focusing on common goals like public safety and fiscal responsibility.

The Far-Reaching Effects of Collateral Consequences

The previous section of this Report laid the groundwork for discussing the moral, economic, and racial issues of criminal justice reform through the common goals of public safety, fiscal conservatism, and inclusive redemption. This section will add the most important voices to the conversation by sharing the human stories and lived experiences of some of the panelists who were formerly incarcerated in America.



“Previously incarcerated people are not just one story.” – Cynthia W. Roseberry

Restrictions on housing and employment opportunities were consistently identified by Conference panelists as the most difficult collateral consequences faced by formerly incarcerated people struggling to meld with the general population. And even for those who are able to obtain post-incarceration employment, the lack of transportation often prevents them from keeping the job long enough to maintain a steady income. To make matters worse, the perpetual cloud of disenfranchisement and the general stigma of having a criminal record compound these day-to-day hurdles by depriving an entire segment of the population of access to the polls and to the media. The only way to change this narrative is to listen and restore the voices of the human beings who have served their sentences but remain imprisoned by the far-reaching effects of collateral consequences.



“I can’t focus on one consequence. I need to know why there are any consequences once I’ve served my time.” – Christopher Ervin

Housing

When people are released from prison, they are usually given two things: \$40 or \$50 and a one-way bus ticket out of town. But many of them have nowhere to go. Some types of convictions — usually those of a violent or sexual nature — carry heavier housing restrictions than others, but any type of criminal record is generally a barrier to renting a decent place to live.

In Houston, for example, city ordinances have tightened restrictions and regulations on alternate housing facilities and boarding homes, making it more difficult for formerly incarcerated people to reintegrate with the communities where they want to live and work.¹⁵ Some public housing authorities require the automatic rejection of people who were convicted of sex crimes or certain drug offenses. Other restrictions give public housing authorities the discretion to reject applicants whose backgrounds include convictions for arson, burglary, or another crime against property. The number of available housing options is further reduced for anyone with a history of mental health or addiction issues.

When public housing is not an option, formerly incarcerated people must turn to private landlords for assistance. It should not be a surprise to hear that many landlords will refuse to rent to anyone with a criminal record. But the housing discrimination story told by panelist Marcus Bullock¹⁶ — who became a successful entrepreneur after spending 8 years in prison — was eye opening. Marcus had been out of prison for more than a decade when his application for an apartment was denied by a private leasing office. At first, he was confused. He thought that perhaps the one apartment he was considering had been rented before his application could be processed, but the leasing officer told him that it was not just that one apartment; none of the units would be available. After pressing for answers, Marcus discovered that his application had been denied because of his decades-old felony conviction — something that was so remote it had not even crossed his mind when the leasing office first turned him down.

After hearing too many stories like the one told by Marcus, panelist Susan Burton¹⁷ decided to become a private landlord for women who need a place to live when they are released from prison. Susan is an author and activist who turned to drugs and alcohol after suffering through years of sexual abuse and the tragic death of her five-year-old son. She served six prison sentences

that her business will not be dictated by governmental restrictions and her tenants will not be subjected to governmental intrusion.

Few communities are lucky enough to have a Susan Burton, though, which is part of the reason why the recidivism rates in this country are so high. Studies have consistently shown that people who get out of prison without the ability to secure safe, stable housing are at a much greater risk of reoffending. America's homeless population is inundated with formerly incarcerated people, many of whom also suffer from mental health problems or substance abuse and addiction issues. Housing restrictions that force these people onto the streets and into high-crime neighborhoods without adequate resources create a self-fulfilling prophecy of recidivism and perpetuate the false narrative that the public would be safer if everyone remained locked up for life.

Employment

Compounding the collateral consequences of housing restrictions is the lack of employment opportunities for people who have served time in prison. And it is undeniable that race and conviction-type play a large



“The best public safety plan for someone coming home from prison is employment.” – Dr. Divine Pryor

for drug-related offenses before she finally found a way to get the treatment and therapy she had so desperately needed long before she was incarcerated. For Susan, that meant leaving her over-policed and under-resourced community of South Los Angeles for a rehabilitation center in the beachfront resort town of Santa Monica.¹⁸

role in this part of the system. As panelist Desmond Meade¹⁹ noted, for example, cybercriminals like hackers sometimes go on to work for the FBI or the CIA, but an ordinary African-American male who is convicted of a drug-related felony would never be allowed to become a police officer.



“I had to change my mindset. Mexicans weren't born to sell and use drugs.” – Jason Hernandez

Now sober for more than 20 years, Susan owns and operates seven houses for women trying to rebuild their lives after a period of incarceration. She refuses to contract with prisons and departments of correction so

Panelist Jason Hernandez is a Soros Justice Fellow who was just 21 years old when he was sentenced to life without parole for a non-violent drug offense. After enduring his brother's death and witnessing first-hand the injustice

of racially disparate crack cocaine laws,²⁰ Jason was eventually granted clemency and released. But as soon as he got out of prison, Jason faced a much different number 21: “You have 21 days to start paying on your fine and get a job or else you go back to prison.” Jason was given only 21 days to get a job, and he had a criminal conviction on his record. Most people with college and doctoral degrees would have trouble finding a job within 21 days if they suddenly found themselves looking for employment. But somehow that is what the criminal justice system expects of people who have been imprisoned far away from their families and who have received little to no education or job training while incarcerated.

Because Jason was serving a sentence of life without parole, he was not provided with any re-entry programs while he was incarcerated. Everyone assumed he was never going home. But Jason remained hopeful, so he paid hundreds of dollars to participate in welding, culinary arts, and paralegal training sessions led by other people who were incarcerated with him. When Jason was released from prison, however, he realized that none of these programs had prepared him for the harsh reality of the job search. Most applications had to be completed online, and Jason — like anyone who is incarcerated for more than five or six years — had not been able to keep up with the changes in technology. He did not know how to use a computer. And as someone with a criminal record, Jason had to “check the box” indicating that he had been convicted of a crime, which most employers use as an automatic disqualifier when sorting through applications. Jason’s prior conviction also disqualified him from donating blood or giving plasma, which otherwise might have been a non-traditional way to make the money he needed to pay his fines and comply with the conditions of his release.

The bitter irony of requiring formerly incarcerated people to find employment and pay their fines almost immediately upon release, while simultaneously placing severe restrictions on their ability to do so, is perhaps best illustrated by last summer’s wildfires in California. More than 2,000 of the 14,000 firefighters who battled the Mendocino Complex Fire were people serving time in the California Department of Corrections and Rehabilitation. These brave firefighters who volunteered to face the deadly blaze will probably never be able to get a firefighting job after they are released. That is because most fire departments require their employees to be certified EMTs. EMTs are required to obtain an occupational license, and occupational licenses are typically denied to anyone with a criminal record.²¹

In fact, according to panelist Lee McGrath — the Institute for Justice’s Senior Legislative Counsel — occupational licensing boards are one of the loudest voices advocating against the hiring of formerly incarcerated people.

There are about 15,000 collateral consequences related to occupational licensing, and about 6,000 of them are permanent, automatic bars to the employment of someone with a criminal record. The occupational licensing boards have consistently refused to “ban the box,” which would prevent the boards from including a question about prior criminal convictions on their licensing applications. This simple decision to “ban the box” would allow formerly incarcerated people to be seen as who they are instead of as the crime they committed, the mistake they made, or — for the truly innocent — the false circumstances under which they were convicted.

The desire to be seen as a human being — a concept that most people take for granted — consumes the minds and hearts of people who just want to get a job and begin contributing to society after a period of incarceration. As Serena Nunn McCullers put it during one panel discussion, “I want [potential employers] to see past my crime and see me.”



“I want [potential employers] to see past my crime and see me.”

– Serena Nunn McCullers

Transportation

Stories similar to those told by Jason Hernandez and Serena Nunn McCullers are not uncommon among formerly incarcerated people trying to get back on their feet after they have served their sentence. Panelist John Koufus is the National Director of Reentry Initiatives for Right on Crime, and he will tell you that no one asks him for money, but everyone asks him for a job. While searching for a solution to this job void, John identified a key obstacle to obtaining employment: the lack of transportation. At an even more basic level, John recognized that many people who were released from prison did not have a driver’s license. John set out to change that. He established a coalition with the Motor Vehicle Commission and pro bono lawyers throughout his home state of New Jersey who work together to clear up outstanding warrants and apply for licenses on behalf of those who were formerly incarcerated.

These kinds of driver's license reinstatement initiatives are necessary steps on the road to redemption, but the obstacles to transportation do not end at the Department of Motor Vehicles. After obtaining a license, anyone who owns a vehicle is required to maintain insurance. For panelist Randy Lanier, who spent nearly three decades in prison for non-violent drug-related offenses, the cost of that insurance was four times the regular rates because it had been so long since he had a driver's license. Perhaps somewhat ironically, Randy is also a former professional racecar driver who won several major events in the 1980s. But because he had a criminal record, Randy's driving qualifications meant nothing to the licensing and insurance agents. As Jason said, they were not treated differently because they had sold drugs and poisoned their communities; they were treated differently simply because they had served time in prison.

4. To get a car, you need a driver's license and insurance.
5. To get a driver's license and insurance, you need money.
6. To get money, you need a job.
7. To get a job, you need reliable transportation.

And just like that, the system repeats its vicious cycle of roadblocks and setbacks that make it nearly impossible for anyone getting out of prison to become a successful contributor to the economy.



They were not treated differently because they “were selling drugs and . . . committing crimes and . . . poisoning [their] community”; they were treated differently simply because they had served time in prison. – Jason Hernandez

Another panelist, Jarrett Adams, summarized the dilemma for formerly incarcerated people like this: “It all comes down to money.”



**“It all comes down to money.”
– Jarrett Adams**

1. When you are released from prison, you need money to pay fines.
2. To get money, you need a job.
3. To get a job, you need reliable transportation.

Voting Rights

Another collateral consequence that prevents people who were formerly incarcerated from becoming productive members of society is the automatic elimination of their voting rights. Only two states in America — Maine and Vermont — allow people to retain their voting rights while they are incarcerated. For everyone else, their voting rights are stripped away as soon as they are convicted. When they are released, these same people face a much more difficult process to get their rights restored, and for some, it is literally impossible. A few states impose lifetime or long-term bans on voting for people who have been convicted of certain crimes. Automatic disenfranchisement for people who were convicted of voter fraud might make sense, but usually this collateral consequence extends to all felony offenses, most of which have nothing to do with the ability to vote.



“Nothing speaks more to citizenship than being able to vote. If you're worthy of being released back into the community, then you're worthy of exercising your rights.” – Desmond Meade

In most states, a person is not eligible for voting restoration until completing their sentence and all conditions of release, including probation, parole, and payment of fines, fees, and court costs. Yet again, as Jarrett Adams said, “[i]t all comes down to money.” Formerly incarcerated people who are unable to afford housing or a car that will get them to and from a job where they can earn money are often unable to pay their financial obligations after release. As a result, these people will never be eligible to apply to have their rights restored. And that word “apply” is intentional — instead of automatically restoring a person’s voting rights after a period of incarceration, many states require people to submit an individual application to their Board of Probation and Parole or to the Governor. The process may take years, and there is no guarantee that an application will be granted. In Florida, for example, the state even lacks a basic process for reviewing these applications. A federal judge recently struck down the Florida Executive Clemency Board’s process for restoring voting rights as unconstitutional, and a constitutional amendment on the November 2018 ballot was passed with 65 percent of the vote, promising to make it easier for most formerly incarcerated people to have their voting rights restored, though implementation is facing certain legislative challenges.²²

Without significant changes to the system and the process, most formerly incarcerated people will never be able to restore their voting rights, whether that is because of a lack of financial resources or a lack of eligibility based on their type of conviction. The inability to vote alienates these people from the rest of society long after they have served their prison sentences, undermines a core tenet of what it means to be a self-governing democracy, and creates feelings of exclusion and unworthiness instead of redemption and forgiveness.

Stigma



“No one prepared me for the invisible life sentence that is associated with having a criminal history.”

– Teresa Hodge

Unfortunately, the feelings of isolation and anxiety that are harbored by most formerly incarcerated people are not limited to the voting restoration process. A person with a criminal record carries a scarlet letter for the rest of his or her life, and sometimes even after death. One of the panels at the Conference was devoted just to this topic. “Forgiving: The Campaign Against the Scarlet Letter,” featured moderator Cynthia W. Roseberry and panelists Jason Hernandez, Margaret “Margy” Love, and John Koufos.



“The unfortunate technological advancements of the last 30 years allow us to look up people’s criminal histories without ever leaving our desks.”

– Margaret Love

The panel members discussed how, thanks in large part to technology and the media, society will never allow the stigma of a criminal conviction to simply fade away. John — whose decades-long battle with addiction led to a conviction for driving under the influence and seriously injuring another person — described wearing his scarlet letter quite literally. Even though John now visits the White House every two to three weeks as a lobbyist for Right on Crime, it is ironic that he is still required to wear an “escort required” badge while he is on the premises.

This panel also garnered some of the most eye-opening audience discussion. One attendee shared a story of stigma that followed her family member beyond the grave. Before her mother could be buried at Arlington Cemetery alongside her honored veteran father, the attendee had to swear that her mother had never been convicted of a

felony. Even in death, a person convicted of a crime can be stigmatized, humiliated, and alienated from family members. In a country that was founded on personal liberation, it is incredible that so many citizens are still forced to be burdened by the tangible and intangible collateral consequences that will never allow society to forgive or forget the single worst day of their lives.

Moving Forward While Looking Back

Amazingly, despite being crippled by the shackles of all these collateral consequences, many people have been able to rebuild their lives and achieve successful careers. But none of the people who shared their stories at the Conference simply picked themselves up and moved on. Every single person who was formerly incarcerated spoke about the importance of reaching back into the system and helping another person break the cycle of recidivism by providing mentorship, training, and sometimes even a job.

Kevin spoke on the panel titled “Plenary — I Am My Brother’s Keeper: Guiding Principles of Re-Entry” with Dominique “Lil Baby” Jones, who has achieved national fame as a rap artist since his period of incarceration. Lil Baby uses his platform to speak out against the culture of drugs and guns in the young black community. And panelist Omar Howard, an author and activist who served eighteen years for a murder he did not commit, now serves as Chaplain of a transition center for people who are released. He also regularly speaks at schools and mentors youth in his community.

Omar shared his story on the panel of Criminal Justice Leaders and Authors, which was moderated by Nkechi Taifa — the Advocacy Director for Criminal Justice at the Open Society Foundations — and included panelist Anthony Graves, who spent more than 15 years on death row before he was finally exonerated from charges of a mass murder that he did not commit. After he was released and exonerated, Anthony “turned around



“I had to outthink and outsmart racism. And I’m gonna outwork you. That’s how I am where I am today.”
– Kevin Skidmore



Photo by Ivan Dominguez
(Left to Right) Omar Howard, Anthony Graves, Susan Burton, and Nkechi Taifa

Kevin Skidmore, for example, routinely hires formerly incarcerated people like himself to work for his trucking company, FourFourtyTrucking, LLC. He attributes his success to hard work and personal responsibility.

and helped exonerate the next guy on the list.” The Anthony Graves Foundation has also created the Exoneree Speakers Bureau, which is a program that trains exonerees on how to tell their stories to the public, legislators, and the media.



“Helping other people, using the law, changed my life.” – Shon Hopwood

Other panelists have taken a longer but nonetheless purposeful route in using their careers to assist the people they left behind in prison. Amy Solomon — Vice President of Criminal Justice Policy for the Laura and John Arnold Foundation — moderated a panel of



I want to “be a servant to my young brothers and sisters.” – Omar Howard

three formerly incarcerated individuals who overcame unbelievable odds to earn juris doctor degrees and obtain licenses to practice law: Jarrett Adams, Serena Nunn McCullers, and Shon Hopwood.



Photo by Ivan Dominguez

(Left to Right) Shon Hopwood, Amy Solomon, Jarrett Adams, Angelyn Frazer-Giles, and Serena Nunn McCullers

whose own prison sentence was commuted by President Bill Clinton and later pardoned by President Barack Obama. For Serena, who provides client-centered legal representation that brings humanity into the courtroom, “banning the box” is crucial because checking a box on an employment application will never provide the whole picture of a person.

While Serena regularly speaks to teenage girls and at-risk youth, her story also resonates with people who have already been convicted. Panelist Shon Hopwood is now a law professor at Georgetown University, but he was inspired by Serena while serving a federal prison sentence for a series of armed bank robberies. Before he was released and long before he went to law school, Shon had filed several successful petitions in the United States Supreme Court — something most lawyers will not do once in their careers. After Shon earned the chance to sit for the Washington State Bar Exam, he successfully petitioned the Washington Supreme Court on behalf of another formerly incarcerated person whose character and fitness application had been denied.



“Families are incarcerated too, just minus the bars.”

– Jarrett Adams

Jarrett Adams, who is now a criminal defense and civil rights lawyer, represents clients like himself who were wrongfully convicted. As an attorney and activist, Jarrett makes a point to talk to his clients’ families and help them develop better resources in their communities. Serena Nunn McCullers is a public defender in Atlanta

Summary

People like Shon, Serena, Jarrett, Anthony, Kevin, Lil Baby, Jason, Susan, John, Randy, and Marcus are not just speakers at the NACDL Conference who happened to have served time in prison. They are activists, lawyers, and entrepreneurs. They are mothers and fathers, husbands and wives, sisters and brothers. And they are not alone. Millions of Americans — people who are parents, children, neighbors, and cousins — are unfairly stigmatized every day because of prior criminal convictions for which they have already paid the price and served the time. They are ready to move on, and it is this country’s moral and fiscal responsibility to help them do so.



“The commutation process is about my freedom; the pardon is about my future.” – Serena Nunn McCullers



“People change, character is not static, and the law needs to recognize that.” – Shon Hopwood

Legislative & Judicial Reforms



“Law and policies change when the issues are humanized.” – Nkechi Taifa

As activists, lawyers, and other groups continue to work for change in the system, they must be willing to cross the aisles of partisan politics and reach strategic solutions to the problems caused by post-incarceration restrictions on housing, employment, transportation, and voting. Perhaps somewhat surprisingly, many of the states that have successfully implemented meaningful criminal justice reform on these issues are in the South and Midwest. The primary panel on these topics — “Forgetting: Alleviating Collateral Consequences Through the Legislative & Referendum Process” — consisted of moderator Monica Reid, who is the Director of Advocacy for NACDL, and panelists Marissa Dodson (Georgia), Desmond Meade (Florida), and Lee McGrath (Minnesota). Based largely on their input, this section of the Report will highlight recent legislative and judicial improvements in Georgia, Florida, Pennsylvania, New Hampshire, and Indiana. The models set by these states can and should be repeated throughout the country to address the collateral consequences faced by those who were formerly incarcerated.

Photo by Ivan Dominguez



Fmr. Georgia Governor Nathan Deal (recipient of Champion of Justice Restoration of Rights Award) delivering remarks at Shattering the Shackles summit

Ban the Box

Former Governor Deal, who hired formerly incarcerated people to work at the Governor’s Mansion, led by example: the state of Georgia as an employer has banned the box. The Governor hopes that the example set by the public sector will encourage employers in the private sector to also ban the box. Marissa Dodson — Public Policy Director at the Southern Center for Human Rights in Atlanta — echoed Governor Deal’s call for cooperation among fiscal conservatives, public officials, and private employers. Marissa emphasized the importance in helping employers understand that banning the box is a way to turn tax burdens into tax payers: if formerly incarcerated people have more opportunities to get jobs, then they will not have to depend on state welfare programs.

Expansion of Accountability Courts²⁴

Georgia has demonstrated its continued commitment to incarcerating only those individuals who represent a threat to public safety while diverting many non-violent individuals into alternative programs such as



Photo by Koichi Take

(Left to Right) Lee McGrath, Desmond Meade, Marissa Dodson, and Monica Reid

Georgia

The then-Governor of Georgia, Republican Nathan Deal,²³ delivered an emotional address to Conference participants and attendees. Governor Deal has been a leader in bipartisan efforts to shatter the shackles of collateral consequences in his state.

accountability courts. These courts include Felony Drug Courts, DUI Courts, Veterans' Courts, Family Treatment Courts, Mental Health Courts, and specialized Juvenile Courts. The Council of Accountability Court Judges of Georgia currently oversees more than 140 accountability courts throughout the state, with at least one accountability court operating in every judicial district. To further incentivize these alternative programs, the state of Georgia pays monetary stipends to judges who operate an accountability court in their district.

Juvenile Justice Reform²⁵

In addition to its specialized Juvenile Courts, Georgia has created community-based alternative programs to divert juveniles away from detention facilities. Juvenile court judges have greater discretion in keeping juveniles out of detention facilities while increasing their access to mental health treatment, substance abuse counseling, and family therapy. The Georgia General Assembly has authorized a grant program that supports counties where juvenile incarceration rates have been reduced.

Education and Treatment for Incarcerated People

In recent years, Georgia has worked to convert facilities into treatment and transition centers rather than build new prisons. The state is also creating a network of prison-based charter schools to provide incarcerated people with the opportunity to learn technical skills and earn real high school diplomas instead of GEDs. These efforts have led to a marked decrease in recidivism rates while increasing the state's general population and thus increasing its revenue.

As former Governor Deal acknowledged, none of these positive reforms in Georgia would have been possible without wide bipartisan support achieved through open discussion, negotiation, and compromise.

Florida

If anyone understands the difficulty in passing statewide criminal justice reform, it is Desmond Meade. Desmond describes himself as “a formerly homeless returning citizen who overcame many obstacles to eventually become the current State Director for Florida Live Free Campaign, President of the Florida Rights Restoration Coalition (FRRRC), Chair of Floridians for a Fair Democracy, Chair of the Florida Coalition on Black Civic Participation's Black Men's Roundtable, and a graduate of Florida International University College of Law.”²⁶ At the Conference, Desmond addressed two of the most controversial collateral consequences in Florida: disenfranchisement and stigma.

Restoration of Voting Rights

Until recently, Florida was one of fewer than five states that would not restore a person's right to vote if they were convicted of certain crimes, but in November 2018, Floridians overwhelmingly voted to change that statistic. Amendment 4, the Voting Restoration Amendment, was on the ballot to provide second chances for over one million people who have been prohibited from voting because of their prior criminal convictions. As Desmond explained, the amendment creates a fast-track for certain people to have their voting rights restored without the intensive, individual application process that is currently in place. Eligible individuals include formerly incarcerated people who have completed the terms of their sentence, including probation and parole. Notably, however, the law does not allow voting restoration for people who have been convicted of murder or a sex offense. While this was a point of great concern among those who opposed the amendment, its proponents emphasized the need for compromise and contended that some reform is better than no reform.²⁷

Expungement Reform

In Florida, there is a very short list of criminal offenses that qualify for expungement, and even the ones that do are not always fully sealed or expunged. For example, a person might be able to conceal an arrest but not a conviction, and the arrest records are still made available to schools and state agencies. These limitations make expungement in Florida a practically meaningless illusion. Faced with an unsympathetic electorate and legislature, Desmond recommended changing the narrative about the stigma associated with a criminal conviction. He suggested that formerly incarcerated people like himself wear their prior convictions as a badge of honor rather than a scarlet letter badge of shame. This idea may be controversial to some, but it has been embraced by others. For most formerly incarcerated people in Florida, the lack of a meaningful legal path to expungement makes Desmond's human-story approach a necessity.

Pennsylvania²⁸

In contrast to Florida, the state of Pennsylvania recently amended its expungement legislation, which Democratic Governor Tom Wolf described as making it “easier for those who have interacted with the justice system to reduce the stigma they face when looking for employment and housing.” On June 28, 2018, Governor Wolf signed the Clean Slate Bill with overwhelming bipartisan support. Although the new law does not allow for the expungement of more serious offenses, it does provide automatic record-sealing for low-level misdemeanors

and arrests that do not result in convictions. People who have been convicted of more serious misdemeanors and felonies can petition for their records to be sealed after certain conditions have been met.

New Hampshire

Notably, legislative criminal justice reforms are not just being passed by Democrats. On July 2, 2018, the Republican Governor of New Hampshire signed into law Senate Bill 589, making New Hampshire the eleventh state to substantially limit the ability of occupational licensing boards to use a person's prior criminal conviction as a basis for denying an employment certification.²⁹ The New Hampshire law, which is similar to laws passed in Arizona, Illinois, Indiana, Kansas, Maryland, Massachusetts, Nebraska, Tennessee, Wisconsin, and Wyoming, is modeled after legislation that was carefully crafted by the Institute for Justice.

Panelist Lee McGrath, speaking at the Conference on behalf of the Institute for Justice, described the model legislation as “flipping the burden” so that the occupational licensing boards — not the formerly incarcerated individuals — are required to demonstrate why a license should or should not be issued to a particular applicant. Although the laws of each state vary to some degree, the unifying goal is to provide a process for formerly incarcerated people to obtain occupational or professional licenses without being automatically barred by their criminal records. Most significantly, if an occupational licensing board wants to deny a license based on a person's criminal history, the board must demonstrate that its decision is justified because the person's prior conviction is directly, substantially, and adversely related to public safety.

The New Hampshire law, which recognizes that “[t]he right of an individual to pursue an occupation is a fundamental right,” prohibits a licensing board from disqualifying an individual based on criminal history unless the board determines that “the state has an important interest in protecting public safety that is superior to the individual's right” to pursue an occupational license. New Hampshire also restricts the licensing board's consideration to felonies and violent misdemeanors — no other prior convictions can factor into the board's decision to deny an occupational or professional license.³⁰

Indiana

The state of Indiana has pushed legislative reforms even farther than most other states by expanding its new occupational licensing laws into county and municipal agencies.³¹ Indiana prohibits its licensing boards from

imposing vague and ambiguous application criteria like “good character,” and it requires its licensing boards to demonstrate that a disqualifying conviction is “specifically and directly” related to a particular occupation or profession.

In addition to these legislative reforms in the occupational licensing arena, Indiana was recently in the judicial spotlight through the case of *Timbs v. Indiana*.³² On June 18, 2018, the United States Supreme Court granted review on the issue of whether the Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment. The Court heard arguments about whether federal law prohibits a state from confiscating someone's personal property (in Mr. Timbs' case, his \$42,000 Land Rover) that is worth significantly more than the maximum monetary fine permitted for a criminal conviction (drug trafficking, in Mr. Timbs' case). The Court ruled for Mr. Timbs on February 20, 2019, holding that the Eighth Amendment's excessive fines clause is an incorporated protection applicable to the states under the 14th Amendment's due process clause, marking an important step in the direction of reform of other fines, fees, and financial penalties imposed as collateral consequences of criminal convictions.³³

Summary

These various legislative and judicial reforms illustrate Margy Love's advice that states must learn from advocates in other jurisdictions because there is not just one particular approach to reducing stigma and restoring citizenship rights to people who were formerly incarcerated. Like many of the Conference panelists, Margy encouraged creativity and progressive thinking among a “new breed of prosecutors,” judges, and legislators who are willing to build coalitions and reach compromises that will lead to real changes in the criminal justice system.

Recommendations: Redemption Is About More Than Re-Entry

The recommendations discussed during the Conference went far beyond the legislative and referendum process and included grassroots movements and entrepreneurial solutions to the myriad problems faced by people who were formerly incarcerated and are seeking to reintegrate with society. Several panels were devoted to this overarching concept of “re-entry” into the community:

1. Plenary — I Am My Brother’s Keeper: Guiding Principles of Re-Entry
2. The Road to Re-entry: Navigating Systems Players and Building Coalitions
3. This Side of the Law: Reentered, Reformed, & Reinvented

But many panelists expressed the inherent inaccuracy of the term “re-entry” to describe the process of formerly incarcerated individuals returning to their pre-incarceration communities. For some people, there was never a stable community to “enter” in the first place. This is often the result of racial and economic disparities that create a systemic culture of criminal activity and a lack of apparent alternatives to the life-altering consequences of becoming involved with the criminal justice system.



“Drugs descended on our community like locusts on crops. And it devastated us.” – Susan Burton

Because there are so many collateral consequences associated with a criminal conviction — and even just an arrest — a primary goal of criminal justice reform must be the prevention of individuals entering the system at all. When people do become justice-involved, a secondary goal of systemic reform must be the development of alternative programs to treat, educate, and empower individuals so they can maintain human connection with their communities and walk the road to redemption before, during, and after their period of incarceration. This section will highlight some of the innovative programs that are designed to shatter the shackles of collateral consequences at all stages of the process.

Pre-arrest

One of the re-entry panels, “Plenary — I Am My Brother’s Keeper: Guiding Principles of Re-Entry,” featured four formerly incarcerated men who spoke about ways to successfully navigate re-entry while avoiding re-arrest and return to prison. The panelists were Christopher Ervin, Randy Lanier, Dominique “Lil Baby” Jones, and Kevin Skidmore.

Christopher Ervin is the Founder and President of The Lazarus Rite, Inc., a non-profit organization that aims to reduce recidivism rates by assisting its clients with obtaining sustainable employment and other re-entry skills. At the Conference, Chris spoke about ways to start the process of “re-entry” even earlier by improving the family and community environment of children. His primary focus was on the concept of exposure: “Exposure is everything toward aspiration.” Chris advocates exposing children to things they may not otherwise see in their own communities, which gives them a chance to aspire to learn and grow into people who are not destined for a street life of drugs and crime.

Randy Lanier echoed Chris' views about setting higher goals for improving the education, exposure, and environment of young people. Before going to prison for drug-related offenses, Randy was a professional racecar driver; he now works as a Behavioral Health Technician at Recovery First, a substance abuse treatment center. For Randy, the principles of re-entry and avoiding recidivism are all about a personal mindset. He described how he uses the practice of mindfulness and sets his intentions every day so that his consciousness creates his reality. Randy encouraged young people to avoid trouble by finding an interest, pursuing it, and becoming it.

Dominique "Lil Baby" Jones uses his platform as a rap artist to speak out against young black males getting arrested and beginning a lifecycle in and out of prison. When asked if he raps about guns and drugs like many others in the hip-hop community, Dominique responded, "I don't promote violence in my music. . . . In my music I actually let young brothers know that when you do . . . violence or you do criminal acts there's a consequence. . . . I do say stuff about shoot and kill but I also say if you shoot and kill you're going to jail and you won't come home." As for himself, Dominique vowed that he would never go back to prison. Although he acknowledged that avoiding recidivism is "an everyday challenge" because "there's so much you can get into," Dominique said he is committed to "turning the other cheek" and "being the bigger man."

Kevin Skidmore is the owner of FourFourtyTrucking, LLC, where he hires many formerly incarcerated people like himself. Like his fellow panel members, he spoke about changing his environment and changing his activities as a way to avoid re-arrest. He also holds himself responsible by staying engaged in his business "24/7" because it reminds him that other people rely on him every day to pay their bills. The pressure of this responsibility helps Kevin stay focused on his work and stay away from circumstances that could lead to recidivism.

In addition to the advice of these panel members, Conference attendees heard from audience members about concrete ways to improve community programs, mentorship, and education. Troy Williams, for example, talked about a Michigan prison partnership with Calvin College that helps people earn college degrees and occupational skills while they are incarcerated.³⁴ Troy reported that Calvin College also provides scholarships to the children of people who are incarcerated, which is an educational program designed to break the family's cycle of poverty and prison before the next generation enters the criminal justice system.

Arrest & Prosecution

If an individual does get arrested or re-arrested, the question then becomes how to best help them navigate the criminal justice system in ways that will minimize or even eliminate the impact of collateral consequences before they are imposed. Some of the Conference recommendations in this regard were to:

- increase opportunities for diversion at earlier stages of the legal process;
- strengthen public defense representation;
- create alternative courts focusing on substance abuse, mental health, and other specific risk factors; and
- eliminate mandatory minimum sentences.

While diversion programs exist in almost every state across the country, they are not all created equal. Variations of diversion programs exist at three major stages of the criminal justice process: the law enforcement stage, the pretrial/prosecution stage, and the specialty/alternative court stage. The sooner diversion occurs, the better chance someone has of avoiding the lasting effects of collateral consequences.

One innovative program discussed at the Conference was Law Enforcement Assisted Diversion (LEAD), which is a pre-arrest diversion pilot program that began in 2011 in the state of Washington. The LEAD model gives front-line law enforcement officers the discretion to work with communities and refer eligible people to designated case workers in lieu of booking them into jail and prosecuting them for low-level offenses.³⁵

Not everyone will qualify for pre-arrest diversion, however, and those who are arrested and prosecuted have an immediate need for a criminal defense lawyer. Several Conference panelists spoke about the importance of providing quality legal representation to everyone, regardless of their ability to pay. Panelist Jarrett Adams, who is now a civil rights and criminal defense lawyer, was wrongfully convicted in 2000 after his court-appointed attorney relied on a "no defense" theory. As a young, black male, Jarrett knew that he could not depend on a jury to hold the prosecution to its evidentiary burden of proving the crime beyond a reasonable doubt. Jarrett served more than 7 years of a 28-year sentence before a unanimous panel of the Seventh Circuit Court of Appeals overturned his conviction and ordered his release. He now zealously defends others who were wrongfully convicted, and he urges states to increase the funding and resources provided to their public defense systems at the trial and appellate levels.

Criminal defense lawyers also play a critical role in helping judges understand the magnitude of the collateral consequences that accompany the sentence imposed by the court. Mandatory minimum sentences, for example, remove the human aspect from the sentencing process and prevent judges from individualizing the appropriate length of punishment. Panelist Jason Hernandez, who described himself as a “jailhouse attorney,” explained how long sentences and sentences that prohibit opportunities for parole negatively affect the ability to successfully re-enter the community by restricting access to rehabilitative and work programs during incarceration. Panelist John Koufos said that lawyers “can be the tip of the spear” in piercing these kinds of barriers to re-entry.

Another obstacle to successful re-entry is the limited availability of mental health and substance abuse treatment programs for people who become justice-involved. But this obstacle is not insurmountable. With appropriate funding and resources, alternative courts and supportive programs like “My Journey Matters” in Georgia can be replicated across the country. Studies consistently show that recidivism rates have been reduced in places where risk assessment, treatment, and accountability courts are used instead of or in addition to the traditional law-and-order model.

During Incarceration

A particularly inspirational aspect of the Conference was the ingenuity of panelists who were previously incarcerated but have achieved economic and personal success despite the families, communities, defense attorneys, prosecutors, and judges who were unable or unwilling to help them along the way. The final panel of the Conference — “Entrepreneurship and Training: Harnessing Your Power for Success” — featured moderator Michael DiLauro and panelists Marcus Bullock, Brandon Chrostowski, and Tracey Syphax.

Marcus Bullock is the Founder and CEO of FlikShop, a mobile app that allows friends and family members to send photos and messages to people who are incarcerated. Brandon Chrostowski is the Founder of EDWINS

Restaurant and Leadership Institute, which provides culinary education and employment opportunities to incarcerated and formerly incarcerated people. Tracey Syphax, who has over 20 years of entrepreneurial experience, owns and manages a construction business and a real estate company. All three panelists emphasized the need to work with people while they are incarcerated to develop the skills and tools they will need to succeed when they are released.

Some of the skills and tools discussed by the panelists as instrumental to their success were obtaining capital, learning management styles, and dealing with changes in technology. Because it is a challenge — and usually too late — to learn all these things at once after release, the panelists spend time going back into prisons and working with wardens, legislators, and incarcerated people to develop what Tracey called “the three Es”: Educational and Entrepreneurial programs inside the prisons that will lead to Employment outside the prisons.



“Anyone who is incarcerated for more than three or five years is already behind the times in technology.”
– Marcus Bullock

Post-incarceration

While much of the groundwork for successful re-entry must be laid while people are incarcerated, there are still many things to be done after they are released. Panelists at the Conference discussed numerous successful initiatives across the country that are conquering collateral consequences like housing restrictions, transportation limitations, a lack of employment opportunities, and stigma.



Photo by Koichi Take

(Left to Right) Brandon Chrostowski, Marcus Bullock, Tracey Syphax, and Michael DiLauro

Public Housing

As former Georgia Governor Nathan Deal said, “Housing is one of the real impediments to successful re-entry.” He has proposed a solution to the White House and to regional administrators of the U.S. Department of Housing and Urban Development: Create “slots in public housing units allocated for returning citizens.” Governor Deal encouraged Conference participants to communicate this idea to their local and regional administrators so that people returning from prison will have a stable place to live, which will reduce their chances of recidivating.

Employment Opportunities

Mark Holden encouraged all employers in the public and private sectors to go beyond banning the box and intentionally hire people who were formerly incarcerated. He suggested hosting job fairs and job-training sessions specifically designed for people who have served time in prison. Koch Industries follows this “win-win-win proposition,” which Mark said has positively impacted their bottom line.

In Georgia, Governor Deal made it easier for employers in the private sector to hire formerly incarcerated people by providing skills and job training in prison programs that result in official certificates for careers like welding and trucking. Georgia prisons also provide people with a driver’s license or personal identification card before they leave, which makes it easier to obtain transportation and employment.

Transportation Partnerships

As several panelists explained throughout the Conference, one of the major obstacles to employment is the lack of transportation getting to and from a workplace. Many people who were incarcerated do not have the tools to obtain driver’s licenses or car insurance, and most of them lack the up-front funds or city infrastructure to rely solely on public transportation. Marc Levin described an innovative partnership with Uber that seeks to address this transportation problem. Uber not only bans the box and hires formerly incarcerated people as drivers,³⁶ but it has also partnered with local governments and businesses to provide free rides to job interviews or the first day of work for people who were formerly incarcerated.

Access to Capital

Like many re-entry activists, Teresa Hodge has “pushed all of [her] work towards making sure that individuals who come home from prison have access to opportunities.” She now works with individuals who do not have a job to create a job through entrepreneurship and business

management. Part of her model includes talking to commercial, national, and community banks about giving formerly incarcerated people access to capital. Most of her partnerships are with Community Development Financial Institutions, which are “community-based banks that are designed to give money at the ground level.” By helping the banks engage with the local community and humanize the local economy, Teresa said “it was very easy” to garner financial support for people who were formerly incarcerated.

Safe Streets & Second Chances

Safe Streets & Second Chances is an innovative program that uses an evidence-based approach to improve post-incarceration rehabilitation and re-entry initiatives while reducing recidivism rates. One of their most recent prison reform partnerships is with Goodwill of Southwestern Pennsylvania and the Pennsylvania Department of Corrections.³⁷ Like its other successful reforms in states such as Texas, Kentucky, and South Carolina, Safe Streets & Second Chances plans to help Pennsylvania create a smart-on-crime system backed by data and research that will achieve public safety goals without burdening taxpayers.

Reducing Stigma

Since returning home from prison, Randy Lanier has filmed a pilot reality TV program called “Back on Track” that feature celebrities, athletes, and formerly incarcerated people. Randy described the show as answering the question: “Once we’ve fallen from grace, what are we doing to get our life back on track?” He hopes that media outlets like “Back on Track” will help tell the success stories of formerly incarcerated people and spark greater interest in re-entry programs.

In addition to sharing these kinds of success stories, a tangible way to reduce the stigma of prior criminal convictions is to provide more opportunities for expungements and pardons. Conference panelists spoke about reforms across the country that are aimed at expanding the types of convictions that are eligible for expungement. One of the creative suggestions from Margy Love was to create a judicial certificate that has the same effect as a presidential pardon.

Summary

Implementing any one of these ideas would be an improvement for states that are interested in ways to reduce recidivism rates and boost their economy. The success of these reforms across the country provide ample statistical proof that these programs work for the betterment of the entire community.

Saturday Events at Ebenezer Baptist Church

The Conference continued into Saturday for a faith-based conversation about progressive criminal justice reform through political, economic, and social justice policies affecting communities and families. The Saturday session was hosted by Ebenezer Baptist Church in Atlanta and included a special screening and panel discussion of “The Sentence,” a 2018 award-winning documentary that provides an intimate look at the human lives impacted by mandatory minimum sentencing laws.

The first half of the Saturday session featured a panel of three female activists: Tiffany Williams Roberts, a social justice community organizer and criminal defense lawyer; Attiyah Ali, the Founder of A Loving Act, a non-profit organization that provides spiritual guidance and entrepreneurial skills to incarcerated people; and Reverend Aundreia Alexander, the Associate General Secretary for the National Council of Churches’ Action and Advocacy for Justice and Peace, whose work blends her passions for accounting, law, and ministry.



(Left to Right) Attiyah Ali, Tiffany Williams Roberts, Rev. Aundreia Alexander, Esq. — Faith Based Conversation.

Tiffany Roberts spoke earnestly about ongoing efforts to change the way that the criminal justice system treats people who cannot afford to pay a cash bail if they are arrested. As the Chair of Social Justice Ministry at Ebenezer Baptist Church, Tiffany helped organize the Freedom Day Bailout Campaign in June 2018, which raised money to help bail people out in time for Father’s Day weekend and raised awareness about the money bail system and why it needs to be reformed. The Freedom

Day project leaders have urged prosecutors to stop requesting bail in most cases, while the Ebenezer faith community continues to raise money for ongoing bail assistance.

For people who remain incarcerated, Attiyah Ali provides resources and training to turn passions into profits through entrepreneurial and social change programs. She also spoke about her role in providing spiritual guidance and support to homeless and incarcerated people, which many of them never received from their families. With a focus on strengthening the family environment, one of the community projects organized by A Loving Act is to provide duffel bags to foster children so they do not have to use trash bags for their belongings when they move homes.

Like many of the Conference panelists, Reverend Alexander’s work with the National Council of Churches focuses on reversing the trend of mass incarceration in America. But her advocacy is not limited to this country; Reverend Alexander has addressed human rights and liberty issues with groups like the United Nations and World Council of Churches, including projects in Egypt, South Africa, Turkey, Mexico, and South Korea. At the Conference, Reverend Alexander gave advice on the role of church communities in shaping policy decisions and supporting parishioners through education and honest discussions about race and gender.

All three women emphasized the need for early intervention in the community before people are arrested. They advocated better training for pastors and other faith-based leaders so that communities start calling criminal defense lawyers at the first sign of trouble instead of suggesting that parishioners speak with law enforcement officers and prosecutors on the misconceived notion that “the truth will set you free.” They also encouraged criminal defense lawyers to humanize their clients by asking to hear their stories and helping them engage in the process. Finally, the panel members spoke about the importance of educating community members on the need to vote in local, state, and national elections.

After the faith-based panel discussion, the topic of voting continued with the screening of Gilda Brasch’s “Let My People Vote.” This 2018 verité short film

chronicles the daily work of civil rights activist and lawyer Desmond Meade as he assisted Floridians with the voting process in the 2016 presidential election. Desmond himself is barred from voting (and practicing law in Florida) because of a decade-old drug conviction, even though he served his sentence and earned his juris doctor degree after completing his term of parole. Director Gilda Brasch vowed to continue documenting voter suppression as long as it exists in its various forms.

The feature film screened at Ebenezer Baptist Church was Rudy Valdez's "The Sentence," which was purchased by HBO in 2018. "The Sentence" tells the story of Rudy's sister, Cynthia Shank, who served 8 years of a 15-year sentence for conspiracy to distribute cocaine. Even though Cynthia was a first-time offender, the harsh sentence was a result of mandatory minimums and the broad wording of the conspiracy statute. Cynthia was indicted nearly 6 years after she provided information to the authorities about her ex-boyfriend, who was a major drug dealer. By the time she was arrested, Cynthia had moved on with her life, gotten married, and had three young daughters. "The Sentence" focuses on the hardships suffered by Cynthia's family as they struggled to maintain contact while she was incarcerated and relocated across the country. Cynthia was granted clemency in 2016, thanks in large part to her brother's advocacy and the work of pro bono lawyers and organizations participating in Clemency Project 2014 (CP2014).³⁸



"We have to take to the streets. We have to be activists."

– Drew Findling

The afternoon panelists also discussed the broader need for re-envisioning a criminal justice system that is not based on retribution and punishment but instead addresses reconciliation and healing. Listening to communities and focusing on human stories must be at the heart of this shift in perspective. Roseberry urged activists to "forget the statistics" and humanize the fight for reform:



Photo by Ivan Dominguez

(Left to Right) Cynthia Roseberry, Marjorie Pearce, Rudy Valdez — Panel on clemency and the documentary "The Sentence."



"Collateral consequences are wider and deeper than the immediate person who serves the time."

– Cynthia W. Roseberry

Following the film, Rudy participated in a panel discussion with Cynthia Roseberry, the Project Director of CP2014, and Marjorie Pearce, one of the hundreds of pro bono lawyers assisting CP2014 to help incarcerated people like Cynthia reach freedom. When asked about ways to implement policy change in the criminal justice system, all three panelists emphasized the importance of mobilizing at the local, grassroots level. Rudy described how he used "political strategy 101: name recognition," by going to D.C. and speaking with anyone who would listen to him about Cynthia's story. Pearce and Roseberry encouraged voter education about local elections, especially with prosecutors and law enforcement officers who are the ones making the decisions whether and how harshly to pursue low-level, first-time offenders like Cynthia.

- Arrest and prosecution, for example, should account for community backgrounds, economic circumstances, and mental health risks;
- sentencing should be based on the individual rather than the quantity of drugs or the amount of money involved; and
- re-entry programs should incorporate group therapy and job training while people are living in halfway houses.

These suggestions echoed the sentiments of the faith-based leaders who gathered on Saturday morning and many of the panelists who spoke throughout the Conference.

Conclusion



**“We don’t have to
be imprisoned by
our past.”**

– Dr. Divine Pryor

For meaningful reform to occur, the initiatives discussed at the Conference must start happening at every level of the criminal justice system. While some people believe it is a broken system, other advocates believe it is working just as it was designed and intended: to make millions and billions of dollars on the backs of poor people. This

may be the past, but it does not have to be the future. This country is currently facing real, deep-rooted issues of separatism and racism that continue to drive a wedge between the rich and the poor, the white and the colored, the educated and the uneducated. Each new generation has the power to close these gaps by opening their ears and expanding their minds so that people start to see each other for what they truly are: human beings. Some human beings have been convicted of crimes and served sentences in prison, but they are not their worst mistake. They are mothers, fathers, sons, and daughters. They are pastors, lawyers, activists, and entrepreneurs. This Conference showed the infinite ways — from a fiscal, moral, and social perspective — that everyone benefits from shattering the shackles of collateral consequences and providing all people with the opportunity to become productive members of the community.

APPENDICES INTENTIONALLY OMITTED
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