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.

I am currently the Marion County General Sessions Judge, the Marion County School Board Attorney, and the City Attorney for the Town of Jasper, Tennessee. I am also the Municipal Court Judge for Monteagle, Tracy City, and Whitwell, Tennessee.

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

I was licensed to practice law in Tennessee in 1996, and my BPR number is 018193.

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

I am only licensed to practice law in Tennessee.

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).

I have never been denied admission to, suspended or placed on inactive status by the Bar of any state.

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

I have been continuously engaged in the private practice of law since obtaining my license in 1996 to the present date.

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 never been unemployed since obtaining my license to practice law.

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.

I am currently the General Sessions Judge for Marion County, which is a part-time position. I am also the Board Attorney for the Marion County Board of Education and the City Attorney for the Town of Jasper, Tennessee. The General Sessions Judge position requires approximately 75% of my time to fulfill all required duties, the School Board Attorney position requires approximately 15% of my time, and the City Attorney position requires the remaining 10% of my working hours to perform those duties.

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.

Over the course of my 30 years practicing law, I represented clients in all types of cases. The largest portion of my practice was devoted to criminal law, in which I represented clients from all walks of life. Many of my clients were retained; however, I also represented many appointed clients when there was a conflict with the Public Defender's Office. I represented criminal defendants in cases ranging from speeding citations to first-degree murder in municipal, general sessions, state trial courts, and federal district and appellate courts, including petitions for hearing before the Tennessee Supreme Court and the United States Supreme Court. I also practiced law in civil matters, ranging from family law, real property disputes, and personal injury, including both criminal and civil matters before juvenile court. I also represented clients in administrative proceedings such as Social Security disability and employee termination proceedings before state administrative law judges. I diligently represented my clients in all these proceedings thoroughly and professionally throughout my legal career. I have never been disciplined or sanctioned for missing deadlines, failure to keep my client informed, failure to diligently pursue cases to conclusion, or any other sanction by the Board of Professional Responsibility or any other legal authoritative body. I am a hard worker, I am efficient, and I know how to manage large caseloads to bring the matters to a just and timely conclusion.

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

The best legal education in my career of practicing law was obtained by representing criminal defendant Richard Romans in the United States District Court for the Eastern District of Tennessee–Case Number CR-99-CR-71. Defendant Romans was accused of conspiracy to distribute cocaine in a multi-count indictment with two other codefendants. Defendant Romans's case was tried before a jury over the course of six weeks with numerous arguments over a multitude of legal issues with scientific testimony, Daubert hearings, falsification of tape recordings and arguments concerning calculation of drug quantities under *United States vs. Apprendi*'s holding that every fact of consequence in determining a defendant's guilt must be proven beyond a reasonable doubt to the jury. In representing Defendant Romans, I appeared and argued on two separate occasions before the United States Court of Appeals for the 6th Circuit, and culminated my representation of Defendant Romans with a petition for certiorari, which was denied by the United States Supreme Court. That case taught me more about law, procedure, evidence, and how to zealously represent a defendant than any other case, training or other legal education in my 30 years of practicing law.

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 was elected to the General Sessions Judge position in 2006 and have served in that capacity continuously to the present date. As the General Sessions Judge of Marion County, I preside over thousands of cases each year, ranging from traffic citations, civil lawsuits under $25,000, detainer actions for unlimited amounts, all criminal misdemeanor matters, and all felony matters that are initiated by warrant instead of the grand jury process. Each of these proceedings has its own special set of circumstances and individual personalities of the parties, often without representation by licensed attorneys, which requires a delicate balancing act as judge, juror (finder of fact), and enforcer of the sentence prescribed for the individual's case. In many cases, the General Sessions Court is in fact the Supreme Court for the parties in the case. Many times, the parties' only experience with the judicial system will be in General Sessions Court, which places a much greater responsibility on the judge who is the sole person rendering the decision affecting their case. I also completed judicial mediation training at Belmont University and served as a Rule 31 mediator for several years until court docket scheduling and long-term client matters did not allow sufficient time to continue mediation services.

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 never served in a fiduciary capacity, Guardian ad litem, Conservator or Trustee other than as a lawyer representing clients.

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

From April 1983 until October 1986 while attending the University of Tennessee at Chattanooga to obtain a bachelor's degree in criminal justice, I worked full time as a Marion County Sheriff's Department Dispatcher to pay for my undergraduate education. This position required making reports on citizen complaints and coordinating with patrol officers to make investigations of those complaints. This experience provided great insight into presiding over criminal proceedings for the last twenty years in General Sessions Court.

From September 1992 until July 1996 while attending the Nashville School of Law to obtain a Doctor of Jurisprudence degree, I served as a probation and court liaison officer for the Marion County Juvenile Court, which along with the G.I. Bill paid for my law school education without the need for student loans. This position entailed receiving and examining complaints, and making investigations, reports, and recommendations to the Juvenile Judge. The position also required supervising and assisting children placed on probation or in protective custody of the court and providing counseling to children and their families. I was assigned with completing predisposition studies and compiling social histories to ensure the best course of action was taken for each child. I was also able to serve in a public relations capacity by educating the public through speaking events at schools and community citizen groups. Finally, I developed resources within the community to give children every opportunity to receive assistance to avoid commitment to an institution.

In addition to serving as a juvenile court probation officer in my last year of law school, I completed an internship as an assistant prosecutor under the supervision of the 12th Judicial District Attorney's Office in the Marion County General Sessions Court.

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 submitted to the Governor's Counsel for Judicial Appointments for a judgeship.

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.

I attended the University of Tennessee at Chattanooga from 1983 until 1987, where I received a Bachelor of Science in Criminal Justice with concentrations in law enforcement and corrections. I attended the Nashville School of Law from 1992 until 1996 where I obtained a Doctor of Jurisprudence degree and was subsequently licensed to practice law in 1996.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 61 years old, my date of birth is [redacted]1964.

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

I have lived continuously in the State of Tennessee except for the occasions I received orders to move to different states while serving as an officer in the United States Army. In the Army, I resided in the states of Alabama and Kentucky while on active duty.

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

I have lived in Marion County continuously since 1977, when my family moved there from Hamilton County, Tennessee.

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

I am registered to vote in Marion County, Tennessee.

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

I was commissioned as a Regular Army 2nd lieutenant from ROTC in 1988 at the University of

Tennessee at Chattanooga. I served on active duty until my voluntary separation from service at the rank of Captain in 1992 to attend law school. I received an honorable discharge in 1998 when I finished my commitment to the individual ready reserve after active duty. I served with the 101st Airborne Division as a Blackhawk Helicopter Platoon Leader in Operation Desert Shield/Desert Storm, where I was awarded a Bronze Star for service and the Air Medal with 3 Oak Leaf Clusters for combat operations with my Assault Helicopter Battalion. Upon departing from active-duty service, I was awarded the Meritorious Service Medal for serving as the battalion supply officer until leaving the unit. Over the course of my military career, I was also awarded the Army Commendation Medal, the Army Achievement Medal, the Army Service Ribbon, the Southwest Asia Service Ribbon, the Army Aviator Badge, the Army Parachutist Badge, and the Army Air Assault Badge while on active duty.

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.

I have never pled guilty or been convicted or placed on diversion for violation of any law.

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.

To the best of my knowledge, information and belief, I am not under any investigation for violation of any federal, state or local law. There is an alleged violation before the Board of Professional Responsibility that I will discuss more fully in response to question 22.

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.

In July 1999, a client named Charles Bottomley, whom I represented in Circuit Court on an unjust enrichment lawsuit, filed a complaint with the Board of Professional Responsibility that I did not zealously represent him within the bounds of the law, among various other false statements about my representation. Basically, the client filed the complaint to avoid payment of the remaining attorney's fee for services rendered in the case. I filed a response detailing all work completed on the client's behalf, along with the ultimate settlement terms of all issues in the case, and the Board ultimately dismissed the complaint without any finding of fault on my part.

In December 2020, a defendant named Larry Thomas Coffelt filed a complaint with the Board of Judicial Conduct alleging I did not adequately explain the consequences of his guilty plea to a DUI 2nd charge, which prejudiced his eligibility for release on parole from the Bledsoe County

Correctional Facility. I responded to the complaint outlining my procedure for guilty pleas, along with the explanation of constitutional waivers, and inquiry whether a defendant is being forced or coerced into entering a guilty plea. After receiving my response, along with the defendant's judgments from the clerk's office, the Board of Judicial Conduct summarily dismissed Coffelt's complaint.

Beginning March 14, 2022, a defendant named John Christof filed the first of a series of five separate complaints with the Board of Judicial Conduct alleging misconduct and conflict of interest on a public indecency charge brought against him in Marion County General Sessions Court. The second complaint was filed on April 6, 2022, and the third complaint was filed on June 30, 2025. The fourth complaint was filed on July 13, 2025, and the fifth complaint was filed on August 11, 2025. This was a case in which I had recused myself from all proceedings since I had given legal advice as the City Attorney to the Town of Jasper Police Department that had issued the citation for the offense. The defendant had a bench trial in General Sessions Court before another Tennessee Supreme Court designated judge, whereupon he was found guilty and fined $500 for the offense. He subsequently appealed his General Sessions Court conviction to Circuit Court and entered a diversion, which was ultimately expunged from his record. The defendant is obsessed with this incident, which resulted in the complaints filed with the Board of Judicial Conduct and every other agency in state government, including the Governor's and Comptroller's offices. After receiving my response to the numerous complaints, the Board of Judicial Conduct summarily dismissed all complaints.

Beginning July 24, 2025, the same defendant, John Christof, filed a complaint with the Board of Professional Responsibility containing the same allegations made in the various Board of Judicial Conduct complaints, with additional allegations of conflict of interest related to my role as the City Attorney and selling real property to the Town of Jasper for the location of the new City Hall facilities. I prepared a 51-page response to the 15 different allegations he made in the Board of Professional Responsibility complaint; however, I am still awaiting an answer from the Board, which forwarded the response to defendant Christof to allow any additional response he may have before making a decision on his allegations. I fully expect the Board of Professional Responsibility complaint will be summarily dismissed just like all his other ethics complaints with the different organizations and agencies in the state, Marion County, and the Town of Jasper.

Copies of all documents will be made available to any member of the selection panel who wishes to review them upon request.

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.

I have never had a federal, state or local authority or creditor tax lien or other collection procedure instituted against me.

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

corporation, or other business organization)?

I have never filed for bankruptcy personally or as part of any partnership, LLC, corporation or other business organization.

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

I was a party to a civil lawsuit, which involved a parcel of real property purchased at a Marion County delinquent tax sale, in which the former owner sued the County to recover the property sold for delinquent taxes. The Chancery Court set aside the sale and returned the property to the former owner, and I was reimbursed the money I paid the County for the property at the delinquent tax sale. *State of TN v. Delinquent Taxpayers*, No. 5869 (1993 Marion County), No. 5978 (1994 Marion County), No. 6087 (1995 Marion County), No. 6213 (1996 Marion County), Marion County Chancery Court filed on or about May 2002.

I was also named as a party in my capacity as attorney for the Town of Jasper in a property lawsuit filed by a pro se plaintiff, *Ortkiese v. Charlie Schaerer, et al,* U.S. District Court for the Middle District of Tennessee, Case Number 3:25-CV-00984. The plaintiff filed this lawsuit over property he purchased from Defendant Shaerer in unincorporated Marion County outside the city limits of the Town of Jasper more than 20 years ago. The subject matter of this lawsuit transpired many years before I was appointed to the position of Jasper's City Attorney. A motion to dismiss has been filed with the court, which I expect will remove me from the case as a party.

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.

Past President of the 12th Judicial District Bar Association, Member of the Tennessee Bar Association House of Delegates, Lifetime Member of the Veterans of Foreign Wars, Lifetime Member of the American Legion, Tennessee Bar Foundation Fellow, Member of Olive Branch Masonic Lodge No. 297, Member of Alhambra Shriners Temple.

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.

If selected to serve on the Tennessee Court of Criminal Appeals, Eastern Section, I will withdraw my membership from the Masonic Lodge and Alhambra Shriners Temple to avoid any appearance of prejudice caused by those organizations' male-only membership policies.

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.

Past President of the 12th Judicial District Bar Association 2010 through 2012. Member Tennessee House of Delegates representing the 12th Judicial District for the past 20+ years.

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.

I was featured in a news article prepared by the Tennessee Administrative Office of the Courts News Division on November 9, 2023, titled "Judge Raines Calls Military Service One of His Greatest Career Accomplishments."

The article featured my history of service in the United States Army as an assault helicopter pilot, air mission commander, and platoon leader while deployed to Operation Desert Shield/Desert Storm in Saudi Arabia, Iraq and Kuwait. While deployed, I served in various combat missions to Iraq, including the longest air assault mission (at that time) in Army history. At the close of combat operations, I flew soldiers from the 101st Airborne Division 2nd Infantry Brigade to Kuwait to conduct operations as a part of the multinational security force for the Iraqi Army's surrender to General Norman Schwarzkopf.

Applicable to this application is the summary of the pertinent provisions of the article below:

"I think it's been probably one of the most important aspects of my life, in how I conduct myself on the bench and in life in general," said Judge Raines. "I learned things in the Army and in service that I probably would have never learned in any other job training or that type of instruction. I had excellent instructors that taught me how to instill discipline, learn how to work with people, and decision making and integrity including always having the utmost integrity regardless of what the popular decision would be."

The complete article may be viewed at: https://tncourts.gov/news/2023/11/09/12th-judicial-district-general-sessions-court-judge-mark-raines-calls-military

One of the best accomplishments in my legal career was selection in 2012 as the people's choice for best attorney in the Sequatchie Valley, which consists of Marion, Sequatchie, and Bledsoe Counties.

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

None

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.

While I do not receive CLE credit, I have taught the legal update session of the annual police officer in-service training for the last approximately ten years.

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 held the office of Marion County General Sessions Judge since being elected in 2006.

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.

See attached pleadings prepared solely by me without the benefit of assistance from others.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking this position for three reasons. First, many rural communities throughout our State need representation that understands the diverse demographics and unique issues of citizens living in widespread, less densely populated areas. Second, given the citizenry's low regard for the legal system and today's highly charged legal climate, my experience, training, and leadership in some of the most challenging times of the last century make me uniquely qualified to address the multitude of security and other issues confronting our legal system. Lastly, there is a need to establish more veteran's court programs and the best person to oversee and address

this issue is someone who has firsthand experience with the unique difficulties veterans encounter. My experience and qualifications will enable me to create strategies that address these legal issues unique to military service.

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)***

While I have been unable to accept pro bono cases since being elected to the General Sessions Judge position, I still perform a variety of pro bono services, mainly along the lines of providing guidance and legal knowledge to various individuals in the community who have no idea where to obtain legal guidance other than speaking with the judge. I routinely encounter many citizens out in the community, such as at the grocery store, gas station, or retail outlets, who request guidance and information on how to address matters involving various legal topics they may encounter in their particular walk of life.

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

I am seeking to fill the upcoming vacancy on the Tennessee Court of Criminal Appeals, Eastern Section. I think that my experience and my skill in communicating with people from many backgrounds, especially those living in rural areas of our State, can help explain how the legal system works and offer valuable insights to citizens who may not be familiar with it. It is my view that this distinctive skill set would significantly enhance and complement the existing expertise and institutional knowledge within the court's membership.

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)***

After my election to the General Sessions Court, I reduced my involvement in community services and organizations to avoid any potential conflicts or the perception of impropriety related to fundraising and similar activities. My participation has been primarily through sponsorship and donations to community organizations that benefit all citizens, such as community library programs and school-sponsored organizations throughout Marion County. If appointed to the Tennessee Court of Criminal Appeals, Eastern Section, I will continue to support community-based organizations through donations and subscriptions through private personal funds to eliminate any appearance of impropriety caused by public participation in those events.

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 varied and wide-ranging life experience would be a great asset to the Tennessee Court of Criminal Appeals, Eastern Section. While pursuing an undergraduate degree in criminal justice, I worked my way through college as a dispatcher with the Marion County Sheriff's Department. In that position, I managed and dealt with almost any legal issue a citizen might encounter. Upon graduation, I served in the United States Army as an aviation officer, where I learned leadership skills that will benefit me for the rest of my life; most importantly, communication and critical thinking skills. I developed these abilities while interacting with everyone from those at the lowest levels of society to world leaders commanding armies and nations of thousands of people. I believe this ability to communicate with people from all levels of society will greatly enhance people's understanding of the legal system throughout the State. I believe that if people understand how the legal system functions and its principles, there will be greater appreciation of the overall legal community. This will, in return, result in higher respect for the rule of law in general across the entire State. If there is higher respect for the rule of law, it will likewise increase and enhance the security, stability and respect for all members of the legal profession; and turn the tide from the public's current opinion, which is the lowest it has been in modern history.

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)***

The best example I have of this principle is serving as an appointed attorney on a criminal defendant's case who was accused of rape of a child. The facts of that case were terrible, and I personally did not approve of any of the actions taken by the defendant. However, as the attorney appointed to represent the defendant, I had to put aside any personal opinion or feeling based upon knowledge of the facts in the case and represent the defendant zealously as required ethically and legally under our statutory and ethical laws. Therefore, I will uphold all laws, even those with which I personally disagree.

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. Marion County Director of Schools Dr. Mark Griffth [redacted]
B. Bledsoe County Mayor Gregg Ridley [redacted]
C. Kimball Municipal Judge Charles G. Jenkins Jr. [redacted]
D. Dunlap Municipal Judge M. Keith Davis [redacted]
E. Hamilton County School Board Attorney D. Scott Bennett [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals, Eastern Section 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: 2/17/, 2026

Marshall G. Raines

Signature

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

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Appellee	)	
v.	)	U.S.C.A. 02-6292
RICHARD ROMANS Appellant	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF OF APPELLANT RICHARD ROMANS

Marshall A. (Mark) Raines Jr.
SWAFFORD, JENKINS & RAINES
Tennessee Bar No. 18,193
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ORAL ARGUMENT REQUESTED

*Portions of this document have been omitted to reduce its length.

STATEMENT OF THE CASE

On December 20, 2000, the jury returned a verdict of guilty on count one, conspiracy to possess with intent to distribute and possess with intent to distribute cocaine in violation of Title 21, U.S.C. sec. 846 and counts thirteen and fourteen distribution of cocaine in violation of Title 21 U.S.C. sec. 841. (R. 393 Minutes, Apx.*).

A motion for judgment of acquittal and motion for new trial was timely filed on December 7, 2000. (R. 401, 402 Docket, Apx.*). On January 9, 2001 the District Court entered an order denying Appellant Romans' motion for judgment of acquittal. (R. 407, Apx.*). On July 3, 2001 the District Court entered an order denying Appellant Romans' motion for new trial. (R. 428 Docket, Apx.*). On July 6, 2001 the District Court granted Appellant Romans' motion to continue sentencing hearing in order to file a motion for new trial based on newly discovered evidence. (R. 429 Docket, Apx.*).

On September 20, 2002 the District Court sentenced Appellant Romans to a term of 148 months concurrent as to counts 1, 13, and 14. (R. 514 Minutes, Apx.*). On September 24, 2002 Appellant Romans timely filed his notice of appeal pursuant to Rules 3(a) and 4 (b)(1)(A), Federal Rules of Appellate Procedure. (R. 515 Docket, Apx.*).

STATEMENT OF THE FACTS

1. TAPE RECORDINGS

Tape N-9 and N-26 were not turned over to defendants' expert pursuant to the court order requiring all of the tape recordings to be furnished the defendants. (R. 252 Memorandum and Order, Apx. at *). The defendants did not have an opportunity to have the recordings tested prior to trial. (R. 317 Defendants Joint Motion in Limine pg. 18, Apx at *).

Bruce Koenig, the government's tape recording expert identified numerous discrepancies with the government's original tape-recorded evidence. "That N-26, the transcript I was provided does not match up, at the beginning of that transcript, with the transcript that I was given." "So you were furnished two Tape N-26s?" "No." "Did you ever get another Tape N-26? I don't believe so." "Did you ever get a tape that matched the transcript you were furnished for N-26? No, ma'am." (R. 527 Daubert Hearing Transcript pg. 133 and pg. 134, Apx. at *). Mr. Koenig also identified problems with tape N-5. "So in this case N-5 could be a used tape? In the areas that have recordings now, it's possible that there could have been a recording now. Of course N-5 is probably not a good example for you on this, because there is no recording basically for the first 5 1/2 minutes." "Most people would have recorded from the beginning of the side. They didn't do it on this one, either." "You look a little embarrassed. -- most people don't start 5 1/2 minutes in.

There is nothing wrong, technically, to do so. But you don't normally do it. But they did normally do it here? In this case the original recording starts 5 1/2 minutes in." (R. 527 Daubert Hearing Transcript pg. 153, Apx. at *).

Elizabeth Sexton, government witness and alleged co-conspirator testified that she had difficulty with "Government's Exhibit N-26(a)-E and Government's Exhibit N-26(a)-ET. "When you listened to it, did you compare it with the transcript that you had? Yes. Did you recognize any voices? Yeah, Eddie's and somebody that -- I wasn't for sure but sounded like Buck. But it was real-- This one was really hard to understand." "And as far as you could tell, did the transcript accurately identify who was speaking? Yes." (R. 528 Transcript pg. 2624 and pg. 2625, Apx. at *). Elizabeth Sexton did not attempt to identify any voices before reading the transcript provided by the government. (R. 528 Transcript pg. 2677, Apx. at *).

Karen West was friends with Sally Moss since she was 14 or 15 years old, she went to school with her and lived with her for about a year. (R. 528 Transcript pg. 4302 Apx. at *). Ms. West listened to tape N-5 and recognized Sally's voice at the front of the tape saying "Get out from behind my bar." Ms. West identified another woman's voice that was similar to Sally's. Ms. West heard Sally laughing in the background while the drug conversation was going on. While she could not identify the voice, Ms. West opined that the voice talking about the drug

conversation was not Sally Moss. (R. 528 Transcript pg. 4303 through pg. 4304, Apx. at *).

Sandra Goodman knew Sally Moss from high school, Ms. Moss was a couple of years younger than her. She is familiar with Ms. Moss' voice in person and on the telephone. (R. 528 Transcript pg. 4315, Apx. at *). Ms. Goodman recognized Ms. Moss' voice on tape N-5 at the beginning and at the end of the tape. Ms. Goodman heard a drug transaction in the middle of the tape and identified the voice as that of Donna the cook. (R. 528 Transcript pg. 4317 through pg. 4318, Apx. at *). Ms. Goodman heard a man whose voice she could not identify speak the name "Donna" (R. 528 Transcript pg. 4319, Apx. at *). Ms. Goodman listened to tape N-8 and opined that she could hear Sally's voice in the background but the majority of the tape sounded like Donna Kay. She heard Donna Kay say "You cannot come between me and Sally" and that Donna and Sally have a similar voice. (R. 528 Transcript pg. 4319 through pg. 4320, Apx. at *). Ms. Goodman knew Richard Romans for about 8 years and had talked to him probably 50 times during that period. She listened to three or four tapes that were supposed to contain Romans' voice but she could not identify them by number. (R. 528 Transcript pg. 4326, Apx. at *). Ms. Goodman testified that the voice on the tapes did not sound like Mr. Romans based upon how long she had known him and conversations she had with him. (R. 528 Transcript pg. 4327, Apx at *). Ms.

Goodman did not make notes about the Romans tapes because they were muffled and there was a lot of background noise such that it was not clear enough for her to make an opinion. (R. 528 Transcript pg. 4344 through pg. 4345, Apx. at *).

Joyce Kirby listened to tape N-5 and opined that she heard Sally Moss say "I've got to get back behind the bar, on my job here," and then the female voice changed and it sounded like Donna Kay. Ms Kirby opined that "If you knew them, you could tell the little difference, because Sally laughed and went on, and then the voice kind of went like Donna Kay." (R. 528 Transcript pg. 4570 through 4571, Apx at *). At trial the government played tapes N-9 and N-5 for Ms. Kirby. Ms. Kirby testified that the voice on tape N-9 sounded like Donna Kay and Eddie Goins but that she was not positive. (R. 528 Transcript pg. 4611 through 4612, Apx at *).

Confidential source Eddie Goins asserted his Fifth Amendment privilege as to his fabrication of tapes at the trial of this matter. (R. 528 Transcript, pg. 4203, Apx. at *) However, at the new trial evidentiary hearing Goins testified that each time Carl Downs would meet with him and debrief him and that sometimes they would go over what was on the tapes. (R. 534 Transcript, pg. 1081, Apx at *). Carl Downs listened to all of the tapes turned in by Goins, while Goins was present, except for tapes N-33 "Fake YoYo" and N-34 "Fake Buck" (R. 534 Transcript, pg. 1081 and pg. 1082, Apx at *). "Did you turn the Yo-Yo tape over

to Carl Downs before you made the Buck tape? Turned them and together." (R. 534, pg. 1088, Apx at *). Eddie Goins testified that normally every time he made a recording that Carl, Ricky (Smith), Roy (Sain) were present except for the two times that he fabricated the tapes, "I mean, there were a lot of people around." (R. 534 Transcript pg. 1090, Apx at *). "But Carl didn't know you were going and making those two tapes. Is that correct? Carl didn't know they were fabricated, no. And on the end of these tapes, you said, 'Carl, I guess you heard that'? Yeah. Did Carl ever ask you why you said that? No." (R.537 Transcript, pg. 1219, Apx at *). "I assume he listened to all of them. So you think he even listened to the two fake tapes? I think so." (R. 537 Transcript pg. 1226, Apx at *). "Were there occasions where you would go in and you would say, you know, "I'm getting nervous here. I'm worried," you know, "People are talking about that I might be a snitch"? Did that happen? A. Yeah, with these two tapes." "They would ask me what I thought about it, and I put my input into it, and I just told them that I don't think they would ever sell to me anymore. I remember telling Carl that." (R. 537 Transcript pg. 1228 through pg. 1229, Apx at *). "Carl and I always-- Carl always debriefed me." (R. 537 Transcript pg. 1231 and pg. 1232, Apx at *).

Tapes N-18(a), N-26(a) which are allegedly transmitter recordings, were not turned over to Defendants by Case Agent Lynn Barker until approximately two weeks before the trial started. This occurred after the government determined that

it would not call Eddie Goins as a witness in the case. (R. 528 Transcript pg. 3400 and pg. 3401, Apx. at *). Out of all of the 38 tapes received in the case, the late found transmitter tapes, are the only two that do not have an individual number designation. (R. 528 Transcript pg. 3413 and pg. 3414, Apx at *). Additionally, tapes N-18(a) and N-26(a) were never identified or turned over to the defendants for submission to their audio expert pursuant to the court's order. (R. 528 Transcript pg. 3415 and pg. 3416, Apx. at *). Case Agent Barker listened to all of the tapes in the case at one point and admitted familiarity with tape N-34 "Fake Buck", however, the trial court denied appellant's counsel the opportunity to cross-examine and challenge Agent Barker's familiarity with and ability to recognize appellant Romans on all of the tapes introduced by the government. (R. 528 Transcript pg. 1324 through pg. 1326, Apx. at *). Agent Barker treated the fabricated tapes in the same manner as he did the other tapes. He listened to them, made copies and placed them into evidence. (R. 528 Transcript pg. 3435, Apx. at *). Agent Barker indicated that Eddie Goins wore a wire with other law enforcement officers when he made the fabricated N-33 "Yo-Yo" tape. (R. 535 Transcript pg. 807 and pg. 808, Apx at *).

Two Tape N-27's were furnished to the Defendants but neither tape N-27 furnished to the Defendants was the same N-27 tape as the N-27 original tape

turned over to Defendants expert pursuant to the court's order to turn over all of the government's tape recordings. (R. 535 Transcript pg. 782, Apx. at *).

The trial court denied appellant's counsel the opportunity to cross-examine and challenge Darlene Goins Estill's familiarity with and ability to recognize appellant Romans on all of the tapes introduced by the government with the N-34 "Fake Buck" tape. The court ruled that introduction of N-34 "Fake Buck" would exceed the scope of direct examination and would not show bias or interest of the witness. The trial court suggested contrary to appellant's counsels assertions that Mr. Romans should waive his Fifth Amendment privilege and stand up and say something and so counsel could ask Ms. Estill if she could identify his voice. (R. 528 Transcript pg. 1073 through pg. 1075, Apx. at *).

2. CHAIN OF CUSTODY

The government claimed that it conducted two controlled buys from appellant Romans in which CS Eddie Goins was under constant surveillance and did not have an opportunity to fabricate or falsify the evidence submitted to the jury.

A. JANUARY 15, 1999

Case Agent Lynn Barker was able to overhear conversations that Eddie Goins had inside the Rhode House with another male individual. (R. 528 Transcript pg. 3211, Apx. at *). Agent Barker lost sight of Eddie Goins when he

went into the Rhode House, there were no other agents or personnel involved in the operation inside, Agent Barker knew only what he overheard on the transmitter. (R. 528 Transcript pg. 3356 through 3358, Apx. at *). Agent Barker did not see Eddie Goins receive any of the exhibits and did not know how many of Mr. Goins associates he may have had in the Rhode House. (R. 528 Transcript pg.2932 and pg. 2933, Apx at *). This case was Agent Barker's first drug case involving controlled buys. (R. 528 Transcript pg. 2946, Apx. at *). Agent Barker did not know whether Eddie Goins had conversations with people other than the named defendants. (R. 528 Transcript pg. 2949, Apx. at *). Agent Barker had no personal knowledge of Mr. Romans voice and played the recorded tapes to numerous people up until the Friday before the trial started. (R. 528 Transcript pg. 3424 and pg. 3426, Apx at *).

Marion County Deputy Carl Downs was involved in the surveillance of Mr. Goins, he did not see Mr. Goins inside the Rhode House, he did not know who Mr. Goins actually spoke to or about physical activities inside the building until Mr. Goins came back and identified them. (R. 528 Transcript pg. 4081 and pg. 4082, Apx. at *). Mr. Downs did not know if the substance that Mr. Goins turned over came from the individuals that Goins said it did, only what was on the tape. (R. 535 Transcript pg. 746 and pg. 747, Apx at *).

TBI Agent Joe Copeland claimed he established surveillance of Eddie Goins and Richard Romans residence approximately one hundred yards from the residence at a mobile home sales lot where the CS allegedly engaged in a conversation about a drug deal. (R. 528 Transcript pg. 1999 through pg. 2001, Apx. at *). Agent Copeland did not know who Eddie Goins had a conversation with inside the Rhode House other than what he heard on the transmitter. (R. 528 Transcript pg. 2021 and pg. 2022, Apx. at *).

DEA Agent David Shelton contradicted TBI Agent Joe Copeland's ability to observe Richard Romans residence. Agent Shelton met up with Agent Copeland at a used car lot approximately "one quarter mile away". (R. 528 Transcript pg. 3730 and pg. 3731, Apx. at *). Agent Shelton testified that he couldn't see individuals or their physical characteristics from that distance. (R. 528 Transcript pg. 3734, Apx. at *).

Twelfth Judicial District Drug Task Force Director Ricky Smith stated that he was 200 yards away from Richard Romans residence, that he could not really see what was being pointed to, but he based his testimony on what he heard on the tapes. (R. 528 Transcript pg. 2233, Apx. at *). Director Smith did not see Agent Copeland during surveillance, but he definitely was not between Director Smith and Mr. Romans' trailer. (R. 528 Transcript pg. 2235 and pg. 2236, Apx. at *). Director Smith was 800 or 900 yards from the Rhode House. (R. 528 Transcript

pg. 2244 and pg. 2245, Apx at *). Director Smith could not see what Eddie Goins was doing inside the Rhode House, he did not know who he was talking to other than what was on the tapes, there was no other agent or anyone in the bar watching him. Director Smith did not see anything change hands between Goins and Romans. (R. 528 Transcript 2240 through pg. 2242, Apx at *).

Twelfth Judicial District Drug Task Force Agent Roy Sain was not able to see Mr. Romans' house trailer? (R. 528 Transcript pg. 2311 and pg. 2312, Apx. at *). Agent Sain could not see anything that Eddie Goins was doing inside the Rhode House, he did not actually see any drugs change hands and he did not see any money change hands. (R. 528 Transcript pg.2377, Apx. at *).

Defendant Romans' Exhibit No. 1. (R. 528 Transcript pg. 2224 and pg. 2225, Apx. at *). Defendant Romans' Exhibit 2. (R. 528 Transcript pg. 2227 and pg. 2228, Apx. at *) clearly show that Director Smith and Agent Sain could not have observed Richard Romans residence as they claimed.

B. FEBRUARY 26, 1999

Case Agent Lynn Barker was unable to overhear the conversation as it occurred that day because he did not have a receiver. Agent Barker could not see inside the Rhode House and did not have any personal knowledge other than reviewing the tapes and hearing what other officers said. (R. 528 Transcript pg. 3394 and pg. 3395, Apx at *).

DEA Agent David Shelton did not have a receiver and was unable to overhear the conversation. (R. 528 Transcript pg. 3730 , Apx. at *). Agent Shelton testified that it is not common to have a shortage of 8 to 10 g, on a controlled buy and that would be unusual, it would be a significant shortage and very noticeable. (R. 528 Transcript pg. 3770, Apx at *).

TBI Agent Joe Copeland did not have a receiver and was unable to overhear the conversation that day. (R. 528 Transcript pg. 2010, Apx. at *).

Twelfth Judicial District Drug Task Force Director Ricky Smith couldn't actually see Mr. Goins when he came out of the Rhode House, he didn't see any exchange between Mr. Romans and Mr. Goins, he had not seen Mr. Romans come out and get in his truck and only heard Goins talking to someone in the parking lot. Director Smith had no way of knowing whether Eddie Goins was making the conversation in the parking lot up. (R. 528 Transcript pg. 2250 through pg. 2253, Apx. at *). Director Smith never made any buys from Romans, never met him personally, never talked with him before all of this took place. (R. 528 Transcript pg. 2253 and pg. 2254, Apx. at *). Director Smith's testimony to the jury that Goins was talking to Romans about money in the parking lot was based solely on what he heard on the tapes and if Goins had not told him about money he would not have had a clue. (R. 528 Transcript pg. 2263 through pg. 2265, Apx. at *).

Twelfth Judicial District Drug Task Force Agent Roy Sain could not see inside the Rhode House, he did not know who Eddie Goins was talking to, he did not see any money or drugs change hands or if Mr. Goins was just talking to himself, and he was not familiar with Richard Romans voice. (R. 528 Transcript pg. 2457 and pg. 2458, Apx. at *). Agent Sain testified that all of the assumptions that he made about the case were based on things that Eddie Goins told him. (R. 528 Transcript pg. 2477 and pg. 2478, Apx. at *).

Eddie Goins knew that his brother Terry had fabricated evidence, that he turned in fake drugs and collected money when he did not make the buy. He knew that Terry bragged about buying drugs from someone that he actually did not, even while under surveillance. Eddie Goins testified at the new trial motion hearing that Terry worked for Marion County and did the same thing while working for Ricky Smith and Roy Sain he guessed that was their last name he did not know. (R. 537 Transcript pg. 1405 and pg. 1406, Apx at *).

Case Agent Lynn Barker testified in regard to the drug evidence that he sent in a white powder chunky substance in a single ziplock bag and that the evidence introduced at trial contained “a mysterious new zip-lock bag” that wasn't there when he sent it, he couldn’t say without it being in the evidence bag with his initials on it that it would be the same substance. All he identified was the

evidence bag with his initials on it. The substance was a brown liquid when it appeared in court. (R. 528 Transcript pg. 2930 and pg. 2931, Apx. at *)

3. SENTENCING

Darlene Goins Estill testified that she made several trips to the to the Rhode House to get money from or deliver drugs to Richard Romans which amounted to four or five times "give or take a few." (R. 528 Transcript pg. 1091 and pg. 1092, Apx. at *). Within a two-year period she could possibly have made four or five trips give or take a few, "I mean, it's between one and ten, I'd say." "So you're saying you have taken 4 or 5 ounces up to Richard Romans? Is that what you're saying? Possibly." (R. 528 Transcript pg. 1096 and pg. 1097, Apx. at *).

Eugene Jones testified that he began going to the Rhode House in '95, '96, and that he was employed as a bouncer there '96 through '99." (R. 528 Transcript pg. 1264, Apx. at *). Jones stated that he bought quarter grams from "Buck", for twenty-five dollars each, two or three times. (R. 528 Transcript pg. 1275, Apx. at *). He stated that while he was a bouncer that he bought quarter grams for $25 two or three times a month. (R. 528 Transcript pg. 1279, Apx at *). The largest amount of cocaine he ever saw Buck in possession of was a "whole bunch of grams, a handful". Jones testified that on two occasions he bought a gram apiece for a hundred dollars each. (R. 528 Transcript pg. 1286 and pg. 1287, Apx. at *). Jones stated that on two occasions he purchased one gram for somebody else.

Jones would go to Bucks house tell him he needed a gram give him $100 and Buck would pull it out of his pocket. (R. 528 Transcript pg. 1296 and pg. 1297, Apx. at *). Jones testified that at the Rhode House Christmas party Buck brought out a platter of cocaine and that 5 or 6 people used it and it never ran out. (R. 528 Transcript pg. 1302 and pg. 1303, Apx. at *). Jones stated that before 1997 he worked as a bouncer for Joyce (Kirby) several times whenever she would call. (R. 528 Transcript pg. 1324 and pg. 1325, Apx. at *). Jones testified that in 1996 he bought a quarter gram once a month for two or three months. (R. 528 Transcript pg. 1331, Apx at *).

Linda Stephens was married to Eugene Jones in 1998 and divorced in 1999. Ms. Stephens testified that Jones never worked at the Rhode House during the time they were married. (R. 528 Transcript pg. 4539, Apx at *). "So during the time that Ms. Kirby operated the Rhode House, your husband was never an employee? Never. Never had any connection with it whatever? Never." (R. 528 Transcript pg. 4542, Apx. at *). Ms. Stephens testified that there was one Christmas party at the Rhode House but that Jones did not go to it and there was no cocaine at the party. (R. 528 Transcript pg. 4542, Apx, at *).

Joyce Kirby testified that she managed the Rhode House restaurant and lounge in 97' and 98.' She stated that during the time she was manager Jones

never worked for her, and that she "would have not worked Gene Jones." (R. 528 Transcript pg. 4564, Apx. at *).

Elizabeth Sexton testified that one time she got an ounce, and took it to a guy named Rick, and maybe a couple other times, personal, not much maybe a gram. (R. 528 Transcript pg. 2595 through pg. 2597, Apx. at *). Elizabeth Sexton claimed the largest amount of cocaine that she ever saw Buck Romans with was 6 ounces and that she cut the ends off of baggies a couple of times. (R. 528 Transcript pg. 2609 and pg. 2610, Apx. at *). The only product she ever bought from Romans was 1 gram and 1 ounce. (R. 528 Transcript pg. 2647 and pg. 2648, Apx. at *). Elizabeth Sexton testified that she saw Sally Moss with a bottle containing maybe 60 grams in it that she thought she saw Buck Romans give to her but she couldn't tell for sure what it was. (R. 528 Transcript pg. 2651 and pg. 2652, Apx. at *).

Roger Pilgrim stated that he started going to the Rhode House quite a bit staying drunk. Pilgrim stated that he started buying small quantities from Buck, whose last name he didn't know, like "sixteenths" about a gram and three-quarters. (R. 528 Transcript pg. 1810, Apx. at *). Pilgrim did not know how many times he bought in 1994 because he stayed drunk all of the time. In 1995 he may have made three or four purchases "I just don't know, no." (R. 528 Transcript pg. 1840 and pg. 1841, Apx. at *). "The maximum number of times that he could recall

even making a purchase of that quantity was six or seven times over an approximate two-year period. (R. 528 Transcript pg. 1842 and pg. 1843, Apx. at *).

SUMMARY OF THE ARGUMENT

1. The trial court erred in refusing to allow Appellant to play tape recordings to the jury that the Government had reluctantly furnished through the discovery process but did not introduce into evidence. The tape recordings included N-2 Joey West, N-33 Yo-Yo, N-34 Fake Richard Romans. These tapes were fabricated by CS Eddie Goins, his brothers Terry and Steve Goins and his sister Darlene Goins Estill. The court erroneously held that these tapes were inadmissible through rulings such as beyond the scope of direct and no showing of bias or interest. By excluding these tapes the Court denied Appellant the most fundamental right in American criminal jurisprudence, a vigorous cross examination and confrontation of the evidence against him.

2. The court erred in admitting certain drug and tape evidence without the government showing it proper chain of custody for said evidence after it was established at the person from whom the evidence was received had fabricated and falsified evidence in this case. Eddie Goins was the critical link to establish that drug evidence introduced on the government was obtained from the defendants. The government refused to call Eddie Goins as a witness and when the defendants

called him to testify he exercised his Fifth Amendment privilege. Normally, chain of custody issues go to the weight of the evidence however, since the critical link and first government agent in the chain fabricated and falsified evidence, none of the evidence obtained from Goins can be properly authenticated for submission to the jury.

3. The court erred in refusing pursuant to Fed. R. Evid. 806 to admit other government tapes made by Eddie Goins for the purpose of impeaching hearsay statements made by him in same manner as if he had testified. The tapes introduced by the Government contained numerous passages in which Eddie Goins while talking to himself or government agents made prejudicial statements about the appellant that were not in the presence of the Appellant and in no way could be offered to place statements of the appellant in context. This placed inadmissible highly prejudicial evidence before the jury without any ability of the appellant to impeach such evidence.

4. The court erred in sentencing Appellant Romans under 21 U.S.C. § 841(b)(1)(A) to serve 148 months confinement based on 5.86 kg of cocaine when Appellant Romans was indicted and found guilty of 21 U.S.C. § 841(b)(1)(C) which violates the Sixth Amendment jury and notice provisions and the Due Process Clauses of the Fifth and Fourteenth Amendments.

5. The trial court erred in submitting transcripts N-1-ET, N-5-ET, N-9-ET, N-18(a)-ET, and N-26(a)-ET, and N-30-ET to the jury when the parties did not stipulate to their accuracy, the Court did not have the transcriber attest to the accuracy and the court did not make a determination based on in camera comparison of the transcripts to the tapes. The court failed to follow the provisions of U.S. vs. Robinson by not having the transcriber attest to the accuracy of the transcripts and mine the making an in camera determination that the transcripts accurately reflected what was spoken on the tapes.

6. The trial court erred in denying defendants' motion for a bill of particulars (R. 76 Docket, Apx. at *) asking that the government be required to identify the known coconspirators in this case. The government indicated numerous times, particularly when going over transcripts, that unknown persons were coconspirators. A defendant is entitled to reasonable notice of the persons with whom he has allegedly conspired so that he may prepare to confront and cross-examine them.

7. The trial court erred by admitting statements allegedly made by unindicted co-conspirators without first making a finding that a conspiracy existed between the person and the defendant on trial and that the statement was made in furtherance of the conspiracy.

ARGUMENT

The trial court erred in refusing to admit other tape recordings made by Eddie Goins that were known to be false and fabricated so that the jury could properly evaluate the recordings admitted into evidence.

Eddie Goins acted as the confidential source in this case and as such, he was the government agent that procured evidence against the defendants intending that it be used in court in this case. After much prodding by the defendants that the tapes in this case were fraudulent, the government conducted a polygraph exam of their agent and determined that he had lied and fabricated at least two of the tapes that he submitted as evidence. The government indicted Mr. Goins on the second day of the defendants trial after witness fees had been paid to secure Goins attendance at the trial. The government had repeatedly relied upon these tapes as substantive evidence in the case at detention hearings to assert that the defendants should not be released on bond. At trial, the government vigorously objected to the playing of these tapes and the trial court sustained each objection holding that the tapes did not go to establish any bias or interest. During the trial, the government played only the tapes that that it claimed were made using a transmitter. The court refused to allow any other tapes to be played for the jury even to challenge a witnesses ability to identify the speaker or to impeach the witnesses testimony. Without proper cross examination, the statements of Eddie Goins cannot be deemed to have "equivalent circumstantial guarantees of

trustworthiness." “The Supreme Court considers cross examination to be the "greatest legal engine ever invented for the discovery of truth." *California v. Green, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970)* (internal quotation and citation omitted). *U.S. v. Gomez-Lemos, 939 F.2d at 329*. We further stated that: "outside of the co-conspirator exception to the hearsay rule (where a statement is made during the course of the conspiracy and not after it has ended), the Supreme Court has consistently concluded that the uncross-examined testimony of an alleged co-conspirator is not sufficiently reliable to meet the requirement of the *Confrontation Clause*." *Id. at 332*. Admission into evidence of tape recording, and transcripts of tape recordings is committed to the sound discretion of the trial court. *United States v. Elder*, 90 F.3d 1110, 1129 (6th Cir.), cert. denied 519 U.S. 1016 (1996). However, under Fed. R. Evid. 106 when part of a tape recording is introduced, an adverse party may require any other part to be played which ought in fairness to be considered contemporaneously with it. Any prejudicial effect caused by the prosecution presenting only a portion of a recording is neutralized when the court provides the defendant an opportunity to play the recording in its entirety, whether or not the defendant chooses to take advantage of that opportunity. *United States v. Spearman*, 186 F.3d 743, 755-56 (6th Cir.), cert. denied, 528 U.S. 1033 (1999). “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

U.S. Const. Amend. VI. 6. The court refused to allow any defendant to play any portion of other tape recordings that the government had not admitted into evidence. These tapes were relevant and admissible to challenge and impeach the tape recorded evidence submitted by Eddie Goins.

The trial court erred in admitting certain drug and tape evidence without the government showing a chain of custody for said evidence after it was shown that the person from whom said evidence was received had fabricated evidence in this case.

It was not until after the discovery that Goins had intentionally defrauded the government and these defendants, that two additional tapes allegedly containing Richard Romans voice were discovered in the government's possession. Tapes identified as government's exhibit N-18(a) and N-26(a) allegedly in the government's possession since January 15, 1999 and February 26, 1999 were somehow inadvertently overlooked. This discovery did not arise until approximately two weeks before the trial started and after the government discovered that it could not use Eddie Goins as its witness. Goins exercised his 5th Amendment privilege when called as a witness by the Defendants. Any evidence that Appellant Romans sold drugs to Eddie Goins cannot be trusted simply because agents observed Goins enter the Rhode house and overheard conversations purporting to contain his voice by a transmitter. In *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983), we noted that "it is well-settled that the admission of tape

recordings rests within the sound discretion of the trial court," subject to the requirement that such tapes be "authentic, accurate, and trustworthy." Id. at 876.

In *United States v. Moss*, 591 F.2d 428, 433 (U.S. App., 1979) this court set out the foundational requirements for the admission of evidence obtained by electronic surveillance in *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1975). "As we recently stated, the purpose of the McMillan foundational requirements is to insure that only competent and reliable tape recording evidence adverse to an accused is allowed to go before the trier of fact. These requirements do not, however, exist In vacuo; they become meaningful only when viewed in light of the facts of a specific case."

> The *McMillan* requirements are: (1) That the recording device was capable of taking the conversation now offered in evidence. (2) That the operator of the device was competent to operate the device. (3) That the recording is authentic and correct. (4) That changes, additions or deletions have not been made in the recording. (5) That the recording has been preserved in a manner that is shown to the court. (6) That the speakers are identified. (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducements.

In *U.S. v. Robinson*, 1996 U.S. App. LEXIS 33594, 5-6 (U.S. App. 1996) the Court cited "Physical evidence may be admitted when there has been a showing that the exhibit offered is in substantially the same condition as it was when the crime was committed." *United States v. Aviles*, 623 F.2d 1192, 1197 (7th Cir. 1980). "Absent a clear showing of abuse of discretion, challenges to the chain of

custody go to the weight of evidence, not its admissibility." [*6] *United States v. Levy*, 904 F.2d 1026, 1030 (6th Cir. 1990), cert. denied sub nom. *Black v. United States*, 498 U.S. 1091, 112 L. Ed. 2d 1060, 111 S. Ct. 974 (1991). "[A] missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect." *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982), quoting *United States v. Jackson*, 649 F.2d 967 (3d Cir.), cert. denied, 454 U.S. 1034, 70 L. Ed. 2d 479, 102 S. Ct. 574 (1981).

In *United States v. Allen*, 106 F.3d 695, 700 (U.S. App. 1997) the court stated "Physical evidence is admissible when the possibilities of misidentification or alteration are eliminated, not absolutely, but as a matter of reasonable probability." *United States v. McFadden*, 458 F.2d 440, 441 (6th Cir. 1972) (quoting *Gass v. United States*, 135 U.S. App. D.C. 11, 416 F.2d 767, 770 (D.C. Cir. 1969) (footnote omitted)), cert. denied, 410 U.S. 911 (1973). Merely raising the possibility of tampering is insufficient to render evidence inadmissible. *United States v. Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994). Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. *United States v. Aviles*, 623 F.2d 1192, 1197-98 (7th Cir. 1980). Absent a clear abuse of discretion, "challenges to the chain of custody go to the weight of the evidence, not its admissibility." *United*

States v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990), cert. denied, 498 U.S. 1091 (1991). In the case at bar none of the evidence submitted by Eddie Goins is trustworthy. He falsified tape recordings and submitted them to the government to be used as evidence against the defendants. Even though the government surveilled him to the alleged buys no one was present to ensure that Goins or his siblings did not fabricate or alter the tape recordings or drugs that were submitted as evidence in this trial. Karen West, Sandra Goodman and Joyce Kirby identified the speaker on the Sally Moss tapes as Donna Kay Mitchell during the drug conversations. Case Agent Lynn Barker testified in regard to the drug evidence that he sent in a white powder chunky substance in a single ziplock bag and that the evidence introduced at trial contained "a mysterious new zip-lock bag" that wasn't there when he sent it, he couldn't say without it being in the evidence bag with his initials on it that it would be the same substance. All he identified was the evidence bag with his initials on it. The substance was a brown liquid when it appeared in court. (R. 528 Transcript pg. 2930 and pg. 2931, Apx. at *). None of the tape or drug evidence should have been admitted in this case over defendant's objection.

The trial court erred in refusing defendant the right to impeach the hearsay statements made by Eddie Goins on said tape recordings in the same manner as would be permitted had Eddie Goins testified in person at said trial.

At the end of tape N-5 and N-5 ET Eddie Goins engages in a conversation with himself making numerous inadmissible and highly prejudicial statements. The comments are not made to any defendant and the jury sits for over a minute reading the transcript as Goins walks out to his car gets in and starts driving down the road before he starts his dialogue. The court ruled that Mr. Goins' conversations were admissible because they showed the context of the conversations with alleged coconspirators.

> The tape, on Page 7 of the transcript, Mr. Goins leaves Ms. Moss, and he's in the car by himself "Goins: All right, buddy. All right. Let's leave this son of a gun." "Was that good? Did you hear what he said--'Who do you think I get it from?' I said, 'You're getting it from Tim.' Then she cut me an eight ball. I said, 'No, dump it back in there.' And she said she could get 5 ounces from him and have him deliver it. I went in there. This button in the bathroom was this way. So I had to."

This is not a conversation between Mr. Goins and Ms. Moss it is blatant hearsay. There are numerous other examples wherein Goins made similar statements on the tape recordings and the court allowed those statements into evidence. The statements are numerous however they are not listed in this brief due to page limitations.

If Eddie Goins had testified in this case the fabricated tapes would be admissible and Goins would be subject to cross-examination about all of the tape

recordings, including the tapes not in evidence and the tapes he fabricated in the case. When Eddie Goins asserted his Fifth Amendment privilege he became unavailable. The defendants were deprived of one of the most important fundamental constitutional rights available to a criminal defendant, due process through confrontation and cross examination of the evidence against him. The defendants were not responsible for the fact that Goins did not testify and the fact that neither the Court nor the government would grant him immunity. So since it would be admissible should he testify, his failure to testify allows impeachment under Fed. R. Evid. Rule 806.

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, * * * by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. * * *
>
> Notes of Advisory Committee on Rules. The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.

"The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *Idaho v. Wright*, 497 U.S. 805, 813, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990). The purpose

of the Clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-24, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999) (internal quotation omitted). Such testing is not possible where the government endeavors to present the hearsay statements of an out-of-court declarant through the testimony of a witness. *Lilly*, 527 U.S. at 124 (citing *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970)). When the court allowed Eddie Goins hearsay statements into evidence the Defendants should have been allowed to challenge these statements in the same manner as if Goins testified; including playing the other tapes made by Goins but not introduced as evidence.

The trial court erred in sentencing Appellant Romans under 21 U.S.C. § 841(b)(1)(A) to serve 148 months confinement based on 5.86 kg of cocaine when Appellant Romans was indicted and found guilty of 21 U.S.C. § 841(b)(1)(C) in violation of the Sixth Amendment jury and notice provisions and the Due Process Clauses of the Fifth and Fourteenth Amendments.

Each of the witnesses that the trial court relied on to establish drug amounts attributable to appellant Romans for sentencing purposes testified because of a promise by the government of lenient treatment in connection with the witness's own criminal wrongdoing. Each of these witnesses were addicted to or using

controlled substances during the time period they testified about and all of these witnesses, admitted being addicted to controlled substances and their testimony in this case is highly suspect as a result of that fact. All of the witnesses, with the exception of Darlene Goins, had been previously convicted of one or more criminal offenses and Darlene Goins admitted her own extensive involvement in the drug business for which she could have been prosecuted. Appellant Romans Pre Sentence Report recommends a sentence at the higher tier of § 841(b)(1)(A).

> PART D. SENTENCING OPTIONS Custody 78. Statutory Provisions: The maximum term of imprisonment as to each count of conviction is 20 years, pursuant to 21 U.S.C. § 841(b)(1)(C). This case involves more than 5 kilograms of cocaine. There are no drug amounts charged in the Superseding Indictment. Five kilograms of cocaine triggers the penalties found in 21 U.S.C. § 841(b)(1)(A), which require a minimum sentence of ten years imprisonment to a maximum of LIFE.

In *United States v. Zidell*, 323 F.3d 412, 427-28 (6th Cir. 2003) this court held "In cases involving drug trafficking offenses tried before a jury, the United States Court of Appeals for the Sixth Circuit has interpreted the *Apprendi* rule as requiring that a defendant be sentenced within the default range set forth at 21 U.S.C.S. § 841(b)(1)(C) -- i.e., not more than 20 years' imprisonment, increased to a 30-year maximum if the defendant has a prior felony drug conviction -- unless the jury determines beyond a reasonable doubt that the offense involved a quantity

of drugs that triggers an enhanced statutory maximum under 21 U.S.C.S. § 841(b)(1)(A), 841(b)(1)(B).”

In *United States v. Copeland*, 321 F.3d 582, 602 (6th Cir. 2003) this court stated:

> In considering this statutory scheme under *Apprendi*, this court has held that where a defendant is sentenced under the higher tiers of this scheme, that is, §§ 841(b)(1)(A) and (B), the quantity of drugs involved must be charged in the indictment and proved beyond a reasonable doubt; otherwise, the defendant should be sentenced to the lower sentencing range of § 841(b)(1)(C). *See Ramirez*, 242 F.3d at 352 ("when a defendant is found guilty of violating 21 U.S.C. § 841(a)(1), he must be sentenced under 21 U.S.C. § 841(b)(1)(C) unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amounts required by § 841(b)(1)(A) and § 841(b)(1)(B)"); *see also Flowal,* 234 F.3d at 936. Furthermore, where drug quantity is not proved, and a defendant is sentenced to a term of years encompassed by both the lowest and highest tiers of the scheme, this court has found that this may constitute an *Apprendi* violation if the defendant can demonstrate that he was sentenced pursuant to one of the higher tiers of the statute. *See United States v. Humphrey*, 287 F.3d 422, 450 (6th Cir. 2002) ("If evidence in the record indicates that the judge thought herself constrained to sentence the defendant within the higher statutory range, such evidence will demonstrate a potential *Apprendi* violation"). Stated differently, this court has held that a defendant's rights under *Apprendi* are violated wherever he is made subject to a mandatory minimum sentence of the higher tiers of § 841(b), even where he is sentenced within range set forth in § 841(b)(1)(C).).

In *U.S. v. Darwich*, 337 F.3d 645, 655 (6th Cir. 2003), this court stated “We cite these cases for the proposition that the subsections of § 841(b) require that the drug quantity be proved beyond a reasonable doubt or else the defendant can

receive only the default statutory-maximum penalty for offenses which do not state drug quantity." *See generally United States v. Lopez*, 309 F.3d 966, 970 (6th Cir. 2002) (noting that because the jury did not find beyond a reasonable doubt the necessary cocaine amounts for sentencing under §§ 841(b)(1)(A) or 841(b)(1)(B), *Apprendi* would require that the defendant be sentenced under the default statutory-maximum provision for cocaine contained in § 841(b)(1)(C)). Because *Strayhorn* requires the district court, when the defendant is subject to an enhanced sentence, to consider "the determination of drug quantity under § 841(b) . . . [as] an element of the offense rather than a sentencing factor," . . . (citing *United States v. Ramirez*, 242 F.3d 348, 351 (6th Cir. 2001)). Thus, for the purpose of establishing the statutory-maximum sentence for drug offenses, the drug amount must be proved beyond a reasonable doubt. United States v. Garcia, 252 F.3d 838, 842 (6th Cir. 2001). The indictment charges an offense under title 21 § 846 to violate §841 b)(1)(c), and carries a maximum sentence of 20 years. The crime charged, as a matter of law, involves less than 500 grams of cocaine. Appellant Romans does not dispute that through application of prior criminal record, role in the offense and other factors he can be sentenced up to 20 years for his conviction. However the trial court did not sentence Appellant Romans under the drug quantities of 841(b)(1)(C) because by default the statute involves drug amounts of less than 500 grams. Appellant Romans has one criminal history point for a simple assault in

which he was not represented by counsel. The trial court opined that he had not performed in a leadership role yet Appellant Romans was sentenced to 148 months because the trial court following the presentence officer recommendations attributed 5.86 kg of cocaine to him. This is a classic example of why drug amounts must be proven beyond a reasonable doubt; because in this case the court sentenced Appellant Romans under 841 (b)(1)(A), more than 5 kg., which carries a range of punishment of 10 years to life imprisonment instead of 841 (b)(1)(C). The decision of the trial court should be reversed and Appellant Romans should be sentenced under the provisions of 841(b)(1)(C) which provide for a base offense level of 22.

The trial court erred in submitting transcripts N-1-ET, N-5-ET, N-9-ET, N-18(a)-ET, and N-26(a)-ET, and N-30-ET to the jury when the parties did not stipulate to their accuracy, the Court did not have the transcriber attest to the accuracy and the court did not make a determination based on in camera comparison of the transcripts to the tapes.

In the case at bar defense counsel made numerous and continuing objections to the governments use of the transcripts it prepared and that the tapes were so inaudible that their accuracy could not be determined. The trial court refused to consider written motions to redact the tapes and transcripts and ordered defense counsel to "get with" the government to determine if a stipulation could be reached. When a stipulation could not be reached the court ordered counsel for all parties to mark the objectionable portions of the transcripts and indicate the basis

for objection to each particular portion of the transcript. The marked up transcripts were submitted to the court and none of the portions submitted for redaction by the defendants were approved. Many of the portions that the defendants marked for redaction consisted of government agent Eddie Goins making self-serving false statements about the defendants while he was not in anyone's presence. This court has held that "Where transcripts are to be used at trial, the preferred practice is for the court not to submit transcripts to the jury unless the parties stipulate to their accuracy." United States v. Scarborough, 43 F.3d 1021, 1024 (6th Cir. 1995), United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983). The second-best method is for the transcriber to attest to the accuracy and the court to make a determination based on in camera comparison of the transcripts to the tapes. Wilkinson, 53 F.3d at 762; United States v. West, 948 F.2d 1042, 1044 (6th Cir. 1991) (use of transcripts within the discretion of trial court when certain procedures are followed for determining their accuracy), cert. denied 502 U.S. 1109 (1992). In the case at bar no government agent testified as to the accuracy of the transcripts, there was no testimony corroborating the content of the transcripts and there was no indication that the court compared the tapes with the transcripts to determine that the transcripts accurately reflected the contents of the tapes. Although the trial court instructed the jury that if there was a discrepancy between the tapes and the transcript that the tape controlled, the trial court also instructed

the jury that it was within their discretion to determine whether the defendants adopted the statements made by Eddie Goins. Defendants were denied any way to confront or cross-examine this evidence other than numerous overruled objections at trial.

In *United States v. West*, 948 F.2d 1042, 1044 (U.S. App., 1991). The court stated "Transcripts are typically used when a tape is of questionable clarity. It is extremely important that in admitting and using transcripts, a foundation is laid demonstrating the accuracy of the tapes." In *U.S. v. Slade*, 627 F.2d at 302, the court specifically addresses procedures to be used in admitting tapes. We have adopted these procedures in *Robinson I*, and reiterate them below:

> It is within the trial court's discretion to allow the jury to use an accurate transcript "to assist them in listening to [a] tape." The need for a transcript tends to arise where . . . portions of a tape were relatively inaudible and the identity of speakers was not automatically clear to a listener. Because a transcript is only meant to be a guide to evidence--the tape being played--it is important that the judge instruct the jurors that their personal understanding of the tape supersedes the text in a transcript. . . .
>
> The ideal procedure for testing accuracy is to have the prosecution and defense attorneys stipulate to a transcript. When they cannot agree as to what is on tape, the second best alternative is for the trial court to make a pretrial determination of accuracy by reading the transcript against the tapes. In either situation the jury receives a transcript, certified as a correct version of the tape. A third alternative is to present the jury with two transcripts, containing both sides' versions, and let the jury determine which is more accurate. In this situation, because no one transcript is presented as "correct," the judge

> "need not necessarily listen to the tapes or pass on the accuracy of any transcript." *Slade*, 627 F.2d at 302 (citations omitted).

Whenever transcripts are used, the person transcribing the tapes should testify concerning the accuracy of the transcripts and the method used in transcribing the tapes. *Hughes*, 895 F.2d at 1147. The transcriber did not testify in this case and there was no indication that the court performed an in camera review of the tapes and transcripts to determine their accuracy. Therefore use of the transcripts by the jury should not have been permitted and this court should reverse the decision of the trial court.

The trial court erred by admitting statements allegedly made by unindicted co-conspirators without first making a finding that a conspiracy existed between the person and the defendant on trial and that the statement was made in furtherance of the conspiracy.

Under United States v. Enright, 579 F.2d 980 (6th Cir. 1978), the determination of whether an extra-judicial statement is a co-conspirator statement under rule 801(d)(2)(E) is to be made by the court as set out in Fed. R. Evid. 104(a). Under Enright, the statement can be admitted (assuming it is relevant) as nonhearsay if the trial judge finds by a preponderance of the evidence that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and that the hearsay statement was made in furtherance of the conspiracy. In Anthony v. Dewitt, 295 F.3d 554, 561-563 (U.S. App., 2002) the court stated:

> "The Supreme Court has established a two-part test for determining whether hearsay is admissible under the Confrontation Clause." *Hill v. Brigano*, 199 F.3d 833, 845-46 (6th Cir. 1999), cert. denied, 529 U.S. 1134, 146 L. Ed. 2d 964, 120 S. Ct. 2015 (2000) (citing *Ohio v. Roberts*, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240 (1980)). Hearsay evidence is admissible only where (1) the declarant is unavailable, and (2) the hearsay statement bears adequate "indicia of reliability." *Hill*, 199 F.3d at 846 (citing *Ohio v. Roberts*, 448 U.S. at 65). . . . Out-of-court statements that do not fit within a firmly rooted hearsay exception do not violate the Confrontation Clause if they possess "particularized guarantees of trustworthiness." *United States v. Tocco*, 200 F.3d 401, 416 (6th Cir. 2000) (quoting *Lilly*, 527 U.S. at 126). The guarantees must be inherent in the circumstances surrounding the testimony itself; it is insufficient that other evidence corroborates it. *Id.* In Dutton, the Supreme Court identified factors "widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89. These factors include: (1) whether the hearsay statement contained an express assertion of past fact, (2) whether the declarant had personal knowledge of the fact asserted, (3) whether the possibility that the statement was based upon a faulty recollection is remote in the extreme, and (4) whether the circumstances surrounding the statement make it likely that the declarant fabricated the assertion of fact. *Dutton*, 400 U.S. at 88-89.

*Remainder omitted for length.

CONCLUSION

*Omitted for length

Respectfully submitted,

_____
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IN THE COURT OF CRIMINAL APPEALS
EASTERN SECTION AT KNOXVILLE, TENNESSEE

FLOYD LEON HYATTE	)	
	)	
Appellant	)	
	)	Court of Criminal Appeals
vs.	)	
	)	Docket No. E2007-02646-CCA-R3-PC
STATE OF TENNESSEE	)	
	)	APPEAL AS OF RIGHT
Appellee	)	

APPEAL FROM THE CIRCUIT COURT
OF RHEA COUNTY, TENNESSEE
CASE NO.: 14812

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

May It Please the Court:

This record presents the appeal from an order entered by the Honorable Buddy D. Perry, Circuit Court Judge sitting in Dayton, Rhea County, Tennessee denying Floyd Leon Hyatte's petition for post conviction relief after having been convicted of first degree murder and sentenced to life imprisonment. Appellant, Floyd Leon Hyatte shall hereinafter be referred to as "Hyatte", Appellee, State of Tennessee, shall hereinafter be referred to as "the State" and trial counsel Nathan Brooks, shall hereinafter be referred to as "Brooks".

The technical record will be referred to as "TR", page _____.

The post conviction hearing transcript will be referred to as HT page _____ Line _____.

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ISSUES PRESENTED FOR REVIEW

The Defendant Floyd Leon Hyatte presents two issues in support of his assertion that the trial court improperly denied post conviction relief in his case.

1. The trial court erred in refusing to grant Hyatte a new trial after proof that he was deprived of his constitutional right to testify and that such denial was not harmless error.

2. The trial court erred in refusing to grant Hyatte a new trial after proof established that he was denied effective assistance of counsel.

STATEMENT OF THE CASE

This is an appeal from a denial of Hyatte's petition for post conviction relief by the Honorable Buddy D. Perry, Circuit Judge of the Twelfth Judicial District held in Dayton, Rhea County, Tennessee.

Floyd Leon Hyatte filed a petition for post conviction relief on January 6, 1998. (TR page 1) Hyatte filed a second supplement to the original petition for post conviction relief on December 20, 2000. (TR page 65) Counsel for Hyatte subsequently filed an amended petition for post conviction relief on July 25, 2002. (TR page 68) Counsel for Hyatte subsequently filed an amendment to petition for post conviction relief with exhibit A on November 5, 2003. (TR page 73) Counsel for Hyatte filed another amendment to petition for post conviction relief with exhibits A and B on August 20, 2004. (TR page 82) The State filed a response to Hyatte's petition for post conviction relief on November 10, 2004. (TR page 86) Hyatte appeared before the Court for a hearing of this matter on the 24th day of February, and 10th day of March, 2005 whereupon the Court heard testimony of Hyatte, witnesses and reviewed the record as a whole in consideration of his petition for post conviction relief. Hyatte filed a pro se motion to render decision on October 3, 2007. (TR page 88) The Trial Court entered a memorandum opinion and order denying the petition for post conviction relief on November 21, 2007. (TR page 95) Hyatte's counsel filed the Notice of Appeal on November 28, 2007. (TR page 101)

STATEMENT OF FACTS

I. DENIAL OF CONSTITUTIONAL RIGHT TO TESTIFY

Testimony of Hyatte Concerning His Right to Testify:

On charges of first degree murder Hyatte was represented by attorney Nathan Brooks who no longer practices law having been disbarred. Hyatte testified that he had discussions with Brooks as the trial was ending. He testified that during a recess for a cigarette break he went outside with Brooks and told him that he needed to testify because he felt the state's witnesses were lying and that he needed to get on the stand to defend himself. [HT Pg 19 Ln 2 - Ln 15] He testified that when he told Brooks about his desire to testify that Brooks said that he wished he would not. Brooks did not really want him to testify and Hyatte kept telling him "I need to do this; I need to get up on the stand." Hyatte testified that Brooks told him that he would ask the judge to give some extended time so that Brooks could prepare him as a witness. [HT Pg 19 Ln 16 - Pg 20 Ln 1] Hyatte testified that he told Brooks specifically that he felt he needed to rebut the testimony of Bobby Combs, Maria Jones, Jamie Johnson, and most definitely Greg Garmany who was a codefendant in the case. Hyatte testified that based on his observations at the trial Greg Garmany and Bobby Combs were the primary witnesses that the State offered to put him as the shooter and that he discussed this with Brooks. [HT Pg 20 Ln 2 - Ln 17] Hyatte testified that once he finished the smoke break and came back into the courtroom that Brooks told him that he was going to talk to the judge but they came in and sat down and the next thing he knew there were closing arguments. He testified that Brooks did not say anything to the Court about him wanting to testify, that he did not ask for any time to get prepared or anything. [HT Pg 20 Ln 20 - Pg 21 Ln 3] Hyatte testified that he never stated on the record or indicated to the court one way or the other that he wanted to testify or needed to testify. Hyatte testified that he was not given a

choice and that Brooks just decided that he was not going to let him testify which was contrary to what Hyatte had conveyed to Brooks. [HT Pg 21 Ln 4 - Ln 16] Hyatte testified that he had emphatically asked Brooks to let him testify. [HT Pg 21 Ln 17 - Ln 21] Hyatte testified that he and Brooks actually got into an argument about Hyatte not testifying. Hyatte testified that during the break he insisted that he wanted to testify and that Brooks did not want him to. [HT Pg 25 Ln 22 - Pg 26 Ln 4] Hyatte testified that he wanted to present his side of the story that would contradict what Mr. Garmany had said about him shooting Mr. Dillard. Hyatte testified that he wanted to tell the jury that he was not with him and that Garmany got up on the stand and just lied. [HT Pg 26 Ln 14 - Ln 21] Hyatte testified that he wanted to convey to the jury that he was at the house lying there on his couch, that the only time he got up was to look out the door, and that was late in the evening of the time when the crime was committed. [HT Pg 26 Ln 22 - Pg 27 Ln 5] Hyatte testified that Maria Jones and Jamie Johnson testified differently than what he actually did that day. He testified that he wanted to offer other evidence in the form of his testimony that he had seen Maria Jones at his aunt's house and that his niece was getting married and he asked Maria Jones where his niece's grandmother Temecki was. He testified that Maria Jones told him she is down at the church and that he turned his car around and went to the church where he saw Jamie Johnson across from the church with a freezer. He testified that he had been drinking and did not want to go into the church so he went across the street and helped Jamie Johnson with the freezer and then he left. [HT Pg 27 Ln 13 - Pg 28 Ln 5] Hyatte testified that Maria Jones claimed at trial that he had asked her if she had seen a white man come by when he in fact had asked her where his niece was and she told him at the church. He testified that he did not ask Jamie Johnson anything except if he wanted him to help him move that freezer and put it in the house, there were five or six people there on the porch with them. Hyatte stated that Jamie

Johnson testified at the first trial that he may or may not have said that he was looking for somebody and at the second trial; he said that Hyatte was definitely looking for someone some white guy. [HT Pg 28 Ln 6 - Ln 22] Hyatte testified that part of the proof at trial was that he and Mr. Garmany had driven through the housing project looking for Mr. Dillard in Mountain View or towards Mountain View. He testified that he felt he needed to present evidence that that was not what happened that he could make account for where he was. [HT Pg 28 Ln 23 - Pg 29 Ln 15]

Expert Witness Testimony of Attorney Graham Swafford.

Attorney Graham Swafford testified that he is Mr. Raines' law partner at Swafford, Jenkins & Raines, that partnership has been together for almost 2 years and that he has been practicing law in general since 1978. Mr. Swafford testified that he has handled first degree murder cases before, that he has been involved in about three or four first-degree murder cases, one as recently as November in Marion County. [HT Pg 53 Ln 2 - Ln 20] Mr. Swafford testified that he practices criminal law regularly in just about the entire Twelfth Judicial District, in federal court and that he has even attended the certification course to handle death penalty cases. He testified that he has attended seminars that addressed murder cases and representing defendants on criminal cases in general in the state and federal system. [HT Pg 53 Ln 21 - Pg 54 Ln 10] Mr. Swafford testified that he is familiar with the standards that a reasonable attorney would employ in defending an accused in a murder case. [HT Pg 54 Ln 11 - Ln 16] In response to the Court's question as to whether in 1993 there was a requirement that a defendant waive his right to testify under oath; Mr. Swafford testified that did not happen in 1993. [HT Pg 57 Ln 25 - Pg 58 Ln 3] Mr. Swafford testified that he was not sure it was provided under case law but that Article 1 Section 6 of the Tennessee Constitution and the fifth and sixth amendment of the

United States Constitution has not changed since 1993, other than as interpreted each session by the Supreme Court. [HT Pg 58 Ln 4 - Ln 18] Mr. Swafford testified that hypothetically if a client told him he had testimony that is crucial and it is different than what other witnesses testified to that the standard for a reasonable attorney in that situation would be to advise him of the consequences but if the client said I want to testify the standard is he is entitled to advance his theory and that has always been a standard that he is entitled to advance his theory. [HT Pg 58 Ln 25 - Pg 59 Ln 11] Mr. Swafford testified that his opinion as to whether Brooks exercised a reasonable standard in this case is that if the client demands to testify he is entitled to testify and if not permitted to do so it is a violation of the standard of care. [HT Pg 59 Ln 12 - Ln 18]

In response to the Mr. Taylor's question about Brooks' reputation in Rhea County as a criminal defense attorney and that he had beaten the state on a first-degree murder case and gotten it down to voluntary manslaughter, Mr. Swafford testified that he was aware that Brook's reputation at times was good and at times was questionable. [HT Pg 68 Ln 6 - Ln 14] Mr. Swafford testified in response to Mr. Taylor's hypothetical whether a reasonable attorney would allow his client to testify in a situation where the attorney had already heard the state's proof once and there was a mistrial, the state's star witness is a convicted felon who is co-indicted with the defendant which brings into question corroboration issues and the client is a three-time convicted felon against whom the state has already filed an enhancement notice that all of those factors are a consideration that must be taken into account when an attorney advises his client. However, if the client is poking the attorney in the ribs and saying I want to testify and is so adamant that a verbal confrontation ensues then it is a violation of the standard of care if the attorney does not allow the client to testify. [HT Pg 70 Ln 12 - Pg 71 Ln 18] Mr. Swafford testified in response to Mr. Taylor's question if a client wants to testify and you know it's going

to hang him should you go ahead and allow it stating "if the attorney has given the client proper advice, and told the client you're making a mistake and you shouldn't do this the client is still entitled to advance his position and his theory by his testimony". [HT Pg 71 Ln 19 - Pg 72 Ln 1] Mr. Swafford testified in response to Mr. Taylor's question whether Hyatte's testimony would have helped stating, "there were clearly credibility issues and the attorney knows that the state will wear him out, but if the client in a confrontational way tells his lawyer I want to take the stand he is entitled to do that." [HT Pg 72 Ln 2 - Ln 18] Mr. Swafford testified that as recently as November, he had a client demand to testify in a first-degree murder case, and that he sure talked to him more than 1.6 hours about that, the client was advised not to take the stand and the client demanded to take the stand and testify and that was the standard. [HT Pg 73 Ln 22 - Pg 74 Ln 17]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Hyatte testified that he did not have a preliminary hearing in this matter but that his case proceeded upon an indictment from the grand jury. [HT Pg 11 Ln 9 - Ln 15] Hyatte testified that he met with Brooks on or about January 7, 1994 for about 15 to 30 minutes that it was not that long a period of time. [HT Pg 11 Ln 16 - Ln 23] Hyatte testified that Brooks asked him what happened and whether he did it, to which he replied no and Brooks stated I will get back in touch with you. Hyatte testified that Brooks did not get back in touch with him until trial. [HT Pg 11 Ln 24 - Pg 12 Ln 7] Hyatte testified that he did not see Brooks from the initial interview on January 7, 1994 until trial on October 17, 1994 except for one time for the plea offer. [HT Pg 12 Ln 8 - Ln 14] Hyatte testified that Brooks had some discussion with him about a week prior to trial for a plea offer. [HT Pg 12 Ln 15 - Ln 21] and that was the only time other than the

initial interview that he met with him for about 15 minutes. [HT Pg 13 Ln 7 - Ln 19] Hyatte testified that he gave Brooks the names of some folks who could verify what he had been doing and that he did not know of any action that Brooks had taken other than questioning his wife, his brother, his sister, and his oldest son. He testified that Brooks never came back and told him what was the result of any of the interviews or investigation he had made. He testified that he would try to get hold of Brooks and that he would not answer the phone. He testified that he did get a hold of him one time and Brooks said that he did not want to talk over the telephone because he felt that his telephone was bugged, that people were watching him. [HT Pg 14 Ln 3 - Ln 21] Hyatte testified that he could never get a hold of Brooks and that he always tried to get his wife to call and tell him that he needed to talk to him about his case about situations that Brooks did not know because he would not stay long enough to hear anything Hyatte said and would not return his phone calls. Hyatte testified that he was unable to make bond and that he remained in the jail from the time he got arrested until the trial was over, that he was locked up continuously. [HT Pg 14 Ln 22 - Pg 15 Ln 15] Hyatte testified that on one particular day when he came back for trial from the hospital the jail brought him before the jury in handcuffs and shackles. He stated that the jury saw him in the shackled condition and that Brooks did not make a motion for a mistrial. [HT Pg 16 Ln 1 - Ln 24] Hyatte testified that Judge Perry did not know the deputies were going to bring him through the doors in the shackled condition and that the judge told the deputies to get him out of there and get the chains off of him and that he was taken out and the chains removed and he was brought back in before the jury. [HT Pg 17 Ln 5 - Ln 15] Hyatte testified that Brooks at some point became involved in a relationship with his sister. He testified that he found out when there was supposed to have been a hearing on a motion that he was supposed to go to but then nobody ever showed up. Nobody came to get him so he called

his wife and asked if he had seen or heard from Brooks. His wife replied, "yes, he's down at your sister's" and when he asked what he was doing down there he was informed that they had been seeing each other ever since they met when he interviewed her the first time. He testified that Brooks did in fact have a relationship with his sister. [HT Pg 21 Ln 22 - Pg 22 Ln 17] Hyatte testified that Brooks and his sister quit seeing one another and that when they broke it off he could not get in touch with him, that Brooks would not take his calls, that he would not answer his letters. He testified that he wrote God knows how many letters to him, called so many times and he would not answer the phone, he would not reply to the letters he just would not do anything. Hyatte testified to the court that Brooks did handle his appeal. [HT Pg 22 Ln 22 - Pg 23 Ln 10]

On cross-examination, Mr. Taylor asked Hyatte if Brooks was retained or appointed to which Hyatte replied that he was appointed and that Brooks requested the court to appoint him to Hyatte's case. [HT Pg 29 Ln 22 - Pg 30 Ln 5] Mr. Taylor asked Hyatte if he was basically saying that Brooks did not do a good job and whether he thought that Brooks did not spend enough time investigating the case, if Brooks was not familiar with the case and he made a critical mistake in not letting him testify to which Hyatte replied yes. [HT Pg 30 Ln 6 - Ln 17] In response to Mr. Taylor's question Hyatte testified that he was aware that Brooks filed a motion to set bond to get him out of jail. He testified there was a hearing on that and that Brooks filed motions to suppress his statements to investigator Billie Cranfield. [HT Pg 30 Ln 18 - Pg 31 Ln 2] Hyatte testified that he did not know Brooks filed discovery motions, motions for exculpatory evidence, motions to compel the state to try and find missing witnesses, motions for the state to try and find missing weapons specifically a knife, until he asked for a record from the court. Hyatte testified that he was not aware that Brooks filed a notice of alibi defense or that he listed

nine separate witnesses that he had interviewed who could establish or might establish Hyatte's whereabouts somewhere else at the time of the crime. [HT Pg 31 Ln 3 - Ln 15] Hyatte testified that his alibi was that he was at Peggy Hyatte's house, Taylor Hills Housing Project, Apartment 1204-A, 521 Memorial Street, Dayton, Tennessee, between 6:00 p.m. and 7:00 p.m., on February the 14th, Valentine's Day, the day this happened. [HT Pg 31 Ln 16 - Ln 23] He testified that he was aware that Brooks was going to call Peggy Hyatte, Heather Hyatte, and Michael Hyatte his brother. He testified that he was aware that Michael had a problem with some felony convictions that might affect his credibility. He testified that Walt Ray did not have some convictions at that time, that Penney Suttles did not have any prior convictions to his knowledge. Stevie "Squirrel" Sharp and Harry McKenzie was going to be a potential witness that he was at the apartment. [HT Pg 31 Ln 24 - Pg 32 Ln 24] In response to Mr. Taylor's question Hyatte testified that he was talking about taking the stand to refute what Ms. Jones and Mr. Johnson said. [HT Pg 32 Ln 25 - Pg 33 Ln 3] Hyatte told Mr. Taylor he remembered that he had already given a statement to Billie Cranfield in March right after the shooting happened which said that other than walking up to the woods behind his house like Bobby Combs had said and then coming back that he had not been anywhere until Sissy came by and wanted him and Michael to take her over to Richland Street. Hyatte denied that he had locked himself in and could not get up and change what he already told Mr. Cranfield, which was why Brooks wanted the statement suppressed. Hyatte testified that he assumed that Brooks wanted the statement suppressed because he knew that Hyatte would be cross-examined about giving a different statement to Billie Cranfield than what he testified to. [HT Pg 33 Ln 4 - Ln 25] Hyatte testified that there was a motion to suppress and a hearing on it, and that he and his attorney got to hear the state's proof at first trial that had been mistried on the third day of the trial. He testified that Brooks had heard the state's proof. [HT Pg

34 Ln 1 - Ln 18] Hyatte testified that he had proof other than his statement if he had taken the stand that Mr. Garmany, Ms. Jones the Combs fellow the kid, and Johnson were all liars. [HT Pg 34 Ln 19 - Pg 35 Ln 2] Hyatte testified that it did not occur to him that an additional risk in testifying in taking the stand in his own behalf other than contradicting the state's witnesses would be the problem that he had prior felony convictions and that the state had filed a notice of intent to impeach with three prior felony convictions, theft, robbery and sale of narcotics with Brooks. [HT Pg 35 Ln 3 - Ln 23] Hyatte testified that he did not know how that would have sounded to the jury or whether it might have made his credibility look bad that he had never been to trial before. He testified that he was not aware that the state was seeking an enhanced punishment because of his prior record because Brooks did not give it to him and that he did not have that in his present file. [HT Pg 35 Ln 24 - Pg 36 Ln 20] Hyatte testified that he was not aware that Brooks used the fact that he did not testify that he elected not to testify as one of the main grounds in his motion for new trial and appeal in the case. Hyatte testified that he did not elect not to testify and that he was not aware that. [HT Pg 36 Ln 21 - Pg 37 Ln 4] Hyatte testified he remembered that Judge Perry at a hearing ordered every juror brought into the courtroom to testify on the issue about whether they held the fact that he did not testify against him. [HT Pg 37 Ln 5 - Ln 13] Hyatte testified he remembered that Brooks alleged that the court erred when it refused to suppress his statement, alleged a violation of double jeopardy, alleged that Hyatte or the jury was the victim of terroristic threats, he alleged insufficient proof, came back with an amended motion saying that Greg Garmany was under the influence of narcotics and drugs and that Brooks included all that in the motion for new trial. [HT Pg 37 Ln 14 - Pg 38 Ln 2] Hyatte testified in response to whether he remembered that Brooks alleged the State suppressed exculpatory evidence because the victim's jacket got destroyed, he attacked Mr.

Garmany as an accomplice and said that the state could not corroborate his testimony and that was a big issue in the case, that Brooks relentlessly attacked Mr. Garmany; Hyatte stated that he did not think so. He testified that he remembered what Brooks had done but that he did not think he did enough; he knew he did not do enough. [HT Pg 39 Ln 11 - Pg 40 Ln 6] Hyatte testified in response to Mr. Taylor's question that if he had taken the stand his testimony would have basically been that Greg Garmany was lying, Johnson was either lying or mistaken, Jones was either lying or mistaken, the Combs fellow, the boy was either lying or mistaken, and everybody was either lying or mistaken except him and his witnesses. Hyatte responded that all Brooks had to do was go and interview the State witnesses to see who was with them. There was more than one person at each scene that they claimed he was at. Brooks never got their testimony, he tried to tell him these things, and he would not listen. [HT Pg 40 Ln 7 - Ln 21] In response to Mr. Taylor's question if your whole defense is based on the fact that you are not there what do you expect your lawyer to do, do you expect him to prove that you were there but it was voluntary manslaughter you can't have it every which way; Hyatte responded that he expected his lawyer to do his job. Hyatte testified that he remembered in October of 1995 less than a year after his conviction signing a letter to Judge Perry stating that he was trying to get in touch with Brooks and John Fine the Circuit Court Clerk and Frankie Lewis at the Court of Criminal Appeals stating "I feel that Brooks did a fairly decent job more perhaps as good a job as possible for him, but I no longer have the confidence in him to handle the appeal." Hyatte stated that he signed the letter but that he did not say that; he had a fellow type it for him because he could not type but that he did sign it. [HT Pg 41 Ln 5 - Pg 42 Ln 7] In response to Mr. Taylor's question about whether Brooks was having relations with his sister and whether he broke up with her after the trial, Hyatte responded that they broke up during his appeal. [HT Pg 42 Ln 16 - Pg 43 Ln 2]

Hyatte testified that the mistrial was declared in October and then he did not see Brooks before he came back to trial in November except one time for 15 minutes to talk about a plea offer. He testified that over the entire year and a half period he spoke with Brooks two or three times by telephone and that each time Brooks told him he could not talk on the telephone; he did not want to discuss anything over the telephone. He testified that after the mistrial he could not get a hold of Brooks and that they did not discuss anything before the new trial. [HT Pg 43 Ln 8 - Pg 44 Ln 10] Hyatte testified that in regard to the eight or nine different people that were testifying to establish his alibi that he never had any discussion with Brooks about these people at all. He testified that he did not know Brooks was talking to these witnesses or trying to get information about what they might say that his wife was trying to help Brooks but that he would not talk to Hyatte so he did not know exactly what was happening. [HT Pg 44 Ln 11 - Ln 25] Hyatte testified that he never had any discussion with Brooks that he was having problems with these people or to give him insight on who else Brooks needed to talk to, Brooks did not want to discuss anything over the telephone, and he would not come to the jail. [HT Pg 45 Ln 1 - Ln 9] Hyatte testified that Brooks never told him anything about the state trying to get his sentence enhanced, that he never discussed that with Brooks, and he did not know the state had filed that until he got the record back on appeal. He testified that he considered that important and that he would like to have known about that, he just found out about that today. [HT Pg 45 Ln 10 - Pg 46 Ln 1] Hyatte testified that the letter he signed that the state made an exhibit was read and he understood it and he told the typist I don't like the way you worded that but he signed it any way because he was trying to get Brooks off his butt to help him that's all he was trying to do, trying to find some help. [HT Pg 46 Ln 2 - Ln 18] Hyatte testified that shortly after he signed the letter he started studying law and was amazed that Brooks did not do, did not talk to him, and did not

explain things to him and that he did not know anything about his case. [HT Pg 46 Ln 19 - Pg 47 Ln 3] Hyatte testified that during the trial Brooks got up and yelled at some of the witnesses, called them liars or accused them in so many words of not telling the truth, but that he did not believe there was any substance to the information he was trying to get out of the witnesses. [HT Pg 47 Ln 4 - Ln 14] Hyatte testified that he figured that out when Mr. Garmany was on the stand and he made a totally different statement than he did in the first trial, it was totally different in the second and when he was showed the transcript he could not recollect ever saying any of what he said in the first trial and denied saying it, emphatically denied it and Brooks just turned around and walked off. [HT Pg 47 Ln 15 - Ln 25] Hyatte testified that before he got himself familiar with his case and the law that he did not know whether Brooks did a good job or not. [HT Pg 48 Ln 1 - Ln 8] Hyatte testified that before he signed the letter that Brooks did a good job, he did not know that Brooks had only investigated prior to the first trial a total of 32 hours. He testified that if he had known that, it would have changed his opinion before he signed the letter. [HT Pg 48 Ln 20 - Pg 49 Ln 7] Hyatte testified in response to Mr. Taylor's question that Brooks told him the state made a plea offer of 15 years after the state had filed a notice of enhancement and which is the lowest in a second-degree murder. Hyatte testified that the plea offer was not irrelevant because he would rather plead guilty to something he did not do than to get a life sentence. [HT Pg 49 Ln 14 - Pg 50 Ln 11] Hyatte testified that if he knew he could not win it yes he would take 15 years he had been in jail before; everybody knew he had been in jail before. As to whether the state actually made an offer of 15 years on a first-degree murder case Hyatte testified that he could only tell what Brooks told him. He testified that Brooks came back and told him that when he told Mr. Taylor that Hyatte wanted to go to trial, that Mr. Taylor said that would be fine look for the death sentence and he would give him the electric chair. In

response to Mr. Taylor's question whether he had seen the file and that there was no offer in the file Hyatte testified he had not seen that he can just tell what Brooks told him, that Brooks came over to the jail pulled him out of his cell and stayed there about 15 minutes and Brooks told him that the state offered 15 years. [HT Pg 50 Ln 13 - Pg 51 Ln 9] In response to Mr. Taylor's question about alibi witnesses Hyatte testified that he was in jail and his wife and brother were trying to help Brooks find these witnesses. Hyatte testified that there were four or five or six. [HT Pg 51 Ln 10 - Pg 52 Ln 5]

Testimony of Attorney Graham Swafford as to Ineffective Assistance of Counsel

Mr. Swafford testified that Brooks' relationship with Hyatte's sister violated the standard of care for a reasonable attorney in Rhea County that it is improper and inappropriate and the court took judicial notice of that fact. [HT Pg 59 Ln 22 - Pg 60 Ln 8] Mr. Swafford testified that in reviewing Brooks' timesheet the initial interview with Hyatte indicates 1.6 hours, and that there is no other indication that he met with Hyatte any other time. [HT Pg 60 Ln 16 - Pg 61 Ln 2] Mr. Swafford testified that on the back sheet there was a total that listed out-of-court time as 32.3 hours. He testified that in his experience and opinion out of court time typically consists of interviews, research, investigating, talking to witnesses, talking to clients, and communications with the District Attorney and other stuff not related to in-court actions. [HT Pg 61 Ln 3 - Ln 15] Mr. Swafford testified that the timesheet indicated 21 hours for in court time. [HT Pg 61 Ln 16 - Ln 24] Mr. Swafford testified that in his opinion 32.3 hours for a first-degree murder case is clearly inadequate for a number of reasons and that is not consistent with the standard of care anywhere. [HT Pg 61 Ln 25 - Pg 62 Ln 8] Mr. Swafford testified when asked what his opinion an average or typical amount of time would be to allot to investigating and preparing a first-

degree murder case that the case he tried in November required over a hundred hours of his time not including all of the time spent preparing by co-counsel. He testified that he interviewed all of the witnesses, talked to the investigator, and prepared the witnesses to testify which did not show in Brooks timesheet, but that it was very important. Mr. Swafford opined that you cannot get a first-degree trial ready in 32 hours or really any jury trial much for 32 hours. [HT Pg 62 Ln 9 - Pg 63 Ln 5] Mr. Swafford testified that it is his opinion that a reasonable lawyer needs to have contact with his client, that he sends the client copies of the various correspondence and that he sends the client copies of any motions or responses to discovery and that is the standard of care. [HT Pg 63 Ln 6 - Ln 17] Mr. Swafford testified that the reasonable standard of care in explaining what you are doing for the client is to go over and sit down and review the indictment with them, what they are charged with and explain the case and communicate with them, that you cannot call every five minutes but that typically you should get back with the client within a day or two at worst the standard of care is to communicate with the client, and particularly the standard of care is to advise them of the major issues, particularly enhancement motions, things like this. [HT Pg 63 Ln 18 - Pg 64 Ln 9] Mr. Swafford testified that 1.6 hours and maybe 15 minutes explaining an apparently nonexistent plea offer would not be a reasonable standard of care for an attorney in Rhea County. [HT Pg 64 Ln 10 - Ln 17] Mr. Swafford testified that his opinion as to the standard of care for conveying information to clients specifically a range enhancement notice is to put a note in with a copy and send the client a copy with an explanation and typically in major command decisions such as enhancements, to go over and eyeball to eyeball explain it to the client every time. The law is clear that you have got to communicate with your client, and that based upon what he heard in this case, that Brooks did not comply with the standard of care that the client is entitled to know what is going on with his case. [HT Pg 64

Ln 18 - Pg 65 Ln 15] On cross-examination Mr. Swafford testified that a hundred hours of preparation does not necessarily guarantee a favorable result to the defense or a not guilty verdict, he testified there is no guarantee in this business. [HT Pg 67 Ln 21 - Pg 68 Ln 3]

The Kellon Gillespie Video Tape

Mr. Raines submitted a videotape into evidence to show that Brooks had video evidence to rebut testimony that Bobby Combs had given to the effect that that he went up to Hyatte's residence and told them that Mr. Coleman had been stabbed, and that subsequently Greg Garmany and Leon Hyatte came back down through the projects and asked if he seen a white man run by, into the woods and they went somewhere into the woods. Bobby Combs was allegedly there with Kellon Gillespie when this occurred, he also testified that later Hyatte and Mr. Garmany came back out of the woods while he was in Kellon Gillespie's grandmother's apartment and that he heard a statement where someone said, "Let me get this gun out of my pocket and put it in safety." He did not know whether it was Mr. Garmany or Hyatte, but he testified he heard someone say that presumably while he is with Kellon Gillespie in the grandmother's apartment. Kellon Gillespie testified that he was not with Bobby Combs at any time during that day, because he had attended a wedding in Cleveland. Presumably during the time that he was with Bobby Combs when this statement was heard or alleged to be made, Kellon Gillespie is alleged to have been there in the apartment with Bobby Combs, but the proof actually was, by his testimony and especially by videotape, that he was at a wedding in Cleveland. [HT Pg 86 Ln 5 - Pg 87 Ln 22] The Court inquired of Hyatte whether Brooks had this tape in his possession to which Mr. Raines replied "It is my understanding that he did." The Court stated "So essentially what you are saying, you have corroborative proof of a witness that

contradicts a key witness and that the trial attorney had that information in his possession and made no effort to corroborate the witness that was contradicting the other key witness then"? [HT Pg 88 Ln 6 - Ln 21] Hyatte in response to the courts question testified that he told Brooks that Ms. Wilkerson who is Kellon Gillespie's grandmother had a tape that showed they were at the wedding. He testified that in the first trial, his wife knew about the tape and took it to Brooks and Brooks had the tape in his possession but that he never introduced it into evidence. [HT Pg 90 Ln 22 - Pg 91 Ln 20]

Appellate Court Reliance on Bobby Combs Testimony

The appellate court relied on Bobby Combs testimony in upholding Hyatte's conviction. Failure to introduce or submit evidence that called Comb's testimony into question clearly demonstrates ineffective assistance of counsel as he failed to rebut key evidence upon which an appellate court relied in upholding Hyatte's conviction. The appellate opinion states "Immediately after the Appellant and Garmany heard about the stabbing, they got Bobby Combs to show them where Johnny Dillard ran into the woods. The Appellant and Garmany then went up to the woods to look for Dillard. Before coming back into the projects, Bobby Combs overheard either the Appellant or Garmany state 'let me get this gun out of my pocket and put it in safety.'" State v. Hyatte, 1997 Tenn. Crim. App. LEXIS 108, 15-16 (Tenn. Crim. App. 1997)

ISSUES & ARGUMENT

There are two issues for the Court's review: First: Hyatte alleges that he was denied a fundamental constitutional right when he was not allowed to testify at the trial of this matter. Second: Ineffective assistance of counsel.

In the case sub judice, counsel points to not only the record but also the unrefuted facts.

ISSUE ONE:

The trial court erred in refusing to grant Hyatte a new trial after proof he was deprived of his constitutional right to testify and such denial is not harmless error.

ARGUMENT AND CONCLUSIONS OF LAW

In Tennessee, there is no question that a defendant has an absolute right to testify on his own behalf and to advance his theory of the case. It is insisted this is constitutional law that cannot be ignored.

> It is now a well established principle in both state and federal law that a criminal defendant has a constitutional **[**9]** right to testify at trial. See *State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976); Campbell v. State, 4 Tenn. Crim. App. 100, 469 S.W.2d 506, 509 (Tenn. Crim. App. 1971);* see also *Rock v. Arkansas, 483 U.S. 44, 49-52, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987); Harris v. New York, 401 U.S. 222, 225, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971).*

In *State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976),* the Tennessee Supreme Court held "The right of a criminal defendant to speak in his or her own behalf is so important in Tennessee that the right has been constitutionally guaranteed since 1796 beginning with this state's first Constitution." See Tenn. Const. art. XI, § IX (1796) (stating "that in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel").

By including this provision, the framers of the 1796 Constitution meant to "insure that every accused citizen enjoyed the benefit of counsel and a correlative right to be heard in person." *Burkhart, 541 S.W.2d at 371.*

The right of a criminal defendant to be heard in their own defense is guaranteed in the Tennessee and Federal Constitutions. "We have no reservation, therefore, in holding that the right of a criminal defendant to testify in his or her own behalf is a fundamental constitutional right." *Momon v. State, 18 S.W.3d 152, 161 (Tenn. 1999)*

> Since the right to testify at one's own trial **[**21]** is a fundamental right, it follows that the right may only be waived personally by the defendant. See *Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)* (stating that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Vermilye v. State, 754 S.W.2d 82, 88 (Tenn. Crim. App. 1987)* (**"The decision as to whether an accused should testify at trial rests with the accused, not defense counsel."**); cf. *State v. Blackmon, 984 S.W.2d 589, 591 (Tenn. 1998)* ("Due to our long-standing presumption against waiver of fundamental constitutional rights, these rights must be personally waived by a defendant."). n13 Generally, a right that is fundamental and **[*162]** personal to the defendant may only be waived if there is evidence in the record demonstrating "an intentional relinquishment or abandonment of a known right or privilege." see *Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).*
>
> The waiver of a fundamental right will not be presumed from a **[**22]** silent record, see *State v. Muse, 967 S.W.2d 764, 767 (Tenn. 1998); House v. State, 911 S.W.2d 705, 715 n.20 (Tenn. 1995),* and the courts should indulge every reasonable presumption against the waiver of a fundamental right. *State ex rel. Barnes v. Henderson, 423 S.W.2d 497, 502, 220 Tenn. 719, 730 (Tenn. 1968).* (Emphasis supplied)

It is insisted the above black letter law is on point, which addresses the issue before this Court.

In this case, there is unrefuted evidence that Hyatte informed his attorney Brooks that he wanted to take the stand to testify and present his defense to rebut certain evidence introduced by the State. There is unrefuted evidence that Hyatte argued with Brooks that he wanted to take the stand and that Brooks ignored his requests. The State argues that Hyatte would have been subject to vigorous cross-examination about his prior criminal record if he had taken the stand, however that in and of itself is insufficient to deny the defendant's constitutional right to testify. All defendants must assume they will be cross-examined. The State also argues that if Hyatte had testified that it would have placed his attorney in the awkward position of asserting inconsistent theories of his defense. Even if this were true it is still an insufficient reason to deny the Defendant of his opportunity to tell the jury his side of the story.

> Although we do not address the question of ineffective assistance of counsel, it should be emphasized that trial tactics and strategy do not afford to defense counsel the authority to unilaterally waive a criminal defendant's right to testify. While it is true that a defendant's decision whether to testify is fraught with tactical and strategic implications, the decision as to whether to exercise **the right to testify is one which can only be made by the criminal defendant, and counsel can not unilaterally waive this right, even when counsel strongly believes the exercise of the right is not in the best interests of the criminal defendant.** *Momon v. State, 18 S.W.3d 152, 162 (Tenn. 1999)* (Emphasis supplied)

Hyatte testified he had discussions with Brooks as the trial was ending. He testified that during a recess for a cigarette break he went outside with Brooks and told him he needed to testify because he felt the state's witnesses were lying and he needed to get on the stand to defend himself. [HT Pg 19 Ln 2 - Ln 15] He testified that when he told Brooks about his desire to testify that Brooks said he wished he would not. Brooks did not really want him to testify and Hyatte kept telling him "I need to do this; I need to get up on the stand."

Hyatte testified that Brooks told him he would ask the judge to give some extended time so that Brooks could prepare him as a witness. [HT Pg 19 Ln 16 - Pg 20 Ln 1] Hyatte testified he told Brooks specifically he felt he needed to rebut the testimony of Bobby Combs, Maria Jones, Jamie Johnson, and most definitely Greg Garmany who was a codefendant in the case. Hyatte testified that based on his observations at the trial Greg Garmany and Bobby Combs were the primary witnesses the State offered to put him as the shooter and he discussed this with Brooks. [HT Pg 20 Ln 2 - Ln 17] Hyatte testified that once he finished the smoke break and came back into the courtroom Brooks told him that he was going to talk to the judge but they came in and sat down and the next thing he knew there were closing arguments. He testified that Brooks did not say anything to the Court about him wanting to testify, that he did not ask for any time to get prepared or anything. [HT Pg 20 Ln 20 - Pg 21 Ln 3] Hyatte testified he never stated on the record or indicated to the court one way or the other that he wanted to testify or needed to testify. Hyatte testified he was not given a choice and that Brooks just decided he was not going to let him testify which was contrary to what Hyatte had conveyed to Brooks. [HT Pg 21 Ln 4 - Ln 16] Hyatte testified that he had emphatically asked Brooks to let him testify. [HT Pg 21 Ln 17 - Ln 21] Hyatte testified he and Brooks actually got into an argument about Hyatte not testifying. Hyatte testified that during the break he insisted that he wanted to testify and Brooks did not want him to. [HT Pg 25 Ln 22 - Pg 26 Ln 4] All of which is unrefuted.

> Therefore, courts should consider the following factors when determining whether the denial of the right to testify is harmless beyond a reasonable doubt: (1) the importance of the defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; (4) the overall strength of the prosecution's case.
>
> As previously stated, the goal of harmless error analysis is to identify the actual basis on which the jury rested its verdict. *Sullivan, 508 U.S. at 279, 113 S. Ct. at 2081.* Accordingly, the factors identified herein are

> merely instructive and not exclusive considerations. The task of the trial court is not to compare the result of the two trials. The task of the trial court is to consider the testimony that the defendant would have given and the proof, which was actually offered at the second trial in light of the factors, delineated herein and any other factors that are relevant to the determination. *Momon v. State, 18 S.W.3d 152, 168 (Tenn. 1999)*

Although it is a difficult to determine the actual basis upon which the jury rested its verdict in this case, the Court of Criminal Appeals relied upon the following facts in its decision to uphold Hyatte's conviction.

> The Court of Criminal Appeals stated "In this case, Greg Garmany was the State's only witness regarding what happened after he and the Appellant left Taylor Hills. The Appellant argues that Greg Garmany was an accomplice to the Appellant and that his testimony implicating the Appellant as the killer was not corroborated. We disagree. Assuming arguendo that Greg Garmany was an accomplice to the Appellant, we find that there was sufficient corroborating evidence to support the Appellant's conviction.
>
> Immediately after the Appellant and Garmany **[*16]** heard about the stabbing, they got Bobby Combs to show them where Johnny Dillard ran into the woods. The Appellant and Garmany then went up to the woods to look for Dillard. Before coming back into the projects, **Bobby Combs overheard either the Appellant or Garmany state "let me get this gun out of my pocket and put it in safety."** Moreover, before the Appellant and Garmany left Taylor Hills they encountered Ms. Jones and asked her whether she had seen a white man running through the area. They then encountered Mr. Johnson and the Appellant asked him whether he had seen a white man, and told him that this white man had stabbed his friend and that he would take care of the situation. Finally, there was also testimony at trial from Billy Coleman, who asked the Appellant approximately three moths after the stabbing if he knew who had killed Johnny Dillard. The Appellant apparently responded to the inquiry by stating: "Never underestimate the power of friends." *State v. Hyatte, 1997 Tenn. Crim. App. LEXIS 108, 15-16 (Tenn. Crim. App. 1997)* (Emphasis supplied)

At a bare minimum if Hyatte had been permitted to testify his testimony would have contradicted that of Mr. Garmany, Ms. Jones, Mr. Johnson, and Billy Coleman. Hyatte would

testify that Maria Jones and Jamie Johnson testified differently at the first trial than what they actually did the day of trial. He would testify he had seen Maria Jones at his aunt's house and his niece was getting married and he asked Maria Jones where his niece's grandmother Temecki was. He would testify Maria Jones told him she is down at the church and that he turned his car around and went to the church where he saw Jamie Johnson across from the church with a freezer. He would testify he had been drinking and did not want to go into the church so he went across the street and helped Jamie Johnson with the freezer and then he left. [HT Pg 27 Ln 13 - Pg 28 Ln 5] **The right to take the witness stand and tell this story for a defense is constitutionally required.**

Hyatte testified that Maria Jones claimed at trial he had asked her if she had seen a white man come by when he in fact had asked her where his niece was and she told him at the church. He testified he did not ask Jamie Johnson anything except if he wanted him to help him move that freezer and put it in the house, there were five or six people there on the porch with them. Hyatte stated Jamie Johnson testified at the first trial that he may or may not have said he was looking for somebody and at the second trial; he said Hyatte was definitely looking for someone some white guy. [HT Pg 28 Ln 6 - Ln 22] Hyatte testified part of the proof at trial was that he and Mr. Garmany had driven through the housing project looking for Mr. Dillard in Mountain View or towards Mountain View. He testified he felt he needed to present evidence that was not what happened and he could make account for where he was. [HT Pg 28 Ln 23 - Pg 29 Ln 15]

Although Hyatte would have been vigorously cross-examined by the State the determination of Hyatte's credibility would have rested solely with the jury. The jury would be free to believe or disbelieve all, part or none of Hyatte's testimony. **Additionally, if Hyatte had been permitted to testify he certainly could have impeached the testimony of Bobby Combs**

if by nothing else reminding Brooks to play the wedding tape to show Bobby Combs was not with Kellon Gillespie at Kellon's grandmothers house when Combs allegedly heard someone say "let me put this gun in safety."

Simply stated as a matter of law an accused is entitled to take the witness stand in his own defense. An accused cannot be muzzled. It is insisted the Court should find that based upon the unrefuted testimony at the post trial hearings denial of Hyatte's right to testify is reversible error.

ISSUE TWO:

The trial court erred in refusing to grant Hyatte a new trial after proof established he was denied effective assistance of counsel.

ARGUMENT AND CONCLUSIONS OF LAW

The second theory Hyatte advances in support of his position is he should have been granted a new trial because of ineffective assistance of counsel. In Mayfield v. State, the Court of Criminal Appeals set forth the standard by which trial courts should determine whether a defendant is entitled to a new trial because of ineffective assistance of counsel. In Mayfield the Court ruled:

> 'In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results."' Id. at 685, 104 S. Ct. at 2063.

The Strickland standard supra is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. [*12] Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. at 687, 104 S. Ct. at 2064.

In the case at bar Hyatte asserts that Brooks' representation fell below an objective standard of reasonableness under prevailing professional norms. Brooks' deficiency is established by several facts; Hyatte testified that he did not see Brooks from the initial interview on January 7, 1994 until trial on October 17, 1994 except for one time for the plea offer. [HT Pg 12 Ln 8 - Ln 14] Hyatte testified Brooks had some discussion with him about a week prior to trial for a plea offer. [HT Pg 12 Ln 15 - Ln 21] This singular interview was the only time other than the initial interview with Hyatte lasting for about 15 minutes. [HT Pg 13 Ln 7 - Ln 19]

Hyatte testified he could never get hold of Brooks and he always tried to get his wife to call and tell Brooks he needed to talk to him about his case regarding facts of which Brooks was unaware, but all of this including Brooks failure to return phone calls is unrefuted.

Hyatte testified he was unable to make bond and that he remained in the jail from the time he got arrested until the trial was over, that he was locked up continuously. [HT Pg 14 Ln 22 - Pg 15 Ln 15] All of which is unrefuted.

Attorney Graham Swafford an attorney licensed in the State of Tennessee testified as an expert witness evidencing that in his opinion Hyatte was entitled to testify and if not permitted to do so there was a violation of the standard of care. [HT Pg 59 Ln 22 - Pg 60 Ln 8] (Mr. Swafford's testimony is unrefuted)

"The Sixth Amendment of the United States Constitution and Article I, section 9 of the Tennessee Constitution both require that a defendant [*11] in a criminal case receive effective assistance of counsel." See U.S. Const. amend. VI; Tenn. Const. art. I, § 9; see also Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

"When reviewing ineffective assistance of counsel, the court must determine (1) whether counsel's performance was within the range of competence demanded of attorneys in criminal cases, Baxter, 523 S.W.2d at 936, and (2) whether any deficient performance prejudiced the petitioner," Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984); see also Powers v. State, 942 S.W.2d 551, 557 (Tenn. Crim. App. 1996). Roland v. State, 2007 Tenn. Crim. App. LEXIS 651, 10-11 (Tenn. Crim. App. 2007)

"To show prejudice, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." Strickland, supra. A reasonable probability is "**a probability sufficient to undermine confidence in the outcome.**" Id. Roland v. State, 2007 Tenn. Crim. App. LEXIS 651 (Tenn. Crim. App. 2007)

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result [*13] of the proceeding would have been different." Strickland, supra. Nelson v. State, 2007 Tenn. Crim. App. LEXIS 849, 12-13 (Tenn. Crim. App. 2007)

"The test in Tennessee to determine if counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases Baxter, supra. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance." Strickland, supra; State v. Honeycutt, 54 S.W.3d 762, 769 (Tenn. 2001).

In order to prove a deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below and objective standard of reasonableness under prevailing professional norms." Goad, supra (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2065). Cammon v. State, 2007 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. 2007) Counsel submits the above analysis is on point when applied to the facts.

DEFENDANT'S ATTORNEY NATHAN BROOKS

Brooks is a disbarred attorney who was no stranger to this Court in matters relating to ineffective assistance of counsel.

Complaints relating to Brooks' inadequate preparation, failure to keep clients reasonably informed, failure to explain matters to enable clients to make informed decisions and numerous other incidents of unprofessional conduct were filed in March and November 1997 (a timeframe contemporaneous to this case). On February 13, 1998 Brooks was disbarred upon his agreement to a two-year suspension from the practice of law and remains disbarred as of this date. **See Brooks v. Bd. of Prof'l Responsibility of the Supreme Court, 145 S.W.3d 519 (Tenn. 2004)**

Simply stated Brooks was and had been a frequent flyer on this precise issue.

Hyatte recites numerous instances of his attempts to contact his attorney and Brooks' failure to meet with him and provide explanations so that he could make informed decisions related to his case; all of which stands totally unrefuted.

Hyatte testified the first time the case was tried a mistrial was declared and then he did not see Brooks before he was brought back to trial except one time for a 15 minute interview to talk about a plea offer. [HT Pg 43 Ln 8 - Pg 43 Ln 16]

Hyatte testified that over the entire year and a half period he spoke with Brooks only two or three times by telephone and that each time Brooks told him he could not talk on the telephone; nor did he want to discuss anything over the telephone. Hyatte testified after the mistrial he could not get a hold of Brooks and that they did not discuss anything before the new trial motion. [HT Pg 43 Ln 17 – Pg 44 Ln 10] (Hyatte's testimony stands totally unrefuted.)

Attorney Swafford testifying as an expert opined that in reviewing Brooks' timesheet, the initial interview with Hyatte was 1.6 hours, and there is no other indication that Brooks met with Hyatte any other time. [HT Pg 60 Ln 16 - Pg 61 Ln 2] Mr. Swafford testified that on the back sheet there was a total listing out-of-court time as 32.3 hours. Swafford testified that in his experience and opinion out of court time typically consists of interviews, research, investigating, talking to witnesses, talking to clients, and communications with the District Attorney and other stuff not related to in-court actions. Mr. Swafford testified that in his opinion 32.3 hours for a first-degree murder case is clearly inadequate for a number of reasons and is not consistent with the standard of care anywhere. (Swafford's testimony is unrefuted.)

It is suspected by counsel that the 32 hours of pretrial investigation was inflated, although admittedly this is not in the record.

Despite Mr. Taylor's laudatory praise of Brooks' performance at trial, Hyatte's claim of ineffective assistance is supported by Brooks' established pattern and history of inadequate preparation and failure to keep clients informed; not to mention this simply was not Brooks' first trip to the rodeo on this exact issue.

Hyatte testified concerning the eight or nine different people who could have established his alibi, that he never had any discussion with Brooks about these people at all. Hyatte testified he did not know Brooks was talking to witnesses or trying to get information about what they might say. Hyatte doubts Brooks even talked to these witnesses. Hyatte simply did not know what was happening. [HT Pg 44 Ln 11 - Ln 25] (Hyatte's testimony is unrefuted.)

Hyatte testified he never had any discussion with Brooks evidencing problems with potential alibi witnesses, nor did he have any opportunity to assist in his defense to give insight on who else Brooks needed to talk to or interview or how to approach potential witnesses. Brooks did not want to discuss anything over the telephone, and he would not come to the jail, which is all unrefuted. [HT Pg 45 Ln 1 - Ln 9]

Hyatte testified that Brooks never gave him an adequate explanation to enable him to make informed decisions about how to proceed in his case all of which is unrefuted. All of this reaches constitutional proportions.

Hyatte testified Brooks never told him anything about the state trying to get his sentence enhanced, and he did not know the State had filed an enhancement notice until he got the record back on appeal. Once again this is all unrefuted. Understandably, Hyatte testified assisting in his defense was important, and he just found out about that today in court at the post conviction hearing. [HT Pg 45 Ln 10 – Pg 46 Ln 1]

Perhaps the most offensive aroma in the smell test (if all of the above does not set new standards of incompetence) is Brooks' participation in an illicit relationship with Hyatte's sister instead of preparing the case for trial. Hyatte testified that Brooks at some point became involved in a relationship with his sister.

Hyatte testified he found out about the relationship when Brooks was scheduled for a Motion hearing that Brooks just flat missed. Nobody came to get him to tell him what happened in court so he called his wife and asked if he had seen or heard from Nathan. His wife replied "yes, he's down at your sister's." When Hyatte asked what Brooks was doing down there he was informed that they had been seeing each other ever since they met when he interviewed her the first time. [HT Pg 21 Ln 22 - Pg 22 Ln 17]

Hyatte testified that Brooks and his sister quit seeing one another and there was absolutely no communication. Hyatte testified that he wrote, "God knows how many letters" to him, called, etc. so many times and he would not answer the phone. Brooks would not reply to the letters he just would not do anything.

Hyatte testified to the Court that Brooks did handle his appeal. [HT Pg 22 Ln 22 - Pg 23 Ln 10]

In response to Mr. Taylor's question about whether Mr. Brooks was having relations with his sister and whether he broke up with her after the trial, Hyatte responded that they broke up during his appeal all of which is unrefuted. [HT Pg 42 Ln 16 – Pg 43 Ln 2]

Attorney Swafford testified that Brooks' relationship with Hyatte's sister violated the standard of care for a reasonable attorney in Rhea County, such a relationship is improper and inappropriate and the Court took judicial notice of that fact. [HT Pg 59 Ln 22 – Pg 60 Ln 8]

Attorney Swafford testified that in his opinion 32.3 hours for a first-degree murder case is clearly inadequate for a number of reasons and such meager preparation is not consistent with the standard of care anywhere. [HT Pg 61 Ln 25 - Pg 62 Ln 8] Attorney Swafford opined an attorney could not get a first-degree murder trial ready in 32 hours or really any serious jury trial involving numerous witnesses for 32 hours. [HT Pg 62 Ln 9 - Pg 63 Ln 5] Once again all of this is unrefuted.

It is insisted if 32 hours does not "undermine the confidence of the outcome," nothing does. By way of argument, counsel insists it will take this forum longer than 32 hours to review and render a decision on this case.

The most compelling indicator to substantiate Hyatte's ineffective assistance claim is the simple fact that this record is utterly devoid of any proof or theory offered by the State to rebut Hyatt's claim of Brooks' inadequate representation or that there was some strategic reason behind Brooks efforts.

The State's singular theory to prove "harmless error beyond a reasonable doubt" consists of the naked unsupported assertion by the District Attorney General that Brooks' sterling performance was sufficient. **NOTHING MORE**!!!

CONCLUSION

The unrefuted proof as set forth in the record and the law establishes that Defendant Floyd Leon Hyatte's conviction for first-degree murder should be set aside.

The Court should remand this case to the criminal docket of the Circuit Court of Rhea County for a new trial allowing Hyatte an opportunity to testify and to receive effective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marshall A. (Mark) Raines, Jr., of Swafford, Jenkins & Raines, 32 Courthouse Square, Jasper, Marion County, Tennessee 37347, affirm that I have sent copies of this Brief to the following persons and/or individuals by placing them in the United States Mail, postage pre-paid, on the date hereinafter noted.

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(Original and 3 copies as required by Rule 29 (b) T.R.A.P.) to:

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This the _____ day of May, 2008.

Marshall A. (Mark) Raines, Jr. (BPR#018193)

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