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 john.jefferson@tncourts.gov .

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Judge, Tennessee Court of Criminal Appeals

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

1998, BPR No. 019366

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

Tennessee -- Active

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

No.

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

Judge, Tennessee Court of Criminal Appeals

April 2016- Present

For a description of my experience in my current position, please see my responses to Questions Nos. 8 and 10 below.

Shelby County Government:

December 2014 – April 2016– County Attorney for Shelby County

Chief Counsel to Shelby County Government and legal advisor to the county mayor, the county commission, other elected county officials, as well as all departments, divisions, and offices of Shelby County government. Other responsibilities included providing oversight to the county's divorce referees and claims department; approving the form of county contracts; representing Shelby County in all lawsuits; drafting and reviewing all

ordinances, resolutions, and state legislation applicable to Shelby County Government. Additionally, the County Attorney served as the County's point person charged with resolving a Memorandum of Understanding with the Department of Justice to improve the Juvenile Justice system in Shelby County.

Office of the Tennessee Attorney General:

August 1998 – December 2001 – Assistant Attorney General – Criminal Justice Division

Handled Criminal Appeals before the Court of Criminal Appeals and Supreme Court; Federal Habeas Corpus Challenges before the Federal District and Appellate Courts; Advising District Attorneys General; Preparing Formal and Informal Attorney General Opinions.

December 2001 – May 2004 – Team Leader for Western Grand Division – Criminal Justice Division

Same as above with the added responsibility of mentoring new attorneys. Also, I supervised the attorneys assigned to handle matters arising out of the Western Grand Division. Responsibilities included assigning cases, reviewing briefs, sitting as a judge on moot court panels and yearly evaluations.

May 2004 – November 2014 – Manager/Supervisor – Memphis Office

Responsible for running the Memphis office and coordinating with Nashville concerning litigation in Shelby and the surrounding counties. I continued to handle heavy criminal appellate caseload, while adding a significant percentage of civil litigation practice.

July 2007 – Named Senior Counsel.

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

Not Applicable.

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

Pursuant to Tennessee Code Ann section 23-3-102 and Tenn. Sup. Ct. R. 10, R.J.C. 3.10, as a judge, I am prohibited from the practice of law. Because I presently serve as an appellate court judge, I am not presently engaged in the practice of law. However, for my experience in my current position, please see my responses to Questions Nos. 8 and 10 below.

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.

Judge, Tennessee Court of Criminal Appeals

As a member of this Court, I, as part of a panel of three, hear appeals from the criminal trial courts across the State in felony and misdemeanor cases, as well as post-conviction petitions, and other post-judgment collateral attacks to ensure that disputes are fairly heard and reviewed under neutral legal principles. The Court reviews the results of the lower court decision and produces a written opinion resolving the contested issues based on the applicable law.

In addition to my responsibilities to hear and resolve cases, in 2019, our supreme court appointed me to serve on the Judicial Ethics Committee, and I was subsequently elected by the members of that committee to serve as chairman. The Judicial Ethics Committee serves as an "advisory" body providing ethical guidance for all judges from the Supreme Court to municipal court judges and even judicial candidates. In addition to producing formal ethics opinions on some issues, I spend a significant portion of my time responding to emails and phone calls, advising judges on a wide spectrum of ethical issues that judges are presented with on a day-to-day basis.

County Attorney:

As County Attorney, I was charged with managing an office that consisted of 22 attorneys and 10 support staff. The County Attorney is the Chief Legal Officer for Shelby County and is charged with representing all County employees (elected and non-elected), offices, and departments in all litigation in both state and federal court. While not directly litigating each matter, as county attorney I was involved at some level in every case. In addition to managing and supervising all the County's litigation matters, I was personally involved as counsel of record in several matters. Aside from litigation, I was also charged with providing legal advice to the County's elected officials, offices, and departments. This advice ranged from daily matters to litigation strategy and came in the form of oral communication to formal written opinions.

Experience in Nashville with the Attorney General's Office:

As a team leader in the Criminal Justice Division, I directly supervised three attorneys who handled cases primarily in the Court of Criminal Appeals. My supervisory responsibilities included assigning cases, monitoring case management, reviewing briefs and pleadings, sitting as a judge on moot court panels, supervising oral arguments, and responding to questions concerning appellate practice and criminal law. In addition to those under my direct supervision, myself and the two other team leaders were responsible for training new attorneys in appellate

practice and procedure, emphasizing oral advocacy, brief writing, and legal research.

In addition to those duties, I also maintained a heavy caseload. Including my time in Nashville and Memphis, I handled well over 800 cases in the Tennessee Court of Criminal Appeals and more than 25 cases in the Tennessee Supreme Court. I have also handled cases in the United States Court of Appeals for the Sixth Circuit and the Tennessee Court of Appeals. I have researched and briefed just about every criminal law issue imaginable. As a Team Leader in Nashville and Senior Counsel in the Memphis office, I was often called upon to handle the high profile and complex cases.

I handled habeas corpus cases in the state trial and U. S. district courts.

I provided legal advice to District Attorneys General and their assistants. While in Nashville, I was the main contact for prosecutors in Western Tennessee who wanted an appeal perfected on behalf of the State of Tennessee or when they needed assistance prior to or during trial. I also provided legal assistance when the constitutionality of a statute was challenged.

I also wrote formal and informal opinions for legislators, District Attorneys General, Public Defenders, Judges, and Justices of the state supreme court. These opinions have addressed questions of constitutional law and statutory interpretation and have addressed a wide array of topics.

Experience in Memphis with the Attorney General's Office:

In taking on the position of Managing the Memphis office, my duties changed some. In addition to the day-to-day operations of the Memphis office, I was responsible for working with all the divisions of the Nashville office and assisting in their litigation in state trial and federal district courts in Memphis and West Tennessee. The degree of assistance ranged from acting as local or co-counsel to taking on the litigation as lead counsel.

As the supervising attorney for the Memphis office and Senior Counsel, I was routinely called upon to help other divisions with their high profile and complex litigation in West Tennessee. For example, I was asked by the Attorney General to serve as counsel in the federal lawsuit concerning the consolidation of the Memphis City and Shelby County school systems.

In addition to the new duties required by this position, I also continued to maintain a heavy criminal appellate caseload and many, if not all, of the responsibilities I had while working in the Nashville office.

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

A. <u>Trial Court Matters</u>:

Shelby County Board of Education v. Memphis City School Board, et al.

February 2011 – August 2011

United States District Court for the Western District of Tennessee at Memphis

The case was settled.

I was one of three attorneys appointed by the Attorney General to defend the constitutionality of a recently passed statute. The basis of the dispute centered on the City of Memphis's decision to surrender its charter to run a school system. By surrendering its charter, the City of Memphis relinquished its right to run a school system within the city and, in effect, placed the responsibility of educating all the children of Shelby County upon the Shelby County government and the Shelby County Board of Education. As a result of the City's actions, the Shelby County School system would have increased from 40,000 students to over 140,000 students.

Prior to the City's surrender of its charter, the State legislature passed a bill that would require a two-year waiting period before the consolidation of the school system. As part of the lawsuit, several of the named defendants challenged the constitutionality of the recently passed legislation.

Once the District Court determined that the statute was constitutional and applicable to the matter, the parties were able to reach a settlement agreement.

Mike Dunavant, District Attorney General for the 25th Judicial District v. Fayette County General Sessions Court and Judge Mike Whittaker, in his official capacity only.

July 2007 – January 2008

Circuit Court for Fayette County

The case was settled in mediation.

I was appointed by the Attorney General to represent District Attorney General Mike Dunavant in his dispute with the General Sessions Court of Fayette County and Judge Mike Whittaker. The basis of the dispute was that Judge Whittaker issued several orders concerning the number of charges the State could file in one case and that released prisoners on their own recognizance without notifying the District Attorney and/or the victims. The main issue in the case boiled down to whether or not the Judge's orders infringed upon the statutory and constitutional duties and rights of the District Attorney General.

With the aid of mediation, the parties were able to determine the true nature of Judge Whittaker's complaints and actions and, thus, reached a resolution that was favorable and agreeable to all parties.

In The Matter of: Braxton Korvacea Moore

November 2006 – March 2007

Shelby County Circuit Court – Division IV

The named juvenile was found to have committed seven aggravated assaults, was declared delinquent, and was placed in the custody of the Department of Children's Services (DCS). DCS placed the child in the Wilder Youth Facility so that he could receive the counseling and educational tools he needed.

The juvenile's mother sued DCS, Wilder Youth Facility, Shelby County Juvenile Court, and the Juvenile Court Judge for Shelby County claiming that the parties had violated the child's rights. The mother wanted the entire juvenile court proceeding declared void and the child returned to

her custody.

After being designated as lead counsel by the Attorney General's office, the Shelby County Attorney's Office and the Shelby County District Attorney's office, I argued that it was in the best interest of the child to remain at Wilder Youth Facility so that he could receive the treatment he needed. We also argued that should the mother prevail and the juvenile matter be voided then the juvenile would likely be transferred to criminal court and tried as an adult. Under that scenario, the juvenile was facing a sentence of over 90 years.

This matter was significant in that one of the main questions was whether the mother had a remedy in the Circuit Court due to the fact that she and the child, with the aid of counsel, had agreed to this "settlement" in juvenile court.

Criminal Courts of Shelby County v. Mark Luttrell, Jr., Sheriff of Shelby County

September 2005 – October 2006

Shelby County Criminal Court and the Tennessee Court of Criminal Appeals

I was appointed by the Attorney General to represent the judges of the Shelby County Criminal Court in their dispute with the Shelby County Sheriff concerning courtroom security. The basis of the dispute was that the Sheriff planned to replace the current full-time deputies who provided courtroom security with part-time deputies. The main issue in the case boiled down to who was in charge of courtroom security.

The Shelby County Attorney's office and I were able to reach a resolution that was agreeable to all parties without major litigation.

B. Appellate Court Matters:

***State v. Jackson*, 444 S.W.3d 554 (Tenn. 2014)**

The defendant was charged with the June 2005 first degree premeditated murder of her mother. The jury convicted her of second-degree murder after a trial in which the evidence was entirely circumstantial. The Court of Criminal Appeals affirmed her conviction and sentence, although the judges on the Panel were not unanimous as to the rationale for the decision. The Supreme Court granted the defendant's application to appeal in order to resolve, among many, three main issues: 1) whether the prosecution had improperly commented on the defendant's right to remain silent; 2) whether the prosecution's failure to produce a witness's statement was harmless error; and 3) whether the defendant had created an attorney/client relationship with a family friend who happened to be an attorney. In reversing the defendant's conviction and granting her a new trial, the Court held that the lead prosecutor's remark during final closing argument at trial amounted to a constitutionally impermissible comment upon the defendant's exercise of her state and federal constitutional right to remain silent and not testify. The Court also held that the prosecution violated the defendant's constitutional right to due process by failing to turn over until after trial the third statement a key witness gave to law enforcement officers investigating the murder, and that the State had failed to establish that these constitutional errors were harmless beyond a reasonable doubt. Concerning the attorney/client issue, the Court determined that the defendant had failed to establish that relationship simply by talking to a family friend who happened to be an attorney.

***Johnson v. State*, 370 S.W.3d 694 (Tenn. Crim. App. 2011)**

After affirmance of his conviction for first-degree felony murder, the defendant petitioned for writ of error coram nobis, claiming there was newly discovered evidence of a close relationship between a prosecution witness and gang prostitute undermined the evidence and strengthened his defense that the murder was committed by someone else. On appeal, the Court determined that, while that relationship alone did not entitle the defendant to a new trial, when viewed in light of the entire record, the testimony may have resulted in a different judgment had it been introduced at trial.

***State v. Johnson*, 366 S.W.3d 150 (Tenn. Crim. App. 2011)**

The defendant in this matter was convicted of aggravated robbery. On appeal, the question before the Court was whether the violence committed by the defendant, by way of displaying a knife to a store employee who was blocking the front door, was concomitant or contemporaneous with the taking of the bleach and children's clothes, as necessary to support a conviction for aggravated robbery. In comparing and distinguishing the facts of this case with prior precedent, the Court determined that the violence displayed by the defendant was contemporaneous with the taking, mainly in part due the fact that the defendant did not attempt to conceal the items, and, therefore, affirmed the conviction.

***Freshwater v. State*, 354 S.W.3d 746 (Tenn. Crim. App. 2011)**

The petitioner in this matter escaped from prison shortly after her conviction was affirmed. She remained at large for 32 years. Upon her capture and return to Tennessee, she filed a petition for writ of error coram nobis, claiming that the State failed to provide evidence that was exculpatory in nature. This was the petitioner's third appeal from the denial of that petition. The main issue in this appeal was whether the State withheld from the petitioner's counsel the statement of Johnny Box that the petitioner's co-defendant told him that he had been the lone shooter of the victim, which, had it been revealed to her counsel, more probably than not, according to the petitioner, would have resulted in a different judgment. In granting the defendant a new trial, the Court of Criminal Appeals determined that that, had the jury known that State's witness Johnny Box had made a statement that Glenn Nash had confessed to being the sole shooter, "there is a reasonable probability" that this evidence may have resulted in a different judgment.

***State v. Garrett*, 331 S.W.3d 392 (Tenn. 2011)**

This case was taken by our Supreme Court to clarify the proper procedure to be used when a defendant requests a severance of indictments pursuant to Tenn. R. Crim. P. 14. The Court found, as the State had conceded, that the trial court had failed to follow the Rules of Criminal Procedure in consolidating the matters for trial. In reaching this conclusion, the Court gave an in-depth refresher on the procedures attorneys and judges must follow when determining whether indictments should be consolidated or severed for trial. Also of note, while not finding an ethical violation in the instant matter, the Court noted that attorneys have an ethical duty to ensure that the rules of court are followed.

***Ward v. State*, 315 S.W.3d 461 (Tenn. 2010)**

This case was taken by our Supreme Court to analyze for the first time whether Tennessee's Sexual Offender Registry Requirement and Lifetime Supervision Requirement were punitive in nature and, thus, a direct versus a collateral consequence of a guilty plea. The Court, siding with a majority of jurisdictions, concluded that the registration requirements imposed by the sex offender registration act were non-punitive and, therefore, a collateral consequence of a guilty plea. However, the Court also held that the mandatory sentence of lifetime supervision is a direct and punitive consequence of a guilty plea and, thus, trial courts have an affirmative duty to ensure that a defendant is informed and aware of the requirements prior to accepting a guilty plea.

***State v. Brown*, 311 S.W.3d 422 (Tenn. 2010)**

This case was taken by our Supreme Court to review, among other issues, whether the defendant was entitled to jury instructions on the offenses of second-degree murder, reckless homicide and criminally negligent homicide as lesser-included offenses of felony murder. After reiterating the importance of charging a lesser-included offense and noting that such a practice benefits both the prosecution and the defense, the Court determined that the trial court erred in failing to instruct the jury as to the lesser-included offenses of felony murder and concluded that such error was harmful and warranted reversal.

***State v. Hatcher*, 310 S.W. 3d 788 (Tenn. 2010)**

Our Supreme Court took this matter to resolve, among other issues, the differing interpretations of Tennessee Rule of Criminal Procedure 33 relating to the filing and hearing of a motion for new trial. The Court interpreted the rule to direct trial courts not to hold any hearing on a motion for new trial until a reasonable time after the sentencing hearing has been held, sentence has been imposed, and the judgment order entered. If the defense files a timely motion for new trial, the trial court should allow ample opportunity to amend prior to holding a hearing. However, once a hearing on the motion for new trial has been heard and an order denying the motion has been entered, motions to make additional amendments must be denied.

***State v. Swift*, 308 S.W.3d 827 (Tenn. 2010)**

Our Supreme Court granted the defendant's appeal to clarify whether the location of the use of violence or fear is relevant in distinguishing theft from robbery. Based on the statutory language, the Court held that the temporal proximity between the taking of property and the use of violence or fear is the sole relevant factor in distinguishing the two crimes.

***State v. Ferrell*, 277 S.W.3d 372 (Tenn. 2009)**

The defendant in this matter was convicted of misdemeanor escape. At trial, the trial court denied the defendant's request to call an expert for the purpose of showing that he lacked the ability to form the required mental state for the offense. The Court of Criminal Appeals affirmed the conviction and held that the proffered testimony regarding "intent" was not relevant to the crime with which the defendant was charged and would not have benefitted him. Our Supreme Court reversed the lower courts and held that the lower courts had improperly limited its prior decisions by distinguishing between specific and general intent.

***Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008)**

In the appeal from the denial of a post-conviction petition, our Supreme Court determined that the trial court erred in striking as hearsay the testimony of witnesses presented at the hearing and in failing to assess their credibility and the potential effect of their testimony on the outcome of the petitioner's trial. Therefore, the Court remanded the matter to the trial court for a new hearing on the petition.

***Allen v. Carlton*, No. 05-5829 (6th Cir. May 24, 2007)**

Petitioner filed a petition for habeas corpus in the Federal District Court. After the District Court denied petitioner's claims, he appealed to the 6th Circuit which accepted the case on one issue concerning an erroneous jury instruction. In affirming the District Court's ruling, the appellate court recited Supreme Court precedent stating that a jury instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. After conducting a harmless error analysis, the 6th Circuit determined that the evidence supporting the defendant's felony murder conviction was overwhelming and affirmed the District Court's findings.

***State v. Maclin*, 183 S.W.3d 335 (Tenn. 2006)**

This was our Supreme Court's first case analyzing the recent U.S. Supreme Court case of *Crawford v. Washington*, 541 U.S. 36 (2004) regarding a defendant's 6th Amendment right to confront the witnesses against him.

***State v. Lawrence*, 154 S.W.3d 71 (Tenn. 2005)**

This case was taken by our Supreme Court to review, among other issues, whether the failure to bring a defendant before a magistrate for a judicial determination of probable cause within a constitutionally reasonable time necessitates the suppression of evidence. The Court determined that the trial court properly denied the suppression motion since the evidence was obtained prior to the detention exceeding forty-eight hours in duration.

***Freshwater v. State*, 160 S.W.3d 548 (Tenn. Crim. App. 2004)**

The defendant in this matter escaped from prison shortly after her conviction was affirmed. She remained at large for 32 years. Upon her capture and return to Tennessee, she filed a petition for writ of error coram nobis claiming that the State failed to provide evidence that was exculpatory in nature. The trial court summarily dismissed the petition claiming it was barred by the one-year statute of limitations. On appeal, the Court of Criminal Appeals reversed the trial court finding that due process allowed for the tolling of the statute and remanded the case for a determination of whether the defendant's newly discovered evidence may have resulted in a different judgment and whether she was without fault in failing to discover and present the evidence at the appropriate time.

***State v. Butler*, 108 S.W.3d 845 (Tenn. 2003)**

The defendant was convicted of DUI when he was found in a Walmart parking about 100 yards from his motorcycle carrying a sparkplug and a sparkplug wrench. Our Supreme Court took this case to determine whether the facts supported a finding that the defendant was in physical control of his motorcycle under Tenn. Code Ann. § 55-10-401(a). In finding the evidence sufficient to support the conviction, the Court adopted the reasonably capable of being rendered

operable standard in cases where a defendant contests the element of physical control based upon the alleged inoperability of the vehicle.

***State v. Cothran*, 115 S.W.3d 513 (Tenn. Crim. App. 2003)**

The Court of Criminal Appeals ruled that defendants did not have standing to challenge the search of the car of a co-defendant. The court also reviewed *Terry* stops and the plain view and inevitable discovery doctrines.

***State v. Jackson*, 60 S.W.3d 738 (Tenn. 2001)**

This was a case of first impression in which our Supreme Court determined that a defendant's history of being placed on juvenile probation allowed the use of the enhancement factor that defendant had a history of unwillingness to comply with a sentence involving release in the community.

***State v. Dean*, 76 S.W.3d 352 (Tenn. Crim. App. 2001)**

The Court of Criminal Appeals determined that a confession given while illegally incarcerated was subject to suppression under the Fourth Amendment, but not under Tenn. R. Crim. P. 5(a). The Court also determined that because the defendant's bodily fluids were obtained pursuant to a valid search warrant, they were neither the fruit of, nor tainted by, the illegal detention.

***State v. Clever*, 70 S.W.3d 771 (Tenn. Crim. App. 2001)**

The Court of Criminal Appeals determined that the Tenn. Code Ann. § 55-10-403(a)(3) providing for enhanced punishment for driving under the influence for a defendant with prior driving under the influence conviction(s) was not void for vagueness and did not violate ex post facto prohibitions as to a defendant who had pled guilty to the prior driving under the influence conviction before the enactment of the statute.

***State v. Lipford*, 67 S.W.3d 79 (Tenn. Crim. App. 2001)**

The Court of Criminal Appeals determined that the Tennessee Supreme Court has the authority by rule to prohibit a full-time municipal judge from representing a defendant or otherwise practicing law after 180 days from assuming judicial office.

***State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001).**

Our Supreme Court took this case to determine whether Tenn. Code Ann. § 39-17-424 requires admission into evidence of a defendant's prior convictions relating to controlled substances, even when Tenn. R. Evid. 404(b) would otherwise render such evidence admissible. The Court held that the legislature did not intend for section 39-17-424 to operate without regard to the Rules of Evidence and, thus, found that the trial court erred in admitting the evidence of the defendant's prior convictions.

***State v. Thompson*, 88 S.W.3d 611 (Tenn. Crim. App. 2000)**

The Court of Criminal Appeals held that under Tennessee's statutory requirements, a nonresident whose Tennessee privilege to drive has been suspended is not extended the privilege to drive in Tennessee until the period of suspension has expired and the nonresident has complied with the reinstatement procedures even though he is in possession of a valid driver license issued by his state of residence.

***State v. Beauregard*, 32 S.W.3d 681 (Tenn. 2000)**

Our Supreme Court held that, under *State v. Denton*, 938 S.W.2d 373 (Tenn. 1996), the defendant's convictions for incest and rape did not violate double jeopardy principles under the United States Constitution or article I, section 10 of the Tennessee Constitution. The Court also concluded that the convictions did not violate due process under the United States Constitution or article I, section 8 of the Tennessee Constitution.

***State v. Lindsey*, 1999 WL 1095679 (Tenn. Crim. App. Oct. 28, 1999)**

The Court of Criminal Appeals affirmed a defendant's murder conviction despite the fact that the State was not able to locate or produce the body of the victim.

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.

Since April of 2016, I have had the privilege to serve on the Tennessee Court of Criminal Appeals. The primary work of this court is to review lower court criminal cases to ensure that the matters were fairly heard and that the constitutional and statutory rights of the defendant, the victim, and the State were protected. It is also the responsibility of the court to refine legal issues so that matters are in the best position for review by our Supreme Court.

Knowing that each of the parties in the opinions I have authored, joined, or dissented in feel, and rightfully so, that their case is a "noteworthy case," makes it difficult to reduce hundreds of opinions into a select few. Therefore, I have attempted to highlight a few that provide a glimpse into how I approach reviewing matters.

***Courtney Anderson v. State*, No. W2023-00067-CCA-R3-PC, 2023 WL 6864731 (Tenn. Crim. App. Oct. 2023).**

In this matter, the State Attorney General appealed from the entry of an agreed order between the district attorney and the petitioner to reopen his post-conviction and amending/reducing his original, lawfully imposed, sentence of 162 years, 11 months, and 29 days to a time served sentence of 25 years. The State argued that the trial court lacked jurisdiction to hear the petitioner's motion as it was barred by the one-year statute of limitations, that the trial court lacked jurisdiction to amend the petitioner's sentence under the post-conviction statute, and that the trial court's actions amounted to an improper commutation of the petitioner's lawfully imposed sentence. We concluded that the petition was barred by the one-year statute of limitations and that the petitioner failed to establish and the trial court failed to find a proper basis for tolling the statute, and, therefore, the trial court lacked jurisdiction to hear the petitioner's motion and amend the petitioner's sentence. Additionally, we concluded that the trial court's actions amounted to an improper attempt to commute the petitioner's lawfully imposed sentence and that to hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3,

section 6 of the Tennessee Constitution.

***State v. Bobo*, 672 S.W.3d 299 (Tenn. Crim. App. 2023)**

In 2022, our legislature amended the Drug-Free School Zone Act ("the Act") to create a procedure allowing defendants previously sentenced under the original version of the Act, to request resentencing under the current revisions to the Act. In this case, the defendant made such a request which the trial court denied. The defendant appealed. Upon review of the language of the statute and the Rules of Appellate Procedure, we determined that the defendant was not entitled to an appeal as of right. More specifically, we concluded that because the Rules of Appellate Procedure 3 does not list the denial of such motion in the rule and because the legislature, knowing that fact, chose not to include such a right in the amendment to the Act, a defendant does not have an appeal as of right and, therefore, dismissed the appeal.

***State v. Moran*, 621 S.W.3d 249 (Tenn. Crim. App. 2020)**

The defendant in this matter challenged the trial court's denial of his motion to suppress. On appeal, the defendant insisted that the trial court applied the incorrect burden of proof regarding custody and that the State failed to meet its burden of establishing the voluntariness of the defendant's confession. As a case of first impression in Tennessee, we held that the defendant bears the initial burden of proving custody for the purposes of *Miranda* before the burden shifts to the State to prove the voluntariness of the statement.

***Maxwell v. State*, No. W2018-00318-CCA-R3-PC, 2019 WL 1783501 (Tenn. Crim. App. 2019) (Dyer, dissenting), *rev'd*, 647 S.W.3d 593 (Tenn. 2019)**

In this matter, the petitioner, who was represented by counsel, filed a timely post-conviction petition. However, counsel failed to have the petitioner verify the petition as required by statute. Therefore, the trial court summarily dismissed the petition as it was not in proper form. The majority of the Court reversed the trial court, holding that the petitioner should not be deprived of his opportunity to seek post-conviction relief because of his counsel's technical statutory violation and noting that letting a pro se petitioner correct a defect "without affording such an opportunity to a petitioner who is represented by counsel essentially discourages a petitioner from seeking the assistance of counsel before filing a post-conviction petition." I dissented based on the fact that the legislature had not provided an exception in the statute for a defendant represented by counsel. Our Supreme Court granted review of the case, agreed with my dissent, and reversed the majority.

***State v. McElrath*, No. W2015-01794-CCA-R3-CD, 2017 WL 2361960 (Tenn. Crim. App. 2017), *aff'd*, 569 S.W.3d 565 (Tenn. 2019)**

I highlighted this case as an example of the intermediate court's duty to clarify and refine issues for possible review by our Supreme Court. In this matter, the State appealed the suppression of evidence and requested the Court of Criminal Appeals recognize a "good faith" exception to the exclusionary rule that had been adopted by the United States Supreme Court but not the Tennessee Supreme Court. While noting that the factual scenario in this matter was similar to

the facts of the United States Supreme Court case which allowed for the exception requested by the State, we noted that the Tennessee Constitution and subsequent Supreme Court opinions provide more individual protections than the United States Constitution and Supreme Court opinions, and therefore, until our Supreme Court adopted the requested "good-faith" exception, we were precluded from extending it in the instant matter.
On appeal, our Supreme Court agreed with the analysis, and while they subsequently, extended the "good-faith" exception requested by the State, they ultimately affirmed our decision that the exception was not warranted in the instant case.

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.

For the past 17 years, I have served on the Board of Directors for Christ Community Health Services. As a board, we have a fiduciary duty to two groups. First, we serve in a fiduciary capacity to the donors to ensure that the intent of their donations is fulfilled. Second, we also have a fiduciary duty to those we serve to ensure that they receive the best medical service possible and that it is delivered in a compassionate manner. In addition to having served as Vice Chair and Chairman of the Board, I also serve on the Board's Finance Committee.

I have also served as the Chairman for the Board of Trustees for Christ Methodist Church. The Board of Trustees supervises and maintains all property belonging to the congregation so that the ministries of the church can be effective. The committee is entrusted to see to the proper keeping of the property, equipment, investments, and resources as a way to facilitate the ministry of the local church. The Board also reports annually to the charge conference on the state of the church's property, equipment, investments, and resources. Therefore, we owe a fiduciary duty to the charge conference, the church membership, and the donors.

Additionally, I currently serve as Chairman of the Trustee Capital Investment and Improvement Committee for Christ Methodist Church. The committee is responsible for monitoring investments of the church designated for capital improvements and determining which improvements should be funded and when.

In 2016-2017, I served as the Treasurer for the Tennessee Judicial Conference.

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

In 2019, our Supreme Court appointed me to serve on the Judicial Ethics Committee, and I was subsequently elected by the members of that committee to serve as chairman. The Judicial Ethics Committee serves as an "advisory" body providing ethical guidance for all judges from

the Supreme Court to municipal court judges and even judicial candidates. In addition to producing formal ethics opinions on some issues, I spend a significant portion of my time each responding to emails and phone calls, advising judges on a wide spectrum of ethical issues that judges are presented with on a day-to-day basis.

Another "legal experience" that is closest to my heart and, in many ways, the most rewarding is coaching my daughter's high school mock trial team over the past two years. While my "job" is to teach, guide, and advise twenty-one young ladies on how to prepare a case, make and respond to objections, and all the other intricacies of a trial, I think I have learned more from them than I have taught. With each practice and tournament, I am more and more convinced that they make me a better lawyer and judge and that one day many of them will be distinguished attorneys and jurists.

Additionally, as a team leader and as Senior Counsel with the State Attorney General's Office, I was called on to mentor new lawyers. This included reviewing briefs, sitting on moot court panels, observing and critiquing oral arguments, and providing general guidance and advice to new lawyers.

Also, for several years, I have been selected to serve as a judge for the University of Memphis, Cecil C. Humphreys School of Law moot court competitions. Also, when I was in Nashville I was selected to serve as a judge for the Middle Tennessee State University, Regional Trial Advocacy Competition. More recently, I was selected to review and grade briefs for the regional portion of the New York City Bar's National Moot Court Competition which was held in Memphis.

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.

July, 2007 – Applied for Criminal Court Judge for the 30th Judicial District. My name was not submitted to the Governor as a nominee.

May, 2008 – Applied for Judge of the Court of Criminal Appeals for the Western Grand Division. My name was not submitted to the Governor as a nominee.

September, 2011 – Applied for Judge of the Court of Criminal Appeals for the Western Grand Division. My name was submitted to the Governor as a nominee.

March, 2016 – Applied for the Court of Criminal Appeals for the Western Grand Division. My name was submitted to the Governor as a nominee, and I was appointed by the Governor and confirmed by the legislature in April, 2016.

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.

Law School:

Samford University – Cumberland School of Law – August, 1995 – May, 1998.

Degree – Juris Doctor

College:

Millsaps College – August, 1991 – May, 1995.

Degree – Bachelor of Business Administration

Major – Business Administration; Minor – Economics

University of Memphis – Summer, 1992.

(I attended the University of Memphis that summer to take one course.)

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 51 Date of Birth: [redacted]1972

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

Though I attended college in Jackson, Mississippi (Millsaps College) and law school in Birmingham, Alabama (Cumberland School of Law), the State of Tennessee has always been my legal residence.

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

20 Years – I returned to Shelby County from Davidson County in 2004.

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

Shelby County.

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

Not Applicable.

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

No.

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

No.

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

I had one complaint filed against me with the Board of Professional Responsibility. It was subsequently dismissed after my response.

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

No.

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

No.

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

foreclosure proceeding.

No.

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.

Christ Methodist Church – Life-long member – Trustee Capital Investment and Improvement Committee 2022 to Present; Chair, 2022 to Present; Lay Leader, 2015-2016; Board of Trustees, 2010; Vice-Chairman of Board of Trustees, 2011; Chairman of Board of Trustees, 2012-2014; Congregational Elder.

Christ Community Health Services – Board Member, 2005 to Present; Chairman of the Board, 2012-2015 and 2019-Present, Vice-Chairman, 2009-2011; Finance Committee, 2009 to Present.

CCHS Holding NP – Board Member 2019 to Present.

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

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

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

No.

ACHIEVEMENTS

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

Tennessee Judicial Conference – 2016 to Present

Conference Treasurer - 2016-2017; Executive Committee – 2016-2017; 2023

Tennessee Bar Association – 2004 to Present.

Memphis Bar Association – 2004 to Present.

Criminal Law Section – Chair - 2007 to 2010; Vice Chair – 2006; Secretary – 2005.

Helped restart the section including planning monthly lunch programs for defense attorneys and prosecutors. We also provide CLE seminars and conducted a candidate forum for the 2006 elections (District Attorney, Criminal Court Judges, Juvenile Court Judge and General Sessions Court Judges).

House of Delegates – 2008, 2006.

The House of Delegates reviews policy and issues facing the Memphis Bar and makes recommendations concerning those matters to the Board of Directors.

Mentoring Program – Criminal and Appellate Issues – 2006 to Present.

Assist new lawyers from both the private bar and prosecutors in civil, criminal and appellate matters.

Served on Host Committee for June 2006 Tennessee Bar Association Annual Meeting in conjunction with Judicial Conference and TLAW.

S.C.A.L.E.S. Committee – 2006

Helped plan and organize for the Supreme Court's visit to Memphis as part of the Supreme Court's Advancing Legal Education program. As a committee, we were responsible for finding local high schools to participate and securing attorneys to meet with and discuss the cases with the students.

Chair of Juvenile Court Ad Hoc Committee – 2007

The committee's mission was to review the current make-up of juvenile court along with the recommendations made by the Shelby County Commission and determine how to increase the effectiveness of juvenile court.

Tennessee Association of County Attorneys – 2014-2016

National Association of Extradition Officials – 2000 to 2014

Tennessee Lawyers Assistance Program – Appointed to the Regional Assistance and Monitoring Team – 2005 to 2014.

TLAP provides consultation, assessment, referral, intervention, education, advocacy and peer support services for lawyers, judges, bar applicants, law students and their families.

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

Tennessee Attorney General's Office:

After three years of service with the Criminal Justice Division of the Attorney General's Office, I was promoted to Team Leader for the Western Grand Division. Three years later, I was

promoted to Manager of the Memphis Office and Senior Counsel.

As a practicing attorney, I was selected on four occasions to present CLE training for the Tennessee Judicial Conference.

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

J. Ross Dyer and Garland Ergüden, *Tennessee's Application of Crawford v. Washington's Confrontation Clause Analysis* – Memphis Lawyer – The Magazine of the Memphis Bar Association – March/April, 2006.

Dyer, J.R. and Fulks, M.A., eds. *Tennessee's Manual on Extradition and Interstate Rendition* (2004).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Appellate Procedure 101 **– National Bar Association, Ben F. Jones Chapter – November, 2017**

- Presented overview of appellate practice.

Ethics and Professionalism in Legal Writing – Tennessee Association of Criminal Defense Lawyers - December, 2020.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorney's file with the courts.

Election and Ethics – Tennessee Judicial Conference – March, 2021.

- Presented overview of the how the Rules of Judicial Conduct impact judicial elections as well as non-judicial races.

Ethics Update – Tennessee Judicial Conference – October, 2021.

- Presented overview Rules of Judicial Conduct, noting common areas of issue and concern.

Introduction to Judicial Ethics and the Board of Judicial Conduct – Tennessee Judicial Academy – August, 2022.

- Presented to newly elected and appointed judges an overview of the Code of Judicial Conduct, including wrapping up practice, potential conflicts, and other situations that tend to arise during the first several months and year for a new judge.

Mastering Criminal Appeals – Strategies and Techniques for Effective Appellate Practice – East Tennessee State University – October, 2023.

- Presented overview of the rules of professionalism and ethics and how they are applicable to the pleadings and briefs attorneys file with the courts.

In addition to the courses listed above, I have spent a large portion of my career taking time to give back by educating and informing judges, attorneys, and even law students. During my career, I have guest lectured at the University of Memphis School of Law for both criminal procedure classes and appellate practice classes. Additionally, I have presented numerous CLEs on ethics and, legal writing, and appellate practice for organizations such as the local and state bar associations, the Tennessee Judicial Conference, and the Tennessee District Attorney Generals Conference.

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.

Judge, Tennessee Court of Criminal Appeals. Was appointed in 2016. Was elected in 2016 and 2022.

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

No.

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.

Please see the attached writing samples.

The attached writings reflect my own writing in their entirety, except for technical proofreading by law clerks or legal assistants.

ESSAYS/PERSONAL STATEMENTS

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

Coming from three generations of lawyers and judges, you either wanted to go into law or you wanted nothing to do with it. Obviously, I chose the former and, thus, have wanted to be a lawyer and, one day a judge, since I can remember. To that end, I have crafted and directed my career to reach my current position always with an eye on taking the next step of serving on our State's highest court.

Similarly, prior generations have also exemplified and instilled in me the importance of giving back and service to your community. After graduating from law school, I took a job with the

State Attorney General's office mainly because I saw this as a way to serve my home state. I have continued this way of thinking by serving as the County Attorney for my home county. I cannot think of a better way to apply this lesson of giving back while also fulfilling a lifelong dream than to give back to the citizens of Tennessee by serving on the State's highest court.

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)***

When I started my career with the State Attorney General's Office, I was statutorily prohibited from participating in direct pro bono work. Therefore, I committed myself to indirect forms of pro bono by giving of my time and service to the Memphis Bar Association and other legal groups to help improve the quality of the representation offered by both defense attorneys and prosecutors. As an officer in the Criminal Law Section of the Memphis Bar, I helped organize and host luncheon programs and CLEs and regularly received calls from and gave advice to both prosecutors and defense attorneys concerning criminal law and appellate questions. I have also worked with the moot court board at the Cecil C. Humphreys School of Law to help law students be better prepared to provide appellate services upon graduation.

While serving as Shelby County Attorney, one of my main tasks was working with the Department of Justice, the Juvenile Court for Shelby County, Shelby County government, and other stakeholders to ensure that Shelby County provides for and protects the rights of those children who find themselves involved in the juvenile justice system.

As a judge, I believe, and hope others would find, that my written opinions continue to show a commitment to equal justice under the law.

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)***

The Tennessee Supreme Court is comprised of 5 members with one from each Grand Division of the State but no more than two from any one Grand Division. The Court has appellate jurisdiction over both civil and criminal matters. Additionally, the Court is charged with overseeing numerous boards and commissions that relate to the practice of law and the judiciary.

I intend to bring the judicial temperament and professionalism that the citizens of Tennessee deserve and which I have seen modeled by my grandfather and the judges before whom I have appeared and with whom I currently serve. I believe my vast experience in handling criminal appeals will be a great value to the Court. Furthermore, I believe that my experience as an appellate practitioner brings a new and different perspective to the Court. I recognize that my governmental and civil background, as well as my service as Chairman of the Judicial Ethics Committee, will be of value to the Court. I believe that the better judges understand how the judiciary works within a larger system of government and appreciate the roles the other branches have in developing public policy. With my experience in the executive branch on the state and

county levels, and in my work with the legislature, I believe these values will be of benefit to the Court as a whole.

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

I have served on the Board of Directors for Christ Community Health Services for 20 years and held the position of Chairman, Vice-Chairman, and Chair of the Development Committee. Christ Community is a non-denominational organization whose mission is to provide the highest quality healthcare (medical, dental, and mental health) to the poor, underprivileged, and medically unserved population of the community. Christ Community has an operating budget of over $63 million and has over 1740,000 patient visits a year. Our Board of Directors mirrors the diversity of those we serve.

In 2019, thanks to a generous donation of an all but abandoned 90,000 square foot shopping center and the 14 plus acres on which it sits, several individuals created CCHS Holding with the goal of developing the property in such a way to serve the community and revitalize the neighborhood. In addition to a general practice medical and dental clinic, the plan is to find and add specialty medical service partners such as imaging, mental health, and physical therapy. Also, we are attempting to address health from the standpoint of eliminating the area from being classified as a food desert and finding a partner to address healthy eating and exercise. Finally, the hope is to offer community meeting space both in the form of interior space and green space. I proudly serve on the board of this organization.

I am also active in my church, Christ Methodist Church, having served as the Chairman of the Trustees Committee, Lay Leader, and a congregational elder. In addition to the church's global missions programs, Christ Methodist Church supports numerous inner-city missions and ministries, including Service Over Self, an urban home repair ministry, Binghampton Development Corporation, a housing and economic development organization, Eikon Ministries, building urban leaders from within the community, and recently opening Cornerstone Preparatory School whose mission is to provide low-income children the quality education, skills and character necessary to succeed in college and to become life-changing leaders in their community.

I believe that it is the responsibility of our elected and appointed officials to be involved in and give back to the community in which they live. Therefore, should I be appointed, I plan to continue my work with these organizations as well as seek other opportunities to serve within my community and throughout the State. It is important that we continue to reach out to the children of our community and support them.

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)***

When I moved to Memphis to manage the State Attorney General's satellite office in Memphis,

one of my missions was to increase the presence of the Attorney General's Office in Memphis and the surrounding counties. It is important for the people we serve to know that we do have a presence in West Tennessee, including Shelby County, and are not just a group of government lawyers sitting in Nashville and concerned only with matters in Middle Tennessee. Therefore, I made a concerted effort to get to know both the criminal and civil judges in Shelby County and the members of the bar, including prosecutors, defense attorneys, and other governmental attorneys. One way I accomplished this goal was by my involvement with the Memphis Bar Association. As a member of the Bar Association, I volunteered for and/or was appointed to numerous committees such as the SCALES committee, the planning committee for the Tennessee Bar, Judicial Conference and TLAW annual meeting, a member of the House of Delegates, Chairman of the Ad Hoc committee concerning Juvenile Court and an officer for the Criminal Law section of the Bar Association.

It is clear that these efforts did not go unnoticed. During my tenure with the Office, the Memphis office received more phone calls each month from citizens, elected officials, and members of the bar. I was routinely stopped by judges and other members who expressed great appreciation for the presence of the Attorney General's Office in Memphis.

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

Yes. As a Judge, County Attorney, and Assistant Attorney General I took an oath to defend the laws and constitutions of the State of Tennessee and the United States. I have, and intend to continue, to honor this oath.

Furthermore, as an attorney for the State, I, on occasion, disagreed with the decisions of our trial and appellate courts. However, as long as the decision was within the bounds of the law, my obligation was to defend the judgment regardless of my personal feelings. One case comes to mind that impacted both my career as a practitioner and even now as an intermediate appellate court judge. In *State v. Kevin Swift,* the defendant was convicted of aggravated robbery after pulling a box cutter on two store employees as he tried to exit the store with stolen merchandise. As an assistant attorney general, I argued that aggravated robbery was the correct charge because the defendant used violence to effectuate the completion of the theft. However, the Tennessee Supreme Court determined that the defendant's actions constituted the separate offenses of theft and assault and did not meet the statutory definition of aggravated robbery. Despite my disagreement with the Court's conclusion, I, as an assistant attorney general, advised district attorneys and now as a Judge, have to resolve whether certain factual scenarios support a charge of aggravated robbery based on the precedent established in *State v. Kevin Swift.*

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. Representative Mark White, [redacted] Nashville, Tennessee 37243 – [redacted]
B. Norma McGee Ogle, Judge (ret.), Court of Criminal Appeals, [redacted] Sevierville, Tennessee 37862 – [redacted]
C. Judge Hardy Mays, District Court Judge for the Western District in Memphis, [redacted] Memphis, Tennessee 38103 – [redacted]
D. Amy P. Weirich, Special Counsel, District Attorney General's Office – 25th Judicial District, [redacted] Somerville, Tennessee 38068 – [redacted]
E. Larry Jensen, Chairman and Principal, CushmanWakefield | Commercial Advisors, [redacted] Memphis, Tennessee 38117 – [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] ___Supreme Court _____ 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: DECEMBER 8, 2023.

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

J. Ross Dyer
Type or Print Name

J. Ross Dyer
Signature

12/8/2023
Date

019366
BPR #

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

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 7, 2023 Session

COURTNEY ANDERSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
Nos. 9709924, 9701093, 9701094, 9701095, 9701096, 9701097, 9706852, 9706853, 9706854, 9706855, 9706856, 9706857, 9708272, 9708273, 9709654, 9709655, 9709656, 9709657, 9709658, 9709659, 9709660, 9708497, 9708498

Paula L. Skahan, Judge

No. W2023-00067-CCA-R3-PC

This is a State appeal, filed by the State Attorney General and Reporter, from the entry of an order granting the petitioner's, Courtney Anderson's, motion to reopen his post-conviction and amending/reducing his original sentence of 162 years, 11 months, and 29 days to a time served sentence of 25 years. The State appealed, arguing the trial court lacked jurisdiction to hear the petitioner's motion as it was barred by the one-year statute of limitations and the petitioner failed to prove the statute should be tolled. Additionally, the State submits that the trial court lacked jurisdiction to amend the petitioner's sentence under the post-conviction statute and that the trial court's actions amount to an improper commutation of the petitioner's sentence. The petitioner contends that the State waived any challenge to the statute of limitations by failing to raise the issue below and that his claim meets the requirements of the statute and allows for the tolling of the statute, and therefore, the trial court properly granted the relief requested. Upon our thorough review of the applicable law and the briefs and arguments of both parties, we conclude that the instant petition is barred by the one-year statute of limitations and that the petitioner failed to establish and the trial court failed to find a proper basis for tolling the statute. Accordingly, the trial court lacked jurisdiction to hear the petitioner's motion and amend the petitioner's sentence. Therefore, we reverse the decision of the trial court, reinstate the petitioner's original sentence, and remand this matter for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TOM GREENHOLTZ, JJ., joined.

Jonathan Skrmetti, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Nicholas W. Spangler, Deputy Attorney General; Steve Mulroy, District Attorney General; and Danielle McMollum, Assistant District Attorney General, for the appellant, State of Tennessee.

Terrell Tooten, Memphis, Tennessee, for the appellee, Courtney Anderson.

OPINION

Procedural and Factual Background

The petitioner was indicted for eight counts of felony theft of property, seventeen counts of forgery, and one misdemeanor count of possession of a handgun in a public place. *See State v. Anderson,* No. W2000-02071-CCA-R3-CD, 2001 WL 912835, at *1 (Tenn. Crim. App., Aug. 13, 2001), *perm. app. denied* (Tenn. June 25, 2001). He proceeded to trial on one count of theft and one count of forgery, and a Shelby County jury convicted him of these offenses for which he received an effective sentence of twenty-one years. *See id.* After this Court affirmed his convictions and sentences on direct appeal, the petitioner entered guilty pleas to the twenty-one remaining charges. *See id.; see also State v. Anderson,* No. W2000-00244-CCA-R3-CD, 2001 WL 91734, at *4 (Tenn. Crim. App., Jan. 31, 2001). The trial court initially imposed an effective sentence of 171 years, 11 months, and 29 days but later modified it to a sentence of 168 years, 11 months, and 29 days. *See Anderson,* 2001 WL 912835, at *2. The petitioner appealed his sentence, and this Court held that the trial court erred in finding the petitioner to be a career offender for his Class C felonies and remanded the case for clarification or correction of the sentences imposed and for resentencing regarding the petitioner's Class C felony convictions. *See id.* at *3.

At the resentencing hearing, the petitioner received an effective sentence of 141 years, 11 months, and 29 days, which was to be served consecutively to his previous sentence of 21 years for a total effective sentence of 162 years, 11 months, and 29 days. *See State v. Anderson,* No W2001-02764-CCA-R3-CD, 2003 WL 57421, at *1 (Tenn. Crim. App. Jan. 6, 2003), *perm. app. denied* (Tenn. June 12, 2006). The petitioner again appealed his sentence as excessive, and this Court affirmed the judgment of the trial court.

The petitioner filed a timely *pro se* petition for post-conviction relief. Following the appointment of counsel, the petitioner filed an amended post-conviction petition on October 5, 2004, claiming that counsel rendered ineffective assistance at the trial and appellate court levels. On November 15, 2005, the petitioner filed a "Memorandum on Post-Conviction Court's Authority to Grant Relief," asserting for the first time that counsel failed to perfect his appeal to the Tennessee Supreme Court pursuant to Tennessee Rule of

Appellate Procedure 11. On November 18, 2005, following a hearing, the post-conviction court entered an order allowing the petitioner to file a delayed application for permission to appeal to the Tennessee Supreme Court and staying the post-conviction proceedings pending the final disposition of the delayed appeal. On June 12, 2006, the Tennessee Supreme Court denied the petitioner's application.

On November 24, 2008, the post-conviction court entered an order dismissing the petition for post-conviction relief, and on December 16, 2008, the petitioner filed a timely notice of appeal. On December 18, 2008, in response to the petitioner's first "Motion to Re-Open his Petition for Post-Conviction Relief," the post-conviction court entered an order finding that all issues raised in the "Motion to Re-Open" had been resolved pursuant to the November 24, 2008 order denying post-conviction relief. *Anderson v. State*, No. W2008-02814-CCA-R3-PC, 2010 WL 432414, at *1-2 (Tenn. Crim. App. Feb. 5, 2010), *perm. app. denied* (Tenn. Oct. 12, 2010).

On December 5, 2022, the petitioner filed his second "Motion to Re-Open Post-Conviction and Reduce Sentence," seeking a sentence reduction under Tenn. Code Ann. § 40-30-117(a)(3). Per the motion, the petitioner alleged he was entitled to relief because his "sentence was enhanced based on prior felony convictions that are no longer considered felonies in Tennessee." The petitioner also alleged that he could overcome the applicable one-year statute of limitations because he diligently pursued his rights and the 2017 amendment to the theft-graduation statute was an extraordinary circumstance that prevented him from timely filing his motion.

The parties appeared before the trial court on December 13, 2022. At the outset of the hearing and prior to any argument or proof being presented, the trial court stated it had reviewed the petitioner's sentence and determined it was "excessive." The court then confirmed it had prepared and signed an order granting the petitioner's motion, resentencing the petitioner to a time-served sentence of 25 years, and releasing the petitioner that day. After the terms of the amended judgments were read into the record, the trial court voir dired the petitioner. The petitioner testified he was fifty-four years old and confirmed that he had been in custody for twenty-five years. He also stated that he had received his barber's license while incarcerated and was going to live with his sister and work as a barber upon being released. The trial court then informed the petitioner that when his motion "came to [her] desk," she found his sentence was excessive and contacted the District Attorney's office to "try to do something if we can" because "you were done wrong." The court went on to state,

> So[,] it was all timing with Amy Weirich out of the office and the right judge who might be willing to do something to help you, it was all timing. It's just the way I guess God looking down on you. So[,] don't blow it.

. . . .

> Don't blow it. Because things don't usually work out like this, okay? So, that's just the way I feel about it. It just worked out for you. You've done a whole lot of time. You got yourself in a whole lot of trouble. You messed up – I'm sure these forgeries and whatever, ID theft, all these things, you messed up people, you know, back in the 90's. But that's too much time, obviously, way too much time, and I know how Judge Dailey was. I -- believe me, I practiced in there. It was not fun. They just piled up on people. But, anyway, I really, really hope we're not going to see you back down here, okay?

Upon concluding its voir dire of the petitioner, the trial court entered its written "Order Granting Petitioner's Motion to Re-Open the Post-Conviction and Reducing Petitioner's Sentence." Despite the requirements of the statute, the trial court's order did not cite the post-conviction reopening statute or include any of the findings necessary to grant reopening under Tenn. Code Ann. § 40-30-117(a)(3). Rather, the order summarily states that "[p]etitioner has articulated the required statutory grounds to reopen the post-conviction, as well as grounds to toll the statute of limitations." The order further states, "this court believes the original sentence to be excessive and a reduction is necessary." The only "analysis" offered by the trial court in its order was as follows: "This court took into consideration that [p]etitioner's convictions are all nonviolent offenses, three of [p]etitioner's prior felony [theft] convictions are now misdemeanors under Tennessee statute, and [p]etitioner has served 25 years so far on these sentences." The order concludes that "[p]etitioner's new sentence will be an effective time[-]served sentence." The court then entered 23 amended judgments reflecting that time-served sentence.

This timely appeal followed.

Analysis

On appeal, the State insists the trial court 1) lacked jurisdiction "to reopen post-conviction proceedings because the motion was filed outside the applicable statute of limitations and because there was no cognizable basis for reopening either pleaded or found"; and 2) "lacked jurisdiction to grant post-conviction relief because there was not constitutional violation pleaded, proven, or found." Additionally, the State contends that the trial court's order "essentially commuting the petitioner's sentence is illegal because under the Tennessee Constitution only the Governor has the authority to commute a sentence."

Initially, the petitioner, relying on Tenn. R. App. P. 24, argues the State has provided this Court with an inadequate record on appeal, and therefore, this Court must presume the ruling of the trial court is correct. The petitioner also submits that the State has waived review of its claims because the State not only failed to raise the issue of the statute of limitations at trial but actually consented to the tolling of the statute of limitations. The petitioner contends, however, that the statute of limitations was tolled based on the entire record, and all filings and pleadings, arguing both the State and the petitioner "concluded that the matter was appropriately before the [t]rial [c]ourt based on the facts and the entire record." "Therefore, any arguments that [the State] is now attempting to make for the first time are waived." Finally, the petitioner argues that the trial court's order does not commute the petitioner's sentence; rather, the trial court simply determined that his sentences should be served concurrently as opposed to consecutively.

Upon our review of the applicable law, the record, and the briefs and arguments of the parties, we conclude the trial court lacked jurisdiction to act upon the petitioner's motion to reopen as the motion was 1) barred by the statute of limitations and no basis for tolling the statute was pled or found and 2) no constitutional infringement was pled, proven, or found. Additionally, the actions of the trial court constituted an impermissible commutation of the petitioner's sentence—an action delineated by the Tennessee Constitution solely to the Governor. Accordingly, we reverse the decision of the trial court and reinstate the petitioner's original sentences.

A. Completeness of the Record

Initially, the petitioner contends the record before this Court is incomplete. Per the petitioner, the trial court reviewed "the transcripts, judgment sheets, appellate opinions, and all pre-sentence information in the court's jacket." And, while not completely clear from the petitioner's brief, he appears to argue, relying on Tenn. R. App. P. 24, that the lack of a "complete record" on appeal either waives the State's claim or requires this Court to presume the correctness of the trial court's ruling. In response, the State initially argues that the issues raised in the instant appeal do not require review of this Court's prior records as the State is only challenging the validity of the order granting the motion to reopen on jurisdictional grounds and that the record as currently constructed "adequately demonstrates the jurisdictional defect." In the alternative, the State asks this Court to supplement the record or take judicial notice of the records from the petitioner's prior appeals.[1] Upon reviewing the record before this Court and the arguments of the parties,

[1] During oral argument before this Court, the petitioner maintained there were additional filings and transcripts that were reviewed by the trial court in reviewing and granting the instant petition. Therefore, this Court provided the petitioner with the opportunity to supplement the record with those documents and transcripts. In response to this Court's invitation, the petitioner filed one transcript from an appearance by the petitioner on November 16, 2022.

we agree with the State and conclude the record as constructed is sufficient to allow for a complete and thorough review of the issues presented. Moreover, we would note that this Court can take judicial notice of the Court records in an earlier proceeding of the same case and the actions of the courts thereon. *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987) (citing *State ex rel. Wilkerson v. Bomar,* 376 S.W.2d 451 (1964)); *see e.g.*, Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009).

B. Merits of Issues Presented

Having determined the record before this Court is sufficient, we turn our attention to the merits of the State's claims.

In *Nichols v. State*, this Court analyzed a post-conviction court's review of a motion to reopen and a subsequent amendment to a first post-conviction petition made pursuant to a post-conviction court's order granting a motion to reopen. *See Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020). Concerning the general availability of post-conviction relief in Tennessee, this Court explained

> In *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus ligation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. In its current ideation, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." Tenn. Code Ann. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed," a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." *Id.*; see *Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997).

Nichols, 2019 WL 5079357, at *3. Although Tennessee limits the filing of a post-conviction relief petition to one petition, there are limited circumstances whereby a petitioner may allege later arising claims via a motion "to reopen the first post-conviction petition." Tenn. Code Ann. § 40-30-117(a). As relevant in this case, a motion to reopen a

first post-conviction petition should be granted when "[t]he claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the *previous conviction* has subsequently been held to be *invalid*, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid." *Id.* § 40-30-117(a)(3) (emphasis added). Once a motion to reopen is granted, "the procedure, relief and appellate provisions of this part shall apply." *Id.* § 40-30-117(b)(1).

"[A] post-conviction court's grant of a motion to reopen does not fully place a petitioner back into the procedural posture of his original post-conviction proceedings." *Nichols*, 2019 WL 5079357, at *7. As noted by our supreme court, claims raised in a motion to reopen and subsequent amendments may be barred by the statute of limitations, previous determination, or waiver. *Coleman v. State*, 341 S.W.3d 221, 255 (Tenn. 2011). Generally, a petitioner must file a petition for post-conviction relief "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred." Tenn. Code Ann. § 40-30-102(a) (2018). The statutory grounds for tolling the statute of limitations are coextensive to those for granting a motion to reopen. *Id.* § 40-30-102(b) (2018). Thus, if an amended claim arising from a motion to reopen a post-conviction petition does not meet the requirements of Code sections 40-30-102(b) and 40-30-117(a), the claim is barred by the statute of limitations. "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." *Id.* § 40-30-106(h) (2018). Further, a claim will be treated as waived when "not raised before a court of competent jurisdiction in which the ground could have been presented." *Id.* § 40-30-110(f) (2018); *see Coleman*, 341 S.W.3d at 257 (discussing the waiver of a specific ineffective assistance of counsel claim for failing to raise it in the original post-conviction petition). The Post-Conviction Procedure Act *requires* the post-conviction court to summarily dismiss any claims which are raised beyond the statute of limitations, have been previously determined, or have been waived. Tenn. Code Ann. § 40-30-106(b), (f). We review the post-conviction court's order de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004).

1. Jurisdiction

This Court is required to "consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." Tenn. R. App. P. 13(b). Subject matter jurisdiction is "the power of a court to adjudicate the particular category or type of case brought before it." *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015). "Subject matter jurisdiction involves the nature of the cause of action and the relief sought, and can only be conferred on a court by legislative or constitutional act." *State v.*

Cawood, 134 S.W.3d 159, 163 (Tenn. 2004) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)). Subject matter jurisdiction "cannot be waived, because it is the basis for the court's authority to act." *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996). "'It is fundamental that jurisdiction, neither original nor appellate, can be conferred by consent and neither waiver nor estoppel could be more effective than the consent of parties.'" *State v. Smith*, 278 S.W.3d 325, 329 (Tenn. Crim. App. 2008) (quoting *James v. Kennedy*, 174 Tenn. 591, 129 S.W.2d 215, 216 (1939)). Whether a court has subject matter jurisdiction is a question of law, and our review is de novo with no presumption of correctness. *Cawood*, 134 S.W.3d at 163 (internal quotation omitted).

As discussed *supra*, "a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken." Tenn. Code Ann. § 40-30-102(a). This limitation period applies not only to the original post-conviction, but also to motions to reopen post-conviction proceedings. *Id.* "No court shall have jurisdiction" to consider a time-barred petition unless it falls within one of the enumerated statutory exceptions, *see* Tennessee Code Annotated section 40-30-102(b), or is mandated by due process, *see Williams v. State*, 44 S.W.3d 464, 468 (Tenn. 2001).

Initially, the State insists the trial court lacked jurisdiction because the petitioner's motion to reopen was barred by the one-year statute of limitations and the petitioner failed to raise a claim that allows for the tolling of the statute. The petitioner contends that the State has waived this challenge because the State not only did not object to the statute of limitations at trial, but actually consented to the tolling of the statute. Therefore, we must first address the petitioner's waiver argument.

While the State is generally required to file a response to a petition for post-conviction relief in which it "shall admit or deny each and every allegation set forth in the petition," including "the facts relied upon to support the motion to raise as a defense that . . . the petition is barred by the statute of limitations," *see* Tenn. Sup. Ct. R. 28, § 5(G), the State's "failure to timely file the answer or motion to dismiss . . . or the failure to detail the facts relating to the defenses . . . shall not entitle [the] petitioner to relief without proof, but may result in the imposition of sanctions in the exercise of the trial judge's discretion." Tenn. Sup. Ct. R. 28, § 5(I).

Rule 28, section 5 clearly states that a petitioner is not entitled to relief simply because the State fails to comply with that rule. *See* Tenn. Sup. Ct. R. 28, § 5(I); *see also* Tenn. Code Ann. § 40-30-108(a) ("Failure by the [S]tate to timely respond does not entitle the petitioner to relief under the Post-Conviction Procedure Act."). Rather, the petitioner bears the burden of pleading and proving that the statute of limitations should be tolled on due process grounds. *See* Tenn. Sup. Ct. R. 28, § 5(F)(4) ("A petition may be dismissed

without a hearing if it . . . does not state the reasons that the claim is not barred by the statute of limitations . . . ."); *see also State v. Nix,* 40 S.W.3d 459, 464-65 (Tenn. 2001). Unlike civil affirmative defenses, which must be sufficiently raised by a defendant to be preserved, a post-conviction petitioner must prove compliance with the statute of limitations to be entitled to post-conviction relief because the post-conviction statute of limitations is a jurisdictional requirement for the courts of Tennessee. *See* Tenn. Code Ann. § 40-30-102(a) ("[T]he one-year limitations period is an element of the right to file the [post-conviction] action and is a condition upon its exercise."); Tenn. Code Ann. § 40-30-102(b) ("No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period . . . . "); Tenn. Sup. Ct. R. 28, § 4(B); *Nix,* 40 S.W.3d at 464 (noting that "the one-year statutory period is an element of the right to file a post-conviction petition and . . . it is not an affirmative defense that must be asserted by the State"). Indeed, because failure to comply with the statute of limitations precludes jurisdiction, courts have a duty to ensure that the post-conviction statute of limitations is satisfied and must dismiss a post-conviction petition on this basis *sua sponte* if necessary. Tenn. Code Ann. § 40-30-106(b) ("If it plainly appears . . . that the petition was not filed . . . within the time set forth in the statute of limitations . . ., the judge shall enter an order dismissing the petition."). Accordingly, the State has not waived the statute of limitations as a defense despite the District Attorney's concession at the trial level. Having determined that the State has not waived its defense, we turn to the questions of whether the petition was filed outside the one-year statute of limitations and, if so, whether due process allows for tolling of the statute—in short, whether the trial court had jurisdiction to hear the instant petition.

The first question, whether the petition was filed within the one-year statute of limitations, is relatively simple to resolve. Here, the petitioner's motion to reopen his post-conviction is based on a claim that the theft convictions used to enhance his current sentence were invalidated. As such, the petitioner was required to file the instant motion within one year of the date of the "finality of the ruling holding the previous conviction to be invalid." Tenn. Code Ann. § 40-30-117(a)(3). As will be discussed *infra*, the petitioner's underlying theft convictions were never invalidated; therefore, the petitioner's underlying judgments became final, and have remained final, per post-conviction purposes on June 12, 2006, when our supreme court denied the petitioner's delayed appeal of his convictions. *Anderson*, 2003 WL 57421, at *1. The petitioner, however, did not file the instant motion to reopen until December 5, 2022, nearly sixteen years after the expiration of the statute of limitations. Accordingly, the trial court lacked jurisdiction to entertain the petitioner's motion short of the petitioner establishing one of the limited exceptions tolling the statute or due process grounds. *See* Tenn. Code Ann. § 40-30-102(b); *Williams*, 44 S.W.3d at 468.

In his petition and on appeal, the petitioner alleges that "[b]ecause [the petitioner] has been pursuing his rights diligently and he was unable to file a timely filing, the statute

of limitations should be tolled." In support of his diligence claim, the petitioner points to his direct appeal of his conviction and his initial post-conviction petition. While the petitioner has pursued the appellate and post-judgment avenues available to him, he has not diligently pursued his instant claim. More specifically, in the instant petition, the petitioner, relying on an amendment to the grading of theft statute, insists he has been diligently pursuing his rights. And he insists, based on the amendment, that he is entitled to relief under the exception in Tennessee Code Annotated section 40-30-117(a)(3), allowing a motion to reopen post-conviction proceedings when an enhancing conviction has later been *invalidated*. Even if we were to conclude that the amendment to the theft graduation statute falls under the exception in Tennessee Code Annotated section 40-30-117(a)(3), which as will be discussed *infra* that we do not, the petitioner has failed to meet the initial hurdle that he has been diligently pursuing this claim.

The Public Safety Act of 2016 ("the 2016 Act") amended Tennessee Code Annotated section 39-14-105, the statute providing for grading of theft offenses. The petitioner, relying on the 2016 Act, contends that three of his prior felony theft convictions are now considered misdemeanors, and, therefore, he is entitled to relief. However, the 2016 Act took effect on January 1, 2017, and the petitioner did not file the instant petition until December 5, 2022, over five years after the effective date of the statute. Clearly, such a delay cannot be described as diligent pursuit of one's rights. The petitioner's claim and the trial court's finding that the petitioner has been diligently pursuing his rights is in no way supported by the record.[2]

In addition to failing to establish he diligently pursued his rights, the petitioner also failed to plead and prove an extraordinary circumstance stood in his way and prevented him from timely filing. *Bush v. State*, 428 S.W.3d 1, 22 (Tenn. 2014). Again, the petitioner relies on the 2016 Act amendment to the theft-graduation statute, arguing that three of his prior felony convictions which were used to enhance his current sentence would now be classified as misdemeanors. However, the amendment to the theft-graduation statute does not amount to an extraordinary circumstance as it has no affect on the petitioner's otherwise final sentences. *See State v. Keese*, 591 S.W.3d 75, 84 (Tenn. 2019) ("a criminal defendant whose sentence is final prior to the effective date cannot benefit from a statutory amendment that provides for a lesser punishment.").

Accordingly, the petitioner failed to establish a basis for allowing the tolling of the one-year statute of limitations, and therefore, the trial court lacked jurisdiction to entertain

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[2] Again, we note that during oral argument the petitioner claimed the record before was incomplete and a more complete record would support his claim that he had been diligently pursuing relief under the 2016 Act. However, the only supplement to the record by the petitioner is a transcript from a hearing on November 16, 2022. However, this hearing, much like the instant petition, occurred nearly five years after the effective date of the 2016 Act, and therefore, does not amount to diligent pursuit of his claim.

the petition to re-open post-conviction proceedings and erred in granting the petitioner relief.

2. No Statutory Basis for Re-Opening

Assuming arguendo the petitioner's motion to reopen was timely filed, the trial court erred in finding that the 2016 Act entitles the petitioner to relief under Tennessee Code Annotated section 40-30-117(a)(3). Per the statute, a petitioner may, in very limited circumstances, allege later arising claims via a motion to reopen the first post-conviction petition. Tenn. Code Ann. § 40-30-117(a). More specifically as it relates to the petitioner's challenge, a petitioner may seek to reopen post-conviction proceedings when "[t]he claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid . . . ." *Id.*, § -117(a)(3). However, as discussed *supra*, the amendment to the graduation of theft statute did not render the petitioner's prior enhancing convictions invalid. *Keese*, 591 S.W.3d at 84. Moreover, the petitioner did not plead and the trial court did not find that the amendment invalidated the petitioner's prior enhancing convictions. Rather, both simply note that the petitioner's prior felony theft convictions would be considered misdemeanors if he had committed them after the amendment to the statute. At no point did the petitioner claim his convictions had been invalidated and at no point did the trial court make a finding in support of such a claim. As such, the petitioner failed to allege a statutory basis for reopening his post-conviction, and therefore, the trial court lacked jurisdiction to hear the matter and, more importantly, to grant the petitioner relief.

During argument, the petitioner extended his claim, arguing that the theft convictions in question have been invalidated. When questioned regarding the alleged invalidation of his judgments, the petitioner noted that the amended judgments entered by the trial court in the instant matter "dismissed" his prior theft convictions. In short, the petitioner relies on an action taken by a trial court without jurisdiction to act as the basis for how the Post-Conviction Procedure Act applied to his petition. Such reliance is nonsensical and in no way provides for the application of the 2016 act and/or the tolling of the statute of limitations.

3. No Constitutional Violation Alleged or Found

Next the State insists the petitioner failed to allege or present evidence of a constitutional violation. Though the State notes that the petitioner's ground for reopening under § 40-30-117(a)(3) "doubles as a substantive constitutional claim," the State argues the petitioner's claim fails as a constitutional challenge for the same reasons it fails as a basis for reopening his post-conviction—the reclassification of his prior felony convictions

does not invalidate those convictions. Additionally, the State contends the trial court's order fails to identify a constitutional violation warranting relief. Upon our review, we agree with the State.

As discussed at length *supra*, the amendment to the theft graduation statute does not invalidate the petitioner's prior convictions. Accordingly, the petitioner cannot satisfy the requirements of § 40-30-117(a)(3). Furthermore, even if we were to view the petitioner's claim and the trial court's ruling under a more liberal lens and assume the petitioner was arguing and the trial court found that the criminal savings statute invalidated the petitioner's prior felony theft convictions, such a conclusion is contrary to prior decisions of our supreme court. In *Keese*, our supreme court held that "[a]lthough . . . the Criminal Savings Statute is generally applicable to the amended theft grading statute, we must conclude . . . that the amendments cannot be applied in the defendant's case because he was sentenced before the effective date of the Public Safety Act." 591 S.W.3d at 84 (citing *State v. Houser,* No. E2017-00987-CCA-R3-CD, 2017 WL 5054074, at *4-5 (Tenn. Crim. App. Nov. 1, 2017). The Court went on to hold that

> [t]he language of the [c]riminal [s]avings [s]tatute does not change the long-standing rule that a statute or act of the legislature cannot become operative until its effective date, nor can "the people . . . be compelled or permitted to act thereunder." *Wright [v. Cunningham]*, 91 S.W. [293,] 295 [(Tenn. 1905)]. The exception to the general rule that offenders must be sentenced pursuant to the statute in effect at the time of the offense embodied in the [c]riminal [s]avings [s]tatute only applies when the defendant is sentenced after the effective date of the relevant amendment. To put it another way, a criminal defendant whose sentence is final prior to the effective date cannot benefit from a statutory amendment that provides for a lesser punishment.

Id. at 84.

In its order granting relief, the trial court failed to make any findings sufficient to satisfy the statutory requirements. Instead, the trial court makes overly broad statements such as the petitioner "has articulated the required statutory grounds to re-open the post-conviction." The trial court makes no factual finding as to what the petitioner has articulated and even fails to cite to the statute the trial court was relying on. Additionally, rather than articulate and explain the constitutional basis for its decision, the trial court broadly states it is granting relief because "this court believes the original sentence to be excessive and a reduction is necessary." In short, as argued by the State, the trial court failed to make any of the required constitutional findings or analysis necessary to grant the relief. And, as we have discussed at great length throughout, the record does not support

the actions of the trial court. Accordingly, the trial court erred in finding a constitutional violation, in reopening the petitioner's post-conviction, and in granting the petitioner relief.

C. Commutation of Sentence

Lastly, the State submits that the trial court's action of "granting post-conviction relief without any cognizable basis" amounted to an illegal commutation of the petitioner's sentence. We agree.

The power of a governor to commute a prisoner's sentence is rooted in the Tennessee Constitution. Article III, Section 6 of the Constitution provides: "He [the governor] shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment." It is a well-established principle of law that the power to "grant reprieves and pardons" embraces the right to commute a sentence. *Ricks v. State*, 882 S.W.2d 387, 391-92 (Tenn. Crim. App. 1994). In 59 Am. Jur. 2d *Pardon and Parole* § 23 (1987), it is said:

> The power to commute a sentence is a part of the pardoning power and may be exercised under a general grant of that power. The general power necessarily contains in it the lesser power of remission or commutation. If the whole offense may be pardoned, a fortiori, a part of the punishment may be remitted or the sentence commuted.
>
> Neither the legislative nor the judicial branch of government has the authority to regulate or control the governor's power to commute a sentence.

When a governor commutes a prisoner's sentence, the governor simply shortens the sentence—a lesser or shorter sentence is substituted for the sentence imposed by the jury or the trial court following the prisoner's conviction. *Ricks*, 882 S.W.2d at 391-92. A commutation does not alter, change or otherwise affect the adjudication of the prisoner's guilt or the judgment entered by the trial court predicated upon the prisoner's guilt of the crimes for which he was convicted. *Id.* In addition, a commutation affirms the sentence imposed by the jury or the trial court—it simply modifies this sentence. *Id.* In other words, the modified or commuted sentence simply replaces the sentence imposed by the jury or the trial court; and the commuted sentence has the same legal effect as if it had been originally imposed by the jury or the trial court. The law is succinctly summarized in 59 Am. Jur. 2d *Pardon and Parole* § 23 (1987):

> The effect of a commutation of sentence is merely to remit or release the punishment without removing the guilt of the offender, and since it is a mere substitution of a lesser for a greater punishment, it has the same legal

effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term.

Id.

Here, having determined that the trial court lacked jurisdiction to entertain the petitioner's motion and that the petitioner's claim fails to satisfy a statutory exception allowing the reopening of post-conviction proceedings, the trial court's actions amount to nothing more than an improper attempt to commute the petitioner's sentence under the guise of a motion to reopen. "To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution." *Abdur'Rahman*, 648 S.W.3d at 196 (quoting *Nichols*, 2019 WL 5079357, at *12); *State v. Dalton*, 72 S.W. 456, 457 (Tenn. 1903). Accordingly, the ruling of the trial court is reversed and the petitioner's original sentence is reinstated.

D. Actions of the Trial Court

Finally, we pause to express our concerns with the actions of the trial court. While not expressly stated, one can easily infer from the transcript that the trial court in this matter not only predetermined the outcome prior to conducting a hearing on the motion but directed the actions of the parties to reach a desired and specific result. During the December 13 hearing, the trial court noted that when the petitioner's case "came to my desk" the court brought the ADA into chambers and directed the ADA "we've got to try and do something if we can" and "we tried to get a lawyer in here that would hopefully do something about it." Then, during the November 16 hearing, the trial court inquired of the parties, "How are *we going to do this*?" When petitioner's counsel informed the trial court that they would be filing a post-conviction petition, the trial court made the following statements, "I think that's – I mean, as soon as I saw this, I thought that [reopening the post-conviction petition] would be the only thing to do"; "Yeah, Yeah. I agree [that reopening the post-conviction is 'cleaner and easier']"; and "Okay. Great. *I'm excited about it.*" After further discussion about the plan and the timing of the next hearing, the trial court stated, "I am certainly on board. I was hopeful this would be able to happen as soon as I looked at it. Seriously [his sentence] is so outrageous." Finally, the trial court opened the December 13 hearing by confirming that it had already prepared and signed an order granting the petitioner's motion and had prepared amended judgments modifying the petitioner's sentence.

As noted by the State and corroborated by the transcripts, the trial court, prior to an actual filing by the petitioner, hearing any argument from the parties, or taking any evidence, was prepared to grant the petitioner relief. We remind the trial court that pursuant

to the Tennessee Rules of Judicial Conduct ("RJC"), a judge shall "aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." Tenn. Sup. Ct. R. 10, Preamble; *see also* RJC 1.2, Comment 3 ("Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary."). "Tennessee litigants are entitled to have cases resolved by fair and impartial judges." *Cook v. State*, 606 S.W.3d 247, 253 (Tenn. 2020) (citing *Davis v. Liberty Mutual Insurance Company*, 38 S.W.3d 560, 564 (Tenn. 2001)); *see also State v. Griffin*, 610 S.W.3d 752, 757-58 (Tenn. 2020). To preserve public confidence in judicial neutrality, judges must be fair and impartial, both in fact and in perception. *Cook*, 606 S.W.3d at 253; *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). To these ends, the RJCs declare that judges must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Tenn. Sup. Ct. R. 10, RJC 1.2. Another provision declares that judges "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." *Id.*, RJC 2.2. To act "impartially" is to act in the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." *Id.*, Terminology. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." *Id.*, RJC 2.11(A).

Additionally, we express our concern with the trial court's *ex parte* conversations with the District Attorney General's office. Per the trial court's comments during the December 13 hearing, the trial court, upon receiving the petitioner's filing, called the assistant district attorney ("ADA") into her chambers and had an *ex parte* conversation with the ADA about the petitioner's case, including directing the ADA "we've got to try and do something if we can." This conversation is concerning because the trial court engaged in *ex parte* communication with a party contrary to the prohibition in RJC 2.9(A). "A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . . ." Tenn. Sup. Ct. R. 10, RJC 2.9 (emphasis added).

When, as in the instant matter, a judge makes comments of the sort at issue here, a reviewing court may properly consider the entire record of the proceeding when evaluating whether those comments are a basis to conclude that the judge's impartiality might reasonably be questioned. *Cook*, 606 S.W.3d at 257; *see also Leighton v. Henderson*, 414 S.W.2d 419, 420 (Tenn. 1967) (reversing for a new hearing before a competent judge based on comments the trial court made); *In re Cameron*, 151 S.W. 64, 76, 79 (Tenn. 1912) (remanding for a new trial because the judge made comments indicating that he had already decided the case); *Buschardt v. Jones*, 998 S.W.2d 791, 803-04 (Mo. Ct. App. 1999)

(reversing and remanding for a new trial before a different judge because comments the original trial judge made in his oral ruling created an appearance of partiality).

Finally, the trial court's comments concerning the former District Attorney General and, more importantly, the original trial judge are extremely troubling. As noted, a judge shall at all times "act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." RJC 1.2. However, here, the trial court took time during her oral ruling to unnecessarily and without provocation or proof, call into question the character of members of the judicial system and, indirectly, the system as a whole. More specifically, the trial court stated,

> So[,] it was all timing with Amy Weirich [the former District Attorney General] out of the office and the right judge who might be willing to do something to help you, it was all timing. It's just the way I guess God looking down on you. . . . But that's too much time, obviously, way too much time, and I know how Judge Dailey was. I -- believe me, I practiced in there. It was not fun. They just piled up on people.

These comments by the trial court only further the concerns relating to bias or prejudice to one party, as well as, cast doubt on the integrity and impartiality of the judicial system. In short, these comments, especially when viewed in light of a court acting without jurisdiction and other comments noted above, are contrary to the spirit of the Code of Judicial Conduct, if not directly in violation of it.

Based on our reversal of the trial court and our concerns about the trial court's impartiality in this matter, we, upon remand to the Criminal Court of Shelby County, direct the clerk to reassign this matter to another division of criminal court and that trial court shall immediately reinstate the petitioner's original sentence and issue a capias for the petitioner.

Conclusion

Based on the foregoing authorities and reasoning, we reverse the trial court's grant of the petitioner's motion to reopen, reinstate the petitioner's original sentence, and remand for further proceedings consistent with this opinion.

J. ROSS DYER, JUDGE

Judicial Ethics Committee
Advisory Opinion 21-01

May 10, 2021

Question:

The Judicial Ethics Committee has been asked for an opinion on whether a judge may use, or allow to be used, his or her likeness for the purpose of raising funds for a for profit organization that intends to donate a portion of those funds to legal aid societies and other organizations whose goal is to promote greater access to justice.

Answer:

No. The Code of Judicial Conduct prohibits a judge from aiding a for profit organization in planning related to fundraising and soliciting contributions for such an organization or entity. RJC 3.7(A)(1), (2). Additionally, while the Code of Judicial Conduct encourages judges to engage in educational, religious, charitable, fraternal or civic extrajudicial activities concerning the law, the legal system, the administration of justice, and even non-legal matters, such activity is to be conducted with not-for-profit organizations. RJC 3.1, Comment 1. Finally, "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." RJC 2.4.

DISCUSSION

The instant question was precipitated by a request from DASH4LAW, Inc. ("DASH") to use the likeness of certain judges to create a non-fungible token ("NFT") which would be auctioned off with a portion of the proceeds from the auction to be donated to legal aid groups who promote access to justice. In order to fully analyze the issue and how the Code of Judicial Conduct is implicated, we have highlighted specific portions of the participation agreement submitted by DASH, as well as the explanatory memorandum. The participation agreement proposed by DASH states that:

> [the] Judge agrees to provide DASH with a digital image ("**Art**") for posting by DASH and for DASH to create an associated a non-fungible token ("**NFT**") to www.opensea.io, www.rarible.com or any other NFT online marketplace ("**Marketplace**") for sale to the highest bidder. If and

> only as allowed by the Marketplace, DASH will provide a description of the Art and incorporate any additional terms or restrictions desired by the Parties. DASH will also create a digital wallet to accept donations ("**Donations**") in connection with the Marketplace ("**Wallet**"). Upon the sale of the NFT to the buyer or any subsequent buyers (collectively, "**Buyer**"), DASH will deduct from the Donation (i) ten percent (10%) of the Donation as a fee, (ii) any costs to create the Wallet, and (iii) fees (if any) imposed by the applicable Marketplace (collectively, "**Fees**") and donate the remainder as directed by the Judge to either or both of the Legal Aid Clinic of East Tennessee and the Knoxville Community Mediation Center (or such other charitable entities mutually agreed upon by the Parties).

The accompanying explanatory memorandum attached to the agreement states that the purpose of the agreement is to create auctionable items with a portion of the proceeds of the auction to be donated to Knoxville Community Mediation Center (KCMC) and Legal Aid of East Tennessee (LAET). The memorandum explains that:

> [the] female Tennessee Supreme Court justices will be honored with non-fungible tokens which depict their digital image and the outstanding accomplishments of their careers. These NFT's will be auctioned and sold to the highest bidders who will then own the only authentically original digital image of the Justices. . . . The TVAJA's first NFT fundraising exclusively will benefit the Knoxville CMC and LAET. As customary in NFT transactions, DASH4Law, the technology provider, will only charge __% for each transaction. The donors receive a charitable deduction for their donation. The Justices receive no compensation for the gift of their image. Like a charity dinner, the Justices lend their image and reputation to charitable causes expecting nothing in return.

While the idea of helping and supporting legal aid organizations in their efforts to create more access to justice and to make it affordable to everyone is not only noble but also aligns with the goals of the Tennessee Supreme Court, the Administrative Office of the Courts, and the Tennessee judicial system as a whole, the proposed agreement and arrangement carries with it numerous ethical concerns.

As relevant to the agreement in question, the first concern is that DASH is a for profit company. While the Code of Judicial Conduct encourages judges to engage in certain extrajudicial activities, especially those that promote the legal system and access to justice issues and concerns, its rules are clear that such activities should be limited to dealings with not-for-profit organizations. As noted above, Comment 1 to RJC 3.1 states that:

> [t]o the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities *not conducted for profit*, even when the activities do not involve the law. *See* RJC 3.7.

RJC 3.1, Comment 1 (emphasis added). Moreover, while judges are allowed to participate in such extrajudicial activities, a judge's ability to aid in fundraising and soliciting of contributions is limited both as to the type of organizations they may help and from whom they may solicit funds. Pursuant to RJC 3.7:

> a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations *not conducted for profit*, including but not limited to the following activities:
>
> > (1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;
> >
> > (2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

RJC 3.7 (emphasis added).

A review of the documents provided, as well as a search of the Secretary of the State's website, makes it clear that DASH is a for profit company. Per the documents, DASH deducts from the donation a 10% fee plus any other costs or fees associated with the creation of the NFT as well as the auction. While the agreement states that the judge will not receive any compensation from the proceeds of the auction, the rule does not make that distinction. Rather, the rule simply states that such activities are allowed when working with a not-for-profit organization. In addition, while the judge is not directly soliciting the funds for DASH and the organizations which DASH's donation will aid, the Code of Judicial Conduct limits from whom a judge may solicit funds, which includes members of the judge's family and judges over whom the judge in question does not have supervisory or appellate authority. Since the auction proposed is not limited as to who may bid on the NFT, it appears that a

judge would, at least indirectly, be soliciting funds beyond the narrowly tailored list of acceptable individuals per the Code of Judicial Conduct.

In addition to the concerns relating to extrajudicial activities with a for profit company, the Code of Judicial Conduct also address external influences on judicial conduct. More specifically, RJC 2.4 states that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." RJC 2.4. While the concern here is perhaps subtle, there is a concern that the general public may perceive that DASH, KCMC and LAET, or the person who purchased the NFT of the judge would have a position of influence with the judge. When viewed in light of the preamble to the Code of Judicial Conduct that "[i]nherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system" and RJC 1.2 which states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety," it is clear that participation in the proposed agreement is not permissible as it can bring into question influence over a judge and, therefore, allow for questioning of "the independence, integrity, and impartiality of the judiciary."

One additional subtle concern is raised by the "Promotion" section of the participation agreement. Per that section,

> [A] judge hereby grants to DASH a royalty free, non-exclusive, irrevocable, worldwide, fully-paid up license use, copy, modify, or display the Art and the Judge's name an appropriate information for the promotion of DASH or any of DAHS's products or services.

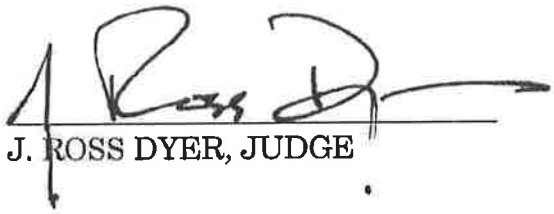
This language appears to be in direct conflict with RJC 1.3 which states that "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." While Comment 4 to this rule directly addresses the publication of a judge's personal writings, the caution expressed by the comment is directly on point. According to Comment 4, when a judge writes or contributes to a publication for a for profit entity,

> [a] judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. *In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.*

The granting of a royalty as defined in the participation agreement is clearly in direct conflict with the spirit of RJC 1.3 if not the rule itself.

For these reasons, it is the opinion of the Tennessee Judicial Ethics Committee that no judge[1] should participate in the program as currently comprised.

FOR THE COMMITTEE:



J. ROSS DYER, JUDGE

CONCUR:

Judge Angelita Blackshear Dalton
Judge Tammy Harrington
Judge Deana Hood
Judge Timothy E. Irwin
Judge Betty Thomas Moore
Judge Jerry Stokes

[1] Per Tennessee Supreme Court Rules, Rule 10, "a judge within the meaning of this Code, is anyone who is authorized to perform judicial functions, including but not limited to an officer such as a magistrate, referee, court commissioner, judicial commissioner, special master, or an administrative judge or hearing officer." Additionally, the Code is not only applicable to full-time judges, but also part-time judges, while serving as judges, and senior judges.