

# Tennessee District Public Defenders Conference: It's not the conviction that "hurts;" it's the Sentence

October 29, 2008

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## A. INTRODUCTION

Focus of your practice should not just be on "the case." Focus must also be on the CLIENT since it is he or she who will be subject to sentencing.

We learn how to speak to judges in law school. Our seminars teach us to speak to witnesses and jurors.

*When do we learn to communicate with our clients?*

## B. ATTORNEY-CLIENT RELATIONS

1. Representation is more than just "go'n to court."
2. Client won't do what you think he/she should at the *critical end* of the case because YOU have not built a relationship at the *beginning* of representation.
3. Recognize client is under a huge amount of **stress** over the case. "Nothing seems to go right" : "Well guess what else happened: I (pick one) lost my job; got evicted; got into a fight with my roommate; broke my leg/arm/foot/neck ; lost power in my house cause the light bill didn't get paid ; lost my cell phone ; am get'n divorced ; and , (always my favorite) totaled my car.
4. **Have client write you a letter about the "story of my life."** Client feels better and it is amazing what you learn.

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5. Meet with client often and tell them when you will get together again.

6. Client NEEDS INFORMATION, send client copies of everything !!!!

7. Go with your client to EVERY proceeding; i.e. presentence officer. NEVER, EVER let client go to presentence officer alone.

8. NEVER tell client to meet you in court at 9 o'clock. **ALWAYS** tell them to be there at 8 o'clock. **WRITE** them about the court date. Call them a day or two ahead to remind them !!!! Do they know where the court is located ?????

9. If they have to bring something to court have them leave it by the front door so they will bring it in the morning. "Shoot, Ms. Jones, that paper you wanted is 1. a'sitt'n on the kitchen table, 2. in my wife's car and she drove it to work, 3. I thought you wanted it next week" ,and/or 4. got stolen/eaten/throwed out."

10. Tell client what to wear to court and have them lay it out the night before. "Well Mr Arbor, I'm sorry the Judge doesn't like my :

1. tank-top, 2. flip-flops, 3. "police-are-pigs tee shirt," 4. skin-tight short shorts, 5. purple moth-eaten sweater, 6. nose, lip, eyebrow ring ."

"Well that is just fine Suzie wear what you want, cause in about an hour you'll be wearing an orange jump-suit."

11. Tell them want not to bring:

Cell phones, pistols, pagers, children, or Bibles !!

12. WARN THEM THAT THEY ARE SUBJECT TO URINE TESTS!!!!!!



13. Tell Clients to get their tail-lights fixed so they don't become:  
"rolling probable cause."

14. Document your file. A short pencil is better than a long memory !!!!!

15. Do not have *too* much of a relationship with your client.

16. Practice PROJECTIVE LAW: where will this case go? , how do I get there?  
What will my client and I need along the way, i.e. in a drug case your client needs to be in a drug program before the sentencing hearing.

17. Help client prepare Sentence Questionnaire, particularly the part about the  
"version of the facts."

18. The SECOND question to the client must ALWAYS be what is your  
citizenship status. WHY? Must learn about the immigration consequences of every  
conviction and every sentence !!

### C. CASE LAW: Sentencing Developments

- **Pretrial Diversion**

State of Tennessee v. Stephen McKim - W2005-02685-SC-S10-CD View

We accepted this extraordinary appeal in order to (1) determine the effect of a district attorney general's consideration of an irrelevant factor in deciding whether to grant pretrial diversion and (2) clarify when an interlocutory appeal from a denial of pretrial diversion should be granted. In this case, the defendant was indicted for *criminally negligent homicide following the death of his daughter after the defendant left her in his car on a hot summer day*. The defendant applied for pretrial diversion. The district attorney general's office denied diversion, in part on the basis of its judgment that diversion of a negligent homicide "appears to be an aberration of the law." The trial court refused to overturn the prosecutor's decision, and the defendant applied for permission to pursue an interlocutory appeal. The trial court denied permission, and the defendant then applied to the Court of Criminal Appeals for permission to pursue an extraordinary appeal. The Court of Criminal Appeals denied the defendant's application. We granted review and hold that the district attorney general abused his discretion when he relied



upon an irrelevant factor in denying pretrial diversion. That there may be substantial evidence to support the denial of pretrial diversion upon a proper consideration of all relevant factors, does not permit the district attorney general to short-circuit the analytical process. As we noted in Bell, “a court cannot reasonably conclude that there is substantial evidence to support the district attorney general’s decision if in fact the district attorney general has not first considered all of the relevant factors and their relative weight.”

- **Pretrial Diversion**

State v. Charles H. Warfield, III - M2007-02011-CCA-R9-CD Defendant was indicted for reckless driving, possession of a controlled substance, and possession of drug paraphernalia. The district attorney denied defendant's application for pre-trial diversion. The trial court granted defendant's writ of certiorari and determined that the prosecutor abused her discretion by denying pretrial diversion.

Upon review of the record, we conclude that the prosecutor considered all of the relevant Hammersley factors but abused her discretion by placing undue weight and emphasis on factors irrelevant to an overall consideration of the defendant’s amenability to correction. Specifically, the prosecutor emphasized criminal behavior admitted to by the defendant, including drug use and a prior violation of the underage drinking law, even though she acknowledged that the defendant had no criminal record. Similarly, even though the defendant was not charged with driving while impaired and there was no evidence showing that the defendant was impaired, the prosecutor asserted that “the defendant should not have been driving a motor vehicle due to impairment. Driving around getting high demonstrates willful disregard for the safety of others.” Additionally, in evaluating the defendant’s social history, the prosecutor effectively disregarded the fact that at the time of arrest, the defendant was working thirty-two hours per week and taking classes at a local college. Instead, she focused on the defendant’s prior poor performance and subsequent expulsion from MTSU. The prosecutor also presumed that the defendant possessed a sustained intent to lie to the arresting police officer, an assertion the trial court concluded was not supported by the evidence. Based on the weight and emphasis the prosecutor placed on those irrelevant factors, we conclude that the trial court did not err by determining that the prosecutor abused her discretion in denying the defendant pretrial diversion.

- **Sentencing –Presumptive Sentencing**

**State of Tennessee v. Edwin Gomez & Jonathan Londono** - M2002-01209-SC-R11-CD View

This matter is before us upon remand by the United States Supreme Court for reconsideration in light of that Court’s decision in Cunningham v. California, 549 U.S. \_\_\_, 127 S. Ct. 856 (2007). In our initial disposition of



this matter, *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), we concluded that the Defendants were not entitled under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny to relief as to their sentences. Upon further review following *Cunningham*, we now conclude that the trial court's enhancement of the Defendants' sentences on the basis of judicially determined facts other than the Defendants' prior convictions violated the Defendants' constitutional rights under the Sixth Amendment to the United States Constitution. In order to redress the unconstitutional enhancement of the Defendants' sentences, we vacate their sentences and remand this matter to the trial court for resentencing.

- **Pre-June 7, 2005**

**State vs. George Franklin** - W2006-01204-CCA-R3-CD [View](#)

**Shelby County** - Following a jury trial Defendant, George Franklin, was convicted of the second degree murder of three-year-old Jessica Borner and the attempted murder of nine other people. Defendant was convicted under the theory of criminal responsibility for the conduct of another. It is undisputed that Defendant did not fire the shot that killed Jessica. Defendant was sentenced to twenty-five years at one-hundred percent for second degree murder and twelve years at thirty percent for each count of attempted murder.

*The sentencing hearing in this case was held on March 14, 2006. In April 2005, our supreme court concluded that the pre-2005 Sentencing Reform Act did not violate Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). State v. Gomez, 163 S.W.3d 632, 661 (Tenn.2005) ( *Gomez I* ). In *Blakely*, the United States Supreme Court concluded that the “ ‘statutory maximum’ for [sentencing] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 124 S.Ct. at 2536; ( quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000)). In *Blakely*, the Court held that “ ‘o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ “ *Id.* The United States Supreme Court subsequently vacated our supreme court's ruling in *Gomez I* and remanded the case to the supreme court for additional consideration in light of the Court's opinion in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). In *Cunningham*, the Supreme Court held “[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt ... the DSL violates *Apprendi*'s bright-line rule: Except for a prior conviction, ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a*

*jury, and proved beyond a reasonable doubt.’ “ Cunningham, 549 U.S. at ---, 127 S.Ct. 856. (citing Apprendi, 530 U.S. at 490, 120 S.Ct. at 2348).*

*Upon reconsideration, our supreme court in Gomez II concluded that other than a defendant's previous history of criminal convictions or other facts admitted to by the defendant, the application of enhancement factors which increases the defendant's sentence over the statutorily presumptive sentence deprives the defendant of his or her Sixth Amendment right to have a jury determine whether those enhancement factors applied. State v. Gomez, 239 S.W.3d 733, 739-40 (Tenn.2007) ( Gomez II ) (citing Cunningham, 127 S.Ct. at 860).*

*Although Defendant challenged the length of his sentence on appeal, Defendant did not base his claim on Sixth Amendment principles but rather on the misapplication of enhancement factors. Defendant does have a prior criminal record consisting of three misdemeanor convictions. The trial court during the sentencing hearing stated that it found, as an enhancement factor for all the convictions, the fact that Defendant did have a prior criminal record, but did not “give a good deal of weight to it” because the convictions were misdemeanors. The court went on to find three more enhancement factors. See T.C.A. 40-35-114(3), (5), (10). The court stated that it gave a “good deal of weight” to factor (2), that Defendant was the leader in the commission of the offense. The court also found that Jessica was particularly vulnerable because of her age and that Defendant possessed a firearm during the offense. The court found no mitigating factors. When sentencing Defendant for the nine attempted second degree murders, the court found five enhancement factors. See T.C.A. 40-35-114(2), (3), (10), (11), (17). The court stated that it sentenced Defendant to twelve years on each attempted second degree murder conviction because “there are just a whole lot of enhancement factors.”*

*In Gomez II, our supreme court reviewed the defendants' sentencing claims under plain error analysis. Gomez, 239 S.W.3d at 737. Rule 52 of the Tennessee Rules of Criminal Procedure provides that “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in a motion for new trial or assigned as error on appeal.” Relief is granted under plain error review “only where five prerequisites are met: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is “necessary to do substantial justice.” *Id.* (quoting State v. Smith, 24*

*S.W.3d 274, 282 (Tenn.2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn.Crim.App.1994)).*

*In the case sub judice, the record clearly establishes what occurred in the trial court in determining the length of Defendant's sentences, and thus the first prerequisite is met. In Gomez II, our supreme court concluded that “the trial court's application of the two other enhancement factors [not based on the defendants' prior convictions] breached a clear and unequivocal rule of law” in light of Cunningham. Gomez II, 239 S.W.3d at 740-41. Further, the trial court's determination that enhancement factors (3), (5), (10), (11), and (17) were applicable to increase Defendant's sentences deprived him of the Sixth Amendment right to have a jury determine whether those enhancement factors applied and, thus, a substantial right of the accused was adversely affected. See id. At the time of Defendant's sentencing hearing, Gomez I, which concluded that Tennessee's sentencing structure did not violate Sixth Amendment principles, was controlling precedent. Therefore, it cannot be said that Defendant waived his Sixth Amendment claim for tactical reasons. See id. Finally, although Defendant has a criminal record, the trial court admittedly did not give that much weight and enhanced his sentence because of the many other enhancements factors found. In light of Gomez II, we conclude that granting Defendant relief is necessary to do substantial justice in this case. Accordingly, we reduce Defendant's sentence to twenty-one years for the second degree murder conviction and to nine years for each of the nine convictions for attempted second degree murder.*

- **Post June 7, 2005**

**State vs. Sean David Anderson - M2007-02714-CCA-R3-CD [View](#)**

The defendant, Sean David Anderson, pled guilty to two counts of vehicular homicide by intoxication, Class B felonies. He was sentenced to eleven years for each conviction and ordered to serve those sentences concurrently. On appeal, the defendant argues that the trial court erred by imposing more than the “presumptive minimum” sentence of eight years. Following our review of the parties’ briefs, the record, and the applicable law, we affirm the judgments of the trial court:

*In State v. Carter, 254 S.W.3d 335 (Tenn.2008), the Tennessee supreme court addressed the issue of whether the trial court was still required to begin with the presumptive minimum term for a sentence and adjust upward in light of the 2005 amendments to the 1989 Sentencing Reform Act. The supreme court held that:*

*Prior to 2005, the Sentencing Act set forth a “presumptive sentence” to be imposed within the applicable range: the minimum sentence for all felonies other than Class A felonies, and the midpoint sentence for Class A felonies.* *Id.* § 40-35-210(c) (2003). Thus, in imposing a specific sentence within a given range, the trial court began with the presumptive sentence. See *id.*; *State v. Gomez*, 239 S.W.3d 733, 739 (Tenn.2007) (“A sentencing court could not increase a defendant’s sentence above the presumptive sentence except upon the application of statutory enhancement factors.”). If the trial court determined that statutory enhancement factors applied, see *Tenn. Code Ann.* § 40-35-114 (2003), the trial court had the authority to increase the presumptive sentence up to the maximum within the range, see *id.* § 40-35-210(d). If the trial court determined that statutory mitigating factors also applied, see *id.* § 40-35-113, the trial court could reduce the enhanced sentence, see *id.* § 40-35-210(e) (“Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors.”). The weight the trial court accorded any applicable enhancement and mitigating factors was left to the trial court’s discretion. *Id.*, *Sentencing Comm’n Cmts.*; *Gomez*, 239 S.W.3d at 739-40.

*Our legislature amended the Sentencing Act in 2005 after the United States Supreme Court issued its opinion in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Blakely, the high court decided that “[i]f the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.” Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 869, 166 L.Ed.2d 856 (2007) (citing Blakely, 542 U.S. at 305 & n. 8, 124 S.Ct. 2531). In order to avoid the constitutional violation arising from a trial court increasing a presumptive sentence on the basis of judicially-determined enhancement factors, the General Assembly revamped section -210.....*

*The amended statute no longer imposes a presumptive sentence. Rather, the trial court is free to select any sentence within the applicable range so long as the length of the sentence is “consistent with the purposes and principles of [the Sentencing Act].” [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include “the imposition of a sentence justly deserved in relation to the seriousness of the offense,” *id.* § 40-35-102(1), a punishment sufficient “to prevent crime and promote respect for the law,” *id.* § 40-35-102(3), and consideration of a defendant’s “potential or lack of potential for ... rehabilitation,” *id.* § 40-35-103(5).*

*Id.* at 342-343. Additionally, the trial court is required to place on the record, whether orally or in writing, what enhancement or mitigating factors were considered, “as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.” Tenn. Code Ann. § 40-35-210(e).

Upon review of the record, we note that the defendant argues that under Blakely v. Washington, 542 U.S. 296 (2004), he could not be sentenced to more than the presumptive sentence of eight years for a Class B felony as a Range I, standard offender. We conclude that this argument by the defendant is erroneous. As noted previously, the 2005 amendments to the 1989 Sentencing Reform Act no longer require application of a “presumptive minimum” sentence. Furthermore, we conclude that contrary to the defendant's assertion, Blakely does not apply to his sentences. Because the offenses leading to the defendant's convictions occurred in August of 2006 and he pled guilty in September of 2007, determination of the defendant's sentences were within the trial court's discretion, so long as the trial court followed the “purposes and principles” of the Sentencing Act. See Tenn. Code Ann. § 40-35-210(d).

Vehicular homicide by intoxication is a Class B felony. The sentencing range for a Class B felony is between eight and twelve years for a Range I, standard offender. The record reflects that the court considered the required factors under Tennessee Code Annotated section 40-35-210(b).

- **Motion to Dismiss**

**State of Tennessee v. Ariel Ben Sherman and Jacqueline P. Crank -**  
E2006-01226-SC-R11-CD [View](#)

**Loudon County** - A Loudon County grand jury indicted the defendant, Ariel Ben Sherman, and co-defendant, Jacqueline Crank, for child neglect. The trial court dismissed the indictment against Sherman. The Court of Criminal Appeals reversed and remanded. We granted Sherman's application for permission to appeal to consider the issues presented for review, and hold as follows: (1) when deciding a motion to dismiss an indictment, a trial court may consider undisputed facts that are clearly and unequivocally agreed upon by the parties;

*When ruling upon a motion to dismiss, a trial court may consider evidence beyond the face of the indictment. ... This may include undisputed facts or stipulations by the parties. The question does not hinge upon how the nature of these facts became apparent to the court but upon whether they qualify as “factual evidence of the defendant's conduct at the time of the*

*alleged offense” or as “relevant only to the legal question presented by the defendant’s motion, not to the general issue of guilt or innocence.”*

*Id. This rationale extends to concessions by parties at any hearing, so long as the facts are not clearly in dispute and properly become a part of the record. Cf. State v. Messamore, 937 S.W.2d 916, 918 (Tenn. 1996) (holding that an indictment was timely filed, despite facial deficiencies, because “the record reflects, and the defendants conceded at oral argument, that prosecution had been timely commenced in each case”). If, on the record, the State and the defense unequivocally agree to those facts, whether written or verbal, then the trial court may rely upon those stipulations as “formal enough” to serve as the basis for deciding a motion to dismiss.*

*(2) a person standing in loco parentis to a child may have a legal duty of care, the breach of which may result in criminal culpability; and (3) the State is not bound at the outset of a trial by the legal theories espoused in its bill of particulars. Because the trial court erroneously dismissed the indictment, we affirm the Court of Criminal Appeals, reinstate the indictment against Sherman, and remand the case for further .*

- **Dismissal of Indictment**

State of Tennessee v. Melissa Ann Layman - E2004-01471-SC-R11-CD and State of Tennessee v. Jonathan Ray Taylor - E2004-02866-SC-R11-CD View (Concur/Dissent) - View

**Anderson County** - We granted and consolidated the applications for permission to appeal filed on behalf of Melissa Ann Layman and Jonathan Ray Taylor to determine the scope of a trial court’s discretion to deny a motion to nolle prosecute to which the defendant has consented. Layman’s appeal also presents the issue of whether a victim’s family has a right to be heard at a pretrial hearing concerning a plea agreement or a nolle prosecute. We conclude that when an uncontested motion to nolle prosecute or dismiss a criminal charge is independent of a plea agreement, a trial court’s discretion to deny the motion under Rule 48(a) of the Tennessee Rules of Criminal Procedure is limited to extraordinary circumstances indicating betrayal of the public interest. Because in each case the prosecutor’s independent, uncontested motion to nolle prosecute the greater charge of the indictment was neither filed in bad faith nor motivated by considerations clearly contrary to manifest public interest, we hold that the trial court abused its discretion in rejecting the nolle prosecute. We also hold in Layman’s case that the victim’s family did not have the right to be heard at the pretrial hearings concerning the plea agreement and nolle prosecute because such pretrial hearings are not critical stages of the criminal justice process as defined by Tennessee Code Annotated section 40-38-302(2). Any error in considering the statements of the family, however, was harmless. Accordingly, we reverse the judgments of the trial court and the Court of Criminal

Appeals in each case and remand for further proceedings consistent with this opinion.

- **Plea Agreement – Sentencing**

Shaun Hoover v. State - W2005-01921-SC-R11-HC View

**Lauderdale County** - We granted permission to appeal in this habeas corpus case to consider the legality of a sentence imposed pursuant to a plea agreement. The agreed sentence exceeds the maximum available term in the offender Range but does not exceed the maximum punishment authorized for the offense. For the reasons explained herein, we conclude that the plea-bargained sentence is legal.

The petitioner, Shaun Hoover was charged with first degree murder and especially aggravated robbery for the 1997 shooting and robbery of Berry Young. Subsequent to his indictment, Hoover negotiated a plea agreement with the State. In exchange for Hoover pleading guilty to the lesser-included offenses of second degree murder and attempt to commit especially aggravated robbery, the State agreed that Hoover should be classified as a **Range I, standard offender and that he should receive concurrent sentences of thirty-five years with a release eligibility of 100 percent for second degree murder and twelve years with a release eligibility of thirty percent for attempt to commit especially aggravated robbery.** On November 29, 1999, the Shelby County Criminal Court entered a judgment in accordance with the plea agreement. Almost six years later, on March 3, 2005, Hoover filed a habeas corpus petition challenging the legality of the thirty-five-year sentence he received for second degree murder. Hoover argued that the sentence is illegal because it exceeds the maximum twenty-five-year sentence statutorily authorized for a Range I offender convicted of second degree murder. See Tenn. Code Ann. § 40-35- 112 (a)(1) (2006). The trial court granted Hoover habeas corpus relief, stating “the thirty-five[-]year sentence for second degree murder . . . is for [a] term in excess of the provisions of the 1989 Act.” The State appealed, and the Court of Criminal Appeals reversed the trial court’s judgment, holding that Hoover’s thirty-five-year sentence is legal because it does not exceed the maximum sixty-year sentence available for Class A felonies such as second degree murder. See Tenn. Code Ann. § 39-13-210(c) (2006); Tenn. Code Ann. § 40-35-111(a), (b)(1) (2006).

Thus, the judgment of the Court of Criminal Appeals dismissing the petition for writ of habeas corpus is affirmed.

- **Habeas Corpus – Sentence Correction**

**Michael Dwayne Edwards v. State of Tennessee, Wayne Brandon, Warden - M2006-01043-SC-R11-HC View**

Separate, Dissenting Opinion - View

**Hickman County** - We granted the State’s application for permission to appeal to consider whether the Court of Criminal Appeals erred in remanding this habeas corpus case to the trial court for a hearing on Michael Dwayne Edward’s claim that his sentence is illegal. Edwards does not assert that his nine-year sentence exceeds the statutory

maximum available for persons convicted of the Class D felony of burglary. Burglary carries a two-to-twelve-year statutory sentencing range. Even assuming the trial court erroneously classified petitioner as a persistent offender for sentencing, this non-jurisdictional error renders the judgment voidable, not void, and does not entitle him to habeas corpus relief. Accordingly, we reverse the judgment of the Court of Criminal Appeals and reinstate the judgment of the trial court dismissing the habeas corpus petition. Justice Wade, joined by Justice Holder, strongly dissents: "I would hold that the Petitioner's sentence for burglary as a Range III, persistent offender was illegal because the trial court lacked authority to proceed under Tennessee Code Annotated section 40-35-107. Because the record of the proceedings demonstrates that the Petitioner did not have the requisite number of convictions to be classified as a Range III, persistent offender, I would grant habeas corpus relief without an evidentiary hearing and remand this cause to the court of conviction for the imposition of a Range II sentence."

- **Deadly Weapon -- an unloaded pellet gun**

State of Tennessee v. Thomas Martin McGouey - E2005-00642-SC-R11-CD View  
**Knox County** - The defendant, Thomas Martin McGouey, was convicted of aggravated assault and felony reckless endangerment, the aggravating factor of each being the use and display of a deadly weapon—an unloaded pellet gun. We granted permission to appeal in this case to determine whether the Court of Criminal Appeals erred in holding that a jury may conclude that an unloaded pellet gun constitutes a “deadly weapon” under Tennessee Code Annotated section 39-11-106(a)(5) (2003). We hold that the pellet gun is not a deadly weapon under subsection (a)(5)(A) because it is not a firearm, nor is it a deadly weapon under (a)(5)(B) because there is no evidence in the record that the defendant used or intended to use the unloaded pellet gun in a manner capable of causing bodily injury or death. Because the defendant does not challenge the evidence supporting the lesser-included charges of simple assault or reckless endangerment, we enter convictions on those lesser charges and remand the case to the trial court for resentencing.

- **Criminally Negligent Homicide**

State of Tennessee v. Susan Marie Gilliam Campbell - E2005-01849-SC-R11-CD View

**Hawkins County** - We granted review to determine whether the Court of Criminal Appeals correctly determined that the evidence at trial was sufficient to support dual convictions of criminally negligent homicide and facilitating escape. Because the defendant, who was charged with the care of the five-year-old victim, took him swimming at a lake without notifying his parents, drank beer and used marijuana, and dared the victim into the water and then failed to supervise his activities, the evidence was sufficient to support the conviction of criminally negligent homicide. Because the defendant, after discovering the disappearance of the victim, discouraged immediate

contact with the authorities so that her son, a fugitive from justice, could avoid the police, the evidence was also sufficient to support the conviction of facilitating escape. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

- **Sentencing -- Consecutive Sentences**

**State of Tennessee v. Anthony Allen** - W2006-01080-SC-R11-CD - Consolidated opinion  
**State of Tennessee vs Eric Lumpkin** - W2005-02805-SC-R11-CD - Consolidated opinion

View **Shelby County** - We granted permission to appeal in these consolidated cases to determine whether Tennessee's consecutive sentencing scheme passes constitutional muster under the holdings of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). We also address the "physical facts rule" in Defendant Lumpkin's case. We hold that the trial courts' imposition of consecutive sentences in these cases did not violate the Defendants' federal constitutional rights. We also hold that the physical facts rule does not require the reversal of Defendant Lumpkin's convictions. Accordingly, we affirm the judgments of the Court of Criminal Appeals in both cases

- **Death Penalty --Cross-examination of defendant**

State v. James Riels - W2004-02832-SC-DDT-DD View  
Appendix Filed March 31, 2007 View

**Shelby County** - The defendant, James Riels, pled guilty to two counts of premeditated murder and two counts of felony murder for the murders of Mary Jane Cruchon and Franchion Pollack. He also entered guilty pleas to one count of especially aggravated robbery, one count of attempted especially aggravated robbery, and one count of aggravated burglary. Following a capital sentencing hearing, the jury found three aggravating circumstances in each murder: (1) the defendant was previously convicted of one or more felonies, the statutory elements of which involve the use of violence to the person; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was knowingly committed, solicited, directed, or aided by the defendant while the defendant had a substantial role in committing or attempting to commit a robbery. Tenn. Code Ann. § 39-13-204(i)(2), (5), (7) (2003). The jury found one additional aggravating circumstance with respect to Franchion Pollack: the victim of the murder was seventy years of age, or older. Tenn. Code Ann. § 39-13-204(i)(14) (2003). The jury also found that these aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Accordingly, the jury imposed a sentence of death for each of the murder convictions. In a separate sentencing hearing, the trial court imposed an effective thirty-five year sentence for the remaining noncapital convictions, to be served concurrently with the death sentences. The defendant appealed the sentences of death. After fully considering the issues raised by the defendant, the Court of Criminal Appeals affirmed the sentences. Upon automatic appeal pursuant to Tennessee Code Annotated

section 39-13-206(a)(1) (2003), this Court entered an order specifying four issues for oral argument: (1) whether the trial court erred in allowing the State to cross-examine the defendant regarding the circumstances of the offenses and, if it did, was the error harmful; (2) whether the sentence was invalid under any of the mandatory issues for review set out in Tennessee Code Annotated section 39-13-206(c)(1)(A)-(D) (2003); (3) whether the trial court's instruction to the jury that aggravated robbery is a felony whose statutory elements involve the use of violence to the person violated the Sixth and Fourteenth Amendments of the United States Constitution; and (4) whether the trial court erred in denying the defendant's motion to suppress. After a careful review of the record and relevant legal authority, we hold that the trial court erred in allowing the State to cross-examine the defendant and that the error was reversible. Therefore, we reverse the judgment of the Court of Criminal Appeals and remand the case for a new capital sentencing hearing.

- **Death Penalty –Mental Retardation**

State of Tennessee v. Danny Strode - M2005-00906-SC-R11-DD View

**Marion County** - In this capital case, we consider whether the State may pursue an interlocutory appeal from a trial court's determination that a defendant is ineligible for the death penalty due to mental retardation. Upon holding that it may, we also consider whether the trial court erred in finding the Defendant, Danny Strode, mentally retarded as set forth in Tennessee Code Annotated section 39-13-203(a) (2003). We hold that Tennessee Code Annotated section 39-13-203(a) requires that a defendant's mental retardation must have been manifested by eighteen years of age. Because the proof in this case preponderates against the trial court's finding that the Defendant's mental retardation manifested by his eighteenth birthday, we hold that the trial court erred in finding the Defendant to be mentally retarded and therefore ineligible for the death penalty. Accordingly, we affirm the judgment of the Court of Criminal Appeals. This matter is remanded to the trial court for further proceedings consistent with this opinion.

- **Sentencing –Modification of Probation**

State of Tennessee vs Carri Lane - W2005-01998-SC-R11-CD View

**Shelby County** - The defendant pled guilty to two counts of theft in excess of \$60,000 after embezzling over \$630,000 from her employer. The trial court imposed a sentence requiring a term of confinement and probation. As a condition of her probation, the trial court ordered the defendant to make monthly restitution payments of approximately \$1,500 to her former employer upon her release from confinement. After her release, the defendant petitioned the trial court to modify the conditions of her probation by reducing her monthly restitution payments to \$500 per month. The trial court denied her motion to modify, and the defendant appealed. The Court of Criminal Appeals held that the

defendant could not appeal as of right the trial court's decision to deny her motion to modify under Tennessee's rules of appellate procedure. Nevertheless, a majority of the intermediate appellate court reviewed the defendant's challenge as a petition for a common-law writ of certiorari and concluded that the trial court's decision constituted a "plain and palpable abuse of discretion." The State appealed. Upon review, we hold that the defendant does not have an appeal as of right to challenge the trial court's denial of her motion to modify. Furthermore, we conclude that the intermediate appellate court erred in granting the defendant a common-law writ of certiorari and in finding that the trial court's decision was erroneous. Accordingly, we reverse the Court of Criminal Appeals and remand with instructions that the trial court's order be reinstated.

- **Sentencing ---Probation**

**State of Tennessee vs. Stacey Carter (State Appeal) - M2005-02784-SC-R11-CD**  
View

**Robertson County** - We granted the Defendant's application for permission to appeal in order to address how the 2005 revisions to the Criminal Sentencing Reform Act of 1989 impact the method of imposing a sentence. The Defendant was convicted by a jury of vehicular homicide and driving on a suspended license. The trial court sentenced the Defendant to serve ten years for the homicide and eleven months twenty-nine days for the driving offense, to be served concurrently. The trial court suspended both sentences. The State appealed, and the Court of Criminal Appeals reversed the trial court's judgment and modified the Defendant's homicide sentence to fifteen years to serve. We hold that the trial court committed no reversible error in sentencing the Defendant to ten years on the homicide offense, but did commit reversible error in placing the Defendant on probation. We also hold that the Defendant's conduct in causing his nephew's death was sufficiently reprehensible and offensive, and the nature of the offense is such, as to require incarceration to avoid depreciating the seriousness of the offense. See *id.* at (1)(B); *State v. Trotter*, 201 S.W.3d 651, 654(Tenn. 2006). For no legitimate reason, the Defendant refused to yield to a patrol car and instead initiated a high-speed chase. With the Defendant was his severely intoxicated fifteen-year-old nephew. The Defendant lost control of his car and landed upside down in a river while trying to avoid apprehension. The Defendant managed to escape the car and, rather than assist his nephew to do likewise, continued trying to outrun the officers. Unable to escape the car, the Defendant's nephew drowned. The defendant's profound disregard for the safety of others while attempting to avoid apprehension is deeply disturbing to this Court. Moreover, while we appreciate the Defendant's (and thus the victim's) family's pleas for leniency, we are troubled by the message such leniency would send. Accordingly, we hold that the Defendant is not entitled to probation on his ten-year sentence for vehicular homicide and must serve his sentence in the Department of Correction. We reinstate the Defendant's ten-year sentence and order that it be served in the Department of Correction.

- **Split Sentence**

State v. Tamela Scott - M2006-02067-CCA-R3-CD Vehicular homicide by intoxication and three counts of vehicular assault; eight year sentence. The defendant lost control of her car and struck another car resulting in the death of one person and serious bodily injury of three others. At least four people smelled alcohol on the defendant when she was at the hospital that day. The defendant gave conflicting accounts of what she had to drink-initially stating that she drank one beer before leaving home in the morning and later stating that she drank two beers during lunch. The collision occurred shortly before 2:00 p.m. Blood tests showed that the defendant's blood alcohol content was .065 percent at 4:50 p.m. The manner of service for the sentence for vehicular homicide is modified to eight years, to be served as one year in jail followed by eight years of probation. Defendant used alcohol and cocaine before the offenses, which resulted in the loss of life to a child and severe injuries to three others. The defendant also admitted prior drug use. However, the record reflects that the defendant has no prior criminal convictions, including driving-related convictions, that the defendant had been attending AA meetings and had stopped using drugs, that the defendant was gainfully employed, and that she had a large support system of family and friends.

- **Split Sentence**

**State vs. Stephanie Lee** - W2007-00569-CCA-R3-CD View The defendant, Stephanie Lee, pled guilty to theft of property over \$10,000, a Class C felony, and was sentenced as a Range I, standard offender to four years in the county workhouse. The defendant was also ordered to pay \$25,000 in restitution. the defendant, a teller and supervisor at Independent Bank in Memphis, took money from the vault on at least thirteen occasions between May 22, 2003, and April 30, 2004, and falsified bank records to evade detection. In total, the defendant took approximately \$43,000. On appeal, she argues that the trial court erred in denying judicial diversion and an alternative sentence. Following our review, we affirm the trial court's denial of diversion and full probation but order that the defendant serve a sentence of split confinement, with six months to be served in the county workhouse and the remainder on supervised probation.

*The trial court accorded great weight to the need for deterrence of theft from financial institutions. Although deterrence is a factor to be considered, it will not alone support a denial of alternative sentencing. .... Trial courts are accorded significant latitude in determining whether deterrence is necessary and incarceration appropriately addresses that need. We will presume that a trial court's decision to incarcerate a defendant on the basis of a need for deterrence is correct if any reasonable person looking at the entire record could conclude that (1) a need to deter similar crimes is present in the particular community, jurisdiction, or in the state as a whole, and (2) incarceration of the defendant may rationally*

*serve as a deterrent to others similarly situated and likely to commit similar crimes. Id. In making these determinations, a trial court is to consider: (1) whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or the state as a whole; (2) whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior; (3) whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case; (4) whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective; and (5) whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions. In this case, the trial court did not explicitly analyze these factors in finding a need for deterrence. A majority of the factors mitigate against the need for deterrence. There is no evidence in the record that other incidents of theft were increasingly present in the community, jurisdiction, or state; the defendant's crime and conviction received substantial publicity beyond that normally expected; or the defendant was a member of a criminal enterprise. As we have discussed previously, there was no evidence that the defendant had previously engaged in the same criminal conduct, notwithstanding an inference that could be drawn from the defendant's dismissal from the credit union. Conversely, the factor that the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain weighs in favor of the need for deterrence. Because four of the five factors mitigate against a need for deterrence, we conclude that the trial court relied too heavily on this factor in denying the defendant an alternative sentence. The trial court did make several findings which are supported by the record. The court found that the circumstances of the offense mitigated against an alternative sentence because the offense took place over a long period of time and the defendant did not show that she took the money to satisfy an important need. The court also found that confinement was necessary to avoid depreciating the seriousness of the offense. These findings are sufficient to justify a denial of full probation. We conclude, however, that they alone are insufficient to support a complete denial of alternative sentencing. We find Stillwell analogous to the case at bar. There, the defendant, a manager at a department store, stole approximately \$150,000 by repeatedly taking cash and checks from the deposit bag and falsifying records to show that an armored car had picked up the deposit. He pled guilty to theft over \$10,000 in exchange for a six-year sentence. At the sentencing hearing, he acknowledged that he was guilty and testified that at first he took the money to protect his family from future job uncertainty, but later began gambling*

*the money away. The trial court denied the defendant's request for an alternative sentence based on the circumstances of the offense, the needs for deterrence and to avoid depreciating the seriousness of the offense, and the defendant's lack of credibility as to why he committed the offense. This court reversed the trial court's denial of alternative sentencing, reasoning that although the defendant was not a suitable candidate for full probation, the trial court's complete denial of alternative sentencing was inappropriate because its reliance on the need for deterrence was not well supported by the record. This court reversed the trial court's denial of an alternative sentence and ordered a sentence of split confinement with one year incarceration and five years supervised probation. In this case, similarly, the defendant pled guilty and acknowledged at the sentencing hearing that she committed the thefts. The trial court denied the defendant's request for an alternative sentence based primarily on the need for deterrence. We conclude, as in Stillwell, that the trial court overemphasized the need for deterrence but that some incarceration is necessary to avoid depreciating the seriousness of the offense.*

- **Probation Violation**

State v. Charles Hopson Stewart - M2008-00474-CCA-R3-CD (Warren County), the Defendant was convicted of four counts of possession of cocaine with intent to deliver. He was sentenced to nine years for each offense, to be served in split confinement of thirty days of jail on the weekends and probation, with the sentences imposed concurrently. His probation was subsequently revoked. The trial court erred in allowing the drug court team to determine whether Defendant's probation should be revoked and what consequence should follow the revocation. In Tennessee, the "neutral and detached hearing body" is statutorily prescribed to be the trial judge. The statute does not give the trial judge the authority to consult outside entities or persons in making its determination or to delegate the decision-making authority to another entity or person, other than another trial judge since his impartiality might reasonably be questioned. The trial judge received communication outside the presence of the parties concerning the matter and relied on that communication in disposing of the defendant's case. On remand, the case is to be assigned to another judge.

- **Habeas Corpus – Right to File**

Joseph Faulkner, aka Jerry Faulkner v. Tennessee - W2004-02354-SC-R11-HC View Shelby County - In this case, we granted permission to appeal to determine whether a prisoner serving concurrent state and federal sentences in a federal correctional institution may attack his state convictions pursuant to a petition for writ of habeas corpus filed in

this state. We hold that the petitioner, who is incarcerated in a federal correctional institution serving concurrent state and federal sentences, is not barred from challenging his state convictions by a state writ of habeas corpus. Because the petitioner has failed to attach the requisite documentation in support of his claim that his sentences are illegal, however, we affirm the summary dismissal of the petition but do so on different grounds than either the trial court or the Court of Criminal Appeals.

- **Habeas Corpus –Right to file**

**Randy L. May v. Howard W. Carlton, Warden** - E2006-00308-SC-R11-HC [View](#) (Separate dissenting opinion filed by Koch, J., with whom Clark, J., joins) [View](#)  
**Johnson County** - Incident to a conviction for first degree murder, the petitioner was declared infamous, a status which involves the loss of rights of citizenship, including the right to vote. At the time of the offense, homicide was not listed as an infamous crime under the statute. We granted permission to appeal to determine whether the judgment could be corrected through the writ of habeas corpus. Because the illegal disenfranchisement of the petitioner qualifies as a “restraint on liberty,” a threshold requirement under our statute, we grant limited habeas corpus relief but uphold the underlying conviction and the term of incarceration. The opinion of the Court of Criminal Appeals is reversed, and the cause is remanded to the trial court for modification of the judgment.



**APPENDIX**

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE  
DIVISION VII

STATE OF TENNESSEE	]	
	]	
vs.	]	Case No. 99-T-77
	]	
JIMMY RAY SIMMONS	]	

**SENTENCING MEMORANDUM**

Mr. Jimmy Ray Simmons is before the Court for sentencing upon his guilty plea to two counts of criminally negligent homicide. The plea agreement contemplates that this Court has full discretion to impose any sentence within the statutory limits.<sup>1</sup>

Mr. Simmons is to be sentenced within Range I given that he has no prior convictions of any sort that would trigger sentencing into higher ranges. A Range I sentence for criminally negligent homicide is between one and two years.

While this Court has authority to impose incarceration, the relevant statutory guidelines, as well as the unusual facts and circumstances of this case, justify a finding that Mr. Simmons should be placed on probation supervision under such terms and conditions as this Court believes to be appropriate.

A.

There should be few, if any, factual disputes in this case. Mr. Jimmy Ray Simmons was employed by McDonald Transit Associates that provides drivers for the buses operated by the Metropolitan Transit Authority. On August 31, 1998, Mr. Simmons was driving a bus that went through a red light at 14<sup>th</sup> and Broadway and also went through a red light at 13<sup>th</sup> and Broadway. The bus initially collided with at least one vehicle and then veered into a lane of oncoming traffic. The bus rode over a Volkswagen, killing two of the occupants and injuring a third. Other vehicles sustained significant damage. Approximately eleven other people were hurt including individuals on the bus as well as one or more people in other vehicles.

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<sup>1</sup>The parties did agree, however, that no fine would be assessed. Further, the relevant statutes require that Mr. Simmons' driver's license be suspended for six months. He surrendered his license on the day of the plea.

It is also undisputed that Mr. Simmons is a diabetic. The defense will demonstrate through medical testimony that Mr. Simmons was suffering from hypoglycemia at the time of this event. Hypoglycemia (or low blood sugar) can produce various symptoms such as faintness, dizziness, and blurred vision. Obviously, this can affect driving performance by decreasing accurate perception.

The defense asserts two factors in mitigation. T.C.A. §40-35-113(8) provides that it is a mitigating factor that the “defendant, although guilty of the crime, was suffering from a mental or physical condition that significantly reduced his culpability for the offense.”

T.C.A. §40-35-113(11) provides in part that it is a mitigating factor that the “defendant, although guilty of the crime, committed the offense under such unusual circumstances, that it is unlikely that a sustained intent to violate the law motivated his conduct.”

The defense asserts that both of these factors are present here. Thus, this Court should exercise its discretion by sentencing Mr. Simmons to probation supervision. Mr. Simmons should not be incarcerated.

#### B.

Mr. Simmons is currently 58 years of age. He was born in Drew County, Arkansas. He grew up in Chicago, Illinois. Mr. Simmons graduated from high school where he was on the track team. Mr. Simmons moved to Nashville after receiving a track scholarship to Tennessee State University. After several years of college he enlisted in the Army in 1965.

Mr. Simmons saw substantial combat. He served with the 101<sup>st</sup> as a medic in Vietnam. Mr. Simmons was awarded a medal for heroism. The specifications are as follows:

“For heroism in connection with military operations against a hostile force: Specialist Simmons distinguished himself by exceptionally valorous actions on 9 June 1967 in the Republic of Viet Nam. As Specialist Simmons, the platoon medic, landed on a landing zone during a heliborne assault, he observed a machine gunner badly sprain his ankle as he jumped from the helicopter. Taking immediate action, he administered the proper medical aid to the man and carried the man’s machine gun as he escorted him to the landing zone. As they approached the landing zone, they were suddenly brought under an intense volume of enemy fire. Realizing the necessity for immediate action, Specialist Simmons opened fire with the machine gun and with complete disregard for his own safety, charged through the enemy’s withering hail of fire and assaulted their position. He succeeded in overrunning their position and killing one enemy soldier. He then heard the cry of “medic” and he again rushed through the enemy fire to aid a wounded comrade. Throughout the battle, he moved all over the battle area treating the wounded, and in one instance undoubtedly saved a seriously wounded soldier’s life. Specialist Simmons devotion to duty and personal courage were in keeping with the highest traditions of the military service, and reflect great credit upon himself, his unit, and the United States Army.”

Mr. Simmons received an Honorable Discharge on January 20, 1968. On June 24, 1968, Mr. Simmons began working as a bus driver here in Nashville. He also finished college and graduated from TSU with a B.S. degree in 1972. Mr. Simmons developed an adult diabetic condition in 1985.<sup>1</sup> On July 28, 1988, the physicians advised that Mr. Simmons' diabetic condition required that he be treated with insulin. Mr. Simmons then took disability retirement effective September 1, 1988 at the age of 47 with 20 years of service. He then sold insurance for a time. In 1991 Mr. Simmons returned to work as a bus driver because the doctors found that Mr. Simmons had adequate control of the sugar level through the use of an oral non-insulin medication. The relevant medical documentation is attached to this memorandum.

Mr. Simmons had a serious bus accident on April 30, 1992. The attached documentation from the MTA advises that:

“One of my drivers, Jimmy Simmons, had a diabetic episode today that rendered him incapable of safely operating a bus. Unfortunately he was driving at the time, and we are very lucky to have avoided a major accident. He was cited for reckless driving.”

This Memorandum includes a defense interview with a witness to the 1992 accident. The interview is relevant as to what happened in the prior accident and, in particular, of the witness' description of Mr. Simmons:

“**Mr. Michael Lewis:** Ah but there were, there must have been a half dozen people, close to a half dozen people that witnessed this situation.

[Investigator] Wells: Oh really?

**Lewis:** Yeah. And there's also, what he did was went through a construction site. They were repairing the street and they had a flagman out and everything. Two flagmen in fact.

**Wells:** And he went through it.

**Lewis:** Yeah. He went through it, he had a huge ah skid marks on the pavement where the bus had nearly overturned and he managed to avoid everybody except one little ol' gal that he tapped the tire on her car an there was no damage by that. It was just a miracle that he kept from killing somebody.

**Wells:** Were you the only one that showed up for court that day?

**Lewis:** Right.

**Wells:** They notified everybody else and told them not to come.

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<sup>1</sup> There are two basic types of diabetes mellitus: Type I is developed in childhood; Type II is adult-onset. Mr. Simmons also suffers from hypertension.

**Lewis:** I would assume they notified everybody but ah I was the only one that showed up.

**Wells:** Okay. Then they failed to notify you?

**Lewis:** Right.

**Wells:** Okay ah was it in the summer time or?

**Lewis:** Yeah.

**Wells:** Okay.

**Lewis:** In fact ah what really surprised me is during this whole thing everybody else was sweating up a storm and here's Jimmy Simmons just sitting there and not breaking a sweat and I said there's something wrong with this guy.

**Wells:** Uh-huh. Did you see him personally face to face?

**Lewis:** Yeah. Yeah. He was sitting in his bus ah pulled over to the side of the road almost in the ditch and ah I told him, I said can you call your supervisor and ah, and, I think we have a problem here and he acted like he didn't know anything and I assume he didn't.

**Wells:** So he was incoherent?

**Lewis:** Yeah cause he tried to start his bus up and pull on out.

**Wells:** So he was incoherent then?

**Lewis:** Yeah."

Two physicians advised that Mr. Simmons could go back to work after five days. The medical documentation is attached. The documentation also includes the following letter to Mr. Simmons from his employer, a full copy of which is attached:

"To follow up on our conversation of yesterday, your return to work is conditional on your personal ability to follow doctor's instruction on diet and exercise. Your doctor says your condition is controllable and only you are in control. Any recurrence will be a consequence of your own causing and will leave the company limited latitude but indefinite suspension or termination. I truly hope that your health remains good, because that is what is really important to you and the company. I am glad that this incident turned out so positively."

The attached documentation includes medical reports from 1993, 1994, 1995, 1996, and 1997. In general, the doctors continue to treat Mr. Simmons for his diabetes. Mr. Simmons had a full physical on or about June 30, 1998. Dr. Daniels' letter of June 30, 1998 is among the papers enclosed and the Court will see that Dr. Daniels advises Mr. Simmons that "I want to keep your sugar consistently between the 115 and 120 range if at all possible."

Jumping ahead a little bit, the attached documentation includes the first page from the Baptist Hospital records indicating that about an hour after the current 1998 bus collision Mr. Simmons' sugar level was approximately 73. After the wreck, Mr. Simmons ate some candy mints which he carried with him. This raised his blood sugar before he was transported to Baptist. The doctors will testify that adrenaline will elevate blood sugar even further and certainly that occurred as a result of this bus collision. Thus, the 73 reading at Baptist demonstrates a depressed blood sugar level which was significantly lower at the time of the bus wreck occurring an hour earlier.

Moving back to the medical documentation, the Court will find that after the visit of June 30, 1998 Mr. Simmons returned several times to Dr. Daniels since there was some alteration and modification of his medication. There was another visit to the doctor's office on July 8, 1998, another on July 16, 1998, and another on July 22, 1998.

Mr. Simmons was seen yet again on August 21, 1998. Dr. Daniels' final office note is as follows:

"Because of the low sugar, even though he has had no hypoglycemia symptoms, we are cutting his glucotrol back to 5mg twice a day. Phone call and message to him about [this], together with asking him to have a follow up sugar this week. He is to report to me immediately any symptoms of hypoglycemia."

The fatal bus collision occurs just ten days later. The attached documentation includes an article provided by Dr. Hayes which deals with hypoglycemia. Significantly, onset of hypoglycemia can occur without warning when an individual has long-term diabetes. The defense physicians will testify that typically an individual may become cognizant of the onset of hypoglycemia (and take precautions) but that there can be an episode where the person does not recognize the symptoms or goes immediately into a hypoglycemic episode which starts with drowsiness, leading to confusion and subsequently a possible coma if severe enough.

"The neuroglycopenic symptoms of hypoglycemia are those attributed directly to a slowing of higher brain function, including drowsiness, confusion, inability to concentrate and/or speak clearly, and irritability. These, together with feelings of warmth, are not affected by autonomic blockade. Traditionally, it is assumed that the autonomic symptoms occur at a slightly higher blood glucose concentration (i.e., earlier) than the neuroglycopenic symptoms and are thus the classic "early warning symptoms" of hypoglycemia. However, many diabetic patients depend on the latter symptoms to alert them to the situation. As long as some of these symptoms are generated at a time when sufficient cognitive and motor ability remain for the patient to recognize them and take appropriate action, he/she is protected against the more profound fall in blood

glucose that causes clinically serious loss of brain function (less than 3 mmol/L). Such symptomatic episodes are unpleasant, but the danger lies in the failure to generate symptoms in response to relatively mild hypoglycemia. If symptoms are absent, there is an increased risk of plunging into profound hypoglycemia with cortical dysfunction that is evident to observers but not to the patient. Severe hypoglycemia is often embarrassing and socially disabling because the patient may behave illogically and uncharacteristically. At worst, injury and even death can result, either from loss of concentration while doing something dangerous or (probably very rarely) from prolonged and/or very severe hypoglycemia.” Amiel, *Hypoglycemia Without Warning: A Dangerous but Reversible Phenomenon?*, *The Endocrinologist* (1994).

On August 31, 1998 Mr. Simmons was on a new route which, significantly, had different work hours. Mr. Simmons had no lunch and had no dinner. Bus drivers, like police officers, get no specific break. In summary, Mr. Simmons had been on this route for about six hours with no food and his blood sugar got low and he had the hypoglycemic episode.

### C.

As has been noted, Mr. Simmons was employed as a bus driver for almost 30 years. In the year preceding the bus collision, Mr. Simmons worked as an “extra board” driver. This meant that he substituted for other drivers who were sick or were on vacation. Thus, his hours and route varied almost every day.

As an “extra board” driver Mr. Simmons reported to work anywhere from 4:30 to 9:00 in the morning. He worked between 6 and 14 hours a day.

On August 31, 1998 Mr. Simmons was assigned a permanent route as “night driver.” This route covered various streets. In the evening the route would change and would pick up routes from other buses as the number of passengers would decrease. Significantly, however, the new “night route” required that Mr. Simmons get to work at 2:15 in the afternoon and drive the bus for 9 hours.

As noted, the various directions that the bus would travel changed during the evening. On the late evening “trip” the bus would leave from the shelter across the street from First American Bank and would go up Charlotte and would turn left on White Bridge Road. The bus would then travel down White Bridge Road and take a left on Harding and go down West End. The bus was scheduled to go down West End and Broadway and take a right on 14<sup>th</sup> by Beaman Pontiac. The bus was then to go around to Demonbruen, up to the Clement Landport and then back around into town to the bus station by First American, arriving there at 8:15 p.m.

Mr. Simmons began his new route on August 31<sup>st</sup>, and, as noted, he had no lunch and no dinner. The bus company does not factor in meal breaks and the drivers catch something to eat when they can or they eat on the bus. As Dr. Hayes’ report discloses, the failure to have any food during the afternoon and evening contributed significantly to Mr. Simmons’ low blood sugar.

As Mr. Simmons was coming down West End and Broadway he should have turned right on 14<sup>th</sup>. He did not. The police report discloses that he went straight through

the intersection. Significantly, the light at 14<sup>th</sup> and Broadway had been red for at least five seconds before the bus went through that intersection.

The accident report also discloses that the light at Broadway and 13<sup>th</sup> turned red for Broadway traffic just after the bus crossed the intersection at 14<sup>th</sup> Avenue.

Traffic on 13<sup>th</sup> had already proceeded into the intersection as the bus approached at perhaps 50 miles per hour.<sup>2</sup> Mr. Blackwell's vehicle had already gone through the intersection just as the bus narrowly passed by. However, another vehicle, being operated by Mr. Reed was struck by the bus.<sup>3</sup>

The police report indicates that the impact caused the bus to go left into the oncoming lane of traffic on Broadway in front of Hippodrome. The Volkswagen containing Mr. Mund, Mr. Gasho, and Mr. Aingworth was then struck and the bus literally rode over that vehicle. Mr. Mund and Mr. Gasho were killed and Mr. Aingworth was trapped in the vehicle for a time.

The report indicates that two other vehicles were struck near Hippodrome but fortunately none of the drivers or their passengers were seriously injured.

The attachments include a transcript of the first 911 call. From the context of the conversation with the 911 dispatcher it is evident that the call is made probably just a few moments after the bus came to rest since the caller reports that individuals are still in the bus and are jumping out of the bus. The transcript reflects that the call is received at the Police Department at 8:03:34 p.m. The caller reports that the bus "skidded all the way across the bridge [over the interstate]." The drawings contained in the accident report show the path of the various vehicles and, in particular, the path of the bus as it entered the intersection at 13<sup>th</sup> and Broadway.<sup>4</sup>

While there are some contrary police reports, there are many witnesses who observed Mr. Simmons both before and after the collision who indicated that Mr. Simmons was disoriented.

Mr. Nelson (a passenger on the bus) testified at the preliminary hearing that he heard Mr. Simmons talking to someone after the wreck: "All I remember him saying was that he said there was a car coming at him and then there were cars coming from every direction." Ms. Spencer, another bus passenger, testified at the preliminary hearing that Mr. Simmons "was in a daze or something."

We know from the reports of the witnesses that Mr. Simmons got off the bus immediately after the collision and then got back on. The police report from Tracy Easley states as follows:

"Easley was a rear (passenger side) passenger in the bus, and had boarded at 7:45 p.m. at the Nashville Tech campus on White Bridge Road. He said that the bus began to speed up going down the big hill on Broadway approaching the interstate, then hit a white car that was crossing Broadway (on 13<sup>th</sup> Avenue). Then he stated that the bus bounced

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<sup>2</sup>The police officers have made multiple speed calculations. The accident report indicates that the speed loss from "first skid" to final rest was 49.81 mph.

<sup>3</sup>Mr. Reed sustained serious injuries as a result of this collision including a severe injury to his shoulder and arm.

<sup>4</sup>The police report indicates that the distance from the intersection of 13<sup>th</sup> and Broadway to the intersection of 14<sup>th</sup> and Broadway is 233.66 feet.

before coming to a stop. Easley had to kick a window out in order to exit the bus, and then went to the aid of bus driver who was lying in the stairwell area of the bus and being trampled by the other passengers.”

Another bus passenger Tramaine Burns, advised in her police report that: “Ms. Burns said that the driver got off of the bus and never checked to see how any of the bus passengers were. She added that she had ridden with this same driver before, and he never had driven like this.”

Mr. Richard Kolinski testified at the preliminary hearing that: “And I mean people had already jumped out of the bus windows. I instinctively ran to the front of the bus to make sure whoever was driving the bus didn’t get away, and I saw the bus driver walking back up the stairs. And that was the only time I saw the bus driver.”

The investigating police sergeant interviewed Mr. Simmons after Mr. Simmons had gotten back on the bus. At the preliminary hearing Sgt. Carter testified that Mr. Simmons said he was speeding and ran the light. This officer was certainly not the first person to speak to Mr. Simmons given that the officer did not get to the scene until four to five minutes after the wreck.

The defense investigation suggests that the first person to speak to Mr. Simmons was Mr. James Yockey whose vehicle was also impacted in the collision. A portion of the interview with Mr. Yockey is as follows:

“I walked up to the door [of the bus] and I said, ‘Why did you do that? Why did you run through those lights? You ran through red lights; why were you speeding? You killed people.’ And he looked at me, and I could tell he was in shock, but he was physically all right and he did not look like he was injured. And if there was anything particularly wrong with him, other than being in shock at that moment. And he said to me, when I asked him why he ran the lights, why he was speeding, he killed people, he said he was just trying to take care of his people. And I said, ‘What?’ I said, ‘Man, you’ve killed people here. Don’t you understand what you’ve done? What were you doing? What were you thinking?’ He said, ‘I was just trying to take care of my people.’ ”

The interview discloses that Mr. Yockey was also a medic in Vietnam and is certainly in a position to recognize a person in shock.

After the wreck there was the odor of gasoline. Apparently, Mr. Simmons could not turn off the motor. Officer Crumby’s report indicates that he, Officer Crumby “proceeded to the bus because the driver was panicking about getting the motor off.” The officer and a fireman eventually found the fuse and cut the motor off in that fashion.

Mr. Simmons was transported to Baptist Hospital. The emergency room physician made note that “the patient was a restrained driver of a bus which was driving into an intersection when another car plowed into it.” Of course this is certainly inaccurate, to say the least, but reflects what Mr. Simmons was thinking when he was at the hospital.

Mr. Simmons was arrested later that evening for vehicular homicide. Officer Meihls spoke with Mr. Simmons in the booking room. According to this police report Mr. Simmons “also stated that he had taken the prescribed amounts [of medication] the previous evening, and to his knowledge, had not been in any type of medical distress prior to or during the crash.” Mr. Simmons is obviously confused. Mr. Simmons had taken medication in the morning when he had had his only meal of the day at approximately 9:00 a.m. Mr. Simmons did not have anything further to eat prior to the collision which occurred approximately eleven hours later. As to Mr. Simmons’ statement that he was not in any medical distress at the time of the wreck, suffice it to say that a person suffering a severe hypoglycemic episode is seldom aware of his or her condition.

The medical reports of Dr. Andrea Hayes and Dr. William Bernet are attached. Dr. Hayes is a physician specializing in endocrinology. As the Court will observe from Dr. Hayes’ Curriculum Vitae virtually all of her work has been in the treatment of diabetes. Dr. Hayes concluded that “Mr. Simmons was hypoglycemic at the time of his accident and that this event played a significant role in the events that occurred.”

Dr. Bernet is a psychiatrist at Vanderbilt. Based on the available documentation and in particular, the report of Dr. Hayes, Dr. Bernet concludes that Mr. Simmons “did not have full control of his behavior” as a “result of the hypoglycemia.”

The defense asserts that this Court may find a factual basis for the statutory mitigating factors that Mr. Simmons was suffering from a “mental and physical condition that significantly reduce his culpability for the offense.” Further, this Court may find a basis for the other statutory mitigating factor that “although guilty of the crime, [Mr. Simmons] committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct.”

D.

The sentencing guidelines indicate that Mr. Simmons is a Range I, Standard Offender which means that the span here is between one and two years for each count. The primary issue in this case will be whether Mr. Simmons should be placed on full probation supervision or, as the State will undoubtedly argue, whether Mr. Simmons should be incarcerated.

T.C.A. §40-35-102(6) provides that a person who is convicted as a Standard Offender for a Class E felony is “presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” T.C.A. §40-35-103(4) provides that “the sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed.” T.C.A. §40-35-103(6) provides that “trial judges are encouraged to use alternatives to incarceration.”

The State may argue that Mr. Simmons should be denied probation because of the enhancement factor that he allegedly had “no hesitation about committing a crime when the risk to human life was high.” T.C.A. §40-35-114. In *State v. Wilkerson*, 905 S.W.2d 933, 937 (Tenn. 1995) the Tennessee Supreme Court found that the concept of “lack of hesitation” was similar to “reckless indifference” signifying a “conscious lack of concern for foreseeable consequences.”

Obviously this factor deals with reckless behavior where a person is aware of but disregards a danger. This could have no application to criminally negligent homicide where, by definition, the accused is not aware of the danger causing the harm. Thus, this aggravating factor would not apply here.

*Wilkerson* also addresses consecutive sentencing factors where it is alleged that a defendant is a “dangerous” offender, defined under T.C.A. §40-35-115 as an “offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life high.” Again, the Supreme Court made it clear that this consecutive sentencing factor dealt with someone who acted with “reckless indifference” which is conscious risk-creation. Moreover, *Wilkerson* was an instance of vehicular homicide by intoxication which is governed by vastly different policy considerations. Thus, consecutive sentencing is not appropriate here.

Unquestionably, this is a serious case. Two people were killed in this collision. The nature of the conviction, however, is not that of an intentional or even a reckless act.

Because criminally negligent homicide (or involuntary manslaughter under prior law) involves non-intentional or non-reckless conduct, the standards for probation are different. In *State v. Clifton*, 880 S.W.2d 737 (Tenn.Cr.App. 1994) the defendant there was convicted of criminally negligent homicide by shooting through a wall when he heard what he believed to be intruders. The trial judge sentenced the defendant to two years and granted unsupervised probation for all but 28 days with 100 days of community service and restitution to cover the funeral expenses. The defendant appealed, contending that the trial judge should not have required him to serve the 28 days in confinement. The Court of Criminal Appeals addressed many of the sentencing factors discussed here and remanded the matter so that the defendant could be placed on full probation. The Court’s discussion is relevant here:

“We recognize that the unlawful killing of another human being is generally viewed to be more serious, for sentencing purposes, than many other criminal acts. *See, e.g., Kilgore v. State*, 588 S.W.2d 567 (Tenn.Crim.App. 1979). However, in *State v. Travis*, 622 S.W.2d 529, 535 (Tenn.1981), our Supreme Court concluded that an involuntary manslaughter conviction resulting from an act occurring without any actual intent to harm would not ordinarily reflect such a violent or heinous crime as to preclude, by itself, a grant of probation. We conclude that the defendant’s offense was not sufficiently aggravated so as to outweigh the evidence supporting suspension of his entire sentence.

As to the states’ contention that split confinement was appropriate as “shock probation,” we acknowledge that cases exist in which a short period of confinement is particularly suited to address sentencing principles dealing with the need for confinement, for rehabilitation, and for appropriate use of alternatives to confinement. However, it is not necessarily warranted in every case. Under the circumstances in this case, we see no sufficient reason to justify a requirement of a period of confinement.” (*State v. Clifton*, 880 S.W.2d 745, 746 (Tenn.Crim.App. 1994).

This case cites *State v. Travis*, 662 S.W.2d 529 (Tenn. 1981). An examination of *Travis* indicates that that case was an involuntary manslaughter conviction involving an automobile which went out of control and struck a tree. The cause of the wreck apparently was excessive speed. The trial judge denied probation but the Supreme Court reversed and remanded for the reasons addressed in *Clifton*, which apply with equal force here.

In determining the appropriate punishment this Court should not only consider Mr. Simmons' medical condition at the time of the offense but also his current health situation. The doctors will testify that Mr. Simmons suffers from a multitude of health-related medical problems. He is now on insulin and will be required to take that medication for the rest of his life.<sup>5</sup>

Another issue concerns the question of restitution. T.C.A. §40-35-304 provides that the Court may require restitution to be paid to the victim's next-of-kin. This would include such matters as funeral expenses.

As the Court might imagine, there have been a multitude of lawsuits filed in this case. Mr. Mund's family has filed a lawsuit in federal court which is currently pending. Mr. Aingworth has also filed a suit in federal court for his injuries.

These lawsuits against the employer should be successful given that Mr. Simmons has now pled guilty to criminally negligent homicide. It is probable that the remaining civil litigation will now revolve around the issue of damages as opposed to the question of liability.

As the Presentence Report notes, the civil suit involving Mr. Gasho has been resolved with a confidential settlement. Counsel will provide the Court with *in camera* documentation concerning that significant sum. Mr. Reed's suit pending in circuit court has recently also been settled. Thus, restitution should not be an issue here since it has been or will be accomplished through the companion civil cases.

#### E.

In summary, the defense respectfully requests that this Court permit Mr. Simmons to be on probation supervision for the duration of his sentence. He has lost much by these convictions. He lost his job. He will be a convicted felon for the rest of his life. The conviction will preclude Mr. Simmons from challenging his termination from his employment, thus precluding his retirement benefit which took him 30 years to acquire.

This is a matter uniquely within the discretion of this Court.<sup>6</sup> The statutes and cases governing this issue authorize this Court to grant probation. The facts and circumstances here are highly unusual. The mitigating factors are profound. Thus, this

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<sup>5</sup>The fact that Mr. Simmons is now on permanent insulin therapy will forever preclude him from being able to drive a commercial vehicle. The Department of Transportation Regulations provide at 49 CFR, Section 391.41 that to be qualified for a commercial vehicle permit, an applicant must have "no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control."

<sup>6</sup>In *State v. Sharpton*, Tenn.Cr.App., October 22, 1999 the Court affirmed the trial judge's decision to fully suspend the sentence of a defendant convicted of two counts of vehicular homicide.

Court should grant probation under such terms and conditions as this Court believes are appropriate.

Respectfully submitted,  
HOLLINS, WAGSTER & YARBROUGH, P.C.

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