IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
APPELLEE	)	KNOX COUNTY CRIMINAL 108568
	)	
V.	)	C.C.A. NO. E2018-01439-CCA-R3-CD
	)	
TYSHON BOOKER,	)	S. Ct.
	)	
APPELLANT	)	

ON APPLICATION FOR PERMISSION TO APPEAL
PURSUANT TO RULE 11 OF THE TENNESSEE RULES OF APPELLATE PROCEDURE

APPLICATION OF THE APPELLANT TYSHON BOOKER

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STATEMENT OF THE ISSUES

1. Upon conviction for felony murder, any defendant in Tennessee -- including a juvenile -- is sentenced to life imprisonment, and will not be eligible for release for fifty-one years. Such sentencing occurs without any possibility for a juvenile to argue, based on his unique characteristics or on those common to juveniles, that he has reduced moral culpability or is subject to rehabilitation. The defendant in this case had a compelling argument, based on his personal history and an expert's opinion that he would be responsive to trauma-based therapy, that he was not irredeemable. Does such an automatic life sentence based solely on the offense of conviction, when imposed on a juvenile, violate the Tennessee Constitution or the United States Constitution as interpreted in *Miller v. Alabama*?

2. The defendant testified that he shot the decedent but did so in self-defense. In closing argument, the State argued at length that his testimony was false because the evidence established that he made two phone calls to friends after the shooting, rather than before the shooting as he had testified. The State's argument was based on an extrapolation from two videos and a set of phone records. The State's calculations, however, were demonstrably incorrect, and the calls were in fact placed prior to the shooting as the defendant testified.
    a. There was no contemporaneous objection to these timing calculations, which had never been offered from the witness stand and which defense counsel was unable to fact-check in the moment. Did the Court of Criminal Appeals error in applying plain error review based on this failure to offer an objection?
    b. Although there was no contemporaneous objection, the issue was raised in the defendant's motion for new trial. This Court, in *State v. Hawkins*, held that inclusion in a motion for new trial was enough to preserve for plenary review an issue of improper closing argument; other decisions, however, reach a different conclusion. Should this Court resolve this split of authority and reaffirm this principle of *Hawkins*?
    c. Does this improper argument, which was the basis of the only sustained attack in closing argument on Mr. Booker's testimony, require a new trial?

3. A juvenile can be transferred to Criminal Court only after a finding of three statutory factors by the Juvenile Court judge. Once transferred, the juvenile is subject to greatly enhanced punishments. In this case, while in Juvenile Court, the defendant could only be incarcerated until he was nineteen years old, and after the transfer decision, he could be incarcerated for fifty-one years. Does this structure, allowing greater punishments based on facts found by a judge, not a jury, and not under a beyond-a-reasonable-doubt standard, violate the Constitution as interpreted in *Apprendi v. New Jersey*?

4. At a post-trial hearing, it was established that a juror had used the Internet, during deliberations, to determine that the defendant would serve a life sentence if convicted, and that a life sentence in Tennessee was fifty-one years. A juror also used the Internet to look up a medical term used during trial. Both pieces of information were shared with all the other jurors. Did this juror misconduct, which resulted in exposure to extraneous information, require a new trial? Further, did the trial court err in refusing to hear testimony of a second juror, who would have testified that more than one juror looked up terms, and they looked up more than one term? Did the Court of Criminal Appeals err in concluding that this information was irrelevant to the determination of guilt or innocence and thus harmless, where the jury obviously believed it was relevant to deliberations in some way?

5. Did the trial court err in instructing the jury that the defendant had a duty to retreat before engaging in self-defense, where the alleged unlawful activity (possession of a firearm by a juvenile) did not cause the fight or the need to engage in self-defense? Did the Court of Criminal Appeals err in substituting a different unlawful activity in order to justify the instruction? Does it violate the Constitution for the finding of unlawful activity to be made by the trial judge under a clear-and-convincing standard rather than by the jury under a beyond-a-reasonable-doubt standard?

6. On the night of the shooting, the State received information that an eyewitness had identified two other young men, not the defendant and his co-defendant, as being involved. The State failed to turn this information over to the defense prior to the transfer hearing. If the defense had that information, the outcome of the transfer hearing could well have been different. Did the State's suppression of this information violate *Brady v. Maryland* and require a new transfer hearing?

7. The Juvenile Court ordered the defendant transferred to Criminal Court based on a finding that he could not be rehabilitated prior to age nineteen, when Juvenile Court jurisdiction would expire. There was expert testimony that the defendant suffered from PTSD and was amenable to trauma-focused cognitive behavioral therapy. There was no evidence that such treatment could not be successful in that time frame. Did the Juvenile Court err in transferring the defendant?

STATEMENT OF THE CASE

I. JUVENILE COURT PROCEEDINGS.

The defendant Tyshon Booker ["Mr. Booker"] was charged by petition on November 17, 2015, in the Knox County Juvenile Court with being delinquent due to committing first degree murder on November 15, 2015. R.252.[1] On November 19, 2015, the State filed a "Notice and Motion to Transfer" seeking transfer to Criminal Court. R.232. Following a transfer hearing conducted over several days, on July 10, 2016, the Juvenile Court (the Hon. Timothy E. Irwin) ordered that Mr. Booker be transferred to the Knox County Criminal Court to be tried as an adult. R.13-14.

II. CRIMINAL CHARGE AND TRIAL.

On July 27, 2016, the grand jury charged Mr. Booker and a co-defendant, Bradley Robinson, with two alternative counts of felony murder and two alternative counts of especially aggravated robbery. R.1-4.[2] Mr. Booker went to trial alone on January 22, 2018, before the Hon. G. Scott Green and a jury. R.722. On January 30, 2018, the jury found him guilty of all four charges. R.727-728.

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[1] References to the technical record are abbreviated herein as R.xx. References to the transcripts are abbreviated as Vol. X/xx.

[2] The defendant subsequently filed a Rule 10 application seeking to appeal the denial of a motion to dismiss on *Brady* grounds. The Court of Criminal Appeals denied the application on May 26, 2017, as did this Court. *State v. Tyshon Booker*, E2017-00714-CCA-R10-CD, E2017-00714-SC-R10-CD.

III. SENTENCING AND MOTION FOR NEW TRIAL.

The court sentenced Mr. Booker to life imprisonment on the felony murder conviction immediately after the jury verdict, on January 30, 2018. R.737-738. A further sentencing hearing was held on March 16, 2018, at which Mr. Booker was sentenced to 20 years on the especially aggravated robbery conviction, to be served concurrently with the murder conviction. R.966-967. On April 6, 2018, a motion for new trial was filed. R.968. On May 29, 2018, the defendant filed a supplemental motion for new trial, along with a motion for an evidentiary hearing and new trial related to juror misconduct. R.974, 977. Following further hearing and argument, the court denied the motion for new trial on July 24, 2018. R.1088. It also issued a separate order relating to the juror misconduct issue. R.1089. A notice of appeal was filed on August 8, 2018. R.1105.

IV. APPEAL.

The defendant appealed his conviction and the denial of the motion for new trial to the Court of Criminal Appeals. After briefing and oral argument, the Court of Criminal Appeals issued an opinion on April 8, 2020, affirming the convictions. *See State v. Tyshon Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Crim. App. Apr. 8, 2020) (attached hereto as Addendum).

STATEMENT OF THE FACTS

I. OVERVIEW OF THE CASE.

G'Metrik Caldwell, then twenty-five years old, was shot to death in the driver's seat of his car parked on a residential street in East Knoxville. Two young men were seen fleeing from his car. The State contended that these were Tyshon Booker, then sixteen years old, and his friend Bradley Robinson, who was then seventeen years old. A gun, not used in the shooting, was found in the driver's seat floorboard. The homicide weapon was never found.

Mr. Booker was charged in Juvenile Court, and a transfer hearing was held. At that transfer hearing, the State established that Mr. Caldwell had been shot and killed. It presented limited evidence linking Mr. Booker to the shooting. First, the State presented evidence that Mr. Booker's fingerprints and palmprint were found in the rear passenger's door area of Mr. Caldwell's car. Secondly, it presented evidence that, the day after the shooting, Mr. Booker had confessed to a neighbor named Linda Hatch that he had shot Mr. Caldwell after a failed robbery attempt with his friend Mr. Robinson. The defense sought to discredit Ms. Hatch, exposing her exploitative relationships with the defendant, and also presented the testimony of a forensic psychologist who had assessed Mr. Booker, diagnosed him with post-traumatic stress disorder (PTSD), and outlined a course of treatment for him. The Juvenile Court found the neighbor to be "creepy" and "despicable" but relied upon her testimony to order Mr. Booker transferred to Criminal Court.

An indictment was subsequently issued, and Mr. Booker proceeded to trial before a jury. At trial in Criminal Court, the State presented home security video and eyewitness testimony

indicating that two men were in the car with Mr. Caldwell and then ran away after the shooting. The State presented forensic evidence that linked Mr. Booker and his friend Mr. Robinson to the car, including testimony regarding Mr. Robinson's DNA on items in the front passenger's seat and testimony regarding fingerprints of Mr. Booker outside and inside of the back passenger's door and of Mr. Robinson outside and inside the front passenger's door. The State established that Mr. Booker had a 9 mm gun prior to the shooting, and established a match between the shell casings at the scene and shell casings shot by Mr. Booker at Ms. Hatch's house, indicating that his gun was used in the shooting. The State also established that four phone calls were made from Mr. Caldwell's cell phone in the minutes prior to the shooting. Although none of the calls were answered, the State established that three of the calls went to Mr. Booker's girlfriend and one went to his best female friend. Neither girl had any connection with G'Metrik Caldwell.

The State also presented the testimony of Ms. Hatch, a middle-aged woman who lived next door to Mr. Booker. Ms. Hatch testified that she acted as a mother-figure to Mr. Booker, and that he spent many hours at her house. She testified that, the day after the shooting, he confessed to her that he and Mr. Robinson had intended to rob Mr. Caldwell, that the robbery went bad when Mr. Caldwell fought back, and that Mr. Booker had panicked and shot Mr. Caldwell multiple times. Ms. Hatch went to police four days later (two days after Mr. Booker was arrested) and told them of this confession. The defense attacked Ms. Hatch's credibility, showing that she had engaged in drug use with Mr. Booker and his friends (a claim she unpersuasively denied) and showing a number of sexually-charged messages and photographs

she exchanged with Mr. Booker. The defense suggested that she had fabricated part of her story to police in an effort to avoid prosecution for her own offenses or to become a paid informant.

Tyshon Booker testified in his own defense. He admitted to the shooting but said that he had acted in self-defense and denied any robbery plan or attempt. He testified that, on the morning of the 15th, Mr. Robinson had been contacted by Mr. Caldwell, and the juveniles made plans to meet up with Mr. Caldwell and smoke marijuana. They were then picked up by Mr. Caldwell in his car. Mr. Robinson got in the front passenger's seat; Mr. Booker got in the back passenger's seat. Mr. Caldwell offered them some pills and encouraged them to take them. They did so. Mr. Caldwell drove them to a nearby house where they bought some at Mr. Caldwell's expense. They then drove around East Knoxville smoking marijuana. Mr. Booker wanted to meet up with his girlfriend, and so he borrowed Mr. Caldwell's phone to call her. He asked Mr. Caldwell to drive him to his grandfather's old house, where he had a change of clothes.

When they arrived at that house on Linden Avenue, Mr. Booker was still trying to reach his girlfriend or his other female friend. After the car stopped, he saw Mr. Caldwell reach over into Mr. Robinson's pocket area. Mr. Robinson responded angrily to this, and a fight broke out between Mr. Robinson and Mr. Caldwell. Mr. Caldwell established control over Mr. Robinson, and began to reach down into the floorboard area. Mr. Robinson called out that Mr. Caldwell was getting a gun. Mr. Booker then pulled out his own gun. Mr. Robinson and Mr. Caldwell wrestled over Mr. Caldwell's gun, but Mr. Caldwell managed to bring it up and was turning towards Mr. Robinson and Mr. Booker. At that time, Mr. Booker was in fear that he or his friend were going to be shot, and he fired his gun repeatedly. Mr. Caldwell then opened his door and

partially fell out, and Mr. Booker and Mr. Robinson fled. Mr. Booker threw the gun away as he ran. He subsequently realized that he still had Mr. Caldwell's phone with him, and he discarded that as well.

Mr. Booker testified that, the following day, he went to Linda Hatch's house and told her what had happened, including that he had shot Mr. Caldwell. He denied ever telling her about any plan to rob Mr. Caldwell. As to Ms. Hatch, Mr. Booker provided details of their relationship, including extensive drug use and occasions on which she helped him sell crack cocaine. He also testified regarding two occasions when she performed oral sex on him and his friends.

The jury convicted Mr. Booker of all four charges against him, and he was sentenced to life imprisonment on the felony murder charges and to twenty years, to be served concurrently, on the robbery charges. In the course of litigating the motion for new trial, the defense requested that the Court hear the testimony of two jurors who indicated that the jurors, during deliberation, used the Internet on their phones to look up information relating to punishment and to terms used during trial. The Court conducted an evidentiary hearing with one juror, who testified that the jury used the Internet to look up the meaning of a life sentence in Tennessee, as well as one medical term. The court denied the motion for new trial on this point, ruling that this extraneous information had no effect on the outcome of the trial. The Court denied the request to subpoena the other juror to testify.

II. TRANSFER HEARING IN JUVENILE COURT.

A. Evidence Presented by the State.

A transfer hearing as to Mr. Booker (but not the co-defendant Mr. Robinson) was held over three days in February and June 2016. Some of the facts were not disputed by the parties at the transfer hearing. There was no dispute that, on November 15, 2015, at around 5:25 p.m., Mr. Caldwell was shot multiple times by a handgun, and was found hanging out of the driver's side door of his vehicle on Linden Avenue. He was taken to UT Hospital and pronounced dead.

Beyond those undisputed facts, the State's main incriminating evidence was testimony by Linda Hatch, the neighbor, and fingerprint evidence linking Mr. Booker to the decedent's car. Mr. Booker did not testify.

1. Testimony of Linda Hatch.

Linda Hatch testified on February 26, 2016. Her testimony was the heart of the transfer hearing. She testified that Mr. Booker lived close to her and she had taken him under her wing. She regarded herself as serving as a mother to him. She stated: "I call him my son. He's one of my kids." 2/26/16 *Tr.* at 9.

Ms. Hatch testified that Mr. Booker texted her on November 15th (the day of the shooting) in the afternoon and, at 6:11 p.m., asked for her to come pick him and Mr. Robinson up. She prepared some food for him, and went to get him. He was not at the indicated pick-up location, even though she waited for over an hour for him. The following day, he showed up at her house, and went with her to take her kids to school. He was "very upset, very nervous." She asked him what was wrong, and he said: "Mom, I fucked up." He continued: "I killed a man….

I shot him with that gun…. It was just a bunch of bullshit going wrong, mom…. I didn't mean to." He told her that he and Mr. Robinson had planned to rob the victim, whom he did not know. He explained that he had panicked and that he had shot him while Mr. Robinson was fighting him, trying to get his money. He said he threw the gun down and ran. Ms. Hatch explained that she was "somewheres between devastated and just in denial." She told him she did not believe him. The day after this conversation, Mr. Booker appeared less concerned, and told Ms. Hatch that "they don't even have the right descriptions. They have no clue it was us." *Id*. at 13-17.

Ms. Hatch testified that she had seen Mr. Booker in possession of a 9 mm gun, and he had in fact shot it on her back porch. *Id.* at 10.

On cross-examination, Ms. Hatch agreed that Mr. Booker was arrested at her house. *Id.* at 39. She agreed that she was then contacted by Mr. Robinson, and went to pick him up, and then he was arrested in her van. *Id.* at 45-46. It was not until days later that she told officers about Mr. Booker's alleged confession. *Id.* at 49.

Ms. Hatch also reiterated on cross-examination that she had performed a maternal role for Mr. Booker. She helped him improve his grades, and encouraged him to work. She summarized her position in his life:

> And even when he didn't feel like he had people proud of him at home, he knew I was very proud of him, and he knew I loved him very dearly. I have a son who just turned 25, and I've put more love and time into Ty than I probably have my son in the past two years. I spend more time with him than with my own child because I love him.

Id. at 32-33. She continued by agreeing that she tried to be a "good influence" on him, to teach him right from wrong, and provide him with structure. *Id.* at 34. She agreed that she

discouraged him from doing drugs and that he did not do anything criminal when he was with her. *Id.* at 35.

After this point, Ms. Hatch's self-portrait as an upstanding and altruistic maternal figure crumbled dramatically on cross-examination when defense counsel surprised her with Facebook messages sent between her and Mr. Booker. These included messages where they discussed her apparent attempts to assist him in selling crack cocaine by finding buyers for him. *Id.* at 55. Counsel showed her a picture of marijuana that Ms. Hatch admitted she took for him. *Id.* at 59-60. She had written that it was "Yummy." *Id.* at 60. Counsel showed her messages where Mr. Booker wrote: "I need some weed," and she responded by asking: "You want to go in half." *Id.* at 61-62. She authenticated a message she sent to Mr. Booker indicating that the "flower man down the street" was asking if anyone wanted orders. She agreed she was communicating between a weed dealer and a 16-year-old child. *Id*. at 64. She suggested in her testimony that she discouraged him from using drugs when they were face to face, but said "crazy stuff" on Facebook. *Id.* at 71. Counsel showed her sexually-charged images and messages that she sent to Mr. Booker. *Id.* at 71-77. She admitted that, at his request, she took "sexy pictures" of him. *Id.* at 77-78. At times Ms. Hatch offered implausible explanations for what the messages meant; at other times she simply agreed with their content.

2. Testimony of fingerprint analyst.

The State presented evidence that latent fingerprints were lifted from the vehicle. Five fingerprints on the exterior front passenger door matched Mr. Robinson. Prints were found that matched Mr. Booker on the back passenger side exterior and interior. *Id.* at 35-51.

3. Expert evidence presented by the State.

The State presented the testimony of Dr. Phillip Axtell, a psychologist who performed a limited psychosocial evaluation of Tyshon Booker. He made no diagnosis, but indicated that Mr. Booker reported anxiety and paranoia as well as stress and trauma. Dr. Axtell recommended treatment and counseling to deal with trauma and to gain better coping skills, as well as GED and vocational training. *Id.* at 129-130. He testified that Mr. Booker, unlike some individuals, may benefit from counseling. *Id.* at 133. He recommended treatment by professionals with training in "trauma-based therapy." *Id.* at 136.

B. Evidence presented by the Juvenile.

The defense's only witness at the transfer hearing was Dr. Keith Cruise, an associate professor of psychology at Fordham University. Dr. Cruise had conducted an evaluation of Mr. Booker over multiple meetings and interviewed a number of collateral witnesses. He noted that Mr. Booker had reported a number of traumatic experiences, including the murder of his grandfather, the death of an aunt in his presence, and the beating of his mother. Dr. Cruise diagnosed him as having Post-Traumatic Stress Disorder, moderate Cannabis Use Disorder, and Conduct Disorder. The murder of his grandfather was the "turning point" for his PTSD, leading to a number of "functional impairments" after that point. Dr. Cruise noted that Mr. Booker blamed himself for the death of his grandfather, because he was not there at the time, and had intrusive memories of him. He developed an apathetic attitude after that event and had difficulty maintaining relationships with others including family members. He attempted to cope with his

PTSD through use of marijuana. *Id.* at 164-207. Dr. Cruise explained in detail the link between his PTSD and his issues:

> [Y]ou have to think about sort of what PTSD is. If after the experience of a traumatic event you experience just what I described, a change in the way that you think about yourself, you know, changes in your thoughts, changes in your moods and in your behaviors….
>
> What is very clear here is that one of the primary ways that Tyshon changed the way that he's thinking about himself was this idea is that he took on a load of guilt. He blames himself for the death of his grandfather. Simultaneously he started to develop symptoms of PTSD where he would experience -- just question memories of his grandfather as well. So, you know, those are memories that would pop into his head, you know, memories of his grandfather, memories of the way that his grandfather died; that he experiences as being extremely distressing to him….
>
> It's not uncommon then as a result of that that you do things to try to avoid any thoughts, feelings, or reminders about that traumatic event as well.
>
> So the experience of this, and Tyshon feeling extremely guilty and sort of blaming himself, essentially, to use Tyshon's words, impacted and changed the way that he sort of perceives himself … in his life and sort of developing what he called an "I don't care" attitude. So if you feel guilty about something and you have this sort of "I don't care" attitude, it diminishes … a focus on being productive, you know, maintaining relationships with others….
>
> So simultaneous, at the same time, Tyshon also started to disengage from his family members as well, which is actually not uncommon when an individual suffers from PTSD, both from a combination of feeling guilty and also as a self-protective effort as well….

Id. at 202-204.

Dr. Cruise explained that he recommended trauma-focused cognitive behavioral therapy for Mr. Booker, a kind of therapy available at Natchez Trace, a facility which had accepted Mr. Booker for treatment. He noted that adult prisons are poorly equipped to give such therapy. As to rehabilitation, Dr. Cruise testified that he believed Mr. Booker was amenable to treatment. He noted that there were "known treatments that research has demonstrated to be effective in reducing the impact of PTSD." *Id.* at 205. He continued:

> Treating the symptoms of PTSD would also involve treating this broad sense of the impact of all of these events but particularly the death of his grandfather that's had on his mindset, the way that he thinks about himself. It would involve changing that pattern of guilt that he perceives and actually thinking about ways that he could actually cope with that as well….
>
> If you change that pattern as well, that should facilitate [Mr. Booker] actually reengaging in his relationships with others, not having to rely on marijuana so much, and helping him to make better decisions about, you know, the type of peers that he's with, for example.
>
> All of that can have an instant impact and what I would suggest should also reduce sort of a risk for him to continue to engage in Conduct Disorder as well.

Id. at 206. He noted Mr. Booker's self-awareness "that he needs to make a number of changes in his life," as well as Mr. Booker's scores on the Personality Assessment Inventory, which was "consistent with adolescents who have indicated that they are willing to receive assistance and help and respond to those changes." *Id.* at 212.

C. Ruling of the Juvenile Court as to Transfer.

The Juvenile Court summarized the initial question under Tenn. Code Ann. § 37-1-134(a)(4)(A) as whether "is it reasonable for me to believe based on the evidence that I heard that Mr. Booker was there and took the victim's life." 6/10/16 *Tr.* at 36. It addressed the fingerprint evidence, and found it equivocal: "[A]ll the fingerprints really tell us is that at some point at sometime he was at or in that car. We know that. No doubt." *Id.* at 37.

It then discussed the testimony of Ms. Hatch. It began by stating: "And for the record, I find parts of her testimony despicable. That's the nicest thing I can say about my feelings about her relationship with this young man. Despicable." It continued:

> I believe in my heart Ms. Hatch is one of the reasons that we're sitting here today. I believe he was allowed to be at Ms. Hatch's when he didn't need to be there. I believe he was into bad things with Ms. Hatch. I believe he and the other young men were in an enterprise with Ms. Hatch and were running wild.

Id. at 37. The court then stated that it did, however, believe portions of her testimony:

> I was offended, disturbed, creeped out by Ms. Hatch. But I also believe he told her, "Mama, I 'effed' up. I killed a man." I believe he said that. I believe she heard that. Despite the improper nature of their relationship, despite the obvious enterprise that they were in, despite the fact she creeps me out, I believe that this young man told her that. I believe those were his fingerprints on the car that day. From those two things I find reasonable grounds to believe that he committed the delinquent act.

Id. at 37-38.

The court noted that it agreed with the diagnosis offered by the experts. It stated: "I said I agree with both mental health experts completely, I don't doubt for a minute that the adverse childhood experiences this young man suffered could have led to Post-Traumatic Stress Disorder." *Id.* at 40. He lamented that the Court had not intervened in his life earlier: "I wish way back when this Court would have acted when this young man was a child and would have removed him [from his home] so he wouldn't have had those adverse childhood experiences and he wouldn't be a victim of Post-Traumatic Stress Disorder." *Id.* at 42. As to the crucial issue of rehabilitation, the court indicated that its decision came down to whether there was enough time for treatment based on its view of Mr. Booker's culpability in the shooting. It concluded that there was not enough time:

> But again, I think the possible rehabilitation of the child is what this case comes down to in my mind. And the General hinted at it in her argument twice, that he's 17 years and three months old. He has 21 months left. What's available out there to rehabilitate someone to make them a productive citizen that I would feel safe about putting out in the community? What's available out there to do that in 21 months? Because if I keep him here when he's 19, he walks. He does whatever he wants to. So 21 months? How can I take a person whose conscience has been so killed that the taking of a human life has so little value, how can he be rehabilitated in 21 months with the time I got left?

> Based on the testimony I've heard, I must conclude that he can't. The decision will be to transfer him and try him as an adult.

Id. at 46-47.

III. INDICTMENT.

The indictment in this case charged Mr. Booker with committing felony murder (by robbery and by attempted robbery) and especially aggravated robbery. R.1 – R.4.

IV. TRIAL IN CRIMINAL COURT.

A. State's Evidence.[3]

1. Surveillance video of Sergio Rosles.

Sergio Rosles testified that he lived near the location of shooting, at 2340 Linden Avenue. Vol. 19/40. He had video cameras at his house, including one on the porch and one on the side. They saved information to a DVR. Vol. 19/41. On November 15, he heard three gunshots, looked through the front window, and saw two or three people running on the right side of the car. Vol. 19/42. (Another eyewitness saw two unidentified people running away. Vol. 19/34.) The driver in the red car had the door open and had fallen. Vol. 19/42. He gave his video, which did not have audio, to police. Vol. 19/43. That video was played to the jury. Vol. 19/44. (The Rosles video is discussed in greater detail below.)

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[3] This discussion of the facts of trial is limited to those facts most relevant to this application. Not all witnesses or pieces of physical evidence are discussed herein.

2. Responding officers.

Officer Jimmy Wilson testified that he responded to Linden Avenue after receiving a call around 5:24 p.m. His cruiser had a video camera in it, and the cruiser video was introduced and played for the jury. Vol. 19/56-60, 68; *Exhibit 5*. When he arrived, the decedent was lying half-in and half-out of the car. Officer Wilson approached him but did not find a pulse. Vol. 19/60-61. He noticed a firearm inside the car. Vol. 19/65. Shell casings were inside the car as well. Vol. 19/65.

3. Crime scene information and fingerprint comparisons.

Tim Schade testified as a fingerprint expert that a print from the passenger's side front door, consistent with closing the door, came back to fingers from Bradley Robinson. Vol. 21/204-205. Another print from the passenger's side front door interior also came back as a match to Bradley Robinson. Vol. 21/208. A palm print from the passenger's side rear exterior matched Tyshon Booker's left hand, and appeared to have been made when the door was open. Vol. 21/209-211. A print from the inside of the passenger's side rear matched the right ring finger of Tyshon Booker. Vol. 21/214.

On cross-examination, Mr. Schade agreed that there was a pistol in the driver's seat floorboard, and that it was loaded with a bullet in the chamber and ready to fire. Vol. 21/259-261. He agreed that, in the driver's side armrest, there was a plastic container with 53 pills. Vol. 21/263. He agreed there was a package of Swisher Sweets Cigarillos in the car. Vol. 21/265. He agreed that he received $835 from the medical examiner which had been on Mr. Caldwell's person. Vol. 21/277.

4. Forensic evidence.

A forensic analyst testified that the gunpowder found around the holes in Mr. Caldwell's jacket would indicate a firing range probably within six feet. Vol. 21/296-300; Vol. 22/301-303. He did not believe the holes were consistent with a contact shot. Vol. 22/304.

A crime scene technician testified that, on November 20, 2015, she went to Linda Hatch's residence and collected two 9 mm casings in the back of the house near the porch. Vol. 22/328-335. A firearms examiner testified that she could conclude that one shell casing from the car was fired from the same gun as the two casings collected from the Hatch house. Vol. 29/1001-1005; *Exhibit 282 - 284*. None of the casings were fired from the operable Ruger pistol recovered from the driver's seat floorboard of the car. Vol. 29/1008-1009, 1020.

5. Testimony of Linda Hatch and her family.

a. Initial meeting with Tyshon Booker.

Linda Hatch testified that she lived at 7309 Martin Mill Pike. She was the next-door neighbor to Mr. Booker's family. She lived with her husband, three nieces, and a nephew (although she referred to them as her children). Vol. 22/382-385. She testified that she first met Mr. Booker when she saw him walking alongside the road in October 2015. She saw that he looked stressed and frustrated, and was carrying a garbage bag with clothes falling out of it. She said: "[M]y heart made me stop and ask this young man if he needed help." Vol. 22/385-386. He got in her car. He said he would be fine, but she could tell he had been crying. She took him to where he was going, and they had a discussion along the way. She told him that, as he was a

friend of her niece's, he was welcome to come to her house anytime, and after that he began coming there frequently. Vol. 22/386-388.

b. Guns and music.

She testified that Mr. Booker had a 9 mm gun, which he would use for music videos. She testified that she helped him write songs and would provide feedback on his "little raps." Vol. 23/437-438. The 9 mm had a problem, and so on one occasion Mr. Robinson took it on the back porch and tested whether it would fire. It did. Vol. 23/438-440.

Ms. Hatch also met another of Mr. Booker's friends, called "Ears Tate." Vol. 23/445. Ears Tate came to her house while Mr. Booker and Mr. Robinson were there, took Mr. Booker's gun, and went on the back porch and shot it. Mr. Booker got mad because he did not have many bullets left. Vol. 23/449-450.

c. Communications on November 15.

On Sunday, November 15, at 3:00 p.m., Mr. Booker sent her a text message asking her to come get him. She was cooking and did not immediately respond. At 6:00, he wrote to her again: "Scoop me [pick me up] right now." She was "concerned that something was wrong with my son and he needed me." Vol. 23/457-458. She wrote back and asked him if he was all right. He asked him to pick her up. She took her daughter, Tiffany, with her to find him. Vol. 23/459. She was told to go back to the Skyline Drive area, where she had dropped him off most recently. Vol. 23/460.

When she arrived at the house where she had dropped him off, he was not there and she could not contact him. She and Tiffany waited for a while. She continued to look for him, and

checked other locations he might be. Vol. 23/460-461. She continued: "I sat in front of the Skyline home after I had drove around East Knoxville for over three hours looking for my son, and I was very scared something had happened to him." She knocked on the door multiple times and then finally she gave up and went home, as Tiffany had school the next day. Vol. 23/461. She did not speak to Mr. Booker or Mr. Robinson that night. Vol. 23/472.

d. Confession on November 16.

The following day, Monday the 16th, she woke up when Mr. Booker "came to my back door, like he does every day, to get a ride to school." He was very early. He woke up Tiffany and said that he needed to speak to her mother. Vol. 23/472. Ms. Hatch testified:

> And when I was able to get up and get dressed and come to my kitchen, Tyshon was in my kitchen sitting at my kitchen table. And he was very upset. And he was very emotional and appeared to be very scared. And he was saying, "mom, I need to talk to you. I need to talk to you right now." And when he said that he had tears in his eyes, which I've saw before and I knew that something was wrong.
>
> … I had asked my children to go ahead and continue to get ready for school. And to please leave the room before I needed to speak to Ty. And when I had my children to leave the room, he had his head bowed in his hands and he was crying a little bit. And I said "Ty, honey, what's wrong"? And he said, "momma, I fucked up". And I said "what? Baby, what? What Ty fly, what's wrong"? And he was trying to talk. And I said "it's okay. Is it you and mom? Is it you and your mom? Is it you and your brother?" "No, momma. I've fucked my life up". And I said "what have you done, Ty? What did you do?" And he said "momma, I killed a man." And I said "what, Ty? What? No, you didn't." And he said "yes, I did, momma. We killed him." And I said "you killed who?"
>
> And I thought my mind was totally in denial because my Ty wouldn't do that. And he said "momma, momma, I shot a man and I killed him and I didn't mean to. And I'm sorry."

Vol. 23/472-473. Ms. Hatch then directed Tiffany to keep the children out of the kitchen. Ms. Hatch further questioned Mr. Booker, who stated: "[M]omma, it went so wrong. We were just

supposed to meet the man, get some weed, take his money. We wasn't supposed to hurt him. Savvy [Mr. Robinson] said we would just take his drugs and money." Vol. 23/474. Ms. Hatch asked him if it had involved the gun she had seen, and he said: "yeah." He explained:

> Savvy called the boy up and set it up. Said he would meet us and we would just get it, you know, get his money. Get the weed. And we would go. But it went bad.

Vol. 23/474. He explained that "it happened so fast." He stated that the plan was to get in and for "Savvy" to grab and hold him, while Mr. Booker got the "money" and the "weed," but instead "he fought and he broke loose. Savvy couldn't hold him. And momma, Savvy said shoot him. Shoot him, Ty." He explained that he pulled the trigger and "when I pulled it, I couldn't stop. It just kept shooting." He explained that they left him dead and took off running. Vol. 23/475. He said he threw the gun away. He said that he was "done" as "[t]hey're going to get me for overkill… because I shot him more than once. I emptied that whole clip in him." Vol. 23/476. Ms. Hatch hugged him and they cried. She was in denial. Vol. 23/477.

e. November 17.

Ms. Hatch testified that Mr. Booker came to her house on Tuesday morning, the next day. He had a changed demeanor: he was "very proud, happy, almost very swag cool as he puts it." He said he was going to school. He asked her if she had seen the news, and explained that they did not "have no clue who shot that boy," and that the description on the news "[d]on't look like us." Vol. 23/478-480.

f. November 18 and arrest of Tyshon Booker and Bradley Robinson.

On Wednesday, Mr. Booker came again as they were getting ready to go to school. As they were pulling out of the driveway, Ms. Hatch noticed some unusual cars, and told him that it was "cops." When they dropped Tiffany off at school, he decided not to go in. Vol. 23/485. They went back home to work on music, and while they were there police arrived. The police pointed guns at Ms. Hatch, put her in handcuffs, and "traumatized" her. Mr. Booker was also taken into custody. Vol. 23/485-489.

Later that same day, Ms. Hatch was contacted by Mr. Robinson. She went to pick him up. After he got in her car, the police showed up and took him into custody. Vol. 23/490-495.

g. November 20 and report to police.

On Friday, Ms. Hatch went to the police department and provided the police with information about Mr. Booker. Vol. 23/496-497.

h. Cross-examination of Linda Hatch.

On cross-examination, Ms. Hatch testified that she wanted to be a good influence on Mr. Booker. Vol. 24/597. She agreed that thought of him like a son and would discourage him from doing anything wrong. Vol. 24/597-598. As to all the messages about drug use and sales, she denied any involvement and blamed incriminating messages on her daughters or claimed merely to be passing on information from other people. Vol. 25/601-620. She agreed that she sent him an image of a female breast. Vol. 25/617. She agreed that she took a series of "sexy photographs" of Mr. Booker. Vol. 25/617. She testified that she never smoked marijuana with Mr. Booker, and never helped him get marijuana. Vol. 25/620.

Defense counsel asked Ms. Hatch about further Facebook messages between her and Mr. Booker. Ms. Hatch testified that the messages referring to marijuana were sent by her daughter Tiffany. Vol. 25/661-664. (Tiffany, in her testimony, denied sending such messages. Vol. 27/836-847.) She admitted she herself asked him if he wanted to "choke with" her, but said that referred just to smoking cigars, not marijuana. Vol. 25/668. She agreed that one message related to a $40 bag of weed, and was sent by her, but contended that she was just passing on a message from Mr. Robinson. Vol. 25/668-669. Counsel asked her about a number of sexually-charged messages from her to Mr. Booker. Vol. 25/669-682.

i. Testimony of daughter Tiffany Springer.

Tiffany Springer testified that she was seventeen years old. She lived with Ms. Hatch, who is technically her aunt, but she thinks of her as her mother. She testified that, on November 15, Mr. Booker texted her mother to come pick him up. They prepared some food and she and her mother drove to East Knoxville and looked for him, but could not find him. They went home and she went to bed. Vol. 27/817-818. The next morning, Mr. Booker came in and woke her up, and she then woke her mother up. When they were in the kitchen, Mr. Booker said he needed to talk to Ms. Hatch, and the other kids (Tiffany and her two younger siblings) left the room. She did hear him say: "I f'd up my life." She eavesdropped and further heard him say: "I didn't know what to do, I panicked so I just -- I kept going. I kept pulling it." Vol. 27/819. (Tiffany did not testify that she overheard Mr. Booker reference any failed robbery.)

After visiting the police station later that week, she and her mother looked on the porch to see if there were any casings. They found some and left them there until a police officer arrived. Vol. 27/831.

6. Cell phone records.

A representative of Sprint testified regarding the number (865) 216-7119 (later testified to be G'Metrik Caldwell's phone). Records indicated that there were calls from that number on November 15 at 5:03:33 p.m., 5:19:32 p.m., and 5:18:08 p.m., all to the number (865) 227-9820. Records indicated that there was a further call at 5:18:57 p.m., to (865) 577-2603. Vol. 26/730-745, 754. There were no outgoing calls after that point. Vol. 26/747-748.

7. Recipients of phone calls.

Shanterra Washington testified that she was eighteen years old. She described Mr. Booker as her best friend. She agreed that 577-2603 is her home phone number.. Vol. 27/881-884. Jada Mostella testified that she was seventeen, and in 2015 she was dating Mr. Booker. She had the phone number 227-9820. Vol. 28/948-953. Neither of them knew Mr. Caldwell.

8. Investigation.

Detective Thomas Thurman testified that he met with Ms. Hatch on Friday following the shooting. She requested to sign up as a confidential informant. He agreed that confidential informants can be paid. Vol. 28/940-947.

9. Narcotics expert.

Andrew Boatman, a supervisor in the Organized Crime Unit, testified regarding his extensive training as a narcotics investigator. He testified that the pills from the car found in the

decedent's car were Roxicodone 30s, worth roughly $30 per pill. He was qualified as an expert, and was asked a hypothetical question: would a person in a car with 51 Roxicodone 30 pills, packaged in a clear plastic box, who also had $835.00 in currency and a loaded firearm be consistent with that individual being engaged in distribution of controlled substances? He answered: "Yes. That scenario would be consistent with that possibility." Vol. 29/1045-1046.

10. Medical Examiner.

The Knox County Medical Examiner, Dr. Darinka Mileusnic-Polchan, testified regarding the autopsy she conducted of G'Metrik Caldwell. She described six gunshot wounds, all from fback to front. Vol. 29/1061-1090. She was not able to determine the sequence of the shots. Vol. 29/1091. She noted that there was marijuana metabolite in his system. Vol. 29/1092.

B. Evidence Presented by the Defense -- Testimony of Tyshon Booker.

Tyshon Booker testified in his own defense. He denied planning to rob or actually robbing G'Metrik Caldwell. He testified that he did shoot him in the car, because he feared Mr. Caldwell was going to shoot him or Mr. Robinson. Vol. 30/1167-1168.

1. Background.

Mr. Booker testified that he was born in 1999. He did not know his father, who was shot and killed two weeks before Mr. Booker was born. He grew up with his mother and four siblings. He had a "rocky" relationship with his mother, and frequently argued with her. She would kick him out of the house, and he would have to stay with friends. He was very close to his grandfather, who taught him "to be a young man." They spent a lot of time together. His

grandfather lived on the 2300 block of Linden Avenue. His grandfather, however, was stabbed to death in his own house. Vol. 30/1168-1171.

Mr. Booker's family moved around in East Knoxville before finally moving to South Knoxville, on Martin Mill Pike. In the fall of 2015, he was a junior at South Doyle High School. He did not go to school regularly, however. He had several close friends, including Ears Tate and Mr. Robinson. They were people he had grown up with, and they would spend time and go to events together. They would also smoke marijuana together. Mr. Booker started smoking marijuana in 8th grade. It served to "help me cope with what was going on." Vol. 30/1172-1174.

2. Relationship with Linda Hatch.

Mr. Booker testified that he met Linda Hatch on July 29, 2015, his brother's birthday. He and his family were on their way to Gatlinburg for the birthday, when he got into an argument with his mother and she kicked him out of the car. He then packed his stuff and was planning on meeting up with a friend in East Knoxville. Ms. Hatch pulled up to him on the side of the road and asked if he needed a ride. He initially declined, but eventually got in her car. She explained that she was his neighbor and that her daughter knew him. Mr. Booker had a "blunt" on him, and asked her if she smoked. She said she did, and they smoked his marijuana. She then dropped him off in East Knoxville, and told him to come next door when he wanted. He started going over there on occasion. Vol. 30/1174-1180.

When he went for the first time, Ms. Hatch gave him a tour of the house. She showed him motorcycles, the game system upstairs, a computer and WiFi, and a tattoo machine. She took him outside and showed him a trampoline and a punching bag. As a 16-year-old, this all

looked fun to him. By November 2015, he began to go there on a daily basis. He would leave clothes there, and spent the night there as well. Ms. Hatch gave him several tattoos. She also bought him things, including jewelry and clothing. They smoked marijuana together daily. Initially, they would communicate by text message or phone call, but after his phone service was turned off, they communicated by Facebook messages. Vol. 30/1180-1184.

The defense walked Mr. Booker through numerous Facebook messages in which he discussed marijuana with Ms. Hatch, including an occasion where she solicited orders from him for the "flower man." Mr. Booker said he never sent messages like this with Tiffany Springer. Mr. Booker said that she "told me I was handsome so she wanted to take my picture," and so he posed for photographs for her. Vol. 30/1184-1188.

Mr. Booker testified that he sold crack cocaine. He testified regarding a Facebook message exchange (previously discussed by Ms. Hatch in her testimony) in which he told her he was trying to sell a "pack," and she told him "I done hit up a few, no one biting." She asked him if he had powder or rocks, and asked for the price, saying "I was trying to help you. I wanted to spread the word." She did connect him with purchasers of crack cocaine, two of her friends. Vol. 30/1188-1191.

Mr. Booker testified that he had two sexual encounters with Ms. Hatch, both initiated by her. One involved her performing oral sex on him, the other involved her performing oral sex on him and three friends. Vol. 30/1191-1194.

3. Firearms.

Mr. Booker testified that, in November 2015, he had a 9 mm gun. He had shot the gun while at Ms. Hatch's house. Mr. Hatch was trying to teach him how to shoot, and he also cleaned the 9 mm gun. Vol. 30/1194-1196.

4. Morning of November 15 and meeting with G'Metrik Caldwell.

On November 15, Mr. Booker awoke at a house on Speedway Circle owned by his brother's father, Bill. Mr. Robinson was there too. Mr. Robinson was on the run from juvenile probation, and Mr. Booker's mother would not allow him to stay at their house. Bill was also there. That morning, Mr. Robinson showed Mr. Booker some Snapchat messages he had exchanged with G'Metrik Caldwell. Mr. Caldwell "asked him what he was doing, if he was trying to [*i.e.*, wanting to] smoke." Mr. Robinson also showed him a video sent by Mr. Caldwell, in which Mr. Caldwell was dancing. Mr. Booker had the understanding that "We was about to meet up and get high." They waited outside for Mr. Caldwell to arrive. Vol. 30/1196-1200.

Mr. Caldwell pulled up in his car. Mr. Robinson got in the passenger's side front, and Mr. Booker got in the passenger's side rear seat. Mr. Caldwell asked if they knew where to get some weed. Mr. Booker was surprised that he did not have any already. Mr. Caldwell told them that he had "oxys on deck," meaning pills, and asked if they wanted any. Mr. Booker first declined, but Mr. Caldwell then "ended up persuading me into taking them." Mr. Caldwell gave them two pills apiece, and did not charge them anything. Vol. 31/1201-1202.

5. Purchase of marijuana.

They left Speedway Circle, and drove to another house to buy marijuana. Mr. Caldwell gave Mr. Robinson $40 in order to get 3.5 grams of weed. Mr. Booker offered to chip in, but Mr. Caldwell told him to keep his money. Mr. Robinson went into a house, and Mr. Caldwell and Mr. Booker stayed in the car. They listened to music. Mr. Booker said: "I didn't really talk to him because I didn't know him. He didn't know me." After Mr. Robinson came back, they went to the Chevron to get cigars, which Mr. Caldwell bought. The cigars were for smoking marijuana. Vol. 31/1202-1204.

6. Mr. Booker's plan.

Mr. Booker's plan was to meet up with his girlfriend, Jada Mostella. He did not have a working phone, so he asked to borrow Mr. Caldwell's phone to call her. His plan was to go to his grandfather's old house on Linden Avenue (now occupied by his aunt's boyfriend), change clothes (he kept clothes there), get something to eat, and then go to Ms. Mostella's house. He asked Mr. Caldwell to take him to the house on Linden Avenue. They first drove around, smoking and listening to music. Mr. Booker tried to call Ms. Mostella again. He also called Shanterra Washington. Vol. 31/1204-1207.

7. Arrival at Linden Avenue and altercation.

Mr. Booker was still using the phone when the car drove up to Linden Avenue, but there was no answer. Mr. Caldwell said: "what we gonna do?" and reached "over to Brad's pockets." Mr. Robinson, in response, said: "Fuck," and hit Mr. Caldwell. A fight then ensued. Mr. Caldwell was bigger than Mr. Robinson, and was "just mushing like his face." Mr. Robinson

was trying to hit Mr. Caldwell. Mr. Booker then saw Mr. Caldwell "reaching underneath his seat." Mr. Booker was "getting ready to jump in and help Brad," because he did not know Mr. Caldwell and Mr. Caldwell was bigger than Mr. Robinson. Mr. Booker continued:

> I couldn't tell what he was reaching for because I'm in the back. But Brad obviously could because Brad said "He got a gun, bro." And he dove like towards the driver's floor. So they was wrestling for something – something.

Vol. 31/1207-1209.

8. Shooting.

Mr. Booker then pulled out his gun. Mr. Caldwell got Mr. Robinson "off of him," and Mr. Robinson was in his seat with his back against the door. Mr. Caldwell then began to turn around with the gun, which Mr. Booker could now see. He stated: "I'm thinking he's going to shoot me and Brad or -- I thought he was going to shoot us." He was scared. At that moment he shot Mr. Caldwell once. After that, Mr. Caldwell did not stop, but "kept coming." Mr. Booker fired again, and kept shooting. Mr. Caldwell finally stopped, sat in his chair, and dropped his gun. He then "opened his door and fell out." Vol. 31/1209-1212.

9. Aftermath.

Mr. Booker and Mr. Robinson then got out of the car and ran. They separated as they ran. Mr. Booker put the gun in a tree stump. He stopped at McDonald's to catch his breath. As he sat down, he realized that he still had Mr. Caldwell's phone with him. He threw it away, and ran back to the house at Speedway Circle. Bill was there. Vol. 31/1212-1213. He did not call 9-1-1. He explained:

> I was scared…. I just shot somebody. They was so many thoughts going through my head … I didn't think nobody was going to believe what I said because I didn't even believe what I saw, what just happened. It happened too fast.

Vol. 31/1213-1214. He tried to get in touch with Ms. Hatch, but she did not respond right away. He later called his mother, and she came and got him. Vol. 31/1214-1215.

10. Conversation with Linda Hatch about shooting.

The next morning, he went to Ms. Hatch's house, and told her that he had shot someone. He told her why as well. She asked him whether he used the "gun my husband cleaned for you." He did not tell her he had been trying to rob Mr. Caldwell, but instead gave her the same account he provided at trial. Vol. 31/1215-1216. She gave him advice to stay away from Mr. Robinson. He went back to her house on Tuesday and Wednesday. He was arrested on Wednesday and had been in jail ever since. Vol. 31/1216-1217.

11. Cross-examination.

On cross-examination, Mr. Booker agreed that he told Ms. Hatch about the shooting in the kitchen. Vol. 31/1249. He was upset and emotional. Vol. 31/1252.

The prosecutor walked Mr. Booker through his actions on the 15th, in even greater detail than on direct. He explained again that when they drove up to his grandfather's old house:

> I showed him which house was mine, he pull up, and then I ask can I use his phone again because I was gonna call her and if she don't pick up this time, I told them to wait outside because if I can't get with her, I just tell them to wait outside while I go get dressed and grab something to eat, jump back in the car with them and continue smoking. But if she did answer, was going to tell him just go ahead and pull off, as I could walk to her house.

Vol. 32/1310. This was the third time he took the phone. Ms. Mostella did not answer, so he then tried to call Shanterra Washington. He said: "I was tired of being around boys all day." She did not answer either. He explained that he still had the phone, and was about to call Ms.

Mostella one more time, when he saw Mr. Caldwell "reach towards Brad's pockets, talking about what we gonna do." Vol. 32/1311. Mr. Robinson swung at Mr. Caldwell in response, and then Mr. Caldwell was "mushing" Mr. Robinson. Vol. 32/1313. Mr. Booker put the phone in his jacket pocket and "put my hands up like I was about to swing." Vol. 32/1315. As he explained: "[I]n a situation like that you're not gonna say, hey, stop fighting my friend, here's your phone." Vol. 32/1315. Mr. Booker put his hands up, and Mr. Caldwell looked back and said: "Oh, so you all gonna gang me?" Vol. 32/1316. Mr. Caldwell then began reaching underneath his seat with his left hand, as he still held off Mr. Robinson with his right hand. Vol. 32/1317.

Mr. Booker initially did not know what Mr. Robinson was reaching for, but Mr. Robinson then said: "He's got a gun, bro." Mr. Booker initially could not see the gun, but he pulled out his own gun from his hip. Vol. 32/1320. The prosecutor was asked why he did not get out:

> Q: And when he says that I've got a gun bro, at that point in time there was nothing preventing you from getting out of the car?
> A: I wasn't gonna leave Brad.
> Q: Yes, sir, I understand that's the decision you made, but it's a fair statement that there was nothing preventing you from opening that back passenger door?
> A: Yes, my friend that's preventing -- I'm not about to leave Brad, we came here together, we're gonna leave together.
> Q: Was there anything preventing you from opening that door?
> MR. HARWELL: Asked and answered, your Honor.
> MS. FITZGERALD: He's not answered it.
> Q: Was anything preventing you from opening that door?
> MR. HARWELL: Asked and answered, your Honor.
> THE COURT: You've made your point, General, move on.

Vol. 32/1320-1321.

When Mr. Booker pulled up his gun, he "was telling him to stop. I was [saying] Brad, come on, let that ride. Chill." Vol. 32/1322. Mr. Booker described Mr. Robinson diving toward

the driver's floor, and wrestling with Mr. Caldwell for something. Vol. 32/1323. Mr. Caldwell got full control of the gun. Vol. 32/1325. He then "started coming around with it in his right hand." Vol. 32/1326. Mr. Booker said he "panic[ked]," and "shot him." Vol. 31/1327. He did not know where he shot him, as he was not aiming for a specific spot. Mr. Caldwell jerked, but kept "coming towards us." Vol. 32/1328. Mr. Booker shot him again in the back, and the same thing happened. He shot for a third time. Vol. 32/1330. Mr. Caldwell then opened his door, and Mr. Booker and Mr. Robinson also got out. Mr. Booker denied putting his palm on the door, leaning in, and shooting again, as suggested by the prosecutor. Vol. 32/1331. He said he did not fire any shots outside of the car. Vol. 32/1331.

V. JURY INSTRUCTIONS.

A. Defendant's Request for Self-Defense Instruction and Court's Ruling.

The defense requested a jury instruction on self-defense, based on the pattern instruction, which included the language that "The defendant also has no duty to retreat before [threatening][using] force likely to cause [death][serious bodily injury]." R.731. The defense argued to the judge that, even if the defendant was engaged in some form of illegal activity such as smoking marijuana, there was no "nexus" between that activity and the need to engage in self-defense. Vol. 32/1345.

The trial court made a finding: "He's clearly engaged in unlawful activity, the Court finds that." Vol. 32/1347. The defendant objected to this finding. Vol. 32/1347. The court stated that its finding was not based on marijuana use but rather that the defendant "carrying around a

loaded 9mm is unlawful activity." Vol. 32/1348. Defense counsel further lodged a "sixth amendment objection to the trial judge making a finding of fact." Vol. 32/1349.

B. Self-Defense Instruction, Including Duty to Retreat.

The court instructed the jury on self-defense and defense of another. It included language imposing a duty to retreat if possible:

> The law of self defense requires that the defendant must have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat if, and to the extent, that it can be done in safety.

Vol. 33/1467-1469.

VI. CLOSING ARGUMENTS.

A. Closing Argument for the State.

The State's closing argument focused substantially on the forensic, ballistic, and circumstantial evidence linking Mr. Booker to the car.[4] The prosecutor (ADA Philip Morton delivered the initial argument) emphasized the importance of the confession to Linda Hatch, noting all the details to which she testified which were corroborated by other evidence. Vol. 32/1364.

Of particular importance for appeal, the prosecutor focused on creating a time line from the various videos in evidence. He noted that the time stamp on the Rosles's security video was not accurate, but contended that it was still possible to determine exactly when the shots were

[4] As the prosecutor stated in his argument, Vol. 32/1356, he had prepared his PowerPoint presentation prior to Mr. Booker's testimony, and thus much of his presentation dealt with evidence on points that, after Mr. Booker's testimony earlier that day, were no longer in dispute.

fired by cross-referencing that video with Officer Wilson's cruiser video. Both videos showed the time Officer Wilson's cruiser arrived and stopped at the scene, and Officer Wilson's cruiser video had an accurate time stamp. He stated:

> And what you know, of course, is that Mr. Rosles's video time line on that [video] is not accurate. It has a different date and a different time. Now, that's very important because you'll look at that time on there, his video is a reference point for the time line of this … whole series of events. Okay? So at 6:52 I believe it was 25 is when this vehicle shows up on there starting to pull over to the side on Linden.

Vol. 32/1365. The prosecutor noted that the car had pulled across the road and stopped abruptly, claiming "I think it suggests to you that something is going on in that car at the time it pulls over toward the curve." Vol. 32/1366. He contended that, based on the video of Mr. Rosles, the car sat for ninety-seven seconds before the shots started. Vol. 32/1366-1367. He played the video, and pointed out the point at which the dog, sitting on Rosles' porch, flinched and ran away, at 6:54:00. Fifteen seconds later, two people began running away. He explained:

> Do you see that dog? Do you see that dog flinch and run away? So it's right at 6:54 on Mr. Rosles's clock and it's another 15 seconds, if you will, before you see those guys running away. So we say that puts the time of the first shot at 5:18, and here's how we get there. Right there at the bottom you'll see 5:25:30 is when Officer [r]olls up to -- to the scene.
>
> And so if you look, and I urge you to do this, look at Mr. Rosles's video and you'll see Officer Wilson show up at 16:07:06 [*sic*, presumably 7:00:06][5]. So that's over six minutes after the first shot that Officer Wilson shows up, okay? So if he shows up at 5:35 [*sic,* 5:25], 5:19 plus a little bit more, 5:18 something is going to be the time that that first shot was made. And that's very important. We'll talk about that in just a minute.

Vol. 32/1367.

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[5] Presumably the prosecutor stumbled over the words, and intended to or did say 7:00:06, which is unquestionably when Officer Wilson rolled to a stop on the Rosles video.

The prosecutor argued that there was proof of a fight in the car, that Mr. Booker fled, and that a cell phone was missing. Vol. 32/1373. He continued to discuss the cell phone:

> We say the cell phone records, Mr. Cook told you a whole lot about, shows that this defendant used that cell phone twice after the killing. And I say that because when you do the extrapolation, if I can call it that, when you match up these videos and go back over six minutes from the time Officer Wilson arrived, that gives you the time -- the approximate time, within seconds I suggest to you, of when those first shots were fired. Okay? And that rolls it back to 5:18 going on 5:19.
>
> He calls his female friends and that phone was turned on and off again 28 times up through the end of these records through November 30th. And these are the four calls that are pertinent, and if you will see, and remember you've got to add an hour, but those last two outbound calls from that phone were to two different females. One at 5:18, almost 5:19, and one at a minute apart 5:19, almost 5:20.
>
> Now, Mr. Booker would have you believe that he was done using that phone long before this skirmish broke out in the car. Well, think of it this way, if you add back the 97 seconds, before the five -- little over five minutes, six minutes, that's at seven and a half minutes or there abouts, if that -- according to his testimony that phone would have no longer been used by him. And these records show that he is not telling the truth about that.
>
> And what makes sense about these last two calls, is that he and Mr. Robinson -- let's take a little closer look at these things -- that after this killing, he's still got the phone and he needs a way out of there. Who does he call? He first calls his girlfriend. Can't get her. Who does he call? The next female friend he calls, Shanterra Washington.

Vol. 32/1373-1374.

The prosecutor argued that Linda Hatch should be believed as to Mr. Booker's confession because she knew details that were not publicly available. Vol. 32/1375-1376.

B. Closing Argument for the Defense.

Defense counsel argued that, given that there was no doubt that Mr. Booker shot and killed Mr. Caldwell in the car, the only piece of evidence presented by the State that shed any light on what happened in the car was the testimony of Linda Hatch. Vol. 32/1381. She argued

that Tyshon Booker's testimony was entirely consistent with all the forensic and ballistic evidence. Vol. 32/1388. She noted that Tyshon Booker's testimony about getting into the car to smoke marijuana with Mr. Caldwell was consistent with the autopsy of Mr. Caldwell, the package of cigarillos in the car, and the testimony of J'Andre Hunt that he would get in the car with Mr. Caldwell and smoke. Vol. 32/1389. She contended that Mr. Booker made his phone calls prior to the shooting. Vol. 32/1391. She noted that Ms. Hatch had not told police about his supposed confession between Monday and Friday. Vol. 32/1399. She noted that the purported plan for robbery, testified to by Ms. Hatch, did not make any sense given that Mr. Caldwell was larger than the juveniles and had a gun. Vol. 33/1401. She stated that Ms. Hatch had lied directly to the jury in falsely denying any involvement with drugs and claiming that Tiffany was sending the messages, which Tiffany disclaimed. Vol. 33/1402. She continued:

> Tiffany said something very powerful though, she said, my mom treated Tyshon just like she did her other kids. It's sadly true. When Linda Hatch felt the heat about something she didn't want to take responsibility for, she blamed it on Tiffany. She blames things on Tyshon. She blames the kids around her.
>
> She lied to you about that. She lied to you when she said, no, this wasn't me again about the drugs. Flower man called taking orders. That was somebody else. Again, anything that was so abundantly clear is about weed, she had an explanation to blame others for. Except one of those people who came in said no.
>
> I did not have a sexual relationship with Mr. Booker. Are you kidding me? You sent that image to a 16 year-old child? How many messages did we read where she wrote cum on, c-u-m? Hey, Boo. Mr. Booker's going over to the house at 12:31 at night. She's taking photographs of Mr. Booker without his shirt on with his pants pulled down that low. Think about the video of these young men walking around half naked in her house. And what's remarkable is that no one in the police department was like, hey, what's that about? Remember because when the State opened they said she's like the friendly mother figure.
>
> Ladies and gentlemen, she's not a friendly mother figure. She's exploitative. She's abusive. And she's predatory.

Vol. 33/1403-1404. Counsel argued that Ms. Hatch did not tell the police her story on Wednesday, when they were at her house, because she "hadn't made it up yet":

> She made it up between Wednesday and Friday. Because if you roll into the police and you say, this young man told me he killed someone in self defense, you're not all that helpful. She knew that. She needed to be a friend and not a foe, so she made herself one.

Vol. 33/1408. Counsel noted that Ms. Hatch also asked police about becoming a confidential informant, which was a sign that she is "somebody who knows the heat is about to come down." Vol. 31/1408. She explained: "[S]he was prepared to do what it took to make sure that she was a witness in this courtroom and not a defendant in another." Vol. 33/1408.

C. Rebuttal Argument for the State.

In rebuttal argument, the State focused on the issue of self-defense and the duty to retreat. The prosecutor (ADA Takisha Fitzgerald delivered rebuttal argument) stated:

> So we anticipate the Court's going to instruct you that the law of self defense requires that the defendant must have employed all means reasonably in his power consistent with his own safety to avoid danger and an immediate necessity of taking another's life. This requirement includes the duty to retreat and to the extent that it can be done in safety.
>
> So the reason I say that is because in cross examination I was asking him about the door. The car door, whether or not he had an ability to get out of the car, and whether or not Mr. Robinson did. So if what Mr. Booker told you was the truth, that the events took place the way he described them, then he cannot claim self defense because he was illegally in possession of a firearm, and he had the ability to get out of --

Vol. 33/1411. The defense objected, and then the prosecutor reiterated: "He had the ability to open up the car door and get out of the car on his own as does Mr. Robinson." Vol. 33/1412. The prosecutor claimed that the evidence provided "a circle of corroboration," and that the case

was not about Linda Hatch. Vol. 33/1412. The prosecutor returned to the issue of the timing of the videos:

> Now, let me go back to what General Morton was talking about with the video. So to be clear, you've got the video that shows the dog flinching. That's when the shots happened. And so if you continue to watch the video you're going to see when Officer Wilson shows up at the scene, and so that's going to give you the time period from the time that the dog flinched until the time Officer Wilson got there. That's going to give you the period of time that it took for the police to get there.
>
> And so the point is, is that since those times aren't synced up, what you've got to do is you've got to go to the time of the dog flinching, which is the gun shots, and then you've got to take the time that Wilson arrives. And the time that Wilson arrives on the … Mr. Rosles's video, that's going to equate to the time of Wilson arriving on the scene on his video. Because the time on his video is accurate. And so whatever … the difference is in those two times is the time that you subtract from up here, if that makes sense.
>
> But this is -- and I ask you, don't -- do not fall into that place where you allow this case to come down to Ms. Hatch.

Vol. 33/1417.

OTHER FACTS RELATING TO ISSUES RAISED ON APPEAL

I. MOTION FOR NEW TRIAL RELATING TO IMPROPER PROSECUTORIAL ARGUMENT.

In the defendant's motion for new trial, the defense raised the argument that the State had presented improper closing argument relating to the timing of the shots, alleging that the prosecutor had misstated the evidence in arguing that Mr. Booker made two phone calls after the shooting. The defendant contended that the prosecutor's calculations were seriously flawed. At the hearing on the motion for new trial, defense counsel discussed the closing argument:

> And so I remember sitting there, I had two primary thoughts. One, I had the thought that's actually pretty clever. That's a good way to figure that out, and I really wish I had thought of using the videos in that way to come up with the time. Because to be honest, we had not approached it like that.
>
> And my second thought was, that can't be right. And I remember thinking maybe I should object. But in good faith I couldn't object because I couldn't say that I had done that [calculation] and it was wrong. And so we had to let it go in the sense that I couldn't stand up and say, objection, your Honor, that's not what the evidence is, when I had not gone through the videos. And so I couldn't say that Mr. Morton wasn't being accurate as to what the videos showed.
>
> But after the trial we did have an opportunity to look at these things.

Vol. 39/139. Counsel explained that the prosecutor's math was incorrect, and that the evidence was in fact consistent with the defendant's testimony that the two last calls were placed prior to the shooting. Vol. 39/139-142. (The exact details of this point will be set out below.)

The court asked whether the jury could also have done this calculation. Counsel responded:

> The jury had the same facts other than I will say I had to do this about four times over the course of about an hour and a half trying to figure it out. And could they have done that in the back room? They could have. But they certainly were entitled to think that the State of Tennessee wasn't going to get up here and make these assertions with no justification for it, your Honor.

> It's just simply not true. The closing argument the State of Tennessee made to send Tyshon Booker to prison for the next 51 years is just not accurate.

Vol. 39/142.

At the hearing, the State declined to engage in the specifics of the calculations. It began its response by saying that its argument was based on its "interpretation of the evidence. The State is not required to accept what the defendant says as the truth." Vol. 39/143. The court pressed it to say whether it disagreed with defense counsel's calculations that had just been presented in court. It responded:

> As an officer of the court, I am standing by the time analysis done by General Morton, because I know how much time he spent on that…. And I do not believe for one second that General Morton made any misstatements intentionally to mislead anybody. I do not believe that.

Vol. 39/144.[6]

The court denied the motion for new trial by written order on July 24, 2018. It did not explain its ruling with respect to the State's closing argument. R.1088.

II. POST-TRIAL PROCEEDINGS RELATING TO JUROR EXPOSURE TO EXTRANEOUS INFORMATION.

A. Motion and Affidavit.

The defendant filed a motion for new trial on April 6, 2018. R.968. On May 29, 2018, the defendant filed a supplemental motion for new trial, raising an issue relating to access to the Internet by the jurors during deliberations. R.975. The defendant also filed a motion for an

[6] The prosecutor who made the primary closing argument, ADA Philip Morton, appeared for the State at this hearing, *see, e.g.*, Vol. 39/147, but the discussion of this issue was handled by his co-counsel, ADA Takisha Fitzgerald. Mr. Morton did not speak regarding his calculations.

evidentiary hearing relating to the juror in question, Jennifer L., along with an affidavit of counsel regarding his conversations with her, in which he stated that a juror had told him that jurors used the Internet to "look up what a life sentence constituted in Tennessee," and that jurors had used the Internet to look up "terms that were unfamiliar to jurors." She also told him that, after this was done, the information would be read aloud to other jurors. R.977, R.979, R.981. At a hearing on June 1, the court ordered that it would hold an evidentiary hearing at which the juror would testify. Vol. 36/5-6. The court ruled that the subpoena would come from the court rather than from defense counsel. Vol. 36/7.

B. Motion for Additional Subpoena.

On June 12, 2018, the defense filed a motion for a subpoena for an additional juror to testify at the upcoming evidentiary hearing. R.1068. The defense also filed an affidavit from an investigator, stating in part:

> 2. At the request of counsel, I contacted Deborah B. [the second juror] and met with her on June 6, 2018.
> 3. In that meeting, Juror Deborah B. stated that several jurors had been using Google to look up terms during deliberations. She explained that, on occasions when the jury was unclear on something, the jurors had looked up the "Webster meaning" of certain words.

R.1071.

C. Hearing.

At a hearing on June 22, 2018, the trial court announced that it was not going to subpoena the second juror. Vol. 37/4. At the hearing on the motion for new trial on July 2, the court began the questioning of the first juror, Jennifer Lambert. Vol. 38/6. She was asked if she looked up any terms or information on the Internet. She answered:

> The only thing that we looked up was the life sentence and how many years it involved, whether it was a 20 year sentence or -- but we figured out -- found out in the State of Tennessee it's 51 years automatic…. As far -- and then the only other things was -- that we looked up was terminology and it's been so long that I honestly could not tell you what the exact words were, but it was just a definition. I do know that. It was a definition and it had to -- it was a medical word was one of them.

Vol. 38/7. She continued: "I don't recall what the word was, but it was a medical word that someone didn't understand, so we just Googled the word to find out what the definition was." Vol. 38/8. She clarified that this took place when everyone was in the jury room, and a juror got on his or her phone and looked it up. Vol. 38/8. She explained, in response to the court's questioning of "why the jury did this when the Court had instructed it not to," that she had not realized that they were not allowed to use their phones. No one had taken them away or told them they could not have their phones in the deliberation room. Vol. 38/8.

On questioning by defense counsel, Ms. Lambert clarified that "we all were discussing it and then one person actually looked it up." Vol. 38/9. That happened when they were sitting around the table, and could be heard by all the jurors. Vol. 38/10. As to the medical term, it was a term that had "come up in trial." Vol. 38/10. That information was also looked up by one juror and shared with the others. Vol. 38/11. She clarified that she understood that the fifty-one-year sentence would attach to a conviction in this case. Vol. 38/13. The prosecutor clarified that the jurors had not looked up information specific to Tyshon Booker. Vol. 38/14.

D. Argument and Ruling.

In argument on the juror issue, defense counsel argued that this testimony "does raise the need for us to hear from the other juror." Vol. 39/118-119. He noted that the second juror

"remembers that there was more than one term which they looked up the dictionary definition for." Vol. 39/119. He continued: "[W]ithout presenting her, we don't have that fact in the record. And also without an inquiry into her we don't know what those terms were." Vol. 39/119. The court responded: "Well, your objection is noted and respectfully overruled." Vol. 39/119.

The court subsequently issued an Order relating to the extraneous juror information issue. R.1089. It found that the jury received extraneous information, but that receipt was "harmless" and "did not alter the verdict in this case." R.1089. The court reasoned that, as to the medical terms: "Ms. Lambert was unable to specify what medical terms were 'googled', and it would be pure speculation to assume that some unknown medical term adversely affected the verdict." R.1090. As to the length of a life sentence, the court stated that "within the context of this case, that this information did not impact the verdict." R.1091.

III. INFORMATION REGARDING JUVENILE BRAIN DEVELOPMENT AND EVALUATION OF TYSHON BOOKER.

At the hearing on the motion for new trial, the defense again presented the testimony of Dr. Keith Cruise. Vol. 38/19. Dr. Cruise testified regarding adolescent brain development. He explained that, by age sixteen, adolescents have similar cognitive powers as adults. However, their psychosocial development and maturity of judgment, issues related to frontal lobe development, is much slower. Vol. 38/29. He identified the physical processes that play into this delay, including the process of development of certain parts of the brain through myelination, synaptic pruning, and redistribution of domaminergic receptors. Vol. 38/31. He explained that

the brain areas relating to "emotions and arousal and reward sensitivity," which he characterized as the "gas pedal part of the brain," are fully developed by the mid-teens. On the other hand, the cognitive control system, what he called the "brake pedal" part of the brain, develops later. He continued:

> [W]hat you can see is because the two systems develop at different time periods, they mature at different time periods, the gap between the cognitive and the social and emotional control center is implicated and [that is] why adolescents have difficulties regulating … their emotions, regulating and moving themselves away from rewards.

Vol. 38/39. It is not until between age twenty and twenty-five that the two systems become equally developed. Vol. 38/40.

He further explained that brain development could be affected by environmental factors. Vol. 38/45. He discussed Mr. Booker's environment, based on his earlier clinical interviews of Mr. Booker and his family. Mr. Booker was a victim of family violence and physical abuse. He also had witnessed community violence, with several peers killed, and indeed his own father was murdered shortly before his birth. He also experienced a home invasion where he was held at gunpoint, and saw his mother being physically beaten on another occasion. At age 14, an aunt died of a stroke in front of him, and also his grandfather was murdered in his home. Vol. 38/55-57. Dr. Cruise diagnosed Mr. Booker with PTSD. Vol. 38/61.

Dr. Cruise testified that PTSD can have a specific impact on brain development, causing the limbic system, including the amygdala, to become hypersensitive. He explained:

> [T]he amygdala is like the brain's alarm system. It's the first part of the brain that signals and starts to mobilize resources, other parts of the brain, in developing a response to stress.
>
> When you've experienced extreme traumatic events, that amygdala becomes hypersensitive to threat. The alarm becomes activated. And it becomes

> activated very, very quickly under actual threat and it also becomes activated when actual threat is not present as well.

Vol. 38/66. He noted that Mr. Booker had never received any treatment for PTSD. Vol. 38/71.

Finally, Dr. Cruise discussed how brains continue to mature as individuals move into their twenties. He noted that PTSD can now be treated through therapy and that in his opinion, Mr. Booker was amenable to treatment. Vol. 38/71-79. He stated: "[T]here were multiple indicators to me that would be suggestive of Tyshon's amenability to trauma specific treatment." Vol. 38/77. He stated he was "confident" in this assessment. Vol. 38/79.

IV. *BRADY* ISSUE RELATING TO NON-DISCLOSURE OF EYEWITNESS IDENTIFICATION IN JUVENILE COURT.

A. Order for Disclosure of *Brady* Information.

After the defense filed a motion for discovery in Juvenile Court, an order was entered, on December 10, 2015, that the State turn over exculpatory evidence as defined by *Brady v. Maryland*, 373 U.S. 83 (1963). R.218.

B. Motion to Dismiss in Criminal Court.

After transfer, the defense filed a motion in Criminal Court to dismiss based on a *Brady* violation during the transfer proceedings. R.610. In that motion and the accompanying memorandum, the defendant stated that the State had provided (in response to defense inquiry) a notice of discovery after the case was transferred to Criminal Court. That notice indicated, as "Brady material," the following:

> Greg Caldwell, the victim's brother, told KPD that an individual at the "Thumbs-Up" store on Magnolia at the corner of Spruce by the street name of "Junk Yard" told Caldwell that he observed Jaquez Hunt and Dre Hunt running from the

> vehicle. Greg Caldwell emailed a picture of the the [sic] people that Caldwell understood to be Jaquez and Dre Hunt.

The defense alleged that this information had not been previously provided to the defense in any form either in the Juvenile Court or in prior discovery in Criminal Court. R.623.

C. Hearing on Motion to Dismiss.

A hearing was held on the motion to dismiss in Criminal Court on February 10, 2017. The lead investigator Det. Clayton Madison testified that, on the night of the homicide, another investigator took a call from the decedent's brother at around 11:30 p.m. Vol. 11/8. The brother said that an individual with the street name of Junkyard had told him that he saw Jaquez Hunt and Dre Hunt running from the vehicle. Vol. 11/11.

Det. Madison testified that he spoke to Mr. Caldwell (the brother) that night. The next day, he conducted a "knock and talk," whereby he detained J'Andre Hunt and took him to headquarters. He interviewed him and took his DNA and fingerprints. Vol. 11/17. The interview was taped and provided to the prosecutor. Vol. 11/18. Det. Madison said that he contacted "Mr. Junkyard," but he "would not tell me his name, and only told me that he did not say that and walked away from me." Vol. 11/22.

On cross-examination by the State, Det. Madison testified that, during his interrogation, J'Andre Hunt stated that at the time of the shooting he had been home watching a football game, and that Jaquez Hunt had been at work. Another investigator went to "We're Cooking" (a restaurant) and confirmed that Jaquez was at work at that time. Vol. 11/26. The investigation of them stopped, as "they had alibis, and it did not appear that they were suspects." Vol. 11/26. The confirmation as to Jaquez came "from his supervisors," and confirmation of J'Andre's alibi

was provided by his mother: "I spoke with his mother. She said that he was at home." Vol. 11/29.

D. Ruling by the Court.

The Court first stated that: "I agree with you. It's *Brady* material." Vol. 11/40. It then framed the relevant question before it as whether "[T]his information would have made a difference to [Juvenile Court] Judge Irwin." Vol. 11/49. It continued:

> The question before this Court is, one, has there been a *Brady* violation? And typically, folks, we're always considering whether or not there's been a *Brady* violation after a trial has occurred and whether or not that impacted a defendant's right to a fair trial. That's the standard. Just because the State may or may not have turned over some piece of information which may or may not have been exculpatory does not automatically, if that fact is proven, equate to having a new trial.
>
> I think it is significant that Judge Irwin was not required to find proof beyond a reasonable doubt. As the fact finder in Juvenile Court, he was required to find probable cause. He had to find the other criteria, as required by the statute, but he was required to find probable cause. So the question becomes, does the fact that the Defense did not have the information that they now have, that they now have in preparation of their defense for Mr. Booker before the trier of fact in this court, the jury, does that equal and equate to their right to have this case dismissed at this juncture and sent back to Juvenile Court? This Court finds that it does not.

Vol. 11/59-60.

ISSUES RAISED ON APPEAL AND DECISION OF THE COURT OF CRIMINAL APPEALS

I. CLAIM OF *APPRENDI* VIOLATION DUE TO INCREASE IN STATUTORY MAXIMUM BASED ON FINDINGS MADE BY JUVENILE COURT JUDGE.[7]

On appeal to the Court of Criminal Appeals, the defense argued that under Tennessee law, the maximum sentence a juvenile can face in the Juvenile Court is incarceration until age nineteen. The maximum sentence a juvenile can face in Criminal Court after transfer, however, is life imprisonment. That increased maximum sentence is available only if a Juvenile Court makes certain findings, under a preponderance standard, at the transfer hearing. The defense contended that this statutory structure constitutes a straightforward violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In that case, the Supreme Court of the United States 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*. at 490. Mr. Booker went from facing a sentence of two years to facing (and receiving) a sentence of life based on findings made not by a jury and not under a beyond-a-reasonable-doubt standard. The defense contended that this is contrary to *Apprendi*.

The Court of Criminal Appeals rejected this argument. It began by observing that this is "an issue of first impression in Tennessee." 2020 WL 1697367 at *15. It noted that several other jurisdictions had rejected similar claims, albeit under different rationales. *Id.* at *18. It set out its view of the issue:

> As an initial matter, we conclude that Tennessee juvenile transfer hearings are dispositional, rather than adjudicatory. As noted in our principle authority,

[7] The issues are discussed in this section in the order they were addressed in the opinion of the Court of Criminal Appeals.

> juvenile proceedings are not criminal prosecutions, and transfer determinations do not determine guilt or innocence. The transfer statute and the resulting findings of the juvenile court function only to determine the most appropriate forum to address the conduct for which the juvenile defendant is charged. We additionally conclude that even if *Apprendi* applied to the juvenile hearing transfer process, there can be no violation of the Defendant's Sixth Amendment right to a jury trial in this case. There is no question that the juvenile transfer statute exposed the Defendant to greater punishment. The Defendant's focus here however is misplaced because the statutory maximum sentence for purposes of *Apprendi* is not release upon the Defendant's nineteenth birthday as argued by the Defendant. The *Apprendi* rule applies only to statutes that enhance sentences beyond the prescribed statutory range for a given offense…. In this case, the Defendant was convicted by a jury of first-degree felony murder, which, for juvenile offenders, is statutorily punishable by a maximum sentence of life without parole.

Id. at *19. It then went on to reject the overall position of the defense:

> Even applying the substance over form test to our analysis, as argued by the Defendant, we are not convinced *Apprendi* was intended to be so broadly construed. Accordingly, under these circumstances, the Defendant has failed to establish a violation of his Sixth Amendment right to a jury, and he is not entitled to relief.

Id. at *19.

II. CHALLENGE TO ADEQUACY OF EVIDENCE TO SUPPORT TRANSFER.

The defense argued on appeal that there was insufficient evidence presented at the transfer hearing to justify the Juvenile Court's transfer decision. It argued in particular that the Juvenile Court had rejected the expert evidence presented by the defense as to Mr. Booker's amenability to rehabilitation. In the absence of any contrary expert evidence, or any reason to dispute the defense expert's credibility, the Juvenile Court's decision was contrary to the evidence. The Court rejected this argument. It noted that there was an extensive hearing and held that the Juvenile Court's decision was based on the evidence. It wrote:

> The juvenile court considered Dr. Cruise's testimony and agreed with both mental health experts "completely." However, when the juvenile court considered Tenn. Code Ann. § 37-1-134(b)(5), the Defendant's potential for rehabilitation, the juvenile court struggled with the amount of time left to rehabilitate the Defendant based on his age. After weighing the amount of time before it lost jurisdiction over the Defendant based on his age against the seriousness of the crime and the safety of the community, the juvenile court determined that the Defendant should be transferred to criminal court to be tried as an adult. Because the record shows the juvenile court had "reasonable grounds" to believe that the Defendant committed first degree felony murder and that the interests of the community required that the Defendant be put under legal restraint, the Defendant is not entitled to relief.

Id. at *20.

III. CLAIM OF *BRADY* VIOLATION IN JUVENILE COURT IN FAILURE TO TURN OVER EYEWITNESS IDENTIFICATION OF THIRD PARTIES AS THE CULPRITS.

The defense argued that there was a *Brady* violation in the Juvenile Court. The defense claimed that, even though the Juvenile Court had ordered disclosure of *Brady* material, the State had not turned over (until after transfer to Criminal Court) evidence of a statement by an eyewitness who identified two individuals by name as having run from the scene (and thus of being the perpetrators). Neither of these individuals were Tyshon Booker or Bradley Robinson. The Court of Criminal Appeals rejected the State's argument on appeal that *Brady* does not apply in Juvenile Court. It held:

> [O]bviously, the State must disclose any exculpatory evidence to the child's attorney per *Brady*. This is consistent with our principle holdings above, concluding that a juvenile transfer hearing is a critical stage in the proceedings which "must measure up to the essentials of due process and fair treatment."

Id. at *23. The Court also held that the information in question was in the possession of the State as it was known to the officers even if not to the individual prosecutors. *Id.* at *23. It concluded, however, that this eyewitness testimony of a third-party culprit was not favorable to the defense and thus did not need to be turned over due to perceived weaknesses in the identification. It wrote:

> Nevertheless, we conclude that the information concerning the other potential suspects was neither favorable nor material to the Defendant's transfer hearing. Detective Madison testified that he interviewed J'Andre Hunt and Jaquez Hunt, both of whom were quickly eliminated as suspects based on their alibis and other information discovered by the police. These individuals did not appear to be legitimate suspects, but rather, stray leads that were dismissed early in the case…. [The inculpatory evidence presented at the transfer hearing] was more than enough to support the juvenile court's finding of probable cause, and we do not believe that the information about two potential suspects that were abandoned very early into the case would have impacted the decision to transfer to criminal court to be tried as an adult.

Id.

IV. CLAIM OF ERROR IN GIVING JURY INSTRUCTION THAT DEFENDANT HAD A DUTY TO RETREAT BEFORE USING DEADLY FORCE.

The defense argued on appeal that the trial court had erred in giving an instruction that imposed on Mr. Booker a duty to retreat if possible before using deadly force. The defense presented two related positions. First, it contended that, even though he was arguably engaged in illegal activity by possessing a firearm as a juvenile, the self-defense statute has a causal nexus requirement between the illegal activity and the duty to retreat. That is, a defendant has a duty to retreat before using force in self-defense only when it is the illegal activity that has precipitated the need to use force, and here the possession of a firearm by a juvenile did not produce the

confrontation. The Court of Criminal Appeals agreed with this position. It engaged in a lengthy analysis of this issue, an issue left open by this Court in its recent decision in *State v. Perrier*, 536 S.W.3d 388, 392 (Tenn. 2017). The Court concluded that a nexus requirement was necessary. It wrote:

> To interpret the statute without a nexus between the "unlawful activity" and the duty to retreat would lead to absurd results. For example, if a defendant had failed to file her income taxes or failed to timely file her vehicle registration or failed to renew her gun license, then she would be unable to avail herself of Tennessee's self-defense statute. As one court has explained, application of the self-defense statute without a nexus to the conviction offense would nullify virtually every claim of self-defense.

2020 WL 1697367 at *27. It continued: "Accordingly, we conclude that a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary before the trial court can instruct the jury that the defendant had a duty to retreat." *Id.*

Applying this conclusion to this case, the Court found that the fact the defendant was a juvenile in possession of a firearm was not necessarily enough to establish the nexus: "status offenses such as this will rarely qualify as unlawful activity because a person's status alone cannot provoke, cause, or produce a situation." *Id.* at *27. It found, however, that the fact the defendant was engaged in a robbery at the time of the homicide did establish the requisite nexus, and thus the jury was properly instructed that Mr. Booker had a duty to retreat before engaging in deadly force. *Id.*

Secondly, the defendant argued that it was a constitutional violation to allow a determinative legal issue, such as whether the defendant was engaged in unlawful activity so as to trigger a duty to retreat, to be determined by the trial court under a clear-and-convincing

standard, rather than by a trial jury under a beyond-a-reasonable-doubt standard. The Court rejected this argument as precluded by this Court's ruling in *Perrier*. *Id.* at 24 n.5.

V. CLAIM OF PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT BASED ON FALSE TIMING CALCULATIONS.

The defense argued on appeal that the prosecutors had engaged in misconduct in closing argument by presenting false time calculations derived from the Rosles video. The State had claimed that the defendant had testified falsely by indicating that the last two phone calls were made prior to the shooting; the prosecutors said that the evidence established instead that those calls were made after the shooting in an effort to arrange a getaway. The defense argued on appeal that, although there was no contemporaneous objection to these misstatements, plenary review should still be available given that it was impossible, in the moment, for defense counsel to double-check these calculations (which had not been presented from the witness stand). The defense also pointed to a case from this Court, *State v. Hawkins*, 519 S.W.3d 1 (Tenn. 2017), which applied plenary review to a closing argument issue even in the absence of a contemporaneous objection for the explicit reason that it was preserved in the motion for new trial. Here, the issue had been included in the motion for new trial.

The Court agreed with the State that review was only for plain error. 2020 WL 1697367 at *28-29. It did not specifically respond to the defense's argument that it was impossible for an objection to be offered in good faith in the middle of this wholly unexpected argument. It distinguished *Hawkins* as "generally involv[ing]" information that had been the subject of a pre-

trial ruling. *Id.* at *29. Under plain error review, the Court found that the defense had not established that a "substantial right" of his had been adversely affected. *Id.* at *30.

In doing so, the Court agreed with several of the defendant's claims. First, it concluded that the State's argument was factually incorrect: "[T]here can be no question that the State erroneously calculated the time of the first shot as 5:18, rather than 5:19:24." *Id.* at *30. It set out at length the correct calculations, consistent with the defense argument on appeal. Second, it concluded that this misstatement was relevant to the issues in dispute at trial: the State's incorrect theory was "significant because it directly contradicted the Defendant's version of events." *Id.* Third, it agreed that this could have been harmful to the defense: "Based on the misstatement by the State, it is conceivable that the Defendant was deemed less credible by the jury, and the State argued this exact point in closing." *Id.* at *30. However, the Court ultimately concluded that the error was not egregious enough to constitute plain error. It held: "[E]ven assuming that this case boiled down to a credibility contest between Hatch and the Defendant, the State's error in misstating the time of the first shot by a minute and twenty-four seconds could not have tipped the credibility scale so much so to have changed the outcome of the trial. Having failed to establish plain error, the Defendant is not entitled to relief." *Id.* at *30.

VI. CLAIMS OF ERROR RELATING TO JUROR MISCONDUCT IN SEARCHING INTERNET FOR INFORMATION DURING JURY DELIBERATIONS.

The defendant argued that the trial court had erred in denying the motion for new trial based on the actions of jurors, as established by testimony of a juror at a post-trial hearing, in

conducting Internet research during deliberations. It also argued that the trial court had erred in refusing to issue a subpoena for a second juror to testify about the improper research.

The Court of Criminal Appeals agreed that the jury had been exposed to extraneous information through this course of action. *Id.* at *32. It concluded, however, that the trial court was correct that this exposure to information was harmless. It wrote:

> While it was highly improper for the jury to research this information in violation of the instruction of the trial court, the victim's cause of death was not in dispute, and as such, medical terms did not play a significant role in this case. Similarly, the meaning of a life sentence in Tennessee did not bear on the guilt or innocence of the Defendant. Because this information was not prejudicial, the Defendant is not entitled to a new trial on this issue.

Id. at *33. Further, the Court concluded that there was no abuse of discretion in refusing to hear from the second juror. The Court wrote:

> [W]e conclude that the trial court properly determined that it was unnecessary to do so. The affidavit of the second juror did not reveal anything that would "add to or supplement" the testimony of juror Lambert. It stated generally that the jury used Google to look up terms and the Webster dictionary definition of certain words.

Id. at *33.

VII. CLAIM THAT MANDATORY LIFE IMPRISONMENT FOR A JUVENILE, BASED ON OFFENSE OF CONVICTION AND WITH NO OPPORTUNITY FOR INDIVIDUALIZED CONSIDERATION AT SENTENCING OF CULPABILITY OR AMENABILITY TO REHABILITATION, IS UNCONSTITUTIONAL.

Finally, the defense argued that the imposition of a life sentence as an automatic consequence of a felony murder conviction, particularly in light of the fact that a life sentence in Tennessee requires service of fifty-one years, was unconstitutional when applied to an offense

committed when the defendant was a juvenile under the Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460 (2012). The Court rejected this argument. It stated: "While we understand the Defendant's argument, we must reject his invitation as we are bound by court precedent." *Id*. at *33.

REASONS SUPPORTING REVIEW BY THIS COURT

I. THIS COURT SHOULD RESOLVE WHETHER THE FEDERAL OR STATE CONSTITUTION PROHIBITS SENTENCING A JUVENILE TO A LIFE SENTENCE, A FIFTY-ONE YEAR SENTENCE HE IS UNLIKELY TO SURVIVE, WITHOUT ANY DETERMINATION BY THE SENTENCING COURT AS TO THE JUVENILE'S RELATIVE CULPABILITY OR POTENTIAL FOR REHABILITATION.

A. Introduction.

This case presents an important and novel issue of constitutional law as to the legality of an automatic life sentence for an offense committed by a juvenile. In *Miller*, the Supreme Court held that it is unconstitutional to impose automatically a sentence of life imprisonment without the possibility of parole ["LWOP"] on a juvenile. Before any such punishment can be imposed, there must be an individualized consideration of the juvenile's culpability and potential for rehabilitation. This holding was based on a line of cases from the Court focusing on unique aspects of juveniles: in part due to their incomplete brain development, they are less morally culpable than adults, and also present greater opportunity for rehabilitation and change. Mr. Booker submits that the sentence imposed here, a life sentence for a juvenile convicted of felony murder, is contrary to *Miller*.

As noted by the Court of Criminal Appeals in this case, that court has been reluctant to expand *Miller* beyond its precise literal holding: that LWOP cannot be imposed on a juvenile merely based on the offense of conviction without any individualized sentencing. In Tennessee, a defendant convicted of first-degree murder (in the absence of additional notice) is not sentenced to LWOP but to a life sentence, which will require service of at least fifty-one years. *See Brown v. Jordan*, 563 S.W.3d 196 (Tenn. 2018). The Court of Criminal Appeals has thus relied on the

difference between LWOP and a fifty-one year sentence. Judges on that Court, however, have expressed discomfort with this obviously formalistic reading of *Miller*, given the minimal practical difference between the two sentences. As Judge Thomas wrote in one case:

> In Tennessee, both juveniles and adults convicted of first degree murder are treated exactly the same. I feel constrained to observe that, although Tennessee's sentencing scheme allows for possible release of a defendant convicted of first degree murder after the service of fifty-one years, it is only in the rare instance, if ever, that a juvenile so sentenced would be released back into society. Even if the judge or jury decides that the features of the juvenile or the circumstances of the homicide require a sentence other than life without parole, the effect of the sentence is still the same. The juvenile has no meaningful opportunity for release whether you name the sentence imprisonment for life or imprisonment for life without the possibility of parole, and the juvenile will likely die in prison.

State v. Zachary Everett Davis, No. M2016-01579-CCA-R3-CD, 2017 WL 6329868, at *26 (Tenn. Crim. App. Dec. 11, 2017) (Thomas, J., concurring).[8]

In the same way, late last year a federal appellate judge voiced an even stronger assessment of the constitutionality of the Tennessee structure. In *Atkins v. Crowell*, 945 F.3d 476 (6th Cir. 2019), a habeas challenge to a Tennessee conviction, Chief Judge Cole penned a concurring opinion in which he highlighted the *Miller* problem for Tennessee life sentences for juveniles convicted of murder. He acknowledged that, under the highly-deferential standard mandated by the Antiterrorism and Effective Death Penalty Act of 1996, he could not find that the Tennessee statutory scheme was contrary to clearly established Supreme Court precedent. He

[8] This Court determined that this opinion was not for citation. Under Supreme Court Rule 4(E)(2), it is quoted herein not for any precedential value but rather for the purpose of "establish[ing] a split of authority." Further, this quotation was later included in *State v. Walter Collins*, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *21 (Tenn. Crim. App. Apr. 18, 2018), *perm. appeal denied* (Aug. 8, 2018), *cert. denied*, 139 S. Ct. 649 (2018).

observed, however, that he would have reached a different result if allowed to address the merits. He wrote:

> That leaves the question of what to do with cases where a juvenile defendant is sentenced to life with the possibility of parole arising only after an extraordinarily lengthy term of years that may reach or exceed the defendant's life expectancy. These types of sentences—where a child can be expected to spend the remainder of her life behind bars—constitute de facto life without parole. And the logic of *Roper*, *Graham*, *Miller*, and *Montgomery* ineluctably extends not only to de jure life without parole sentences but also to de facto ones: both types of sentences deny a child offender a chance to return to society. To hold otherwise would lead to the absurd result of permitting sentencing courts to circumvent *Miller* by sentencing juveniles to a term of years that exceeds the juvenile's projected lifespan. Surely this is not what the Supreme Court intended when it said that it was a "foundational principle" that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474, 132 S.Ct. 2455.

945 F.3d at 481 (Cole, C.J., concurring). He thus concluded:

> [T]o reach the conclusion that the Supreme Court has already opined that sentencing courts may not impose a term-of-years sentence on a juvenile that exceeds the juvenile's life expectancy, one need not search for elephants in mouseholes. One need only recognize that the Court has spoken with clarity on a simple yet profound moral principle: it defies decency to sentence a child to die in prison without considering the fact that he is a child. I therefore must conclude that, under established precedent, it is unconstitutional for a court to sentence a child to a term of imprisonment with no meaningful opportunity for release and no meaningful consideration of his or her chances of rehabilitation.

Id.[9] Indeed, Tennessee stands as the state with the least differentiation between a LWOP sentence and a life sentence with a technical possibility of parole.

In sum, this is a hotly-disputed constitutional issue of the greatest possible magnitude. As the ultimate authority in this state on the legality of our sentencing structure, this Court should

[9] He noted, further: "But although Congress has tied our hands when it comes to Atkins's sentence, it may not be too late for juveniles who appeal their sentences on direct review…." 945 F.3d at 480 (Cole, C.J., concurring).

accept review to resolve the issue. This case -- in which a *Miller* claim was preserved in Juvenile Court, in Criminal Court, and in the Court of Criminal Appeals -- presents a perfect vehicle for such resolution. Tyshon Booker has received a sentence that will likely result in him spending the rest of his life in prison. In the words of Judge Cole, he is a "a child [sentenced] to die in prison without considering the fact that he is a child." *Atkins*, 945 F.3d at 481 (Cole, C.J., concurring). The record includes copious information regarding his personal history and mental health diagnoses, including information regarding his abuse and exploitation as a child; his repeated exposure to violence; and his diagnosis of post-traumatic stress disorder. The expert evaluation of this information was expressly credited by the Juvenile Court judge who heard the expert's testimony. If ever there has been a case where the record supports a finding of reduced blameworthiness and the capacity for change and growth, it is this case. Yet despite this information, and the expert's informed opinion that Mr. Booker could be rehabilitated through trauma-focused cognitive behavioral therapy, the sentencing court had no choice but to send Mr. Booker to prison for a term he is unlikely to survive. That violates the state and federal constitutions and the principles expressed in *Miller*. And, in the event that this *Miller* claim fails, it should be this Court -- not a string of unpublished opinions from the Court of Criminal Appeals -- that so holds. Permission to appeal should be granted.

B. Summary of Applicable Law.

In a trio of cases in recent years, the Supreme Court has repeatedly recognized the special concerns that apply to juveniles and provided special categorical protections for them. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the death penalty is unconstitutional for

juvenile offenders. It noted that juveniles more often have a lack of maturity and underdeveloped sense of responsibility than adults, and that they are more susceptible to outside pressures. It also noted that a juvenile's character is not "as well formed" as that of an adult. It stated: "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. It concluded, therefore, that juvenile offenders are "categorically less culpable than the average criminal." *Id.* at 567, *quoting Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

Building on *Roper*, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that life without parole cannot constitutionally be imposed on a juvenile in a non-homicide case. Noting the observations about juvenile culpability made in *Roper*, the Court concluded: "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* at 69. It further noted that LWOP shares many characteristics with the death penalty. It wrote:

> The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.... As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

Id. at 69-70 (*internal citations omitted*). It observed that LWOP is a particularly harsh punishment for a juvenile, who will serve more time than an adult sentenced to LWOP. It concluded: "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 73. It continued:

> Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75.

Most recently, in *Miller*, the Supreme Court held that mandatory sentences of life without parole for juveniles violate the Eighth Amendment. Drawing on *Roper* and *Graham*, the Court again noted the unique features of juveniles, and wrote:

> [T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance - by subjecting a juvenile to the same life-without-parole sentence applicable to an adult - these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

467 U.S. at 474. The Court noted its precedents have required that capital punishment be imposed only after a consideration of the characteristics of the defendant and the details of his offense. It stated that these principles -- as applied to LWOP, the juvenile equivalent of the death penalty -- were violated in the instant situation:

> Under these schemes, every juvenile will receive the same sentence as every other-the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses-but really, as *Graham* noted, a greater sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

Id. at 477.

C. Application of Law to Facts.

Both the United States Constitution and the Tennessee Constitution bar cruel and unusual punishment. U.S. Const. Amend. VIII; Tenn. Const. Article I, § 16. As a matter of both state and federal law, it is cruel and unusual to impose -- as an automatic matter of law and without consideration of the characteristics of the specific juvenile or of juveniles in general -- a sentence requiring service of fifty-one years of incarceration prior to release. Due to the jury's verdict of felony murder, Mr. Booker was automatically sentenced to life imprisonment. In the aftermath of *Miller*, a sentence of fifty-one years for a juvenile, with no possibility for a lesser sentence based on the unique issues relating to juvenile culpability or rehabilitation, is contrary to the Constitution.

To be sure, Mr. Booker's sentence is not, technically speaking, a life without parole sentence; thus a distinction with *Miller*, which dealt with a traditional LWOP sentence, is possible. It is, however, surely a distinction without a meaningful difference. A fifty-one year sentence means that Mr. Booker will not be released until he is sixty-seven years old at the earliest. Given the reduced life expectancies that individuals have in prison, that is likely to be either an actual life sentence or extremely close to one. The logic of *Roper*, *Graham*, and *Miller* applies just as clearly to a *de facto* life sentence as to an actual LWOP sentence. As one court has written persuasively on this point, concluding that a sentence of 50 years to life, imposed as a statutory minimum, constituted a *de facto* life sentence in violation of *Miller*:

> [W]e do not regard [appellant's] potential future release in his [ ] late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity

> for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by" those decisions....
>
> To the contrary, appellant's sentence of 50 years to life in prison means the state has essentially made "an irrevocable judgment about [his] value and place in society."... For all intents and purposes, it " 'means denial of hope [for appellant]; it means that good behavior and character improvements are immaterial; it means that whatever the future might hold in store for [his] mind and spirit ..., he will remain in prison for the rest of his days.'

People v. Solis, 224 Cal. App. 4th 727, 734-735 (2014) (*internal citations omitted*). To distinguish *Miller* merely because Mr. Booker was sentenced to a finite term of years would be to elevate form over substance, which courts have recognized as contrary to law and logic. *See Commonwealth v. Foust*, 180 A.3d 416, 432 (Pa. Superior 2018) ("Permitting *de facto* LWOP sentences for juvenile homicide offenders capable of rehabilitation but prohibiting *de jure* LWOP sentences for the same class of offenders places form over substance…. We again refuse to place form over substance when determining if a juvenile capable of rehabilitation will ever have the chance to walk free."). In the same way, in *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Supreme Court of Iowa rejected the idea that *Miller* only applies to true LWOP sentences. There, the defendant received a mandatory sentence to serve at least 52.5 years of a 75-year sentence. The Court found this to violate *Miller*. It wrote: "[W]e note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'." *Id.* at 71-72. It ultimately concluded that "while a

minimum of 52.5 years imprisonment is not technically a life without parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller* type protections." *Id*. at 71.

In sum, there is nothing in the reasoning of the Supreme Court's trilogy of cases that would suggest that an entirely different outcome should obtain for a defendant facing a half-century sentence rather than a sentence of LWOP. As courts across the country have regularly recognized, the Supreme Court's basic insight -- that the unique aspects of juveniles require individualized consideration -- applies just as forcefully to both. The words of the Court in *Roper* still ring true:

> The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."... Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.... The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

543 U.S. at 570 (*internal citations omitted*). The present statutory scheme after transfer treats juveniles convicted of first-degree murder the same as adults, deeming them essentially irredeemable and incarcerating them until old age. The sentencing court has no option of sentencing a juvenile convicted of first-degree murder, no matter how strongly the factors identified by the Supreme Court may weigh in favor of leniency, to anything less than fifty-one years. This is contrary to the Constitution.[10]

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[10] Like many states, Tennessee has both a life sentence and a LWOP sentence. It is unusual, however, in that the life sentence carries at least fifty-one years (sixty years minus a possibility of fifteen percent). In other jurisdictions, there is generally a meaningful difference between the life

This violation is particularly harmful here where, as presented at the new trial motion by Dr. Cruise, there was abundant expert evidence of Mr. Booker's reduced moral culpability, based both on general information relating to adolescent brain development and also specific information relating to his unique history and his diagnosis of PTSD. Vol. 38/29-80. In the same way, there was evidence that Mr. Booker's conditions were susceptible to treatment and rehabilitation. *Id.* In short, had the trial court been allowed to make a decision that Tyshon Booker was not an irredeemable threat to the community, and thus did not need to die behind bars, there would have been an ample justification for doing so. Here, though, the trial court had no option to make that decision.

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sentence and the LWOP sentence. The majority of jurisdictions provide parole review after, at most, twenty-five years. Tennessee's sentence of life imprisonment is significantly harsher than any other such sentence in the country. *See* American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, Appendix A, online at https://www.aclu.org/report/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences (last visited June 3, 2020).

II. THE STATE'S ONE SUSTAINED ATTACK ON THE DEFENDANT'S TESTIMONY IN CLOSING ARGUMENT WAS PREDICATED ON A FALSE STATEMENT BY THE PROSECUTOR. THIS COURT SHOULD RESOLVE THE SPLIT IN ITS OWN PRECEDENT AS TO WHETHER A CONTEMPORANEOUS OBJECTION IS REQUIRED IN ORDER TO PRESERVE PLENARY REVIEW FOR A CHALLENGE TO CLOSING ARGUMENT, OR WHETHER INCLUSION OF THAT ISSUE IN THE MOTION FOR NEW TRIAL IS SUFFICIENT. FURTHER, THIS COURT SHOULD ADOPT AN EXCEPTION FORGIVING A FAILURE TO OBJECT WHERE THE FALSITY OF THE PROSECUTOR'S CLOSING ARGUMENT COULD NOT BE IMMEDIATELY DETERMINED.

A. Introduction.

This case provides an opportunity for this Court to resolve a crucial issue relating to the standard of review to apply to prosecutorial misconduct in closing argument, where no objection was offered at the time but where it would have been impossible in the moment for defense counsel to be certain of the falsity of the argument and where the issue was included in the motion for new trial (and fully litigated at the motion for new trial hearing).

One of the primary arguments made by the State in its closing, and indeed perhaps the only argument that directly attacked Tyshon Booker's credibility or the accuracy of his testimony, was to point to the cruiser and security videos in combination with the telephone records. Carefully considered, the State claimed, those exhibits established that the shots were fired before the last two phone calls were made on G'Metrik Caldwell's phone. If true, this rendered the defendant's testimony unbelievable. He testified clearly that the calls were made prior to the shooting, in an effort to meet up and socialize with his friends, rather than to seek assistance in the aftermath of the shooting. He testified that after the shooting, he was in panic

mode, and not even aware that he had the phone; he certainly did not testify that he called two friends seeking assistance.

The State's interpretation of this evidence had not been presented by anyone from the witness stand, but was articulated by prosecutors both in the initial closing and the rebuttal closing. This argument was a devastating attack on Mr. Booker's testimony. It surely contributed directly to the jury's finding that Mr. Booker was guilty of felony murder and his resulting sentence of life imprisonment. It was also unquestionably false.

Here, the Court of Criminal Appeals agreed (as is impossible to dispute meaningfully) that this argument was inconsistent with the actual evidence. The Court of Criminal Appeals found that this misstatement was "significant"; that it was "conceivable that the Defendant was deemed less credible by the jury" due to this misstatement; and that indeed the State had directly argued that this went to his credibility. 2020 WL 1697367 at *30. Despite those conclusions, the Court of Criminal Appeals nonetheless denied relief. It reasoned that, as there was no contemporaneous objection, the defendant was entitled only to plain error review, and that the error here did not meet that demanding standard. *Id*. at *29-30.

This presents two separate issues worthy of resolution by the Court. First, it presents the question of whether there should be an exception to the ordinary rule of contemporaneous objection for situations like the one presented here: the prosecutor discussing (falsely) a precise timing detail of a video that was in evidence, where those details had not been offered from the witness stand and where defense counsel had no ability to double-check the prosecutors' assertions during the course of the closing argument. It makes no sense to penalize defense

counsel (and, even more so, defendants) for failing to have photographic memories or failing to offer an objection based on nothing more than a hunch that the calculation being offered was incorrect. This situation has not been discussed in the case law and should be addressed by this Court.

Secondly, and perhaps even more importantly, this case presents the question of whether a contemporaneous objection is necessary to preserve for full review a challenge to misstatements in closing argument, or whether it is enough to include the issue in the motion for new trial. As the Court of Criminal Appeals held here, the more commonly-stated rule is that such an objection is necessary, or else only plain error is available. *See State v. Thomas*, 158 S.W.3d 361, 413 (Tenn. 2005). However, this Court has also directly held the opposite. In *State v. Hawkins*, 519 S.W.3d 1 (Tenn. 2017), the Court held that the critical issue for determining whether to apply plain error or plenary review is whether the issue was included in the motion for new trial. It explained: "Although the defendant did not contemporaneously object to any of the alleged instances of improper prosecutorial argument, we will apply plenary review, rather than plain-error review, to the two alleged instances of improper prosecutorial argument raised in the motion for new trial." *Id.* at 48; *see also State v. Zackary James Earl Ponder*, No. M2018-00998-CCA-R3-CD, 2019 WL 3944008, at *11 (Tenn. Crim. App. Aug. 21, 2019), *perm. appeal denied* (Dec. 5, 2019) (following *Hawkins* to apply plenary review to closing argument issue raised in motion for new trial). In short, there is a conflict in authority from this Court – which has trickled down to the Court of Criminal Appeals -- as to what standard of review should be applied to a closing-argument claim that was not objected to at trial but was included in the

motion for new trial. Or, to look at it another way, there is a confusion as to whether an attorney, in order to fully preserve an objection to a closing argument, must offer a contemporaneous objection or can wait to raise the issue in the motion for new trial.

This state of confusion should not continue, and should be resolved by this Court. This case is an ideal vehicle for doing so given that, as is apparent from the Court of Criminal Appeal's decision, it is quite possible that a different outcome would obtain on plenary review than on plain error review.[11] The correct standard of review may be determinative. Indeed, given that court's language that the false statement was "significant" and could have led the jury to deem the defendant "less credible," a new trial would seem to be required under plenary review under the Court of Criminal Appeals' view of the case.

B. Summary of Applicable Law.

1. Bounds of appropriate argument.

Noting that the task of the prosecutor is to seek justice and not merely to win, the courts have imposed limitations on what is appropriate closing argument. One of the most fundamental limitation is that a prosecutor may not "intentionally … misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Goltz,* 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003).

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[11] The Court of Criminal Appeals sought to distinguish *Hawkins* by claiming that it dealt only with issues that were addressed pre-trial. 2020 WL 1697367 at *29. While that is accurate as to one of the claimed errors (the use of the word "rape"), that is not true as to the other claim (the prosecutor calling the defendant "mean"). Thus, there was one claimed error in closing argument (calling the defendant "mean") that was not the subject of a pre-trial ruling, was not objected-to at the time of the closing, and which was specifically given plenary review by the *Hawkins* court solely because it was included in the motion for new trial.

2. Standard of review.

In order to be entitled to relief on appeal based on a claim of improper prosecutorial argument, the defendant must "show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment." *State v. Farmer*, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996). The appellate court should consider the following factors when determining whether the argument of the prosecutor was so inflammatory or improper as to negatively affect the verdict:

> (1) the conduct complained of viewed in the light of the facts and circumstances of the case;
> (2) the curative measures undertaken by the court and the prosecution;
> (3) the intent of the prosecutor in making the improper arguments;
> (4) the cumulative effect of the improper conduct and any other errors in the record; and
> (5) the relative strength and weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); *see also State v. Chalmers*, 28 S.W.3d 913, 917 (Tenn. 2000) (citations omitted).

As noted above, this Court held in *Hawkins* that inclusion of a claim relating to prosecutorial misconduct in closing argument is sufficient to preserve the issue for plenary review, and plain-error review is applicable only if there was no contemporaneous objection and the issue was not included in the motion for new trial. 519 S.W.3d at 48.

Finally, improper prosecutorial argument can violate a defendant's constitutional right to a fair trial. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutors must "refrain from improper methods calculated to produce a wrongful conviction"). In evaluating this federal constitutional claim: "The relevant question is whether the prosecutors' comments so infected the

trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

C. Application of Law to Facts.

1. The prosecutors misstated the evidence in closing argument.

The prosecutors argued that it was possible to determine the exact time of the shooting by looking at the Rosles' video in combination with Officer Wilson's cruiser video. There was nothing wrong with this approach -- if conducted properly. In making their calculations, however, the prosecutors reached an entirely incorrect conclusion by misstating and misusing the evidence.

a. Correct calculations.

The Rosles' security video showed the dog jumping, which was agreed to be the moment of the shooting. The time-stamp for that was 6:54:00, which was agreed to be an incorrect time but still a useful relative reference point. *See* Vol. 32/1367; *Exhibit 4*. Second, as noted by the prosecutor, the moment Officer Wilson's cruiser came to a stop on Linden Avenue, as depicted on the Rosles' security video, was 7:00:06. Vol. 32/1367; *Exhibit 4*. This means that there was a delay of six minutes and six seconds between the shooting and the moment Officer Wilson's cruiser came to a stop on Linden Avenue. (7:00:06 – 6:54:00 = 6:06.) Vol. 32/1367 (prosecutor: "So that's over six minutes after the first shot").

Finally, Officer Wilson's cruiser video, which did have an accurate time-stamp, showed that the cruiser came to a stop at 17:25:30 (*i.e.*, 5:25:30 p.m.). *See* Vol. 32/1367; *Exhibit 5*. When these three pieces of information are combined, it is possible to determine the exact time

of the shooting, by subtracting six minutes and six seconds from the arrival time on Officer Wilson's cruiser video. This results in a shooting time of 5:19:24 p.m. (5:25:30 – 6:06 = 5:29:24.)

Further, the phone records that were in evidence indicated that the last two phone calls to Jada Mostella and Shanterra Washington were made at 5:18:08 p.m. (ending at 5:18:45) and at 5:18:57 p.m. (ending at 5:19:58). *See Exhibit 276*; Vol. 26/730-745, 754. All this information can be used to establish a timeline of events:

5:17:49	*Car stops on Linden Avenue*
5:18:08	Second-to-last call begins (to Jada Mostella)
5:18:45	Second-to-last call ends (to Jada Mostella)
5:18:57	Last call begins (to Shanterra Washington)
5:19:24	*First shot fired*
5:19:58	Last call ends (to Shanterra Washington)

This timeline is entirely consistent with Mr. Booker's testimony that he borrowed the phone again to make the last two calls once they stopped on Linden Avenue. Vol. 32/1310 ("I showed him which house was mine, he pull up, and then I ask can I use his phone again…."). Twenty seconds passed between the car stopping and the call to Ms. Mostella. This timeline is also consistent with Mr. Booker then making a second call and, while the second call was still ringing, getting involved in the fight, with the call remaining connected until the line automatically disconnected.

b. Prosecutors' erroneous calculations.

The prosecutor, however, came to a different conclusion. As set forth above, this is not because he used different data points. The prosecutor identified the correct times for the key moments on the videos (the dog jumping at 6:54:00, the cruiser arriving at 7:00:06, which turns out to be 5:25:30 on Wilson's video), but then butchered the calculations with those numbers.

Having acknowledged that Officer Wilson arrived at 5:25:30, when the prosecutor came to subtract just over six minutes from that, he omitted the :30 and arrived wrongly at "5:18 something." Vol. 32/1367. He compounded this initial error by misusing the cell phone records. He stated that the outbound calls were at "5:18, almost 5:19," and one at "5:19, almost 5:20." Vol. 32/1374. Those times, however, were the ending times (5:18:45 and 5:19:58), not the starting times (5:18:08 and 5:18:57) of the calls. *Exhibit 276*. In short, by ignoring thirty seconds from 5:25:50, by using the end times rather than the beginning times (though saying only that he was using the times of "outbound calls"), and by being vague on the specifics, the prosecutor was able to plausibly contend the first shot was at "5:18 something" and then the calls were close to 5:19 and 5:20, and thus that "the defendant used that cell phone twice after the killing." Vol. 32/1373.

2. The State relied heavily on its timing calculations in closing argument.

In the circumstances of this case, the prosecutor's argument went to the heart of the case. At the conclusion of the case, despite all the days of testimony, there was very little in dispute. The only live issue was what exactly happened in the car immediately prior to Mr. Booker shooting Mr. Caldwell. The State contended that there was a failed robbery attempt. Mr. Booker

testified that Mr. Caldwell had made an advance on Mr. Robinson; that the two of them had engaged in a physical fight; and that Mr. Caldwell was in the process of picking up his loaded gun from the floorboard. Vol. 31/1207-1212.

Mr. Booker did not waver from his story during his lengthy cross-examination. In closing argument, the State largely restated the evidence that proved what was no longer in dispute. The only direct attack that the State made on Mr. Booker's story -- other than pointing to Linda Hatch's testimony -- was to claim that the evidence established that the last two phone calls were made after the shooting. The prosecutor contended:

> We say the cell phone records, Mr. Cook told you a whole lot about, **shows that this defendant used that cell phone twice after the killing**….
>
> Now, Mr. Booker would have you believe that he was done using that phone long before this skirmish broke out in the car. Well, think of it this way, if you add back the 97 seconds, before the five -- little over five minutes, six minutes, that's at seven and a half minutes or there abouts, if that -- according to his testimony that phone would have no longer been used by him. **And these records show that he is not telling the truth about that.**
>
> And what makes sense about these last two calls, is that he and Mr. Robinson -- let's take a little closer look at these things -- that **after this killing, he's still got the phone and he needs a way out of there. Who does he call? He first calls his girlfriend. Can't get her. Who does he call? The next female friend he calls, Shanterra Washington.**

Vol. 32/1373-1374 (*emphasis added*).

Obviously, if Mr. Booker had made those two phone calls after the shooting, then he had not testified truthfully. If, as the State contended, the last phone call to Jada Mostella and the call to Shanterra Washington were placed after the shooting, then Tyshon Booker had perjured himself in his testimony at trial. He testified that he fled the scene and did not realize that he even had the phone until he stopped to catch his breath at McDonald's, and then immediately

discarded the phone. Vol. 31/1212-1213. Given that this was the only identified inconsistency between his testimony and the undisputed evidence at trial, the State expounded on it at length, after first informing the jury that the timing was "very important." Vol. 32/1367. The other prosecutor returned to the timing issue in the rebuttal argument, outlining again the way the State had made its calculations, as support for her conclusion that the jury should not "fall into this place where you allow this case to come down to Ms. Hatch." Vol. 33/1417. This argument purported to provide objective proof that Mr. Booker had lied, so that the jury did not have to rely on Ms. Hatch alone.

3. Counsel's failure to object to this unexpected argument, which could not be double-checked during closing, should not result in waiver. The misstatements by the State went directly to the defendant's credibility, a key issue in the case, and cannot be deemed harmless.

a. The issue was not waived.

Defense counsel did not offer a contemporaneous objection to this argument. Under the unique circumstances of this case, however, this should not constitute waiver of the issue. As defense counsel noted at the hearing on the motion for new trial, the State's approach was a clever way to derive the exact time of the shooting, but not one that defense counsel had previously performed himself. Vol. 39/139. Consequently, although he suspected the conclusion was wrong in some way, he could not in good faith object and affirmatively accuse the State of misstating the evidence. Vol. 39/139. It would have been improper for counsel to offer an objection without a good-faith basis for doing so. Nor, at that moment in the courtroom, could defense counsel independently consult the different videos and phone records and determine that the prosecutors' claims were false. It makes no sense to penalize the defendant and his counsel

for failing to object to a novel argument, offered for the first time during closing, which they had no way to contemporaneously fact-check. The State should not be able to spring an unpredictable argument on the defense and then claim the defense has waived its objection for its failure to spot the misstatements hidden therein.

Further, as noted above, while the Court has indicated to the contrary in other cases, in *Hawkins* it directly stated that inclusion of the issue in the motion for new trial was sufficient to preserve a claim of prosecutorial misconduct in closing argument. The issue in that case of whether the prosecutor was wrong to call the defendant "mean" was reviewed on the merits, even though there had been no objection at the time, merely because it was included in the motion for new trial. Thus, even if this Court were to conclude, going forward, that a contemporaneous objection is required, and that *Hawkins* is no longer good law, it would be inappropriate to penalize counsel for failing to follow steps that this Court had said (only one year before) were not required.

b. This was a devastating argument that went to the central issue. The other evidence in the case was not so overwhelming as to render it harmless.

Under the *Judge* factors, this improper argument requires a new trial. It is hard to overstate the impact of this argument. As outlined above, this argument, made at length in both the initial closing argument and rebuttal argument, went directly to the one truly disputed issue in the case: was Tyshon Booker's testimony truthful? If the State was correct regarding the times, and the jury had no reason to believe the prosecutors would mislead it, then Mr. Booker's narrative of the interactions at the car was objectively false. If the jury believed Tyshon Booker

had lied about making phone calls before the shooting, instead of after the shooting, then the jury would almost certainly not accept his version of events and his claim of self-defense.

Nor was this a case where the evidence against the defendant was so strong that no mistake could have any impact. While there was indeed significant evidence against the defendant, it all proved nothing more than what he readily admitted from the stand: that he was present in the car and he shot Mr. Caldwell. The State had very little evidence to counteract his testimony that there had not been a robbery plan. Indeed, on that point, the only evidence it had was from Ms. Hatch. As a witness, Ms. Hatch was extremely flawed: a middle-aged woman in an inappropriate, if not illegal, relationship with a sixteen-year-old boy, whose response on the witness stand to overwhelming evidence of these things was to falsely deny them. The trial judge himself, at the hearing on the motion for new trial, stated that she "perjured herself" a "couple of" times. Vol. 39/115. To be sure, a jury could possibly have concluded (as did the trial judge) that she was nonetheless accurate in reporting Mr. Booker's confession. But a case where the primary disputed inculpatory fact is provided only by a perjurious witness cannot be correctly characterized as involving overwhelming evidence. Indeed, the State relied on its timeline relating to the phone calls as part of its direct plea to the jury not to view the case as coming down to Linda Hatch. Vol. 33/1417 ("do not fall into that place where you allow this case to come down to Ms. Hatch").

c. A new trial is required.

The analysis of the Court of Criminal Appeals fundamentally misunderstood one key point. That Court emphasized that: "Our review of the State's closing argument shows that the

prosecutor mentioned the time of the shooting twice, which was fairly isolated compared to the length of the closing argument." 2020 WL 1697367 at *30. It is correct that much of the prosecutor's closing was devoted to other subjects. As is clear from the trial transcript, the prosecutor had prepared his PowerPoint presentation prior to the last day of trial, and thus prior to Tyshon Booker's testimony, which changed the nature of the trial. *See* Vol. 32/1356-1357 ("[T]o be honest with you, I prepared this before this morning and we didn't know what Mr. Booker's defense was going to be"). The bulk of the prosecutor's argument, then, focused on proving matters which were no longer disputed. The prosecutor went to great lengths to link Tyshon Booker to the car and to the gun in question. Yet after he testified, those facts were not in dispute. In sum, much of the closing argument was utterly irrelevant, delivered not because the issues were in dispute but rather because the PowerPoint presentation had been prepared prematurely. In this light, compared with the vast majority of the closing argument that was irrelevant, the one instance in which the prosecutor actually engaged with, and sought to discredit, Mr. Booker's testimony takes on even greater importance. It may have been a discrete part of the closing argument, but it also may have been the only important part. It simply makes no sense to find the error harmless merely because much of the prosecutor's closing argument was irrelevant. Further, this argument violated the defendant's federal due process right to a fair trial. *See Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005) (conduct "so gross as probably to prejudice the defendant").

A conviction obtained by such means cannot stand. If Tyshon Booker is to spend the rest of his life in prison, it should be on the basis of real evidence, not false claims. This Court

should allow the application for permission to appeal, apply plenary review to this issue, and grant a new trial.

III. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER TENNESSEE'S STATUTORY SCHEME, WHICH ALLOWS FOR INCREASED PENALTIES UPON TRANSFER TO CRIMINAL COURT AUTHORIZED BY FACTUAL FINDINGS BY THE JUVENILE COURT, VIOLATES THE INSISTENCE IN *APPRENDI V. NEW JERSEY* THAT INCREASED MAXIMUM PENALTIES REQUIRE FACT-FINDING BY A JURY ON A BEYOND-A-REASONABLE-DOUBT STANDARD.

A. Introduction and Summary of Applicable Law.

The Court of Criminal Appeals noted that the defense raised another "an issue of first impression in Tennessee": a constitutional challenge to the Tennessee transfer statute, which increases the maximum statutory penalty based on factual findings by the Juvenile court, contrary to *Apprendi*. 2020 WL 1697367 at *15. Here, the issue is fully preserved due to a pre-transfer objection as well as a motion to dismiss in Criminal Court on this ground. R.23, R.550.

In *Apprendi*, the Supreme Court held that the New Jersey hate crime statute, which authorized an increase in the maximum prison sentence based on a judge's finding that the defendant acted with the purpose to intimidate because of race, violated due process. The Court concluded 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." 530 U.S. at 490. In doing so, it rejected the state's argument that the intimidating purpose was merely a sentencing factor and not an element of the offense. It noted

that the "relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

In the wake of *Apprendi*, the Supreme Court has repeatedly applied its principles in striking down state and federal sentencing schemes. *See Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007). Most recently, in *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012), the Court found that *Apprendi* applies to the setting of criminal fines. In doing so, it rejected the argument that such a ruling would be impractical or would cause confusion. It explained that practicality was beside the point: "[E]ven if these predictions are accurate, the rule the Government espouses is unconstitutional. That 'should be the end of the matter'." *Id.* at 2356.

B. Application of Law to Facts.

If he remained in Juvenile Court, Mr. Booker faced a maximum sentence of incarceration until he reaches the age of nineteen. Once he was transferred, he faced (and received) a sentence of life imprisonment, meaning no release for at least fifty-one years. Such transfer to Criminal Court was explicitly dependent on findings as to the three required facts under Tenn. Code Ann. § 37-1-134(a)(4) (which are themselves based on the six factors listed in subsection (b)). If those three facts were all found, then the case would be transferred. If any one of them were not found, then the case could not be transferred.

Apprendi sets out a clear rule: if a defendant is to be subjected to an increased statutory maximum sentence, the predicate findings upon which that increase is based must be submitted

to a jury and proven beyond a reasonable doubt. The § 37-1-134(a)(4) factors meet this test. Under *Apprendi*, it does not matter whether these are labeled "elements" of the offense or given some other name. The important question is "one not of form, but of effect," 530 U.S. at 494 -- and the effect here was clearly to subject Mr. Booker to the possibility of vastly increased punishment, from incarceration until age nineteen to life imprisonment. His Sixth and Fourteenth Amendment rights were therefore violated.

The courts of at least one jurisdiction have recognized that *Apprendi* applies to the decision of whether a juvenile is subject to the adult criminal justice system. Under the Massachusetts statutory scheme, juveniles between the age of 14 and 17 can be prosecuted by indictment in criminal court if certain statutory requirements are met. *See* Mass. Gen. Laws c. 119, § 54. In the leading case of *Commonwealth v. Quincy Q.*, 434 Mass. 859, 862 (2001), the Massachusetts Supreme Judicial Court held that these statutory requirements therefore fell under the scope of *Apprendi*, and thus had to be submitted to a jury. It wrote:

> Similar to the New Jersey hate crime statute, the youthful offender statute authorizes judges to increase the punishment for juveniles convicted of certain offenses beyond the statutory maximum otherwise permitted for juveniles, if the requirements set forth in G.L. c. 119, § 54, have been satisfied.… **However, once the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the Department of Youth Services (department) for a defined time period, see G.L. c. 119, § 58, any facts, including the requirements for youthful offender status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt….**

Id. at 864-66 (*emphasis added*).[12] While other courts have resisted this uncomfortable conclusion, individual judges have noted that the conclusion cannot be logically avoided. One judge in New Mexico has written:

> It is unconstitutional to increase an adult's sentence based on additional findings relating to the offense or the offender unless a jury finds such facts beyond a reasonable doubt…. The majority concludes that it is constitutional to increase a child's sentence by decades and imprison the child in an adult prison, based on additional findings relating to the offense and the child, even though a judge and not a jury makes those findings and even though the judge finds such facts by something less than a reasonable doubt.

State v. Rudy B., 243 P.3d 726, 740-41 (N.M. 2010) (Chavez, J., dissenting).[13] Similarly, another judge has explained that historical practice provides no support for considering the transfer process as being beyond the scope of *Apprendi*. The judge wrote:

> When a court decides that a juvenile is to be tried as an adult, *Apprendi* requires that the Sixth Amendment command of a jury trial be obeyed. The jury's verdict alone in this prosecution is insufficient to punish a 15–year–old defendant such as [the one in this case] with a lifetime in prison. To prosecute [him] as an adult, and to impose a sentence of life without parole, the additional fact-finding mandated by Missouri's juvenile certification process also is necessary. To allow this additional fact-finding to be made by a judge and not by a jury violates the defendant's fundamental right to a jury under the Sixth Amendment of the United States Constitution.

State v. Andrews, 329 S.W.3d 369, 394-95 (Mo. 2010), *as modified on denial of reh'g* (Jan. 25, 2011) (Stith, J., dissenting).

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[12] Counsel acknowledges that courts in other jurisdictions have disagreed with this analysis. *See, e.g.*, *State v. Childress*, 169 Wash. App. 523, 532 (2012).

[13] *See also See also* Mark Kimbrell, "It Takes A Village to Waive A Child . . . or at Least A Jury: Applying *Apprendi* to Juvenile Waiver Hearings in Oregon," 52 Willamette L. Rev. 61 (2015); Jenny E. Carroll, "Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: *Apprendi*, Adult Punishment, and Adult Process," 61 Hastings L.J. 175 (2009).

Here, by statute, Mr. Booker could be punished with life imprisonment only after a finding of guilt and also a finding of the three factors under § 37-1-134. That latter finding was made not by a jury of his peers beyond a reasonable doubt but by a judge under a preponderance standard. This is a straightforward violation of the Sixth Amendment and *Apprendi*. The defendant's conviction and sentence must be vacated.

IV. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE JURY'S EXPOSURE TO EXTRANEOUS INFORMATION SUCH AS DEFINITIONS OR POTENTIAL PUNISHMENTS CAN BE CONSIDERED HARMLESS, UNDER THE THEORY THAT SUCH INFORMATION WAS NOT RELEVANT TO THE DISPUTED ISSUES IN THE CASE, WHERE THE JURY ITSELF ACTIVELY AND IMPROPERLY SOUGHT OUT SUCH INFORMATION DURING DELIBERATIONS.

A. Introduction.

This case also presents an important question of law as to the jury's exposure to extraneous information. As was established at the post-trial hearing, the jury in this case obtained information from the Internet, during deliberations, about a medical term and about the length of a possible sentence for first-degree murder. The Court of Criminal Appeals accepted that this conduct occurred, and that it was "highly improper." 2020 WL 1697367 at *33. It went on to decide, however, that this conduct was "harmless" because medical terms did not "play a significant role" in the case and the potential penalty "did not bear on the guilt or innocence" of the defendant. *Id.* at *33.

The glaring hole in this analysis, which presents an unanswered question of law, is that the information the Court of Criminal Appeals said was irrelevant and unimportant was the

information that the jury was affirmatively seeking out. This case therefore poses a different question than cases in which the jury was the passive and accidental recipient of extraneous information. The jury sought out this information, during the middle of deliberations, which surely is strong proof that it was relevant to or important to the jury's deliberations. *Compare Fitzpatrick v. Allen*, 410 Mass. 791, 796 (1991) (applying different standard to situation where jury affirmatively sought out extraneous information). To be sure, the information regarding punishment should not have been considered in determining guilt or innocence. However, unless it is to be assumed that one or more of the jurors was simply wasting time during deliberations, it is clear from this proof that the information regarding punishment was in fact considered, in some way, during deliberations. The analysis of the Court of Criminal Appeals, which treats passively-received information in the same way as actively-sought information, must be rejected. Indeed, the harmless-error analysis of the Court of Criminal Appeals directly conflicts prior language from this Court which identified jurors "investigating likely prison sentences for a defendant" as an example of improper extraneous information, *State v. Smith*, 418 S.W.3d 38, 47 (Tenn. 2013), even though under our system punishment information would never be directly relevant to guilt. Given the prevalence of smart phones, this issue of jurors actively seeking outside information is likely to arise with increasing regularity.

B. Summary of Applicable Law.

1. Constitutional right to impartial jury.

Every criminal defendant has a constitutional right to a trial "by an impartial jury." U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see also State v. Sexton*, 368 S.W.3d 371, 390 (Tenn.

2012); *Remmer v. United States*, 347 U.S. 227, 229 (1954). Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge. *Caldararo ex rel. Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 743 (Tenn. Crim. App. 1990). The courts have held that when a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable. *See State v. Blackwell*, 664 S.W.2d 686, 688 (Tenn. 1984). As this Court has written: "An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that bases its verdict on that evidence." *Smith*, 418 S.W.3d at 45.

2. Definition of extraneous information.

Extraneous prejudicial information has been broadly defined as information "coming from without." *State v. Coker*, 746 S.W.2d 167, 171 (Tenn. 1987). Such information, which has not been tested by the adversarial process and which is considered by the jury without the awareness of counsel, has no place in a fair trial. This Court has clarified that the prohibition on extraneous information remains the same even in the Internet Age. In *Smith*, it stated:

> [One judge has] also observed that jurors are tweeting, "conducting factual research online, looking up legal definitions, investigating likely prison sentences for a criminal defendant, visiting scenes of crimes via satellite images, blogging about their own experiences and sometimes even reaching out to parties and witnesses through 'Facebook friend' requests." Social media websites and applications have "made it quicker and easier to engage more privately in juror misconduct, compromise the secrecy of [jury] deliberations, and abase the sanctity of the decision-making process."…
>
> Even though technology has made it easier for jurors to communicate with third parties and has made these communications more difficult to detect, our pre-Internet precedents provide appropriate principles and procedures to address extra-judicial communications….

Smith, 418 S.W.3d at 47.

3. Presumption of prejudice.

A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence. *Caldararo*, 794 S.W.2d at 740–41. Once the challenging party has made the initial showing that the jury was exposed to extraneous prejudicial information, a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless. *See State v. Mark Tracy Looney*, No. M2014-01168-CCA-R3-CD, 2016 WL 1399344, at *13 (Tenn. Crim. App. Apr. 7, 2016), *appeal denied* (Aug. 18, 2016).

4. Hearing.

In *Smith*, the Court explained that a hearing should be held "in open court to obtain all the relevant facts surrounding the extra-judicial communication." *Smith*, 418 S.W.3d at 48. At that hearing, it may be necessary to present the testimony of more than one juror. *Smith*, 418 S.W.3d at 48.

5. Standard for prejudice.

The Court has given the framework for evaluating whether the State met its burden of rebutting the presumption of prejudice upon a showing of exposure to extraneous information:

> In determining whether the State has rebutted the presumption of prejudice in circumstances such as these, trial courts should consider the following factors: (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial; (2) the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror(s); and (4) the weight of the evidence adduced at trial. No single factor is dispositive. Instead, trial courts should consider all of the factors in

> light of the ultimate inquiry—whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict.

State v. Adams, 405 S.W.3d 641, 654 (Tenn. 2013).

6. Standard of review.

The trial court's failure to conduct a proper hearing is reviewed *de novo*:

> [W]e have determined that the potential risk of prejudice to the judicial process requires appellate courts to review de novo a trial court's decision not to conduct a hearing or to inquire further when the court receives reliable information that a juror has had extra-judicial communications with a third party during the trial.

Smith, 418 S.W.3d at 48.

C. Application of Law to Facts.

1. The trial court erred in denying the motion for new trial.

The trial court committed two separate errors here. First, it erred in denying the motion for new trial after the evidence established that the jury was exposed to extraneous prejudicial information and the State failed to carry its burden of showing that it was harmless. Second, it denied the defense request to subpoena a second juror to testify regarding exposure to extraneous information.

a. The jury obtained extraneous prejudicial information.

At the hearing, Jennifer Lambert testified that she and the other jurors decided to look up the meaning of a life sentence in Tennessee, and determined that it was fifty-one years. Vol. 38/7. They understood that this would be the sentence if the jury convicted the defendant. Vol. 38/13. Further, she testified that there was a "medical word" that was relevant to the case, which someone did not understand, and therefore they "Googled the word" to get a definition. Vol.

38/8. In both situations, this happened while the jurors were sitting around the table during deliberations, and the information was shared with all the jurors. Vol. 38/9-10.

The information regarding the punishment for felony murder, and its practical effect under Tennessee law, was clearly extraneous prejudicial information as defined by Tennessee law, constituting information learned by the jury "from without," *Coker*, 746 S.W.2d at 171, that was neither presented from the witness stand nor tested in the crucible of an adversarial trial. It does not matter that this information did not specifically relate to Tyshon Booker or the factual allegations in this case. The courts of Tennessee have repeatedly dealt with situations where the problematic "extraneous information," sufficient to raise the presumption of prejudice, did not involve new facts about the defendant or the commission of the alleged crime, but rather related to other parts of the trial or deliberation process.[14] *See Walsh*, 166 S.W.3d at 646 (information in question was bailiff's statements to jury that it had to reach decision); *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997), *abrogated on other grounds by Walsh* (bailiff told juror that if jury reported deadlock judge would just tell it to keep deliberating); *Smith*, 418 S.W.3d at 50 (finding presumption raised and remanding for evidentiary hearing where juror and witness had Facebook communication, even though nothing in that communication shared new facts relevant to guilt or innocence); *Adams*, 405 S.W.3d at 654 (note from alternate juror indicating that the alternate jurors believed the defendant to be guilty was extraneous information sufficient to raise presumption, although concluding on facts of the case that presumption was rebutted). Indeed, the Court in *Smith* listed, as two possible instances of exposure to extraneous

information, jurors "looking up legal definitions" and "investigating likely prison sentences for a criminal defendant," 418 S.W.3d at 47, even though likely prison sentences are never directly relevant to guilt or innocence.

b. The State did not establish that obtaining information regarding punishment through the Internet was harmless.

In the circumstances of this case, the State did not carry its burden of establishing that the sentencing information was harmless. This information was not presented at trial, and indeed could not have been presented at trial in light of Tennessee law prohibiting such information. *See* Tenn. Code Ann. § 40-35-201. The jury could have used this information in a variety of ways. It could have determined that Mr. Booker was a dangerous person, regardless of whether he was guilty of felony murder or some lesser offense, and therefore worked backward from a desired lengthy punishment to a guilty verdict. On the other hand, it could have been concerned that a conviction would mean the defendant would die in jail, and been reassured by learning that he would be eligible for release at some point. It is self-apparent that this information played a part in the decision-making process. **If it were irrelevant and unimportant, why would the jury take the drastic and improper step of looking it up in the middle of deliberations?** The mere fact that the jury sought this information out, in direct contravention of the judge's instructions, is conclusive evidence that it played some part in the deliberations. It may have been legally irrelevant, but it certainly was not practically irrelevant.

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[14] That is, while the paradigmatic examples of extraneous information would be a juror reading a newspaper discussing a defendant's unadmitted prior criminal history or a juror going to a crime scene and making his own measurements, the law is not restricted to those situations.

Of equal importance is that this shows the jury was concerned with, discussing, and obtaining outside information on an issue unrelated to its proper deliberations. The jury is supposed to determine guilt or innocence, not to be concerned with punishment. There was thus double misconduct -- the jury was both focusing on improper considerations and obtaining outside information. In that situation, one cannot plausibly claim that this was harmless.

c. The State did not establish that obtaining a medical definition was harmless.

Similarly, the State did not carry its burden of establishing that the juror's Google search to obtain a definition of a medical term was harmless. To be sure, Jennifer Lambert did not recall exactly what word it was. Vol. 38/8. If anything, that uncertainty made it even harder for the State to show harmlessness. Instead of deciding the case based on the testimony from the witness stand, in particular the testimony from the medical examiner (the only witness who used many medical terms, and thus presumably the reason for the outside research), the jury was apparently seeking additional information in order to evaluate the evidence. To look at it another way, the State had the burden of proof at trial, and if it failed to introduce adequate explanation through its witnesses, the jury should not simply fill in those holes on its own.

2. The trial court erred in denying the request for a subpoena for an additional juror.

The trial court also erred in denying the defense request for a subpoena for the second juror, Deborah B., based on the affidavit of a defense investigator that she had told him that there were "several jurors" that had been using Google to "look up terms during deliberations." R.1071. Without testimony from that juror, it is not known what these terms were. Information

from this second juror went beyond that of Ms. Lambert, as she stated that "several jurors" were looking up things (rather than just one juror), and that there were "terms" (instead of just one term) that were researched on Google. The trial court had an obligation to conduct a hearing at which this juror would testify. *See Smith*, 418 S.W.3d at 48.

The trial court's decision not to hear from the second juror was particularly misguided in light of its ruling as to the first juror. In its ruling, it stated that Ms. Lambert "was unable to specify what medical terms" were researched, and therefore it "would be pure speculation" to assume that research had any impact. R.1090. This analysis gets the burden of prejudice precisely backward -- the State has to prove harmlessness rather than the defense needing to prove prejudice -- but also flies in the face of the trial court's refusal to hear from the second juror. That is, the trial court did not allow the second juror to testify, and then denied the motion on the basis of a lack of specific information, which was precisely what the second juror might have been able to provide! This was error. This Court should grant further review and either vacate the conviction or remand for an additional hearing at which the second juror would testify.

V. THIS COURT SHOULD RECONSIDER THE ALLOCATION OF FACT-FINDING AUTHORITY SET OUT IN *STATE V. PERRIER* AS TO WHETHER THE DEFENDANT WAS ENGAGED IN UNLAWFUL ACTIVITY. SUCH DETERMINATIONS MUST BE MADE BY THE JURY RATHER THAN BY THE TRIAL JUDGE.

A. Introduction.

The Criminal Court, following this Court's guidance in *Perrier*, 536 S.W.3d at 392, concluded that it was required to make a factual finding as to whether the defendant was engaged

in unlawful activity as a precedent to issuing a jury instruction imposing on the defendant a duty to retreat before engaging in deadly force. The Court of Criminal Appeals, again bound by this Court's precedent, agreed with this conclusion.

Perrier requires the trial court to make factual findings on questions that are intertwined or even identical with the ultimate issues of the defendant's culpability for the charged acts. Those factual findings, in turn, can determine whether the defendant acted legally in self-defense or illegally by failing to retreat. Under the Sixth Amendment, such factual findings, however, should be determined not by a trial judge but rather by the trial jury (and under a reasonable-doubt standard). That is, it was the jury in this case, and the jury alone, which should have been tasked with determining what Mr. Booker was doing in the car at the time of the altercation with Mr. Caldwell. Under *Perrier*, however, the trial judge was required to do so. In *Perrier*, it appears that the Court was not presented with a Sixth Amendment challenge. The Court should accept review and revisit its analysis in light of the constitutional right to a jury trial.

B. Summary of Applicable Law.

1. Interpretation of self-defense statute in *Perrier*.

In *Perrier*, the Supreme Court interpreted the self-defense statute, Tenn. Code Ann. § 39-11-611. It concluded that even a defendant engaged in unlawful activity could engage in self-defense; however, such a defendant would have a duty to retreat, if possible to do so safely, before doing so. A defendant who is not engaged in unlawful activity and at a place where he or she has the right to be, to the contrary, has no duty to retreat before engaging in self-defense (the

so-called "true man" doctrine). The Court further held that the trial court should make a determination of whether the defendant should be entitled to a "true man" instruction. It wrote:

> Within this structure, the trial court makes the threshold determination whether to charge the jury with self-defense, and we conclude that the trial court, as part of that threshold determination, should decide whether to charge the jury that a defendant did not have a duty to retreat. As part of that decision, the trial court should consider whether the State has produced clear and convincing evidence that the defendant was engaged in unlawful activity such that the "no duty to retreat" instruction would not apply.

Id. at 403.

2. Standard of review.

Challenges to jury instructions "present mixed questions of law and fact" and are therefore reviewed "de novo without a presumption of correctness." *State v. Smith*, 492 S.W.3d 224, 245 (Tenn. 2016). "In order to determine whether an instructional error is harmless, the appellate court must ask whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Cecil*, 409 S.W.3d 599, 610 (Tenn. 2013) (*internal quotation marks and citations omitted*) (*quoted in Perrier*, 536 S.W.3d at 404 n.8).

C. Application of Law to Facts.

1. The trial court erred in giving a duty-to-retreat instruction in the absence of any nexus between the unlawful activity and the necessity of using force.

The trial court in this case made the finding, under *Perrier*, that Mr. Booker was engaged in unlawful activity as contemplated by the self-defense statute, and therefore instructed the jury that the defendant had a duty to retreat, if possible, prior to engaging in self-defense. It based this decision on its factual finding that Mr. Booker was carrying a loaded firearm. Vol. 32/1348. In

doing so, it rejected the defendant's argument, Vol. 32/1345, that there needed to be a "nexus" between the unlawful activity and the need to engage in self-defense or defense of another. This was error. This Court in *Perrier* explicitly left open the question of whether there is a requirement of a "causal nexus" between the unlawful activity and the self-defense, so as to impose a duty to retreat. 536 S.W.3d at 404 ("It is unnecessary to resolve this issue to decide the case before us"). This Court should now resolve that issue and, consistent with the Court of Criminal Appeals, find that a nexus is required.

In *Perrier,* the Court explained that the statute reflected the "true man" doctrine established in cases such as *State v. Renner,* 912 S.W.2d 701, 704 (Tenn. 1995). Under that doctrine, "one need not retreat from the threatened attack of another even though one may safely do so." *Id.* As the Court explained in *Perrier,* quoting *Renner*:

> [T]his doctrine applies only: (1) when the defendant is without fault in provoking the confrontation, and (2) when the defendant is in a place where he has a lawful right to be and is there placed in reasonably apparent danger of imminent bodily harm or death.

536 S.W.3d at 399.

Just as the prior law focused on whether the defendant was "without fault in provoking the confrontation" and "in a place where he has a lawful right to be," the current statute similarly focuses on whether the defendant is "not engaged in unlawful activity and is in a place where the person has a right to be." The requirement that the defendant not be "engaged in unlawful activity" is not a free-standing limitation on who must retreat and who must not retreat, but rather an elaboration of the "without fault in provoking the confrontation" requirement. That is, the

point is not that the defendant is "without fault" in general (that he is somehow living a blameless life), but rather that he is "without fault" in causing the confrontation.

Thus understood, there must be a requirement of a "causal nexus" between the unlawful activity and the imposition of a duty to retreat. A defendant whose unlawful activity directly (or even perhaps indirectly) contributes to the need to use unlawful force can still perhaps engage in self-defense (subject to other statutory limitations), but must avail himself of any possibility of safe retreat prior to doing so. On the other hand, a defendant who has not done anything illegal that contributed to the need to defend himself does not have to retreat, even if he can. To conclude otherwise would lead to absurd results.

On the facts in this case, this erroneous decision was not harmless. The State relied heavily on the duty to retreat both during trial and in closing argument. In cross-examination of Mr. Booker, the State harped repeatedly on his supposed ability to get out of the car. *See* Vol. 32/1321 (asking four times in a row whether anything prevented him from opening the back door, stopping only when court ruled "You've made your point, General…"). The prosecutor emphasized this claim in her rebuttal argument, quoting the jury instruction imposing a duty to retreat and then stating:

> [T]he reason I say that is because in cross examination I was asking him about the door. The car door, whether or not he had an ability to get out of the car, and whether or not Mr. Robinson did. So if what Mr. Booker told you was the truth, that the events took place the way he described them, then he cannot claim self defense because he was illegally in possession of a firearm, and he had the ability to get out of …

Vol. 33/1411. She then continued: "He had the ability to open up the car door and get out of the car on his own as does Mr. Robinson." Vol. 33/1412. The State thus argued directly that, due to

the duty to retreat, even if Mr. Booker's testimony was accepted, he had still not acted in legal self-defense. Where the issue was discussed so heavily by the prosecution, and relevant given the factual scenario inside the car, where Mr. Booker could perhaps have gotten out instead of firing his gun in defense of Mr. Robinson, the trial court's erroneous instruction on this point cannot be deemed harmless beyond a reasonable doubt. A new trial is required.

The Court of Criminal Appeals correctly concluded that a nexus between the unlawful activity and the provocation was required. 2020 WL 1697367 at *26. It then went on, however, to substitute a different finding (that Mr. Booker was engaged in robbery) for the finding of the trial court (that Mr. Booker was unlawfully possessing a weapon). *Id.* at *27. Putting aside the issue of whether the Court of Criminal Appeals can substitute its own factual finding for that of the lower court, this position misses the point. The State did not argue that Mr. Booker had a duty to retreat based on the allegation of robbery. Rather, as outlined above, it argued that Mr. Booker had a duty to retreat *even if his own testimony was truthful* because of his unlawful possession of a firearm, Vol. 33/1411, and that he did not do so. Through the trial court's erroneous application of the self-defense statute, the State was allowed to argue, wrongly, that Mr. Booker's testimony, even if true, amounted to a confession to murder.

2. A judge cannot act as the finder of fact under a clear-and-convincing standard in a criminal trial.

Under this Court's decision in *Perrier*, the trial court is required to make the factual finding of whether the defendant was engaged in unlawful activity such that a duty to retreat was imposed on him. That Court did not separately address, however, a problem with this approach: that allowing a crucial factual determination -- one that could make the practical difference

between acquittal and conviction -- to be made by the trial judge (not the trial jury), on a clear-and-convincing standard (not proof beyond a reasonable doubt), violates the State and Federal constitutional guarantees to due process and to a jury trial. *See United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged"); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (reasonable doubt standard necessary in criminal cases). The defense objected to this finding by the judge at the time, Vol. 32/1349, and this violation of the defendant's constitutional rights to a jury trial and to proof beyond a reasonable doubt requires a new trial.

VI. THIS COURT SHOULD DECIDE WHETHER EYEWITNESS IDENTIFICATION OF A THIRD-PARTY CULPRIT QUALIFIES AS "FAVORABLE" FOR *BRADY* PURPOSES AT A TRANSFER HEARING IN JUVENILE COURT.

A. Introduction.

The Court of Criminal Appeals, in a decision that departs significantly from prior precedent, held that information that an eyewitness identified two people who were not the defendant as the perpetrator did not qualify as "favorable" under the test of *Brady v. Maryland*. As the Court wrote: "[W]e conclude that the information concerning the other potential suspects was neither favorable nor material to the Defendant's transfer hearing." 2020 WL 1697367 at *23. This represents a complete departure both from the jurisprudence of the Supreme Court of the United States and of this Court. This Court had previously explained that evidence "regarding the fact that someone other than the appellant killed the victim" constituted

prototypical *Brady* material. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). That clear holding has now been cast into doubt.

To be sure, the Court of Criminal Appeals argued that this eyewitness evidence was weak because investigators had looked into the identified perpetrators and determined that they had alibis. This reasoning is deeply flawed. First, of course, while that supposed weakness might be probative of whether the information was "material" under *Brady*, it is not reason to determine that the proof was not even "favorable." Second, that reasoning is not supported by the facts in this case. As was established at the hearing on the motion, the investigation of the alibi consisted, as to one of the identified individuals, of nothing more than a phone call to that person's mother. Vol. 11/29. When she said that he had been home at the time in question, investigators dropped that line of inquiry. This information would have been doubly-favorable if it had been disclosed prior to the transfer hearing: the eyewitness identification would have suggested that Mr. Booker was not involved, and law enforcement's acceptance of the supposed alibi (dependent on accepting a mother's word without challenge) would have indicated the shipshod nature of its investigation. It is unfathomable that such arguments could not have led the Juvenile Court to view the case in a different light.

B. Summary of Applicable Law.

1. Constitutional right to exculpatory evidence.

As a matter of due process, a defendant is entitled to discovery of material exculpatory information in the possession of the State. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes evidence that "provides some significant aid to the defendant's case, whether it furnishes

corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Johnson v. State*, 38 S.W.3d 52, 56–57 (Tenn. 2001).

2. *Brady* test.

Brady material is defined by a four-part test:

> 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
> 2) that the State suppressed the information;
> 3) that the information was favorable to the accused; and
> 4) that the information was material.

Johnson, 38 S.W.3d at 56. Materiality is evaluated under a familiar standard: whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). The courts have emphasized that this does not mean that a defendant must show by a preponderance that the outcome would have been different. *Id.* at 434. As the Supreme Court has explained: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* The test can also be framed, the Court stated, as whether the nondisclosed information "could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict." *Id.* at 435.

3. Materiality in the context of third-party culprit information.

Evidence that a third-party, rather than the defendant, committed the crime in question is perhaps the prototypical example of material evidence covered by *Brady*. *See Gumm v. Mitchell*,

775 F.3d 345, 364 (6th Cir. 2014). Similarly, this Court has cited third-party culprit evidence as basic to the definition of *Brady* material:

> Information that is favorable to the accused may consist of evidence that "could exonerate the accused, corroborate[ ] the accused's position in asserting his innocence, or possess[ ] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation **regarding the fact that someone other than the appellant killed the victim**."

Johnson, 38 S.W.3d at 56 (*emphasis added*) (*quoting State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992)).

Courts in Tennessee have repeatedly cited these principles in reversing convictions when evidence of third-party culprits was suppressed. *See, e.g.*, *State v. Spurlock*, 874 S.W.2d 602, 613 (Tenn. Crim. App. 1993) ("[T]he prosecution had a constitutional duty to disclose the statements which either stated or implied that [an identified third party] killed [the victim] to defense counsel."); *Marshall*, 845 S.W.2d at 233.

C. Application of Law to Facts.

Mr. Booker, through counsel, repeatedly requested access to any *Brady* material. The Juvenile Court ordered, on December 10, 2015, that the State turn over exculpatory evidence as defined by *Brady*. R.218. The State stated on the record that it had not withheld any *Brady* material. Vol. 44/30. Yet, there can be no dispute that this information was not provided until September 30, 2016, well after the transfer hearing had occurred, even though the State was aware of this information at the time of the transfer hearing. Indeed, according to Det. Madison, Mr. Caldwell reported this information to investigators on the night of the homicide. Vol. 11/8.

Evidence that the shooting was perpetrated by two individuals who were not Mr. Booker was favorable to the defense. Information of this kind can be used in two ways: to directly point to another person as the guilty party or to attack the police investigation. As the Court of Criminal Appeals wrote in a case involving nondisclosed physical evidence, "investigation [by the defense after disclosure] might have led to evidence that exonerated the defendant or implicated another suspect, and the defendant might also have used the fact that the police did not investigate the knife to impugn the quality of the police investigation." *Jordan v. State*, 343 S.W.3d 84, 99 (Tenn. Crim. App. 2011).

The violation alleged here is to Mr. Booker's due process right to a fair *transfer hearing*, which cannot be answered by merely claiming that he had a fair criminal trial. Consequently, the relevant inquiry is not whether this information was useful at the trial in Criminal Court. At trial, the positions of the parties at the transfer hearing were different, and the State presented a vastly different case, including use of records of the calls to his girlfriend to place Mr. Booker in the car at the time of the shooting. (The State did not present that evidence at the transfer hearing, nor did Mr. Booker testify.) The relevant inquiry here is whether this information would have been useful at the transfer hearing, where the State's inculpatory evidence consisted merely of fingerprint evidence and of Linda Hatch's testimony. As to the fingerprint evidence, the Juvenile Court noted that it was equivocal: "[A]ll the fingerprints really tell us is that at some point at sometime he was at or in that car." 6/10/2016 *Tr*. at 37. As to Linda Hatch's testimony, the Juvenile Court clearly had concerns about her honesty, finding her "despicable" and disbelieving portions of her testimony. 610/2016 *Tr.* at 37. In that circumstance, the fact that an eyewitness

had identified two other young men as being involved could have been powerful evidence for the Juvenile Court to consider. Further, the fact that the other two were ruled out after such a half-hearted investigation by the police -- the entirety of the investigation of J'Andre's asserted alibi (that he was home watching a football game) consisted of asking his mother, whose word exculpating her son was accepted as definitive, Vol. 11/29 -- could have affected the Juvenile Court's confidence that Mr. Booker was the perpetrator. Had this information been disclosed by the State and then used by the defense, the decision of the Juvenile Court could have been different.

VII. THIS COURT SHOULD DECIDE WHETHER A JUVENILE COURT CAN BASE A TRANSFER DECISION ON ITS REJECTION OF UNCONTRADICTED, UNCHALLENGED TESTIMONY FROM A DEFENSE EXPERT REGARDING THE DEFENDANT'S POTENTIAL FOR REHABILITATION.

A. Introduction.

This case presents a significant issue of public interest relating to the transfer hearing. Here, at the transfer hearing, the defense presented uncontradicted expert testimony regarding the juvenile and his potential for rehabilitation. Although the State had an expert witness, that expert did not contradict those conclusions; indeed he agreed that Mr. Booker could benefit from therapy. 6/9/16 *Tr*. at 133. Yet despite this evidence, and giving no other reason to disbelieve the expert, the Juvenile Court found that Tyshon Booker could not be rehabilitated in its jurisdiction and therefore transferred the case. This Court should grant permission to appeal, and hold that a Juvenile Court cannot reject unchallenged and uncontradicted expert testimony that a juvenile can be rehabilitated.

B. Summary of Applicable Law.

The juvenile transfer statute provides that transfer is available, for certain crimes including murder, if the Juvenile Court makes three specific findings after notice and a hearing. In order to transfer, it must find that there is "probable cause to believe":

> (A) The child committed the delinquent act as alleged;
> (B) The child is not committable to an institution for the developmentally disabled or mentally ill; and
> (C) The interests of the community require that the child be put under legal restraint or discipline.

Tenn. Code Ann. § 37-1-134(a)(4). Further, the statute provides that as to the third factor, certain matters should be considered:

> In making the determination required by subsection (a), the court shall consider, among other matters:
> (1) The extent and nature of the child's prior delinquency records;
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
> (4) Whether the offense was committed in an aggressive and premeditated manner;
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
> (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Tenn. Code Ann. § 37-1-134(b). The courts have emphasized the discretionary nature of this decision entrusted to the Juvenile Court, noting that the listed factors are "by no means exclusive." *See State v. Cecil L. Groomes*, No. M1998-00122-CCA-R3-CD, 2000 WL 1133542, at *7 (Tenn. Crim. App. Aug. 10, 2000).

4. Standard of review.

The Court of Criminal Appeals has described the standard of review for a transfer hearing, to be conducted after conviction in the criminal case:

> This court has previously stated that in reviewing a transfer decision, we do not evaluate the preponderance of the evidence but review to determine whether there are reasonable grounds or probable cause to support the decision to transfer…. This review is one for abuse of discretion…. The juvenile court is allowed "a wide range of discretion" in determining whether to transfer a child from juvenile to criminal court….

State v. Bradley Mitchell Eckert, No. E2017-01635-CCA-R3-CD, 2018 WL 3583308, at *9 (Tenn. Crim. App. July 25, 2018), *appeal denied* (Oct. 10, 2018) (*internal citations omitted*).

C. Application of Law to Facts.

Based on the evidence presented to it, the Juvenile Court erred in transferring the case to Criminal Court. Under a deferential standard of review, there was sufficient evidence to find probable cause that Mr. Booker had committed a crime. However, the transfer decision, as was correctly acknowledged by the Juvenile Court, is not limited to that issue. Rather, as it correctly stated: "the possible rehabilitation of the child is what this case comes down to in my mind." 6/10/16 *Tr.* at 46. The Juvenile Court's resolution of this question, though, was incorrect.

The Juvenile Court reasoned that Mr. Booker could not be rehabilitated in twenty-one months prior to his nineteenth birthday. 6/10/16 *Tr.* at 46-47. Such went contrary to the testimony of the evaluating expert, who asserted that Mr. Booker could be treated by trauma-focused cognitive behavioral therapy, that such treatment could have "an instant impact," *Tr.* 6/10/16 at 206, and that Mr. Booker had been accepted into a facility offering such treatment. Indeed, the State's evaluating expert did not offer any testimony that would have supported the

Juvenile Court's conclusion that treatment would be inadequate. In short, the transfer decision was not based on any of the evidence admitted at the hearing, but rather on the Juvenile Court's untutored intuition as to the futility of treatment. That is not a valid basis for decision-making. Mr. Booker should not have been transferred. His conviction should be vacated, the indictment against him dismissed, and his case remanded to Juvenile Court.

CONCLUSION

For the foregoing reasons, this Court grant permission to appeal. Upon further review of the case, the Court should vacate the conviction and remand the case to Juvenile Court, or take other appropriate action.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Jonathan Harwell, hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to Nicholas Spangler, Attorney General's Office, Criminal Justice Division, P.O. Box 20207, Nashville, Tennessee 37202, this the 8th day of June 2020.

JONATHAN HARWELL

ADDENDUM

State v. Tyshon Booker, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Crim. App. Apr. 8, 2020)