IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
September 6, 2017 Session Heard at Knoxville

STATE OF TENNESSEE v. LINDSEY BROOKE LOWE

Criminal Court for Sumner County
No. 2011CR834

No. M2014-00472-SC-R11-CD

ORDER

On July 26, 2018, the defendant, Lindsey Brooke Lowe, timely filed a petition seeking rehearing of the July 20, 2018 opinion of this Court. See Tenn. R. App. P. 39. After careful review, the petition to rehear is denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
September 6, 2017 Session Heard at Knoxville[1]

STATE OF TENNESSEE v. LINDSEY BROOKE LOWE

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Sumner County
No. 2011CR834 Dee David Gay, Judge

No. M2014-00472-SC-R11-CD

A jury convicted the Defendant, Lindsey Brooke Lowe, of two counts of first degree premeditated murder, two counts of first degree felony murder, and two counts of aggravated child abuse, all arising from the Defendant's smothering to death her newborn infant twins. The trial court merged the alternative counts of first degree murder as to each victim and sentenced the Defendant to two terms of life imprisonment for the murders and two terms of twenty-five years for the aggravated child abuse convictions, all to be served concurrently. On direct appeal, the Court of Criminal Appeals affirmed the Defendant's convictions and sentences. We granted the Defendant's application for permission to appeal in order to address the following issues raised by the Defendant: (1) whether the Exclusionary Rule Reform Act, codified at Tennessee Code Annotated section 40-6-108 ("the ERRA"), violates the Tennessee Constitution's Separation of Powers Clause; (2) whether the trial court erred by relying on the ERRA to deny the Defendant's motion to suppress the evidence gathered at her house pursuant to a search warrant that did not conform with the technical requirements of Tennessee Rule of Criminal Procedure 41; (3) whether the trial court erred by ruling inadmissible certain expert testimony proffered by the defense during the hearing on the Defendant's motion to suppress her statement to Detective Malach; (4) whether the trial court erred by denying the Defendant's motion to suppress her statement; and (5) whether the trial court erred by prohibiting the Defendant's expert witness from testifying at trial about the reliability of her responses to Detective Malach's questions. We also directed the parties to address the additional issue of whether the good-faith exception to the exclusionary rule adopted by this Court in State v. Davidson, 509 S.W.3d 156, 185-86 (Tenn. 2016), should be expanded to include clerical errors made by the issuing magistrate when the search in question is otherwise constitutional. We hold that the ERRA represents an impermissible encroachment by the legislature upon this Court's authority and

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[1] We heard oral argument in this case at the University of Tennessee College of Law.

responsibility to adopt exceptions to the exclusionary rule and, therefore, violates the Tennessee Constitution's Separation of Powers Clause; that the exclusionary rule should not be applied to suppress evidence gathered pursuant to a search warrant that is technically defective under Rule 41 due to the magistrate's simple and good-faith clerical error of incorrectly indicating on one of three copies of the warrant that it was issued at 11:35 "PM" while correctly indicating on the other two copies that it was issued at 11:35 "AM"; that the trial court did not err in ruling inadmissible the defense expert's testimony at the hearing on the Defendant's motion to suppress her statement, although the trial court should have allowed defense counsel to proffer the testimony in a question and answer format; that the trial court did not err in ruling that the Defendant was not in custody at the time she made her statement to Detective Malach, rendering moot any claimed defects in the administration of Miranda warnings prior to her statement being made; and that the trial court did not commit reversible error in ruling inadmissible at trial certain proffered expert testimony by a defense witness. In sum, we affirm the Defendant's convictions and sentences.

Tenn. R. App. P. 11 Appeal by Permission;
Judgment of the Court of Criminal Appeals Affirmed

JEFFREY S. BIVINS, C.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, SHARON G. LEE, HOLLY KIRBY, and ROGER A. PAGE, JJ., joined.

David L. Raybin (on appeal), Nashville, Tennessee; John Pellegrin (at trial and on appeal) and James Ramsey (at trial), Gallatin, Tennessee, for the appellant, Lindsey Brooke Lowe.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; Leslie E. Price, Senior Counsel; Lawrence Ray Whitley, District Attorney General; and C. Ronald Blanton, Assistant District Attorney General, for the appellee, the State of Tennessee.

Jonathan Harwell, Knoxville, Tennessee, and Richard L. Tennent, Nashville, Tennessee, for amicus curiae, Tennessee Association of Criminal Defense Lawyers.

OPINION

Factual and Procedural Background

In September 2011, the Defendant was twenty-five years old, had graduated from college, and was engaged to be married. She was employed in the office of a dental practice and was living with her parents, Mark and Paula Lowe, and her younger sister, Lacey, in the Lowes' home. The Defendant's bedroom was upstairs, as was Lacey's, and the two sisters shared a bathroom.

In late December 2010 or early January 2011, the Defendant became pregnant with twins by a man not her fiancé. The Defendant concealed her pregnancy. During the night of Monday, September 12, 2011, the Defendant gave birth to twin boys, unassisted, in the bathroom she shared with her sister. The Defendant concealed the births from her family members and cleaned up the bathroom before her sister used it on the morning of the 13th. The Defendant texted her supervisor on the morning of the 13th and stated that she would not be into the office that day due to illness. One day later, on Wednesday, September 14, 2011, the Defendant reported to work as usual.

That same morning, after the Defendant left for work, the Defendant's mother discovered one of the infant boys in a laundry basket in the Defendant's bedroom. Mr. Lowe contacted the police. Several police officers and emergency medical personnel arrived and determined that the boy was dead.

A "death investigation" ensued. Detective Steve Malach, after briefly viewing the boy's body, departed the Lowes' house to go to the Defendant's workplace. Although Mr. Lowe reportedly consented to the police officers' searching his house, the police began the process of obtaining a search warrant for the Lowe residence. After obtaining the warrant late in the morning on the 14th, the police obtained numerous items from the Lowe residence.

In the meantime, Detective Malach drove to the dental practice where the Defendant was employed and, after introducing himself, was taken to meet the Defendant. Detective Malach spoke briefly to the Defendant at her workplace and then requested that she come to the police department to be interviewed. The Defendant agreed, and she accompanied Detective Malach in Detective Malach's car to police headquarters. During the ensuing interview, the Defendant explained that she had given birth to not just one, but actually two infants. Upon learning this information, Detective Malach immediately paused the interview so that he could alert the officers still at the Lowe residence about the existence of another infant. Subsequently, officers found a second deceased boy at the bottom of the same laundry basket.

In response to Detective Malach's questions about how the boys died, the Defendant explained that she had placed her hand over each one's mouth in order to stifle his cries. She acknowledged that, by doing so, she smothered each boy to death. She later placed their bodies, as well as the single placenta, in her laundry basket. She then proceeded to clean up the bathroom. She stayed home on Tuesday, September 13, 2011, in order to recover from the deliveries. At no time during these events did the Defendant inform any family member as to what had happened nor did she call for medical assistance.

After Detective Malach completed interviewing the Defendant, he arranged for the Defendant to be taken to the hospital to be checked for complications following her

deliveries. The Defendant later was arrested at the hospital and subsequently indicted for two counts of first degree premeditated murder, two counts of first degree felony murder in the perpetration of aggravated child abuse, and two counts of aggravated child abuse.[2]

Prior to trial, the Defendant moved to suppress (1) her statement to Detective Malach and (2) the evidence obtained pursuant to the search warrant. After evidentiary hearings, the trial court denied both motions, and the matter proceeded to a jury trial. The jury convicted the Defendant as charged. The trial court merged the two first degree murder convictions as to each child and sentenced the Defendant to life imprisonment for each murder conviction. The trial court subsequently sentenced the Defendant to twenty-five years' imprisonment for each of the aggravated child abuse convictions, and ordered all of the sentences to be served concurrently. On direct appeal, the Court of Criminal Appeals affirmed the trial court's judgments. State v. Lowe, No. M2014-00472-CCA-R3-CD, 2016 WL 4909455, at *48 (Tenn. Crim. App. July 12, 2016), perm. appeal granted (Tenn. Jan. 18, 2017).

We granted the Defendant's application for permission to appeal in order to address the following issues: (1) whether the Exclusionary Rule Reform Act, codified at Tennessee Code Annotated section 40-6-108 ("the ERRA"), violates the Tennessee Constitution's Separation of Powers Clause; (2) whether the trial court erred by relying on the ERRA to deny the Defendant's motion to suppress the evidence gathered at her house pursuant to a search warrant that did not conform with the technical requirements of Tennessee Rule of Criminal Procedure 41; (3) whether the trial court erred by ruling inadmissible certain expert testimony proffered by the defense during the hearing on the Defendant's motion to suppress her statement to Detective Malach; (4) whether the trial court erred by denying the Defendant's motion to suppress her statement; and (5) whether the trial court erred by prohibiting the Defendant's expert witness from testifying at trial about the reliability of her responses to Detective Malach's questions. We also directed the parties to address whether the good-faith exception to the exclusionary rule that this Court adopted in Davidson, 509 S.W.3d at 185-86, should be expanded to include clerical errors made by the magistrate issuing a search warrant when the search in question is otherwise constitutional.

[2] Because we are not addressing the sufficiency of the evidence in this appeal, we have kept our summation of the gruesome facts in this case very brief. The Court of Criminal Appeals' opinion in this matter contains a thorough review of the facts adduced at trial. See State v. Lowe, No. M2014-00472-CCA-R3-CD, 2016 WL 4909455, at *1-12 (Tenn. Crim. App. July 12, 2016), perm. appeal granted (Tenn. Jan. 18, 2017).

Analysis

Search of Defendant's House

Prior to trial, the Defendant moved to suppress the evidence obtained from her house pursuant to a search warrant. At the hearing on the motion to suppress, the proof established that, at approximately 9:10 a.m. on September 14, 2011, Detective David Harrell was instructed to obtain a search warrant for the Lowe residence. He prepared the necessary paperwork, including three copies of the proposed search warrant, and appeared before Judge C. J. Rogers at the Circuit Court in Sumner County. At 11:35 a.m. on September 14, 2011, Judge Rogers signed and issued the search warrant in triplicate. However, on the line providing the date and time at which the warrant was delivered to Detective Harrell for execution, Judge Rogers indicated "11:35 o'clock AM, on this 14 day of Sept, 2011" on two of the copies and "11:35 o'clock PM, on this 14 day of Sept, 2011" on the third copy. Judge Rogers testified at the hearing and described the AM/PM discrepancy as a "clerical error" on his part.[3]

After obtaining the warrant, Detective Harrell returned to the Lowe residence and executed it, beginning at approximately 12:34 p.m. on September 14, 2011. Pursuant to the warrant, he collected a laundry basket and its contents; bloody linens and clothing; a thumb drive from the Defendant's bedroom; and several computers and computer components. The police also took photographs and conducted testing for the presence of blood in the Defendant's bedroom and bathroom. When the search was finished, Detective Harrell left one of the copies of the warrant marked "AM" on the kitchen counter. The copy of the warrant bearing the "PM" notation was returned and filed with the trial court on September 21, 2011.

The Defendant contended that the evidence collected pursuant to the search warrant must be suppressed because, contrary to the requirements of Tennessee Rule of Criminal Procedure 41, the three copies of the search warrant were not exact replicas because two of them indicated that the warrant was issued in the morning, and one of them indicated that the warrant was issued in the evening.

The trial court denied the Defendant's motion to suppress the evidence recovered upon execution of the search warrant. The trial court acknowledged that the warrant did

[3] At the hearing, Judge Rogers requested to see "all three originals" of the search warrant. He explained that, while he was being shown "some copies," he "need[ed] the originals" because he could not "ever work off of a copy." The trial court then stated on the record, "There's the three originals," whereupon Judge Rogers testified, "The original that the officer has and my original are A.M. I don't know about this one that shows up P.M. If I wrote P.M., which I obviously did, my mistake." The State's brief, which indicates that two of the iterations of the warrant indicated "P.M.," is incorrect.

not comply with Tennessee Rule of Criminal Procedure 41(d) because there was a discrepancy between the three iterations of the warrant. See Tenn. R. Crim. P. 41(d) (2011) (requiring the magistrate to "prepare an original and two *exact* copies of each search warrant" (emphasis added)). The trial court also acknowledged that Rule 41 required suppression of the evidence gathered pursuant to the warrant because of the discrepancy. See Tenn. R. Crim. P. 41(g)(5)(A) (requiring trial court to grant a motion to suppress if "the magistrate did not . . . make an original and two copies of the search warrant"). Nevertheless, the trial court ruled that the evidence obtained pursuant to the warrant should not be suppressed on the basis of the ERRA, which provides as follows:

> (a) Notwithstanding any law to the contrary, any evidence that is seized as a result of executing a search warrant issued pursuant to . . . Tennessee Rules of Criminal Procedure Rule 41 that is otherwise admissible in a criminal proceeding and not in violation of the constitution of the United States or Tennessee shall not be suppressed as a result of any violation of . . . Tennessee Rules of Criminal Procedure Rule 41 if the court determines that such violation was a result of a good faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate as defined in subsection (c).
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> . . . .
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> (c) As used in this section, unless the context otherwise requires, "good faith mistake or technical violation" means:
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> (1) An unintentional clerical error or clerical omission made by a law enforcement officer, court official or issuing magistrate in the form, preparation, issuance, filing and handling of copies, or return and inventory of a search warrant[.]

Tenn. Code Ann. § 40-6-108 (Supp. 2011).

Relying on this statute, the trial court ruled as follows:

> I find specifically that, although there is a violation of Rule 41(d), that the magistrate did not prepare an original and two exact copies of the warrant, that this violation was the result of a good faith mistake or technical violation made by the issuing judge, that this error was an unintentional clerical error made by the issuing judge that had absolutely no effect on . . . the constitutionality of this warrant. Therefore, . . . I find that [the ERRA] applies and there is good faith here, and I uphold the validity based on this statute . . . . Therefore, the warrant will be upheld. The

evidence taken from the search warrant will be admitted into evidence and the motion to suppress is respectfully denied.

Before this Court, the Defendant argues "that in enacting the Exclusionary Rule Reform Act the Tennessee legislature invaded the province of the judicial branch, as prohibited by the separation of powers doctrine of the Tennessee Constitution, that no 'good faith' exception exists to salvage the defective warrants, and thus the evidence secured by the warrants should have been suppressed." The State disagrees.

Standard of Review

Because issues of constitutional and statutory construction are questions of law, we review them de novo with no presumption of correctness accorded to the legal conclusions of the courts below. See Waters v. Farr, 291 S.W.3d 873, 882 (Tenn. 2009); State v. Walls, 62 S.W.3d 119, 121 (Tenn. 2001).

Tennessee's Exclusionary Rule

We begin our analysis of this issue with a brief historical review. This Court first applied the exclusionary rule to evidence obtained pursuant to a defective search warrant in 1923. See Hampton v. State, 252 S.W. 1007 (Tenn. 1923). Referring to both the Tennessee Constitution's prohibition against unreasonable searches[4] and several statutes detailing the procedures to be followed in obtaining a search warrant,[5] this Court recognized that

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[4] The Tennessee Constitution provides

> [t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Tenn. Const. art. 1, § 7.

[5] As quoted in Hampton, these statutes provided as follows:

> 7297. No search warrant can be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and place to be searched.

> [t]here is no writ more calculated to be abused in its use than the search warrant, for with it any home may be entered and the inmates disturbed, humiliated, and degraded. To prevent such a possibility from false informants made to officers inspired by overzeal, or acting from expediency, or obeying the command uttered by a mob impulse, the provisions of the Constitution and statutes found force and command observance.
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> . . . .
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> It is uniformly held that the search warrant must conform to both the constitutional and statutory requirements.
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> The requirements of the Constitution and the statutes we have quoted are not difficult. It would be easy to comply with them, and compliance would result in protecting the innocent from unlawful search, and authorize the use of evidence obtained through lawful search against the guilty.

Id. at 1008 (citations omitted).

Because this Court determined that the affidavit and warrant at issue contained deficiencies that it attributed to the "carelessness" or "oversight" of the magistrate issuing the warrant, id., it held that "evidence of the offense discovered by means of the illegal search warrant was not admissible, and should have been excluded," id. at 1009. This Court reasoned that, "'where the action of the governmental authorities is unlawful and violative of the constitutional rights of the citizen, . . . the government cannot rely upon

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> 7298. The magistrate shall, before issuing the warrant, examine on oath the complainant and any witness he may produce, and take their affidavits in writing, and cause them to be subscribed by the persons making them.
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> 7299. The affidavit shall set forth the facts tending to establish the grounds of the application, or probable cause for believing they exist.
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> 7300. If the magistrate is satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him, to any lawful officer, commanding him forthwith to search the person or place named for the property specified, and to bring it before him.

Hampton, 252 S.W. at 1008 (quoting Shannon's Code sections 7297-7300). These statutes make no reference to the exclusion of evidence for failure to meet their requirements.

the evidence thus unlawfully obtained by its agents.'" Id. at 1009 (quoting Hughes v. State, 238 S.W. 588, 591 (Tenn. 1922)).

This Court has more recently described our exclusionary rule as "a judicially crafted remedy," State v. Reynolds, 504 S.W.3d 283, 314 (Tenn. 2016), whose purpose is "to deter police misconduct," id. at 312. Because the exclusionary rule originated with this Court, "this Court has both the authority and the responsibility to decide whether [a] good-faith exception, or any other exception, should be adopted." Id. at 314.

In 1959, the Tennessee General Assembly enacted a statute that both added specific requirements as to the form of warrants and incorporated implicitly an aspect of this Court's exclusionary rule:

> SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That all magistrates, clerks of courts, judges and any other person or persons whomsoever issuing search warrants shall prepare an original and two exact copies of same, one of which shall be kept by him as a part of his official records, and one of which shall be left with the person or persons on whom said warrant is served. The original search warrants shall be served and returned as provided by law. The person or persons as aforesaid who issue said warrants shall endorse the warrants showing the hour, date, and the name of the officer to whom the warrants were delivered for execution, and the exact copy of such warrant and the endorsement thereon, shall be admissible in evidence in the Courts.
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> SECTION 2. *Be it further enacted,* That failure to comply with Section 1 hereof shall make any search conducted under said warrant an illegal search and seizure.

1959 Tenn. Pub. Acts, ch. 241 (codified at Tenn. Code Ann. § 40-518) ("the 1959 Statute").

In 1961, this Court considered the impact of the 1959 Statute on the admissibility of evidence obtained pursuant to a search warrant described as

> contain[ing] no endorsement made on it by the justice [of the peace] "showing the hour, the date, and the name of the officer to whom the warrant was delivered for execution." Nor does it appear that the justice otherwise complied with the provisions of the statute requiring him to make two copies of the warrant, one to be kept as his official record and the other to be left with the person on whom the warrant was served.

Talley v. State, 345 S.W.2d 867, 869 (Tenn. 1961). Holding that the search warrant was "void" due to its failure to comply with the 1959 Statute, id., this Court reasoned:

> This statute was within the constitutional power of the Legislature, and it seems a reasonable and valid legislative declaration designed to supplement the provisions of our Constitution and of our statutes protecting citizens against unreasonable searches and seizures. Its intent no doubt was to secure the citizen against carelessness and abuse in the issuance and execution of search warrants.
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> . . . .
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> It appears the legislative intent was to secure strict compliance with the requirements of section 1 of the Act; for section 2 provided that failure of such compliance "shall make any search conducted under said warrant an illegal search and seizure." Words could not be plainer, and they are mandatory.

Id. (internal citations omitted). Thus, this Court construed the 1959 Statute as congruent with its decades-earlier creation and application of the exclusionary rule.

In 1979, the Tennessee General Assembly repealed the 1959 Statute because it had been replaced by a Rule of Criminal Procedure. See 1979 Tenn. Pub. Acts, ch. 399 (noting that "the Tennessee Supreme Court, after lengthy study by the court-appointed Rules Commission, adopted certain rules, known as the Tennessee Rules of Criminal Procedure, in order to modernize and clarify procedures in criminal cases and to provide for the fair and efficient conduct of such proceedings"). The Rule of Criminal Procedure that took the place of the 1959 Statute was Rule 41. See, e.g., State v. Coffee, 54 S.W.3d 231, 233 n.1 (Tenn. 2001) (noting that, "[w]hen Talley was decided, the requirements now found in Rule 41(c) were codified at Tenn. Code Ann. § 40-518 (1959)"); State v. Steele, 894 S.W.2d 318, 319 (Tenn. Crim. App. 1994) (noting that the provisions of Tennessee Rule of Criminal Procedure 41 derived from the 1959 Statute); State v. Lindsey, 1985 WL 3715, at *1-2 (Tenn. Crim. App. Nov. 20, 1985) (after reciting the text of Tennessee Rule of Criminal Procedure 41(c) with regard to a search warrant issued in 1984, noting that the tenets of the 1959 Statute were "essentially the same as Tenn. R. Crim. P. 41(c)"), perm. appeal denied (Tenn. Mar. 3, 1986). The original Rule 41 provided, in relevant part, as follows:

> (c) **Issuance [of Search Warrant]; Contents; Copies; Failure to Comply.** . . . *The magistrate shall prepare an original and two exact copies of the search warrant,* one of which shall be kept by him as a part of his official records, and one of which shall be left with [the] person or persons on whom the search warrant is served. *The magistrate shall endorse upon*

> *the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution*; and the exact copy of the search warrant and the endorsement thereon shall be admissible evidence. *Failure of the magistrate to make said original and two copies of the search warrant or failure to endorse thereon the date and time of issuance* and the name of the officer to whom issued, or the failure of the serving officer where possible to leave a copy with the person or persons on whom the search warrant is being served, *shall make any search conducted under said search warrant an illegal search and any seizure thereunder an illegal seizure.*
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> . . . .
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> (f) **Motion for Return or Suppression of Property.** A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to Rule 12(b) to suppress any evidence obtained in such unlawful search or seizure. If property was unlawfully seized, he may move for the return of the property; and the motion *shall* be granted, except as to the return of contraband, if the evidence in support of the motion shows that:
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> . . . .
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> (2) a search warrant was relied upon, but the search warrant or supporting affidavit is legally insufficient on its face and hence invalid[.]

Tenn. R. Crim. P. 41 (1978) (emphases added).[6]

Since the adoption of Rule 41, this Court has strictly construed the Rule's provisions consistently with its 1961 holding in Talley. For instance, in Coffee, the defendant sought to suppress evidence on the basis that the judicial commissioner who had issued the search warrant "'failed to keep an exact copy of the original of said search warrant as part of his official records as required by Rule 41(c).'" 54 S.W.3d at 232 (quoting defendant's motion to suppress). Characterizing the provision at issue as one of the "specific procedural safeguards" set forth in Rule 41, this Court held as follows:

> These procedural safeguards are intended "to secure the citizen against carelessness and abuse in the issuance and execution of search warrants." Talley v. State, 208 Tenn. 275, 345 S.W.2d 867, 869 (1961). . . .

[6] Effective July 1, 2018, Rule 41 has been amended in order to provide trial courts the discretion to determine whether to exclude evidence that was gathered pursuant to a search warrant that meets constitutional requirements but is noncompliant with Rule 41's technical requirements. See 2018 Tenn. Ct. Order 0002, No. ADM2017-01892 (Tenn. 2018).

> The provision at issue, that a magistrate prepare and retain a copy of the search warrant, endeavors to prevent improper searches and facilitate judicial review of whether a search was executed within the scope of the warrant. The rule achieves its goals in that a written record of the specifics of the search stifles the ever-present temptation for an officer to conduct a search and justify it later. Additionally, the copy of the warrant enables review of the original boundaries of a search; without an exact copy of the warrant, review is compromised because the critical facts and details of the warrant cannot be precisely determined. It is for these reasons that it is important to retain an exact copy of the warrant identifying the property or person to be searched, and it is for these same reasons that this requirement has been strictly enforced by our courts for many years. See Talley, 345 S.W.2d at 868; State v. Brewer, 989 S.W.2d 349, 353-54 (Tenn. Crim. App. 1997); State v. Steele, 894 S.W.2d 318, 319 (Tenn. Crim. App. 1994).
>
> As stated in Talley, "'Words could not be plainer, and [the procedural safeguards against abuse] are mandatory.'" 345 S.W.2d at 869 (citation omitted). Accordingly, the judicial commissioner's failure to make and retain a copy of the search warrant so that a record of the precise limits of the search could be maintained requires suppression of the evidence seized.

Coffee, 54 S.W.3d at 233-34 (footnotes omitted) (brackets in Coffee).

Similarly, in State v. Bobadilla, this Court considered the efficacy of a search warrant that "did not contain an endorsement of the hour of its issuance, as required by Rule 41(c)." 181 S.W.3d 641, 645 (Tenn. 2005). This Court held that, "[b]ecause the hour was not endorsed by the magistrate on the search warrant in this case, the warrant fails to explicitly show that it was issued first—then executed. Therefore, the search warrant fails to meet the requirements as set forth in Tennessee Rule of Criminal Procedure 41(c)." Id. Accordingly, this Court concluded that "the search warrant on its face did not meet the requirements of Tennessee Rule of Criminal Procedure 41(c). Therefore, the warrant was invalid, the search was illegal, and the evidence obtained thereby inadmissible." Id.

At the time the search warrant in this case was issued, Tennessee Rule of Criminal Procedure 41(c) provided, in pertinent part, as follows:

> (1) Issuance. — A warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish the grounds for issuing the warrant.

(2) Content. — If the magistrate is satisfied that there is probable cause to believe that grounds for the application exist, the magistrate shall issue a warrant as follows:

(A) The warrant shall, as the case may be, identify the property or place to be searched, or name or describe the person to be searched; the warrant also shall name or describe the property or person to be seized.

(B) The search warrant shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person.

(C) The search warrant shall be directed to and served by:

(i) the sheriff or any deputy sheriff of the county where the warrant is issued; or

(ii) any constable or any other law enforcement officer with authority in the county.

(D) *The magistrate shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution.*

Tenn. R. Crim. P. 41(c) (2011) (emphasis added). Additionally, subsection (d) of Rule 41 provided that "[t]he magistrate shall prepare an original and two *exact* copies of each search warrant. The magistrate shall keep one copy as a part of his or her official records. The other copy shall be left with the person or persons on whom the search warrant is served." Tenn. R. Crim. P. 41(d) (emphasis added). Further, Rule 41 provided that a motion to suppress evidence obtained pursuant to a search warrant "shall be granted" if "the magistrate did not . . . make an original and two copies of the search warrant." Tenn. R. Crim. P. 41(g)(5)(A).

In State v. Hayes, 337 S.W.3d 235 (Tenn. Crim. App. 2010), our Court of Criminal Appeals considered a search warrant that suffered from the same irregularity that is present in the instant case. The detective who prepared the warrant made two copies and presented all three documents to the trial judge. Id. at 251-52. The judge signed and dated all three documents. Id. One of the copies indicated that it was issued on September 12, 2005, at 10:35 a.m.; the original and remaining copy indicated that the warrant was issued on September 12, 2005, at 10:35 p.m. Id. at 252. The warrant was executed during the early afternoon of September 12, 2005. Id. Proof at the suppression hearing established that the judge had actually issued the warrant in the morning and had

committed a clerical error when he indicated "p.m." on two of the copies of the warrant. Id.

Relying on this Court's rulings in Coffee and Bobadilla, our intermediate appellate court reasoned that, "[l]ogically, in order to ensure that the warrant is first issued, *then* executed, not only must the time be endorsed, but the *accurate* time must be endorsed." Id. at 254. "Accordingly," the Court of Criminal Appeals held, "the requirement that the date and time of issuance shall be endorsed implicitly means that the *correct* date and time shall be endorsed. Thus, the search warrant in this case failed to comply with the requirements of Rule 41 and the motion to suppress must be granted." Id. at 256.

Following these decisions, the General Assembly promulgated the ERRA in 2011. There is no dispute that the ERRA was in effect at the time the subject search warrant was issued. As set forth above, the ERRA dictates that certain evidence otherwise subject to Tennessee's exclusionary rule "shall not be suppressed." Tenn. Code Ann. § 40-6-108(a). Because the ERRA specifically conflicts with this Court's holdings regarding our exclusionary rule, as well as with the express language of a procedural rule promulgated by this Court, we turn now to an examination of whether this statute unconstitutionally violates the Separation of Powers Clause of the Tennessee Constitution.

Separation of Powers

Article II, section 1 of the Tennessee Constitution provides that "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Section 2 of the same Article provides: "Limitation of powers. No person or persons belonging to one of these departments [set forth] shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." With respect to the judicial department, the Tennessee Constitution specifies that "the judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace." Tenn. Const. art. VI, § 1. The Tennessee Supreme Court is a "direct creature of the Constitution" and "constitutes the supreme judicial tribunal of the [S]tate." Barger v. Brock, 535 S.W.2d 337, 340 (Tenn. 1976). The Tennessee Supreme Court "and its jurisdiction cannot be interfered with by the other branches of the government. *Its adjudications are final and conclusive upon all questions determined by it*, save those reserved to the federal courts, which may be reviewed by the Supreme Court of the United States." Clements v. Roberts, 231 S.W. 902, 902 (Tenn. 1921) (emphasis added) (citing Miller v. Conlee, 37 Tenn. 432, 433 (1858); Dodds v. Duncan, 80 Tenn. 731, 734 (1884); State, to Use of Fletcher v. Gannaway, 84 Tenn. 124, 126 (1885)).

This Court has recognized that it, and it alone, "has the inherent power to promulgate rules governing the practice and procedure of the courts of this state," State v. Mallard, 40 S.W.3d 473, 480-81 (Tenn. 2001), and that "this inherent power 'exists by virtue of the establishment of a Court and not by largess of the legislature,'" id. at 481 (quoting Haynes v. McKenzie Mem'l Hosp., 667 S.W.2d 497, 498 (Tenn. Ct. App. 1984)). Moreover,

> because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary "to engage in the complete performance of the judicial function," this power cannot be constitutionally exercised by any other branch of government. In this area, "[t]he court is supreme in fact as well as in name."

Id. (quoting Anderson Cnty. Q. Ct. v. JJ. of 28th Jud. Cir., 579 S.W.2d 875, 877 (Tenn. Ct. App. 1978); Barger, 535 S.W.2d at 341) (citations omitted).

We continued in Mallard:

> Notwithstanding the constitutional limits of legislative power in this regard, the courts of this state have, from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature. Indeed, such occasional acquiescence can be expected in the natural course of events, as this practice is sometimes necessary to foster a workable model of government. When legislative enactments (1) are reasonable and workable *within the framework already adopted by the judiciary*, and (2) work to *supplement* the rules already promulgated by the Supreme Court, then considerations of comity amongst the coequal branches of government counsel that the courts not turn a blind eye. . . .
>
> It must be emphasized, however, that the consent of the courts to legislative regulation of inherent judicial authority is purely out of considerations of inter-branch comity and is not required by any principle of free government. To hold otherwise would be to irreparably damage the division of governmental power so essential to the proper maintenance of our constitutional republic. As the Court of Appeals has stated,
>
> > In deference to separation of powers, judges will lean over backward to avoid encroaching on the legislative branch's (power) . . . .
> >
> > . . . .

> However, the separation of powers doctrine, properly understood, imposes on the judicial branch not merely a Negative duty not to interfere with the executive or legislative branches, but a Positive responsibility to perform its own job efficiently. This Positive aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial [prerogatives].

Id. at 481-82 (emphasis added) (quoting Anderson Cnty. Q. Ct., 579 S.W.2d at 878).

Thus, we recognized that "'[i]t is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution,'" id. at 482 (quoting State ex rel. Shepherd v. Nebraska Equal Opportunity Comm'n, 557 N.W.2d 684, 693 (Neb. 1997)), and that "the legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power," id. at 483 (citation omitted).

The State argues in its brief to this Court that the ERRA "can be read to supplement Rule 41(g) without frustrating or impairing its overriding function." We disagree. The ERRA is not an attempt by the General Assembly to "supplement" Rule 41; the ERRA is an attempt by the General Assembly to *abrogate* both the express terms of Rule 41 and this Court's prior holdings regarding Rule 41. Cf. State v. Pruitt, 510 S.W.3d 398, 417 (Tenn. 2016) (characterizing the ERRA as "a modification of a rule of criminal procedure"). By passing the ERRA, the General Assembly was attempting to create a good-faith exception to the exclusionary rule, a *judicially created remedy*. We repeat: "this Court has both the authority and the responsibility to decide whether [a] good-faith exception, or any other exception [to the exclusionary rule], should be adopted." Reynolds, 504 S.W.3d at 314 (citing Hodge v. Craig, 382 S.W.3d 325, 337 (Tenn. 2012)). We are compelled to conclude that, by passing the ERRA, the General Assembly effectively usurped both that authority and that responsibility.

We hold that, by directly contradicting existing procedural rules and then-existing Court precedent related to any good-faith exception through the enactment of the ERRA, the General Assembly overstepped its constitutional boundaries. The ERRA represents a violation of the Tennessee Constitution's Separation of Powers Clause and, therefore, cannot be upheld.

In light of our holding that the ERRA is unconstitutional, we must conclude that the trial court erred when it denied the Defendant's motion to suppress in reliance on the ERRA. However, that conclusion does not necessarily entitle the Defendant to relief.

Good-Faith Exception to Rule 41's Exclusionary Rule

This Court recently adopted a good-faith exception to the exclusionary rule in a case in which the record demonstrated that a law enforcement officer executed a warrant in good faith but the warrant later was determined to be invalid "solely because of a good-faith failure to comply with the affidavit requirement of Tennessee Code Annotated section 40-6-103 and -104 and Tennessee Rule of Criminal Procedure 41(c)(1)." Davidson, 509 S.W.3d at 186.[7] In doing so, we noted that the search warrant complied with the United States and Tennessee Constitutions because it was issued by a neutral and detached magistrate, specifically described the place to be searched and the things to be seized, and it was based on probable cause supported by testimony under oath. Id. at 183.

We then considered the defect that rendered the warrant noncompliant with the relevant statutes and Rule 41: the preparing officer inadvertently printed out the supporting affidavit on letter-sized paper instead of legal-sized paper with the result being that the signature line was left off of the affidavit. As a result, after appearing before the magistrate and swearing to the truth of the affidavit, the officer did not sign the affidavit as the affiant. Both the issuing magistrate and the officer did sign the warrant, however. We summarized the status of the warrant as follows: "Because Investigator Childress inadvertently failed to sign as the affiant on the affidavit, the search warrant was not issued on the basis of a signed affidavit as required by Tennessee Code Annotated section 40-6-103 and 40-6-104 and Tennessee Rule of Criminal Procedure 41(c)(1). All other constitutional and statutory requirements were met." Id. at 184.

We adopted the good-faith exception referenced above based on the following reasoning:

> Investigator Childress intended to obtain a valid search warrant. He reasonably believed that the warrant, based on probable cause and issued by a neutral and detached magistrate, was valid. The search warrant was later determined to be invalid based on noncompliance with statutory and procedural provisions because Investigator Childress printed the affidavit on the wrong size paper, did not notice that the signature line was cut off, and failed to sign the affidavit. Instead, he placed his signature on a line on the warrant. All other constitutional and statutory requirements were met. . . . When an officer has complied with constitutional requirements to obtain a warrant, but in good faith failed to comply with the state statutory and rule affidavit requirements, societal interests are not advanced when the

[7] We note that the search warrant at issue in Davidson was issued in January 2007, before the ERRA became effective. See Davidson, 509 S.W.3d at 173.

> exclusionary rule applies to exclude evidence obtained from execution of the warrant.

Id. at 186.

A similar analysis is called for under the facts of this case. Here, the good-faith mistake was made not by the officer seeking the warrant but by the judge when he filled out the requisite information about the time of issuance. Judge Rogers completed the search warrant paperwork in triplicate, as mandated by Rule 41, but erroneously indicated the hour as "PM" on one of the three required iterations. Judge Rogers correctly indicated "AM" on the other two. Because the search was conducted immediately after the warrant was issued, i.e., long before "11:35 PM," and because a signed copy of the warrant was left at the Lowe residence, it was obvious to all concerned that the mistake was a simple clerical error. Indeed, Judge Rogers himself testified that the "PM" was the result of a clerical error on his part.

As this Court has emphasized repeatedly, the purpose of the magistrate indicating the time at which a search warrant is issued is to ensure that the warrant is obtained *before* the search is conducted, not afterwards. See, e.g., Bobadilla, 181 S.W.3d at 645; Coffee, 54 S.W.3d at 233. Moreover, Rule 41's requirement that all three copies of a search warrant be "exact" is to ensure that "the critical facts and details of the warrant" are subject to precise determination. Coffee, 54 S.W.3d at 233. To this end, we remind officers and magistrates that their utmost attention to detail is required when seeking and issuing search warrants. See Everett v. State, 184 S.W.2d 43, 45 (Tenn. 1944) ("The use of printed forms has made the procurement of a search warrant the merest formality, considering the fundamental constitutional right which the search invades. Certainly, this Court can do no less than to require that the few blank spaces be filled in, and the other details of the formality be carried out with care and precision."). Nevertheless, we also recognize that officers and magistrates are busy human beings and, as such, can be expected to make the occasional harmless clerical error in good faith.

There is no contention in this case that the search of the Lowe residence took place before the search warrant was duly issued. Nor is there any contention that the "AM/PM" discrepancy resulted in any particular prejudice to the Defendant. Rather, the Defendant contends that all of the evidence gathered pursuant to a search warrant that satisfied constitutional requirements must be suppressed because Rule 41's technical requirement of three "exact" copies was not met. However, the facts of this case support the trial court's findings that the technical violation of Rule 41 "was the result of a good faith mistake" and "was an unintentional clerical error" by the issuing magistrate. The record further demonstrates that the variation between the three copies of the warrant caused by the magistrate's good-faith mistake was inconsequential. We hold that the exclusionary rule should not be applied under these circumstances.

We hold that a good-faith clerical error that results in an inconsequential variation between the three copies of a search warrant required pursuant to Rule 41, in and of itself, does not entitle the moving party to suppression of the evidence collected pursuant to the warrant. We adopt a good-faith exception to the exclusionary rule under such circumstances. When a magistrate has issued a warrant in compliance with constitutional requirements but, in good faith, fails to comply with Rule 41's technical requirement of three "exact" copies, "societal interests are not advanced when the exclusionary rule applies to exclude evidence obtained from execution of the warrant." Davidson, 509 S.W.3d at 186.

In order to provide guidance to trial courts considering motions to suppress arising from technical violations of Rule 41, we take this opportunity to explain that, when a defendant has demonstrated that a search warrant or its supporting affidavit is noncompliant with the technical requirements of Rule 41 or other relevant statute(s), the burden shifts to the State to establish by a preponderance of the evidence that (1) the technical noncompliance was the result of a good-faith error and (2) the error did not result in any prejudice to the defendant. See, e.g., United States v. Diehl, 276 F.3d 32, 41-42 (1st Cir. 2002) (recognizing that, where the state is defending a motion to suppress on the basis of a good-faith exception to the exclusionary rule, it is the state's burden to demonstrate that the conduct at issue meets the standards of good faith). Although the term "good faith" is not subject to precise definition, a good-faith mistake is one characterized by simple, isolated oversight or inadvertence. A good-faith mistake does not include conduct that is deliberate, reckless, or grossly negligent, nor does it include multiple careless errors. Furthermore, where a finding of good faith depends on the credibility of one or more witnesses, the trial court should set forth its assessment of that factor to facilitate appellate review. If the State carries its burden of proving both prongs, the trial court then may consider, in the trial court's sound discretion, whether the technical noncompliance was sufficiently inadvertent and inconsequential to qualify for the narrow good-faith exception to Rule 41's exclusionary rule that we have adopted.[8]

In sum, we affirm, although on different grounds, the trial court's denial of the Defendant's motion to suppress the evidence gathered from the Lowe residence.

Defendant's Statement to Detective Malach

In addition to moving to suppress the evidence gathered from her home, the Defendant moved to suppress the statement she made to Detective Malach on the basis that Detective Malach failed to advise her properly of her rights as required under

[8] Because the trial court in this case did not have the benefit of the good-faith exception analysis that we adopt herein, the trial court did not make a specific finding that the error at issue was inconsequential and caused no prejudice to the Defendant. However, the record contains no indication that the "A.M./P.M." variance was anything other than inconsequential and harmless.

Miranda and that her alleged waiver of those rights was ineffective. The Defendant also asserted that her statement was not voluntary due to Detective Malach's interrogation technique and her mental status at the time she made her statement.

At the November 2012 hearing on the Defendant's motion, Detective Malach testified that, when he arrived at the dental practice where the Defendant worked, he spoke to a manager and asked to speak to the Defendant. Detective Malach was led to the Defendant's workstation where the Defendant was working. Detective Malach introduced himself and requested a private space. Detective Malach and the Defendant went to a meeting room and Detective Malach began their conversation by asking if the Defendant knew why he was there. He testified, "She was in a good mood. She was laughing. She said no." Detective Malach told her that they "had found the laundry basket" and, according to Detective Malach, "[a]t that point [the Defendant's] mood changed," and "she became more serious about it."

Detective Malach explained that he wanted the Defendant's cooperation in determining what had happened and that he wanted her to come to the police department for an interview. He also told her that, once they got to the police department, he would issue her Miranda warnings. He testified that he "went over" the Miranda warnings at the dental office. He told the Defendant that she did not have to go to the police department and that she did not have to speak with him. When he asked her if she would come to the police department to be interviewed, the Defendant agreed to do so. She also agreed to accompany Detective Malach in his vehicle, and she rode in the front passenger seat. She was not handcuffed. During the drive, they did not discuss any matters involving the dead infant boy. Detective Malach described their conversation during the drive as "normal" and described the Defendant's mood and demeanor as, "She was nice. She was laughing, you know, talking, just a normal conversation. There wasn't a whole range of emotions."

After they arrived at the police station, Detective Malach took the Defendant into an interview room. The ensuing interview was videotaped. Detective Malach testified that he read the Defendant her Miranda rights, and she orally waived them. When the Defendant asked if she should have an attorney, Detective Malach "let her know it was not mandatory." The Defendant subsequently agreed to the interview.

On cross-examination, Detective Malach acknowledged that he did not obtain a written waiver of her Miranda rights from the Defendant. He explained his position was that, given the videotape of the interview, the written waiver was not necessary. Detective Malach also testified that he had received some "first responder" first aid training. Based on this training, he suspected that the Defendant had recently given birth and "assumed" that she had lost a significant amount of blood. He agreed that "extreme blood loss can impair somebody's ability to think and reason."

Detective Malach described the interview room as being "a little bit on the interior of the building," requiring passage through several doors and not open to the general public. The room had no windows.

In response to questions by the trial court, Detective Malach testified that he did not consider the Defendant to have been in custody "until we found out exactly what happened during the interview." He indicated that, once the interview had provided probable cause to arrest the Defendant, she would not have been free to leave the police station.

The videotape of the interview was admitted into evidence, and the trial judge stated that he had reviewed it. This Court has reviewed it as well.

After Detective Malach finished testifying for the State, the defense called Dr. Pamela Auble, a psychologist who had examined the Defendant after she was arrested. The State objected on the basis of relevancy. Defense counsel explained that Dr. Auble would testify "as to [the Defendant's] mental state at the time that she was—or near the time she was being interrogated." Defense counsel told the trial court that Dr. Auble had not reviewed the videotape of the Defendant's statement but had administered several psychological tests and, based on the results of those tests, would testify about the Defendant's "ability to perform in an interview at the time Detective Malach talked to her." Defense counsel asserted that Dr. Auble had concluded that the Defendant's thinking and reasoning had been impaired at the time Dr. Auble saw the Defendant, which was several days after the police interview. Defense counsel further asserted that Dr. Auble could opine as to the effect of those several days on the Defendant's mental state. Defense counsel stated,

> Judge, I expect Dr. Auble to be able to say that [the Defendant] was someone who could be—who would have a difficult time understanding the adversarial nature of the interview; that she was someone with extremely low self-esteem, as I mentioned the depression and anxiety; and she was someone who in response to authority, such as a police officer, would almost not have a will to say no.

The trial court understood the defense to be arguing that Dr. Auble's testimony would be relevant to demonstrating that the Defendant's alleged waiver of her Miranda rights was not effective and that her ensuing statement was not voluntary. The trial judge allowed Dr. Auble to be sworn in so that he could "ask some basic questions" "just to preserve the record." When Dr. Auble told the trial court that she had not watched the videotape of the Defendant's interview with Detective Malach, the trial judge stated, "I'm not going to allow her testimony." After further argument by defense counsel, the trial court clarified that it was ruling Dr. Auble's testimony inadmissible for two reasons: first, because of the time delay between the interview and Dr. Auble's testing, which

delay encompassed the Defendant being arrested, placed in jail, and medicated; and second, because Dr. Auble had not reviewed the videotape of the Defendant's statement. The trial court allowed the defense to place a copy of Dr. Auble's report in the record, under seal, as an offer of proof.

The defense next called Dr. William Kenner, a psychiatrist who had treated the Defendant after she was arrested on the instant charges. Dr. Kenner testified that he first saw the Defendant on October 21, 2011, and that he had seen her eight to ten times since then. He diagnosed the Defendant as suffering from posttraumatic stress disorder; dissociative disorder not otherwise specified; and adjustment disorder with anxiety and depression. Dr. Kenner stated that he had watched the videotape of the Defendant's interview with Detective Malach.

When the trial court asked Dr. Kenner if, at the time of her interview with Detective Malach, the Defendant had been "capable of understanding and waiving her constitutional rights," Dr. Kenner responded,

> There are two aspects to that question. One is a cognitive understanding, could she understand the words that were said to her, and from a strictly cognitive standpoint, she can. There's also an emotional aspect of understanding, with which she would struggle. [The Defendant] is an extremely passive individual. She was before she became pregnant, and that was part of what happened that she became pregnant. She—because of her difficulty in standing up for herself, she is extraordinarily vulnerable to simply complying with an interrogator's version of reality rather than sticking up for her own.

Dr. Kenner added that, due to the unassisted deliveries during which the Defendant lost a significant amount of blood, the Defendant was "a woman who was not in good shape physically at the time of the interrogation."

Asked by defense counsel about his opinion of the Defendant's ability to waive her Miranda rights after having viewed the videotape, Dr. Kenner opined, "As I said earlier, I think from a cognitive standpoint, if you ask her to—or if you explained her rights to her, she would be able to hear those, but her ability to stand up for herself and to understand that she could put those rights into play, she's going to be—have almost no ability in that department." Dr. Kenner added,

> I think the interrogation was highly coercive. It involved considerable bullying on the part of Detective Malach, and when you—he essentially had his narrative of what had occurred, and, in essence, asked her to agree with him. Her ability not to agree, even though she may have other—wish

> not to or have other ideas about it, is not that great. She's a highly compliant young woman.

On cross-examination, Dr. Kenner clarified that he did not consider Detective Malach's demeanor during the interview to have been bullying, but rather "his words were emotionally powerful and bullying." He added, "this is a woman who was having a great deal of trouble thinking, thinking clearly, and at the time of her interrogation what I think she was pushed into agreeing to was an element of knowingly killing the babies." Dr. Kenner opined that, at the time of the births, the Defendant was not "capable of knowing that the simple act of putting your hand over the mouth would suffocate a baby."

Neither the State nor the defense called any additional witnesses. After hearing argument, the trial court denied the Defendant's motion to suppress her statement. The trial court found that the Defendant "was clearly physically and mentally able to engage and carry out the questioning and conversation with Detective Malach," that she "was voluntarily engaged in conversation," and "[t]here was no significant mental or physical issue to make this statement involuntary." The trial court concluded that the Defendant's

> statements were not the result of techniques and methods offensive to due process. There was no interference with the defendant's free will in giving any incriminating statements in this interview. Further, her free will was definitely not overborne in such a way as to render her statements a product of force, coercion or intimidation.

The trial court also determined that, in light of the videotape and Dr. Kenner's testimony, the Defendant "might have some emotional issues but that did not make her incapable of understanding her waiver and the constitutional rights admonition." The trial court added, "I conclude that this statement was not the result of unconstitutional force, coercion, [or] manipulation tactics in violation of the due process clause of the United States Constitution or the Tennessee Constitution."

The trial court further determined that, prior to and at the beginning of the interview, the Defendant was not in custody for purposes of Miranda; that, nevertheless, the Defendant was properly advised of her rights pursuant to Miranda; and that the Defendant made an ambiguous request for an attorney that Detective Malach dealt with appropriately, followed by the Defendant's agreement to continue the interview without an attorney. Accordingly, the trial court ruled that the Defendant's statement was not made in contravention of either the federal or state constitutions.

Before this Court, the Defendant argues that the trial court erred in excluding Dr. Auble's testimony. She also contends that she (1) was in custody during her

interrogation by Detective Malach; (2) "was denied her Miranda rights prior to her interrogation"; and (3) "did not effectively waive her Miranda rights."

Exclusion of Dr. Auble's Testimony

The Defendant contends that the trial court committed reversible error by refusing to admit the testimony of Dr. Auble regarding the voluntariness of the Defendant's statement. The Defendant also asserts that the trial court erred by not permitting the defense to make an offer of proof by question and answer, citing Tennessee Rule of Evidence 103(b).

Addressing this second contention first, we agree with the Defendant that the trial court erred by not allowing defense counsel to make its offer of proof through soliciting testimony from Dr. Auble in question and answer form. Tennessee Rule of Evidence 103(b) provides that a trial court "shall permit the making of an offer [of proof] in question and answer form." This Court has recognized that the question and answer format is "the better practice," see Farmers-Peoples Bank v. Clemmer, 519 S.W.2d 801, 804 (Tenn. 1975), and our Court of Criminal Appeals has properly held that "the trial court must allow [question and answer offers] when appropriately offered," Alley v. State, 882 S.W.2d 810, 817 (Tenn. Crim. App. 1994) (citing N. Cohen, D. Paine, S. Sheppeard, Tennessee Law of Evidence § 103.4 at 16 (2d ed. 1990)).

The purpose of an offer of proof is to preserve excluded evidence in a manner sufficient to allow appellate review of the trial court's decision to exclude the evidence. As this Court previously has recognized,

> In order for an appellate court to review a record of excluded evidence, it is fundamental that such evidence be placed in the record in some manner. When it is a document or exhibit, this is done simply by having the exhibit marked for identification only and not otherwise introduced. When, however, it consists of oral testimony, it is essential that a proper offer of proof be made in order that the appellate court can determine whether or not exclusion was reversible.

State v. Goad, 707 S.W.2d 846, 852-53 (Tenn. 1986); see also Alley, 882 S.W.2d at 816 ("When a party contends that the trial court erred in excluding testimony, the need for a description of that testimony is compelling. Absent such a showing, an appellate court cannot determine whether the exclusion was error, and if error is found, whether the error is harmless."). Thus, if the record on appellate review is sufficient to allow the reviewing court to determine whether the trial court erred in excluding the proffered evidence, the trial court's erroneous refusal to allow the evidence to be proffered via questions and answers will not entitle the proffering party to relief. See Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set

aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.").

In this case, defense counsel stated on the record that Dr. Auble had administered three psychological tests to the Defendant on September 23, 2011, and that Dr. Auble would testify about the Defendant's "ability to perform in an interview at the time Detective Malach talked to her." Defense counsel added,

> I expect Dr. Auble to be able to say that [the Defendant] was someone who could be—who would have a difficult time understanding the adversarial nature of the interview; that she was someone with extremely low self-esteem, as I mentioned the depression and anxiety; and she was someone who in response to authority, such as a police officer, would almost not have a will to say no.

Additionally, while the trial court did not allow defense counsel to question Dr. Auble about her evaluation of the Defendant, the trial court admitted, under seal, Dr. Auble's written report as an exhibit to the hearing. The record reflects that the trial court reviewed the report prior to ruling that Dr. Auble's testimony was inadmissible. Dr. Auble's report contains the following "conclusion":

> In summary, the personality testing revealed acute distress with symptoms of both severe depression and anxiety. [The Defendant's] thinking and reasoning were impaired at the time that I saw her. She had poor self-esteem and a tendency to respond to situations on the basis of feelings rather than thinking. There were health concerns from the testing. She is introverted and passive, with difficulty being assertive about her needs.

We hold that, although the trial court should have permitted defense counsel to proffer Dr. Auble's testimony via questions and answers, the trial court's error in this regard was harmless. The record contains a sufficient summation of Dr. Auble's expected testimony to enable this Court to determine whether the trial court erred by excluding it. Accordingly, the Defendant is not entitled to relief on the basis of the trial court's refusal to allow the defense to proffer Dr. Auble's expected testimony via a question and answer format.

We turn, then, to an assessment of whether the trial court erred by excluding Dr. Auble's testimony at the hearing on the Defendant's motion to suppress her statement to Detective Malach. As set forth above, the excluded testimony would have been offered to prove that the Defendant's statement to Detective Malach was not voluntary. It is

axiomatic that the State may not prove its case-in-chief against a criminal defendant by using an involuntary statement. See, e.g., Oregon v. Elsted, 470 U.S. 298, 306-07 (1985).

The trial court ruled Dr. Auble's testimony inadmissible for two reasons. First, the trial court recognized that, by the time Dr. Auble evaluated the Defendant, the Defendant had been arrested, jailed, and charged with two counts of first degree murder. Due to these significant intervening negative events, the trial court reasoned, Dr. Auble's conclusions about the Defendant's state of mind at the time of her earlier interview with Detective Malach were not reliable. Second, the trial court reasoned that Dr. Auble's conclusions about the Defendant's interactions with Detective Malach were not sufficiently reliable because Dr. Auble had not watched the videotaped interview.

This Court reviews a trial court's decision regarding the admissibility of expert testimony for an abuse of discretion. See State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993) (stating that, "[i]n Tennessee the qualifications, admissibility, relevancy and competency of expert testimony are matters which largely rest within the sound discretion of the trial court"). A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the proof, or utilizes reasoning that causes an injustice to the complaining party. Konvalinka v. Chattanooga-Hamilton Cnty Hosp. Auth., 249 S.W.3d 346, 358 (Tenn. 2008).

Tennessee Rule of Evidence 702 provides that, "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." However, Tennessee Rule of Evidence 703 provides, in pertinent part, that "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." Although the trial court did not specifically reference Rule 703 in its ruling that Dr. Auble's testimony was inadmissible, the trial court's stated reasons for disallowing that proof indicate clearly that the trial court considered her opinion unreliable for two reasons: first, because the underlying data was compromised by the passage of time and the significant events that had occurred during that time, and second, because Dr. Auble had not watched the very interview about which she was expected to opine. That is, the trial court considered the underlying data upon which Dr. Auble was basing her opinion to be both (1) influenced by subsequent events and (2) incomplete.

We hold that the trial court did not err in ruling Dr. Auble's testimony inadmissible. We agree with the trial court that Dr. Auble's proffered opinion was based on facts that indicated a lack of trustworthiness as to the issue for which her opinion was being proffered and that, further, because she had not reviewed the interview between the Defendant and Detective Malach, her proffered opinion was based on incomplete data.

Therefore, it would not have substantially assisted the trial court to determine whether the Defendant's statement to Detective Malach was voluntary. See State v. Brimmer, 876 S.W.2d 75, 79 (Tenn. 1994) (holding that trial court did not erroneously exclude expert's opinion regarding defendant's susceptibility to coercion because expert reviewed only a portion of interrogation, rendering expert's opinion "not sufficiently trustworthy"). The Defendant is entitled to no relief on this issue.

The Defendant's *Miranda* Rights

We now consider the Defendant's assertions that her statement to Detective Malach should have been suppressed because of Miranda violations.

When this Court reviews a trial court's denial of a defendant's motion to suppress, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). We are bound by the trial court's findings of fact unless the evidence in the record preponderates against them. Id. Moreover, because the State prevailed in the trial court, it "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence." Id. We review the trial court's application of the law to the facts de novo, however, with no presumption of correctness. State v. Talley, 307 S.W.3d 723, 729 (Tenn. 2010) (citing State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001)).

In Miranda v. Arizona, the United States Supreme Court held as follows:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized . . . . [Accordingly,] [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. 436, 478-79 (1966). We have recognized that, "[b]y its own terms, Miranda applies to the questioning of an individual who has been 'taken into custody or otherwise

deprived of his freedom by the authorities in any significant way.'" State v. Dailey, 273 S.W.3d 94, 102 (Tenn. 2009).[9]

Thus, our first inquiry is whether the Defendant was "in custody" during her interview with Detective Malach. This Court concluded over twenty years ago that

> in determining whether an individual is "in custody" and entitled to Miranda warnings, the relevant inquiry is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest. The test is objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question.

State v. Anderson, 937 S.W.2d 851, 852 (Tenn. 1996). Factors relevant to making the objective assessment of whether a person was in custody at the time he or she was questioned include

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id. at 855. This list of factors is not exclusive, and the inquiry is "very fact specific." Id.

---

[9] Following Miranda, the Supreme Court clarified in California v. Beheler, 463 U.S. 1121 (1983), that,

> [a]lthough the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

Id. at 1125 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

With regard to the issue of whether the Defendant was "in custody" while Detective Malach was interviewing her at the police station, the trial court allowed the defense to put on additional proof at a subsequent hearing. At this hearing, the Defendant testified that she drove herself to her job on the morning of September 14, 2011, arriving between 7:30 and 8:00 a.m. after about a thirty-minute drive. She first met Detective Malach at her workplace at approximately 10:00 a.m. that morning. She spoke to him there for approximately ten minutes, and he asked her if she would accompany him to the police station. She agreed, and he allowed her to retrieve her purse before she got in his car. When she asked about her car, "he told me just leave it there at the time and we would be back shortly to get it."

She got in the front passenger seat of Detective Malach's car, and "he immediately locked the doors." At that point, she testified, she "felt like [she] had no choice in the matter anymore." When they arrived at the station, they entered through a side door. Detective Malach asked her to sit on a bench in the hallway, which she did. The Defendant remained on the bench, unrestrained and unaccompanied, for approximately thirty minutes. During this time, she had her purse and her cellphone with her. Although she received a phone call from her grandmother while she sat on the bench, she did not answer her phone because she "didn't know if [she] was allowed to use [her] cell phone at the time."

Eventually, Detective Malach escorted the Defendant into a small, windowless room next to the bench. Detective Malach left briefly and then returned with a bottle of water for the Defendant. He closed the single door. The Defendant sat in a chair with her back to the door and facing Detective Malach. At some point during the interview, Detective Malach left the room and she remained alone for approximately thirty minutes. The Defendant testified that, once she was in the room, she did not feel like she could leave. She added that she did not remember any doors other than the first one she had used to enter the station and then the door into the interview room.

On cross-examination, the Defendant agreed that, the "whole time" that she was with Detective Malach, he was "very pleasant" to her. She also acknowledged that, during the time that she was seated on the bench, she could have gotten up and walked out of the station. At no time during her interview with Detective Malach did he tell her that she was under arrest.

The trial court asked the Defendant if, at any time, she had asked Detective Malach if she could leave. She said that she had not, that it was "not [her] personality to do that." She denied that Detective Malach had ever made any display of force to her.

After considering this additional proof, the trial court again concluded that the Defendant had not been in custody during her interview with Detective Malach at the police station. The trial court meticulously considered the Anderson factors, noting that

the interview began at approximately 9:00 in the morning and that the interview took place at the police department; the interview there took approximately ninety minutes; the character of the questioning was based on cooperation and was not "unfair"; that Detective Malach's demeanor was "excellent," noting particularly that he was "pleasant," "polite," "never . . . rude" or "argumentative," that he "never . . . raised his voice" or "talked down to her"; that the Defendant was driven to the police station in Detective Malach's vehicle, in the front seat, with the car doors locked; that Detective Malach was the only officer present during the interview; that there was no show of force or authority; that, while the door to the interview room was closed most of the time, it was also open some of the time; that the Defendant was "very responsive" to Detective Malach's questions and was not badgered or belittled; that the Defendant's verbal and non-verbal responses were normal and natural and not the result of force, coercion or pressure; that, while the Defendant was confronted with the fact of the deceased infant having been discovered in the laundry basket, she was not confronted with Detective Malach's suspicions of guilt; and that the Defendant had been told that she could refuse to answer questions. With respect to the Defendant's claim that she felt that she was not free to leave once she got into Detective Malach's car and he locked the doors, the trial court noted that the Defendant had sat on a bench in the hallway of the police department for approximately thirty minutes after she arrived and that she was not under any restraint during this time period. The trial court found that a reasonable person in the Defendant's position would not have considered herself under arrest under these circumstances.

Based on these findings, the trial court concluded that the Defendant "was not in custody" and "was not deprived of her freedom in any significant way" such that "Miranda had no application to the interview at the police department."

After our thorough review of the proof adduced at both suppression hearings as well as our careful review of the videotape of the interview, we agree with the trial court. Viewed objectively, a reasonable person in the Defendant's position would not have "consider[ed] himself or herself deprived of freedom of movement to a degree associated with a formal arrest." Anderson, 937 S.W.2d at 855.

Detective Malach asked the Defendant to accompany him to the police station from her place of work, and she agreed. Although he locked the doors of his car after she got in, the Defendant sat in the front of the car and was not handcuffed. She had her purse and her cell phone with her. Before the interview at the police station began, the Defendant spent a considerable period of time sitting unrestrained and unaccompanied on a bench in a hallway, with her phone. At the beginning of the interview, even though he was not required to, Detective Malach advised the Defendant that she did not have to speak with him. During the interview, after learning that the Defendant had given birth to a second infant, Detective Malach left the Defendant alone in the interview room for several minutes with the door ajar. Detective Malach's questioning was appropriate to his stated goal of learning how a dead infant had come to be placed in a laundry basket in

the Defendant's bedroom and was not focused on obtaining a confession to a crime. Cf. Dailey, 273 S.W.3d at 103-04 (holding that the defendant was in custody prior to being given Miranda warnings in part because two police officers interrogated the defendant with "focused accusations and questions" about his involvement with the victim's death and that they told the defendant that they "already had sufficient evidence to convict him of first degree murder").

In sum, we hold that the Defendant was not in custody. Therefore, Detective Malach was not required to provide the Defendant with the Miranda warnings prior to commencing his interview of her. Accordingly, we need not address the Defendant's challenges to the efficacy of the Miranda warnings that Detective Malach provided or of the validity of her rights waiver.[10] The trial court did not err in denying the Defendant's motion to suppress her statement on these bases.

Exclusion of Dr. Kenner's Testimony at Trial

The Defendant's final issue arises from the trial court's refusal to allow Dr. Kenner to testify at trial about the reliability of her statements to Detective Malach. Prior to ruling, the trial court allowed the defense to make an offer of proof through questions and answers.

Initially, defense counsel asked Dr. Kenner what "particular qualifications" he had that qualified him to opine "with regard to the reliability of statements or confessions." Dr. Kenner responded,

> I have done a significant amount of research. I have given—on interrogation techniques, false confessions, and the coercive elements in interrogations, I have lectured on this at local, national, and international meetings in areas of psychiatry and psychiatric law. I have been referenced in publications—well, one is by Dr. Snyder Sherman in her book called The Troops Returning from Iraq. And so I have significant knowledge in that respect.

Based on his avowed expertise, Dr. Kenner opined that the Defendant's "law enforcement interrogation by Detective Malach took place proximal to delivery during a time of increased vulnerability, both physical and emotional. Because of her dissociative symptoms and her medical condition, she was particularly vulnerable to suggestion, manipulation, and subversion of her reality." Dr. Kenner also opined that the Defendant's statement was "so contaminated by Detective Malach's narrative that we don't know if it is true or not."

[10] Moreover, we agree with the Court of Criminal Appeals' substantive analyses and conclusions regarding these issues. See Lowe, 2016 WL 4909455, at *19-22.

The following colloquy between the trial court and Dr. Kenner also took place:

> THE COURT: [H]ave you ever been qualified to testify as an expert in state court about the reliability of statements to police officers?
>
> THE WITNESS: I've been allowed to review interview statements, yes.
>
> THE COURT: And have you testified to the same subject matter, same type of testimony, that you have today?
>
> THE WITNESS: Very similar, in which I went over the narrative.

We note that the record does not contain a copy of Dr. Kenner's curriculum vitae.

During his cross-examination, Dr. Kenner maintained that, although Detective Malach began questioning the Defendant without knowing the facts that resulted in Mr. Lowe finding a dead infant in the Defendant's bedroom,

> he pursued his narrative as if he knew exactly what had happened. He stereotyped the case. There is a stereotype within law enforcement for these kinds of cases. And, in my opinion, Detective Malach simply followed that stereotype rather than remaining open to all of the possibilities because he didn't explore anything other than what was in his stereotypical narrative.

The following colloquy between the prosecutor and Dr. Kenner ensued:

> Q. I understand you're critiquing his interview technique, but, Doctor—
>
> A. No, I'm—I'm sorry. I'm critiquing his thinking.
>
> Q. How do you know what his thinking is, Dr. Kenner?
>
> A. Because of how he conducted himself in the interrogation.
>
> Q. But to answer my question earlier, would you agree that Detective Malach did not know what the facts were?
>
> A. Absolutely.
>
> Q. And would you agree that he was trying to determine what the facts were?

A. No.

Q. You would not agree to that?

A. No. He had his stereotype of what the case involved, and that is all that he would allow Lindsey Lowe to give voice to.

Q. How do you know he had a stereotype as to what the case involved, Dr. Kenner?

A. Because there is a stereotype within law enforcement of what—if a woman ends up delivering a baby that is dead, how it died. And that is typically one in which she smothers the child to prevent discovery of her pregnancy, the embarrassment that would follow, et cetera.

Q. How do you know, Dr. Kenner, that law enforcement has that stereotype that they go around with?

A. Well, one is the way Detective Malach jumped to conclusions. He always jumped in the same direction and he always jumped in the direction of the stereotype so that that is a significant clue to me that he was operating off of that stereotype.

Q. I'm wondering, Dr. Kenner, how you know that there's a stereotype among all law enforcement that women smother their babies.

A. That is what has been written about in law enforcement journals. It's what—the way interrogations are—the information that law enforcement are supposed to get [in] an interrogation. If their course is on interrogation about women who just delivered and their babies are dead, that's what's taught.

Q. In every law enforcement jurisdiction?

A. You know, I don't know about every law enforcement jurisdiction. What I do know about is the way Detective Malach structured his interrogation of her, and it was exactly by the book. There was nothing that varied from that in the slightest. If he had, I would certainly be saying something different.

In ruling that Dr. Kenner would not be allowed to testify in this regard, the trial court stated,

> In evaluating his credibility, his testimony appears to be personal rather than professional. . . . It's not reliable. I find that his testimony is not credible as to this particular issue and it will not substantially assist the jury. His credibility and bias is clear. Therefore, this testimony will not be allowed.
>
> . . . .
>
> He just is not qualified in this court to give that testimony.

As set forth above, this Court reviews a trial court's decision regarding the admissibility of expert testimony for an abuse of discretion. See Ballard, 855 S.W.2d at 562. A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the proof, or utilizes reasoning that causes an injustice to the complaining party. Konvalinka, 249 S.W.3d at 358.

Also as set forth above, Tennessee Rule of Evidence 702 provides that, "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise," and Tennessee Rule of Evidence 703 provides, in pertinent part, that "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness."

The Defendant asserts in her brief to this Court that the trial court "had no right to determine Dr. Kenner's bias or credibility." However, while the trial court certainly referred to Dr. Kenner's bias and credibility, the actual basis for the trial court's ruling was its conclusion that Dr. Kenner was not sufficiently qualified to testify as an expert about the reliability of the Defendant's statements in light of the manner in which Detective Malach conducted his interview. We also glean from the trial court's ruling a concern that Dr. Kenner's opinions and inferences were not based on sufficiently trustworthy data.

Initially, we note that the Court of Criminal Appeals thoroughly analyzed this issue and concluded that the trial court did not abuse its discretion in excluding Dr. Kenner's testimony about the reliability of the Defendant's confession in light of Detective Malach's interview technique. See Lowe, 2016 WL 4909455, at *36-42. We agree with the lower court's analysis and conclusion on this issue.

Moreover, we emphasize that it is a trial court's responsibility to act as a gatekeeper regarding the admissibility of expert testimony. State v. Scott, 275 S.W.3d 395, 401 (Tenn. 2009). In this role, the trial court must ensure that the proffered expert "'whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" Brown v. Crown Equip. Corp., 181 S.W.3d 268, 275 (Tenn. 2005) (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)). Thus, the trial court "must assure itself that the [expert's] opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 265 (Tenn. 1997). This reliability analysis includes "four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4) foundational reliability." Scott, 275 S.W.3d at 402.

We note that the foundation of Dr. Kenner's opinion that the Defendant's statement to Detective Malach was not reliable was based, in turn, on his opinion about what Detective Malach was thinking during his interview of the Defendant. That is, Dr. Kenner engaged in sheer bootstrapping to support his claim that Detective Malach had engaged in an interviewing technique based on an alleged stereotype allegedly taught to police officers. Dr. Kenner claimed that the stereotype of a woman smothering her newborn infant "has been written about in law enforcement journals," but did not identify any of these journals. He stated that this stereotype was "what's taught" to law enforcement officers but admitted that he did not know whether this stereotype was taught in every jurisdiction. There was no proof in the record that Detective Malach had been exposed to, or schooled in, this particular stereotype other than Dr. Kenner's claim that Detective Malach "jumped to conclusions . . . in the direction of the stereotype" and that Detective Malach "structured his interrogation of [the Defendant] . . . exactly by the book." In essence, Dr. Kenner testified that his opinion was valid and trustworthy because he said it was. However, "[j]ust because an expert is speaking does not make what he or she is saying sufficiently reliable to be admitted into evidence as expert testimony." Scott, 275 S.W.3d at 402.

We hold that the trial court did not abuse its discretion in ruling inadmissible Dr. Kenner's proffered testimony about the reliability of the Defendant's statement in light of Detective Malach's interviewing technique. The Defendant is not entitled to relief on this basis.

Conclusion

For the reasons stated herein, we affirm the Defendant's judgments of conviction.

JEFFREY S. BIVINS, CHIEF JUSTICE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 11, 2015 Session

STATE OF TENNESSEE v. LINDSEY BROOKE LOWE

Criminal Court for Sumner County
No. 2011-CR-834

No. M2014-00472-CCA-R3-CD

JUDGMENT

Came the appellant, Lindsey Brooke Lowe, by counsel, and also came the Attorney General on behalf of the State of Tennessee, and this case was heard on the record on appeal from the Criminal Court for Sumner County; and upon consideration thereof, this Court is of the opinion that there is no error in the judgments of the trial court.

It is, therefore, ordered and adjudged that the judgments of the trial court are affirmed, and the case is remanded to the Criminal Court for Sumner County for the execution of the judgment and the collection of costs accrued below.

It appearing that the appellant, Lindsey Brooke Lowe, is indigent, costs of the appeal are taxed to the State of Tennessee.

JOHN EVERETT WILLIAMS, Judge
NORMA MCGEE OGLE, Judge
ROBERT W. WEDEMEYER, Judge

MINUTES, CRIMINAL COURT, SUMNER COUNTY, TENNESSEE – MINUTES FOR MARCH 19, 2013

IN THE CRIMINAL CIRCUIT COURT OF SUMNER COUNTY, TENNESSEE

Case Number: 834-2011 Count # 1 Counsel for the State: C. RONALD BLANTON/LAWRENCE RAY WHITLEY

Judicial District: 18th Judicial Division: Counsel for the Defendant: JOHN DAVIS PELLEGRIN

☑ Retained ☐ Private Atty Appt ☐ Pub Def Appt ☐ Counsel Waived ☐ Pro Se

State of Tennessee
vs.

Defendant: LINDSEY BROOKE LOWE Alias:

Date of Birth: 08/29/1986 Sex: Female Race: White SSN: 413-59-4797

Indictment Filing Date: 11/10/2011 TOMIS/TDOC State Control #

State ID # County Offender ID # (if applicable)

FILED
3:40 P M
MAR 22 2013
MAHALIAH HUGHES, CLERK
BY D.C.

JUDGMENT ☑ Original ☐ Amended ☐ Corrected

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.

On the 19th day of March, 2013, the defendant:

☐ Pled Guilty ☐ Dismissed/Nolle
☐ Pled Nolo Contendere
☐ Pled Guilty – Certified Question Findings Incorporated by Reference

Is found: ☑ Guilty ☐ Not Guilty
☑ Jury Verdict ☐ Not Guilty by Reason of Insanity
☐ Bench Trial

Indictment: Class (circle one) 1st A B C D E ☑ Felony ☐ Misdemeanor
Indicted Offense Name AND TCA §: 39-13-202 – FELONY MURDER
Amended Offense Name AND TCA §:
Offense Date: 09/12/2011 County of Offense: SUMNER COUNTY
Conviction Offense Name AND TCA §: 39-13-202 – FELONY MURDER
Conviction: Class (circle one) 1st A B C D E ☑ Felony ☐ Misdemeanor
Is this conviction offense methamphetamine related? ☐ Yes ☑ No
Sentence Imposed Date: 03/19/2013

After considering the evidence, the entire record, and in the case of sentencing, all factors in Tennessee Code Annotated Title 40, Chapter 35, all of which are incorporated by reference herein, it is ORDERED and ADJUDGED that the conviction described above is imposed hereby and that a sentence and costs are imposed as follows:

Sentence Reform Act of 1989

Offender Status (Check One): ☐ Mitigated ☑ Standard ☐ Multiple ☐ Persistent ☐ Career ☐ Repeat Violent

Release Eligibility (Check One): ☐ Mitigated 20% ☐ Mitigated 30% ☐ Standard 30% ☐ Multiple 35% ☐ Persistent 45% ☐ Career 60% ☐ Agg Rob 85% ☐ Violent 100% ☐ Agg Rob w/Prior 100% ☐ Multiple Rapist 100% ☐ Child Rapist 100% ☐ Child Predator 100% ☐ Repeat Violent 100% ☑ 1st Degree Murder ☐ Drug Free Zone ☐ Gang Related

Concurrent with:

Consecutive to:

Pretrial Jail Credit Period(s):
From 09/14/2011 to 09/20/2011
From to
From to
From to

Sentenced To: ☒ TDOC ☐ County Jail ☐ Workhouse

Sentence Length: Years Months Days Hours ☑ Life ☐ Life w/out Parole ☐ Death

Mandatory Minimum Sentence Length: 39-17-417, 39-13-513, 39-13-514, or 39-17-432 in Prohibited Zone *or* 55-10-401 DUI 4th Offense *or* 39-17-1324 Possession/Employment of Firearm *or* 39-13-522. Rape of a Child

Period of incarceration to be served prior to release on probation or Community Corrections: Months Days Hours

Minimum service prior to eligibility for work release, furlough, trusty status and rehabilitative programs: % (Misdemeanor Only)

Alternative Sentence: ☐ Probation ☐ Community Corrections (CHECK ONE BOX) Years Months Days

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE? ☐ Yes ☑ No

Court Ordered Fees and Fines: **Costs to be Paid by** ☑ Defendant ☐ State

$ Court Costs
$ Fine Assessed
$ Traumatic Brain Injury Fund (68-55-301 et seq.)
$ Drug Testing Fund (TN Drug Control Act)
$ CICF $ Sex Offender Tax
$ Other:

Restitution: Victim Name
Address
Total Amount $ Per Month $

☐ Unpaid Community Service: Hours Days Weeks Months

☑ The Defendant having been found guilty is rendered infamous and ordered to provide a biological specimen for the purpose of DNA analysis.
☐ Pursuant to 39-13-521 the defendant is ordered to provide a biological specimen for the purpose of HIV testing.
☐ Pursuant to 39-13-524 the defendant is sentenced to community supervision for life following sentence expiration.

Special Conditions

Merges with count 3.

DEE DAVID GAY
Judge's Name

Judge's Signature

03/19/2013
Date of Entry of Judgment

C. Ronald Blanton / Ray Whitley
Counsel for State/Signature (optional)

Defendant/Defendant's Counsel/Signature (optional)

I , clerk, hereby certify that, before entry by the court, a copy of this judgment was made available to the party or parties who did not provide a signature above.

cc: DA, Atty, Probation, TDOC, AOC, SCI, TBI

1032

MINUTES, CRIMINAL COURT, SUMNER COUNTY, TENNESSEE – MINUTES FOR MARCH 19, 2013

IN THE CRIMIN[illegible]CIRCUIT COURT OF SUMNER CO[illegible]Y, TENNESSEE

Case Number: 834-2011 Count # 2 Counsel for the State: C. RONALD BLANTON/LAWRENCE RAY WHITLEY

Judicial District: 18th Judicial Division: Counsel for the Defendant: JOHN DAVIS PELLEGRIN

State of Tennessee ☑ Retained ☐ Private Atty Appt ☐ Pub Def Appt

vs. ☐ Counsel Waived ☐ Pro Se

Defendant: LINDSEY BROOKE LOWE Alias:

Date of Birth: 08/29/1986 Sex: Female Race: White SSN: 413-59-4797

Indictment Filing Date: 11/10/2011 TOMIS/TDOC State Control #

State ID # County Offender ID # (if applicable)

FILED 3:40 PM MAR 22 2013 MAHAILIAH HUGHES, CLERK BY D.C.

JUDGMENT ☑ Original ☐ Amended ☐ Corrected

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.

On the 19th day of March, 2013, the defendant:

☐ Pled Guilty ☐ Dismissed/Nolle
☐ Pled Nolo Contendere
☐ Pled Guilty – Certified Question Findings Incorporated by Reference

Is found: ☑ Guilty ☐ Not Guilty
☑ Jury Verdict ☐ Not Guilty by Reason of Insanity
☐ Bench Trial

Indictment: Class (circle one) 1st A B C D E ☑ Felony ☐ Misdemeanor
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Amended Offense Name AND TCA §:
Offense Date: 09/12/2011 County of Offense: SUMNER COUNTY
Conviction Offense Name AND TCA §: 39-13-202 – FELONY MURDER
Conviction: Class (circle one) 1st A B C D E ☑ Felony ☐ Misdemeanor
Is this conviction offense methamphetamine related? ☐ Yes ☑ No
Sentence Imposed Date: 03/19/2013

After considering the evidence, the entire record, and in the case of sentencing, all factors in Tennessee Code Annotated Title 40, Chapter 35, all of which are incorporated by reference herein, it is ORDERED and ADJUDGED that the conviction described above is imposed hereby and that a sentence and costs are imposed as follows:

Sentence Reform Act of 1989

Offender Status (Check One): ☐ Mitigated ☑ Standard ☐ Multiple ☐ Persistent ☐ Career ☐ Repeat Violent

Release Eligibility (Check One): ☐ Mitigated 20% ☐ Mitigated 30% ☐ Standard 30% ☐ Multiple 35% ☐ Persistent 45% ☐ Career 60% ☐ Agg Rob 85% ☐ Violent 100% ☐ Agg Rob w/Prior 100% ☐ Multiple Rapist 100% ☐ Child Rapist 100% ☐ Child Predator 100% ☐ Repeat Violent 100% ☑ 1st Degree Murder ☐ Drug Free Zone ☐ Gang Related

Concurrent with:

Consecutive to:

Pretrial Jail Credit Period(s):
From to
From to
From to
From to

Sentenced To: ☒ TDOC ☐ County Jail ☐ Workhouse

Sentence Length: Years Months Days Hours ☑ Life ☐ Life w/out Parole ☐ Death

Mandatory Minimum Sentence Length: 39-17-417, 39-13-513, 39-13-514, or 39-17-432 in Prohibited Zone *or* 55-10-401 DUI 4th Offense *or* 39-17-1324 Possession/Employment of Firearm *or* 39-13-522 Rape of a Child

Period of incarceration to be served prior to release on probation or Community Corrections: Months Days Hours

Minimum service prior to eligibility for work release, furlough, trusty status and rehabilitative programs: % (Misdemeanor Only)

Alternative Sentence: ☐ Probation ☐ Community Corrections (CHECK ONE BOX) Years Months Days

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE? ☐ Yes ☑ No

Court Ordered Fees and Fines: **Costs to be Paid by** ☑ Defendant ☐ State

$ Court Costs
$ Fine Assessed
$ Traumatic Brain Injury Fund (68-55-301 et seq.)
$ Drug Testing Fund (TN Drug Control Act)
$ CICF $ Sex Offender Tax
$ Other:

Restitution: Victim Name
Address
Total Amount $ Per Month $

☐ Unpaid Community Service: Hours Days Weeks Months

☑ The Defendant having been found guilty is rendered infamous and ordered to provide a biological specimen for the purpose of DNA analysis.
☐ Pursuant to 39-13-521 the defendant is ordered to provide a biological specimen for the purpose of HIV testing.
☐ Pursuant to 39-13-524 the defendant is sentenced to community supervision for life following sentence expiration.

Special Conditions

Merges with count 4.

DEE DAVID GAY
Judge's Name

Judge's Signature

03/19/2013
Date of Entry of Judgment

C. Ronald Blanton / Ray Whitley
Counsel for State/Signature (optional)

Defendant/Defendant's Counsel/Signature (optional)

1033

I , clerk, hereby certify that, before entry by the court, a copy of this judgment was made available to the party or parties who did not provide a signature above.

cc: DA, Atty, Probation, TDOC, AOC, SCI, TBI

MINUTES, CRIMINAL COURT, SUMNER COUNTY, TENNESSEE – MINUTES FOR MARCH 19, 2013

IN THE CRIMIN[illegible] CIRCUIT COURT OF SUMNER COU[illegible]Y, TENNESSEE

Case Number: 834-2011 Count # 3 Counsel for the State: C. RONALD BLANTON/LAWRENCE RAY WHITLEY

Judicial District: 18th Judicial Division: _____ Counsel for the Defendant: JOHN DAVIS PELLEGRIN

State of Tennessee ☑ Retained ☐ Private Atty Appt ☐ Pub Def Appt

vs. ☐ Counsel Waived ☐ Pro Se

FILED 3:40P M

Defendant: LINDSEY BROOKE LOWE Alias: _____

Date of Birth: 08/29/1986 Sex: Female Race: White SSN: 413-59-4797

Indictment Filing Date: 11/10/2011 TOMIS/TDOC _____ State Control # _____

State ID # _____ County Offender ID # (if applicable) _____

MAR 2 2 2013

MAHAILIAH HUGHES, CLERK

BY _____ D.C.

JUDGMENT ☑ Original ☐ Amended ☐ Corrected

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.

On the 19th day of March, 2013, the defendant:

☐ Pled Guilty ☐ Dismissed/Nolle ☐ Pled Nolo Contendere ☐ Pled Guilty – Certified Question Findings Incorporated by Reference Is found: ☑ Guilty ☐ Not Guilty ☑ Jury Verdict ☐ Not Guilty by Reason of Insanity ☐ Bench Trial	**Indictment:** Class (circle one) 1st A B C D E ☑ Felony ☐ Misdemeanor Indicted Offense Name AND TCA §: 39-13-202 – MURDER-FIRST DEGREE Amended Offense Name AND TCA §: _____ Offense Date: 09/12/2011 County of Offense: SUMNER COUNTY Conviction Offense Name AND TCA §: 39-13-202 – MURDER-FIRST DEGREE **Conviction:** Class (circle one) 1st A B C D E ☑ Felony ☐ Misdemeanor Is this conviction offense methamphetamine related? ☐ Yes ☑ No Sentence Imposed Date: 03/19/2013

After considering the evidence, the entire record, and in the case of sentencing, all factors in Tennessee Code Annotated Title 40, Chapter 35, all of which are incorporated by reference herein, it is ORDERED and ADJUDGED that the conviction described above is imposed hereby and that a sentence and costs are imposed as follows:

Sentence Reform Act of 1989

Offender Status (Check One): ☐ Mitigated ☑ Standard ☐ Multiple ☐ Persistent ☐ Career ☐ Repeat Violent

Release Eligibility (Check One): ☐ Mitigated 20% ☐ Mitigated 30% ☐ Standard 30% ☐ Multiple 35% ☐ Persistent 45% ☐ Career 60% ☐ Agg Rob 85% ☐ Violent 100% ☐ Agg Rob w/Prior 100% ☐ Multiple Rapist 100% ☐ Child Rapist 100% ☐ Child Predator 100% ☐ Repeat Violent 100% ☑ 1st Degree Murder ☐ Drug Free Zone ☐ Gang Related

Concurrent with: _____

Consecutive to: _____

Pretrial Jail Credit Period(s): From _____ to _____; From _____ to _____; From _____ to _____; From _____ to _____

Sentenced To: ☒ TDOC ☐ County Jail ☐ Workhouse

Sentence Length: _____Years _____Months _____Days _____Hours ☑ Life ☐ Life w/out Parole ☐ Death

Mandatory Minimum Sentence Length: _____ 39-17-417, 39-13-513, 39-13-514, or 39-17-432 in Prohibited Zone *or* _____ 55-10-401 DUI 4th Offense *or* _____ 39-17-1324 Possession/Employment of Firearm *or* _____ 39-13-522 Rape of a Child

Period of incarceration to be served prior to release on probation or Community Corrections: _____Months _____Days _____Hours

Minimum service prior to eligibility for work release, furlough, trusty status and rehabilitative programs: _____% (Misdemeanor Only)

Alternative Sentence: ☐ Probation ☐ Community Corrections (CHECK ONE BOX) _____Years _____Months _____Days

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE? ☐ Yes ☑ No

Court Ordered Fees and Fines: **Costs to be Paid by** ☑ Defendant ☐ State

$ _____ Court Costs

$ _____ Fine Assessed

$ _____ Traumatic Brain Injury Fund (68-55-301 et seq.)

$ _____ Drug Testing Fund (TN Drug Control Act)

$ _____ CICF $ _____ Sex Offender Tax

$ _____ Other: _____

Restitution: Victim Name _____

Address _____

Total Amount $_____ Per Month $_____

☐ Unpaid Community Service: _____Hours _____Days _____Weeks _____Months

☑ The Defendant having been found guilty is rendered infamous and ordered to provide a biological specimen for the purpose of DNA analysis.

☐ Pursuant to 39-13-521 the defendant is ordered to provide a biological specimen for the purpose of HIV testing.

Special Conditions ☐ Pursuant to 39-13-524 the defendant is sentenced to community supervision for life following sentence expiration.

Merges with count 1.

DEE DAVID GAY
Judge's Name

Judge's Signature

03/19/2013
Date of Entry of Judgment

C. Ronald Blanton / Ray Whitley
Counsel for State/Signature (optional)

Defendant/Defendant's Counsel/Signature (optional)

1034

I _____, clerk, hereby certify that, before entry by the court, a copy of this judgment was made available to the party or parties who did not provide a signature above.

cc: DA, Atty, Probation, TDOC, AOC, SCJ, TBI

MINUTES, CRIMINAL COURT, SUMNER COUNTY, TENNESSEE – MINUTES FOR MARCH 19, 2013

IN THE CRIMIN[illegible]IRCUIT COURT OF SUMNER CO[illegible]Y, TENNESSEE

Case Number: 834-2011 Count # 4 Counsel for the State: C. RONALD BLANTON/LAWRENCE RAY WHITLEY

Judicial District: 18th Judicial Division: Counsel for the Defendant: JOHN DAVIS PELLEGRIN

State of Tennessee ☑ Retained ☐ Private Atty Appt ☐ Pub Def Appt

vs. ☐ Counsel Waived ☐ Pro Se

Defendant: LINDSEY BROOKE LOWE Alias:

FILED 3:40 PM MAR 22 2013 MAHAILIAH HUGHES, CLERK BY D.C.

Date of Birth: 08/29/1986 Sex: Female Race: White SSN: 413-59-4797

Indictment Filing Date: 11/10/2011 TOMIS/TDOC State Control #

State ID # County Offender ID # (if applicable)

JUDGMENT ☑ Original ☐ Amended ☐ Corrected

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.

On the 19th day of March, 2013, the defendant:

☐ Pled Guilty ☐ Dismissed/Nolle
☐ Pled Nolo Contendere
☐ Pled Guilty – Certified Question Findings Incorporated by Reference

Is found: ☑ Guilty ☐ Not Guilty
☑ Jury Verdict ☐ Not Guilty by Reason of Insanity
☐ Bench Trial

Indictment: Class (circle one) I A B C D E ☑ Felony ☐ Misdemeanor
Indicted Offense Name AND TCA §: 39-13-202 – MURDER-FIRST DEGREE
Amended Offense Name AND TCA §:
Offense Date: 09/12/2011 County of Offense: SUMNER COUNTY
Conviction Offense Name AND TCA §: 39-13-202 – MURDER-FIRST DEGREE
Conviction: Class (circle one) I A B C D E ☑ Felony ☐ Misdemeanor
Is this conviction offense methamphetamine related? ☐ Yes ☑ No
Sentence Imposed Date: 03/19/2013

After considering the evidence, the entire record, and in the case of sentencing, all factors in Tennessee Code Annotated Title 40, Chapter 35, all of which are incorporated by reference herein, it is ORDERED and ADJUDGED that the conviction described above is imposed hereby and that a sentence and costs are imposed as follows:

Sentence Reform Act of 1989

Offender Status (Check One): ☐ Mitigated ☑ Standard ☐ Multiple ☐ Persistent ☐ Career ☐ Repeat Violent

Release Eligibility (Check One): ☐ Mitigated 20% ☐ Mitigated 30% ☐ Standard 30% ☐ Multiple 35% ☐ Persistent 45% ☐ Career 60% ☐ Agg Rob 85% ☐ Violent 100% ☐ Agg Rob w/Prior 100% ☐ Multiple Rapist 100% ☐ Child Rapist 100% ☐ Child Predator 100% ☐ Repeat Violent 100% ☑ 1st Degree Murder ☐ Drug Free Zone ☐ Gang Related

Concurrent with:

Consecutive to:

Pretrial Jail Credit Period(s):
From to
From to
From to
From to

Sentenced To: ☒ TDOC ☐ County Jail ☐ Workhouse

Sentence Length: Years Months Days Hours ☑ Life ☐ Life w/out Parole ☐ Death

Mandatory Minimum Sentence Length: 39-17-417, 39-13-513, 39-13-514, or 39-17-432 in Prohibited Zone *or* 55-10-401 DUI 4th Offense *or* 39-17-1324 Possession/Employment of Firearm *or* 39-13-522 Rape of a Child

Period of incarceration to be served prior to release on probation or Community Corrections: Months Days Hours

Minimum service prior to eligibility for work release, furlough, trusty status and rehabilitative programs: % (Misdemeanor Only)

Alternative Sentence: ☐ Probation ☐ Community Corrections (CHECK ONE BOX) Years Months Days

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE? ☐ Yes ☑ No

Court Ordered Fees and Fines: **Costs to be Paid by**

$ Court Costs ☑ Defendant ☐ State
$ Fine Assessed
$ Traumatic Brain Injury Fund (68-55-301 et seq.)
$ Drug Testing Fund (TN Drug Control Act)
$ CICF $ Sex Offender Tax
$ Other:

Restitution: Victim Name
Address
Total Amount $ Per Month $

☐ Unpaid Community Service: Hours Days Weeks Months

☑ The Defendant having been found guilty is rendered infamous and ordered to provide a biological specimen for the purpose of DNA analysis.
☐ Pursuant to 39-13-521 the defendant is ordered to provide a biological specimen for the purpose of HIV testing.
☐ Pursuant to 39-13-524 the defendant is sentenced to community supervision for life following sentence expiration.

Special Conditions

Merges with count 2.

DEE DAVID GAY
Judge's Name

Judge's Signature

03/19/2013
Date of Entry of Judgment

Counsel for State/Signature (optional)

Defendant/Defendant's Counsel/Signature (optional)

1035

I , clerk, hereby certify that, before entry by the court, a copy of this judgment was made available to the party or parties who did not provide a signature above.

cc: DA, Atty, Probation, TDOC, AOC, SCT, TBI

MINUTES, CRIMINAL COURT, SUMNER COUNTY, TENNESSEE - MINUTES FOR FEBRUARY 12, 2013

IN THE CRIMINAL COURT FOR SUMNER COUNTY, TENNESSEE

AT GALLATIN

STATE OF TENNESSEE

VS.

LINDSEY BROOKE LOWE

CASE NO. 2011-CR-834

FILED
10:00 A M
FEB 13 2013
MAHAILIAH HUGHES, CLERK
BY D.C.

ORDER

THIS CAUSE is before the Court upon a Defendant's Motion to Suppress filed February 8, 2013.

IT IS, THEREFORE, ORDERED that the Defendant's Motion to Suppress filed February 8, 2013, is Denied for reasons stated in open court.

ENTERED this the 12th day of February, 2013.

DEE DAVID GAY
CRIMINAL COURT JUDGE

cc: DA
James Ramsey, Atty
John Pellegrin, Atty

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
vs.	)	Case No. # M2014-00472-SC-R11-CD
	)	
LINDSEY BROOKE LOWE	)	

PETITION TO REHEAR

A.

Pursuant to Rule 39, Tennessee Rules of Appellate Procedure, the Appellant, Lindsey Brooke Lowe, [Petitioner] respectfully requests this Court entertain this Petition to Rehear on whether the creation of the "good faith" exception to Rule 41, Tennessee Rules of Criminal Procedure, should be retroactively applied to her in violation of the Due Process and Ex Post Facto provisions of the Tennessee and United States Constitutions.

This timely Petition to Rehear is proper since this is a follow-on question directly related to the holding in this Court's July 20, 2018 Opinion that a good faith exception would apply to mistakes of magistrates in approving search warrants in direct violation of Rule 41, Tennessee Rules of Criminal Procedure.

Petitioner does not seek to relitigate this Court's decision. Retroactivity was not addressed by this Court and was not among the several questions set forth by the Court in its Order Granting Application for Permission to Appeal on January 18, 2017. The primary issue of interest was whether some good faith exception should be created, but not whether it was to be applied retroactively.

Petitioner asserts that retroactive application conflicts with prior decisions of this Court. While this Court is free to adopt interpretations of its own rules, it should do so in a prospective manner, since this Court squarely held that the search warrant here contravened Rule 41, Tennessee Rules of Criminal Procedure, as that Rule had consistently been interpreted by this Court since its promulgation. *Lowe* is a judicial ruling and not a statute, and retroactivity is governed by the Due Process provisions of the United States and Tennessee Constitutions.

Should the Court determine that interpreting a Rule of Criminal Procedure is similar to a retroactive alteration of the statute, Petitioner asserts that retroactive application of the decision is prohibited by the Ex Post Facto clauses of the Tennessee and United States Constitutions.

B.

In *State v. Rogers*, 504 S.W. 3d 283 (Tenn. 2016), this Court considered the Tennessee homicide year-and-a-day rule regarding the maximum permissible time between an infliction of injury and the later actual death of the victim. This Court determined that the rule had been dwindling in application in Tennessee and that the rule was archaic and should be changed. This Court held that retroactive application of the modified rule would not violate ex post facto considerations because the alteration was not "unexpected" or "unanticipated."

A related doctrine was explored in *State v. Feaster*, 466 S.W. 3d 80 (Tenn. 2015). Here, the question dealt with identity of offenses under the *Blockburger* test to determine whether separate convictions could stand for attempted voluntary manslaughter and

aggravated assault. This Court had earlier adopted modifications of the *Blockburger* rule in *State v. Watkins*, 362 S.W. 3d 530 (Tenn. 2012). In *Feaster* this Court found that because *Watkins* could not be classified as "unexpected" by reference to prior law, due process did not preclude its retroactive application to the defendant in *Feaster*. *Feaster* relied heavily on this Court's decision in *Rogers* regarding the year-and-a-day rule.

C.

The question here is whether the adoption of the "good faith" exception to Rule 41 was foreseeable. It is undisputed that the search warrant in this case was created on September 14, 2011. What was the state of the law at that time?

In *State v. Reynolds*, 504 S.W. 3d 283 (Tenn. 2016), the Court considered for the first time a so-called "good faith" exception to issues regarding searches and seizures. *Reynolds* is significant because, there, the police officer relied on existing rulings that a search warrant was not required to draw blood. *Reynolds* also addressed Rule 41 of the Tennessee Rules of Criminal Procedure, which this Court had exclusive authority to construe.

Reynolds was decided on November 3, 2016, some five years after the search warrant in Petitioner's case. Clearly, on September 14, 2011, it was unforeseeable this Court would create some new good faith exception a half-decade later. Indeed, it was precisely because of this Court's refusal to modify Rule 41, Tennessee Rules of Criminal

Procedure, that the Tennessee legislature enacted the Exclusionary Reform Act in 2011.[1] The only thing foreseeable then was the distinct probability this Court would find this law violative of the Tennessee Constitution, which this Court so held in *Lowe*.

There is much to be said for stability and justifiable reliance on settled precedent and the effect a modification will have on our justice system. Indeed, in *State v. Reynolds*, *supra*, this Court found it highly relevant that the officer was relying on "binding precedent," when the "good faith" exception was first promulgated as matter of Tennessee jurisprudence. Implicitly, it was not lost on the courts that a contrary ruling would have affected dozens, if not hundreds, of pending DUI cases. See also, *State v. Robbins*, 519 S.W.2d 799, 801 (Tenn. 1975) ("wholesale unsettling of final judgments of conviction").

That impact undoubtably jumpstarted the "good faith" issue which had been dormant in our State for years. See, *State v. Carter*, 16 S.W.3d 762, 768 n. 8 (Tenn.2000), "Moreover, this Court has yet to adopt the ["good faith"] exception, and we decline to address its validity under the Tennessee Constitution until the issue is squarely presented."

In *State v. Davidson*, 509 S.W. 3d 156 (Tenn. 2016), this Court found that evidence obtained under an invalid search warrant issued on an unsigned affidavit was admissible under then newly-minted good faith exception to suppression of evidence, obtained in violation of Rule 41, Tennessee Rules of Criminal Procedure.

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[1] *State v. Hayes*, No. M2012-01768-CCA-R3CD, 2013 WL 3378320, at *5 (Tenn. Crim. App. July 1, 2013), later overruled by *State v. Pruitt*, 510 S.W.3d 398 (Tenn. 2016) ("After the second indictment was issued, the Defendant again moved to have the evidence against him suppressed based upon the invalid search warrant. At the hearing on the motion to suppress, the State's attorney informed the trial court that, based upon this Court's [earlier] decision [in *State v. Hayes*, 337 S.W. 3d 235 (Tenn. Crim. App. 2010)], the District Attorney's office had asked the Legislature to change the law, which had in fact happened.").

Finally, this Court should not be unmindful that Rule 41 was, itself, not modified by this Court until July 1, 2018 by changing the exclusionary mandate from "shall" to "may." See discussion in *State v. Daniel*, __ S.W. 3d ___, 2018 W.L. 3490864, footnote 5 (Tenn. 2018), decided the same day as this Court rendered *Lowe*.

These authorities are compelling that the adoption of the "good faith" exception was unanticipated on September 14, 2011. This Court took pains in *Lowe* to list all the many cases which strictly construed Rule 41 to find the search warrants were invalid for the same "technical" defects present here. One of the cases cited by the Court, *State v. Hayes*, 337 S.W. 3d 235 (Tenn. Crim. App. 2010), involving as it did the same a.m./p.m. defect as *Lowe*, was considered by this Court in 2011 when this Court refused to entertain the State's Application for Permission to Appeal. This was the very same year that the search warrant was executed here in Petitioner's case. To extend the "unanticipated "or "unexpected" precedent doctrine to permit retroactive application of the "good faith" rule to Petitioner here renders the doctrine meaningless. While the "good faith" rule certainly evolved in later cases, if viewed from the jurisprudence which existed in 2011, the searches here were fatally defective.

D.

Much discussion in *Lowe* regards prejudice. Petitioner was prejudiced. It was her own home invaded by the police without a valid search warrant in direct violation of Rule 41, Tennessee Rules of Criminal Procedure. An invasion into one's home still violates the law, if done without a valid search warrant. *Lucarini v. State*, 159 Tenn. 373, 19 S.W.2d 239, 240–41 (1929) "[A person's] home is his [or her] castle and cannot be invaded or

searched without a warrant. The courts of the land have uniformly discountenanced all attempts on the part of officers to evade this sacred right upon various pretexts and subterfuges."

If the Court were to allow the retroactive application of the functionally amended rule of procedure, clearly the law would alter the situation of the Petitioner to her disadvantage based upon the law's relationship to the offenses charged in this case. Without the rule as amended by a "good faith" exception, evidence supporting the offenses would be suppressed.

Last, Petitioner asserts that the error here was not the fault of some police officer who blundered. Rather, the error was of the magistrate who, it must be noted, is the only independent barrier between the citizen and overzealous police officers. See, *Reed v. State*, 162 Tenn. 643, 39 S.W.2d 749, 749 (1931):

> The affidavit for the search warrant was presented to the magistrate in good faith, for his judicial consideration, and by the issuance of the warrant he adjudged that the affidavit was sufficient to create in him a belief that the warrant should issue. ... It was for him to determine whether to read the affidavit "plumb to the bottom" or merely "sketch it over," and, in the absence of fraud or collusion or willful failure to exercise his discretion, his action in holding the affidavit sufficient was final and not subject to review, *except for deficiency on the face of the affidavit or warrant.* (emphasis added)

Similarly situated defendants should be treated similarly. The defendant in *State v. Hayes*, 337 S.W. 3d 235 (Tenn. Crim. App. 2010) was granted relief for a similarly defective search warrant as we have before us here. Counsel for Ms. Lowe must explain to her why she has been denied a similar result. Until Rule 41 was itself amended on July 1,

2018, the strict but salutary exclusionary provisions of the Rule existed unaltered for many decades. The unforeseeable "good faith" modification of a Rule, which is as a plain as pikestaff, renders fluid all this Court's procedural rules. This is not a healthy precedent dictating why this Petition to Rehear should be granted.

For all these reasons the good faith exception adopted here should not apply to Petitioner and this Court should reverse and remand this matter for new trial. At the new trial the State will be free to advocate that the fruits of the now-warrantless search might be admissible under other search exceptions. But that is for another day. For now, Petitioner is entitled, under the law as it existed in 2011, to a new trial.

Respectfully submitted,

RAYBIN & WEISSMAN, P.C.

David L. Raybin (B.P.R. #3385)
Fifth Third Center, Suite 2120
424 Church Street
Nashville, Tennessee 37219
(615) 256-6666
DRaybin@NashvilleTnLaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to Leslie Price, Assistant State Attorney General, Office of the Attorney General, 500 Charlotte Avenue, P. O. Box 20207, Nashville, TN 37202-0207 on this the 26th day of July 2018.

David L. Raybin

IN THE CRIMINAL COURT for SUMNER COUNTY, TENNESSEE
at GALLATIN

FILED 4:18 P M
FEB 0 8 2013
MAHAILIAH HUGHES, CLERK
BY _____ D.C.

STATE OF TENNESSEE,	)	
	)	
Prosecutor,	)	
	)	
vs.	)	**CASE #: 2011 - CR - 834**
	)	
LINDSEY BROOKE LOWE,	)	
	)	
Defendant.	)	
	)	

MOTION TO SUPPRESS SEARCH WARRANT

COMES NOW **LINDSEY BROOKE LOWE**, by and through her counsel of record JOHN PELLEGRIN, Esq., and hereby respectfully submits this Motion to Suppress the search warrant issued on or about September 14, 2011 regarding the search and seizure of evidence conducted at 105 Park Circle, Hendersonville, Sumner County, Tennessee.

This Motion is made pursuant to the Tennessee Constitution Article I, §9, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and the TENN. R. CRIM. P. Rule 41.

In relevant portion, TENN. R. CRIM. P. Rule 41 states as follows:

> *"(c) Issuance and Content of Warrant.*
> *(1) Issuance. A warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish the grounds for issuing the warrant.*
> *(2) Content. If the magistrate is satisfied that there is probable cause to believe that grounds for the application exist, the magistrate shall issue a warrant as follows:*
> > *(A) The warrant shall, as the case may be, identify the property or place to be searched, or name or describe the person to be searched; the warrant also shall name or describe the property or person to be seized.*

(B) The search warrant shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person.

(C) The search warrant shall be directed to and served by:

(i) the sheriff or any deputy sheriff of the county where the warrant is issued; or

(ii) any constable or any other law enforcement officer with authority in the county.

(D) The magistrate shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution.

*(3) **Hearsay.** The magistrate may base a finding of probable cause on hearsay evidence in whole or in part.*

***(d) Copies and Record of Warrant.** The magistrate shall prepare an original and two exact copies of each search warrant. The magistrate shall keep one copy as a part of his or her official records. The other copy shall be left with the person or persons on whom the search warrant is served. The exact copy of the search warrant and the endorsement are admissible evidence."*

For cause, Defendant would show this Honorable Court as follows:

1. On or about September 14, 2011, the Hendersonville Police Department endeavored to seek and secure a search warrant regarding the discovery of a deceased male newborn infant at the resident of the Defendant (105 Park Circle, Hendersonville, Tennessee). Detective Malach has testified under oath that he told Detective Vaughn of the need for the search warrant at approximately 9:10 a.m. (See excerpt of Transcript of Proceedings, December 10, 2012 [Rule 9 hearing], page 22, lines 9-14, attached hereto as

Exhibit "A"). The warrant sought evidence of a criminal homicide and/or abuse of a corpse.[1]

2. A 'true and correct copy' of the 'original' search warrant was provided to defense counsel pursuant to TENN. R. CRIM. P. Rule 16. (Defendant had submitted to the State and filed with the Court two (2) discovery requests: (1) a Motion for discovery filed on December 2, 2011; and (2) a Request for Supplemental Discovery of Evidence filed on July 31, 2012).

3. The search warrant indicates that it was delivered for execution to Detective David Harrell of the Hendersonville Police Department.

4. Upon information and belief, the 'copy' of the original search warrant provided to defense counsel states that the warrant was issued for execution at 11:35 p.m. on the 14th day of September 2011. (See 'copy' of the original search warrant delivered to defense counsel through discovery, attached hereto as **Exhibit "D"**).

5. It is undisputed that a search was conducted at the 105 Park Circle address on or about noon on September 14, 2011.[2]

---

[1] Hendersonville Police Department (HPD) Incident Report (attached hereto as **Exhibit "B"**) verifies that Detective Malach sought the search warrant prior to his initial arrival at 105 Park Circle at 0915. HPD Call to Service rough notes (attached as **Exhibit "C"**) verify the time of Detective Malach's arrival at the 105 Park Circle Address as approximately 0915-0917.

[2] See attached **Exhibit "E"**, an inventory of items seized during the search.

6. It is irreconcilable that the search warrant that was issued for execution at 11:35 p.m. could have been the search warrant that was executed at the address nearly twelve (12) hours earlier.

7. Given a fair and logical evaluation of the facts as they exist, the search and seizure conducted at the 105 Park Circle address on September 14, 2011 was conducted without a valid warrant, and furthermore without the availability of an exception (such as risk of loss of evidence, urgency, safety concerns of law enforcement and/or the citizenry, etc.) to the necessary acquisition of a search warrant.

8. As a result, any and all evidence acquired during the search and seizure conducted at the 105 Park Circle residence should be suppressed. As well, any and all evidence acquired as either a direct or indirect result thereof should likewise be suppressed.

9. Notwithstanding what appears to have been a warrantless search, the failure of law enforcement to have assured the acquisition of an original and two (2) exact copies of the search warrant is fatal to the validity of the search warrant, pursuant to *State v. Steele*, 894 S.W.2d 318, 1994 Tenn. Crim. App. LEXIS 746 (Tenn. Crim. App. 1994), to wit: the 'exact' copy of the search warrant (or what is purported to be an exact copy of the search warrant) left at the Defendant's residence demonstrates a critical error as to issuance of the search warrant.

10. As evidence thereof, please find attached a true and correct copy (**Exhibit "F"**) of the search warrant that was left at the 105 Park Circle address following the search and seizure at that address, which contains a date and time of issuance of September 14, 2011 at 11:35 a.m., and not 'p.m.' It is noteworthy that Exhibit "F" also demonstrates confusion or other error as to the date of said 'copy', including as can be demonstrated in the copy left with at the address (in possession of defense counsel) differing blue and black ink usage.

11. As a result of the inconsistency of the times stated within the two 'original' search warrants, these exhibits represent evidence that the search warrant itself is invalid under the express provisions of and pursuant to subsection (d) of Rule 41. In contravention of the technical yet strict and mandatory requirements of Rule 41, it appears that the magistrate failed to endorse on the search warrant and copies thereof the hour, date, and name of the officer to whom the warrant was delivered for execution, thereby rendering the search warrants invalid.

12. Given the variance between the original search warrant and the Defendant's copy, the execution of the search warrant is invalid under the express provisions of Rule 41.

13. Our Court of Criminal Appeals in *State v. Steele* has expressly stated the risks created by the delegation to or the assumption by a police officer of a function expected to be performed by the magistrate issuing a search warrant. This case is yet another example of that risk, which risk and its attendant duty the Hendersonville Police

Department knew or should have known of in that the *Steele* opinion was published in 1994 and remains the letter of the law today.

14. In further support hereof, the strict application of Rule 41 as to this issue has been endorsed by the court of criminal appeals in *State v. Gambrel*, 783 S.W.3d 191, 192 (Tenn. Crim. App. 1989), stating that not unlike the predecessor statute T.C.A. §40-518 (repealed 1979) dealing with the strict and technical compliance, the provisions of Rule 41 are mandatory.

WHEREFORE, PREMISES CONSIDERED, any and all evidence acquired during the search and seizure conducted at the 105 Park Circle residence should be suppressed pursuant to the above-stated law, rules, and argument. As well, any and all evidence acquired as either a direct or indirect result thereof should likewise be suppressed.

Submitted this 8th day of February, 2013.

Respectfully submitted,

By: _____

JOHN PELLEGRIN, BPR #7326
JAMES J. RAMSEY, BPR #016263
113 West Main Street
Gallatin, TN 37066
Ph: (615) 452-5844
Fax: (615) 452-6203
Attorneys for Lindsey Brooke Lowe

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been contained within a secured and opaque envelope and hand-delivered to the following individual(s):

L. RAY. WHITLEY, ESQ.,
DISTRICT ATTORNEY GENERAL
AND
C. RONALD BLANTON, ESQ.,
ASSISTANT DISTRICT ATTORNEY GENERAL

18th Judicial District – Sumner County, Tennessee
113 West Main Street, 3rd Floor
Gallatin, Tennessee 37066
Ph: (615) 451-5810
Fax: (615) 451-5836

on this 8th day of February, 2013.

JAMES J. RAMSEY

IN THE CRIMINAL COURT FOR SUMNER COUNTY
AT GALLATIN, TENNESSEE

STATE OF TENNESSEE,)
)
Plaintiff,)
)
vs.) NO. 83CC1-2011-CR-834
)
LINDSEY BROOKE LOWE,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Dee David Gay

December 10, 2012

GLORIA J. DILLARD, LCR
LICENSED COURT REPORTER
1069 Bradley Road
Gallatin, Tennessee 37066
(615)230-8011

EXHIBIT A

APPEARANCES:

FOR THE PLAINTIFF:

Lawrence Ray Whitley
District Attorney General
113 West Main Street, Third Floor
Gallatin, Tennessee 37066

C. Ronald Blanton
Assistant District Attorney General
113 West Main Street, Third Floor
Gallatin, Tennessee 37066

FOR THE DEFENDANT:

John Pellegrin
James Ramsey
Attorneys at Law
113 West Main Street
Gallatin, Tennessee 37066

INDEX

EXHIBITS

Q. Would you tell the Court how you were aware of that and how the search warrant came about?
A. I was the first detective to respond to the scene on Park Circle where the officers were. Once I got there, we had learned that Ms. Lowe was at work at Snodgrass in Nashville. We started to getting a game plan as to what the particular duties of each detective were going to be. That's when I got with Sergeant Vaughn once he arrived on the scene. I told him that we would need a search warrant. While I'm going to go meet with Ms. Lowe, we need to get a search warrant going.

I believe it was roughly around 9:10 in the a.m. that Detective Harrell was notified that a search warrant needed to be done. He was given the facts through the officers on the scene, not through me at all. None of the information, I gave him. I hadn't talked to him. He started preparing the search warrant, and he had the search warrant signed at I believe approximately 11:40, and it's stamped on the warrant.
Q. Detective Malach, what was the search warrant for? What were you going to search for?
A. The search warrant was going to be to search for all evidence of the fact that there was a child, one child, deceased in a laundry basket and all evidence leading up to exactly the cause of that and all evidence

C E R T I F I C A T E

STATE OF TENNESSEE)
) SS.
COUNTY OF SUMNER)

I, GLORIA J. DILLARD, LCR #241, licensed court reporter and notary public at large, in and for the State of Tennessee, do hereby certify that the foregoing proceedings were reported by me and that the foregoing 87 pages of the transcript were taken at the time and place set forth in the caption thereof; that the witnesses therein were duly sworn on oath to testify the truth; that the proceedings were stenographically reported by me in shorthand; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I further certify that I am not related to nor an employee of counsel or any of the parties to the action, nor do I have any interest in the outcome thereof.

Dated this 17th day of December, 2012.

GLORIA J. DILLARD, LCR #241
Notary Public at Large
State of Tennessee
My Commission Expires:
December 21, 2015

Hendersonville Police Department Incident Report

Hendersonville, Tennessee TNO830400

Incident Number	Location
11034909	105 Park Cir

OFFENDER/ARRESTEE #

Last Name	First	MI	Offender / Arrestee	Address

Race	Sex	Hair	Eyes	Height	Weight	DOB	Age	SSAN	DL

Phone	Business address and phone	Linked to offense(s)
		1

Arrest Date	Arrest Transaction #	State Control #	DOMESTIC VIOLENCE Warrant signed: Officer / Victim / Both	Hispanic / Non-Hisp	Resident / Non-Resid	On-View / Custody / Cited

Weapons possessed when arrested	Scars, marks, tattoos	Clothing

Charge	Charge Code	Charge	Charge Code

OFFENDER/ARRESTEE #

Last Name	First	MI	Offender / Arrestee	Address

Race	Sex	Hair	Eyes	Height	Weight	DOB	Age	SSAN	DL

Phone	Business address and phone	Linked to offense(s)

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Weapons possessed when arrested	Scars, marks, tattoos	Clothing

Charge	Charge Code	Charge	Charge Code

LEOKA

Type of LEOKA: ☐ Officer Assaulted ☐ Officer Killed, Felony ☐ Officer Killed, Accident, Negligent, Other ☒ Not LEOKA Incident

Vehicle: ☐ 2 Man Uniformed ☐ One Man Uniformed ☐ One Man Assisted ☐ Det./Spec. Assignment Alone ☐ Det./Spec. Assignment Assisted ☐ Other Alone ☐ Other Assisted

Circumstances: ☐ Responding to Disturbance (Domestic) ☐ Responding to Disturbance (Other) ☐ Burglaries in Progress/Pursuing Burglary Suspects ☐ Robberies in Progress/Pursuing Robbery Suspects ☐ Attempting Other Arrests ☐ Civil Disorders ☐ Handling/Transporting Prisoners ☐ Investigating Suspicious Persons Circumstances ☐ Ambush/No Warning ☐ Mentally Deranged ☐ Traffic Pursuits/ Stops ☐ All Others

Reporting Officer, #, Unit, Shift, Supplement Date	Reviewing Officer, #, Date
Mpo J. Fentress #255 I-29 7-3 9/14/11	Lt. B Rumble 98 9-14-2011

EXHIBIT B

NARRATIVE

Crime scene log is as follows:

0849 I entered with Officer Wilson
0850 Three Firefighters entered went to top of stairs
0851 three Firefighters left
0852 Paramedic Jones in
0854 Paramedic Jones out
0900 Sgt. Fohrd in
0902 Sgt. Fohrd and Fentress out
0915 Det. Malach and Fentress in
0917 Det. Malach and Fentress out
0923 Fentress in (clear house per Sgt. Vaughn)
0928 Fentress out
0932 Fentress in to retrieve purse, wallet and keys
0932 Fentress out
0953 Fentress in to retrieve cell phone charger
0955 Fentress out
1107 Fentress and Garrett in retrieve his cell phone charger and Mrs. Lowe's medications
1112 Fentress and Garrett out
1139 Wilson relieved by Fentress
1147 Fentress relieved by Wilson
1145 Garrett, Fentress and Sgt. Vaughn in (exigent circumstances to check on another possible alive baby newborn that came from Det. Malach's interview with the mother.
1148 Fentress, Garrett and Sgt. Vaughn out
1156 Wilson relieved by Fentress
1205 Fentress relieved by Wilson
1232 Garrett and Fentress in
1234 Harrell in
1259 Sgt. Vaughn in
1308 Harrell out
1311 Vaughn out
1313 Vaughn in
1316 Harrell in
1334 Vaughn out
1340 Fentress out
1345 Sgt. Vaughn in
1347 Fentress in and out
1350 Fentress in
1351 Fentress out
1401 Sgt. Vaughn out
1410 Sgt. Vaughn in
1415 bodies out (Garrett carried into ambulance)
1437 Harrell and Garrett in
1507 Fentress in
1508 Fentress out
1525 Fentress relieved Wilson
1525 Wilson in
1530 Sgt. Vaughn in
1536 Wilson out
1541 Sgt. Vaughn out
1711 Harrell out
1745 Fentress out
1746 Harrell in
1747 Wilson in and out
1749 Sgt. Vaughn in
1801 Fentress in
1804 Fentress out
1823 Sgt. Vaughn out
1835 Fentress in and out

Hendersonville Police Department Incident Report

Hendersonville, Tennessee TN0830400

Incident Number: 11034909 Location: 105 Park Cir

OFFENDER/ARRESTEE

Last Name | First | MI | Offender | Arrestee | Address

Race | Sex | Hair | Eyes | Height | Weight | DOB | Age | SSAN | DL

Phone | Business address and phone | Linked to offense(s): 1

Arrest Date | Arrest Transaction # | State Control # | DOMESTIC VIOLENCE Warrant signed | Officer | Victim | Both | Hispanic | Non-Hisp | Resident | Non-Resid | On-View | Custody | Cited

Weapons possessed when arrested | Scars, marks, tattoos | Clothing

Charge	Charge Code	Charge	Charge Code
Charge	Charge Code	Charge	Charge Code
Charge	Charge Code	Charge	Charge Code

OFFENDER/ARRESTEE

Last Name | First | MI | Offender | Arrestee | Address

Race | Sex | Hair | Eyes | Height | Weight | DOB | Age | SSAN | DL

Phone | Business address and phone | Linked to offense(s)

Arrest Date | Arrest Transaction # | State Control # | DOMESTIC VIOLENCE Warrant signed | Officer | Victim | Both | Hispanic | Non-Hisp | Resident | Non-Resid | On-View | Custody | Cited

Weapons possessed when arrested | Scars, marks, tattoos | Clothing

Charge	Charge Code	Charge	Charge Code
Charge	Charge Code	Charge	Charge Code
Charge	Charge Code	Charge	Charge Code

OFFENDER/ARRESTEE

Last Name | First | MI | Offender | Arrestee | Address

Race | Sex | Hair | Eyes | Height | Weight | DOB | Age | SSAN | DL

Phone | Business address and phone | Linked to offense(s)

Arrest Date | Arrest Transaction # | State Control # | DOMESTIC VIOLENCE Warrant signed | Officer | Victim | Both | Hispanic | Non-Hisp | Resident | Non-Resid | On-View | Custody | Cited

Weapons possessed when arrested | Scars, marks, tattoos | Clothing

Charge	Charge Code	Charge	Charge Code
Charge	Charge Code	Charge	Charge Code

LEOKA

Type of LEOKA: ☐ Officer Assaulted ☐ Officer Killed, Felony ☐ Officer Killed, Accident, Negligent, Other ☒ Not LEOKA Incident

Vehicle: ☐ 2 Man Uniformed ☐ One Man Uniformed ☐ One Man Assisted ☐ Det./Spec. Assignment Alone ☐ Det./Spec. Assignment Assisted ☐ Other Alone ☐ Other Assisted

Circumstances: ☐ Responding to Disturbance (Domestic) ☐ Responding to Disturbance (Other) ☐ Burglaries in Progress/Pursuing Burglary Suspects ☐ Robberies in Progress/Pursuing Robbery Suspects ☐ Attempting Other Arrests ☐ Civil Disorders ☐ Handling/Transporting Prisoners ☐ Investigating Suspicious Persons Circumstances ☐ Ambush/No Warning ☐ Mentally Deranged ☐ Traffic Pursuits/ Stops ☐ All Others

Reporting Officer, #, Unit, Shift, Supplement Date: Mpo J. Fentress #255 I-29 7-3 9/14/11

Reviewing Officer, #, Date: LT. B. Rum 98 9-14-2011

Hendersonville Police Department Incident Report

Hendersonville, Tennessee TNO830400

Incident Number	Location
11034909	105 Park Cir

NARRATIVE

Crime Scene log continued

1851 Harrell out
1938 Harrell in
1940 Garrett out
1945 Vaughn in
1948 Harrell out
1949 Vaughn out
1949 Residence was locked and secured by Sgt. Vaughn and logged with Dispatch.

End Of Report.

11039409

Fentress wife @ 0849 [redacted]

3 FD in @ 0850 - 0851 - Didn't tamper with the basket / body / blu

Music in @ 0852 - 0854 - Barb Jones, Mickey Crowder
(went to inspect) (stayed at front door)

Folded + left in @ 0900 - 0902

Malone left in @ 0915 - 0917

Fentress in @ 0915 - 0917

Fentress cleared house upon request of Sgt. Vaughn 0923 - 0928

Fentress in @ 0932 - 0932 (retrieved Black Bag (purse), Wallet, keys)

Fentress in @ 0953 - 0955 - Iphone charger retrieved

Fentress + Garrett @ 1107 - 1112 w/ Cell phone charger Phillips

her dazepam + citalopram

William relieved by fentress - 1139

Fentress relieved by Wilson - 1147 [redacted]

Garrett, fentress, Vaughn @ 1145 - 1148 SIM visitation

Wilson relieved by fentress 1156

Fentress relieved by Wilson 1205

IN 1232 -
Garrett, fentress

IN 1254
Harrell

IN 1259 - Vaughn

OUT 1308 - Harrell

OUT 1311 - Vaughn

EXHIBIT C

11-034909

IN 1313 Vaughn
IN 1316 Harrell
out 1334 Vaugh (Press)
out 1340 Fentress
IN 1345 Vaughn
IN 1347 Fentress
Out 1347 fentress
IN 1350 Fentress
OUT 1351 Fentress
Out 1401 Vaughn
IN 1410 Vaughn
Out 1415 Bodies Removed - Garrett to EMS Employee Michael Tennyson - 2/14/1976 to Harrell Malden 07/25/88
IN 1437 - Harrell, Garrett
IN 1507 - Fentress
Out 1508 - Fentress
1525 FENTRESS RELIEVED WILSON
IN 1525 Wilson
IN 1530 VAUGHN
OUT WILSON 1536
OUT VAUGHN 1541
1541 Wilson IN
1711 Harrell Out
1710 - White Male white t-shirt, grey shorts approached house to make sure no one hurt. I told man it is under investigation and there is no immediate threat. He gave a unopened diet pepsi and said thank you for ch you do.
1746 Harrell IN
1745 fentress Out

Harrell Photographed
Corsey Photographed

11-034909

1749 Vaughn IN
1801 Fentress IN
1804 Fentress Out
1823 Vaughn Out
~~Vaughn IN~~
~~1835 Fentress Out~~
1835 Fentress Out
1851 Harrell Out
1938 Harrell IN
1940 GARRETT out
1945 VAUGHN IN
1948 HARRELL OUT
1949 VAUGHN OUT + RESIDENCE SECURED

SEARCH WARRANT

FILED
10:45 a.M
SEP 21 2011
MAHAILIAH HUGHES, CLERK
BY Joanner D.C.

COUNTY OF Sumner
STATE OF TENNESSEE

TO ANY PEACE OFFICER WITHIN OR OF SAID COUNTY:

Proof by Affidavit having been made before me by **Detective David Harrell** that there is probable cause to believe that **Lindsey B. Lowe, a white female DOB 08-29-1986, 5'3" Blue/Blonde** is in possession and control of certain evidence of a crime to wit: violations of state laws as set forth in **TCA 39-13-201 Criminal Homicide and TCA 39-17-312 Abuse of Corpse** and that evidence of said crimes will be found at the location of **105 Park Circle, Hendersonville, Sumner Co, Tennessee** and the evidence to be searched for is as follows:

Evidence of a Criminal Homicide and/or Abuse of Corpse including the body of a deceased infant and any documentation of knowledge of the pregnancy and prenatal care for the child. This will include:
- **Biological samples for identification of the parentage of the deceased infant including a known DNA sample from Lindsey B. Lowe.**
- **Any cleaning chemicals or material used to remove evidence of a birth**
- **Any documentation of medical or clinic visits to a health care professional seeking care or advice concerning the time prior to, during or post pregnancy for the mother and/or child**
- **Any documentation of correspondence or communication concerning the pregnancy by Lindsay Lowe to any individual**
- **New or used pregnancy tests**
- **Books, items, and documents used for the purpose of researching pregnancy, abortion, prenatal care of developing children and newborn care**
- **Any records of the aforementioned activity whether stored on paper, on magnetic media such as tape, cassette, disk, diskette or on memory storage devices. This shall also include but not be limited to records stored on programmable instruments and electronic storage media such as telephones, voice mail, answering machines, electronic address books, calculators, or any device designed to store information.**
- **Any equipment, devices, records, computers and computer storage discs, used to document the aforementioned activity to include the seizure of computers to retrieve such records.**
- **Any indicia of use, ownership, possession, or control of such records mentioned above.**
- **Any indication of ownership, dominion, or control over the premises to be searched including rental receipts, mortgage payments, and utility bills.**

YOU ARE THEREFORE COMMANDED to make an immediate search on the premises of **105 Park Circle, Hendersonville, Sumner Co, Tennessee** and in the premises used and occupied by the occupants of this residence located and more particularly described as follows:

The residence is a private residence located at 105 Park Circle, Hendersonville, Sumner Co, Tennessee. The residence is located off Mansker Park Dr on Park Circle, being the third house on the left from Mansker Park Dr. The residence is

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EXHIBIT D

a two story house of of red brick construcion with a black asphalt shingle roof, black shutters and white trim. The driveway is of aggregate concrete driveway construction and is located on the right side of the property. A black metal mailbox is located on the left side of the driveway. A black colored plate affixed to the mailbox has white reflective numbers "105" affixed to the plate. The front porch has a small roof supported by two white columns on either side of the porch. There are two small windows on either side of the front door. The front door is black in color with a brass kickplate and has a glass storm door. The doorknob is brass in color with the door opening to the right.

This search will include all outbuildings, outhouses, trash receptacles, mailboxes, storage buildings, and other outside structures directly related to this location and all vehicles found thereon, for the aforesaid evidence; and if you find the same or any part thereof, you shall seize the evidence.

I HEREBY DELIVER THIS SEARCH WARRANT FOR EXECUTION TO:

Det. David Harrell

at 11:35 o'clock P M, on this 14 day of Sept, 2011.

Judge of the Circuit Court

OFFICER'S RETURN AND SUMMARY INVENTORY OF PROPERTY SEIZED

The within warrant came to hand, and executed on this 14th day of Sept, 2011, by searching the person(s) and premises herein described, and taking therefrom the following evidence which was seized:

See attached list made a permanent part thereof

Det David Schnell

Agent, Deputy or Officer Executing Warrant

JUDGEMENT ON SEARCH WARRANT

Due and proper return having been made of the warrant, the property seized as described in the said return shall be retained, subject to the orders of the CRIM Court of Sumner County, and the within warrant, and return shall be filed in the office of the Clerk of said Criminal Court.

This 21 **day of** Sept, **2011.**

Judge of the Circuit **Court**

COMPLAINT #11034909
1ST DEGREE MURDER X2
SEARCH WARRANT AT 105 PARK CIR. 9/14/11

1) DECEASED BABY LOWE #1
2) DECEASED BABY LOWE #2
3) WHITE LAUNDRY BASKET
4) ASSORTED LINENS IN WHITE BASKET
5) ONE PAIR "LOVE PIMK" PANTIES, BLOODY FROM CLOSET'
6) ~~ONE RED HAND TOWEL, BLOODY FROM CLOSET~~
7) ONE BLUE BATH TOWEL, BLOODY FROM CLOSET
8) ONE PAIR PURPLE VICTORIA SECRET PANTIES, BLOODY FROM CLOSET
9) ONE PAIR GREY SHORTS, BLOODY FROM CLOSET
10) ONE RED WASHCLOTH AND ONE WHITE WASH CLOTH FROM CLOSET
11) ONE WHITE T-SHIRT, BLOODY FROM CLOSET
12) ONE PAIR PINK PAJAMA BOTTOMS WITH BLOOD FROM CLOSET
13) ONE PAIR PINK PANTIES WITH BLOOD FROM CLOSET
14) ONE PAIR VICTORIA SECRET PANTIES LARGE WITH PANTY LINER FROM CLOSET
15) ONE PAIR BLUE/WHITE PAJAMA BOTTOMS, BLOOD SOAKED FROM CLOSET
16) ONE PAIR VICTORIA SECRET PURPLE/GREEN STRIPED LARGE PANTIE, BLOOD SOAKED FROM CLOSET
17) ONE PAIR VICTORIA SECRET WHITE MEDIUM PANTIE BLOOD SOAKED
18) ONE PAIR PINK PAJAMA BOTTOMS OLD NVY, BLOODY FROM CLOSET
19) ONE WHITE BTH TOWEL
20) ONE PINK COVER UP
21) ONE GOLD FITTED BED SHEET, ONE GREEN HAND TOWEL AND ONE BROWN BATH TOWEL
22) TWO BLUE TOWELS
23) WHITE PLASTIC BAG WITH BLOODY PAPER PRODUCTS
24) ONE RED BATH RUG
25) ONE ROLLED UP PIECE OF CARPET FROM BEDROOM
26) ONE WHITE GARBGE CAN WITH CONTENTS
27) ONE TENNESSEE DRIVERS LICENSE BELONGING TO LINDSEY B. LOWE FROM HER BEDROOM
28) ONE PIECE OF MAIL ADDRESSED TO LINDSEY B. LOWE
29) ONE THUMB DRIVE FROM LINDSEY BEDROOM
30) ONE PRESCRIPTION BOTTLE BELONGING TO LINDSEY LOWE FOR OXYCODONE WITH 4 PILLS LEFT
31) ONE CONTROL SWAB
32) TWO LIFTS WITH MOISTENED SWABS

Det David Arnett

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EXHIBIT E

Page 1 of 2

33) ONE SILVER FRAME WITH PHOTO
34) ONE BLACK CASE WITH INDEX CARDS OF ADDRESSES
35) TWO BRIDES MAGAZINES MAILED TO LINDSEY LOWE AT 105 PARK CIR
36) ONE LAPTOP COMPUTER KP MODEL PAVILLION ENTERTAINMENT PC S/N CND00126D4 FROM UPSTAIRS NORTHEAST BEDROOM, AND CHARGER
37) ONE hp LAPTOP MODEL DV6000 S/N CNF7161NNW
38) ONE WESTERN DIGITAL HARD DRIVE S/N WCANK3720662
39) ~~ONE WESTERN DIGITAL EXTERIOR HARD DRIVE S/N~~ WCASU7895437 WITH POWER CORD
40) ONE HP PAVILLION P6644Y PC S/NMXX0450852
41) ONE PIECE OF US MAIL TO LINDSEY BROOKE LOWE 105 PARK CIRCLE
42) ONE HANDWRITTEN NOTE FFROM KITCHEN TABLE
43) ONE ASUS LAPTOP MODEL US2F S/N AANOAS285258427
44) ONE CAN OUST AIR FRESHENER

The above described property was seized on 09-14-2011 from 105 Park Circle, Hendersonville, Sumner County Tennessee.

Det. David Harrell

Det David Harrell
Date 9.14.2

SEARCH WARRANT

COUNTY OF Sumner
STATE OF TENNESSEE

TO ANY PEACE OFFICER WITHIN OR OF SAID COUNTY:

Proof by Affidavit having been made before me by **Detective David Harrell** that there is probable cause to believe that **Lindsey B. Lowe, a white female DOB 08-29-1986, 5'3" Blue/Blonde** is in possession and control of certain evidence of a crime to wit: violations of state laws as set forth in **TCA 39-13-201 Criminal Homicide and TCA 39-17-312 Abuse of Corpse** and that evidence of said crimes will be found at the location of **105 Park Circle, Hendersonville, Sumner Co, Tennessee** and the evidence to be searched for is as follows:

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- Any documentation of correspondence or communication concerning the pregnancy by Lindsay Lowe to any individual.
- New or used pregnancy tests
- Books, items, and documents used for the purpose of researching pregnancy, abortion, prenatal care of developing children and newborn care
- Any records of the aforementioned activity whether stored on paper, on magnetic media such as tape, cassette, disk, diskette or on memory storage devices. This shall also include but not be limited to records stored on programmable instruments and electronic storage media such as telephones, voice mail, answering machines, electronic address books, calculators, or any device designed to store information.
- Any equipment, devices, records, computers and computer storage discs, used to document the aforementioned activity to include the seizure of computers to retrieve such records.
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333

EXHIBIT F

a two story house of of red brick construcion with a black asphalt shingle roof, black shutters and white trim. The driveway is of aggregate concrete driveway construction and is located on the right side of the property. A black metal mailbox is located on the left side of the driveway. A black colored plate affixed to the mailbox has white reflective numbers "105" affixed to the plate. The front porch has a small roof supported by two white columns on either side of the porch. There are two small windows on either side of the front door. The front door is black in color with a brass kickplate and has a glass storm door. The doorknob is brass in color with the door opening to the right.

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at 11:35 o'clock AM, on this 14 day of Sept., 2011.

Judge of the Circuit Court

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See Attached list made a permanent part thereof

Det Daniel Lowell #248 9-14-11

Agent, Deputy or Officer Executing Warrant

JUDGEMENT ON SEARCH WARRANT

Due and proper return having been made of the warrant, the property seized as described in the said return shall be retained, subject to the orders of the _____ Court of Sumner County, and the within warrant, and return shall be filed in the office of the Clerk of said Criminal Court.

This _____ day of _____,2011.

_____

Judge of the _____ Court