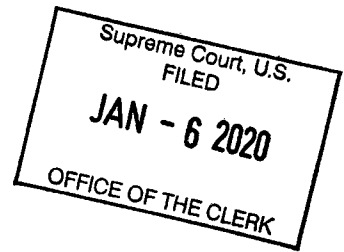


19-7238

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



JERRY REGINALD BURKES — PETITIONER
(Your Name)

vs.

STATE OF TENNESSEE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TENNESSEE SUPREME COURT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jerry Burkes

(Your Name)

212 Volaris Lane

(Address)

Hubert, NC, 28539

(City, State, Zip Code)

914-987-8987

(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER THE TRIAL COURT'S DENIAL OF A MOTION TO DISMISS AN INDICTMENT FOR A VIOLATION OF THE SPEEDY TRIAL ACT'S 70 DAY TIME LIMIT FOR BRINGING A DEFENDANT TO TRIAL IS SUBJECT TO HARMLESS-ERROR ANALYSIS, DESPITE THE STATUTE'S MANDATORY LANGUAGE STATING THAT, IN THE EVENT OF A VIOLATION, "THE INDICTMENT SHALL BE DISMISSED."
2. WHETHER MR. BURKES RECEIVED A FAIR TRIAL PURSUANT TO TENNESSEE RULES OF EVIDENCE 404(B) WITHOUT SEVERING THE CHARGES PURSUANT TO TENNESSEE RULES OF CRIMINAL PROCEDURES 8(B) AND 14(B)(1).
3. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION OF MONEY LAUNDERING PURSUANT TO TENNESSEE CODE ANNOTATED §39-14-903(B)(1).
4. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WITHOUT INTRODUCING INTO EVIDENCE AN AUDIO RECORDING GOVERNED BY TENNESSEE LOCAL RULE 10.03.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

State of Tennessee v. Jerry Reginald Burkes, No. E2018-01713-SC-R11-CD, Tennessee Supreme Court.
Judgment entered October 11, 2019

State of Tennessee v. Jerry Reginald Burkes, No. E2018-01713-CCA-R3-CD. Tennessee Court of Criminal Appeals. Judgment entered July 12, 2019

State of Tennessee v. Jerry Reginald Burkes, No. E2017-00079-CCA-R3-CD, Tennessee Court of Criminal Appeals. Judgment entered May 14, 2018

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ^A_____ to the petition and is

☒ reported at TN Courts. gov _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Tennessee Court of Criminal Appeals _____ court appears at Appendix ^B_____ to the petition and is

☒ reported at TN Courts. gov _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was October 11, 2019.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Act 18 U.S.C. §1956(a)(1)(B)(i): Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-with the intent to promote the carrying on of specified unlawful activity.

Speedy Trial Act 18 U.S.C. §3161: Requires the government to bring a criminal defendant who pleads not guilty to trial within 70 days from the filing of an indictment or the defendant's first appearance before a judicial officer of the court in which the charge is pending, whichever is later. If the 70 day time limit, taking into account any exclusions is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. §3162(a)(2).

Tennessee Constitution Article I Section 8: That no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but the judgment of his peers, or the law of the land.

Tennessee Constitution Article I Section 9: That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment a speedy public trial, by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Tennessee Constitution Article I Section 10: That no person shall, for the same offense, be twice put in jeopardy of life or limb.

Tennessee Constitution Article VI Section 9: The Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

STATEMENT OF THE CASE

PROCEEDINGS BEFORE THE TRIAL COURT

1. On or about March 25, 2014, Mr. Burkes was taken into custody by Greeneville Sheriff's Deputies, subsequently a sealed indictment naming Mr. Burkes was handed up on or about March 24, 2014 by a Greene County Grand Jury. See: September 19, 2014 Tr. p. 2. This case involved an unlawful arrest without an arrest warrant, pursuant to the "knock and announce" rule according to the Fourth Amendment Constitution. See: December 1, 2015 Tr. p. 23.
2. On or about March 28, 2014, Mr. Burkes appeared in front of the Honorable Judge Dugger and was charged and indicted on 25 counts of Money Laundering T.C.A. §39-14-903(b)(1), Tax Evasion T.C.A. §67-1-1440(g), Forgery T.C.A. §39-14-114, and Theft over \$60,000 T.C.A. §39-14-103,105(5). See: September 19, 2014 Tr. pp. 5-6.
3. On Count 12 of the Indictment, Mr. Burkes' name was not listed as the individual being charged. The name of Mustafa Zobot was listed on the Indictment. See: September 19, 2014 Tr. pp. 8-9; See: Attached Count 12 Indictment.
4. On or about September 18, 2014, Mr. Burkes submitted a Motion to Dismiss Indictment as multiplicitous as well as duplicitous. See: September 19, 2014 Tr. p. 3.
5. Motions to Dismiss the initial indictment/charges as multiplicitous and duplicitous and objections to the final indictments were discussed. See: September 19, 2014 Tr. pp. 3-13.
6. On or about September 19, 2014, the Honorable Judge Dugger dismissed the 25 count indictment and all charges in its entirety. See: September 19, 2014 Tr. pp. 14-16.
7. On or about November 17, 2014, District Attorney, Ritchie Collins, went back to the Grand Jury and issued a Superseding Indictment unconstitutionally circuit conflict. State v. Burkes, 2018 WL 2194013, at *2 (Tenn. Crim. App. May 14, 2018).
8. On or about March or April 2013, Mr. Burkes' business, Preeminent Skate Speciality, was arbitrarily shut down intentionally without a capias warrant or the knowledge of Mr. Burkes. See: April 26-27, 2016 Tr. Vol. II, pp. 267-272. The State's primary witness, Agent Brian McGhee, was present. See: April 26-27, 2016 Tr. Vol. II, pp.269-270.

Department of Revenue on two (2) separate occasions prior to his death, verifying that Mr. Burkes' store should not have been closed down without authorization. See: April 11, 2016 Tr. pp. 11-12.

10. On or about August 3, 2015, Mr. Burkes had a scheduled court appearance for a trial announcement hearing with Judge Pearson. During a recess at the Courthouse, Mr. Burkes was arrested and detained inside a holding cell for approximately two (2) hours while the District Attorney, Ritchie Collins, conjured up a Motion to Revoke Mr. Burkes' bond, for an erroneous criminal offense. See: August 14, 2015 Tr. pp. 13-28.

11. On or about December 1, 2015, Mr. Burkes filed a Motion to Change Venue and a Motion to Sever Charges. Both motions were denied by the trial court. See: December 1, 2015 Tr. pp. 2-27.

12. The Motion to Dismiss due to the Fast and Speedy Trial guarantees of Due Process protected by the Sixth and Fourteenth Amendments to the United States Constitution supported by Article I Section 9 of the Tennessee Constitution have been violated in the instant case. The trial judge used the Barker v. Wingo analysis to deny Mr. Burkes the right to a Speedy Trial. See: April 11, 2016 Tr. pp. 20-42.

13. On August 7, 2012 and May 10, 2013, Mr. Burkes was interviewed by Agent Brian McGhee. During the 404(B) pre-trial motion hearing, the State only introduced parts of the statements.

The August 7, 2012 statement is exculpatory and should have been introduced in its entirety. See: April 14, 2016 Tr. pp. 7-17.

14. According to Agent Mark See, Mr. Burkes didn't provide any buydown information and was thus never given credit for any buydowns. State v. Burkes, 2018 WL 2194013, at *5 (Tenn. Crim. App. May 14, 2018).

Agent McGhee stated that Mr. Burkes received credit for buydowns. The companies JT International, S&M Brands, and Liggett was not calculated in the over amount of \$132,766 and those numbers shall reduce the disparity in the numbers. See: April 26, 2016 Tr. Vol. II, pp. 213-217.

15. The Purchase Factor Method, an investigational tool used by the Revenue Department and Agent Brian McGhee, to calculate the numerical graph during trial was completely flawed and erroneously computed. During the interview with Agent McGhee, McGhee referenced a comment Mr. Burkes made about "messing up", that was in reference to the back of the used sales tax form that was not taken into consideration.

16. Mr. Burkes was denied to introduce an audio recording of Agent McGhee and Mr. Burkes conversation that was held at Preeminent Skate Speciality. The audio included Justin Wyatt not ("White") used sales tax numbers and how it was similiar to Mr. Burkes' used sales tax numbers. The audio meets Tennessee Rules

of Evidence 803(5) specifically, all records shall be included for timely filed motions by Mr. Burkes to include such evidence during pre-trial motion hearings to wit: Notice of State's Oral Statement(s) dated April 20, 2015. See: April 27, 2016 Tr. Vol. III, pp. 312-327.

17. Trial was held in Greene County Criminal Court on April 26th and April 27th, 2016. The jury returned a verdict of guilty as to all counts on April 27, 2016 Vol. III, pp. 355-358.

18. A Sentencing Hearing was held on July 29, 2016. Mr. Burkes was acting Pro Se, but had asked for and was granted counsel for the Sentencing Hearing. Mr. Burkes was sentenced to 18 years as a multiple offender with 60 months to serve with the remainder on Community Corrections. See: July 29, 2016 Tr. pp. 2-67.

19. A Motion for New Trial was heard on December 16, 2016. It was denied.

B. THE COURT OF CRIMINAL APPEALS OPINION

20. Mr. Burkes filed a Notice of Appeal on January 13, 2017. On appeal, Mr. Burkes argued the State's motion to allow Tennessee Rules of Evidence 404(b) in the trial of this case should not be allowed, that Mr. Burkes' convictions shall not be admissible for purposes of Tennessee Rules of Evidence 609, that the State failed to discover and disclose exculpatory evidence, that the evidence was insufficient to support a conviction of money laundering, and that the trial court improperly imposed a Range II sentence.

21. On May 14, 2018, the Court of Criminal Appeals issued its Opinion. Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed in Part; Vacated in Part; Remanded. The Court of Criminal Appeals decided that the five-year term of confinement imposed by the trial court is not authorized, they vacated the sentencing decision of the trial court and remanded the case for resentencing. The Court of Criminal Appeals said the amount of restitution ordered by the trial court cannot be satisfied under the terms ordered by the trial, they vacated the restitution order and remanded the case for the trial court to impose restitution in a manner that complies with Code section 40-35-304. The Court of Criminal Appeals affirmed the judgments of the trial court in all other respects.

22. Mr. Burkes filed a Notice of Appeals on September 20, 2018. An extension was requested and granted by the Court of Criminal Appeals for February 15, 2019. On appeal, Mr. Burkes argued that the trial court should have allowed him to introduce proof at the resentencing hearing concerning certain out-of-state convictions used by the trial court at the first sentencing hearing to establish that he was a Range II offender. On July 12, 2019, the Court of Criminal Appeals issued its Opinion. Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed.

THIS COURT SHOULD REVIEW THIS PETITION TO SETTLE AN IMPORTANT QUESTION OF LAW AND TO EXERCISE THE SUPREME COURT'S SUPERVISORY AUTHORITY: WHETHER THE TRIAL COURT'S DENIAL OF A MOTION TO DISMISS AN INDICTMENT FOR A VIOLATION OF THE SPEEDY TRIAL ACT'S 70 DAY TIME LIMIT FOR BRINGING A DEFENDANT TO TRIAL IS SUBJECT TO HARMLESS-ERROR ANALYSIS DESPITE THE STATUTE'S MANDATORY LANGUAGE STATING THAT, IN THE EVENT OF A VIOLATION, "THE INDICTMENT SHALL BE DISMISSED."

This case presents questions of first impression. Should a superseding indictment be obtained without dismissing the indictment? The answer to this question should be "no", for the Tennessee Supreme Court explains the State's authority to obtain a superseding indictment as follows: a superseding indictment is an indictment obtained without the dismissal of the prior indictment. (The record is replete, that Mr. Burkes' indictment/presentment was eradicated and/or dismissed or not formally indicted prior to the State's presentment of the superseding indictment. See: September 19, 2014 Tr. p. 10. State v. Harris, 33 S.W. 3d 767, 771 (Tenn. 2000). Despite the clarity of the aforementioned Supreme Court explanation, the Court of Criminal Appeals answered this question "yes". In turn, the Court of Criminal Appeals held "that the trial court apparently believed that the original presentment was invalid

because none of the counts had been marked as a true bill. Because a presentment bears the signature of all the grand jurors, however, it is not necessary that it be marked as a true bill in order to be valid." State v. Burkes, 2018 WL 2194013, at *2 (Tenn. Crim. App. May 14, 2018); Martin v. State, 155 S.W. 129, 130 (Tenn. 1913). This holding, respectfully, contravenes the plain meaning of the Tennessee Rule of Criminal Procedure 12(b)(2) requires a motion alleging a defect in the indictment, presentment, or information to be made prior to trial. See: September 19, 2014 Tr. p. 3, titled: Defendant's Motion to Dismiss Indictment.

STANDARD OF REVIEW

This petition to the Supreme Court presents the following issue of law: Whether Mr. Burkes is entitled to interlocutory appellate review of a trial court's order denying a motion to dismiss an indictment based on a violation of the Sixth Amendment right to a speedy trial. The Supreme Court review these issues of law de novo, with no presumption of correctness afforded to the lower court's conclusions. Lacy v. Cox, 152 S.W. 3d 480, 483 (Tenn. 2004); Kyle v. Williams, 98 S.W. 3d 661, 663-64 (Tenn. 2003).

1. Indictment and Superseding Indictment having Multiple Defects/ Double Jeopardy Clause

An indictment is only signed by the foreman of the grand

jury, and therefore, unless it appears from the record that the bill was returned by the grand jury into open court 'a true bill', it cannot appear that it has been before them, and found by them. State v. Muzingo, 19 Tenn. 112, 113 (1838). Suffice to say, based upon Assistant District Attorney, Ritchie Collins, thereby way of his own admission, the record was well established and the presentment was construed as an original indictment. See: September 19, 2014 Tr. pp. 6,9. "The original indictment without the indorsement, 'A true bill', followed by the signature of the foreman of the grand jury, is utterly worthless, invalid, and devoid of any legal efficiency whatsoever; shall be dismissed, even when the adjudication of record is sparse, to determine whether or not, if the indictment was dismissed." State v. Herron, 7 S.W. 37, 38 (Tenn. 1888).

Accordingly, without dismissing the original indictment resulted in multiple sentences for an alleged single offense, in violation of constitutional double jeopardy provisions, or otherwise prejudice Mr. Burkes (U.S. v. Brandon, 17 F.3d 409, 422 (1st. Cir. 1994)). Motions to dismiss as multiplicitous and objections to the final indictments were discussed on September 19, 2014. See: September 19, 2014 Tr. pp. 3-13.

Trial was held in Greene County Criminal Court on April 26th and April 27th, 2016. The jury returned a verdict of guilty as to all counts of money laundering, tax evasion, and theft on April 27, 2016

Tr. Vol. III, pp. 354-358. Mr. Burkes asserts that the above charges were barred by the double jeopardy clause of the Fifth Amendment. The double jeopardy clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb...." Article I Section 10 of the Tennessee Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." "As this court has noted on numerous occasions, three fundamental principles underlie double jeopardy: (1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for the same offense." State v. Denton, 938 S.W. 2d 373 (Tenn. 1996).

What is troubling in this case, is that the trial court's ruling, negated all pre-trial motions filed by Mr. Burkes. But the State was not bound to prove money laundering or theft, for there was no evidence introduced during trial regarding money laundering or theft charges. See: April 26-27, 2016 Tr. Vol. I, II, and III. The central question for determining multiplicity is "whether a jury could plausibly find that the actions described in the [disputed] counts of the indictment, objectively viewed, constituted separate executions of money laundering, theft, and tax evasion scheme." The calculation of

the sales tax evasion is the only evidence that the State presented during trial. See: April 26-27, 2016 Tr. Vol. I, II, and III.

While the Prosecutor has broad discretion on seeking a Superseding Indictment, this discretion is not without limits, and a trial court retains the authority to dismiss an indictment based upon defects in the indictment or improper delay in presenting a charge. State v. Harris, 33 S.W. 3d 767, 771 (Tenn. 2000). The original indictment contained 11 counts of money laundering T.C.A. §39-14-903(b)(1), one count of forgery T.C.A. §39-14-114, one count of theft of property valued at more than \$60,000 T.C.A. §39-14-103, 105(5), and 12 counts of sales tax evasion T.C.A. §67-1-1440(g). State v. Burkes, 2018 WL 2194013, at *2 (Tenn. Crim. App. May 14, 2018).

Mr. Burkes challenged the validity of the indictment for charging 11 individual counts of money laundering, one count of forgery, one count of theft of \$60,000, and 12 counts of sales tax evasion. (There was no doubt concerning the indictment, it was clear and convincing evidence that the indictment was obtained multiplicitously and in violation of the Fifth Amendment of the Constitution). State v. Burkes, 2018 WL 2194013, at *2 (Tenn. Crim. App. May 14, 2018). This court should accept review of this petition and settle this important question of law because Mr. Burkes did not receive a fair trial.

2. The Fast and Speedy Trial Act 18 U.S.C. §3161

Mr. Burkes asserted his constitutional right to a speedy trial. See: Motion to Dismiss November 26, 2014/May 30, 2016. See: April 11, 2016 Tr. pp. 20-23, 27. The Speedy Trial Act, 18 U.S.C. §3161, requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. Shortly after, the time of filing the Motion to Dismiss the original indictment, Mr. Burkes had suffered a trial delay of 25 months (2 years and 1 month) from the date of the defendant's arrest on March 2014, which is presumptively unreasonable. Bosworth v. State, 422 S.W. 3d 759 (Tex. App. 2013); State v. Tidwell, M2000-00538-CCA-R3-CD (Tenn. Crim. App. 2000). The unnecessary delay violated Mr. Burkes' Sixth and Fourteenth Amendments of the United States Constitution, in which guarantees of Due Process and Speedy Trial, further supported by Article I Section 9 of the Tennessee Constitution. Moreover, the State may not bring a superseding indictment to harass or intimidate the accused, for not accepting the State's plea agreement.

On or about August 3, 2015, Mr. Burkes was arrested and charged for allegedly driving on a revoked license (while parked in front of the Courthouse), ultimately revoking Mr. Burkes' bond without holding the proper evidentiary hearing. See: April 11, 2016 Tr. pp.

22-23. State v. Burgins, 464 S.W. 3d 298(2015). The above arrest unfolded three (3) weeks prior to the last trial date that was postponed in July 2015. See: August 14, 2015 Tr. pp. 17-22. The District Attorney's Office is in the same building as the Child Support Office (they are located across the hall from one another) how conveniently conducive that, it is within ten feet away, and suspend Mr. Burkes' driving license for non child support after the child support office ruled in favor to modify child support payments until the criminal case is resolved. Chief Justin Jeffrey S. Bivins eloquently stated, "We need to be able to be zealous advocates as a lawyer while still being professional, ethical, and courteous. Tennessee Rules of Criminal Procedures 48(b) preserves the accused's right to a speedy trial by providing that the trial court may dismiss an indictment "if there is unnecessary delay in presenting the charge to a grand jury against a defendant who has been held to answer to the trial court, or if there is unnecessary delay in bringing a defendant to trial..." Due to an unfortunate and untimely demise of Mr. Burkes' key witness Mr. Wilbur Hooks, Commissioner of the IRS for the Department of Revenue. See: April 11, 2016 Tr. pp. 11, 17-18. Without Mr. Hook's testimony, this unnecessary delay caused a prejudicial, catastrophic, and lingering consequence effect for the defendant as well as the defense. See: April 11, 2016 Tr. p. 33.

Arresting Mr. Burkes in front of the Courthouse was malicious,

vindictive, and retaliatory. In Phipps, the Tennessee Supreme Court held that "even in the absence of proof of actual bad faith or malice, a rebuttal presumption of Prosecutorial Vindictiveness may arise if the circumstances of a case posed 'realistic likelihood' of Prosecutorial retaliation". 959 S.W. 2d at 546.

In the instant case, the State's indifference and negligence was the sole reason for the Speedy Trial Act violation "the Appellate Court was thoroughly equipped based upon their authority, to thoroughly examine the record and review the Motion for New Trial that was duly denoted therein the Appellate's brief on page 3." "Our Supreme Court has stated that the Sixth Amendment was not intended, as commonly believed, solely to limit possibilities that delay would prevent, impair, or prejudice a defendant's ability to present a defense. Rather, major evils intended to be protected by the Sixth Amendment were to minimize interference that public arrest may cause with the defendant's liberty, whether he is free on bail or not, and to avoid disruption of his employment, curtailment of his associations, subjection of defendant to obloquy, and creation of anxiety in him, his family, and his friends." Kilpatrick v. State, N.M. 52 53, 702 P 2d 997, 998 (1985). Mr. Burkes was prejudice due to constraints on his liberty. When Mr. Burkes was first arraigned on the first indictment on March 2014, he was processed into the Greene County Detention Center and then released on a \$75,000 bond,

subject to conditions of release that: He was not allowed to leave Greene County, he was required to make weekly contact with the Bond Agency, he was required to keep his Bonding Agency informed of his whereabouts. When Mr. Burkes was arraigned on the Superseding Indictment on November 17, 2014, his conditions were kept in effect. The Prosecutor had Mr. Burkes arrested in front of the Courthouse on August 3, 2015, and was placed in custody for three(3) weeks before trial that was set for August 26, 2015. See: December 1, 2015 Tr. pp. 22-23. Mr. Burkes and his wife had to suffer a plethora amount of mental anguish during his incarceration for the mere fact, affected Mr. Burkes' child support payments, secured employment, forced to file bankruptcy, and eradicating all financial resources. See: April 11, 2016 Tr. pp. 22-23. Preeminent Skate Speciality/Discount Tobacco was closed for a four (4) month (October 2012-January 2013) bereavement sabbatical, without the obligation of filing the required used sales tax form due to a cardiac arrest episode bringing upon his five year old son's early demise. See: April 26-24, 2016 Tr. Vol. II, p. 267. As stated ultimately inside the motion, the State conjured up a excessive methodology to imprision Mr. Burkes on August 3rd and revoke his bond prior to the initial trial date on August 26, 2015. See: April 11, 2016 Tr. pp. 22-23. The Supreme Court established a four-factor test to determine when a defendant's constitutional right to a speedy trial has been

violated. The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the speedy trial right; and (4) the prejudice to the defendant. Thusly, the trial court shall have applied. Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). During pre-trial testimony, the State's position for the length of the proceedings was based upon the intricacies of the charges and the trial court concurred. See: April 11, 2016 Tr. p. 24. However, a minimum of nine months delay is necessary to trigger further inquiry into the claim of a violation of the right to a speedy trial in simple cases, twelve months in cases of intermediate complexity, and fifteen months in complex cases. Salandre v. State, 111 N.M. 422.

A defendant is guaranteed Due Process of law under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I Sections 8 and 9 of the Tennessee Constitution. Punishing an individual for choosing to exercise his or her constitutional rights violates Due Process. North Carolina v. Pearce, 395 U.S. 711, 724-25; State v. Phipps, 1959 S.W. 2d 538, 540 (Tenn. 1997). This court should accept review of this petition and settle this important question of law because Mr. Burkes did not receive a fair trial.

THIS COURT SHOULD REVIEW THIS CASE TO SETTLE AN IMPORTANT QUESTION OF LAW: WHETHER MR. BURKES RECEIVED A FAIR TRIAL PURSUANT TO TENNESSEE RULES OF EVIDENCE 404(B) WITHOUT SEVERING THE CHARGES PURSUANT TO TENNESSEE RULES OF CRIMINAL PROCEDURE 8(B) AND 14(B)(1).

STANDARD OF REVIEW

The proper standard by which to review a denial of a motion to sever offenses under the Rules of Criminal Procedure is an issue of first impression for the Supreme Court. Tennessee Supreme Court hold that decisions to consolidate or sever offenses pursuant to Rules 8(b) and 14(b)(1) are to be reviewed for an abuse of discretion. A trial court's refusal to sever offenses will be reversed only when the "court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W. 2d 662, 669 (Tenn. 1997). (citing Ballard, 924 S.W. 2d at 661).

3. 404(B), SEVERANCE

Tennessee Rules of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). The rationale underlying the general rule is that admission of such evidence carries with it the

inherent risk of the jury's convicting the defendant of a crime bases upon his bad character or propensity to commit a crime, rather than upon the strength of the evidence. State v. Thacker, 164 S.W. 3d 208, 239 (Tenn. 2005). This rule is subject to certain exceptions, however, including "evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same." Tenn. R. Evid. 404(a)(1). In addition, [e]vidence of other crimes, wrongs, or acts" may be admissible for "other purposes," such as proving identity, criminal intent, or rebuttal of accident or mistake. The rule specifies three prerequisites to admission:

1. The court upon request must hold a hearing outside the jury's presence;
2. The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
3. The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). A fourth prerequisite to admission is that the court must find by clear and convincing evidence that the defendant committed the other crime or bad act. *Id.*, Advisory Comm'n Comments; State v. DuBose, 953 S.W. 2d 649, 654 (Tenn. 1997).

The trial court agreed to allow the State to introduce 404(b)

evidence to determine whether or not intent was a factor in lieu of the common scheme or plan. During the 404(b) hearing, "the trial court ruled that Mr. Burkes didn't make a mistake and that he had an intent to commit the act as well as the fact it could be a common scheme or plan." See: April 14, 2016 Tr. pp. 66-67. During the pre-trial hearing, Mr. Burkes' Motion to Sever Charges, the judge ruled to grant the State's request pursuant to Rule 8(b) and joined the charges together. See: December 1, 2015 Tr. pp. 2,3,5,8. The Court of Criminal Appeals agreed with the trial court that Mr. Burkes acted intentionally and that his failure to remit the appropriate amount of sales tax was not the result of an accounting mistake or misunderstanding. State v. Burkes, 2018 WL 2194013, at *9 (Tenn. Crim. App. May 14, 2018).

The decision to consolidate or sever offenses that have been permissively joined under Tennessee Rule of Criminal Procedure 8(b) is reviewed on appeal for an abuse of discretion. State v. Shirley, 6 S.W. 3d 243, 247 (Tenn. 1999). When the offenses are part of a common scheme or plan or when the offenses sought to be severed would be admissible as evidence in the trial of the other offenses, the trial court has wide discretion to join offenses for a single trial. *Id.* The decision whether to sever offenses will depend on the facts of a particular case; therefore, the denial of a motion to sever will be reversed on appeal only when the court applied an

incorrect legal standard or reached a conclusion that defies logic or resulted in an injustice to the aggrieved party. Id.

Procedurally, the Court failed to follow the guidelines in the Tennessee Rules of Evidence 404(b), and allowed the State to introduce two (2) civil assessments from 2012 and 2013, that was not disclosed to the jury or therein the original indictment or the Superseding Indictment. See: April 26, 2016 Tr. Vol. I, pp. 56-67. Mr. Burkes' defense appeared to be reasonable doubt. Mr. Burkes aggressively attacked the validity of the State's calculations. He pointed out that the State's primary witness, Agent McGhee, left out records from a company called Inmar. He also attacked the accuracy of Agent McGhee's summary for omitting a company that Mr. Burkes did business with, JT International. See: April 26-27, 2016 Tr. Vol. I, pp. 192-201, 230-232. Mr. Burkes attacked on individual month or a miscalculation by omission, the Tennessee Rules of Evidence 404(b) ruling allowed the State to introduce up to 25 more months of underpayments. It allowed the jury to overcome any reasonable doubt raised by Mr. Burkes' questioning with an almost endless substitution of other bad acts. Mr. Burkes in his trial attacked all twelve months and all twelve individual counts of sales tax fraud, and the trial court negated Mr. Burkes' attempt, to introduce evidence, such as the manufacturer Liggett buydowns in the amount

of \$8,000, manufacturer S&M Brand buydowns in the amount of \$26,248.15, manufacturer JT International buydown in the amount of \$10,000, Inmar coupon redemption in the amount of \$27,393, is a huge disparity in number that the Prosecution withheld to disclose to the jury, in the sum of \$71,641.15. See: Notice of Intent to Introduce Certified Records Pursuant to Tennessee Rules of Evidence 902(11) motion dated December 4, 2015. See: April 26-27, 2016 Tr. Vol. II, pp. 154-187. Mr. Burkes questioned the absence of the records and how, if they had been included, they would have affected the State's calculation and Appendix A and B; in which Agent McGhee maliciously declined to include the aforementioned buydown deductions. See: April 26-27, 2016 Tr. Vol. II, pp. 200-204 State v. Burkes, 2018 WL 2194013, at *3 (Tenn. Crim. App. May 14, 2018). The trial judge abused his discretion to improperly join the offenses, (because when he did, the above standard applies for an immediate severance), by negating the Motion to Sever the money laundering Tenn. Code Ann. §39-14-903(b)(1) and theft charges Tenn. Code Ann. §39-14-103, 105(5) and not consolidate the tax evasion Tenn. Code Ann. §67-1-1440(g), negated Mr. Burkes, the opportunity to challenge the miscalculations therein the State's claim of underreported taxes.

"[Evidence and arguments tending to establish or negate the propriety of consolidation (or severance) must be presented to the

trial court in the hearing" on a pre-trial motion. Spicer v. State, 12 S.W. 3d 438, 443 (Tenn. 2000). "[B]ecause the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts should usually only look to that evidence, along with the trial court's findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses." *Id.*; Shirley, 6 S.W. 3d at 247. "[W]hen a defendant objects to a pre-trial consolidation motion by the [S]tate, the trial court must consider the motion by the severance provisions of Rule 14(b)(1), not the 'same or similar characters' standard of Rule 8(b)." Spicer, 12 S.W. 3d at 443; Tenn. R. Crim. P. 14(b)(1); Tenn. R. Crim. P. 8(b). Rule 14(b)(1) provides:

If two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.

The primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed. State v. Burchfield, 664 S.W. 2d 284, 286 (Tenn. 1984). This Court should accept review of this petition and settle this important question of law because, for the trial court abused its discretion by negating Mr. Burkes Motion to Sever the Charges,

ultimately negating Mr. Burkes' a fair trial.

THIS COURT SHOULD REVIEW THIS PETITION TO SETTLE AN IMPORTANT QUESTION OF LAW: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION OF MONEY LAUNDERING PURSUANT TO TENNESSEE CODE ANNOTATED §39-14-903(B)(1).

STANDARD OF REVIEW

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally sufficient to sustain a guilty verdict." State v. Hanson, 279 S.W. 3d 265, 275 (Tenn. 2009).

4. MONEY LAUNDERING/ FAILURE OF THE INDICTMENT TO STATE AN OFFENSE

Money Laundering, T.C.A. §39-14-903(b)(1) does not apply to the facts of this case. The State alleged theft and failure to pay sales taxes as their argument to justify money laundering for Count 1 therein their Superseding Indictment. Mr. Burkes argue that the indictment failed to state an offense with respect to the money laundering count because it did not allege that the State of Tennessee was the target solely of money laundering based upon the State's facilitation to include theft over \$60,000 T.C.A. §39-14-103, 105, and fraudulent sales tax return T.C.A. §67-1-1440(g) to satisfy Count 1 of the indictment an objected fact

that must be established in order for the statute to apply. The State's claim of money laundering is insufficient to satisfy the requirement under Tennessee Code Annotated §39-14-903(b)(1) which states "It is an offense to knowingly use proceeds derived directly or indirectly from a specified unlawful activity with the intent to promote, in whole or in part, the carrying on of a specified unlawful activity." See: Attached Count 1 of the Superseding Indictment.

In the instant case, Mr. Burkes purchased cigarettes for his Discount Tobacco Establishment from various Tobacco Wholesale Outlet franchises without concealing his purchase activity. The Court of Criminal Appeals stated in their opinion, "He does not claim that he did not use the funds saved by underpaying his sales tax" however, it was the State's contention therein the indictment and during the trial proceedings, that Mr. Burkes utilized the use sales tax funds to continue purchasing tobacco products. State v. Burkes, 2018 WL 2194013, at *14 (Tenn. Crim. App. May 14, 2018). The trial court subsequently merged the money laundering conviction into the tax evasion conviction, as well as the trial court's jury instructions on that offense. That evidence is insufficient to support Mr. Burkes' conviction of money laundering. State v. Jackson, 124 S.W. 3d 139 (Tenn. Crim. App. 2003); See: September 19, 2014 Tr. pp. 5-7; United States v. Olaniyi-Oke, 199 F. 3d 767 (5th Cir. 1999).

Like the Tennessee statutory provisions at issue in this petition,

the Federal Act prohibits, *inter alia*, financial transactions designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activities. See: 18 U.S.C. §1956(a)(1)(B)(i). In construing this aspect of the Federal Act, however, federal courts have recognized that an accused who simply uses the proceeds of illegal activity to purchase items, **is not guilty of money laundering**. This Court should accept review of this petition and settle this important question of law because Mr. Burkes did not receive a fair trial.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION
WITHOUT INTRODUCING INTO EVIDENCE AN AUDIO
RECORDING GOVERNED BY TENNESSEE LOCAL RULE
10.03.

STANDARD OF REVIEW

Post-conviction relief is available for any conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. §40-30-103. In order to prevail in a claim for post-conviction relief, a petitioner must prove his factual allegations by clear and convincing evidence. T.C.A. §40-30-110(f); Momon v. State, 18 S.W. 3d 152, 156 (Tenn. 1999). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hicks v. State, 983 S.W. 2d 240, 245 (Tenn. Crim. App. 1998). This

Court will review the post-conviction court's findings of fact "under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise." Fields v. State, 40 S.W. 3d 450, 458 (Tenn. 2001)(citing Tenn. R. App. P. 13(d)); Henley, 960 S.W. 2d at 578). However, the post conviction court's conclusions of law and application of the law to the facts are reviewed under a purely de novo standard, with no presumption of correctness. Fields, 40 S.W. 3d at 458.

5. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. BURKES THE RIGHT TO INTRODUCE INTO EVIDENCE AN AUDIO RECORDING DURING TRIAL PURSUANT TO TENNESSEE LOCAL RULE 10.03.

Mr. Burkes' right to due process of law was violated by the State's refusal to include exculpatory evidence within the meaning of Brady v. Maryland and its progeny. As a result of the State's Brady violation, Mr. Burkes was denied a fair trial by the trial court. The trial court denied Mr. Burkes' Motion to introduce an audio recording that ensued between Mr. Burkes and the primary State's witness, Agent McGhee. The audio meets Tennessee Rules of Evidence 803(5), specifically, all records shall be included for timely filed motions by Mr. Burkes to include such evidence during pre-trial motion hearings April 20, 2015. See: April 27, 2016 Tr. Vol. III, pp. 316-319, 326.

Brady Material Law is a technical term for a specific type of prosecutorial misconduct. It is derived from the United States Supreme Court case Brady v. Maryland, 373 U.S. 83 (1963). In that case, the Supreme Court held the Prosecution must turn over any evidence favorable to the defendant. The State's witness, Agent McGhee, and the State's Prosecutor intentionally refused to relinquish or disclose exculpatory evidence for Mr. Burkes pertaining to an individual by the name of Justin Wyatt not "White", as it is disclosed in the transcript. See: April 27, 2016 Tr. Vol. III, pp. 322-323, 325. Justin Wyatt's indictment had all the characteristics associated with Mr. Burkes' indictment down to the dollar amount in the amount of \$1.6 million dollars. Mr. Burkes had no other avenue to retrieve this evidence without the Prosecutors assistance. Without this information the defense could not have impeached the State's witness for this information would have enabled the defense to more effectively impeach the creditability of the State's witness. Thus, Brady Material is evidence discovery by the Prosecution that would have helped the defendant in some way, by proving his or her innocence, impeaching the credibilitiy of a witness, or reducing his or her sentence. When a Prosecutor withholds favorable evidence from the defense, Brady Material is implicated, and a defendant's right to Due Process under the U.S. Constitution are violated. The Prosecution's job is not merely to "win" by getting a conviction, but

to seek justice. Defendants are entitled to all evidence that would help their case.

Motions in limine relating to an audio recording shall be governed by Tennessee local rule 10.03. When a party intends to offer audio/or visual recording as evidence in a jury trial, counsel must provide written notice to all adverse counsel at least ten (10) days before a trial and shall be allowed to copy the recording at their expense. Adverse counsel shall promptly advise the other attorney of each objection to the recording. The lawyers shall then attempt in good faith to resolve objections. If no resolution is reached, a motion in limine shall be filed and set sufficiently before trial and not during trial, so that objections may be ruled on in time to allow any necessary editing. Counsel are encouraged to raise appropriate evidentiary objections by written motion at least five (5) days before trial. The State's Attorney had ample enough time to object accordingly prior to trial. Therefore, the Prosecution should have been barred from raising their objections during trial for not submitting a timely motion in limine, thusly, violating Tennessee Constitution Article VI Section 9. See: April 27, 2016 Tr. Vol. III, pp. 313, 318. This Court should accept review of this petition and settle this important question of law because Mr. Burkes did not receive a fair trial.

REASONS FOR GRANTING THE PETITION

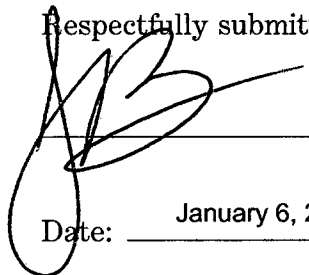
This Court should grant Mr. Burkes' Petition for a Writ of Certiorari because it presents important questions, which significantly implicate the need to secure settlement of important questions of law, and the need for the exercise of the Supreme Court's Supervisory Authority.

First, there is a need to secure settlement of important questions of law as to each of the questions presented in this petition. Second, this Court should grant Mr. Burkes the authority to execute Constitutional violations presented during pre-trial Motion Hearings as well as trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: January 6, 2020