

TENNESSEE SUPREME COURT

STATE OF TENNESSEE

v.

WALTER FRANCIS FITZPATRICK III

Appellate Court Case Number:
E2014-01864-CCA-R3-CD

Trial Court Docket #: 2014-CR-69

**APPLICATION FOR PERMISSION TO
APPEAL TO THE TENNESSEE
SUPREME COURT FROM THE
TENNESSEE COURT OF CRIMINAL
APPEALS**

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APPLICATION

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure the Defendant/Appellant in the above-named case hereby requests review by the Tennessee Supreme Court of the judgment entered in favor of the State by the Tennessee Court of Criminal Appeals. Said order was entered by the Court of Criminal Appeals on September 8, 2015.

Copies of the Court of Criminal Appeals' Order and Opinion are appended to this Application.

GROUND

Grounds for this application are that Supreme Court review is required to secure settlement of questions of public interest, and that this case reflects the need for the Supreme Court to exercise its supervisory authority.

Specifically, the questions of public interest raised by the instant case are:

Whether citizens petitioning the government for redress of grievances, with a genuine desire to have the government act, can be tried for extortion; and

Whether a victim of a crime can serve on the grand jury that indicts the alleged perpetrator of the crime to which the grand jury member was a victim.

This case also includes the need for the Supreme Court to exercise its supervisory authority because the Court of Criminal Appeals' opinion conflicts with Federal precedent on a matter of Federal Constitutional application, yet fails to discuss said precedent.

QUESTIONS PRESENTED FOR REVIEW

- Whether citizens petitioning the government for redress of grievances, with a genuine desire to have the government act, can be tried for extortion.
- Whether any reasonable juror can conclude that a defendant had the intent to deceive when the named victim testifies that the defendant “certainly acts like he believes” the allegedly false statements?
- Whether a victim of a crime can serve on the grand jury that indicts the alleged perpetrator of the crime, simply because a different victim of the same crime was named on the indictment and the voting jury member/victim was not named?

RELEVANT FACTS

For several years retired Navy Lieutenant Commander Walter Fitzpatrick has investigated jury selection practices used by East Tennessee Criminal Courts. (IV, 148:2-5).

Commander Fitzpatrick was arrested on March 18, 2014 while waiting in the McMinn County Courthouse to present a petition to the grand jury. That grand jury had just indicted him alleging Harassment, Stalking, Aggravated Perjury, and Extortion. (I, 1-3). Fitzpatrick was arrested while he was quietly reading a book just outside the grand jury room.

The victim named in the indictment is Jeff Cunningham. (I, 1-3). Mr. Cunningham had served as McMinn County grand jury foreman until just before the March 18 meeting. (III, 23:1-10). In January Fitzpatrick had attempted to petition the grand jury, alleging that Cunningham had been illegally appointed. (III, 43:14-23). At the January meeting Cunningham refused to remove himself from the grand jury proceedings as required by Tennessee Rule of Criminal Procedure 6(c)(1)(A), when the grand jury member is charged with an offense. (III, 48:1-6; III, 49:8-14; III, 64:12-15; V, 80:12-81:8). During the January meeting, and during several other grand jury meetings, Cunningham also refused to follow statutorily required procedures for considering petitions to the grand jury. (*Compare* TCA §40-12-104; *and* TN R. Crim. Proc. 6(c)(1)(A) *with* III, 41:4-6; III, 48:3-10; III, 48:19-48:6; III, 49:8-14; III, 62:3-6; III, 64:12-15; V, 15:22-16:6; V, 17:16-24; V, 21:9-17; V, 34:10-18; V, 37:11-15; V, 38:4-6; V, 38:19-22; V, 40:18-22; V, 59:1-14; V, 74:12-75:5; V, 77:15-21; V, 80:12-81:8; 107:19-22).

At the February grand jury meeting, when Mr. Cunningham learned that Fitzpatrick was still accusing Cunningham of being illegally appointed, Cunningham told Fitzpatrick “when you file things on me as a private citizen you are, in my opinion, committing a felony. You will make no more presentments to the grand jury. I will not, as the grand jury foreman accept anymore

presentations from you.” (V, 41:6-14). A month later one of the other serving grand jury members was temporarily appointed foreman for the purpose of indicting Fitzpatrick. (I, 1-3).

During the January 2014 grand jury meeting foreman Jeff Cunningham told the grand jury members that Commander Fitzpatrick had tried to make a citizen’s arrest in Monroe County, and that he accused “a litany of people of crimes” in relation to the grand jury and that he had “disrupted the grand jury there.” (III, 59:8-12; III, 60:21-24; III, 61:7-11; V, 113:19-114:3; V, 114:18-115:5; V, 115:19-116:8). He told the jurors to “stay away” from Fitzpatrick and “have nothing to do with him.” (III, 82:20-83:4). One woman on the grand jury panel asked if she should be scared of Fitzpatrick. (III, 112:21-23).

Also after the January grand jury meeting, Cunningham requested that court officers “remove him [Fitzpatrick] from the building,” stating “The Grand Jurors don’t want him here.” (III, 69:2-11; IV, 157:14-17). Cunningham made this statement in the presence of the other grand jurors. *Id.* Fitzpatrick was escorted out of the building and the grand jurors were asked by uniformed officers to remain in the building until he left. (III, 68:1-4, III, 105:9-14).

When the grand jurors finally left the building, escorted by uniformed officers, Fitzpatrick was across the street leaning against a car. (III, 81:18-20). Grand juror Kay Hicks testified that “When I went out he was sitting—or standing—he was on my car.” (III, 81:16-17). She also testified that she was scared of Fitzpatrick and felt threatened by him. (III, 83:9-23). Yet she participated in the grand jury proceedings, including voting on the instant indictment. (III, 80:3-5; I, 1-3).

At trial the prosecution presented evidence confirming that the charges against Fitzpatrick arose from his interactions with the grand jury in January, February, and March of 2014. (VII, 110:21-22; VII, 115:19-120:1; VIII, 221:22-222:17; VIII, 229:13-231:18; VIII,

238:13-18; VIII, 240:19-241:8; VIII, 243:22-245:16; VIII, 249:13-18; VIII, 254:12-15; VIII, 255:13-16; Record Exhibits 3-7 *see also* I, 1-3).

All of the exhibits presented by the prosecution at trial as examples of Fitzpatrick's activities are petitions to the government for redress of grievances. (Record Exhibits 3-7 & 9-12). Cunningham testified that Fitzpatrick's goal in presenting all of these petitions was to have Cunningham removed from his position as grand jury foreman because Fitzpatrick believed Cunningham was illegally appointed. (V, 76:5-10). Cunningham testified that Fitzpatrick certainly acts like he believes his assertion that Cunningham was illegally appointed. *Id.*

REASONS SUPPORTING SUPREME COURT REVIEW

Supreme Court review of the instant case is required to secure settlement of questions of public interest. Specifically, the public holds a strong interest in this Court's determination of whether citizens petitioning the government for redress of grievances, with a genuine desire to have the government act, can be tried for extortion. Also, whether a victim of a crime can serve on the grand jury that indicts the alleged perpetrator of the crime to which the grand jury member was a victim.

This case also includes the need for the Supreme Court to exercise its supervisory authority because the Court of Criminal Appeals' opinion conflicts with Federal precedent on a matter of Federal Constitutional application, yet fails to discuss said precedent.

Question 1: Whether citizens petitioning the government for redress of grievances, with a genuine desire to have the government act, can be tried for extortion?

In the instant case the decision of the Tennessee Court of Criminal Appeals conflicts with Federal precedent interpreting the U.S. Constitution.

“[D]e novo review is appropriate when reviewing decisions involving the United States Constitution.” *State v. Merriman*, 410 S.W.3d 779,790-91 (Tenn.2013); citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

In 1982 the Southern District of Texas, citing the U.S. Supreme Court, established that the first fact to be decided when considering a defendant’s assertion of the right to petition, is whether or not the defendant genuinely desired governmental action on the petition:

“It is well settled that liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if...the real purpose is not to obtain governmental action...It is clear that the defendant genuinely sought governmental response to her complaint, namely, the filing of criminal charges by officials of Chambers County. In such a situation, the defendant’s intent or purpose in lodging the complaint is of no moment.” *United States v. Hylton*, 558 F.Supp. 872 (S.D.Tex. 1982)(emphasis added); citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Because of the standards established by the *Noerr-Pennington* doctrine, as applied in *Hylton*, above, Federal Courts have been unwilling to apply Federal extortion charges to witnesses because of the risk that such prosecutions would lead to citizen self-censorship. *United States v. Pendergraft*, 297 F.3d 1198, 1207 (11th Cir. 2002) citing *Butz v. Economou*, 438 U.S. 487, 512 (1978); *Charles v. Wade*, 665 F.2d 661, 667 (5th Cir. 1981); *Imbler v. Pachtman*, 424 U.S. 409, 440 (1976). The Federal Courts concluded that prosecutions for extortion arising from petitions to the government would lead citizens to fear using established channels of communication with the government. Therefore, in *Pendergraft* the Court concluded that even intentional fabrication of evidence should not be prosecuted via the Federal extortion statute. *Pendergraft*, 297 F.3d at 1207.

The Appellate Court’s decision in the instant case conflicts with *Pendergraft*, *Hylton*, and the U.S. Supreme Court’s *Noerr Pennington* doctrine.

In the instant case the named victim admitted that the defendant believed that the victim was illegally appointed as grand jury foreman, and that the defendant wanted the victim removed from that governmental position. (V, at 76:5-14). The named victim also testified that the defendant “sure acts like he believes it.” *Id.*

According to the alleged victim’s own testimony, defendant Fitzpatrick “sure acts like he believes” that Cunningham was wrongfully appointed to the grand jury. *Id.* Fitzpatrick did believe this, which is why he petitioned the government to remove Cunningham. Nothing in the record contradicts this conclusion.

Because Fitzpatrick’s real purpose in filing his petitions was to obtain governmental action, his petitions cannot be used to support any criminal charges. U.S. Const. amd. I; *Marbury*, 5 U.S. 137; *Hylton*, 558 F.Supp. 872; *Otter Tail*, 410 U.S. at 380; *California Motor Transport*, 404 U.S. at 512-13; *Pennington*, 381 U.S. at 670; *Noerr*, 365 U.S. 127.

This issue was raised at every stage of the case, yet was not addressed by the Criminal Court of Appeals.¹

Both the Federal and State governments are prohibited from making any law “abridging the freedom of speech, or...to petition the Government for a redress of grievances.” U.S. Const. amd. I; *Marbury v. Madison*, 5 U.S. 137 (1803). “The First Amendment right to petition for redress of grievances is ‘among the most precious of the liberties safeguarded by the Bill of Rights.’” *United States v. Hylton*, 558 F.Supp. 872, 874 (S.D. Tex. 1982)(reversing jury conviction for “intimidating” IRS agents by filing a criminal complaint) *quoting United Mine Workers of America v. Illinois State Bar*, 389 U.S. 217, 222 (1967).

¹ The defendant moved to dismiss before trial on grounds that his petitions are Constitutionally-protected activities. (I, 64-67; I, 75-78; II, 113-117). Objections to evidence of petitions were made at trial. (VII, 140:17-23; VIII, 159:23-160:4; VIII, 24:19-205:3). The motion to dismiss was renewed after close of prosecution’s case, and in defendant’s motion for a new trial. (V, 125:15-126:4; I, 142-3).

“It is axiomatic ‘that filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right’ to petition government for the redress of grievances.” *Jackson v. New York State*, 381 F.Supp.2d 80, 89 (N.D.N.Y. 2005); *quoting Lott v. Andrews Center*, 259 F.Supp.2d 564, 568 (E.D.Tex.2003); *see also Myer v. Board of County Commissioners of Harper County*, 482 F.3d 1232, 1243 (10th Cir. 2007); *quoting Estate of Morris v. Dapolito*, 297 F.Supp.2d 680, 692 (S.D.N.Y.2004); *Hylton*, 558 F.Supp. at 874.

Commander Fitzpatrick’s petitions to submit information to the grand jury, pursuant to procedures set forth by Tennessee statute 40-12-104, were quite literally attempts “to petition the Government for a redress of grievances.” (Record Exhibits 9-12). Similarly, Commander Fitzpatrick’s petitions for protective orders were literally “petitions” to the government for a redress of grievances. (Record Exhibits 3-7). Also, any written or oral communications by Commander Fitzpatrick regarding the activities of the McMinn County Grand Jury are constitutionally protected free speech. All such communications were expressions of Commander Fitzpatrick’s opinion regarding political matters of public importance. Such communications are the highest category of protected speech, given the most protection possible under the Constitution’s First Amendment. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2673 (2011)(citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)). As such, Fitzpatrick’s actions were not only lawful activities under state law, they are explicitly protected by the U.S. Constitution. Yet Commander Fitzpatrick is now in prison for exercising these rights.

Commander Fitzpatrick genuinely sought governmental response to his petitions. In fact the prosecution asserted that Fitzpatrick’s goal was to have Cunningham removed from his position as grand jury foreman. (V, 76:5-10; VIII, 254:23-255:21). The prosecution’s accusation regarding Fitzpatrick’s real purpose for filing all of his petitions is correct: Fitzpatrick followed legal channels to request that Cunningham be removed from his position as grand jury foreman. In other words Fitzpatrick genuinely sought governmental response to his petitions.

Because Fitzpatrick's real purpose in filing his petitions was to obtain governmental action, those petitions cannot be used to support any criminal charges. U.S. Const. amd. I; *Marbury*, 5 U.S. 137; *Hylton*, 558 F.Supp. 872; *Otter Tail*, 410 U.S. at 380; *California Motor Transport*, 404 U.S. at 512-13; *Pennington*, 381 U.S. at 670; *Noerr*, 365 U.S. 127.

Question 2: Whether any reasonable juror can conclude that a defendant had the intent to deceive when the named victim testifies that the defendant "certainly acts like he believes" the allegedly false statements?

Even if the Federal precedent discussed above is not applicable to the instant case, no reasonable juror can conclude, beyond a reasonable doubt, that the defendant had the intent to deceive where the named victim testifies that the defendant acts like he believes the allegedly false allegations.

"Findings of guilt in criminal actions, whether by the trial court or jury, shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." TN R. App. Proc. 13(e).

The standard of review when a defendant challenges the sufficiency of evidence is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Proof beyond a reasonable doubt is proof that precludes every reasonable hypothesis except guilt and is inconsistent with any other rational conclusion. *State v. Hines*, 709 A.d 522, 534 (1998).

Both extortion and perjury require the State to prove beyond a reasonable doubt that the defendant had an intent to deceive. TCA § 39-14-112 Extortion; TCA § 39-16-702 Perjury ("with intent to deceive...that the person does not believe to be true). "[A]n honest but erroneous expression of opinion is not perjury." *Shook & Fletcher Supply Co. v. City of Nashville*, 47

Tenn.App. 339, 350 (1960). Deception' means that a person knowingly: Creates or reinforces a false impression...that the person does not believe to be true." TCA § 39-11-106 (a)(6)(A)(i)(emphasis added).

The accuser in the instant case testified that Fitzpatrick "sure acts like he believes it," "referring to the same thing he has been throughout," that Cunningham was improperly appointed as grand jury foreman:

Cunningham: "I think he's referring to the same thing he has been throughout. He's saying that I'm acting as an illegal wrongfully appointed grand jury person...in other words, he was wanting me to leave, but if I'm there, what he says is I'm improperly appointed; which he says makes it illegal."

Q: "Do you have any doubt that he believed that statement?"

A: "I don't know what he believed. He sure acts like he believes it." (V, at 76:5-14).

In other words Cunningham, Fitzpatrick's accuser, testified he, Cunningham, was convinced that Fitzpatrick believed the assertions made in all of his petitions. Cunningham was aware of all of the evidence presented at the trial because he was present for the entire trial and because he was the State's source for practically all the evidence against Fitzpatrick. Since the State saw fit to appoint Cunningham to the position of Grand Jury Foreman, it appears to be assumed that Cunningham is a reasonable person. So, a reasonable person with interests against the defendant and knowledge of all facts in the case concluded that Fitzpatrick believed the assertions Fitzpatrick made in all of his petitions.

When the alleged victim of the crime comes to an ultimate conclusion against an essential element of the charge, no reasonable trier of fact can come to the opposite conclusion. In the instant case Cunningham concluded that Fitzpatrick appeared to believe his accusations against Cunningham. In light of this no reasonable juror could have found beyond a reasonable doubt that Fitzpatrick knew his assertions were false and that he intended to deceive.

Question 3: Whether a victim of a crime can serve on the grand jury that indicts the alleged perpetrator of the crime, simply because a different victim of the same crime was named on the indictment and the voting jury member/victim was not named?

The named victim on the indictment was the foreman of the grand jury. However, evidence presented at trial included actions taken by defendant Fitzpatrick that were directed toward the grand jury as a whole. (*See Citations below*). A member of the grand jury that voted to indict later testified that she was “scared” and “felt threatened” by Fitzpatrick’s actions. (III, 83:9-23.). The specific actions described by her were included in the State’s evidence as proof of the Stalking and Harassment charges against Fitzpatrick. Despite this the Appellate Court concludes that the voting grand jury member is not a victim of the crime for which she voted to indict, simply because she was not named on the indictment as the victim.

Questions of jurisdiction are reviewed *de novo*, with no presumption of correctness. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). Because the defendant asserts that the indictment is void in the instant case, and that the trial court lacked jurisdiction because the indictment is void, this issue must be reviewed *de novo*. *Id.*, *See also Wyatt v. State*, 24 S.W.3d 319, (Tenn. 2000) (A valid indictment is an essential jurisdictional element, without which there can be no prosecution), *and* Rules Crim.Proc., Rule 12(b)(2).

“No member of the grand jury shall be present during—or take part in—the consideration of a charge or the deliberation of the other grand jurors” when “the offense was committed against the member’s person or property.”

TN Rules Crim.Proc. 6(c)(1)(C).

The record in the instant case reflects that at least one member of the Grand Jury that voted to indict the defendant was also a victim of the alleged crimes for which she voted to indict. Therefore, at least one member of the Grand Jury who voted to indict was disqualified to do so. TN Rules Crim.Proc. 6(c)(1)(C). Disqualification of said juror leaves only eleven Grand

Jury members having voted on the instant indictment; fewer than required by law to indict.² TCA §40-30-105. The indictment is, therefore, void and the trial court lacked jurisdiction. TCA §40-30-105; TN Rules Crim.Proc. 6(c)(1)(C); *Wyatt*, 24 S.W.3d 319.

Also, even if 12 qualified grand jurors had remained after elimination of the disqualified juror, as a victim of the crime charged the disqualified juror's participation in the grand jury's deliberation of the instant indictment is prohibited. TN Rules Crim.Proc. 6(c)(1)(C). Her voting on the indictment is also prohibited. *Id.* Therefore, her presence and participation in the March 18 grand jury proceedings prejudiced the defendant.

Grand jury member Kay Hicks was a victim of the same alleged harassment and stalking charged on the indictment against Fitzpatrick. During the January 2014 grand jury meeting foreman Jeff Cunningham told the grand jury members that Commander Fitzpatrick had tried to make a citizen's arrest in Monroe County, and that he accused "a litany of people of crimes" in relation to the grand jury and that he had "disrupted the grand jury there." (III, 59:8-12; III, 60:21-24; III, 61:7-11; V, 112:21-113:1; V, 113:19-114:3; V, 114:18-115:5; V, 115:19-116:8). Grand jury member Kay Hicks testified that Cunningham had instructed the grand jurors to "stay away" from Fitzpatrick and "have nothing to do with him." (III, 82:20-83:4). Cunningham testified that one woman on the grand jury panel asked if she should be scared of Fitzpatrick. (V, 112:21-23; V, 115:19-24).

After that grand jury meeting Cunningham requested that court officers "remove him [Fitzpatrick] from the building," stating "The Grand Jurors don't want him here." (IV, 157:14-17). Cunningham made this statement in the presence of the other grand jurors. *Id.* Fitzpatrick

² Elimination of Ms. Hicks left only 11 qualified grand jurors present on March 18, 2014, according to McMinn County Criminal Court Clerk's records. Cunningham, the named victim, had served as the grand jury foreman, and was the 13th voter on most indictments. However, prior to the vote on the instant indictment Cunningham stepped down and one of the remaining 12 members was appointed as temporary Grand Juror. Therefore, elimination of Ms. Hicks left only 11 voting grand jurors.

was escorted out of the building and the grand jurors were asked by uniformed officers to remain in the building until he left. (V, 85:16-19; V, 92:14-17; III,90:22-23; III, 105:9-11).

When the grand jurors finally left the building, escorted by uniformed officers, Fitzpatrick was across the street leaning against a car. (III, 81:13-20). Grand juror Kay Hicks testified that “When I went out he was sitting—or standing—he was on my car.” (III, 81:16-17). She further testified:

Q: “Were you aware that Mr. Fitzpatrick was the reason that the court officers were escorting the Grand Jurors out of the building?”

A: “At that time, I guess I was. I knew there was a man.”

Q: “Okay. And you knew that this man leaning on your car was the man that they were referring to?”

A: “Yes. He was the man that spoke to me.”

Q: “What had you been told about him?”

A: “I just knew that that was the man I was supposed to stay away from.” (III, 82:9-22).

Ms. Hicks further testified:

Q: “Did you feel scared at all?”

A: “Yes. I did.”

Q: “Okay. Because Mr. Fitzpatrick--”

A: “Because of that man on my car.”

Q: “All right.”

A: “Because I don’t lock my car. And when I got in the car, I locked my doors.”

Q: “And you knew that that man was the same man who’d been in the courthouse outside the jury room?”

A: “Yes. Because he spoke to me that morning.”

Q: “All right. And you felt—you said you felt scared. Did you feel harassed?”

A: “Just threatened.” (III, 83:9-23).

Two months later Commander Fitzpatrick was waiting in the hall outside the grand jury room when the grand jurors arrived for their regular meeting. He spoke to several jurors and was seen by all as they arrived. At that meeting Kay Hicks voted to indict Fitzpatrick for Harassment and Stalking. (I, 1-3; III, 80:3-5).

“‘Harassment’ means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress.” TCA § 39-17-315(a)(3). “Unconsented contact includes, but is not limited to, any of the following: (A) Following or appearing within the sight of that person; (B) Approaching or confronting that person in a public place or on private property.” *Id.* at (a)(5).

Stalking means “harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested” TCA § 39-17-315(a)(4).

Kay Hicks testified that she was actually scared of Fitzpatrick and felt threatened by him. (III, 83:9-23).

At trial the prosecution presented evidence confirming that the charges against Fitzpatrick arose from his interactions with the grand jury in January, February, and March of 2014. (VII, 110:21-22; VII, 115:19-120:1; VIII, 221:22-222:17; VIII, 229:13-231:18; VIII, 238:13-18; VIII, 240:19-241:8; VIII, 243:22-245:16; VIII, 249:13-18; VIII, 254:12-15; VIII, 255:13-16; Record Exhibits 3-7 *see also* I, 1-3). In other words, the actions used to convict Fitzpatrick include the same actions that led Ms. Hicks to feel “scared” and “threatened.”

Kay Hicks fits the definition of a victim of the crimes alleged in the indictment against Fitzpatrick. (I, 1-3; III, 80:3-5).³ Yet the Appellate Court concludes that Ms. Hicks is not a victim because she was not named on the indictment as the victim. The Court's conclusion establishes that naming one victim on an indictment conclusively proves that no other victims exist.

This conclusion runs contrary to the definition of "victim" given in Tennessee's Stalking statute: "'Victim' means an individual who is the target of a willful course of conduct involving repeated or continuing harassment." TCA § 39-17-315(a)(6). Contrary to the Appellate Court's conclusion, the Tennessee Stalking statute definition of victim does not limit victims to only those named on an indictment.

The Appellate Court's conclusion also runs contrary to the definition of "victim" from Black's Law Dictionary: "A person harmed by a crime, tort, or other wrong." Black's Law Dictionary, 7th Ed. at 1561. Like Tennessee's Stalking statute, Black's Law Dictionary also does not limit "victim" to only the person named on the indictment.

Crimes often have multiple victims. Not all victims are necessarily named on an indictment. If the Appellate Court's conclusion in the instant case is upheld, a hostage in a bank during a robbery could later sit as a grand jury member and vote to indict the robber simply because the indictment names only the bank manager as the victim. Upholding such a conclusion would eliminate the purpose of Tennessee Rule of Criminal Procedure 6(c)(1)(C).

For this reason the defendant respectfully requests that this Court reverse the Appellate Court's decision, and order that Commander Fitzpatrick be immediately released from prison.

³ At the June 16 hearing Fitzpatrick's attorney moved to dismiss the case for lack of jurisdiction. (III, 85:13-19; III, 86:4-8; III, 86:24-87:2). The trial court denied the motion, stating that the indictment indicated that Cunningham was the named victim. (III, 87:4-5; III, 87:14-15).

CONCLUSION

For the reasons set forth above, the Applicant respectfully requests that the Tennessee Supreme Court grant his application to appeal the order of the Court of Criminal Appeals.

Submitted,



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November 5, 2015

CERTIFICATE OF SERVICE

It is hereby certified that the undersigned has served a true and correct copy of the foregoing documents upon attorney for the State.



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