IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DAVID SCOTT BLACKWELL,	)	
	)	
Petitioner/ Appellant,	)	
	)	
	)	**Supreme Court**
v.	)	**Case No. _____**
	)	
WILLIAM HASLAM, Governor of the State of Tennessee in his official capacity only and ROBERT E. COOPER, JR., Tennessee Attorney General, VICTOR S. TORRY JOHNSON III, District Attorney of Davidson County, Tennessee in his official capacity only, and KIM R.HELPER, District Attorney of Williamson County, Tennessee in her official capacity only and the STATE OF TENNESSEE,	)	**Court of Appeals Case No.M2012-01991-COA-R3- CV**
	)	**Davidson County Chancery Court Case No.: 10-0739-III**
	)	
Defendants/ Appellees	)	

ON APPLICATION FOR PERMISSION TO APPEAL FROM THE JUDGMENT OF THE COURT OF APPEALS

RULE 11 TRAP APPLICATION OF THE PETITIONER/APPELLANT FOR PERMISSION TO APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Constitutions

Other Authorities

INTRODUCTION

This case presents two central questions: If a person is pardoned for a felony committed in another state, can the person lawfully possess a firearm in Tennessee, and if so, does a declaratory judgment enforcing the constitutional right of firearm possession entitle the successful party to attorney fees pursuant to 42 U.S.C. § 1988(b)? These questions implicate significant constitutional issues—some of which of are matters of first impression—involving the federal Full Faith and Credit Clause, the right to keep arms under the federal and state constitutions, the separation of powers doctrine, and the federal civil rights "prevailing party" attorney fees rule.

In 1989 Mr. Blackwell was convicted of three felony offenses in Georgia for selling cocaine. He received a full pardon in 2003 which expressly restored his firearm rights. Upon moving to Tennessee, Mr. Blackwell sought declaratory relief to establish that Tenn. Code Ann. § 39-17-1307, which prohibits the possession of a firearm by a convicted felon, is inapplicable to him in light of his pardon. As he did below, Mr. Blackwell relies primarily on the constitutional right to keep and bear arms, and the federal Full Faith and Credit Clause.

The trial court correctly granted declaratory relief, holding that a comparable Tennessee pardon of a Tennessee conviction would supersede the statutory firearm prohibition and thus the federal Full Faith and Credit Clause dictated that the Georgia pardon be accorded equal dignity. Although Tennessee statutes express a policy to promote public safety by preventing felons from having firearms, the trial court agreed with Mr. Blackwell that "Tennessee has a clear policy to restore civil disabilities upon

receipt of a pardon as established in case law," namely the provision in *State v. Blanchard*, 100 S.W.3d 226, 231 (Tenn. Crim. App. 2002), providing that "a full pardon restores one's civil rights." (Appendix Page 46). The trial court then correctly held that Mr. Blackwell is entitled to attorney fees because he prevailed in a declaratory action in which "the operative facts of the case concerned enforcement of the Petitioner's Second Amendment rights." (Appendix Page 53).

The intermediate appellate court, by contrast, found that a Tennessee pardon does *not* restore civil rights. In doing so, the intermediate appellate court ignored *Blanchard*'s clear holding and relied solely on two of this Court's decisions which had nothing to do with pardons, *Cole v. Campbell*, 968 S.W.2d 274 (Tenn. 1998) and *State v. Johnson*, 79 S.W.3d 522 (Tenn. 2002). (Slip Op. 14-18, Appendix Pages 14-18). However, the intermediate appellate court noted that a recent amendment to Tennessee's expungement statute, Tenn. Code Ann. § 40-32-101, reflects a *statutory* policy to restore the rights of certain Tennessee pardoned felons, and concluded that Mr. Blackwell would be entitled to Full Faith and Credit of his Georgia pardon if the trial court finds that the expungement statute would apply to him. As for attorney fees, the intermediate appellate court held that Mr. Blackwell is not a "prevailing party" entitled to attorney fees because his "supposed" firearm rights could be restored only "from legislative grace, not from the constitutional right of a convicted felon to bear arms." (Slip Op. 28, Appendix Page 28).

It is axiomatic that restraining the right to keep arms is a depravation of the Second Amendment as reflected by the recent United States Supreme Court decisions in

District of Columbia v. Heller, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). A declaratory judgment enforcing this civil right, or any civil right for which 42 U.S.C. § 1983 provides a remedy, is all a party need establish to be entitled to attorney fees. 42 U.S.C. § 1988(b). It matters not what statutes or other constitutional provisions are invoked to achieve prevailing party status if the right being enforced is considered a civil right. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-13 (1989) (holding that enforcement of federal statutory right under Supremacy Clause falls within "the broad remedial scope of § 1983"). "If the party enforcing such [Federal] rights is successful, that party is entitled to receive an award of attorneys' fees under 42 U.S.C. § 1988." *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1992).

The intermediate appellate court erroneously inquired only by what *route* the Second Amendment was enforced and ignored that the *goal* of the journey determines civil rights prevailing party status. Or as more succinctly stated by the United States Supreme Court, in determining civil rights attorney fees issues: "The result is what matters." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). That settled doctrine must be applied here for this and other cases where constitutional civil rights are being enforced through statutes and other state and federal non-civil right provisions.

This appeal implicates all four Tenn. R. App. P. 11(a) factors which support review by this Court. First, there is a need to secure uniformity because the intermediate appellate court's opinion irreconcilably conflicts with the Court of Criminal Appeals's holding in *Blanchard* and cases from this Court as to the effect of a Tennessee pardon.

Second, the effect of a Tennessee pardon is an important question of law which goes directly to the separation of powers doctrine and the federal and state constitutions. Third, there is a significant public interest in ensuring that prevailing parties who enforce their constitutional rights receive attorney fees to encourage legal action in cases seeking only declaratory relief. Finally, the intermediate appellate court's inappropriate analysis of the "prevailing party" inquiry demonstrates a need for this Court to exercise supervisory authority to create clearer guidelines for lower courts to follow.

DATE OF JUDGMENT BELOW

On Tenn. R. App. P. 3 Appeal as of Right, the Court of Appeals issued an opinion on June 28, 2013 affirming in part and reversing in part, and remanding to the trial court. A copy of the Opinion is attached. No petition to rehear was filed by either side. Mr. Blackwell now seeks Tenn. R. App. P. 11 Permission to Appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. In light of Mr. Blackwell's full Georgia Pardon of his Georgia felony convictions, whether Tennessee can prohibit Mr. Blackwell's exercise of his constitutional right to purchase and possess a firearm as guaranteed by:

   A. The Full Faith and Credit Clause of the United States Constitution

   B. The Second Amendment of the United States Constitution

   C. Article I, § 26 of the Tennessee Constitution

   D. The Equal Protection Clause of the United States Constitution

   E. The Privileges and Immunities Clauses of the United States Constitution

II. Since he is the prevailing party establishing enforcement of his Second Amendment Rights, whether Mr. Blackwell is entitled to Attorney Fees pursuant to 42 U.S.C. § 1988(b).

FACTS RELEVANT TO THE ISSUES PRESENTED

Tenn. R. App. P. 11(b)(3) provides that "the facts relevant to the questions presented [shall be set forth in the Application], but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application. " Attached to this Application the Court will find the opinion of the intermediate appellate court rendered on June 28, 2013, (Appendix Page 1), as well as the opinion of that court rendered in this case on January 11, 2012, (Appendix Page 33). These accurately provide the history of this litigation and the factual context necessary to address the issues. The Appendix also contains a copy of the Pardon, (Appendix Page 32), and the relevant trial court's orders.

STANDARD OF REVIEW

All of the issues in this case are strictly matters of law, there being no factual disputes. Accordingly the appropriate standard of review for each issue is de novo without a presumption of correctness afforded to the lower court's conclusions of law. *Blair v. Brownson*, 197 S.W.3d 681, 683 (Tenn. 2006).

REASONS SUPPORTING REVIEW BY THIS COURT

I. Mr. Blackwell is Entitled to Possess a Firearm

Mr. Blackwell has consistently argued for his right to possess a firearm on multiple grounds, although the trial court only reached the Full Faith and Credit claim. Before addressing the several substantive arguments, it is necessary to first preface that the right to keep and bear arms contained in the Second Amendment has been held by the

Supreme Court to be "among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3042 (2010); *see also Cole v. Campbell*, 968 S.W.2d 274, 276 (Tenn. 1998) (stating that carrying arms is among "specific rights of citizenship"). Because this suit ultimately seeks to enforce Mr. Blackwell's Second Amendment right to possess a firearm in Tennessee, recognition that this right is of the greatest possible magnitude heightens the significance of each underlying sub-issue addressed below.

A. Full Faith and Credit

The Full Faith and Credit Clause of the United States Constitution generally requires states to recognize and give effect to the "public acts, records, and judicial proceedings" of other states. U.S. Const. art. IV, § 1. There is no dispute that Mr. Blackwell's pardon fits under the category of "public acts, records, and judicial proceedings." The "public policy" exception to Full Faith and Credit provides that a forum state is not required to apply another state's law in violation of its own legitimate public policy. *See Seiller & Handmaker, LLP v. Finnell*, 165 S.W.3d 273, 276-77 (Tenn. Ct. App. 2004).

The "judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law." *Trustmark Nat'l Bank v. Miller*, 209 S.W.3d 54, 58 (Tenn. Ct. App. 2006) (quoting *Four Seasons Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984)). Rather, the party opposing Full Faith and Credit must offer additional compelling evidence of a significant policy conflict.

1. Tennessee Pardons Restore Firearm Rights

The trial court found that, as in Georgia, a Tennessee pardon restores firearm rights. (Appendix Page 46). The trial court correctly held that since "there is no inconsistency between Tennessee and Georgia's public policies regarding pardons," the public policy exception to the Full Faith and Credit clause does not apply and thus, Mr. Blackwell's Georgia pardon's express firearm right restoration must be afforded Full Faith and Credit in Tennessee. (Appendix Page 46-47). The trial court's opinion was grounded entirely on *State v. Blanchard*, which held that "a full pardon restores one's civil rights and remits all punishment associated with the conviction." 100 S.W.3d at 231.

The intermediate appellate court, by contrast, held that pardons do not restore civil rights (and apparently have no direct effect at all). Instead, the intermediate appellate court held that statutory procedures are the *only* means of restoring civil rights in Tennessee. (Slip Op. 14, Appendix Page 14). This conclusion conflicts with not only *Blanchard* but centuries of other cases pertaining to executive pardons and separation of powers.

Article III, § VI of the Tennessee Constitution provides that the governor "shall have the power to grant reprieves and pardons, after conviction, except in cases of impeachment." Apart from the "after conviction" and "impeachment" limitations, the

power of the Tennessee governor to pardon is absolute.[1] *Sharp v. State*, 49 S.W. 752, 753 (Tenn. 1899).

The operation of the pardon power contained in the Tennessee Constitution is governed by "the principals established by the common law." *Id.* at 753-54 (quoting 3 Op. Att'y Gen. 622 (1841)). At common law, in which the clemency power belonged to the king of England, "it was well settled that a pardon by the king removed not only the punishment that flowed from the offense, but also 'all the legal disabilities consequent on the crime.'" Effects of a Presidential Pardon, 19 Op. Off. Legal Counsel 160 (1995) (quoting 7 M. Bacon, Abridgment of the Law 416 (1852)). Thus, it is black-letter law that a pardon restores an "offender's civil rights without qualification," Black's Law Dictionary (7th ed. 1999), unless a state constitution expressly limits the pardon power.

This Court has long repudiated "legislative attempts to regulate the power of the Governor with respect to pardons":

> The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state, and the Legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved.

State ex rel. Rowe v. Connors, 61 S.W.2d 471, 472 (Tenn. 1933) (quoting *State v. Dalton*, 72 S. W. 456, 457 (Tenn. 1903)).

[1] The reason for the "after conviction" limitation was to ensure that facts are "brought to light" so that crimes would not be "smothered" out of the view of the public and to ensure a defendant "cannot deceive the pardoning power" because "[t]he public are in possession of the facts and can resist his application." *State v. Garrett*, 188 S.W. 58, 59 (Tenn. 1916).

As our Attorney General himself recently opined, "The pardoning power, as an enumerated constitutional power, will find its limitation, if any, only in the constitution itself." Tenn. Op. Att'y Gen. 11-31 (2011) (citing *Shick v. Reed*, 419 U.S. 256, 267 (1974)); *see also Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997) ("The Governor's power to grant reprieves, pardons and commutations is limited only by the language in the Constitution" and "cannot be interfered with" by the legislature.). This view is in stark contrast to the intermediate court's holding that a Tennessee pardon has no practical effect.

The Tennessee Constitution contains no provision which limits the governor's power to restore civil rights for non-impeachable offenses. Accordingly, this Court has held that a "full and absolute pardon releases the offender from entire punishment prescribed for his offense, and from all the disabilities consequent upon his conviction." *Fite v. State ex rel. Snider*, 88 S.W. 941, 943 (Tenn. 1905). Thus, as in other states, a Tennessee governor unequivocally has the authority to restore a person's firearm disabilities for a Tennessee conviction by virtue of a pardon.[2]

In determining that Tennessee pardons do not restore civil rights, the intermediate appellate court did not consider or distinguish *any* of the above cases and authorities (which were raised in the Petitioner's briefs). Instead, the intermediate appellate court

[2] *See, e.g., Touchet v. Broussard*, 31 So.3d 986, 993 (La. 2010) (a pardon "restores privileges as well as rights"); *Turbyfill v. Executive Branch Ethics Comm'n*, 303 S.W.3d 124, 128 (Ky. Ct. App. 2009) ("[A] full pardon restores the offender's civil rights 'without qualification.'"); *Heath v. State*, 983 A.2d 77, 82 (Del. 2009) (A "pardon restores all civil rights."); *In re Sang Man Shin*, 206 P.3d 91, 91 (Nev. 2009) ("[A] pardon is an act of forgiveness that restores civil rights and removes most legal consequences of a criminal conviction."); *R.J.L. v. State*, 887 So.2d 1268, 1280 (Fla. 2004) ("[A] pardon has the effect of removing punishment and disabilities, and restoring civil rights."); *State v. Norris*, 879 So. 2d 557, 560 (Ala. 2003) (a pardon "restores civil and political rights").

relied entirely on this Court's decisions in *Cole v. Campbell*, 968 S.W.2d 274 (Tenn. 1998) and *State v. Johnson*, 79 S.W.3d 522 (Tenn. 2002). (Slip Op. 14-18, Appendix Page 14-18). Neither of these cases had anything to do with pardons. *Cole* held that a felon's "infamous" status pursuant to Tenn. Code Ann. § 40-20-112 did not disqualify him from making a Public Records Act request as a "citizen" under § 10-7-503, whereas *Johnson* held that § 39-17-1307(b) prohibited a non-pardoned felon from possessing a firearm even though he had obtained a statutory restoration of citizenship pursuant to § 40-29-101.

Certainly the legislature can override one statute with another, and *Cole* and *Johnson* are merely reconciliations of seemingly-conflicting statutes. By contrast, the legislature cannot contravene the Constitution with a statute. *Williams v. Carr*, 404 S.W.2d 522, 529 (Tenn. 1966) ("[T]he Legislature has unlimited power to act in its own sphere of legislation except so far as restrained by the Constitution of the United States and of the State."). Neither *Cole* nor *Johnson* even purport to address separation of powers or whether the legislature may override an executive pardon with a statute. Thus, they are simply irrelevant to this case. The intermediate appellate court's reliance on those decisions for the entirety of its analysis on Tennessee public policy reveals its misapprehension of the important constitutional issues at stake.

If the practical effects of Tennessee pardons are to be eviscerated and centuries of case law overruled, that is something which must be expressly declared by this Court rather than inferred by a lower court based on two non-controlling decisions.

2. Full Faith and Credit Does *Not* Require Identical Remedies

The intermediate appellate court's decision fundamentally misapplied the established Full Faith and Credit analysis and created an entirely new standard than that used in previous cases. All a Tennessee court need decide in this case is whether the restoration of firearm rights resulting from Mr. Blackwell's Georgia pardon is "violative" of Tennessee public policy. *Seiller & Handmaker, LLP v. Finnell*, 165 S.W.3d 273, 277 (Tenn. Ct. App. 2004). The restoration of firearm rights in Tennessee and Georgia need not stem from "identical remedies" so long as there are "similar remedies in other circumstances." *Four Seasons Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984) (Koch, J.). Even where policies actually conflict, the Court of Appeals has held that Full Faith and Credit must be afforded unless the "act or case" restricting the remedy in Tennessee *also* express a public policy of proscribing the enforcement of such a remedy from another state. *Francis v. Francis*, 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996).

Despite this clear doctrine, the intermediate appellate court imposed an "identical remedy" standard by holding that Mr. Blackwell is entitled to Full Faith and Credit *only* if he could obtain relief under Tennessee's expungement statute, and remanded for such a determination. This result is contrary to numerous Tennessee cases which extended Full Faith and Credit to acts and judgments that could not exist in Tennessee.[3] Under the

[3] *E.g.*, *Farnham v. Farnham*, 323 S.W.3d 129, 140 (Tenn. Ct. App. 2009) (extending full faith and credit for bigamous marriage, which are illegal in Tennessee); *Trustmark*, 209 S.W.3d at 58 (same for foreign lien priority judgment that differs from Tennessee priority rules); *Seiller & Handmaker*, 165 S.W.3d at 278-79 (same for malicious prosecution claim against attorney, assuming the claim would be prohibited in Tennessee); *Boardwalk Regency Corp. v. Patterson*, No. M1999-02805-COA-R3-CV, 2001 WL

standard applied by the intermediate appellate court, none of those petitioners would have been successful because they would be unable to "bring themselves" within an identical remedy under Tennessee law.

The intermediate appellate court's attempt to make an "apples to apples" comparison of firearm right restoration among the two states is particularly inappropriate here where both the remedies and procedures at issue are different. The Tennessee expungement law confers more numerous and generous remedies than a Georgia pardon. Mr. Blackwell seeks only to compare the lone provision of firearm right restoration which is applicable to those receiving a pardon. Unfortunately, the intermediate appellate court went astray in apparently believing that the new amendment serves to "create[] an entirely new avenue for the restoration of firearm rights" for pardoned felons. (Slip Op. 20, Appendix Page 20). To the contrary, the amendment could not create a "new avenue" for a pardoned felon to regain firearm rights because a pardon restores such rights automatically. *Blanchard*, 100 S.W.3d at 231. Instead, the amendment was enacted specifically to allow *expungement* for pardoned felons because pardons have been held to "forgive" but do not "forget" an offense.[4] *Id.* The restoration of firearm rights provided

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1613892, at *3 (Tenn. Ct. App. Dec. 18, 2001) (same for out-of-state gambling debt); *Four Seasons*, 688 S.W.2d at 445 (same for certain damages in contract action); *Francis v. Francis*, 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996) (same for alienation of affections judgment).

[4] This conclusion is bolstered by the fact that the discussion of the enabling legislation focused entirely on expungement, not firearm restoration. *E.g., Hearing on H.B. 1275 Before the H. Criminal Justice Sub. Comm.*, 108th Gen. Assemb. (Tenn. March 12, 2013) (Statement of Rep. Dennis) ("This bill as amended would simply provide for a small group of people that we left out of the expungements bill that we passed last year that allowed individuals to apply for expungement, if [a person is pardoned and meets the other criteria in the statute]. . . . We usually think of pardons as being final but in fact from expungement purposes they are not.").

in the expungement statute is an incidental, previously-existing benefit for anyone who receives an expungement, not simply those with pardons.

The fact that the remedies between Tennessee and Georgia are somewhat different—just as in most other Full Faith and Credit cases—highlights the rationale for the "similar remedies" standard. Requiring a petitioner to effectively "bring himself" within a Tennessee statute conferring the exact benefit sought in order to receive the effect of a foreign act or judgment would eviscerate Tennessee's longstanding Full Faith and Credit doctrine. Such a radical departure should come, if at all, from this Court, although Mr. Blackwell urges this Court, instead, to exercise its supervisory authority to clarify the effect of a pardon on Second Amendment civil rights given the new split of authority in the intermediate appellate courts.

3. A Remand is Unnecessary, Prejudicial, and Contrary to Law

The intermediate appellate court's remand of this case—for a second time—is unnecessary, prejudicial, and contrary to law, and would thus would be a waste of judicial economy. After oral argument, new legislation, Act of May 14, 2013, Pub. Ch. 384, effective July 1, 2013, amended Tennessee's expungement statute, Tenn. Code Ann. § 40-32-101, to permit certain pardoned Tennessee felons to have their convictions expunged and, as a consequence, receive an accompanying restoration of firearm rights. The intermediate appellate court concluded that this amendment expresses a new public policy to afford firearm rights to pardoned felons who are deemed to be within the ambit of the statute, most notably by a finding that their offense was "non-violent." Accordingly, the intermediate appellate court remanded for the trial court to determine

whether Mr. Blackwell's offense was "non-violent," in which case his pardon could be afforded full faith and credit. (Slip Op. 20, Appendix Page 20).

Mr. Blackwell anticipates that the State may oppose this Court's review because Mr. Blackwell was the one who raised the new amendment in the lower court, and the underlying decision affords him an opportunity to potentially regain his firearm rights based on that amendment. This Court should reject such arguments for several reasons. First, although Mr. Blackwell did present the new amendment to the lower court, he expressly did so as an additional, alternative position to those already raised and contended that the intermediate appellate court should not actually reach the question since it was unnecessary to do so.[5] Mr. Blackwell in no way conceded that reliance entirely on the newly-amended expungement statute was a legally appropriate basis for relief or would offer satisfactory vindication of Mr. Blackwell's constitutional rights.

Second, a determination of "non-violence" in Mr. Blackwell's favor is entirely speculative at this point as a matter of fact and law. While the trial court declared that Mr. Blackwell actually prevailed in enforcing his right to possess a firearm in Tennessee, the intermediate appellate court reversed and held that Mr. Blackwell does not currently have this right (although the trial court *may* later find he has such right upon remand). It is true that Mr. Blackwell's convictions are only for the sale of cocaine, but there are no facts surrounding the offense in the record so another victory in the trial court is not guaranteed. From a legal standpoint, it is unclear exactly how the trial court would or should construe "violence" for purposes of the statute because the amendment has only

[5] In hindsight, the intermediate appellate court's opinion certainly justified that decision.

recently taken effect. *Cf. Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (noting the massive confusion over federal courts' application of the "violent felony" provision of the Armed Career Criminal Act, which, unlike our expungement statute, includes a definition). Any dispute over the trial court's application of the standard could result in a *third* appeal of this action (and potentially as many remands). Should Mr. Blackwell be unsuccessful in such an appeal, he would no longer have an opportunity to ask this Court to review the other legal issues discussed in this Petition under the law-of-the-case doctrine.

Third, should the intermediate appellate court's decision remain intact, Mr. Blackwell's firearm rights would be only as good as determined by the next legislative session. Suffice it to say that the right of felons to bear arms in Tennessee, and the restoration thereof, has been in flux over the last several years, and it is certainly possible that the legislature may determine that the new expungement law should not apply to drug felons (rather than merely violent felons) or even that out-of-state pardoned felons should be barred from possessing firearms in Tennessee under any circumstances. Such legal limbo may be unavoidable when the relief in question is, in fact, statutory, but it is simply unacceptable when the proper relief is *constitutionally* based and immune from the whims of the legislature. Moreover, should the expungement law be changed to Mr. Blackwell's detriment, the Court of Appeals's decision would preclude him from re-raising these constitutional arguments in another suit due to *res judicata*, if not simply the decision's precedential effect.

Finally, as discussed above, there is simply no valid basis for a Tennessee court to scrutinize Mr. Blackwell's *conviction* in order to determine the effect of his *pardon*. In short, the Full Faith and Credit inquiry in this case does not require an "apples to apples" assessment of the facts but rather a legal determination as to whether a Georgia peach and a Tennessee blackberry are both fruits. If, *arguendo*, this Court agrees that the expungement statute is the only basis for Mr. Blackwell to obtain relief, it should at least clearly establish the correct legal standard that the dispositive question is one of law, not one of fact in need of a trial court determination upon remand.

There are thus a number of important questions of law involving the public interest because Tennessee law is in serious disarray as to the effect of a Tennessee pardon on one's Second Amendment rights, an expungement notwithstanding. These questions affect (1) persons who, like Mr. Blackwell, are in Tennessee with a foreign pardon, (2) persons who hold a Tennessee pardon and seek firearm rights here, and (3) persons who hold a Tennessee pardon and seek firearm rights in other states via Full Faith and Credit. In light of the current split of authority among Tennessee courts, most notably between the Court of Appeals in this case and the Court of Criminal Appeals in *Blanchard*, a remand without this Court's involvement would do nothing to clarify the law and to resolve these important questions. Thus, this case is appropriately postured for review.

B. United States Constitutional Right

The intermediate appellate court purported not to reach the remaining issues raised by Mr. Blackwell, including his claim that the Second Amendment guarantees pardoned

felons the right to bear arms. (Slip Op. 24, Appendix Page 24). However, in holding that Mr. Blackwell is not attempting to vindicate any civil rights and cannot obtain attorney fees, the intermediate appellate court unequivocally reached and decided the Second Amendment claim:

> Under the laws of either Georgia or Tennessee, Mr. Blackwell forfeited his constitutional right to bear arms when he committed the drug felonies for which he was convicted. Any law that allows him to regain those rights after conviction — in either Georgia or Tennessee — springs from legislative grace, not from the constitutional right of a convicted felon to bear arms. Therefore, we reject Mr. Blackwell's argument that the relief granted to him by the trial court below constituted the enforcement of his constitutional right to bear arms, or that the relief granted was "related to" his supposed right to bear arms so as to entitle him to attorney fees under Section 1988.

(Slip Op. 28, Appendix Page 28). Thus, the intermediate appellate court found, without any citation or explanation, not merely that pardoned felons lack a Second Amendment *right* to possess firearms, but that pardoned felons do not even have a Second Amendment *interest* in possessing a firearm.

The intermediate appellate court's summary approach conflicts with the analysis applied in numerous other decisions, including the lone post-*Heller* Tennessee Second Amendment case, *Embody v. Cooper*, M2012-01830-COA-R3CV, 2013 WL 2295671 (Tenn. Ct. App. May 22, 2013). In *Embody*, a challenge to the constitutionality of Tennessee's handgun carrying restriction, the Court of Appeals decided it must: "look to 1) the scope of the Second Amendment right as historically understood, and, if necessary, 2) choose and apply a level of scrutiny as required if the historical evidence is inconclusive." *Id.* at *8. Finding that "the historical evidence . . . is not *conclusive*" as to

the question of whether handgun possession "implicate[]s core Second Amendment rights," the court applied intermediate scrutiny to the restriction. *Id.*

By contrast, the Court of Appeals in this case failed to give any consideration into the wholly novel question of whether the keeping of any firearm by *pardoned* felons is a core Second Amendment right. The answer to this question can hardly be conclusive when even the right of *non-pardoned* felons to keep arms is debatable. *Compare Heller*, 554 U.S. at 626 (noting the "longstanding prohibitions on the possession of firearms by felons") *with id.* at 644 (Stevens, J., dissenting) (arguing that the Second Amendment, like the First and Fourth, should apply to felons), *id.* at 721 (Breyer, J., dissenting) (observing the lack of evidence that felons could not possess firearms in the late 18th century), *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010) ("[T]he historical data is not conclusive on the question of whether the founding era understanding was that the Second Amendment did not apply to felons."), *and* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 696, 699 (2009) (observing that "a lifetime ban on any felon possessing any firearm is not 'longstanding' in America").

This Court should grant review in this case because the scope of the Second Amendment in Tennessee following *Heller* and *McDonald* is an important question of law and public interest, and because there is a need to secure uniformity in the review of a post-*Heller* case given the conflict between the Court of Appeals's decision below and its decision in *Embody*.

C. Tennessee Constitutional Right

Along with his rights under the Second Amendment, Mr. Blackwell has sought to enforce his right to possess a firearm under the corresponding section of the Tennessee Constitution, art. I, § 26, which provides:

> That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

Again, the intermediate appellate court purported not to reach this issue, (Slip Op. 24, Appendix Page 24), but its broad holding certainly addressed it and—apparently inadvertently—created new law which may bind future courts. In Footnote 19 on Page 23, the intermediate appellate court observed that the second half of art. I, § 26 confers "*explicit* authority upon the Tennessee Legislature to regulate firearm rights." Thus, the intermediate appellate court held, "we should look to Tennessee statutes regulating firearms, rather than to executive power to remove firearm disabilities."

This conclusion assumes, without any analysis or discussion, that the authority of the legislature "to regulate the wearing of arms" is *necessarily superior* to the authority of the executive department "to grant reprieves and pardons." Tenn. Const. art. III, § 6. While this may be a debatable reconciliation of the two provisions if the intermediate appellate court was writing on a clean slate, this Court has long held that a "full and absolute pardon releases the offender from entire punishment prescribed for his offense, and from all the disabilities consequent upon his conviction." *Fite v. State ex rel. Snider*, 88 S.W. 941, 943 (Tenn. 1905). Thus, unless this Court overrules *Fite* and similar cases, the only permissible reconciliation is the conclusion that the legislature may create

statutes concerning the loss and restoration of firearm rights for non-pardoned felons, but not for felons who have received an executive pardon which restores their firearm rights. In short, the fact that the legislature has the right to enact laws regulating the wearing of arms does not confer exclusive authority over the subject, especially when the specifically enumerated power of another branch of government is implicated. Given that the effect of a pardon is of constitutional magnitude this Court should unequivocally find that a governor's pardon restores the civil right to possess a firearm, notwithstanding a contrary enactment by the legislature.

This Court should grant review in this case to secure uniformity of decision and settlement of important questions of law involving the scope of a citizen's rights under art. I, § 26, as well as the separation—and, indeed, the balance—of power between the legislature and the executive branches to regulate and restore firearm rights. Mr. Blackwell suggests that this Court squarely hold that the legislature does not have the authority to trump the effect of the governor's pardon power with respect to Second Amendment civil rights. By extension, a comparable pardon from a sister jurisdiction should be accorded equal dignity.

D. Equal Protection

Neither the trial court nor the intermediate appellate court reached Mr. Blackwell's claim that his right as a pardoned felon is governed by Equal Protection. In order to enable this Court the opportunity to consider this important issue of law, Mr. Blackwell has preserved that claim since the inception of this litigation.

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 113 (1966). "[I]f a classification adopted by a legislature . . . impinges upon the exercise of a 'fundamental right,' the legislative classification is subject to strict scrutiny by the courts." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). The Supreme Court held that the right to keep and bear arms is a "fundamental right," *McDonald*, 130 S. Ct. at 3042, so strict scrutiny must apply, which requires the State to demonstrate "that its classification has been precisely tailored to serve a compelling governmental interest." *Doe*, 751 S.W.2d at 841.

Mr. Blackwell agrees that the State has a compelling interest in protecting the public from violent offenders, but the State has not shown that classifying Mr. Blackwell with *non*-pardoned felons and preventing him from possessing a firearm is "precisely tailored" to this interest in light of his pardon and its individualized determination that he is "a law-abiding citizen and is fully rehabilitated."

E. Privileges and Immunities Clauses

Although this claim was also not reached by either court below, Mr. Blackwell asserts that the firearm restrictions imposed by Tennessee law—notwithstanding a valid pardon in another state for a conviction in that state—violates the Privileges and Immunities Clauses of the United States Constitution which guarantee the freedom of movement. *See Saenz v. Roe*, 526 U.S. 489 (1999). The right to travel is a fundamental right protected by the Constitution. *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969).

It is derived from the Privileges and Immunities Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 631.[6]

Unquestionably, Mr. Blackwell could have a firearm in Georgia and, since he meets federal firearm law requirements,[7] he could also have a firearm in Washington D.C. or any exclusively federal enclave. At the time Mr. Blackwell left Georgia and moved to Tennessee, he did so in full possession of all civil rights like any other citizen. *Cf. Schlenther v. Dep't. of State, Div. of Licensing*, 743 So.2d 536 (Fla. Dist. Ct. App. 1998) ("Once another state restores the civil rights of one of its citizens whose rights had been lost because of a conviction in that state, they are restored and [another state] has no authority to suspend or restore them at that point."). The State of Tennessee's attempt to unilaterally impose a disability on Mr. Blackwell's fundamental civil rights upon his presence here is an unconstitutional abridgement of his right to travel.

II. Since Mr. Blackwell Enforced His Second Amendment Civil Rights He Is The "Prevailing Party" and Entitled to Attorney Fees

Since Mr. Blackwell is the "prevailing party" in a declaratory judgment action where the relief sought was to vindicate a federal constitutional civil right under 42 U.S.C. § 1983, the trial court correctly held that Mr. Blackwell is entitled to attorney fees

[6] Mr. Blackwell also notes that one member of the United States Supreme Court concluded that the right to keep and bear arms is protected by the Privileges or Immunities Clause. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3083 (2010) (Thomas, J., concurring).

[7] 18 U.S.C. § 921(a)(20) provides in part: "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of [federal criminal prosecution], unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

under 42 U.S.C. § 1988. The intermediate appellate court, in holding that Mr. Blackwell would not be a "prevailing party" *even if* he can enforce his right to possess a firearm on remand, misapplied this Court's clear standards for determining prevailing party status. Review of this case is necessary to secure uniformity, secure the settlement of important questions of law affecting public interest, and to exercise this Court's supervisory authority over how lower courts conduct the "prevailing party" analysis.

42 U.S.C. § 1983 "provides a remedy for the deprivations of rights secured by the Constitution and laws of the United States." *Rowe v. Bd. of Educ. of City of Chattanooga*, 938 S.W.2d 351, 354 (Tenn. 1996). Section 1983 has been invoked "in virtually every conceivable setting to enforce every conceivable right in the Constitution." *King v. Betts*, 354 S.W.3d 691, 702 (Tenn. 2011) (citation omitted). Claims arising under 42 U.S.C. § 1983 may be tried in Tennessee state courts. *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986). If a party prevails in an action alleging a federal constitutional deprivation, then § 1988 provides that the party may recover an award of attorney fees in State court. *Bloomingdale's by Mail v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992).

This Court, like the United States Supreme Court, has recognized that § 1988(b) is a significant matter of public interest. Because civil rights cases often lack monetary relief, the award of attorney fees for the vindication of those rights ensures "effective access to the judicial process." *Daron v. Dep't of Corr.*, 44 S.W.3d 478, 481 (Tenn. 2001) (quoting H.R. Rep. No. 94–1558, 94th Cong., 2d Sess. 1 (1976)). Construing § 1988(b) too narrowly "would not only discourage litigants from pursuing their legitimate

claims but would also make attorneys reluctant to represent them." *Id.*; *see also City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (stating that attorney fees in civil rights cases are necessary because: "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.").

There are two arguments to establish Mr. Blackwell's entitlement to attorney fees here. First, the federal Full Faith and Credit clause is a source of personal rights such that successful enforcement of this constitutional provision confers prevailing party status and thus an entitlement to attorney fees under 42 U.S.C. § 1988. This is a question of first impression in Tennessee, and one on which other jurisdictions are divided. The intermediate appellate court held that Full Faith and Credit "is not a source of a federal right" by looking to only one case on one side of the debate, *Adar v. Smith*, 639 F.3d 146, 151-57 (5th Cir. 2011) (en banc). (Slip Op. 26, Appendix Page 26). In doing so, the intermediate appellate court overlooked other authorities submitted by Mr. Blackwell, including a United States Supreme Court case.[8] Given the importance of this issue, this Court should resolve the question following a full analysis of the competing authorities.

Second, even if Full Faith and Credit does not confer personal rights, Mr. Blackwell is nonetheless a "prevailing party" because he has successfully enforced his

[8] *Pac. Employers Ins. Co. v. Indus. Accident Comm'n of State of Cal.*, 306 U.S. 493, 501 (1939) ("The purpose of [the Full Faith and Credit Clause] was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states."); *Finstuen v. Crutcher*, 496 F.3d 1139, 1155 (10th Cir. 2007) (holding that application of Full Faith and Credit is a "substantive constitutional right[]."); *see also* Michael H. Hoffheimer, *Mississippi Conflict of Laws*, 67 Miss. L.J. 175, 247 (1997) ("[F]oreign [probate] proceedings should also be binding under the Full Faith and Credit Clause to the extent they determined personal rights and liabilities of parties who were actually present in the proceedings.")

Second Amendment civil right to possess a firearm. A "prevailing party" is "one who has succeeded on any significant claim affording it some of the relief sought." *Daron*, 44 S.W.3d at 480 (quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791 (1989)).

The United States Supreme Court has consistently extended a "generous formulation" in which a petitioner need only "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted) (quoted by *Fannon v. City of LaFollette*, 329 S.W.3d 418, 431 (Tenn. 2010)). A civil rights plaintiff need not prevail on each and every constitutional issue. Rather, the "result is what matters" because a "civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011) (emphasis added).

The concept that the "result is what matters" was applied in the Supreme Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). In *Golden State*, the petitioner prevailed under application of the Supremacy Clause because a federal statute preempted the defendant's practices. *Id.* at 104. After concluding that the Supremacy Clause itself does not confer personal rights, the Court then looked to whether the federal statute at issue "create[d] a federal right for which § 1983 provides a remedy." *Id.* at 107-08. Ultimately, the Court found that the statute in question fell within "the broad remedial scope of § 1983," *id.* at 113, and upon remand attorney fees were awarded, 773 F. Supp. 204, 220 (C.D. Cal. 1991). If a petitioner can receive

attorney fees for enforcing a statutory right under the Supremacy Clause, surely Mr. Blackwell should receive attorney fees for enforcing a constitutional right under the Full Faith and Credit Clause.

The United States Supreme Court has also recognized that Congress considered situations in which, as here, a court applies the constitutional avoidance doctrine and rules in favor of a plaintiff only on a statutory basis pendent to the constitutional claim. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980). In such situations, Congress expressly intended that attorney fees be permitted under a "substantiality test" in which the claims arise out of a "common nucleus of operative fact." *Id.* (citation omitted). This principal has been consistently applied. *E.g.*, *Seaway Drive-In, Inc. v. Clay Twp.*, 791 F.2d 447, 451 (6th Cir. 1986) (holding that attorney fees are appropriate where plaintiff prevailed on state-law claims arising out of common nucleus from federal constitutional claims); *Seals v. Quarterly County Court of Madison County, Tenn.*, 562 F.2d 390, 393-94 (6th Cir. 1977) (same).

Similarly, this Court has followed federal law in recognizing that a plaintiff need not succeed upon—or even directly plead—a direct personal constitutional violation in order to be awarded attorney fees. Rather, plaintiffs need only show that the constitutional violation is "related to the plaintiffs' ultimate success." *Bloomingdale's*, 848 S.W.2d at 55 (quoting *Americans United*, 835 F.2d at 631).

Following this bountiful precedent, the trial court agreed with Mr. Blackwell and awarded attorney fees, recognizing that "the operative facts of the case concerned the enforcement of the Petitioner's Second Amendment rights," (Appendix Page 53), and

that the "judgment concern[ed] the Petitioner's Second Amendment, firearm rights." (Appendix Page 58). After all, the right to keep and bear arms is a "fundamental right." *McDonald*, 130 S. Ct. at 3042.

The intermediate appellate court overlooked these cases by actually reaching (and wrongly deciding) the separate issue of whether a pardoned felon has an independent right under the Second Amendment to possess a firearm. (Slip Op. 28, Appendix Page 28). Again, it is axiomatic that "the right of the people to keep and bear arms" is, even under the plain language of the Second Amendment, among the "rights . . . secured by the Constitution," 42 U.S.C. § 1983, and that the enforcement of such a right confers attorney fees, *id.* § 1988(b). This is particularly true following *Heller* and *McDonald* now that the Supreme Court has established the right to keep and bear arms is personal and fundamental. Even if Mr. Blackwell's ability to possess a firearm was limited upon conviction, no court has ever held that a person can be completely stripped of the cloak of protections afforded by the entirety of a constitutional right forever with no available executive or legislative remedy of any sort.

In this case, there can be no doubt that the trial court's reliance on the Full Faith and Credit Clause was "related to" and arose from a "common nucleus of operative fact" from a standalone Second Amendment claim because the trial court said so. (Appendix Page 53). "The result is what matters," *Hensley*, 461 U.S. at 435, and here the result is that Mr. Blackwell has successfully enforced his right to acquire and possess a firearm in Tennessee without fear of criminal prosecution, which is all the relief he sought.

This result does not change if Mr. Blackwell prevails "merely" because of the newly-amended expungement statute. According to the intermediate appellate court, Mr. Blackwell would succeed only from "legislative grace" rather than a "constitutional right." Stated in another fashion, the intermediate appellate court is treating the recent amendment to the expungement law as if our legislature had enacted a statute proclaiming that all those possessing pardons from other states may now have their firearms, such that Mr. Blackwell would achieve a statutory remedy from a statutory procedure (rather than a constitutional right from a constitutional mechanism).

The intermediate appellate court's holding fails to appreciate that the new Tennessee expungement law does not confer any direct remedy for Mr. Blackwell because it does not apply to Georgia convictions or pardons. Rather, the expungement law is merely descriptive of one facet of Tennessee public policy. Mr. Blackwell received an *executive* pardon which he seeks to enforce based on the federal constitution. Although this enforcement may be determined *by reference to* a Tennessee statute for purposes of evaluating the "public policy exception," nothing about Mr. Blackwell's asserted right to possess a firearm in this state stems from the "legislative grace" of either state.

This issue cannot be resolved in a later appeal following remand since, without this Court's review now, the intermediate appellate court's holding on this issue will become the law of the case, forever precluding attorney fees even if the Chancellor later resolves the matter in Mr. Blackwell's favor regarding the "non-violent" nature of his prior drug convictions. *Memphis Pub. Co. v. Tennessee Petroleum Underground Storage*

Tank Bd., 975 S.W.2d 303, 306 (Tenn. 1998). Since this litigation is now firmly postured for a resolution of the issue, this Court should grant review to create uniformity of decision over this important question of law and public interest. If allowed to stand, the lower court's holding would cast a significant chill on attorneys' willingness to pursue complex civil rights cases for fear that, after more than three years of litigation, a court will decide that even successful enforcement of the most fundamental of civil rights will no longer confer attorney fees.

CONCLUSION

Ours is the land of the second chance. Mr. Blackwell is not the only citizen of our state who has been pardoned by the executive authority of another state and desires to enjoy his or her Second Amendment rights. This Court should grant review to address and resolve the novel questions in this case decided by the intermediate appellate court in the first instance in Tennessee, such as the scope of the Second Amendment rights for pardoned felons, the separation of power between the executive branch's authority to pardon and the legislature's ability to regulate firearms, and whether the Full Faith and Credit clause confers a personal right for "prevailing party" purposes or whether enforcement of the Second Amendment is sufficient to achieve the same end given that the "result is what matters."

This Court should also grant review to secure uniformity of decision because the intermediate appellate court's opinion conflicts with earlier Tennessee cases on such issues as the effect of a Tennessee pardon, the proper means of analysis for a post-*Heller* Second Amendment claim, the proper means of analysis for the "public policy exception"

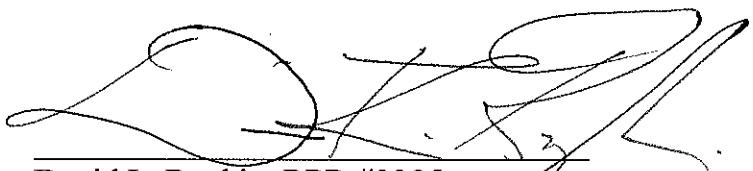
in a Full Faith and Credit case, and whether enforcement of a fundamental constitutional right entitles the prevailing party to attorney fees.

Finally, this Court should grant review in order to prevent a remand for a determination of "non-violence" which would be unnecessary, prejudicial, and contrary to law.

Should review be granted, this Court will be asked to affirm the Chancellor's decision (1) granting Mr. Blackwell declaratory relief that he may possess and purchase a firearm, (2) awarding him attorney fees, and (3) that this matter be remanded for the sole purpose of an assessment of attorney's fees incurred on appeal in enforcing Mr. Blackwell's Second Amendment rights. See *Fayne v. Vincent*, 301 S.W.3d 162, 179 (Tenn. 2009).

Respectfully submitted,

HOLLINS, RAYBIN & WEISSMAN, P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to Michael Meyer, Assistant State Attorney General, Office of the Attorney General, P. O. Box 20207, Nashville, TN 37202-0207 on this the 19th day of July, 2013.

David L. Raybin

APPENDIX

Index to Appendix[1]

[1] Petitioner has electronically added "Petitioner's Appendix Page" numbers to the below documents, which are referred to in this index.

[2] This record citation refers to the technical record of the previous appeal in this case. This Court "may take judicial notice of the court records in an earlier proceeding of the same case and the actions of the courts thereon." *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987).

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 26, 2013 Session[1]

DAVID SCOTT BLACKWELL
v.
BILL HASLAM, GOVERNOR OF THE STATE OF TENNESSEE, IN HIS OFFICIAL CAPACITY ONLY; ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL; VICTOR S. (TORRY) JOHNSON, III, DISTRICT ATTORNEY GENERAL FOR THE 20TH JUDICIAL DISTRICT, IN HIS OFFICIAL CAPACITY ONLY; KIM HELPER, DISTRICT ATTORNEY GENERAL FOR THE 21ST JUDICIAL DISTRICT, IN HER OFFICIAL CAPACITY ONLY; AND THE STATE OF TENNESSEE

An Appeal from the Chancery Court for Davidson County
No. 10-0739-III Ellen Hobbs Lyle, Chancellor

No. M2012-01991-COA-R3-CV - Filed June 28, 2013

This appeal involves the Full Faith and Credit Clause and firearm rights. The petitioner was convicted of felony drug offenses in Georgia. The State of Georgia granted the petitioner a full pardon for his crimes; his Georgia pardon expressly restored his right to possess a firearm. The petitioner now resides in Tennessee. A Tennessee statute provides that it is a felony for a person who has been convicted of a felony drug offense to possess a firearm, and it does not make an exception for persons who have been pardoned for their crime. The petitioner filed this declaratory judgment action against the State of Tennessee, seeking a declaration that, because he received a pardon for his drug offenses in Georgia, he can purchase or possess a firearm in Tennessee without violating the Tennessee statute. The trial court held in favor of the petitioner, concluding that the Full Faith and Credit Clause of the United States Constitution requires Tennessee to recognize Georgia's pardon in full and to permit the petitioner to carry a firearm in Tennessee. The State of Tennessee now appeals. On appeal, we consider the public-policy exception to the Full Faith and Credit Clause. We hold that Tennessee's public policy on the restoration of firearm rights for a convicted *violent* drug felon is not entirely inconsistent with Georgia's public policy, so the public-policy

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[1]As discussed below, after oral argument in this cause, the parties were asked to submit supplemental briefs on the effect of an amendment to a pertinent Tennessee statute that was enacted after oral argument. The Court considered the appeal after the supplemental briefing was completed on June 18, 2013.

exception to full faith and credit is not applicable in that situation. However, Tennessee public policy proscribes the restoration of firearm rights for a convicted *violent* drug felon, contrary to Georgia's public policy allowing the restoration of firearm rights for all felons, violent or not. This Tennessee policy implicates public safety so as to warrant application of the public-policy exception to the Full Faith and Credit Clause under the appropriate circumstances. Therefore, we vacate the trial court's grant of judgment on the pleadings and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Vacated in Part, Reversed in Part, and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; William E. Young, Solicitor General; and Frank Borger-Gilligan, Assistant Attorney General, for the Respondents/Appellees, Bill Haslam, Governor of the State of Tennessee; Robert E. Cooper, Jr., Tennessee Attorney General; Victor S. (Torry) Johnson, III, District Attorney for the 20th Judicial District; Kim R. Helper, District Attorney for the 21st Judicial District; and the State of Tennessee

David L. Raybin and Benjamin K. Raybin, Nashville, Tennessee, for the Petitioner/Appellee, David Scott Blackwell

OPINION

This is the second appeal in this case. ***See Blackwell v. Haslam***, No. M2011-00588-COA-R3-CV, 2012 WL 113655 (Tenn. Ct. App. Jan. 11, 2012). In 1989, Petitioner/Appellee David Scott Blackwell was convicted of three felony drug offenses in the State of Georgia. The record does not reveal any details about the nature or circumstances of Mr. Blackwell's drug offenses. Mr. Blackwell was sentenced to nine years of incarceration; he served five years in prison and four years on probation.

In 2003, Mr. Blackwell received a full pardon for his crimes from the Georgia Board of Pardons and Paroles, which is authorized under the Georgia Constitution to grant pardons. Mr. Blackwell's pardon document, entitled "Pardon Including Restoration of the Right to Bear Arms," expressly restored Mr. Blackwell's firearm rights:

> ORDERED that all disabilities under Georgia law resulting from the above stated conviction(s) and sentence(s) . . . are hereby removed; and

> ORDERED further that all civil and political rights, including the right to receive, possess, or transport in commerce a firearm, lost under Georgia law as a result of the above stated convictions, . . . are hereby restored.

In 2007, Mr. Blackwell moved to Tennessee. After doing so, he learned that Tennessee Code Annotated § 39-17-1307(b)(1)(B) makes it a felony for a person who has been "convicted of a felony involving the use or attempted use of force, violence or a deadly weapon" or who has been "convicted of a felony drug offense" to possess a firearm,[2] as that term is defined in Tennessee Code Annotated § 39-11-106.[3]

Mr. Blackwell wanted to own and possess a firearm and engage in lawful hunting activities in Tennessee, but he did not want to risk being charged with a felony under Tennessee Code Annotated § 39-17-1307(b)(1)(B). To ascertain whether his Georgia pardon and Georgia's restoration of his firearm rights exempted him from the application of Section 39-17-1307(b)(1)(B), Mr. Blackwell asked his Tennessee State Representative, Representative Glen Casada, to request a written opinion of the Attorney General of Tennessee. Representative Casada did so, and on October 29, 2009, the Attorney General issued an opinion that Tennessee Code Annotated § 39-17-1307(b)(1)(B) prohibits any person convicted of a felony drug offense from possessing a handgun, including a person who has received an out-of-state pardon.[4]

On April 29, 2010, Mr. Blackwell filed this declaratory judgment action in the Chancery Court for Davidson County, Tennessee, pursuant to Tennessee Code Annotated § 29-14-102 and 42 U.S.C. § 1983. In his complaint, Mr. Blackwell sought a declaration that the State's enforcement of the Tennessee statute prohibiting him from possessing a firearm in Tennessee would violate his rights under several provisions of the United States and Tennessee

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[2]This statute has been revised over the years, but the revisions do not affect the analysis in this appeal unless noted herein.

[3]Tennessee Code Annotated § 39-11-106(11) defines a firearm as "any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use." Tenn. Code Ann. § 39-11-106(11) (Supp. 2012).

[4]The Attorney General opinion requested by Mr. Blackwell's state representative, dated October 20, 2009, apparently inadvertently analyzed the issue under Tennessee Code Annotated § 39-17-1307(b)(1) as it read prior to a 2008 amendment. ***See*** Tenn. Op. Atty. Gen. No. 09-168, 2009 WL 3479586 (Oct. 20, 2009). The previous version of the statute prohibited only the possession of "handguns." As such, the Attorney General's Opinion stated that a person convicted of a drug felony who has received an out-of-state pardon may possess a "long gun" but not a handgun. Effective July 1, 2008, Tennessee Code Annotated § 39-17-1307(b)(1) was amended to replace the term "handgun" with "firearm." ***See*** 2008 Tenn. Pub. Acts 1044-45. Our analysis in this appeal is with respect to all firearms, not just handguns.

constitutions, and that he may lawfully purchase and possess a firearm or handgun in the State of Tennessee. As defendants in the action, Mr. Blackwell named the State of Tennessee, the Governor of Tennessee, and the Tennessee Attorney General. He included in his complaint a request for an award of attorney fees for the violation of his constitutional rights pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

In July 2010, the defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Rules 12.02(1) and (6) of the Tennessee Rules of Civil Procedure. They later filed an amended motion to dismiss. After that, Mr. Blackwell amended his complaint to add two additional defendants, the District Attorneys General for Davidson County, Tennessee, and Williamson County, Tennessee (hereinafter, we refer to the defendants collectively as "the State").[5]

In ruling on the State's motion, the trial court rejected the State's claim that the court lacked subject matter jurisdiction over the case, but it granted the State's motion to dismiss for failure to state a claim as to all defendants. Both Mr. Blackwell and the State appealed. On appeal, this Court affirmed the trial court's holding that it had subject matter jurisdiction, but it reversed the dismissal for failure to state a claim. The case was remanded for the State to file an answer and for consideration of the petition on the merits. ***Id.*** at *10.

On remand, the State filed an answer to Mr. Blackwell's complaint. It admitted all of the facts alleged in the complaint, and it specifically admitted that Mr. Blackwell was granted a pardon by the Georgia Board of Pardons and Paroles that included the restoration of his right to lawfully own and possess a firearm in Georgia. The State denied, however, that Mr. Blackwell was entitled to a declaration that Tennessee is required to recognize the Georgia restoration of Mr. Blackwell's firearm rights.

A few days later, Mr. Blackwell filed a motion for judgment on the pleadings pursuant to Rule 12.03 of the Tennessee Rules of Civil Procedure. He asserted that the parties' pleadings contain all of the necessary facts, that the pertinent facts are undisputed, and that he is entitled to a judgment as a matter of law on the undisputed facts. Mr. Blackwell claimed that Tennessee must recognize both his Georgia pardon and Georgia's restoration of his firearm rights; he relied on a number of provisions in the state and federal constitutions, namely, the Full Faith and Credit Clause of the United States Constitution, the right to bear arms in the Tennessee Constitution and the United States Constitution, and the Due Process Clause,

[5]The amended complaint named Phil Bredesen, the former Governor of Tennessee, as a defendant in his official capacity. Subsequently, Governor Bill Haslam was elected and has been appropriately substituted as the named defendant in this matter.

Equal Protection Clause, and Privileges and Immunities Clause of the United States Constitution.

The State filed its response to Mr. Blackwell's motion for judgment on the pleadings, and also filed its own motion for judgment on the pleadings. The State and Mr. Blackwell agreed that the pertinent facts are undisputed; each sought a judgment as a matter of law based on those undisputed facts. In short order, the trial court conducted a hearing in which both sides argued their respective motions for judgment on the pleadings.

On July 2, 2012, the trial court entered a memorandum and order, granting Mr. Blackwell the declaratory relief he sought. At the outset, the trial court noted that the facts as alleged by Mr. Blackwell were admitted as true by the State, and that the only issues presented were questions of law. It then observed that Tennessee is required under the Full Faith and Credit Clause of the United States Constitution to recognize the pardon Mr. Blackwell received from the State of Georgia, because it "explicitly restores his firearm rights." The trial court acknowledged that there is a "public policy" exception to the full-faith-and-credit requirement, that a forum state is not required to give full faith and credit to a foreign judgment if doing so would violate the forum state's strong public policy. The trial court rejected the State's argument that the public-policy exception to the Full Faith and Credit Clause applied in this case, because "there is no inconsistency between Tennessee and Georgia's public policies regarding pardons."

The trial court further held, however, that, "even if this Court is wrong on its foregoing analysis of the similarity of the policy informing pardons," the public-policy exception does not necessarily apply just because the forum state's law is different. The trial court cited as an example a case in which Tennessee enforced a foreign judgment for a gambling debt, even though gambling debts are unenforceable in Tennessee; it also cited a case in which a Tennessee court recognized a foreign court's approval of marriage by estoppel, even though Tennessee public policy prohibits application of the marriage by estoppel doctrine.[6] Ultimately, the trial court held that the public-policy exception to the Full Faith and Credit Clause does not apply in the instant case. The trial court summarized its reasoning as follows:

> [T]he Court has concluded as a matter of law that the Georgia pardon [Mr. Blackwell] received in this case — explicitly restoring his firearm rights — is not inconsistent with nor violative of Tennessee's public policy. . . . Tennessee has a statutory policy to restore civil disabilities upon receipt of a

[6]The cases that were cited by the trial court are ***Boardwalk Regency Corp. v. Patterson***, No. M1999-02805-COA-R3-CV, 2001 WL 1613892, at *3 (Tenn. Ct. App. Dec. 18, 2001), and ***Farnham v. Farnham***, 323 S.W.3d 129, 140 (Tenn. Ct. App. 2009).

> pardon just as the Georgia pardon restores civil disabilities. . . . The Court's alternative conclusion is that, like with gambling debts or bigamous marriages, Tennessee shall extend full faith and credit in this case even if its laws and procedures are different. Accordingly, under either alternative the U.S. Constitution requires this Court to give full faith and credit to the Georgia pardon. When that is done, Tennessee Code Annotated section 39-17-1307(b)(1)(B) does not apply to disqualify [Mr. Blackwell] from possessing a firearm or purchasing one under section 39-17-1316(r)(1).

Therefore, the trial court held, "Tennessee must give full faith and credit to [Mr. Blackwell's] Georgia pardon, including restoration of rights of firearms possession." The trial court found that its decision "renders it unnecessary . . . to decide [Mr. Blackwell's] other theories regarding the inapplicability of sections 39-17-1307(b)(1)(B) and 39-17-1316(r)(1), and/or that they are unconstitutional." Accordingly, the trial court granted Mr. Blackwell's motion for judgment on the pleadings and denied the State's motion for judgment on the pleadings. It ordered the parties to brief the issue of whether Mr. Blackwell is entitled to attorney fees under 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

After briefing on the issue of attorney fees, on August 17, 2012, the trial court entered an order awarding Mr. Blackwell $26,817.75 in attorney fees and $902.80 in expenses. The trial court cited 42 U.S.C. § 1988(b) as the basis for the attorney fee award:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections . . . 1983, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 1988(b). The trial court held that a prevailing party in a declaratory judgment action may qualify for "prevailing party" status. It further held that, even though it resolved the case without reaching Mr. Blackwell's constitutional claims, Mr. Blackwell was not precluded from the recovery of attorney fees "as the operative facts of the case concerned enforcement of [his] Second Amendment rights [to bear arms]." Therefore, because the fees requested were reasonable, the trial court held that Mr. Blackwell was entitled to an award of attorney fees and expenses.

The State now appeals the trial court's July 2, 2012 order granting Mr. Blackwell declaratory relief, and also the August 17, 2012 order granting Mr. Blackwell attorney fees and costs.[7]

STANDARD OF REVIEW

The trial court granted Mr. Blackwell's motion for judgment on the pleadings pursuant to Rule 12.03 of the Tennessee Rules of Civil Procedure. Our standard of review for a trial court's grant of a Rule 12.03 motion for judgment on the pleadings is as follows:

> In reviewing a trial court's grant of judgment on the pleadings under Rule 12.03 of the Tennessee Rules of Civil Procedure, we construe the complaint in favor of the plaintiff "by taking all factual allegations in the complaint as true and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts." ***Satterfield v. Breeding Insulation Co.***, 266 S.W.3d 347, 352 n.1 (Tenn. 2008) (citing ***Lanier v. Rains***, 229 S.W.3d 656, 660 (Tenn. 2007); ***Cherokee Country Club, Inc. v. City of Knoxville***, 152 S.W.3d 466, 470 (Tenn. 2004)). Conclusions of law are not admitted and judgment on the pleadings should not be granted "unless the moving party is clearly entitled to judgment." ***Cherokee Country Club, Inc.***, 152 S.W.3d at 470 (Tenn. 2004) (quoting ***McClenahan v. Cooley***, 806 S.W.2d 767, 769 (Tenn. 1991)). This determination is a question of law, and we review the trial court's conclusions of law *de novo* with no presumption of correctness. ***Frye v. Blue Ridge Neuroscience Ctr., P.C.***, 70 S.W.3d 710, 713 (Tenn. 2002) (citing ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993)); ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000) (citing ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 924 (Tenn. 1998)).

Duffer v. Lawson, No. M2009-01057-COA-R3-CV, 2010 WL 3488620, at *4 (Tenn. Ct. App. Sept. 3, 2010) (quoting ***Harman v. Univ. of Tenn.***, No. E2009-02139-COA-R3-CV, 2010 WL 2432049, at *2 (Tenn. Ct. App. June 16, 2010)). Thus, under this standard, the relevant facts set forth in the pleadings are taken as true, and the issues presented are questions of law, which we review *de novo*.

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[7]On October 15, 2012, the trial court entered an order denying the State's motion for a stay of the July 2, 2012 order granting Mr. Blackwell declaratory relief. However, it granted a stay as to the August 17, 2012 order awarding Mr. Blackwell attorney fees; Mr. Blackwell did not oppose a stay as to that order pending appeal.

ANALYSIS

Full Faith and Credit Clause

The Full Faith and Credit Clause of the United States Constitution states: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, § 1. Expounding on the Full Faith and Credit Clause, Chief Justice John Marshall stated:

> [T]he judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.

Hampton v. M'Connel, 3 Wheat. 234, 16 U.S. 234, 4 L. Ed. 378 (1818). In the wake of ***Hampton*** and its progeny, "it is now well established that the full faith and credit clause of the federal constitution requires that the judgment of a state court, which had jurisdiction of the parties and the subject matter in suit, be given the same credit, validity and effect in the courts of every other state and that such judgment be equally conclusive upon the merits in the courts of the enforcing states." ***Mirage Casino Hotel v. J. Roger Pearsall***, No. 02A01-9608-CV-00198, 1997 WL 275589, at *3 (Tenn. Ct. App. May 27, 1997). The Full Faith and Credit Clause of the federal Constitution was a key component of the Founding Fathers' efforts to form a unified nation, rather than simply a confederation of independent sovereign states:

> Full faith and credit embodies an important federal policy. It is designed to give the United States certain of the benefits of a unified nation. As stated by Mr. Justice Stone in ***Milwaukee County v. M.E. White Co.***, 296 U.S. 268, 276-7 (1935):
>
> > "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

Restatement (Second) of Conflict of Laws § 103 cmt. b (2012).

Notwithstanding the importance of the principle behind the constitutional provision, "the United States Supreme Court has recognized at least three exceptions to the full faith and credit clause." ***Mirage Casino Hotel***, 1997 WL 275589, at *4. Specifically, a forum state may decline to accord full faith and credit to the judgment or public act of another state if it is (1) void due to a lack of personal or subject matter jurisdiction, (2) based upon fraud, or (3) "where enforcement of the judgment would violate the public policy of the forum state." ***Id.*** (citations omitted). Tennessee courts have recognized and adopted all three of these exceptions. ***See Four Seasons Gardening & Landscaping, Inc. v. Crouch***, 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984); ***In re Riggs***, 612 S.W.2d 461, 465 (Tenn. Ct. App. 1980).

In the case at bar, the focus is on exception number three, the so-called "public-policy exception" to the full faith and credit requirement. Under this exception, "Tennessee courts are not obligated to give full faith and credit to any judgment of a state which we hold to be violative of Tennessee's public policy or the Federal Constitution." ***Seiller & Handmaker, LLP v. Finnell***, 165 S.W.3d 273, 276-77 (Tenn. Ct. App. 2004) (quoting ***Aqua Sun Invs., Inc. v. Henson***, 1993 WL 382230, at *2 (Tenn. Ct. App. Sept. 30, 1993)). The Restatement of Conflict of Laws describes the public-policy exception to the Full Faith and Credit Clause in the following manner:

> A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.

Restatement (Second) of Conflict of Laws § 103 (2012). The public-policy exception recognizes: "Regard must be had in a federal nation for the needs of each individual State." ***Id.*** Therefore, although the principle of giving full faith and credit to the judgments of sister states will "almost invariably" outweigh the interest of an individual state, a forum state may decline to give full faith and credit to a sister state's judgment if doing so would be contrary to the forum state's fundamental interests:

> There will be extremely rare occasions . . . when recognition of a sister State judgment would require too large a sacrifice by a State of its interests in a matter with which it is primarily concerned. On these extremely rare occasions, the policy embodied in full faith and credit will give way before the national policy that requires protection of the dignity and of the fundamental interests of each individual State.

Id. § 103 cmt. b.

As observed by the trial court below, Tennessee courts have held that "a party who invokes the public policy exception must identify the public policy that is offended by the foreign judgment and has a 'stern and heavy' burden." ***Finnell***, 165 S.W.3d at 277 (internal quotation marks omitted) (quoting ***Aqua Sun Invs., Inc.***, 1993 WL 382230, at *2 (quoting ***Biogen Distrib., Inc. v. Tanner***, 842 S.W.2d 253, 256 (Tenn. Ct. App. 1992))). "[T]he judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law." ***Four Seasons Gardening & Landscaping***, 688 S.W.2d at 445.

Public policy in Tennessee is found in Tennessee's "constitution, statutes, judicial decisions, and common law." ***Finnell***, 165 S.W.3d at 277 (quoting ***Alcazar v. Hayes***, 982 S.W.2d 845, 851 (Tenn. 1998)). Indeed, we look at these potential sources in roughly that order; the task of divining the State's public policy falls to the judicial branch only in the absence of definitive indication from the other branches of government: "Although the determination of public policy is primarily a function of the legislature, the judiciary may determine public policy in the absence of any constitutional or statutory declaration." ***Id.*** (quoting ***Alcazar***, 982 S.W.2d at 851 (quoting ***Crawford v. Buckner***, 839 S.W.2d 754, 759 (Tenn. 1992))).

Arguments on Appeal

The State argues that the trial court erred in holding that "there is no inconsistency between Tennessee and Georgia's public policies regarding pardons," because the two states differ greatly in their policies toward the restoration of firearm rights to convicted felons and in their treatment of pardons. It asserts that, in Tennessee, a drug felon's firearm rights cannot be restored either by statute or by executive pardon, even if the pardon specifies that the felon's firearm rights are restored. Because the policies regarding the restoration of firearm rights differ so much, the State argues, Tennessee is not required to give effect to Georgia's restoration of Mr. Blackwell's firearm rights while he is in Tennessee.

On May 14, 2013, after oral argument in this appeal, the General Assembly enacted an amendment to Tennessee's expungement statute, Tennessee Code Annotated § 40-32-101. The amendment would permit "a person who was convicted of a non-violent crime" to have his record expunged and his firearm rights restored if he is pardoned for his non-violent crime. This amendment will be discussed in more detail below. The parties filed supplemental briefs on the impact of the 2013 amendment on the issues in this case. In its supplemental brief, the State conceded that, "when it becomes effective on July 1, 2013, [the expungement statute] will provide a means for some convicted felons to have their firearm rights restored." The State further stated, "With this change in public policy, Tennessee will be obligated, as of July 1, to honor Georgia's restoration of Petitioner's firearm rights under his Georgia pardon if Petitioner can establish that he would have been able to obtain

restoration of his firearm rights under" subsection (h) of the amended expungement statute. The State nevertheless maintains that, other than in this single instance, Tennessee public policy prohibits the restoration of a drug felon's firearm rights. The State therefore urges this Court to remand the case to the trial court so that Mr. Blackwell can show that the circumstances of his crime would be such that he would have likely been entitled to relief under the amended expungement statute.

For Mr. Blackwell's part, he continues to maintain that a Tennessee executive pardon that specifically restores a felon's firearm rights would have the effect of automatically restoring those rights, and that the trial court was correct in concluding that "Tennessee has a clear policy to restore civil disabilities upon receipt of a pardon," because "a full pardon restores one's civil rights." ***State v. Blanchard***, 100 S.W.3d 226, 231 (Tenn. Ct. Crim. App. 2002). He further argues that any Tennessee statute that would purport to limit the power of the Governor of Tennessee to restore firearm rights through a specific provision in a pardon would violate the separation of powers clause of the Tennessee Constitution.

Addressing the 2013 amendment to the expungement statute noted above, Mr. Blackwell claims that the amendment bolsters his argument that the policies of Tennessee and Georgia on the restoration of firearm rights are consistent. In the alternative, Mr. Blackwell argues that, even if this Court is inclined to hold that Tennessee statutes as they were prior to the amendment express a public policy that precludes the restoration of firearm rights by an executive pardon, and that the statutes that evince such a policy are not unconstitutional, the newly-amended expungement statute expresses a *new* public policy to now make pardoned, non-violent felons eligible for expungement and for restoration of their firearm rights. He argues, "Because the remedies available to non-violent pardoned felons in Georgia and Tennessee are now 'similar' — even if not wholly 'identical' — this Court should adhere to its decision in ***Four Seasons Gardening & Landscaping, Inc. v. Crouch***, [688 S.W.2d 439 (Tenn. Ct. App. 1984),] to apply Full Faith and Credit to Mr. Blackwell's pardon."

In determining whether the public-policy exception to full faith and credit applies in a given case, our first task is to identify the relevant public policies of Georgia and Tennessee. ***See Finnell***, 165 S.W.3d at 277 (quoting ***Aqua Sun Invs., Inc.***, 1993 WL 382230, at *2 (quoting ***Biogen Distrib., Inc. v Tanner***, 842 S.W.2d 253, 256 (Tenn. Ct. App. 1992))). We then determine whether and to what extent the two states' policies conflict. If Tennessee's public policies do not conflict with those of Georgia, we need go no further and Tennessee must give full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights.[8] If they do conflict, we must then go on to determine whether Tennessee's interest in enforcing its

[8]The State does not dispute that the Georgia pardon is an official act by the State of Georgia that is otherwise entitled to recognition under the Full Faith and Credit Clause.

own policies is so significant that it warrants Tennessee's refusal to extend full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights.

Public Policy

The trial court determined that "Tennessee has a clear policy to restore civil disabilities upon receipt of a pardon" and held there was "no inconsistency between Tennessee and Georgia's public policies *regarding pardons*." (Emphasis added). This holding indicates that the trial court focused on the two states' public policies as to executive pardons only. As explained below, we view the public policy at issue differently. We perceive that the more important public policy at issue is each state's view of the restoration of firearm rights *for a convicted drug felon,* by executive pardon or otherwise.

Georgia

The pardon Mr. Blackwell received from the State of Georgia expressly removed "all disabilities under Georgia law resulting from" his conviction, and restored "all civil and political rights, including the right to receive, possess, or transport in commerce a firearm, lost under Georgia law." The effect of an executive order restoring a felon's firearm rights in Georgia was discussed at length by the Georgia Supreme Court in the recent case of ***Ferguson v. Perry***.[9] ***See Ferguson v. Perry***, 740 S.E.2d 598 (Ga. 2013).

In ***Ferguson,*** the plaintiff was convicted of violating federal liquor tax laws, which resulted in the removal of his federal and state firearm rights. ***Id.*** at 600. In 1979, after the plaintiff was released from prison, the Georgia Board of Pardons and Paroles granted the plaintiff's petition for restoration of his state firearm rights. The Board did not pardon the plaintiff's conviction, because his conviction was in federal court. However, it issued an executive order based upon "the constitutional . . . authority vested in this Board to remove disabilities imposed by law." The 1979 Board order provided that "all disabilities resulting from [the plaintiff's] sentences(s) be . . . removed" and "all civil and political rights lost as a result of [his] offense(s) be . . . restored." ***Id.***

Thirty years later, the plaintiff in ***Ferguson*** petitioned the Georgia probate court for a firearms permit in Georgia. The probate court denied his petition. ***Id.*** at 601. The plaintiff then filed a lawsuit against the probate court judge, seeking declaratory relief and a writ of mandamus. The plaintiff argued that he had met all the requirements for obtaining a firearms permit, and that the probate court judge did not have the authority to ignore the 1979 order

[9] ***Ferguson v. Perry*** was decided after the parties' appellate briefs were filed in this case and the day before oral argument of the appeal.

of the Board of Pardons and Paroles. The trial court granted the relief requested; it issued a writ of mandamus directing the probate court judge to issue a firearms permit to the plaintiff. ***Id.*** The probate court judge appealed, ultimately to the Georgia Supreme Court.

On appeal in ***Ferguson***, the probate court judge argued that the writ of mandamus was issued in error, because the plaintiff's firearm rights were not restored through either a pardon or through the procedure set forth in Georgia statutes,[10] so the plaintiff was not entitled to a firearms permit. The Georgia Supreme Court acknowledged that the plaintiff had not utilized the statutory avenues for restoration of his firearm rights. It held, however, that "these statutory routes to relief are not the exclusive means by which a convicted felon may regain the right to possess firearms (and obtain a [firearms permit]) under Georgia law." ***Id.*** at 602. The ***Ferguson*** Court explained:

> Our Constitution provides another way in which a convicted criminal's lost right to keep and bear arms may be restored, and the disabilities imposed by state firearms laws removed: a decision doing so from the Georgia Board of Pardons and Paroles, like the one Perry received in 1979. At that time, the 1976 Georgia Constitution said that the Board "*shall have power to* grant reprieves, pardons, and paroles, to commute penalties, *remove disabilities imposed by law*, and may remit any part of a sentence for any offense against the State, after conviction," with only two narrow exceptions not applicable to Perry. Ga. Const. of 1976, Art. IV, Sec. II, Par. I (emphasis added). Moreover, the Board's authority could not be restricted by statute, as the Constitution expressly precluded the General Assembly from enacting laws "inconsistent with[ ] this Paragraph." ***Id.*** Our current Constitution grants the Board the same broad authority, . . . and the General Assembly still may not enact statutes that limit the Board's powers, see Art. IV, Sec. VII, Par. II (providing that the "powers and duties of members of constitutional boards and commissions provided for in this article, *except the Board of Pardons and Paroles*, shall be as provided by law" (emphasis added)).

Id. The ***Ferguson*** Court acknowledged that Georgia's General Assembly had enacted statutes providing for the removal of a felon's firearm disabilities under certain circumstances, but it found that the statutes were not the only way to obtain restoration and were not inconsistent with the Board's power to remove firearm disabilities. Thus, the ***Ferguson*** Court recognized that Georgia's constitution specifically gave the Board of

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[10] Pursuant to Georgia Code Annotated § 16-11-131(d), "a person who has been convicted of a felony but who has been granted relief from the disabilities imposed by the laws of the United States" may, under certain circumstances, apply to the Georgia Board of Public Safety to have their firearm rights restored.

Pardons and Paroles the power to "remove disabilities imposed by law," including firearm disabilities, without requiring the petitioner to go through statutory procedures.

In addition to the holding in ***Ferguson***, Georgia's statutes contain a built-in reprieve from firearm disabilities for convicted felons who have received an executive pardon. Georgia Code Annotated § 16-11-131, which makes it a crime for a convicted felon to possess a firearm, also includes the proviso that the firearm prohibition "shall not apply to any person who has been pardoned for the felony . . . and, by the terms of the pardon, has expressly been authorized to receive, possess, or transport a firearm." ***Id.*** § 16-11-131(c). Moreover, Georgia Code Annotated § 16-11-129, which governs the issuance of firearms permits, provides that a firearms permit shall not be issued to a person who has been convicted of a felony "and has not been pardoned for such felony." Thus, a convicted felon who has been pardoned for his crime may be issued a firearms permit under this statute.

Therefore, in Georgia, a felon can have his firearm rights restored automatically through an executive pardon that expressly restores those rights, or through a petition under Georgia statutes for restoration of his firearm rights. ***See Id.*** § 16-11-131(d). Neither the executive pardon procedure nor the statutory restoration procedure appears to treat those convicted of drug felonies or violent felonies differently from other felons. It is apparent, then, that Georgia's constitution, statutes, and caselaw are all aligned. All indicate a public policy to permit the restoration of firearm rights for a convicted drug felon or violent felon; also, a person who receives an executive pardon that expressly restores firearm rights, such as Mr. Blackwell, automatically has his firearm rights restored by virtue of the pardon.

Tennessee

In our analysis of Tennessee public policy, we will consider those policies as reflected in the law in effect at the time of the decision of the trial court below, as well as the impact of the recent amendment to Tennessee's expungement statute.

Tennessee's disability statutes "designate a particular civil disability that occurs upon" a person's conviction for a particular crime. ***Cole v. Campbell***, 968 S.W.2d 274, 276 (Tenn. 1998), ***quoted in State v. Johnson***, 79 S.W.3d 522, 527 (Tenn. 2002). In Tennessee, when a person's civil rights are removed pursuant to a disability statute, the civil disability "remains in effect throughout the defendant's life unless restored by a specific statutory procedure." ***Id.***

The "statutory procedure" for the restoration of civil rights is set forth in Tennessee Code Annotated § 40-29-101, known as the "Restoration Statute." Under the Restoration Statute,

a person whose civil rights are removed by virtue of the disability statutes may petition the circuit court for restoration of those rights:

> (a) Persons rendered infamous or deprived of the rights of citizenship by the judgment of any state or federal court may have their full rights of citizenship restored by the circuit court.
>
> (b) *Those pardoned, if the pardon does restore full rights of citizenship, may petition for restoration immediately after the pardon*; provided, that a court shall not have jurisdiction to alter, delete or render void special conditions of a pardon pertaining to the right of suffrage.
>
> (c) Those convicted of an infamous crime may petition for restoration upon the expiration of the maximum sentence imposed for the infamous crime.

Tenn. Code Ann. § 40-29-101 (2012) (emphasis added). As the emphasized portion of the statute indicates, a person who has received a pardon that restores his "full rights of citizenship" must still petition the circuit court pursuant to this statute to obtain the restoration of those citizenship rights; the restoration of rights is not automatic by virtue of the pardon itself. Consistent with the language of the Restoration Statute, Tennessee courts have noted that "[t]here is no 'absolute right to the restoration of the full rights of citizenship'" under this statute, even if the statutory requirements are satisfied. ***In re Cox***, 389 S.W.3d 794, 798 (Tenn. Crim. App. 2012) (quoting ***Johnson***, 79 S.W.3d at 527).

Interpreting the Restoration Statute, the Tennessee Supreme Court has held that the restorable "full rights of citizenship" to which the statute refers do not include firearm rights if those rights were removed pursuant to Section 39-17-1307(b)(1). In ***State v. Johnson***, the defendant was convicted in Tennessee of a violent felony, aggravated assault with a knife. Pursuant to the disability statutes, this conviction resulted in the loss of his citizenship rights, including his right to lawfully own and carry a handgun. Years later, the defendant obtained a Certificate of Restoration of Citizenship pursuant to the Tennessee Restoration Statute. Less than a year after that, the defendant was found to be in possession of a rifle, a handgun, and marijuana. ***Johnson***, 79 S.W.3d at 524-25.

The defendant in ***Johnson*** entered a guilty plea to unlawful possession of a weapon and to one count of simple possession of marijuana. In entering his guilty pleas, the defendant reserved for appeal the following certified question of law: "After an individual has had his full rights of citizenship restored pursuant to Tenn. Code Ann. § 40-29-101, *et seq.*, following a conviction of aggravated assault with a deadly weapon, can he be convicted of

a violation of Tenn. Code Ann. § 39-17-1307(b)(1)(A),[11] or is he allowed to possess a handgun?" ***Johnson***, 79 S.W.3d at 524. In a split decision, a majority of the Tennessee Court of Criminal Appeals concluded that a person convicted of a violent felony whose citizenship rights have been restored may lawfully possess a handgun. The Tennessee Supreme Court then granted the State's request for permission to appeal. ***Id.*** at 525.

The Supreme Court in ***Johnson*** reversed the decision of the intermediate appellate court. Interpreting Tennessee statutes, it held that a person convicted of a violent felony *cannot* have his right to lawfully possess a handgun restored, "even where his or her citizenship rights have been restored pursuant to Tenn. Code Ann. § 40-29-101, *et seq*." ***Id.*** at 528. The ***Johnson*** Court first described the disability statutes that put into effect certain disabilities upon the conviction of a defendant:

> Initially, we observe that Tennessee has "specific disability statutes," which "designate a particular civil disability that occurs upon the conviction and remains in effect throughout the defendant's life unless restored by a specific statutory procedure." ***Cole v. Campbell***, 968 S.W.2d 274, 276 (Tenn. 1998) (citing Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 951 (1970)). Specific disability statutes include the loss of the right to vote, *see* Tenn. Code Ann. § 40-20-112 (1997); the loss of the right to hold public office, ***see id.*** § 40-20-114; the loss of the right to serve as a fiduciary, ***see id.*** § 40-20-115; and the loss of the right to possess a handgun, ***see id.*** § 39-17-1307(b).

Id. at 527. The ***Johnson*** Court looked at the "specific disability statute" at issue, Section 39-17-1307(b)(1)(A), which unambiguously prohibits a person convicted of a violent felony or a drug felony from possessing a handgun. ***Id.*** at 526. The Court then examined other pertinent statutes and found that they demonstrated a legislative intent to not permit the restoration of handgun rights for violent felons under the Restoration Statute. It noted that, while Section 39-17-1308[12] provides for certain defenses to a charge of felony possession under Section 39-17-1307, those defenses are specifically made unavailable "to persons described in § 39-17-1307(b)(1)," *i.e.*, violent felons and drug felons. ***Id.*** at 527 (quoting Tenn. Code Ann. § 39-17-1308(b)). Furthermore, Section 39-17-1308 does not include

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[11]The version of the statute at issue in ***Johnson*** prohibited the possession of a "handgun." As indicated *supra* at note 3, the statute was later amended to replace the term "handgun" with "firearm."

[12]Section 39-17-1308(a)(3)(A) made it "a defense to the application of § 39-17-1307 if the possession or carrying was . . . [a]t the person's [p]lace of residence." Tenn. Code Ann. § 39-17-1308(a)(3)(A)).

"restoration of citizenship rights" as one of the available defenses to a charge of felony firearm possession. ***Id.*** at 528.

The ***Johnson*** Court further noted that "other statutory provisions likewise explicitly limit a convicted violent felon's right to possess a handgun, even when that felon has had his or her citizenship rights restored under" the Restoration Statute. ***Id.*** at 528. As an example, the Court cited Tennessee Code Annotated § 39-17-1316, which generally prohibits the sale of a firearm to a convicted felon. Subsection (a)(2) of that statute states that the prohibition does not apply to one who was pardoned or whose rights were restored pursuant to the Restoration Statute — however, both conditions are subject to the proviso that the person is not prohibited from possessing a firearm under 39-17-1307, i.e., a violent felon or a drug felon. ***Id.*** Finally, the Court noted that Section 39-17-1351(j)(3) provides that a handgun permit may be issued to a felon whose rights of citizenship have been restored, but only if the felon *was not* convicted of a violent felony or certain drug felonies. ***Id.*** These statutes, the ***Johnson*** Court reasoned, "demonstrate the clear intent [of the legislature] to prohibit convicted violent felons from possessing a handgun," even if they have obtained restoration of other citizenship rights under the Restoration Statute. ***Id.***

The holding in ***Johnson*** has not been abrogated or overruled. Although the facts in ***Johnson*** involve a person who was convicted of a violent felony, other Tennessee caselaw indicates that the holding in ***Johnson*** is equally applicable to one who is convicted of a felony drug offense. ***See State v. Ferguson***, 106 S.W.3d 665, 667 (Tenn. Ct. App. 2003); ***see also*** David L Raybin, "*Stick to Your Guns: Restoration of Tennessee's 'Firearm Rights'* " 39 Tenn. B. J. 17, 18 (Mar. 2003) (citing ***Johnson*** and concluding that, under Tennessee statutes, "even restoration of rights will not allow possession of handguns for those convicted of certain violent felonies or felony drug convictions"); ***Evans v. State***, 66 Tenn. 12, 1872 WL 4238, at *2 (1872) (a pardon does not restore the right to testify to a person rendered incompetent to testify by virtue of his pardoned crime). We note as well that, since ***Johnson*** was decided, Section 39-17-1307 has been amended, but it still makes it a felony for drug felons, and persons convicted of a felony "involving the use or attempted use of force, violence, or a deadly weapon, to possess a firearm."[13] Tenn. Code Ann. § 39-17-1307(b)(1)(A).

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[13]Subsection (b) currently provides:

> (b)(1) A person commits an offense who unlawfully possesses a firearm, as defined in § 39-11-106, and:
>
> (A) Has been convicted of a felony involving the use or attempted use of force, violence, or a deadly weapon; or
>
> (B) Has been convicted of a felony drug offense.
>
> (2) An offense under subdivision (b)(1)(A) is a Class C felony.

(continued...)

We note further that Tennessee's disability statute does not exempt a pardoned violent felon or drug felon from the disability imposed by the statute, as does the comparable statute in Georgia. ***Compare*** Tenn. Code Ann. § 39-17-1307 ***with*** Ga. Stat. Ann. § 16-11-131(c). Furthermore, as noted in ***Johnson***, Tennessee's firearms permit statute does not allow most convicted drug felons, even if pardoned, to obtain a firearms permit, as does Georgia's firearms permit statute.[14] ***Compare*** Tenn. Code Ann. § 39-17-1351(j)(3) ***with*** Ga. Code Ann. § 16-11-129(b)(2)(B).

Thus, Tennessee's public policy, as reflected in the statutes as they existed at the time of the trial court's decision, stands in stark contrast to Georgia's public policy of permitting a convicted drug felon or violent felon to obtain restoration of his right to lawfully own and carry a firearm. Unlike Georgia, Tennessee's legislature clearly adhered to a policy of making drug felons and violent felons ineligible for restoration of firearm rights, even if they have been pardoned for their crime.

The first and only indication that a person convicted of a felony, albeit only a non-violent felony, may regain his firearm rights in Tennessee is found in the very recent amendment to Tennessee's expungement statute.[15] An overview of the amendment, enacted after the trial court issued its decision and after the parties briefed and argued their positions on appeal, is helpful to our analysis.

Historically, Tennessee's expungement statute provided a mechanism for expunging the criminal records of persons whose criminal charges were dismissed, whose charges resulted in acquittal, or who completed a diversion program. Tenn. Code Ann. § 40-32-101 (2012). Prior to 2012, the expungement statute essentially did not permit the expungement of criminal records for a person who was convicted of a crime; relief was available only in circumstances where the person was, in effect, deemed innocent. In 2012, the expungement

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[13](...continued)

(3) An offense under subdivision (b)(1)(B) is a Class D felony.

Tenn. Code Ann. § 39-17-1307(b) (Supp. 2012).

[14]Although the record is unclear on the nature of Mr. Blackwell's drug convictions, he states that he was convicted of selling Schedule II drugs, which would prevent him from obtaining a firearms permit in Tennessee under Section 39-17-1351.

[15]Mr. Blackwell noted in his supplemental brief that, before the new amendment was passed, the expungement statute was irrelevant to the issues on appeal, because "(1) he was not seeking Full Faith and Credit of an expungement, (2) the list of expungeable offenses in the statute did not include the crime of which Mr. Blackwell was convicted, and (3) the statute did not address persons who had been pardoned." Appellee's Supplemental Brief at 4 (footnote omitted).

statute was amended in a significant way by adding a wholly new subsection (g). Under subsection (g), the term "eligible petitioner" includes a person who has been convicted of one of the enumerated non-violent misdemeanors or felonies.[16] ***See id.*** § 40-32-101(g). Under subsection (g), the "eligible petitioner" is entitled to file a petition to have his criminal records expunged if (A) the person has not been convicted of any other offense, (B) five years has elapsed since the completion of the sentence, and (C) the person a has paid all fines and costs and has complied with any conditions imposed. ***Id.*** § 40-32-101(g)(2).

In addition to broadening the category of persons eligible for expungement, subsection (g) also provides that, when criminal records are expunged pursuant to that subsection, "all public records of the expunged conviction [are] destroyed," and the "expunction has the legal effect of restoring the petitioner . . . to the same status occupied before the arrest, indictment, information, trial and conviction." ***Id.*** § 40-32-101(g)(14)(A), (B). Relevant to this case, subsection (g) further provides: "Notwithstanding § 39-17-1307(b)(1)(B) [relating to drug felons] and (c) [relating to felony handgun possession], a petitioner whose petition is granted pursuant to this subsection (g) . . . shall be eligible to purchase a firearm pursuant to § 39-16-1316 and apply for and be granted a handgun carry permit pursuant to § 39-17-1351." ***Id.*** § 40-32-101(g)(14)(E). To obtain relief under this subsection, the eligible petitioner must file a petition in the court in which he or she was convicted of the offense sought to be expunged, and both the petitioner and the district attorney general may submit evidence relating to why the person should (or should not) have his criminal records expunged. That court has discretion over whether to grant the petition; subsection (g) provides specifically that, "[i]n making a decision on the petition, the court shall consider all evidence and weigh the interests of the petitioner against the best interests of justice and public safety." ***Id.*** § 40-32-101(g)(3) - (5).

Very recently, on May 14, 2013, the General Assembly passed another significant amendment to the expungement statute by adding subsection (h). Subsection (h) describes a new category of "eligible petitioners," namely, persons who have been "convicted of a non-violent crime" and who have received an executive pardon after a favorable vote from Tennessee's Board of Parole:

> (h)(1) For purposes of this subsection (h), "eligible petitioner" means a person who was convicted of a non-violent crime after January 1, 1980, if the person:

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[16]It is undisputed that Mr. Blackwell's crimes were not included in the list of expungeable offenses in the statute.

> (A) Petitioned the court in which the petitioner was convicted of the offense and the judge finds that the offense was a non-violent crime;
>
> (B) Petitioned for and received a positive vote from the board of parole to receive a pardon; and
>
> (C) Received a pardon by the governor.
>
> (2) Notwithstanding the provisions of this section, effective July 1, 2013, an eligible petitioner under subdivision (h)(1) may file a petition for expunction of that person's public records involving the crime. The procedures in subdivisions (g)(3)–(6), (8), (10), (14) and (15) will apply to a petitioner under this subsection (h).

2013 Tenn. Laws Pub. Ch. 384 (S.B. 860). Thus, pursuant to this subsection and subsection (g)(14)(E) by reference,[17] a person who receives a pardon for a non-violent felony under subsection (h) may not only file a petition to have his criminal records expunged, but they may also regain their right to purchase and possess a firearm "notwithstanding § 39-17-1307(b)(1)(B)" if their petition is granted.

The 2013 amendment to the expungement statute is an important change in Tennessee's public policy on the restoration of firearm rights to a convicted felon, and it is relevant to our analysis in the instant case. In one respect, by requiring that a felony be *non-violent* in order to be eligible for expungement, the amendment confirms our conclusion that a person who was convicted of a *violent* felony in Tennessee — one who has lost their firearm rights pursuant to Section 39-17-1307(b)(1)(A) — cannot regain his firearm rights, either through an executive pardon, the Restoration Statute, or the expungement statute. But the amendment creates an entirely new avenue for the restoration of firearm rights in the specific situation in which "a person who was convicted of a non-violent crime," including a *non-violent drug* felony, has received a pardon for his crime. To be sure, the amendment highlights the fact that, in contrast to Georgia, a Tennessee executive pardon does not effect an *automatic* restoration of firearm rights to a convicted felon. Still, the new amendment sets out a statutory procedure by which a non-violent drug felon *may* have his firearm rights restored, whereas Tennessee laws previously disallowed the restoration of firearm rights for a convicted drug felon under any circumstances.

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[17] Subsection (g)(14) was also amended by deleting the language "this subsection (g)" and substituting instead the language "this subsection (g) or subsection (h)" wherever it appears, so as to clarify that it applies when expungement is sought under subsection (h). ***See*** 2013 Tenn. Laws Pub. Ch. 384 (S.B. 860).

As we have indicated above, the State agrees that the 2013 amendment to the expungement statute effects a change in Tennessee's public policy; it argues, however, that the change is a very narrow one, and that it applies only where a petitioner can establish that he would have been entitled to expungement of his records under the new subsection (h). The State concedes that Tennessee's public policy would not be offended *provided* Mr. Blackwell can establish that he is "a person who was convicted of a non-violent crime," and that he would otherwise have been eligible for expungement under this provision had his conviction been in Tennessee. It maintains, however, that Tennessee's overall public policy disfavors the restoration of a drug felon's firearm rights unless their circumstances fit within the parameters of the new statute, and that Tennessee is, therefore, not required to give full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights without such a showing. Thus, the State argues that we should remand the case to the trial court for further fact finding, so that Mr. Blackwell can establish that he would have been entitled to seek restoration under the new expungement statute had he been convicted in Tennessee.

Conflict in Public Policies of Georgia and Tennessee

The trial court held in favor of Mr. Blackwell based on the pleadings alone, and the pleadings do not contain any details about Mr. Blackwell's crimes. Nevertheless, we do not agree with the State that the proper inquiry is whether Mr. Blackwell can prove that the circumstances of his conviction are such that he would have been eligible for expungement under the 2013 amendment to the Tennessee expungement statute.[18] Rather, we must keep our focus on the overall public policy of Tennessee, being mindful that the State has the "stern and heavy" burden of establishing that the policies of Tennessee and Georgia are so diametrically opposed so as to warrant Tennessee's refusal to give full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights.

We agree, however, that there has been some change in Tennessee's policy. The tipping point on this issue is the fact that the legislature has seen fit to relax its blanket prohibition on the restoration of firearm rights for pardoned criminals, including drug felons, in circumstances where the crime was *non-violent* in nature. Thus, the general public policy in Tennessee, which formerly prohibited all convicted drug felons from regaining their firearm rights, is no longer in total conflict with the public policy of Georgia, in that

[18]The State suggests that we remand the case "to make a determination as to whether . . . Respondent would have been eligible to obtain relief under Tenn. Code Ann. § 40-[32]-101(h)." We are not certain how that would be done. Mr. Blackwell, having been convicted in Georgia, could not fully satisfy the requirements in subsection (h), given the fact that it requires him to return to the *convicting* court (which is in Georgia) for a determination on whether his crimes were non-violent in nature and whether expungement would be warranted.

Tennessee now would appear to allow *non-violent* drug felons to have at least a statutory avenue by which they may regain their firearm rights after receiving a pardon for their crime. Certainly the two states' public policies are not the same, as Mr. Blackwell would have this Court believe. But in light of the amendment to Tennessee's expungement statute, we can no longer say that the public policies of Tennessee and Georgia on the restoration of firearm rights to a pardoned *non-violent* drug felon "fatally conflict" so as to justify Tennessee's refusal to give full faith and credit to the Georgia restoration of Mr. Blackwell's firearm rights. ***Four Seasons Gardening & Landscaping***, 688 S.W.2d at 445.

In short, we disagree with the trial court's holding that there was "no inconsistency between Tennessee and Georgia's public policies regarding pardons" under the Tennessee statutes at the time of the trial court's decision in July 2012, and in particular we disagree with the trial court's focus on Tennessee's policy regarding pardons rather than the restoration of firearm rights for convicted drug felons. Under Tennessee statutes as they exist now, however, we find ourselves in partial agreement with the trial court's ultimate conclusion, albeit on a different basis. We conclude that, since the passage of the 2013 amendment to the expungement statute, the public policies of Tennessee and Georgia are not entirely inconsistent on the restoration of firearm rights for those who have committed non-violent drug felonies.

Thus, we recognize that the statutory landscape has changed considerably since the trial court proceedings below; but the record indicates little about Mr. Blackwell's offenses, and particularly whether the drug felonies involved "the use or attempted use of force, violence, or a deadly weapon." Tenn. Code Ann. § 39-17-1307(b)(1)(A). The amendment to Tennessee's expungement statute does not change Tennessee's public policy against the restoration of firearm rights for violent felons; the petitioner under the new statute may obtain relief only if the judge of the convicting court "finds that the offense was a non-violent crime." 2013 Tenn. Laws Pub. Ch. 384 (S.B. 860), to be codified at Tenn. Code Ann. § 40-32-101(h)(1)(A), effective July 1, 2013. The public policy in Tennessee prohibiting a person convicted of a felony "involving the use or attempted use of force, violence, or a deadly weapon" from regaining his firearm rights remains at loggerheads with the public policy of Georgia, which apparently permits the restoration of firearm rights to

persons convicted of *all* felonies, violent or not.[19] ***See*** Tenn. Code Ann. § 39-17-1307(b)(1)(A).

Moreover, Tennessee's public policy against the restoration of firearm rights for persons convicted of a felony involving force, violence, or a deadly weapon implicates public safety and arises out of Tennessee's penal statutes. One court has commented that a state's penal code is perhaps the strongest statement of its public policy. ***New Mexico v. Edmondson***, 818 P.2d 855, 860-61 (N.M. Ct. App. 1991). We find persuasive both the ***Edmondson*** case and ***People v. Shear***, 71 Cal. App. 4th 278, 83 Cal. Rptr. 2d 707 (Ct. App. 3d Dist. 1999), cited by the State on the issue of whether the public policy difference between Georgia and Tennessee is of sufficient importance to warrant application of the public-policy exception to the Full Faith and Credit Clause. As in ***Shear***, the Tennessee statutes on firearm rights are borne of the State's significant interest in "protecting the safety of its citizens" by barring persons whom our legislature has deemed unfit to be entrusted with the possession of firearms. ***Shear***, 71 Cal. App. 4th at 288. Tennessee's penal code conveys "in the clearest possible terms [Tennessee's] view of public policy." ***Edmondson***, 818 P.2d at 860. In enacting the statutes governing firearm rights, Tennessee's legislature made the public policy judgments inherent in discharging its constitutional duty, "by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const. art. I, § 26. The Full Faith and Credit Clause "should not require a state to abandon such fundamental policy in favor of the public policy of another jurisdiction." ***Edmondson***, 818 P.2d at 860-61.

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[19]We are unpersuaded by Mr. Blackwell's argument that any difference in the statutes of Georgia and Tennessee regarding the restoration of firearm rights do not matter because the pardon issued in this case explicitly restored his firearm rights, and Tennessee's governor would have the power to do the same thing in Tennessee. Notwithstanding Mr Blackwell's eloquent arguments on the breadth of the governor's pardon power, the pivotal public policy relates to each state's view of the restoration of firearm rights for a convicted felon, regardless of method. It matters not whether Georgia restored Mr. Blackwell's rights through executive pardon, statutory procedure, or otherwise. We are charged in this appeal with determining whether Georgia's restoration of Mr. Blackwell's firearm rights, *by any means,* conflicts with Tennessee's public policy on the restoration of a convicted felon's firearm rights. The allocation of authority in the Tennessee Constitution suggests that, to ascertain Tennessee's public policy on the restoration of firearm rights, we should look to Tennessee statutes regulating firearms, rather than to executive power to remove firearm disabilities. While the Georgia Constitution explicitly provides for executive authority to remove disabilities such as firearm disabilities, Tennessee's constitution says nothing about it. Tenn. Const. art. III, § VI. On the other hand, the Tennessee constitution confers *explicit* authority upon the Tennessee Legislature to regulate firearm rights: "[T]he Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const. art. I, § 26; ***see*** Tenn. Code Ann. § 39-17-1351(a) (recognizing the power of the general assembly "to regulate the wearing of arms with a view to prevent crime"). It is pursuant to this constitutional authority that Tennessee's legislature enacted the Restoration Statute, the expungement statute, and the other statutes that address firearm rights. Therefore, we decline Mr. Blackwell's invitation to probe the outer boundaries of executive authority in Tennessee and instead determine the relevant Tennessee public policy by looking to Tennessee's statutes.

As we have indicated, this case was decided based on the pleadings alone, and the pleadings do not give details about the circumstances of Mr. Blackwell's crimes. Specifically, Mr. Blackwell's complaint states that he was pardoned for "drug felonies,"[20] but it does not indicate whether the drug felonies of which Mr. Blackwell was pardoned involved the use or attempted use of force, violence, or a deadly weapon. For this reason, the case should be remanded for further proceedings. On remand, the State bears the "stern and heavy" burden of proving that Mr. Blackwell's crimes involved the use or attempted use of force, violence, or a deadly weapon. If this is so, then giving full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights would be directly contrary to Tennessee's strong public policy against the restoration of firearm rights for one convicted of such a felony. In other words, requiring Tennessee to extend full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights under those circumstances would require "too large a sacrifice by [Tennessee] of its interests in a matter with which it is primarily concerned" — protecting public safety and preventing crime. Restatement (Second) of Conflict of Laws § 103 cmt. b.

Therefore, we vacate the trial court's grant of judgment on the pleadings to Mr Blackwell.[21] We remand the case to the trial court for the State to have the opportunity to show that giving full faith and credit to Georgia's restoration of Mr. Blackwell's firearm rights would offend Tennessee's public policy against the restoration of firearm rights for a person convicted of a felony that involved the use or attempted use of force, violence, or a deadly weapon, and further related proceedings.

The trial court below based its decision solely on the Full Faith and Credit Clause, and so found it unnecessary to reach other arguments raised by Mr. Blackwell. Mr. Blackwell argues that, if we find that his firearm rights are not guaranteed under the Full Faith and Credit Clause, his firearm rights are independently guaranteed by his right to bear arms under the federal and state constitutions, the Equal Protection Clause of the United States Constitution, and the Privileges and Immunities Clause of the United States Constitution.

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[20]Mr. Blackwell's pardon, which was attached to the complaint as an exhibit, indicates only that the crimes of which he was pardoned were three counts of "Violation of Georgia Controlled Substance Act (Sale of Cocaine)."

[21]As an alternative argument, Mr. Blackwell argues that Tennessee's acceptance of his Georgia conviction requires equal acceptance of his Georgia pardon under the Full Faith and Credit Clause. In support, Mr. Blackwell urges this Court to adopt the reasoning in ***Schlenther v. Department of State, Division of Licensing***, 743 So. 2d 536 (Fla. Dist. Ct. App. 1998). We respectfully decline to apply the reasoning in ***Schlenther*** to the case at bar. We see no indication in ***Schlenther*** that the public-policy exception to full faith and credit was raised as an issue, or even that there were any differences in the public policies of Connecticut and Florida. This argument is without merit.

In light of our decision herein, we leave it to the trial court, in its discretion, to address any of Mr. Blackwell's other arguments that were raised but not addressed by the trial court in the order on appeal if Mr. Blackwell does not prevail in his claim on other grounds.[22]

Attorney Fees

As we have indicated, the trial court granted Mr. Blackwell his reasonable attorney fees and costs as the "prevailing party" in this action. In doing so, the trial court acknowledged that it did not reach any of Mr. Blackwell's constitutional arguments, but it nevertheless awarded him attorney fees pursuant to 42 U.S.C. § 1988 because "the operative facts of the case concerned the enforcement of [Mr. Blackwell's] Second Amendment rights [to bear arms]."[23]

On appeal, the State argues that Mr. Blackwell was not entitled to an attorney fee award under Section 1988, because the trial court decided to give full faith and credit to the Georgia pardon without reaching Mr. Blackwell's constitutional arguments that were cognizable under Section 1983. The State acknowledges that Section 1988 was intended to give courts authority to award a reasonable attorney fee to the prevailing party in actions brought pursuant to Section 1983 and other civil rights laws. It argues, however, that "not all matters of constitutional law are subject to claims under § 1983." It notes three considerations for determining whether a federal statute confers a "right" within the meaning of Section 1983:

> In deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." [2] The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." [3] We have also asked whether the provision in question was "intend[ed] to benefit" the putative plaintiff.

Dennis v. Higgins, 498 U.S. 439, 448-49 (1991) (quoting ***Golden State Transit Corp. v. Los Angeles***, 493 U.S. 103, 106 (1989) (internal citations omitted)). The Full Faith and Credit

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[22] We express no opinion on whether Blackwell's other arguments were properly raised. That is a matter for the trial court to decide in the first instance.

[23] The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The State of Tennessee has its own analogue to the Second Amendment, which provides: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const. art. I, § 26.

Clause, the State argues, is not intended to benefit a putative plaintiff. Instead of conferring a right that belongs to the individual, the State claims, the full-faith-and-credit requirement is a duty that states have to respect the orders of other states. Therefore, the State argues, the trial court's ruling, based solely on the Full Faith and Credit Clause, is insufficient to give rise to a federal cause of action under Section 1983, and so is insufficient to warrant an attorney fee award under Section 1988.

In response, Mr. Blackwell asserts that the trial court correctly awarded him attorney fees under Section 1988.[24] Mr. Blackwell claims that the declaratory relief he received based on the Full Faith and Credit Clause entitles him to an award of attorney fees, because a claim under this clause is cognizable under Section 1983. He claims that the purpose of the clause is to preserve civil rights that were acquired or confirmed under the public acts of Georgia, requiring recognition of their validity in other states. ***Pac. Employers Ins. Co. v. Indus. Accident Comm'n of State of Cal.***, 306 U.S. 493, 501 (1939). Mr. Blackwell also argues that the enforcement of another state's judgment is a "substantive constitutional right." ***Finstuen v. Crutcher***, 496 F.3d 1139, 1155 (10th Cir. 2007). He further claims that, if a party prevails in an action *alleging* a federal constitutional deprivation, then that party is entitled to attorney fees under Section 1988; it does not matter that the relief awarded was not based on the alleged constitutional deprivation.

It is undisputed that the trial court held in favor of Mr. Blackwell on his full-faith-and-credit claim, and that it did not reach the other constitutional issues based on "the doctrine of constitutional avoidance." We have found no case in which a court has concluded that a declaratory judgment action seeking to enforce another state's official action is, itself, a claim that is cognizable under Section 1983. The full-faith-and-credit requirement "embodies an important federal policy . . . designed to give the United States certain of the benefits of a unified nation." Restatement (Second) of Conflict of Laws § 103 cmt. b. Thus, the full-faith-and-credit requirement is intended to promote a unified nation, not to address individual constitutional interests, and it is not a source of a federal right. ***See Adar v. Smith***, 639 F.3d 146, 151-57 (5th Cir. 2011) (en banc) (concluding that a violation of the Full Faith and Credit Clause is not a basis for relief under Section 1983, and that "the only remedy available for violations of full faith and credit is review by the Supreme Court"), *cert. denied*, 132 S. Ct. 400 (2011). Therefore, we reject Mr. Blackwell's argument that a claim for declaratory relief under the Full Faith and Credit Clause is, by itself, cognizable under Section 1983.

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[24]Mr. Blackwell argues that this issue is settled by the law-of-the-case doctrine, because this Court previously affirmed the trial court's finding that he suffered a constitutional deprivation. We do not agree with Mr. Blackwell's interpretation of our opinion in the first appeal of this case.

No matter, argues Mr. Blackwell, because "a plaintiff need not succeed upon — or even directly plead — a direct personal constitutional violation in order to be awarded attorney fees [under Section 1988]." He claims that a plaintiff need only show that the constitutional violation is "related to the plaintiffs' ultimate success," quoting ***Americans United for Separation of Church and State v. School District of the City of Grand Rapids***, 835 F.2d 627, 631 (6th Cir. 1987), ***quoted in Bloomingdale's By Mail Ltd. v. Huddleston***, 848 S.W.2d 52, 55 (Tenn. 1992).

In ***Americans United***, the plaintiffs filed a complaint for declaratory relief, seeking a declaration that certain programs of the defendant school district violated the Establishment Clause of the First Amendment of the federal Constitution, made applicable to the states by the Fourteenth Amendment, and also seeking a permanent injunction against continuation of the program. ***Americans United***, 835 F.2d at 628. The plaintiffs also alleged in their complaint that the acts of the defendants "under color of law, deprive the individual plaintiffs . . . of rights, privileges and immunities guaranteed them by the Constitution of the United States, and more particularly, rights guaranteed them under the First and Fourteenth Amendments . . . ." ***Id.*** The plaintiffs sought declaratory relief, but they did not specifically state that the relief was sought pursuant to Section 1983. Ultimately, the plaintiffs prevailed on the merits; on appeal, the Supreme Court upheld the determination that the school programs constituted violations of "the dictates of the Establishment Clause of the First Amendment."[25] ***Id.*** at 629 (quoting Supreme Court decision). The case was remanded for further proceedings.

On remand in ***Americans United***, the plaintiffs sought an award of attorney fees under 42 U.S.C. § 1988, even though they had not specifically mentioned Section 1983 or Section 1988 in their complaint. ***Id.*** at 629. The district court concluded that the plaintiffs' action was not brought "to enforce a provision of" 42 U.S.C. § 1983, and therefore did not qualify for an award of attorney's fees under 42 U.S.C. § 1988. ***Id.*** On appeal, the Sixth Circuit recognized that no claim had been made pursuant to Section 1983 or Section 1988. It held, however, that a court must focus on the substance of the action in order to determine whether attorney fees may be awarded pursuant to Section 1988. In short, if the claim would be cognizable under Section 1983, then attorney fees may be awarded under Section 1988:

> The rule to be distilled from [a line of decisions addressing the matter] is that § 1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented. The mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleadings and

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[25] The Supreme Court's decision in ***Americans United*** has since been overruled. ***See Agostini v. Felton***, 521 U.S. 203 (1997). The overturning of that decision, however, does not affect the issues in this appeal.

> evidence *do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy,* and this claim is related to the plaintiffs' ultimate success.

Americans United, 835 F.2d at 631 (emphasis added). Thus, the court held, "only two allegations are required to state a cause of action under § 1983: (1) a plaintiff must allege that some person has deprived him of a federal right; and (2) he must allege that the person so depriving him acted under color of state law." ***Id.*** at 632. Because the plaintiffs prevailed in an action that alleged these things, the appellate court held, then they were entitled to attorney fees under Section 1988. ***Id.*** at 633-34.

Based on ***Americans United***, Mr. Blackwell argues that, because he alleged personal constitutional violations, and the claim upon which he prevailed is "related to" his constitutional claims, then he is entitled to attorney fees under Section 1988. In our view, Mr. Blackwell misapprehends the conclusion of the Sixth Circuit in ***Americans United***. The appellate court in that case recognized that, even if the claim for relief in the petition for declaratory relief does not specifically mention Section 1983, a plaintiff may still establish entitlement to attorney fees under Section 1988 if the substance of his petition alleges claims cognizable under Section 1983, and the plaintiff prevailed on those claims. In the instant case, even though Mr. Blackwell's full-faith-and-credit claim is in some sense "related to" his other constitutional claims, he has not established that any of his personal constitutional rights have been violated. A party cannot recover attorney fees for deprivation of his constitutional rights if he has not succeeded on his constitutional claims. ***Heyne v. Metro. Nashville Bd. of Educ.***, 380 S.W.3d 715, 740 (Tenn. 2012) ("[A] party must prove a violation of its constitutional rights before it is entitled to attorneys' fees [under Section 1988].").

Mr. Blackwell makes much of the trial court's comment that "the operative facts of the case concerned enforcement of [his] Second Amendment rights," and on the supposed fact that his Georgia pardon was based on his Second Amendment right to bear arms. We respectfully disagree. Under the laws of either Georgia or Tennessee, Mr. Blackwell forfeited his constitutional right to bear arms when he committed the drug felonies for which he was convicted. Any law that allows him to regain those rights after conviction — in either Georgia or Tennessee — springs from legislative grace, not from the constitutional right of a convicted felon to bear arms. Therefore, we reject Mr. Blackwell's argument that the relief granted to him by the trial court below constituted the enforcement of his constitutional right to bear arms, or that the relief granted was "related to" his supposed right to bear arms so as to entitle him to attorney fees under Section 1988.

Therefore, because we are vacating the trial court's grant of a judgment on the pleadings and remanding for further proceedings, and because Mr. Blackwell did not establish that he was deprived of a personal constitutional right cognizable under Section 1983, he is not entitled to attorney fees under Section 1988. Accordingly, we reverse the trial court's award of attorney fees and costs in favor of Mr. Blackwell. We also exercise our discretion to deny Mr. Blackwell his request for attorney fees on appeal. Our holdings in this case pretermit all other issues raised on appeal.

CONCLUSION

The decision of the trial court is vacated in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion. Costs on appeal are to be taxed to Appellee David Scott Blackwell, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE

State of Tennessee

PUBLIC CHAPTER NO. 384

SENATE BILL NO. 860

By Tate, Harper

Substituted for: House Bill No. 1275

By Faison, Dennis, Gilmore, Hardaway, Camper, Favors, Johnnie Turner, Miller

AN ACT to amend Tennessee Code Annotated, Title 40, Chapter 32, relative to criminal records.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 40-32-101, is amended by adding the following language as a new subsection:

(h)(1) For purposes of this subsection (h), "eligible petitioner" means a person who was convicted of a non-violent crime after January 1, 1980, if the person:

(A) Petitioned the court in which the petitioner was convicted of the offense and the judge finds that the offense was a non-violent crime;

(B) Petitioned for and received a positive vote from the board of parole to receive a pardon; and

(C) Received a pardon by the governor.

(2) Notwithstanding the provisions of this section, effective July 1, 2013, an eligible petitioner under subdivision (h)(1) may file a petition for expunction of that person's public records involving the crime. The procedures in subdivisions (g)(3)-(6), (8), (10), (14) and (15) will apply to a petitioner under this subsection (h).

SECTION 2. Tennessee Code Annotated, Section 40-32-101, is amended in subdivisions (g)(10) and (11) by deleting the language "this subsection" and substituting instead the language "this subsection (g) or subsection (h)" and is amended in subdivisions (g)(14) and (15) by deleting the language "this subsection (g)" and substituting instead the language "this subsection (g) or subsection (h)" wherever it appears.

SECTION 3. This act shall take effect July 1, 2013, the public welfare requiring it.

SENATE BILL NO. 860

PASSED: April 17, 2013

RON RAMSEY
SPEAKER OF THE SENATE

BETH HARWELL, *SPEAKER*
HOUSE OF REPRESENTATIVES

APPROVED this 14th day of May 2013

BILL HASLAM, *GOVERNOR*

STATE BOARD OF PARDONS AND PAROLES

PARDON

INCLUDING RESTORATION OF THE RIGHT TO BEAR ARMS

WHEREAS, David Blackwell, Serial Number BF-235799 was convicted in the court(s) indicated below of the following offense(s) for which he received the sentence(s) hereinafter set forth:

OFFENSE	COURT OF CONVICTION	SENTENCING DATE	SENTENCE
Violation of Georgia Controlled Substance Act (Sale of Cocaine) (88BB714) (Counts 1-3)	Gwinnett Superior	1/23/89	9 years to serve 5 years, balance probated (3 counts concurrent) (c/f 9/9/88) $3,000 fine, $50 POT, $10 probation fee Terminated 1/22/94

and,

WHEREAS, an application for a Pardon has been filed by the above named individual; and

WHEREAS, having investigated the facts material to the pardon application, which investigation has established to the satisfaction of the Board that the pardon applicant is a law-abiding citizen and is fully rehabilitated;

THEREFORE, pursuant to Article IV, Section II, Paragraph II (a), of the Constitution of the State of Georgia, the Board, without implying innocence, hereby unconditionally fully pardons said individual, and it is hereby

ORDERED that all disabilities under Georgia law resulting from the above stated conviction(s) and sentence(s), as well as, any other Georgia conviction(s) and sentence(s) imposed prior thereto, be and each and all are hereby removed; and

ORDERED FURTHER that all civil and political rights, including the right to receive, possess, or transport in commerce a firearm, lost under Georgia law as a result of the above stated convictions, as well as, any other Georgia conviction(s) and sentence(s) imposed prior thereto be and each and all are hereby restored.

It is directed that copies of this order be furnished to the said applicant and to the Clerk(s) of Superior Court(s) in the County(s) where the above sentence(s) were imposed.

GIVEN UNDER THE HAND AND SEAL of the State Board of Pardons and Paroles, this 11th day of August, 2003.

STATE BOARD OF PARDONS AND PAROLES

FOR THE BOARD Linda Winston

Linda Winston

2012 WL 113655
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

David Scott BLACKWELL
v.
Bill HASLAM, Governor of the State of Tennessee et al.

No. M2011–00588–COA–R3–CV. | Aug. 26, 2011 Session. | Jan. 11, 2012.
| Application for Permission to Appeal Denied by Supreme Court April 11, 2012.

Appeal from the Chancery Court for Davidson County, No. 100739–III; Ellen Hobbs Lyle, Chancellor.

Attorneys and Law Firms

David L. Raybin and Benjamin K. Raybin, Nashville, Tennessee, for the appellant, David Scott Blackwell.

Robert E. Cooper, Jr., Attorney General & Reporter; Joseph F. Whalen, Associate Solicitor General; and Frank Borger–Gilligan, Assistant Attorney General, for the appellee, Bill Haslam, Governor of the State of Tennessee, Robert E. Cooper, Jr., Tennessee Attorney General, Victor S. Torry Johnson III, District Attorney of Davidson County, Tennessee, Kim R. Helper, District Attorney of Williamson County, Tennessee, and the State of Tennessee.

Ronald D. Krelstein, Germantown, Tennessee, for the Amicus Curiae, Tennessee Firearms Association, Inc.

FRANK G. CLEMENT, JR., J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Opinion

OPINION

FRANK G. CLEMENT, JR., J.

***1** This is a declaratory judgment action filed pursuant to Tennessee Code Annotated § 29–14–102. The petitioner, who was convicted of three felony drug offenses in Georgia, was granted a full pardon by the State of Georgia that expressly restored his right to possess a firearm, now resides in Tennessee and desires to purchase and possess firearms. Tennessee Code Annotated § 39–17–1307(b)(1)(B) makes it a Class E felony offense for a person, who has been "convicted of a felony involving the use or attempted use of force, violence or a deadly weapon" or who has been "convicted of a felony drug offense," to possess a firearm in Tennessee. Therefore, Petitioner filed this action seeking a declaration that he would not be in violation of Tennessee Code Annotated § 39–17–1307(b)(1)(B) by purchasing or possessing a firearm in Tennessee. The State of Tennessee responded to the petition by filing a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(1) for lack of subject matter jurisdiction and a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief could be granted under the Full Faith and Credit Clause, the Due Process Clause of the Second and Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, the Second Amendment, and article I, section 26 of the Tennessee Constitution. The chancery court ruled that it had subject matter jurisdiction and denied the State's Rule 12.02(1); however, the chancery court granted the State's Rule 12.02(6) motion finding that the petitioner failed to state a claim upon which relief could be granted. On appeal, the petitioner challenges Tennessee Code Annotated § 39–17–1307(b)(1)(B) as applied to him under the Second Amendment to the United States Constitution; article I, section 26 of the Tennessee

Constitution, the Privileges and Immunities Clause, the Equal Protection Clause, and the Full Faith and Credit Clause. The State raises one issue on appeal, asserting that the chancery court did not have subject matter jurisdiction and the appeal should be dismissed for that reason. We affirm the chancery court's finding that it has subject matter jurisdiction. As for the decision to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Tenn. R. Civ. P. 12.02(6), we have determined that the complaint for declaratory relief states facts sufficient to demonstrate the existence of an actual controversy concerning the matter at issue; therefore, the chancery court erred by granting the State's motion pursuant to Rule 12.02(6) instead of rendering a declaratory judgment as the facts and law require. Accordingly, the complaint for declaratory relief is reinstated and this case is remanded for further proceedings consistent with this opinion.

David Scott Blackwell, (hereinafter "Petitioner"), was convicted of three felony drug offenses in the State of Georgia in 1989 and sentenced to nine years of incarceration, serving five years in prison and four years on probation. In 2003, Petitioner received a full pardon from the Georgia Board of Pardons and Paroles, which is the entity entitled to grant pardons under the Georgia Constitution. The pardon expressly provided that Petitioner's firearm rights were restored.

***2** When Petitioner moved to Tennessee, he learned that Tennessee Code Annotated § 39–17–1307(b)(1)(B) makes it a Class E felony for a person, who has been "convicted of a felony involving the use or attempted use of force, violence or a deadly weapon" or who has been "convicted of a felony drug offense," to possess a firearm as that term is defined in Tennessee Code Annotated § 39–11–106. [1] In order to determine if his Georgia pardon exempted him from the application of Tennessee Code Annotated § 39–17–1307(b)(1)(B), and to avoid the risk of being charged with a felony should he possess a firearm in Tennessee, Petitioner asked his state representative to request a written opinion of the Attorney General of Tennessee concerning the right of a Tennessee resident who had received a full pardon of felony drug offenses in another state to purchase and possess a firearm in Tennessee. On October 29, 2009, the Attorney General issued an opinion that Tennessee Code Annotated § 39–17–1307(b)(1)(B) (2007) prohibited a person convicted of a felony drug offense from possessing a handgun, including a pardoned out-of-state felon. [2]

1 Tennessee Code Annotated § 39–11–106(11) defines a firearm as "any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use ."

2 It should be noted that the Attorney General opinion requested by Petitioner's state representative and referenced by the parties and the trial court, which was dated October 20, 2009, analyzed the issue under Tennessee Code Annotated § 39–17–1307(b)(1) as it read prior to a 2008 amendment. *See* Tenn. Op. Atty. Gen. No. 09–168 (Oct. 20, 2009). The previous version of the statute prohibited the possession of "handguns." Tennessee Code Annotated § 39–17–1307(b)(1) was amended effective July 1, 2008, and the amendment replaced the term "handgun" with "firearm." *See* 2008 Tenn. Pub. Acts 1044–1045. Thus, the statute as amended in 2008 should have been the subject of the Attorney General's 2009 Opinion, not the prior version.

On April 29, 2010, Petitioner filed a Verified Complaint in the Chancery Court for Davidson County seeking a declaration that Tennessee law governing the possession of firearms as applied to him was in violation of the United States and Tennessee Constitutions and that he may lawfully purchase and possess firearms and handguns in the State of Tennessee. The complaint named the Governor, the Tennessee Attorney General, and the State of Tennessee as defendants in the action. On July 13, 2010, the defendants filed a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12.02(1) for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted pursuant to Tenn. R. Civ. P. 12.02(6). An amended motion to dismiss was filed on September 28, 2010. Petitioner subsequently amended his complaint on September 29, 2010, by adding two additional defendants, the Davidson County District Attorney General and the Williamson County District Attorney General (hereinafter, we refer to the defendants collectively as "the State"); however, the motions to dismiss were not withdrawn and were subsequently heard.

Following a hearing on the State's motions, the chancery court denied the State's Rule 12.02(1) motion to dismiss for lack of subject matter jurisdiction; however, the court granted the State's Rule 12.02(6) motion to dismiss the Complaint for failure to state a claim upon which relief could be granted under the Full Faith and Credit Clause, the Due Process Clause of the Second

and Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Privileges and Immunities Clause of Article IV of the Constitution.

On December 7, 2010, Petitioner filed a Motion to Alter or Amend Judgment contending that the order failed to address the claims asserted against the two district attorney generals and failed to address the state constitutional claims. On March 3, 2010, the chancery court issued an order amending its previous order to include the district attorney generals; the court also ruled that Petitioner failed to state a claim upon which relief could be granted as it pertained to Petitioner's claim for relief pursuant to article I, section 26 of the Tennessee Constitution. As a result, all of Petitioner's claims for a declaratory judgment were dismissed pursuant to Tenn. R. Civ. P. 12.02(1) and (6). This appeal followed.

***3** We begin our analysis by addressing the State's sole issue on appeal, that of subject matter jurisdiction.

ANALYSIS

I.

SUBJECT MATTER JURISDICTION

In its Tennessee Rule of Civil Procedure 12.02(1) motion to dismiss, the State argued that the chancery court lacked subject matter jurisdiction to preside over this action. The chancery court ruled that it had subject matter jurisdiction, citing *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749 (Tenn.2006), which the court read to permit chancery courts to rule on the constitutionality of criminal statutes, although the court lacked jurisdiction to enjoin enforcement of a criminal statute.

The State asserts that the chancery court lacked subject matter jurisdiction because a court may only entertain an action for declaratory relief if the court could have entertained an original action based upon the same subject matter, relying on our Supreme Court's ruling in *Zirkle v. City of Kingston*, 217 Tenn. 210, 396 S.W.2d 356, 363 (Tenn.1965). As the chancery courts of Tennessee do not have original jurisdiction over criminal cases, [3] the State argues that the Chancery Court of Davidson County did not have subject matter jurisdiction to render a declaratory judgment concerning the application of a criminal statute. We have concluded that the chancery court has subject matter jurisdiction over the petition for declaratory relief on the constitutionality of Tennessee Code Annotated § 39–17–1307(b)(1)(B) as applied to the Petitioner.

3 Tennessee Code Annotated § 16–10–102 confers exclusive jurisdiction over criminal cases upon the circuit courts, except in counties which have established criminal courts, in which case, exclusive jurisdiction of criminal matters rests with the criminal courts.

Before we examine the *Zirkle* decision relied upon by the State in support of their argument, we find it pertinent to discuss the Tennessee Supreme Court's decision in *Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S.W. 565 (Tenn.1927), which also dealt with the issue of jurisdiction over a declaratory judgment action. The petitioners in *Buckner*, owners of a billiard parlor, filed suit against the sheriff of Unicoi County, foreman of the grand jury, and the district attorney general, under the provisions of the then Declaratory Judgments Law, seeking a declaration that chapter 104 of the 1925 Private Acts of the State of Tennessee, as amended by chapter 290 of the 1925 Private Acts, which made it unlawful to operate "pool and billiard rooms for profit and pay in counties of the state having a population of not less than 10,115, nor more than 10,125, by the federal census of 1920, or any subsequent federal census," was unconstitutional. [4] *Id.* at 565–66.

4 The complaint stated that Unicoi County had the requisite population at that time to come under the purview of the act. *Buckner*, 300 S.W. at 565.

In the complaint, then referred to as the "bill," the plaintiffs stated they were:

> [E]ngaged in the operation of pool and billiard rooms for pay and profit, in Unicoi county, the population of which county brings it within the application of said statute, and that complainants have made investments of money in their said business, so that their property rights would be destroyed by the enforcement of the statute.

Id. at 566. The complaint further stated that the plaintiffs "had been served with notice by the sheriff that he would procure warrants against them and close their places of business and continue to prosecute them for every separate offense committed by them contrary to the provisions of said statute, etc." *Id.* The chancellor dismissed the bill on demurrer, and the plaintiffs appealed.

***4** The Supreme Court reversed the dismissal of the bill on demurrer relying in part on *Lindsey v. Drane*, 154 Tenn. 458, 285 S.W. 705 (Tenn.1926). The Supreme Court noted that *Lindsey* "entertained the bill of the complainants filed against the District Attorney General for a declaratory judgment as to the constitutionality of a statute, penal in its nature, affecting the property rights of the complainants." *Id.* at 566, 285 S.W. 705. The court did, however, note that the jurisdiction of the chancery court to render the declaratory judgment had not been challenged in *Lindsey*. Nevertheless, the court went on to state: "This court is committed to a liberal interpretation of the Declaratory Judgments Act so as to make it of real service to the people and to the profession." *Id.* (quoting *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S.W. 901 (Tenn.1925)).

Upon the Supreme Court's determination in *Buckner* that the plaintiffs had sufficiently established in the complaint that "they have a special interest in the question of the constitutionality of the penal statute described in the bill, distinct from the interest of the public generally, in that their investment and property rights will be directly affected and injured by its enforcement," the court held that the plaintiffs were entitled to:

> Maintain an action for the determination of the proper construction or constitutionality of such a statute, under the provisions of the Declaratory Judgments Law, and the bill in the present cause was properly filed against the sheriff, in view of the averment of the bill that the sheriff had given notice of his intention to proceed against complainants.

Id. The court noted however that the jurisdiction of the chancery court "did not include the power to issue an *injunction* against officers of the state or county charged with the enforcement of penal laws." *Id.* (citing *Lindsey*, 154 Tenn. 458, 285 S.W. 705) (emphasis added). The court therefore reversed the chancery court's dismissal of the complaint and ordered that "a decree be entered in this court declaring the said chapter 104 of the Private Acts of 1925 and its amendatory act unconstitutional and void, in accordance with the prayer of the bill, but the injunctive relief sought will be denied." *Id.* at 567, 285 S.W. 705.

In *Zirkle*, the decision relied upon by the State, the plaintiffs sought an injunction to restrain the defendant from trespassing on property and maintaining sewer and water lines, a declaration of rights as to the sewer and water lines, and an award of damages for conversion under the theories of unjust enrichment or quasi-contract. *Zirkle*, 396 S.W.2d at 358. When the Chancery Court for Roane County sustained the defendant's demurrer, the plaintiffs appealed. *Id.* at 359. In the 1965 opinion, the court determined that "the complaint stated no cause of action of which equity had jurisdiction, nor did it state a case of inherent jurisdiction, and since there was an adequate remedy at law the demurrer was properly sustained." *Id* at 356. The only paragraph in *Zirkle* in which the court addressed the issue of jurisdiction stated:

> ***5** Finally, complainants claim chancery jurisdiction because they seek a declaration of rights. Apparently, the gist of this prayer is that they seek a declaratory judgment, as authorized by T.C.A. § 23–1102. A declaratory judgment is proper in chancery, but only if chancery originally could have entertained a suit of the same subject matter. Gibson, Suits in Chancery § 36, n. 62 (5th ed.1955). Since chancery does not have jurisdiction of the complainants' suit under any of their theories—injunction, unjust enrichment, conversion—it cannot take jurisdiction to enter a declaratory judgment.

Id. at 363.

We acknowledge, as the State asserts, that the Supreme Court has not explicitly overruled *Zirkle;* nevertheless, we find that the court has clearly departed from the unequivocal declaration in the foregoing paragraph in at least two cases: *Davis–Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520 (Tenn.1993) and *Clinton Books, Inc. v. City of Memphis,* 197 S.W.3d 749 (Tenn.2006). [5] Therefore, contrary to the State's insistence, we find it appropriate to not only consider, but to rely upon the Supreme Court's subsequent determinations that, at least in some cases and with some limitations, the chancery court has subject matter jurisdiction to rule upon declaratory judgment actions as they pertain to the application of criminal sanctions to petitioners. The Supreme Court's decisions in *Davis–Kidd* and *Clinton Books,* pertained to actions for declaratory relief concerning statutes that assessed criminal penalties for violations thereof, and in none of these cases did the court find that the chancery court lacked subject matter jurisdiction.

5 Notably, *Zirkle* made no reference to the Supreme Court's previous decision in *Buckner.*

In *Davis–Kidd,* the Supreme Court addressed the constitutionality of a statute that prohibited the display of materials deemed harmful to minors and a companion nuisance statute. *Davis–Kidd,* 866 S.W.2d at 521. More important to this action than the rulings on the constitutionality of the statute, however, is the procedural posture of the case, which was brought as a declaratory judgment action in the Chancery Court of Davidson County seeking a declaration that the statutes were facially unconstitutional under the federal and state constitutions. *Id.* at 522. The statutes at issue made it a criminal offense to display materials that were harmful to minors as defined in the statute. *Id.* Thus, *Davis–Kidd* provides an example of a declaratory judgment action that was commenced and maintained in a court of equity wherein the petitioner challenged the constitutionality of a criminal statute as applied and our Supreme Court considered the merits of the case and did not find that the court of equity lacked subject matter jurisdiction.

In *Clinton Books,* our Supreme Court addressed whether a trial court had jurisdiction to issue a temporary injunction barring enforcement of a statute regulating the hours during which an adult-oriented business could operate, which if violated would result in criminal penalties. *Clinton Books,* 197 S.W.3d at 751. The court answered this in the negative holding that the long-standing rule in this State is that "state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional." *Id.* at 752 (citing *Alexander v. Elkins,* 132 Tenn. 663, 179 S.W. 310, 311 (Tenn.1915); *J.W. Kelly & Co. v. Conner,* 122 Tenn. 339, 123 S.W. 622, 637 (Tenn.1909)). In so holding, the court noted that nothing in their decisions in *Planned Parenthood* nor *Davis–Kidd,* which dealt with declaratory actions seeking relief from statutes that provided for the imposition of criminal penalties if violated, altered the long-standing rule. *Id.* at 752–53. The court held that the omission of any discussion of the trial court's jurisdiction should not be interpreted as altering the general rule prohibiting state equity courts from *enjoining* enforcement of a criminal statute. *Id.* at 753. [6] The court further noted that criminal proceedings had already been instituted for violation of the statute at issue and that the "issue of validity is not so complex that it cannot be resolved by a court with criminal jurisdiction if raised as a defense in a criminal action." *Id.* at 754.

6 An exception to this is when the Supreme Court has already found the statute unconstitutional, at which point "no controversies are required to be settled by a criminal court, and the equity court is not invading the criminal court's jurisdiction by issuing an injunction." *Clinton Books,* 197 S.W.3d at 753.

***6** The court next addressed whether the trial court erred in consolidating the request for injunctive relief with the declaratory judgment action and addressing the constitutionality of the statute. *Id.* at 755. The court ruled that the trial court erred in addressing the constitutionality of the statute because it failed to order consolidation or give notice to the parties that it intended to consolidate the hearings on the declaratory judgment action and the injunction action. *Id.* Thus, due to its failure to comply with Tenn. R. Civ. P. 65.04(7), the trial court could not have addressed the constitutionality of the statute at the time of the hearing, which the parties believed and desired to be only on the issue of injunctive relief against the enforcement of the statute. *Id.* The Supreme Court then reversed and *remanded* the case to the trial court for a hearing on the merits of the declaratory judgment action. *Id.* at 755–56. Had our Supreme Court determined that the trial court lacked jurisdiction to entertain an action for declaratory relief on the statute, a violation of which would result in criminal penalties, the court would not have remanded the action for a hearing on the merits of the declaratory judgment action; instead, the court would have remanded with instruction

to dismiss the action for lack of subject matter jurisdiction. *See Cnty. of Shelby v. City of Memphis*, 211 Tenn. 410, 365 S.W.2d 291 (Tenn.1963) (noting that subject matter jurisdiction may be raised at any time by the parties or by the appellate court sua sponte on appeal).

For the foregoing reasons, we have concluded that the chancery court had subject matter jurisdiction over Petitioner's complaint for declaratory relief concerning the constitutionality of Tennessee Code Annotated § 39–17–1307(b)(1)(B) as applied to him.[7] Accordingly, we affirm the trial court on this issue.

7 Nevertheless, as *Clinton Books* clearly stated, the chancery court "lack[s] jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional." *Clinton Books*, 197 S.W.3d at 752.

II.

RULE 12.02(6) MOTIONS TO DISMISS DECLARATORY JUDGMENT ACTIONS

Next, we consider whether the trial court erred by granting the State's Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss instead of denying the motion and, when the case was in the proper posture, entering a declaratory judgment to afford Petitioner relief from the uncertainty of whether he may lawfully possess a firearm in Tennessee.

As our Supreme Court explained in *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn.2011), when considering a Rule 12.02(6) motion to dismiss:

> [C]ourts " 'must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.' " *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn.2007) (quoting *Trau–Med*, 71 S.W.3d at 696); *see Leach v. Taylor*, 124 S.W.3d 87, 92–93 (Tenn.2004). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn.2002). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo. *Brown*, 328 S.W.3d at 855; *Stein*, 945 S.W.2d at 716.
>
> ***7** *Webb*, 346 S.W.3d at 425–26 (some internal citations omitted).

The foregoing notwithstanding, because this is a declaratory judgment action, as distinguished from a tort action or a contract action in which the plaintiff is seeking monetary damages, to recover property, or other affirmative relief, the standard by which we review a Rule 12 dismissal of the complaint is somewhat different from that applied in most civil actions. This is because, as this court explained in *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725 (Tenn.Ct.App.2005), Tennessee Rule of Civil Procedure 12.02(6) motions to dismiss are seldom appropriate in declaratory judgment actions *provided* there is an actual controversy that may be resolved by means of a declaration of the parties' respective rights. *Id.* at 730 (citing *Glover v. Glendening*, 376 Md. 142, 829 A.2d 532, 539 (Md.2003)).

When considering a motion to dismiss a declaratory judgment action it is important to recognize that the general purpose of a declaratory judgment action is not to award affirmative relief, but "*to resolve a dispute, afford relief from uncertainty with respect to rights, status, and other legal relations.*" *Wade*, 178 S.W.3d at 730 (emphasis added). In this context, the fact that the party seeking declaratory relief is not entitled to a favorable judgment—that he, she, or it will not prevail on the issue in controversy—does not mean that the parties are not entitled to the "relief from uncertainty that a declaratory judgment affords." *Id.* at 730. As we explained in *Wade:*

> The prevailing rule is that *when a party seeking a declaratory judgment alleges facts demonstrating the existence of an actual controversy concerning a matter covered by the declaratory judgment statute, the court should not grant a Tenn. R. Civ. P. 12.02(6) motion to dismiss but, instead, proceed to render a declaratory judgment as the facts and law require. Hudson*

v. Jones, 278 S.W.2d 799, 804 (Mo.Ct.App.1955); 1 Walter H. Anderson, *[Actions for Declaratory Judgments]* § 318, at 740 (2d ed.1951).

The Tennessee Supreme Court followed this protocol in *Frazier v. City of Chattanooga*, 156 Tenn. 346, 1 S.W.2d 786 (1928). A resident of Chattanooga sought a declaratory judgment concerning whether a private act conferring powers on the City of Chattanooga had been repealed by implication by another private act. The City filed a demurrer, being the former equivalent of today's Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim. Rather than ruling against the resident on the merits of the case, the trial court sustained the City's demurrer (dismissed the action). The Tennessee Supreme Court observed: "*It seems to us that the better practice in a case brought under the Declaratory Judgment Law ... is to enter a decree, sometimes referred to as a 'declaration,' defining the rights of the parties under the issues made, even though such decree is adverse to the contentions in the bill.*" *Frazier*, 1 S.W.2d at 786.

***8** *Id.* at 730 (emphasis added). Thus, what is essential is that the party seeking the declaratory judgment state facts sufficient to demonstrate the existence of an actual controversy concerning the matter at issue in the declaratory judgment action. *See Hudson*, 278 S.W.2d at 804; *see also* 1 Walter H. Anderson, *Actions for Declaratory Judgments* § 318, at 740.

Based upon the prevailing rule, the party seeking a declaratory judgment is not required to allege facts in its complaint demonstrating that it is entitled to a favorable decision. *Wade*, 178 S.W.3d at 730 (citing *Maguire v. Hibernia Sav. & Loan Soc'y*, 23 Cal.2d 719, 146 P.2d 673, 678 (Cal.1944) (holding a complaint for declaratory relief which recites the dispute between the parties and prays for a declaration of rights, states facts sufficient to constitute a cause of action against a motion to dismiss for insufficiency of the complaint although it is on the wrong side of the controversy); *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186 (Tenn.2000) (holding the essential element to be that a justiciable controversy exists)) (emphasis added).

The above principles were applied in *Wade*, an action in which the Cannon County School Board filed a Declaratory Judgment action seeking to avoid binding arbitration with Goldy Wade, a non-tenured teacher, as it pertained to the School Board's decision to not extend Ms. Wade's contract of employment beyond its one-year term. *Id.* at 726. At issue were the parties' respective rights under a collective bargaining agreement. Ms. Wade and the Cannon County Education Association responded to the complaint by filing a Tennessee Rule of Civil Procedure 12.02(6) Motion to Dismiss for failure to state a claim. The trial court dismissed the complaint stating "there was no state of facts the School Board could prove that would warrant relief." *Id.* On appeal, we noted that Rule 12.02(6) motions are rarely appropriate in declaratory judgment actions and reversed the trial court, reinstated the complaint for declaratory judgment, and remanded the case for further proceedings. *Id.*

It is also significant that the trial court dismissed the complaint for a declaratory judgment in *Wade* upon a finding that "the parties had entered into a binding [collective bargaining] agreement to submit such grievances to arbitration." *Id.* That finding, however, was undermined because the trial court dismissed the complaint instead of declaring the parties' rights as the school board had requested. As for the ruling in *Wade*, we acknowledge the case was not in the proper posture for the trial court to make such a summary ruling concerning the parties' respective rights when the motion to dismiss came on for hearing. However, had the court denied the motion to dismiss, the parties could have filed motions for summary judgment, thereby putting the case in the proper posture for a declaration of the parties' respective rights as it pertained to the collective bargaining agreement and Ms. Wade's employment. As we explained in our remand instructions:

> ***9** If the trial court, in its discretion, determines that this is an appropriate case for summary judgment, then it should determine whether and under what conditions the School Board would be required to submit its decision not to renew Mr. Wade's contract to binding arbitration under the collective bargaining agreement.

Id. at 731.

The foregoing notwithstanding, there are circumstances where a Rule 12.02(6) dismissal of a declaratory action is appropriate, for example, when the complaint fails to establish that a justiciable controversy exists. If that is the case, dismissal is appropriate.

If not, the trial court should delve into the merits of the declaratory judgment action and determine whether it is or is not more appropriate to issue a declaratory judgment on the controverted issue, even if the declaration of rights is adverse to the plaintiff, for the end result is that a controversy is put to rest.

III.

PETITIONER'S COMPLAINT FOR A DECLARATORY JUDGMENT

As Petitioner states in his complaint for declaratory judgment, he seeks to determine whether he may "lawfully purchase firearms and possess them in his home and to engage in otherwise lawful hunting activity" in Tennessee. [8] Petitioner insists this action is necessary to remove the uncertainty of whether Tennessee Code Annotated § 39–17–1307(b)(1)(B) may apply to him because, if it does, he would be committing a felony if he purchased or possessed a firearm in Tennessee. The factual basis upon which he asserts the statute does not apply to him is because he received a full pardon from the State of Georgia with the "Restoration of the Right to Bear Arms" expressly stated in bold letters on the pardon. [9] He insists that Tennessee may not apply Tennessee Code Annotated § 39–17–1307(b)(1)(B) against him based upon certain constitutional rights, specifically the full faith and credit clause of the United States Constitution, the Second Amendment to the United States Constitution; the Privileges and Immunities Clause, the Equal Protection Clause of the United States Constitution, and article I, section 26 of the Tennessee Constitution.

8 Petitioner states in his brief that he only seeks the collective rights of "purchasing and possessing firearms" and that nothing in his petition addresses "the separate issue of 'wearing' of arms as in the case of carrying a concealed pistol, for example. That is the issue in this appeal. Mr. Blackwell seeks only the rights to lawfully purchase firearms and possess them in his home and to engage in otherwise lawful hunting activity...."

9 Petitioner also noted that he received certification from the Federal Bureau of Investigation that his right to purchase and own a firearm was not obstructed by federal law. This is because under federal law, a pardoned felon is not in violation of 18 U.S.C. § 922(g), if his civil rights have been restored under federal law. *See Beecham v. United States,* 511 U.S. 368, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994).

It is readily apparent from our review of two comprehensive memorandum opinions rendered by the chancery court that the chancellor concluded that Petitioner had alleged sufficient facts to demonstrate that an actual controversy concerning the application of Tennessee Code Annotated § 39–17–1307(b)(1)(B) to Petitioner exists, and we agree with this determination. Although not declared by the trial court, the obvious inference from the chancellor's rulings is that Petitioner may not lawfully purchase or possess a firearm in Tennessee. A thorough examination of the chancellor's analysis makes it clear the court determined that Petitioner would not be the prevailing party. Nevertheless, as was the case in *Wade,* we are hampered by the fact that Petitioner's Complaint for Declaratory Judgment was dismissed pursuant to Tennessee Rule of Civil Procedure 12.02(6) for failure to state a claim upon which relief can be granted without an expressed declaration of the parties' respective rights. *See Wade,* 178 S.W.3d at 730; *see also Frazier,* 1 S.W.2d at 786 (stating "the better practice in a [declaratory judgment action] is to enter a decree, sometimes referred to as a 'declaration,' defining the rights of the parties under the issues made, even though such decree is adverse to the contentions of the bill.").

***10** In order to preserve judicial resources, our preference would be to rule on the issues presented as the Supreme Court did in *Lindsey,* 154 Tenn. 458, 285 S.W. 705, and *Buckner,* 156 Tenn. 278, 300 S.W. 565. If we decided the issues without remand, our decision would not infringe upon the rights of any party *provided* we affirmed the trial court in all respects. If, however, we were to disagree with the trial court, in whole or in part, concerning any of the constitutional grounds and rule in favor of Petitioner, the State would have every reason to complain. This is because the State has not filed an Answer to the Complaint, a fact that is acknowledged by Petitioner in his reply brief. [10] Moreover, we cannot rule out the possibility that additional facts may need to be considered if the case is to be decided on the merits. Even though it is unlikely that the filing of an Answer

or the introduction of additional facts will be of consequence, we feel compelled to afford the State the opportunity to file an Answer to the Complaint, and both parties the opportunity to present additional facts, if they so choose.

10 In the appellant's brief, Petitioner asked this Court to reverse and remand "with directions to grant the Petition for Declaratory Relief." However, in Petitioner's Reply Brief, he stated: "With the pun only partially intended, Petitioner believes he has 'jumped the gun.' Given that the State had filed a Motion to Dismiss and not an Answer the requested remedy should, instead, be that this Court reverse the Chancellor's Order dismissing the case on the merits and remand for further proceedings."

Accordingly, we reverse the grant of the State's Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss, reinstate the Complaint, and remand this action to the trial court for further proceedings consistent with this opinion.

IN CONCLUSION

The judgment of the trial court is affirmed in part, reversed in part, and this matter is remanded with costs of appeal assessed against the defendants.

End of Document

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

DAVID SCOTT BLACKWELL Petitioner, vs. BILL HASLAM, Governor of the State Of Tennessee in his official capacity only; ROBERT E. COOPER, JR., Attorney General and Reporter for the State of Tennessee; VICTOR S. TORRY JOHNSON, District Attorney General for the 20th Judicial District, in his official capacity only; KIM R. HELPER, District Attorney General for the 21st Judicial District, in her official capacity only; and the STATE OF TENNESSEE, Respondents.	)	NF No. 10-0739-III

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D.C. & M.

MEMORANDUM AND ORDER

This is a declaratory judgment action filed pursuant to Tennessee Code Annotated § 29-14-102 and 42 U.S.C. § 1983, and for recovery of costs and attorneys' fees pursuant to 42 U.S.C. § 1988. The case arises out of the Petitioner's conviction and subsequent pardon for three felony drug offenses in Georgia. The Petitioner was granted a full pardon by the State of Georgia that expressly restored his right to possess a firearm. The Petitioner now resides in Tennessee and desires to purchase and possess firearms. The issue which spurred the lawsuit is that Tennessee Code Annotated § 39-17-1307(b)(1)(B) makes it a Class E felony offense for a person, who has been "convicted of a felony

involving the use or attempted use of force, violence or a deadly weapon" or who has been "convicted of a felony drug offense," to possess a firearm in Tennessee. The Petitioner filed this lawsuit seeking a declaration that, by virtue of his Georgia pardon, he would not be in violation of Tennessee Code Annotated §§ 39-17-1307(b)(1)(B) and 39-17-1316(r)(1) by purchasing or possessing a firearm in Tennessee.

The case is back before this Court upon remand from the Tennessee Court of Appeals. That Court has ruled (1) this Court has subject matter jurisdiction and (2) further proceedings before the trial court are required to afford each side the opportunity to add whatever facts they choose.

The latter opportunity to add facts has occurred. The State has filed an answer, and, after reviewing the State's answer, the Petitioner has represented that it has no more facts to allege in any further amended complaint. Thus, there are no additional facts beyond those alleged in the complaint which are admitted as true by the State. Under these circumstances, each side has appropriately[1] filed competing motions for judgment on the pleadings.

[1] As cited and quoted in the Petitioner's papers, "Where the allegations of the complaint are admitted in the answer, the subject matter thereof is removed as an issue, no proof is necessary, and it becomes conclusive on the parties." *Rast v. Terry*, 532 S.W.2d 552 (Tenn. 1976). "Admissions in pleadings are judicial (conclusive) admissions, conclusive against the pleader until withdrawn or amended....This is so because pleadings are for the purpose of notifying adversary and the court of the contentions of the pleader and thus defining the issues. If a fact alleged in a pleading is admitted in the pleading of the adversary, then that fact ceases to be an issue in the case and there is no need to prepare or hear evidence on the subject." *John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp.*, 642 S.W.2d 151, 152 (Tenn. Ct. App. 1982).

After considering the parties' motions, the Court concludes that the Petitioner prevails. The Court's decision is based upon the following facts, authorities and reasoning.

Facts

The undisputed facts on which this case is based are quoted as follows from the Court of Appeals opinion:

> David Scott Blackwell, (hereinafter "Petitioner"), was convicted of three felony drug offenses in the State of Georgia in 1989 and sentenced to nine years of incarceration, serving five years in prison and four years on probation. In 2003, Petitioner received a full pardon from the Georgia Board of Pardons and Paroles, which is the entity entitled to grant pardons under the Georgia Constitution. The pardon expressly provided that Petitioner's firearm rights were restored.
>
> When Petitioner moved to Tennessee, he learned that Tennessee Code Annotated § 39–17–1307(b)(1)(B) makes it a Class E felony for a person, who has been "convicted of a felony involving the use or attempted use of force, violence or a deadly weapon" or who has been "convicted of a felony drug offense," to possess a firearm as that term is defined in Tennessee Code Annotated § 39–11–106.[1] In order to determine if his Georgia pardon exempted him from the application of Tennessee Code Annotated § 39–17–1307(b)(1)(B), and to avoid the risk of being charged with a felony should he possess a firearm in Tennessee, Petitioner asked his state representative to request a written opinion of the Attorney General of Tennessee concerning the right of a Tennessee resident who had received a full pardon of felony drug offenses in another state to purchase and possess a firearm in Tennessee. On October 29, 2009, the Attorney General issued an opinion that Tennessee Code Annotated § 39–17–1307(b)(1)(B) (2007) prohibited a person convicted of a felony drug offense from possessing a handgun, including a pardoned out-of-state felon.[2]

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[1]Tennessee Code Annotated § 39–11–106(11) defines a firearm as "any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use."

[2]It should be noted that the Attorney General opinion requested by Petitioner's state representative and referenced by the parties and the trial court, which was dated October 20, 2009, analyzed the issue under Tennessee Code Annotated § 39–17–1307(b)(1) as it

On April 29, 2010, the Petitioner filed this lawsuit for a declaration of his rights to possess firearms in Tennessee.

Analysis and Decision

The Court has concluded that the Petitioner prevails because Petitioner's counsel, on remand, has demonstrated and persuaded this Court that Mr. Blackwell's receipt of a pardon from the State of Georgia – which explicitly restores his firearm rights – is sufficient for this Court to find that the Tennessee firearm prohibition of section 39-17-1307(b)(1)(B) can not be applied to the Petitioner. In so concluding the Court quotes excerpts from and adopts the following argument of Petitioner's counsel on the Full Faith and Credit Clause of the U.S. Constitution. (*See* Memorandum of Law In Support of Judgment on the Pleadings, April 23, 2012, pages 14-15, 23-24, 29, 33).

Article IV, §1 of the United States Constitution generally requires states to recognize and give effect to the "public acts, records, and judicial proceedings" of other states. There is, however, a "public policy" exception to full faith and credit: a forum state is not required to apply another state's law in violation of its own legitimate public policy. *See Seiller & Handmaker, LLP v. Finnell*, 165 S.W.3d 273, 276-77 (Tenn. Ct. App. 2004). This exception, though, is tempered by two well-recognized doctrines. First, "a party who invokes the public policy exception must identify the public policy that is

read prior to a 2008 amendment. *See* Tenn. Op. Atty. Gen. No. 09–168 (Oct. 20, 2009). The previous version of the statute prohibited the possession of "handguns." Tennessee Code Annotated § 39–17–1307(b)(1) was amended effective July 1, 2008, and the amendment replaced the term "handgun" with "firearm." *See* 2008 Tenn. Pub. Acts 1044–1045. Thus, the statute as amended in 2008 should have been the subject of the Attorney General's 2009 Opinion, not the prior version.

offended by the foreign judgment and has a 'stern and heavy' burden." *Id.* at 277 (quoting *Biogen Distrib., Inc. v. Tanner*, 842 S.W.2d 253, 256 (Tenn. Ct. App. 1992)). Second, a "judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law." *Trustmark Nat. Bank v. Miller*, 209 S.W.3d 54, 58 (Tenn. Ct. App. 2006) (quoting *Four Season Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984)).

In this case, the State asserts that the public policy exception applies such that Tennessee does not have to accord full faith and credit to Petitioner's Georgia pardon. The Court rejects this argument. The Court adopts Petitioner's argument that Tennessee has a clear policy to restore civil disabilities upon receipt of a pardon as established in case law. "[A] full pardon restores one's civil rights and remits all punishment associated with the conviction...." *State v. Blanchard*, 100S.W.3d 226, 231 (Tenn. Crim. App. 2002). "The purpose of [the Restoration of Rights] law was to wipe out the transgressions of the offending person and to give him another chance in society." *Bryant v. Moore*, 279 S.W.2d 517, 518 (Tenn. 1995). The same is true with Georgia pardons, as demonstrated in this case, with the restoration of the Petitioner's civil rights. The semantics that Tennessee pardons forgive but do not forget, (*see State v. Blanchard*, 100 S.W.3d 226 (Tenn. Crim. App. 2002)), whereas Georgia pardons do both, is immaterial.[2] Thus, there

[2] At least one other state employing the very same "forgive but not forget" approach extended full faith and credit to the pardon of another state to restore the right to obtain a concealed weapon permit. *See Schlenther v. Dep't of State, Div. of Licensing*, 743 So.2d 536, 537 (Fla. Dist. Ct. App. 1998) (Connecticut restoration of appellant's civil rights following his Connecticut felony conviction was entitled to full faith and credit in Florida; "At the time appellant moved to Florida in 1973, he did so in

is no inconsistency between Tennessee and Georgia's public policies regarding pardons. Accordingly, the public policy exception to application of the Full Faith and Credit Clause does not apply in this case. The result is that Tennessee must give full faith and credit to Petitioner's Georgia pardon, including restoration of rights of firearms possession.

But even if this Court is wrong in its foregoing analysis of the similarity of the policy informing pardons in Tennessee and Georgia, the Petitioner nevertheless prevails on his full faith and credit argument. The mere fact that states have different laws and procedures is insufficient by itself to apply the public policy exception and to refuse to recognize Mr. Blackwell's pardon. *Trustmark Nat. Bank v. Miller*, 209 S.W.3d 54, 58 (Tenn. Ct. App. 2006) (applying a foreign lien priority judgment that differs from Tennessee priority rules).

Tennessee Court have regularly extended full faith and credit to out-of-state judgments which conflict with Tennessee policy and statutes. For example, Tennessee courts have consistently enforced foreign judgments for gambling debts:

> Holding to American attitudes and prohibitions that predate the Revolutionary War, Tennessee considers gambling contrary to public policy of this state. Tenn. Code Ann. § 39-17-501(1) (Supp. 2001). In fact both gambling and the promotion of gambling are misdemeanors, Tenn. Code Ann. §§ 39-17-502 and 503 (1997), and gambling debts incurred in Tennessee cannot be collected in Tennessee's courts. Tenn. Code Ann. § 29-19-102 (2000). However, notwithstanding Tennessee's official antipathy toward gambling, our courts have long held that judgments for out-of-state gambling debts are enforceable in Tennessee.

---

full possession of all civil rights of Connecticut citizenship. He did not arrive here under a disability. To the contrary, he arrived as any other citizen, with full rights of citizenship."). The Florida court was not concerned that Schlenther's conviction might also be "forgotten" in the process of being forgiven.

Boardwalk Regency Corp. v. Patterson, No. M1999-02805-COA-R3-CV, 2001 WL 1613892, at *3 (Tenn. Ct. App. Dec. 18, 2001). Similarly, a Tennessee court recently granted full faith and credit to a bigamous marriage upon finding it was recognized by estoppel in the couples' previous state, even though "the applicable statutes, our prior case law, and the public policy of this state prohibit the application of the marriage by estoppel doctrine to void, bigamous marriages." *Farnham v. Farnham*, 323 S.W.3d 129, 140 (Tenn. Ct. App. 2009), *perm. app. denied* (Tenn. May 12, 2010) (quoting *Guzman v. Alvares*, 205 S.W.3d 375, 380-81 (Tenn. 2006)).

Conclusion

In the above analysis, the Court has concluded as a matter of law that the Georgia pardon the Petitioner received in this case – explicitly restoring his firearm rights – is not inconsistent with nor violative of Tennessee's public policy. The authorities and analysis of the Petitioner's brief demonstrate that Tennessee has a statutory policy to restore civil disabilities upon receipt of a pardon just as the Georgia pardon restores civil disabilities. That demonstration renders immaterial the semantics of Tennessee and Georgia law, respectively, "forgive but not forget" versus "forgive and forget." The Court's alternative conclusion is that, like with gambling debts or bigamous marriages, Tennessee shall extend full faith and credit in this case even if its laws and procedures are different. Accordingly, under either alternative the U.S. Constitution requires this Court to give full faith and credit to the Georgia pardon. When that is done, Tennessee Code Annotated

section 39-17-1307(b)(1)(B) does not apply to disqualify the Petitioner from possessing a firearm or purchasing one under section 39-17-1316(r)(1).

It is therefore ORDERED that the Petitioner's Motion For Judgment On The Pleadings is granted to the extent that the Court declares, upon application of the Full Faith and Credit Clause of Article IV, § 1 of the U.S. Constitution, that Tennessee Code Annotated sections 39-17-1307(b)(1)(B) and 39-17-1316(r)(1) do not apply to the Petitioner and that these sections can not prohibit and/or be enforced against the Petitioner to prevent him from possessing and purchasing a firearm in Tennessee. The foregoing Order renders it unnecessary for the Court to decide the Petitioner's other theories regarding the inapplicability of sections 39-17-1307(b)(1)(B) and 39-17-1316(r)(1), and/or that they are unconstitutional.

It is further ORDERED that the Defendant's Motion For Judgment On The Pleadings is denied.

With respect to whether the foregoing declaration by the Court that the Petitioner is entitled to possess a firearm in Tennessee under the Full Faith and Credit Clause of the U.S. Constitution has resulted in a violation of the Petitioner's constitutional rights and/or entitlement to recovery of attorneys' fees, it is ORDERED that Petitioner's counsel, on or before July 13, 2012, shall file a brief and supporting affidavits, as required by Local Rule § 5.05, if Petitioner, in light of the Court granting only the Full Faith and Credit Claim, continues to assert constitutional violations and entitlement to attorneys' fees.

It is also ORDERED that opposition to Petitioner's claims of constitutional violations and/or attorneys' fees shall be filed by July 27, 2012.

Subsequently, the Court shall decide any remaining issues on the papers.

This is not a final order. One shall be issued after the attorneys' fee issue is decided, and at that time court costs shall be taxed to the Defendants.

ELLEN HOBBS LYLE
CHANCELLOR

cc: David L. Raybin
Frank Borger-Gilligan

MAILED
7/2/12

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

DAVID SCOTT BLACKWELL	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 10-0739-III**
	)	
BILL HASLAM, Governor of the State Of Tennessee in his official capacity only; ROBERT E. COOPER, JR., Attorney General and Reporter for the State of Tennessee; VICTOR S. TORRY JOHNSON, District Attorney General for the 20th Judicial District, in his official capacity only; KIM R. HELPER, District Attorney General for the 21st Judicial District, in her official capacity only; and the STATE OF TENNESSEE,	)	
	)	
Respondents.	)	

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MEMORANDUM AND FINAL ORDER AWARDING ATTORNEYS' FEES

This lawsuit is a declaratory judgment action filed pursuant to Tennessee Code Annotated § 29-14-102 and 42 U.S.C. § 1983, and for recovery of costs and attorneys' fees pursuant to 42 U.S.C. § 1988. Determined herein is the Petitioner's claim to recover attorneys' fees.

In a July 2, 2012 Memorandum and Order, this Court ruled as follows:

> It is therefore ORDERED that the Petitioner's Motion For Judgment On The Pleadings is granted to the extent that the Court declares, upon application of the Full Faith and Credit Clause of Article IV, § 1 of the U.S. Constitution, that Tennessee Code Annotated sections 39-17-1307(b)(1)(B)

> and 39-17-1316(r)(1) do not apply to the Petitioner and that these sections can not prohibit and/or be enforced against the Petitioner to prevent him from possessing and purchasing a firearm in Tennessee. The foregoing Order renders it unnecessary for the Court to decide the Petitioner's other theories regarding the inapplicability of sections 39-17-1307(b)(1)(B) and 39-17-1316(r)(1), and/or that they are unconstitutional.

As well, the Court in the July 2, 2012 Memorandum and Order reserved the issue of Petitioner recovering his attorneys' fees to provide the parties an opportunity for additional briefing and affidavits on that issue. Those have now been filed and studied by the Court.

Based on these filings, the Court grants the Petitioner's motion to recover attorneys' fees. Contained below are the Court's conclusions of law, drawn largely from the Petitioner's brief, and the Court's findings of fact.

Conclusions of Law That Fees Shall Be Awarded

1. Essential Elements—The requirements for recovery of attorneys' fees under 42 U.S.C. § 1988 are these:

> § 1988. Proceedings in vindication of civil rights
>
> (a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and

disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections . . . 1983, . . . the court, in its discretion, may allow the prevailing party, . . ., a reasonable attorney's fee as part of the costs, ...

If a party prevails in an action alleging a federal constitutional deprivation, then section 1988 provides that the party may recover an award of attorney fees in State court. *Bloomingdale's by Mail v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992).

2. Winner In Dec Action Qualifies As Prevailing Party—A declaratory judgment—the relief granted to the Petitioner in this case—confers prevailing party status, *Hewitt v. Helms*, 482 U.S. 755 (1987); *Berger v. City of Mayfield Heights*, 154 F.3d 621, 626 (6th Cir. 1998); *Dilaura v. Township of Ann Arbor*, 471 F.3d 666, 671 (6th Cir. 2007); *Consol. Waste Sys., LLC v. Metro Gov't of Nashville & Davidson County*, M2002-02582-COA-R3CV, 2005 WL 154860 (Tenn. Ct. App. June 30, 2005), as is required to recover fees under section 1988.

3. Full Faith and Credit Ruling Does Not Preclude Civil Rights Fee Award—The Court's application of the Full Faith and Credit Clause of Article IV, § 1 of the U.S. Constitution enabled it, pursuant to the doctrine of constitutional avoidance, to resolve the case without reaching the constitutional claims. The Court concludes, however, that such avoidance does not preclude recovery of attorneys fees, as the operative facts of the case concerned enforcement of the Petitioner's Second Amendment rights. In so concluding, the Court relies upon the analogous cases of: *Seals v. Quarterly Cnty. Court of Madison Cnty.*, 562 F.2d 390, 393-94 (6th Cir. 1977), which states that a party who

prevails on state-law claims arising out of a common nucleus of operative fact with constitutional claims is entitled to fees under 42 U.S.C. § 1988; *Seaway Drive-In, Inc. v. Township of Clay*, 791 F.2d 447, 451 (6th Cir. 1986), which held that the test for determining whether fees may be awarded under 42 U.S.C. § 1988 on state-law claims is the same for determining whether the federal court has pendant jurisdiction over those state-law claims; *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), where violation of the Commerce Clause triggered a section 1988 award of attorneys' fees; and *Dennis v. Higgins*, 498 U.S. 439, 443-46, 111 S. Ct. 865, 868-70, 112 L. Ed. 2d 969 (1991), stating that the scope of the Civil Rights statute is vast.

Findings of Fact As to Reasonableness of Fee Amount

As to the amount of the fee award, the recovery is to account for "all the time reasonably spent on the matter." *Northcross v. Board of Education*, 611 F.2d 624, 636 (6th Cir. 1979). In this case Petitioner's counsel has submitted an affidavit suggesting recovery of fees of $26,817.75 and expenses of $902.80. The Court awards those fees and expenses based upon these findings derived from the factors stated in Rule 8, Section 1.5 of the Tennessee Supreme Court Rules.

1. No Objection To Amount—The State has not challenged the reasonableness of the fees or expenses. Its challenge is, instead, that the law as applied to this case does not allow recovery of attorneys' fees at all.

2. Hours and Suggested Rate—The attorney hours total 67.45. The suggested rate is $395 per hour.

3. Time, Labor, Difficulty—As to the hours spent, the Court finds that the facts of the case were not complex, but the legal issues were challenging as the Second Amendment issues were of first impression and rapidly evolving in the law. Also an appeal was involved. Under these circumstances, the expenditure of 67.45 hours is reasonable.

4. Rate—As to the $395 rate, the Court finds that the Petitioner's attorney is highly skilled in this area as established by his resume attached to his July 9, 2012 affidavit.

Additional support for the $395 rate are the facts in the attorney affidavit of:

> My normal rate of billing is $450 per hour. There is one exception made for the Fraternal Order of Police under a long-standing contract of $150 per hour which I considered to be work in the public interest given the necessity of police officers to have competent legal representation.
>
> Although my normal rate of billing in litigation is $450 per hour I am suggesting a rate of $395 per hour which has been the rate of award for attorney's fees in the United States District Federal Court for myself since June of 2010 as reflected in the attached Order of the United States District Court in *Brian A. v. Phil Bredesen, et al*, case number 3:00-0445, page 8. This is a long-standing civil rights case wherein I am serving as local counsel and have directly participated in the litigation for many years. The State of Tennessee is the adversary party in *Brian A.* and is well familiar with the attorney's fee issues in that case. Given that the complexity and novelty of that litigation is comparable in the instant case I believe that the similar rate of $395 per hour is a reasonable rate in this jurisdiction.

From the resume and affidavit, the Court finds the $395 rate is amply justified.

5. Cost Effective Approach—Also having a bearing on the reasonableness of the fees is that the Petitioner used the cost effective method of a motion for judgment on the pleadings instead of a trial.

6. Immaterial Discrepancy—The Court realizes that the total hours 67.45 multiplied by the suggested rate of $395 does not equal $26,817.75. Nevertheless the $26,817.75 is awarded because the reasons for the discrepancy show that the discrepancy is immaterial. Two entries on the billing sheet, attached to the Raybin affidavit, account for the discrepancy. First, there is a May 11, 2012 entry where a flat $10.00 fee is charged where the time expended is less than a quarter of an hour which registers at "0.00" in the "Time" column. The other pertinent entry is July 5, 2012, where the amount of $1,350 at $395.00 per hour would equal 3.42 hours, not 3.00.

Based upon the foregoing, it is ORDERED that the Petitioner is entitled under 42 U.S.C. § 1988 to recover attorneys' fees in this case in the amount of $26,817.75 and $902.80 in expenses.

This is a final order. Court costs are taxed to the Respondents.

Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: David L. Raybin
Frank Borger-Gilligan

RULE 58 CERTIFICATION
A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

CS
Deputy Clerk and Master
Chancery Court

8/17/12
Date

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
PART III

DAVID SCOTT BLACKWELL,	)
	)
Petitioner,	)
	)
v.	)
	)
BILL HASLAM, Governor of the State of Tennessee in his official capacity only and ROBERT E. COOPER, JR., Tennessee Attorney General, VICTOR S. TORRY JOHNSON III, District Attorney of Davidson County, Tennessee in his official capacity only, and KIM R. HELPER, District Attorney of Williamson County, Tennessee in her official capacity only and the STATE OF TENNESSEE,	)
	)
Respondents.	)

AF
No.: 10-0739-III

ORDER

This cause came to be heard on October 5, 2012, on the Motion of Respondents for a Stay of Judgment Pending Appeal. The Respondents have failed to establish the necessary requirements for a stay. Thus, the motion for a stay as to the Second Amendment firearm issue is denied.

The Petitioner does not oppose the separate request for a stay as to the payment of attorney's fees. The Court therefore grants a stay expressly limited to the payment of attorney's fees pending further orders of this Court following any appeal.

The Petitioner does not oppose the Respondents' request that this Court waive a bond or other security. Accordingly, pursuant to Rule 26.06, Tennessee Rules of Civil Procedure this Court waives the bond requirement or other security for the Respondents

since the governmental entity is financially responsible if the appeal is unsuccessful. The named defendants are sued only in their official capacities as necessary parties to the litigation and thus no bond or security is required as to any of the Respondents.

It is therefore ordered that the Respondents' motion for a stay of the judgment concerning the Petitioner's Second Amendment, firearm rights is DENIED; the Respondents' motion for a stay as to that portion of the order regarding attorney's fees is GRANTED; and the Respondents may collectively appeal without the necessity of posting any security or cost bond with the clerk of this Court, this the _____ day of October, 2012.

ELLEN HOBBS LYLE
CHANCELLOR

APPROVED FOR ENTRY:

David L. Raybin, #3385
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Nashville, Tennessee 37219
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(615) 254-4254 fax
Attorney for Petitioner

2013 WL 2295671
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Leonard EMBODY
v.
Robert E. COOPER, Jr.

No. M2012–01830–COA–R3–CV. | March 12, 2013 Session. | May 22, 2013.

Appeal from the Chancery Court for Davidson County, No. 101227–IV; Russell T. Perkins, Chancellor.

Attorneys and Law Firms

Leonard Embody, pro se appellant.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General; Benjamin A. Whitehouse, Assistant Attorney General; for the appellee, Robert E. Cooper, Jr.

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which JOHN W. McCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Opinion

OPINION

D. MICHAEL SWINEY, J.

***1** This appeal arises from a challenge to the constitutionality of Tenn.Code Ann. § 39–17–1307(a)(1), a law restricting the carrying of firearms in Tennessee. Leonard Embody ("Embody") challenged the validity of Tenn.Code Ann. § 39–17–1307(a)(1) [1] in a case filed against Attorney General and Reporter Robert E. Cooper, Jr. ("Respondent") in the Chancery Court for Davidson County ("the Trial Court") on grounds that the law violates the Second Amendment to the United States Constitution and Tenn. Const. Art. I, § 26. The Trial Court upheld the law as constitutional. Embody filed an appeal to this Court. We hold that Tenn.Code Ann. § 39–17–1307(a)(1) is a valid regulation of the carrying of firearms that does not contravene either the Second Amendment or Tenn. Const. Art. I, § 26. We affirm the judgment of the Trial Court.

1 Tenn.Code Ann. § 39–17–1307(a)(1) (Supp.2012) provides: "A person commits an offense who carries with the intent to go armed a firearm, a knife with a blade length exceeding four inches (4"), or a club."

Background

The relevant factual background of this case is both brief and largely agreed upon by the parties. In March 2010, the Tennessee Department of Safety suspended Embody's handgun carry permit on the basis that his continued possession of the permit posed a material likelihood of risk of harm to the public. This action stemmed from a complaint from the Belle Meade Police Department alleging that Embody carried a firearm in public in an unsafe manner. Embody disputed this characterization of his actions, and thereafter requested an administrative hearing to challenge the suspension of his permit. In May 2010, Embody

filed suit in the Chancery Court for Williamson County, challenging the administrative suspension of his handgun carry permit and seeking declaratory judgment that Tenn.Code Ann. § 39–17–1351, the law governing the issue of handgun carry permits, is unconstitutional. By agreement, the case later was transferred to the Trial Court.

In September 2010, Embody withdrew his administrative appeal of the suspension of his handgun carry permit. Embody also filed an amended complaint wherein he withdrew his challenge to the administrative suspension, and added a facial challenge to the constitutionality of Tenn.Code Ann. § 39–17–1307. In November 2010, Respondent filed a motion to dismiss Embody's suit for failure to state a claim upon which relief can be granted. The Trial Court granted Respondent's motion to dismiss in January 2011. Embody then filed a motion to alter or amend. The Trial Court, deeming Embody's motion as "respectful" and "well-crafted," vacated the dismissal and directed the parties to engage in discovery and file cross motions for summary judgment. In June 2011, the parties filed motions for summary judgment. In July 2012, the Trial Court entered a thorough and detailed order granting Respondent's motion for summary judgment. The Trial Court held, *inter alia:* 1) carrying firearms in public does not fall within the core Second Amendment right as articulated by the U.S. Supreme Court in recent landmark cases; the law survives a facial challenge; 2) the law withstands intermediate scrutiny, as the law represents a reasonable fit with the State's goal of preventing crime; and, 3) Embody's overbreadth and due process arguments are meritless. Embody filed a timely appeal to this Court.

Discussion

***2** Though not stated exactly as such, Embody raises one issue on appeal: whether the Trial Court erred in upholding the constitutionality of Tenn.Code Ann. § 39–17–1307(a)(1), a law restricting the carrying of firearms in Tennessee. Embody has argued variously that his challenge to Tenn.Code Ann. § 39–17–1307(a)(1) is a facial challenge, an as applied challenge, or a challenge based on overbreadth. In any event, this case was decided on a motion for summary judgment.

Our Supreme Court reiterated the standard of review in summary judgment cases as follows:

> The scope of review of a grant of summary judgment is well established. Because our inquiry involves a question of law, no presumption of correctness attaches to the judgment, and our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50–51 (Tenn.1997); *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn.1991).
>
> A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn.1993). The party seeking the summary judgment has the ultimate burden of persuasion "that there are no disputed, material facts creating a genuine issue for trial ... and that he is entitled to judgment as a matter of law." *Id.* at 215. If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. *Id.* at 215 n. 5; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8–9 (Tenn.2008). "[C]onclusory assertion[s]" are not sufficient to shift the burden to the non-moving party. *Byrd*, 847 S.W.2d at 215; *see also Blanchard v. Kellum*, 975 S.W.2d 522, 525 (Tenn.1998). Our state does not apply the federal standard for summary judgment. The standard established in *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn.1998), sets out, in the words of one authority, "a reasonable, predictable summary judgment jurisprudence for our state." Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 Tenn. L.Rev. 175, 220 (2001).
>
> Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn.2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd*, 847 S.W.2d at 210–11. Recently, this Court confirmed these principles in *Hannan.*

***3** *Giggers v. Memphis Housing Authority*, 277 S.W.3d 359, 363–64 (Tenn.2009).

To review, Tenn.Code Ann. § 39–17–1307(a)(1) (Supp.2012) provides: "A person commits an offense who carries with the intent to go armed a firearm, a knife with a blade length exceeding four inches (4"), or a club." Violation of this section is a misdemeanor offense, with a first violation punishable by imprisonment or a fine not to exceed $500. Tenn.Code Ann. § 39–17–1307(a)(2)(A)–(C) (2010).

Our analysis of this issue must begin "with the presumption which the law attaches and which we cannot ignore that the acts of the General Assembly are constitutional." *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856, 858 (Tenn.1996). Therefore, we begin our analysis with the presumption that Tenn.Code Ann. § 39–17–1307(a)(1) is constitutional. Additionally, "we must indulge every presumption and resolve every doubt in favor of constitutionality." *Id.*

Insofar as Embody asserts a facial challenge to Tenn.Code Ann. § 39–17–1307(a)(1), he faces a steep burden. The United States Supreme Court has stated that success in a facial challenge requires a showing that the law in question is invalid under all circumstances. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Our Supreme Court has stated that when bringing a facial challenge to the validity of a statute, "the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn.2009). The crux of Embody's argument is that, as a law-abiding citizen, the legislature may not constitutionally bar him from carrying loaded firearms in public. To properly address Embody's challenge to Tenn.Code Ann. § 39–17–1307(a)(1), we look to some of the major cases in state and federal jurisprudence concerning the right to keep and bear arms.

The Second Amendment to the United States Constitution reads as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. The State of Tennessee has its own analogue to the Second Amendment, which provides: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const. Art. I, § 26. As Art. I, § 26 clearly provides, our Legislature has the power "to regulate the wearing of arms with a view to prevent crime."

In *Aymette v. State*, 21 Tenn. 154, 1840 WL 1554 (1840), the Tennessee Supreme Court considered the validity of a statute that banned the open or concealed carry of certain weapons, such as Bowie knives. The appellant apparently had gone about in public brandishing a Bowie knife. *Id.* at * 1. As perceived by the court, the appellant's argument was that Tennessee's constitution at the time guaranteed him the right to "arm himself in any manner he may choose ... and, thus armed, to appear wherever he may think proper ... and that any law regulating his social conduct, by restraining the use of any weapon or regulating the manner in which it shall be carried, is beyond the legislative competency to enact, and is void." *Id.* After a discussion about the right to keep and bear arms in the context of common defense, the *Aymette* court stated:

> ***4** The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence. The right to keep and bear arms for the common defence is a great political right. It respects the citizens, on the one hand, and the rulers on the other. And, although this right must be inviolably preserved, yet it does not follow that the Legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed.

Aymette, 1840 WL 1554, at *4.

Several decades later, in 1871, in *Andrews v. State*, 50 Tenn. 165, 1871 WL 3579, at *3 (1871), the Tennessee Supreme Court addressed the constitutionality of a law which forbade "any person to publicly or privately carry a dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver." [2] The *Andrews* court, in finding an individual right to keep arms, stated: "Bearing arms for the common defense may well be held to be a political right ... intended to be guaranteed; but the right to keep them,

with all that is implied fairly as an incident to this right, is a private individual right....” *Id.* at *8. The court specified that the arms subject to protection from prohibition were “the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature.” *Id.* at *7. However, these weapons could be regulated. *Id.* Ultimately, the court upheld the statute in question, save for its provision regarding pistols.[3] *Id.* at * 11. The court elaborated:

2 The Tennessee Constitution of 1870, our present Constitution, was operative in *Andrews.*

3 The *Andrews* court stated that it was “a matter to be settled by evidence” whether a pistol as described in the statute was a military weapon, thus shielding it from prohibition. *Andrews*, 1871 WL 3579, at *11.

> And we add, that this right to keep arms, though one secured by the Constitution, with such incidents as we have indicated in this opinion, yet it is no more above regulation for the general good than any other right. The right to hold property is secured by the Constitution, and no man can be deprived of his property “but by the judgment of his peers, or the law of the land.” If the citizen is possessed of a horse, under the Constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed title, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city, if the Legislature chose to prohibit the latter and make it a high misdemeanor.
>
> The principle on which all right to regulate the use in public of these articles of property, is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.
>
> So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

***5** *Andrews*, 1871 WL 3579, at * 10. *Aymette* and *Andrews*, while rather old cases, nevertheless remain instructive on the right to keep and bear arms in Tennessee, with both acknowledging the right of the Legislature to impose certain regulations on the wearing of firearms. As already discussed, it is Tenn. Const. Art. I, § 26 that both acknowledges the right to keep and bear arms and gives our Legislature the power “to regulate the wearing of arms....” Our Legislature in enacting Tenn.Code Ann. § 39–17–1307(a)(1) did nothing more than attempt “to regulate the wearing of arms” as permitted by Tenn. Const. Art. I, § 26.

In the modern era, recent landmark U.S. Supreme Court cases have added to what historically had been a relative dearth of Second Amendment jurisprudence. In the landmark case of *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the U.S. Supreme Court, in striking down a Washington, D.C. law that effectively banned possession of handguns even in the home, held for the first time that the Second Amendment to the United States Constitution protects an individual's right to keep and bear arms:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g.*, *United States v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose.*

Heller, 554 U.S. at 595, 128 S.Ct. 2783 (emphasis in original). With regard to permissible regulations in light of this individual right to keep and bear arms, the court stated:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, e.g., *Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, *e.g.*, *State v. Chandler*, 5 La. Ann., at 489–490; *Nunn v. State*, 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

***6** *Id.* at 626–27, 128 S.Ct. 2783. The court wrote of what it termed "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635, 128 S.Ct. 2783. In *McDonald v. City of Chicago*, —— U.S. ——, 130 S.Ct. 3020, 177 L.Ed.2d. 894 (2010), the U.S. Supreme Court incorporated the *Heller* holding to the states. Similar to the facts of *Heller*, *McDonald* involved a Chicago law banning the possession of handguns in the home. 130 S.Ct. at 3026.

In the wake of *Heller* and *McDonald*, the Sixth Circuit adopted a two-pronged test in Second Amendment challenges in the case of *United States v. Greeno*, 679 F.3d 510 (6th Cir.2012). The test consists of the following:

> Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood. *Chester*, 628 F.3d at 680. As the Seventh Circuit recognized, "*Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified." *Ezell*, 651 F.3d at 702. If the Government demonstrates that the challenged statute "regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification]—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id.* at 702–03.
>
> "If the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Id.* at 703. Under this prong, the court applies the appropriate level of scrutiny. *Marzzarella*, 614 F.3d at 89. If the law satisfies the applicable standard, it is constitutional. *Id.* If it does not, "it is invalid." *Id.*

Id. at 518. As pointed out by the Trial Court in its order, some courts have found intermediate scrutiny to be appropriate in cases of this type, where the core Second Amendment right has not been implicated. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir.2010). Intermediate scrutiny requires that the statute or legislation serve important governmental objectives and be substantially related to achieving those objectives. *United States v. Marzzarella*, 614 F.3d 85, 98–99 (3rd Cir.2010).

After our review of the applicable law, we find no historical or legal basis for Embody's apparent contention that the state may not regulate the carrying of firearms. Anchored in *Andrews*, longstanding Tennessee law is such that the legislature may regulate the carry of firearms with an intent to prevent crime. Embody makes much of his law-abiding status, but this is not the point. A view to *prevent* crime could entail regulations that must be adhered to by people without criminal backgrounds.

***7** As regards the Second Amendment, *Heller* and *McDonald* unquestionably recognize an individual's right to keep and bear arms. However, neither *Heller* nor *McDonald*, nor any U.S. Supreme Court opinion to date has precluded legislatures from regulating the carry of firearms. This remains a nascent and developing area of law. In any case, there are important distinctions between *Heller* and the instant case. Both *Heller* and *McDonald* involved highly onerous restrictions on gun

ownership which effectively banned keeping usable handguns even in one's home. *Heller* and *McDonald* both involved the core Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635, 128 S.Ct. 2783. We believe this right of "citizens to use arms in defense of hearth and home" to be the core Second Amendment right under *Heller* and *McDonald*. Tenn.Code Ann. § 39–17–1307(a)(1) is not a prohibition on the possession on firearms in the home. It is not even a genuine prohibition on the carrying of firearms, as there are numerous defenses to the law. Tenn.Code Ann. § 39–17–1308 provides:

> (a) It is a defense to the application of § 39–17–1307 if the possession or carrying was:
>
> (1) Of an unloaded rifle, shotgun or handgun not concealed on or about the person and the ammunition for the weapon was not in the immediate vicinity of the person or weapon;
>
> (2) By a person authorized to possess or carry a firearm pursuant to § 39–17–1315 or § 39–17–1351;
>
> (3) At the person's:
>
> (A) Place of residence;
>
> (B) Place of business; or
>
> (C) Premises;
>
> (4) Incident to lawful hunting, trapping, fishing, camping, sport shooting or other lawful activity;
>
> (5) By a person possessing a rifle or shotgun while engaged in the lawful protection of livestock from predatory animals;
>
> (6) By a Tennessee valley authority officer who holds a valid commission from the commissioner of safety pursuant to this part while the officer is in the performance of the officer's official duties;
>
> (7) By a state, county or municipal judge or any federal judge or any federal or county magistrate;
>
> (8) By a person possessing a club or baton who holds a valid state security guard/officer registration card as a private security guard/officer, issued by the commissioner, and who also has certification that the officer has had training in the use of club or baton that is valid and issued by a person certified to give training in the use of clubs or batons;
>
> (9) By any person possessing a club or baton who holds a certificate that the person has had training in the use of a club or baton for self-defense that is valid and issued by a certified person authorized to give training in the use of clubs or batons, and is not prohibited from purchasing a firearm under any local, state or federal laws; or
>
> (10) By any out-of-state, full-time, commissioned law enforcement officer who holds a valid commission card from the appropriate out-of-state law enforcement agency and a photo identification; provided, that if no valid commission card and photo identification are retained, then it shall be unlawful for that officer to carry firearms in this state and the provisions of this section shall not apply. The defense provided by this subdivision (a)(10) shall only be applicable if the state where the out-of-state officer is employed has entered into a reciprocity agreement with this state that allows a full-time, commissioned law enforcement officer in Tennessee to lawfully carry or possess a weapon in the other state.

***8** Tenn.Code Ann. § 39–17–1308(a) (2010).

Additionally, Tennesseans who meet certain statutory qualifications will be issued handgun carry permits if they wish one. Tenn.Code Ann. § 39–17–1351 (Supp.2012) (detailing the requirements and procedures for application). The Department of Safety, however, retains the ability to revoke a permit upon, among other things, a finding that an individual poses a material likelihood of risk of harm to the public. Tenn.Code Ann. § 39–17–1352(a)(3) (Supp.2012). [4] In no sense does Tenn.Code Ann. § 39–17–1307(a)(1) come close to resembling the sort of extremely restrictive laws struck down in *Heller* and *McDonald*.

Tenn.Code Ann. § 39–17–1307(a)(1) does not regulate activities incident to the core right to keep and bear arms for protection for 'hearth and home' as articulated by the U.S. Supreme Court in *Heller* and *McDonald.* Embody's facial challenge falls far short of the mark.

4 We also note that Embody voluntarily withdrew his administrative challenge to the revocation of his handgun carry permit. While Embody may regret this decision, it may not be said that he was denied a fair process.

Embody has characterized this action as both a facial and as applied challenge. Under the post-*Heller* jurisprudence as applied by many lower courts and by the Sixth Circuit in *Greeno,* we look to 1) the scope of the Second Amendment right as historically understood, and, if necessary, 2) choose and apply a level of scrutiny as required if the historical evidence is inconclusive. The *Heller* court underwent a thorough review of the history of gun rights in the United States. For reasons previously discussed, we believe that Tenn.Code Ann. § 39–17–1307(a)(1) does not implicate core Second Amendment rights. Nevertheless, as the historical evidence for this issue is not *conclusive,* we will choose a level of scrutiny. We believe, as did the Trial Court, that intermediate scrutiny is appropriate. Tenn.Code Ann. § 39–17–1307(a)(1), with certain exceptions regulates the carry of firearms in Tennessee. Individuals may apply for handgun carry permits, subject to a number of disqualifying conditions. *See* Tenn.Code Ann. § 39–17–1351. This is a regulation that reasonably comports with the State's goal of preventing crime. Whether in light of *Heller* or the analysis adopted in *Greeno,* Tenn.Code Ann. § 39–17–1307(a)(1) is a legitimate regulation of the carry of firearms that does not run afoul of the Second Amendment.

We emphasize that we need not and do not pass judgment on the policy wisdom of Tenn.Code Ann. § 39–17–1307(a)(1), and the associated handgun carry permit laws. That is certainly not the court's proper function. Political policy decisions belong to the General Assembly. We hold only that Tenn.Code Ann. § 39–17–1307(a)(1) is within the constitutionally permissible realm of firearm regulations available to the state, and it violates neither the state nor federal constitution. The judgment of the Trial Court is affirmed.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against Leonard Embody, and his surety, if any.

End of Document

2001 WL 1613892
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

BOARDWALK REGENCY CORPORATION,
v.
Roy B. PATTERSON.
and
Trump Taj Mahal Associates,
v.
Roy B. Patterson.

No. M1999-02805-COA-R3-CV. | Dec. 18, 2001.

Appeals from the Chancery Court for Putnam County, Nos. 96-478 & 96-479; Vernon Neal, Chancellor.

Attorneys and Law Firms

John E. Buffaloe, Jr., Nashville, Tennessee, for the appellants, Boardwalk Regency Corporation and Trump Taj Mahal Associates.

Jon E. Jones and Gwen D. Jones, Cookeville, Tennessee, for the appellee, Roy B. Patterson.

Opinion

OPINION

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which ALAN E. HIGHERS and DAVID R. FARMER, JJ., joined.

WILLIAM C. KOCH, JR., J.

***1** This appeal involves the efforts of two Atlantic City casinos to collect the gambling debts of a Tennessee resident. After obtaining default judgments against the Tennessee resident in New Jersey, the casinos twice attempted to file their judgments in the Chancery Court for Putnam County in accordance with the Uniform Enforcement of Foreign Judgments Act. On both occasions, the trial court declined to file the judgments after finding that they were irregular and that they were not properly authenticated. On the second occasion, the trial court also concluded that its refusal to file the first set of judgments precluded the casinos from filing the second set of judgments. The casinos have appealed. We have determined that the second set of judgments meet the requirements for filing and enforcement under the Uniform Enforcement of Foreign Judgments Act and that the casinos' unsuccessful efforts to file the first set of judgments does not prevent them from filing the second set of judgments. Accordingly, we reverse the trial court's order denying the application to enforce the foreign judgments.

I.

Sometime in the early or mid 1990s, Roy Patterson, a resident of Putnam County, traveled to Atlantic City, New Jersey where he ran up debts at two casinos. He returned to Tennessee owing the Boardwalk Regency $5,558.92, and the Trump Taj Mahal

$5,587.32. Both casinos eventually filed suit against Mr. Patterson in the Superior Court of New Jersey in Atlantic County and obtained default judgments against him for their respective debts.

In 1995 the Boardwalk Regency and the Trump Taj Mahal retained counsel in Tennessee to register and enforce their judgments against Mr. Patterson under Tennessee's version of the Uniform Enforcement of Foreign Judgments Act [Tenn.Code Ann. §§ 26-6-101, -107 (2000)]. However, in July 1996, the trial court dismissed the applications to enforce the judgments after concluding that they were irregular on their face, that they conflicted "with another judgment filed in this record from the same case in the same Court," and that they lacked "proper certification."

The casinos did not let the matter drop. As best we can determine, they filed new lawsuits against Mr. Patterson and, on October 21, 1996, obtained new judgments against him in the Special Civil Part of the Superior Court of New Jersey. The New Jersey court awarded the Trump Taj Mahal a $5,730.90 judgment [1] and the Boardwalk Regency a $5,760.07 judgment. [2] Thereafter, on December 17, 1996, the casinos' Tennessee lawyer applied to the trial court to enforce these new judgments and provided the court with "exemplified" copies of the judgments and "affidavits" supporting the enforcement of the judgments. [3] Mr. Patterson moved to dismiss these applications on two grounds-that the New Jersey court documents did not include a "written [o]rder of [j]udgment" and that these documents contained "different amounts and different signatures of certification." [4]

1 The judgment included $5,558.72 in damages and $172.18 in costs for a total of $5,730.90.

2 The judgment included $5,587.32 in damages and $172.75 in costs for a total of $5,760.07.

3 The required affidavits of the casinos' Tennessee lawyer in support of enforcing these foreign judgments were, for some reason, not notarized. The trial court apparently did not deem this oversight material because it granted the casinos' lawyer permission to file properly notarized affidavits.

4 Mr. Patterson argued that "[a] Tennessee court is not obligated to give full faith and credit where the party seeking enforcement has filed a string of so-called and inconsistent 'judgments.' "

***2** In August 1998, the casinos responded to Mr. Patterson's motion by filing copies of nunc pro tunc orders entered by the New Jersey court on June 16, 1998 again awarding them default judgments against Mr. Patterson. On this occasion, the New Jersey court granted the Trump Taj Mahal a judgment for $5,558.72 "plus costs of suit" and awarded the Boardwalk Regency a judgment for $5,587.32 "plus costs of suit." Mr. Patterson renewed his objection to the enforcement of the judgments. He insisted that the June 16, 1998 judgments were not authenticated and that they were "at least the third document one [sic] filed in this [c]ourt purporting to be the final judgment of the New Jersey court against this defendant. Each of these purported judgments is for a separate amount." He also invoked the doctrine of res judicata and insisted that the trial court's July 1996 dismissal of the earlier applications to enforce the judgments should bar the current applications.

On February 11, 1999, the trial court filed orders denying both casinos' applications to enforce their New Jersey judgments. The court concluded that "there was not a properly authenticated foreign judgment in this case" and that the documents purporting to be foreign judgments were "irregular" and in conflict with "other judgments filed in this record and in the predecessor record." The trial court also concluded that its previous dismissal of the casinos' applications to enforce the judgments "applied to bar the present action under the doctrine of *res judicata.*" The casinos have appealed.

II.

THE STANDARD OF REVIEW

Mr. Patterson has not denied that he incurred the debts at the Boardwalk Regency and the Trump Taj Mahal, nor has he asserted that the Superior Court of New Jersey lacked either subject matter jurisdiction over the casinos' claims or personal jurisdiction

over him. Instead, he asserts (1) that the judgments are not entitled to full faith and credit because the Superior Court of New Jersey is not a court of record, (2) that the casinos have not complied with the technical requirements of the Uniform Enforcement of Foreign Judgments Act, and (3) that the doctrine of res judicata bars the casinos' current efforts to enforce their judgments. All these defenses involve legal rather than factual questions. Accordingly, we will review the trial court's conclusions de novo without presuming that they are correct. *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn.2001).

III.

THE ENFORCEABILITY OF GAMBLING DEBTS

One of the most settled principles of American jurisprudence is the constitutional mandate that each state must give full faith and credit to every other state's judicial proceedings. U.S. Const. art. IV, § 1. This principle is tempered by only a few narrow and specific qualifications. A state court asked to recognize a judgment of a court of another state may satisfy itself (1) that the court entering the judgment sought to be enforced had personal and subject matter jurisdiction, (2) that no fraud had been practiced on the foreign court entering the judgment, and (3) that enforcement of the foreign judgment would not violate the strong public policy of the state where the judgment is sought to be enforced. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-05, 102 S.Ct. 1357, 1365-66 (1982); *Hyde v. Hyde*, 562 S.W.2d 194, 196 (Tenn.1978); *Hart v. Tourte*, 10 S.W.3d 263, 269 (Tenn.Ct.App.1999); *Coastcom, Inc. v. Cruzen*, 981 S.W.2d 179, 181 (Tenn.Ct.App.1998). This case touches upon the public policy exception.

***3** Holding to American attitudes and prohibitions that predate the Revolutionary War,[5] Tennessee considers gambling contrary to the public policy of this state. Tenn.Code Ann. § 39-17-501(1) (Supp.2001). In fact, both gambling and the promotion of gambling are misdemeanors, Tenn.Code Ann. §§ 39-17-502 and 503 (1997), and gambling debts incurred in Tennessee cannot be collected in Tennessee's courts. Tenn.Code Ann. § 29-19-102 (2000). However, notwithstanding Tennessee's official antipathy toward gambling, our courts have long held that judgments for out-of-state gambling debts are enforceable in Tennessee. In the words of the Tennessee Supreme Court, reducing a gambling debt to judgment "purifies the contract from the gaming taint." *Holland v. Pirtle*, 29 Tenn. (10 Hum.) 167, 169 (1849). Thus, we have consistently enforced foreign judgments for gambling debts. *Robinson Props. Group, L.P. v. Russell*, No W2000-00331-COA-R3-CV, 2000 WL 33191371, at *4 (Tenn.Ct.App. Nov. 22, 2000) (No Tenn. R.App. P. 11 application filed); *Mirage Casino Hotel v. Pearsall*, No. 02A01-9608-CV-00198, 1997 WL 275589, at *4-5 (Tenn.Ct.App. May 27, 1997) *perm. app. denied* (Tenn. Dec. 8, 1997); *Hotel Ramada of Nevada, Inc. v. Thakkar*, No. 03A01-9103-CV-00113, 1991 WL 135471, at *3-4 (Tenn.Ct.App. July 25, 1991) *perm. app. denied* (Tenn. Jan. 6, 1992). In this case, the fact that the casinos have judgments for gambling debts presents no impediment to their enrollment and enforcement by a Tennessee court.

5 *See generally* Ann F. Withington, *Toward a More Perfect Union* 11 (1991) (discussing measures taken by the First Continental Congress to prohibit gambling activities).

IV.

THE STATUS OF JUDGMENTS OF THE SUPERIOR COURT OF NEW JERSEY

Mr. Patterson's first argument is that the casinos' judgments are not entitled to full faith and credit because they were not rendered by a court of record. This argument is wrong on two counts. First, Tenn.Code Ann. § 26-6-104(b) does not, even by implication, limit the judgments entitled to full faith and credit to those rendered by a court of record. Second, the Superior Court of New Jersey is, as a matter of law, a court of record.

Tenn.Code Ann. § 26-6-104(b) provides that our state courts will treat a foreign judgment "in the same manner as a judgment of a court of record in this state." Based on this language, Mr. Patterson asserts that in order for a foreign judgment to be accorded the same treatment as a judgment of a Tennessee court of record, the judgment must have been rendered by a court of record. This reasoning overlooks that neither U.S. Const. art. IV, § 1 nor Tenn.Code Ann. § 26-6-103 limits the judgments entitled to full faith and credit to judgments of "courts of record." According to Tenn.Code Ann. § 26-6-103, a "foreign judgment" entitled to full faith and credit in Tennessee is "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state."

In addition to his mistaken interpretation of Tenn.Code Ann. § 26-6-104(b), Mr. Patterson is also mistaken about the status of the Superior Court of New Jersey. That court, which is divided into the appellate, law, and chancery divisions, is New Jersey's court of original general jurisdiction. N.J. Const. art. VI, § 3; *Mayor & Council v. Brewster*, 80 A.2d 297, 301 (N.J.1951). The law and chancery divisions of the court are the counterparts of Tennessee's circuit, chancery, and criminal courts.

***4** A court of record is simply a court that permanently preserves regular minutes of its orders, judgments, and other proceedings. *Allen v. McWilliams*, 715 S.W.2d 28, 29 (Tenn.1986); *Page v. Turcott*, 179 Tenn. 491, 503, 167 S.W.2d 350, 354-55 (1943). N.J. Stat. Ann. § 2A: 16-11 (West Supp.2000), provides that

> The Clerk of the Superior Court shall keep a book known as a civil judgment and order docket in which shall be entered, an abstract of each judgment or order for the payment of money, submitted for entry, including a judgment or order to pay counsel fees and other fees or costs, entered from, or made in, the Superior Court.

Based on this statute, we conclude that the Superior Court of New Jersey, Law Division, Special Part is a court of record. As we have on prior occasions, [6] we also conclude that the judgments of the Superior Court of New Jersey are entitled to full faith and credit and are entitled to be filed with and enforced by the courts of this state.

6 In *Advanta Bus. Servs. Corp. v. McPherson*, No. W1999-02682-COA-R9-CV, 2000 WL 371194 (Tenn. Ct.App. April 11, 2000) (No Tenn. R.App. P. 11 application filed), we found that a judgment of the Superior Court of New Jersey was entitled to be registered and enforced in Tennessee.

V.

THE ADEQUACY OF THE AUTHENTICATION OF THE CASINOS' JUDGMENTS

Mr. Patterson also asserts that the casinos' New Jersey judgments are not entitled to be filed or enforced in Tennessee because their authentication does not comply with Tenn.Code Ann. § 26-6-104(a) or Tenn.Code Ann. § 26-6-105(a). We have determined that the trial court correctly determined that the casinos' lawyer's failure to comply with Tenn.Code Ann. § 26-6-105(a) was not a fatal oversight. However, we respectfully disagree with the trial court's conclusion that the New Jersey judgments were not authenticated as required by Tenn.Code Ann. § 26-6-104(a).

The requirements for filing a foreign judgment are few and straightforward. A person desiring to file a judgment must file a copy of the judgment that has been authenticated in accordance with Tennessee law. Tenn.Code Ann. § 26-6-104(a). Along with the authenticated copy of the judgment, the person desiring to file a judgment must also file an affidavit containing the names and last known addresses of the judgment creditor and the judgment debtor. Tenn.Code Ann. § 26-6-105(a). Once these documents are filed, the clerk of the court in which they were filed must issue a summons to the judgment debtor. Tenn.Code Ann. § 26-6-105(b). If the judgment debtor makes no response after being served, the judgment creditor may, after waiting thirty days, simply enforce the judgment by execution or other means. Tenn.Code Ann. § 26-6-105(c).

Although these procedures are simple, they are not optional. Both "affidavits" prepared by the casinos' lawyer to comply with Tenn.Code Ann. § 26-6-105(a) contain a blank notary's certificate, indicating that the lawyer knew that the documents were required to be notarized but for some reason neglected to have the documents notarized before filing them. Under Tennessee law, neither document, despite its title, qualifies as an affidavit because an affidavit is a written statement by the affiant that is made under oath. *State Dep't of Human Servs. v. Neilson,* 771 S.W.2d 128, 130 (Tenn.Ct.App .1989). Accordingly, as far as this record shows, the casinos did not comply with Tenn.Code Ann. § 26-6-105(a).

***5** However, under the facts of this case, the failure to notarize the documents intended to fulfill the requirements of Tenn.Code Ann. § 26-6-105(a) should not be fatal. No one has disputed the accuracy of the information in the documents, and the information was sufficient to enable the clerk and master to issue the summons to Mr. Patterson required by Tenn.Code Ann. § 26-6-105(b). Mr. Patterson received the summons, and accordingly, there is no question that he received the sort of timely notice of the filing of the foreign judgments that the Uniform Enforcement of Foreign Judgments Act envisioned. The trial court itself did not view this oversight as material because it granted both casinos permission to file properly-notarized affidavits. Accordingly, we conclude that the trial court correctly did not dismiss the applications to domesticate these judgments because of the casinos' lawyer's failure to comply with Tenn.Code Ann. § 26-6-105(a). [7]

7 Notwithstanding the trial court's decision to permit the casinos to file properly-notarized affidavits as required by Tenn.Code Ann. § 26-6-105(a), the appellate record does not contain these affidavits or any other indication that they have been filed. The casinos have likewise not requested permission to supplement the appellate record with copies of these affidavits. Accordingly, because we do not know whether these affidavits have been filed, we are proceeding on the assumption that they have been filed. If they have not been filed, the trial court should give the casinos a reasonable time to file the affidavits to replace the non-notarized documents filed on December 17, 1996. If the casinos still fail to comply with Tenn.Code Ann. § 26-6-105(a), the trial court is free to dismiss the applications to domesticate these judgments.

We turn now to Mr. Patterson's claim that the "exemplified copy of judgment" and the January 16, 1998 order of the Superior Court for New Jersey were not properly authenticated. Because this case does not involve a judgment of a federal court, the question of authentication is governed by Tennessee law since Tenn.Code Ann. § 26-6-104(a) requires that the "foreign judgment [be] authenticated in accordance with the ... statutes of this state." Thus, the pivotal question here is whether the copies of the New Jersey judgments filed by the casinos have been properly authenticated.

Tennessee courts have not yet construed what "authentication" for the purposes of Tenn.Code Ann. § 26-6-104(c) requires. In common parlance, an authenticated document is simply a writing whose genuineness and authenticity have been verified or certified. *Interinsurance Exchange v. Velji,* 118 Cal.Rptr. 596, 601 (Ct.App.1975); 1 *Oxford English Dictionary* 796 (2d ed.1989) (defining "authenticated" as "[i]nvested with authority, validity, trust, genuineness; certified"). Thus, for the purposes of the Uniform Enforcement of Foreign Judgements Act, authentication refers to the process of verifying the genuineness of the judgment, order, or other document in question. *Morrow v. Westphal,* 521 N .E.2d 283, 285 (Il.App.Ct.1988).

We concur with the trial court that the copies of the January 16, 1998 nunc pro tunc orders of the Superior Court of New Jersey are not authenticated for the purposes of Tenn.Code Ann. § 26-6-104(a) because they bear no certificate or attestation of either the clerk of the Superior Court or the judge that they are true and accurate copies of the orders maintained in the records of the Superior Court of New Jersey Law Division.

The same cannot be said, however, for the two documents entitled "exemplified copy of judgement" filed with the trial court on December 17, 1996. Without reciting the details of the attestations attached to these documents, the attestations of both the clerk of the Special Civil Part of the Superior Court of New Jersey and the judge of that court demonstrate beyond reasonable question that the copies of these documents are what they purport to be "a true copy of the record in the cause ... as full, entire and complete as the same on file in said Court...." Substantially similar attestations or certifications have been found to be sufficient under the Uniform Enforcement of Foreign Judgments Act. *Lust v. Fountain of Life, Inc.,* 429 S.E.2d 435, 437 (N.C.Ct.App.1993). Accordingly, we find that the trial court erred by concluding that the "exemplified copy of judgement" filed on behalf of each casino did not meet the authentication requirements of Tenn.Code Ann. § 26-6-104(a). [8]

8 Likewise, we see little merit in Mr. Patterson's protestations that these judgments are suspect because they are "inconsistent." In fact, they are completely consistent. Both judgments include damages and costs. The only difference between the "exemplified copy of judgement" and the later nunc pro tunc order is that the former actually calculates the costs adjudged against Mr. Patterson, while the latter simply awards a judgment for the "costs of suit." Were it necessary to reconcile inconsistent judgments, we would have applied the last-in-time rule employed by other courts to give effect to the last judgment. *Valley Nat'l Bank v. A.G. Rouse & Co .*, 121 F.3d 1332, 1335 (9th Cir.1997).

VI.

THE RES JUDICATA EFFECT OF THE DISMISSAL OF THE FORMER APPLICATION

***6** The final issue involves the correctness of the trial court's conclusion that the doctrine of res judicata bars the casinos' efforts to enforce these judgments because in June 1996 it had declined to enforce other judgments against Mr. Patterson. Res judicata is inapplicable in this case because the former Tennessee proceeding involved different New Jersey judgments and because the trial court's June 1996 order did not conclude the rights of the parties on the merits.

Res judicata is a claim preclusion doctrine that promotes finality in litigation. *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn.1976); *Jordan v. Johns*, 168 Tenn. 525, 536-37, 79 S.W.2d 798, 802 (1935). It bars a second suit between the same parties or their privies on the same cause of action with respect to all the issues which were or could have been litigated in the former suit. *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn.1995); *Brown v. Brown*, 29 S.W.3d 491, 495 (Tenn.Ct.App .2000); *Collins v. Greene County Bank*, 916 S.W.2d 941, 945 (Tenn.Ct.App.1995). In order for the doctrine of res judicata to apply, the prior judgment must conclude the rights of the parties on the merits. *Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn.1989); *Lewis v. Muchmore*, 26 S.W.3d 632, 637 (Tenn.Ct.App.2000).

Parties asserting a res judicata defense must demonstrate (1) that a court of competent jurisdiction rendered the prior judgment, (2) that the prior judgment was final and on the merits, (3) that the same parties or their privies were involved in both proceedings, and (4) that both proceedings involved the same cause of action. *Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn.Ct.App.1990). A prior judgment or decree does not prohibit the later consideration of rights that had not accrued at the time of the earlier proceeding or the reexamination of the same question between the same parties when the facts have changed or new facts have occurred that have altered the legal rights and relations of the parties. *White v. White*, 876 S.W.2d 837, 839-840 (Tenn.1994); *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn.Ct.App.2000).

We have already disposed of the argument that a foreign judgment creditor should not be permitted more that one opportunity to use Tennessee's courts to enforce a foreign judgment. Thus, when an application to enforce a foreign judgment is dismissed on non-merits grounds, such as failure to comply with Tenn.Code Ann. § 26-6-104(a) or Tenn.Code Ann. § 26-6-105(a), we have held that the doctrine of res judicata does not prevent the judgment creditor from re-filing documents in proper form. *Hart v. Tourte*, 10 S.W.3d at 267. In addition to the trial court's June 1996 dismissals not being on the merits of the casinos' claims, these proceedings, commenced in December 1996, involve new judgments that were not at issue in the earlier proceeding. Accordingly, we conclude that the trial court erred by invoking the res judicata doctrine as grounds to decline to permit the casinos to file and enforce their judgments against Mr. Patterson.

VII.

***7** Many of the difficulties encountered by the New Jersey casinos in this case stem from their own conduct. Nevertheless, in the final analysis, their omissions and oversights are not so material that they prevent the domestication and enforcement of their New Jersey judgments in Tennessee. Accordingly, the orders denying the casinos' application to enforce their judgments

are reversed and the cases are remanded with directions to file these judgments as soon as the casinos have demonstrated that they have filed affidavits meeting the requirements of Tenn.Code Ann. § 26-6-105(a). We tax one-half of the costs of this appeal to Roy B. Patterson and one-half of the costs, jointly and severally, to Boardwalk Regency Corporation and Trump Taj Mahal Associates and their surety for which execution, if necessary, may issue.

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