IN THE CRIMINAL COURT FOR ANDERSON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. B6C00016
	)	
LEE HAROLD CROMWELL,	)	
	)	
Defendant.	)	

AMB

FIRST AMENDMENT TO SENTENCING MEMORANDUM

Comes now the Defendant pursuant to T.C.A. §§ 40-35-202, 40-35-113, and 40-35-109, and amends the initial Sentencing Memorandum filed on or about April 7, 2017, by the Defendant's previous counsel. That memorandum is incorporated herein by reference as it set out verbatim. This amendment will set out additional mitigating factors, address the state's purported enhancing factors and the state's attempt at justification for consecutive sentencing, and finally designate how the Defendant qualifies as an especially mitigated offender.

The following mitigating factors apply to the determination of a proper, just sentence for Mr. Cromwell:

1. Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense. T.C.A. § 40-35-113(3).

2. The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. T.C.A. § 40-35-113(11).

3. The defendant has no significant criminal record whatsoever. Prior to this accident, the Defendant had one (1) speeding ticket. T.C.A. § 40-35-113(13).

4. Mr. Cromwell has expressed great remorse for the loss to the Robinson family throughout these proceedings. T.C.A. § 40-35-113(13).

The enhancement factors alleged by the state are not applicable in this case. There are none that are not essential elements of the offense charged in the indictment. T.C.A. § 40-35-114.

Factor 1:

The state alleges in its Notice of Enhancement Factors that Mr. Cromwell has a previous history of criminal convictions or behavior. T.C.A. 40-35-114(1). The notice identifies no convictions. That a defendant has been arrested or charged with an offense is not enough alone to implicate this enhancing factor. *State v. Carico*, 968 S.W.2d 280, 288 (Tenn.1998) ("The Court of Criminal Appeals has properly held that merely being arrested or charged with a crime is not 'criminal behavior' within the meaning of the statute.", *State v. Newsome*, 798 S.W.2d 542, 543 (Tenn. Crim. App. 1990)).

The plain wording of the statute shows that this factor cannot be applied to Mr. Cromwell. Prior to this accident he had no "previous" history of any criminal behavior whatsoever unless a speeding ticket is deemed "criminal".

Factor 3:

Likewise, that the offense involved more than one victim does not apply. T.C.A. § 40-35-114(3). *State v. Patrick Wayne Evans*, No. M2015-00897-CCA-R3-CD, 2016 WL 3992524, (Tenn. Crim. App. at Nashville, July 21, 2016) the court reversed the trial court on the applicability of this factor to vehicular homicide by impairment. The court pointed out that the Tennessee Supreme Court has held that there cannot be multiple victims for any one offense where the indictment specifies a named victim. *State v. Imfeld*, 70 S.W.3d 698, 705 (Tenn. 2002).

The Court of Criminal Appeals has defined "victim," as used in T.C.A. § 40-35-114(3), as being limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime. *State v. Raines*, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994). That court has also held that factor (3) may not be applied to enhance a sentence when a defendant is separately convicted of the offenses committed against each victim. *State v. Freeman*, 943 S.W.2d 25, 31 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995). Hence, "there cannot be multiple victims for any one offense of aggravated assault committed against a specific, named victim". *State v. Imfeld,* 70 S.W.3d at 706. In addition, application of the factor on the basis that there were individuals in the accident on behalf of whom no charges were filed is simply inconsistent with the statutory language of T.C. A. § 40–35–114(3). *Id.*

Factor 4:

The state claims that Enhancement Factor 4 applies because children were particularly vulnerable to injury in this accident. Children would be vulnerable in any traffic accident, but there is no indication in the testimony at trial that the children in Counts 3, 4, 8, and 9 were "particularly vulnerable" as the statute requires. No medical records or expert testimony was presented at trial to demonstrate that the children suffered any injuries and especially none unique to their childhood.

Age alone does not equal particular vulnerability. Factor 4 does not apply absent additional proof, other than a victim's age, to support application of this factor. *State v. Hunter*, 926 S.W.2d 744, 749 (Tenn. Crim. App. 1995) citing *State v. Adams,* 864 S.W.2d 31, 34–35 (Tenn.1993),

Factor 6:

The state further alleges that Enhancement Factor 6 applies based on substantial property damage to the property of two (2) of the victims. The statute requires the damage to be "particularly" great, i.e. significantly greater than that normally attendant to a traffic accident. No such damage was shown in the trial. Proof is required on "the amount of the victim's property loss resulting from the collision" and it must be "particularly great".

Factor 10:

Factor 10 is unavailable to the state and the court as an enhancement factor. That a defendant has no hesitation about committing a crime where the risk to human life was high is inherent in reckless vehicular homicide and reckless aggravated assault. Recklessness requires knowledge of a substantial risk and the conscious disregard of that risk to the extent of being a gross deviation from the standard of care an ordinary person would exercise. The Supreme Court quoted with approval from the Court of Criminal Appeals opinion in *State v. Cross* that the same proof used to convict Mr. Cross "of evading arrest with risk of death and reckless endangerment with a deadly weapon cannot be used to support the enhancement. The trial court therefore erred in relying on this enhancement." (referring to T.C.A. § 40-35-114(10). *State v. Cross*, 362 S.W.3d 512, 528-529, (Tenn. 2012).

Consecutive Sentencing:

The state asserts that consecutive sentencing is appropriate for Mr. Cromwell as he is a dangerous offender. That circumstance is defined in the statute on consecutive

sentencing:

> The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high;

T.C.A. § 40-35-115(b)(4).

It would appear that this definition and that of reckless as a culpable mental state are mutually exclusive. Recklessness requires taking an unjustifiable risk; behavior evidencing little or no regard for human life requires intentional action. Note the "and" between the two required elements in the dangerous offender definition. Neither of these phrases, individually or in combination describe Mr. Cromwell.

It is not enough to introduce proof that a defendant is a "dangerous offender", it must also be determined that proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. *State v. Wilkerson,* 905 S.W.2d 933, 938 (Tenn.1995). Since the dangerous offender classification is the most subjective to apply, "the record must also establish that the aggregate sentence reasonably relates to the severity of the offenses and that the total sentence is necessary for the protection of the public from further crimes by the defendant." *State v. Pollard,* 432 S.W.3d 851, 863 (Tenn. 2013).

The burden is on the state to prove the applicability of the dangerous offender classification. Society does not need protection from an individual who went 66 years from birth to this accident with no law violations other than perhaps a speeding ticket. Of course, had he been able to afford a several million dollar insurance policy on his truck, no trial would ever had been had and vengeance would evaporate as the motive to prosecute.

This case involves a traffic accident that happened quickly. Only concurrent sentences will serve the interests of justice. Since there are mitigating factors and no legitimate enhancement factors, Mr. Cromwell qualifies as an especially mitigated offender. T.C.A. § 40-35-109. A three-year suspended sentence, all concurrent, is the most appropriate sentence. The American system of justice is not supposed to punish citizens for their political beliefs as the state admits it is trying to do in its Notice of Enhancement Factors.

Respectfully submitted, this the 13 day of June, 2017.

Tom Marshall
Attorney for Defendant

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the above motion has been served on the Office of the District Attorney General, 7th Judicial District, State of Tennessee by mail, postage prepaid, to his office at 101 S. Main St., Clinton, TN 37716, or by hand-delivery on this the 13 day of June, 2017.

Tom Marshall