Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev.14 September 2011

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

- State your present employment.

State of Tennessee Criminal Court Judge Division III
Thirtieth Judicial District at Memphis (Shelby County)

- State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1980 BPR# 007037

- List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Colorado 1999 #30778 (inactive) This has never been in an active status. I once considered moving there but did not do so. The license is in good standing, but in "inactive" status.

- Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No

- List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Kirkpatrick, Lucas and Kirkpatrick	Aug. 1980 –March 1981
Friedman and Sissman, PC.	March 1981- Nov. 1982
Shelby County Public Defender's Office	Nov. 1982- Feb. 1985
Shelby County District Attorney General's Office	Feb. 1985 – Sept. 1, 2010
Criminal Court Judge (State of TN.)	Sept. 1, 2010- present

- If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

N/A

- Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Criminal Court Judge (practice is 100% criminal law)

- Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

My initial work experience involved the handling of insurance defense matters and the related subrogation and general practice issues of a medium sized law firm. I began to practice more criminal law with the smaller firm and graduated to the total practice of criminal law upon employment with the Public Defender's Office. Obviously, that entailed criminal defense work. For twenty-six years I prosecuted criminal cases in a variety of capacities for the District Attorney General's Office. Since my election in 2010, I have presided over an exclusively criminal docket. I inherited one of the largest case backlogs in Shelby County. Thirteen months later I have one of the smallest case backlogs. My experience as a criminal defense attorney, a prosecutor and a trial judge make me uniquely qualified to bring a balanced perspective to the Court of Criminal Appeals bench.

- Separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

As a prosecutor I tried over two hundred jury trials. As a trial judge I have presided over approximately twenty-five jury trials in my first thirteen months on the bench, as well as a

variety of Post- Conviction Relief Petitions and all other aspects of criminal cases.

- If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was elected in August, 2010 to fill the term of retired Judge John P. Colton, Jr. During my tenure I have presided over several homicide cases among the hundreds of matters that have been handled by guilty plea, trial or other disposition.

- Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I was the executor of an estate in probate court twenty years ago.

- Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

During my employment with the District Attorney General's office, I have been the Director of Training, Chief Child Abuse and Homicide Prosecutor, Division Leader in the Major Violator's Unit and Director of the West Tennessee Judicial Violent Crime and Drug Task Force.

- List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied in July 2007 for the position of Criminal Court Judge. The committee met July23-24, 2007 and my name was not submitted to the Governor.

EDUCATION

- List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other

aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Christian Brothers College 1977 B.A. English and B.A. Humanities Magna Cum Laude

Cecil C. Humphreys School of Law (Univ. of Memphis) 1980 J.D. Moot Court Board

University of Nevada 4 hours toward a Master of Judicial Studies. (on-going studies)

PERSONAL INFORMATION

- State your age and date of birth.

(55) December 9, 1955

- How long have you lived continuously in the State of Tennessee?

43 years

- How long have you lived continuously in the county where you are now living?

43 years

- State the county in which you are registered to vote.

Shelby County

- Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

N/A

- Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

N/A

- To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

N/A

- If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

N/A

- Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

None

- Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

- Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Carter v Carter Docket No. 11748-RD3 Circuit Court of Shelby County (uncontested divorce) (granted August 1988)

James Bryant v Jack Owens, Sheriff et al Docket no. 90-2364-HB Western Dist. Of TN

An inmate sued the sheriff, judge and everyone whose name appeared on his criminal court case file, accusing them of civil rights violations. The matter was dismissed for failure to state a claim on August 19, 1991 without the necessity of filing an answer or otherwise responding.

- List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

Trout Unlimited (no office)

- Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
    - If so, list such organizations and describe the basis of the membership limitation.
    - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

None

ACHIEVEMENTS

- List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

American Bar Association 2010 to present (no office)

Association of Government Attorneys in Capital Litigation (inactive-no office)

National Advocacy Center Alumni Association (inactive-no office)

- List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

James G. Hughes Excellence C.P.I.T. Award 2010 (for professionalism in the field of Child Abuse Prevention and Prosecution)

- List the citations of any legal articles or books you have published.

I wrote the section, "Considerations in Opening Statement" for a book entitled Successful Trial Strategies for Prosecutors, published in 2005 by the National College of District Attorneys, Columbia, South Carolina. It is attached as one of my writing samples.

- List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

"Prosecuting Drug Cases" National College of District Attorneys Las Vegas, NV. Feb. 2009
"Child Abuse Prosecution" Criminal law Section –Memphis Bar Association Dec. 2009
"Asset Forfeiture" Criminal Law Section- Memphis Bar Association Dec. 2008
"Trial Advocacy" National Advocacy Center Columbia, SC. Sept. 2006, July 2007 May 2010
"Prosecuting Drug Cases" National College of District Attys. Myrtle Beach, SC March 2007
"Connecting For Children's Justice" Nashville, TN. Nov. 2007, 2008 , 2009
"Prosecuting Drug Cases" National College of District Attorneys San Diego, CA May 2007
"Anticipatory Search Warrants" West Tn. Drug Task Force Tiptonville, TN. June 2006
"Prosecuting Drug Cases" National College of District Attorneys New Orleans, LA. Nov. 2006
"Gangs and Drugs" American Prosecutors Research Institute Indianapolis, IN. Oct. 2006

- List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Criminal Court Judge I was elected in August 2010 to my current position.

- Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

- Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

All writing samples are 100% my own work. (see attached.)

ESSAYS/PERSONAL STATEMENTS

- What are your reasons for seeking this position? ***(150 words or less)***

Appellate law serves two distinct functions. A good opinion addresses the "correctness" of the actions complained of and, secondarily, provides guidance to trial courts, attorneys and parties as to "better practices" or how things should be done. I would like the opportunity to continue my practice of law in a more focused environment. In reviewing the specific questions of law raised on appeal, I would be able to research, evaluate and write about specific issues with an

eye towards more clearly stating the law. I would welcome the opportunity to bring my strengths to this important task.

- State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

My entire legal career, since 1982, has been spent in the service of the people of the community. Initially as a public defender, representing the indigent and for the next twenty-six years as a prosecutor representing the people the State of Tennessee. Both of those jobs require much more commitment than a standard work week.

- Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

Court of Criminal Appeals for the Western Section of Tennessee.

Due to the significant number of cases that arise out of Shelby County, I feel it is important that the judges have an awareness of the people and methods common to those criminal courts. I would also bring a knowledge of west Tennessee in general, and Shelby County, in particular to the bench. In the District Attorney's Office, I served as Director of a Drug Task Force that covered eleven counties and four judicial districts across west Tennessee. I would bring a familiarity and appreciation for the variety of jurisdictions whose cases are heard in Jackson.

- Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I believe that it is important for members of the judiciary to exercise care in their choice of community service. I am on a host committee at this time to raise funds for MIFA (Memphis Inter-Faith Association). MIFA provides meals to shut-ins, assistance to a variety of people without advancing a particular political or social agenda. I think this is the type of role that I would continue to have if appointed to the Court of Criminal Appeals.

- Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I have always been a voracious reader and love to write and teach. I believe that my ability to work hard in a self motivated manner would serve me well in handling the volume of work associated with the appellate bench. Because I have been a defense attorney, a prosecutor and a trial judge I bring an understanding of the roles of each of the parties in the matters before the Court of Criminal Appeals. My capacity for work coupled with my experience would be an

excellent fit for this appointment.

- Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Absolutely. I believe that my job as a judge is to uphold and interpret the law…not to write it. Many times over the years I have handled matters that, if left only up to me, I might have done differently. Mandatory minimum fines are one example. There is ample room for discretion in most situations, however, and I find it easy to follow the substance of the laws passed as I have sworn to do.

REFERENCES

- List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.
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A. Amy P. Weirich, District Attorney General, Thirtieth Judicial District at Memphis, TN 201 Poplar Ave., Memphis, TN. 38103 (901) 545-5900

B. Lee V. Coffee, Criminal Court Judge, Thirtieth Judicial District at Memphis, TN, 201 Poplar Ave., Memphis, TN. 38103 (901 545-5858

C. Nancy Williams, Executive Director, Memphis Child Advocacy Center, 1085 Poplar Ave. Memphis, TN. 38105 (901) 525-2377

D. Dot Gilbertson, Vice President-Development, Metropolitan Inter-Faith Association, 910 Vance Ave, Memphis, TN. 38126 (901) 529-4503

E. James C. Beasley, Jr., Criminal Court Judge, Thirtieth Judicial District at Memphis, 201 Poplar Ave. Memphis, TN. 38103 (901) 545-5858

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public

hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: October 6, 2011.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

Tennessee Judicial Nominating Commission

511 Union Street, Suite 600
Nashville City Center
Nashville, TN 37219

Tennessee Board of Professional Responsibility

Waiver of Confidentiality

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

October 6, 2011 BPR# 007037 J. Robert Carter, Jr.
Type or Printed Name

OPENING STATEMENTS

"Well Begun is Half Done"

Black's Law Dictionary defines the Opening Statement of Counsel as an "outline of anticipated proof… it's purpose is to advise the jury of facts relied upon and issues involved, and to give the jury a general picture of the facts and situations so that the jury will be able to understand the evidence." (citations omitted) [2]
Taken literally, it would seem that Opening Statements are little more than a table of its contents. Unfortunately, all too many prosecutors view Opening as something to be gotten out of the way as quickly as possible, so that the "real trial" can begin. Those individuals spend little time preparing for Opening, and miss a tremendous opportunity to further the ultimate goal of the advocate, persuasion.

An effective Opening sets the stage for the rest of the trial and will stay with the jury throughout the entire matter until completion in Final Argument. This full circle approach to trying cases is what is taught by the National College of District Attorneys and referred to as Analytical Advocacy. [3]

Chief Justice Burger, in his concurring opinion, declared, "An Opening Statement has a narrow purpose and scope. It is to state what evidence will be presented to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an **occasion for argument"**. United States vs. Dinitz, 424 U.S. 600 (1976)

Opening Statements should be fact or evidence based and should not include argument. This emphasis on facts is what differentiates an Opening Statement from a Closing Argument. In a Closing one may certainly argue inferences, the credibility of witnesses, nuance, and even urge such logical conclusions as may be drawn from the evidence. These are not appropriate topics in an Opening Statement.

Our task is to determine how we can stay within the legal confines of this "narrow purpose and scope" and still get the most out of this golden opportunity to further our case. A legitimate, legal, ethical, and most importantly, effective Opening does not have to be a boring recitation of dry

facts and expectations, filled with a litany of phrases, such as, "We believe the proof will show…" "We submit that you will see" and God forbid, "We will all discover together". But, given the admonishments of Dinitz, supra, how are we to avoid this? By treating our Opening Statement as a key part of the synthesized and integrated method of trial preparation known as Analytical Advocacy. We can use a simple model for our Opening that is adaptable to any case from the simplest to the most complicated.

Before we get into the nuts and bolts of constructing an Opening Statement, let's take a moment to remind ourselves exactly what it is that we are doing. We are trying to convince a group of people of something. This group was chosen, at least in part, because of their lack of knowledge about the subject. And we must convince them "beyond a reasonable doubt". Our burden of proof is, in effect a burden of persuasion.

The burden of persuasion begins in jury selection if your jurisdiction allows a significant degree of interaction with the jury during this process. Of course, this is limited to the questions and answers aimed at getting an appropriate jury for this case. Once selected, "potential jurors" now become "jurors" and seem to experience a heightened sense of responsibility that was not in existence when they were simply part of the venire. Thus, Opening Statement becomes the first part of the trial for them as "real jurors".

Keep in mind that everything that we do communicates something to the jury and we must be mindful of the impression we make before the first word is spoken. Are you prepared, professional and in charge, or are you running around shuffling papers and looking like you don't have a clue.

It is important to capitalize on this most focused state and not to waste it on less than important housekeeping matters. The jury is about to form its first impression of you as an advocate, and more importantly, of your case. While it is not impossible to change a first impression, it is certainly easier to bolster a positive impression, then to overcome a negative one. There is an apocryphal study, done by the University of Chicago, which showed that eighty percent of jurors made up their minds, or at least formed opinions, on liability at the end of opening statements, and did not change their opinions during the entire trial. [4]

Even allowing for the questionable statistical accuracy of such claims, it is clear that experience, knowledge and general principles of communication teach us that the Opening Statement may be one of the most important parts of the entire trial. And to think, there are many lawyers who consider it a formality to be gotten over with, or even waived altogether, a truly unpardonable sin.

This seems all too common in bench trials, where it is reasoned that Opening is not important. The importance is not diminished in front of a judge, although the approach may be somewhat different. Providing the trier of fact with a clear and persuasive outline to follow can help us to prevail more frequently. This principle applies to "mini-trials" such as pre-trial hearings and Motions to Suppress as well.

The doctrine of primacy says that that which is heard first is remembered best. [5] Will you use this "once in a trial" opportunity to talk to the jury about "road maps", "puzzles", and to assure them that "What I am about to say is not evidence"? You might as well tell them not to listen at all.

All good Opening statements share three common traits. Each has: a good start or "hook", a factual outline or main body, and a well thought out high note for an ending. We will discuss how to incorporate these elements into our own effective Opening Statements.

The first minute or so of the Opening is used to articulate the theme of your case or perhaps to describe an advantageous fact capsule. You may even wish to highlight some other aspect of the case in such a way as to capture the attention of the jurors. This Attention Step [6] is critical and should be well thought out. There are a number of different types of Attention Steps to choose from depending upon the nature of your case and your personal style. These include value-based themes, fact characterization themes or fact capsules. [7]

Value-based themes serve as memory devices for the jury which serve to illustrate the case theory in terms of human values. These values may be either positive or negative. By aligning our case with human values, we, in essence, create a desire to deliver a verdict consistent with these values. We are appealing to both the logical and the emotional facets of the decision making process.

Examples:

"Greed brings us to the courtroom today, greed on the part of this defendant. He wanted something. He saw it. And he took it. It really didn't matter that it didn't belong to him…" (negative value)

The values may attach to the overall event, the individuals in the event or actions on the part of those individuals.

An example of a positive value:

"Gina Watson worked two jobs for two full years to buy her first car. It only took two minutes for this defendant to take it away."

When reviewing a case for the first time, we sometimes encounter something that "just doesn't feel right" about it. Be aware that such things about your case which bother you, may be your intuition warning you of some negative value or aspect of your case, perhaps a less than likable victim. If it bothers you it may bother the jury. We will address meeting these negatives "head-on" in the factual narrative.

Another type of effective Attention Step involves the use of Fact Capsules. These may be Event-based, People-based or a mixture of both.

An Event-based Opening focuses initially on "what happened" with the people involved being brought in later.

"The Sunday morning silence on Park Avenue, a quiet residential street, was shattered by the BANG! BANG! BANG! of three shots from a high-powered rifle."

This may be an effective tool where there are multiple witnesses, or in cases where victims are not as compelling individually. Such cases may include multiple victims in a white-collar fraud case. Where you have a person or persons, whose perspective is unique, a more People–based fact capsule may be in order.

In this approach, you relate the event from the vantage point of one witness.

Example

"On December 4th, Ellen Jones kissed her husband, George as he walked out the door for his shift with the Metro Police Department. As she always did, she straightened his tie and gave him a final "uniform check". She had no way of knowing that it was the last time she would see him alive."

Many good Attention Steps combine elements of both Event-based and People-based capsules. An excellent example would be excerpts from a 9-1-1 call or some other pertinent exerted utterance.

Example:

"They killed him! They killed him! These were the words Andrew Johnson heard when he picked up the phone that Tuesday morning."

Now having fully engaged the attention of the jury, it is time to move on to the main body of the Opening. This Fact Narration is what defines the Opening. As we have discussed, we can do this in a perfunctory manner in such a way as to get it over with, or we can take the time to present these facts in a manner designed to advance our case theory in the most positive fashion.

Traditionally, the old standby technique has been a witness-by-witness list that reminds one of a Table of Contents from a high school textbook, only less compelling. "Next you will hear from Officer Smith who will say that…"

A far more interesting way would be to relate the case from the perspective of a single significant witness or to take much more of a story-telling approach. This is certainly easier for the jury to follow, and, in reality, easier for you to relate. Many young attorneys struggle through an Opening Statement only to go to lunch and be asked by someone about the case. At that point they recount this interesting tale complete with a human interest angle that makes for very easy and entertaining listening. The trick is to incorporate portions of this conversational style into our Opening.

In using a narrative approach, we can eliminate the use of such "crutch language" as "We expect the proof to show", and "We submit that you will see". Conversational language is far more compelling to the jury.

This method requires preparation, however, it is not effective to read to the jury. You must be thoroughly familiar with your facts, and able to relate them without constant reference to notes. If you must use notes, prepare an outline and leave it nearby to refer to in an emergency. Just knowing that you have this "safety blanket" may keep you from ever needing it.

One solution to the need for notes, especially in a complicated case, is to use visual aids. Whether in the form of charts, diagrams, photographs or PowerPoint ® computer slideshows, this will add another dimension to your Opening. Your PowerPoint or other computer presentation becomes your notes or outline. By preparing it, you practice and then have command of your information, which will be presented in the order you have planned.

This use of visuals will often draw an objection based on any number of things but usually translating to "we never used to do that". Be aware of your own rules, but, generally speaking, except in South Dakota, "if you can say it, you can show it. [9] Visuals may range from being very helpful in a simpler case, to being almost essential in a more complicated matter. Again, recall how much more information that a juror retains by seeing it as well as hearing it.

During your fact narration you will need to keep in mind certain principals. While being thorough, you do not want to go into every detail. Don't bog down. While it essential to state your facts firmly, you must exercise care not to overstate them. If you say one thing in Opening that you cannot prove, you cast doubt on everything else that you have said. You run the risk of losing your credibility.

Not only is this a tactical error, but possibly an ethical violation. Disciplinary Rule 7-106 (c) (1) provides that a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or will not be supplied by admissible evidence. [10]

This is the time to tell the jury about a witness or victim's criminal record or prior inconsistent statement. You will be much better able to lessen the sting of such matters and to explain them if you first bring them up, rather than waiting for them to hear about them from the defense and get the impression that you were hiding something.

Another thing that your Factual Narrative must do is to get the defendant involved. It does little good to weave a compelling narrative about a horrible crime, and have the jury unsure who that guy behind the other attorney is.

The tone used should be dictated by the circumstances of the case. A different mood should be used in a murder case, as opposed to a small theft, or DUI. A career violent offender may merit different treatment than that reserved for a first offender. Every offense merits the appropriate level of seriousness, but not every case should be handled in a way that makes the jury think of you as "heavy-handed" or overly strict. While there may be times when humor finds its way into a trial, your Opening Statement should probably not be one of them.

Care should be taken not to lapse into legal jargon or "cop talk" when speaking to the jury. Have your witnesses "get out of the car" rather than "exit the vehicle". Allow your police officers to "go to lunch" not "Signal Five at this location".

The narrative section of your Opening should also begin to meet specific defenses, if known to you. By addressing the evidence that you will rely upon to meet these defenses, you go a long way toward diffusing them. Another benefit of addressing these issues in a non-argumentative way is that you, in effect, challenging the defense in their Opening to state exactly what their defense is. This makes for a nice contrast between your Opening and the typical defense Opening that rambles on about "not deciding until all the proof is in" and "looking for reasonable doubts."

Now, having engaged the attention of the jury, and presenting them with a well thought out narrative of the facts, it is time to end the Opening Statement. With some attorneys, this last section again gives rise to admonitions about what we say not being evidence or thanking the jury of their service. Like the first thing heard, the last thing tends to stay with the listener, as well. Therefore, our Exit Line[11] should be prepared carefully. It may be used to summarize issues, or sound certain terms that you want the jury to remember. It may be a call to act or a plea for justice. [12] It is of particular importance because it will be remembered longest.

This one or two sentence Exit Line should be memorized so that its delivery can have maximum impact. A reference to a theme or fact that you used on your Attention Step may give a nice sense of closure or completeness to the Opening.

Example:

"At the conclusion of the States case, you will have seen, a combination of eyewitness testimony, expert testimony and scientific evidence that prove that the person who fired the shots that shattered that Sunday morning silence, is this defendant. And I will ask you to render the only verdict that truth dictates and justice demands. "

Using the basic model outlined above with an Attention Step, Factual Narrative and Exit Line, we are now prepared to construct an effective Opening in any type of case. The time invested in such preparation will continue to pay dividends as yet one more tool for the successful advocate. We are now poised to make Opening Statement one of the most powerful and persuasive portions of our case while still remaining true its intended purpose.

END NOTES

1. Early American Proverb

2. BLACK'S LAW DICTIONARY, Revised Fourth Edition
   Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern
   Henry Campbell Black, M.A.
   St. Paul Minn. West Publishing Co. 1968

3. Analytical Advocacy – (unsure how to cite)

4. Art of Advocacy – OPENING STATEMENT
   Leonard DeCof
   Matthew Bender 1982 §1.01 p.1-4

5. Art of Advocacy § 1.01 (1) p. 1-6

6. Analytical Advocacy

7. Analytical Advocacy

8. Analytical Advocacy

9. 16 ALR 4th 810

10. Trial Ethics,
    Richard Underwood & William H. Fortune
    Little, Brown and Company 1983 at p. 311

11. Analytical Advocacy

12. Art of Advocacy § 1.21 p.1-56

WRITING SAMPLE #2

IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION III

Demario Johnson **AKA Leo Scott**	)	
VS.	)	**Case Number: 06-05748**
State of Tennessee	)	

Order Denying Petition for Post-Conviction Relief

This cause came to be heard on upon the Petition for Post-Conviction Relief, the State's Response and Brief in Support of Response, upon the hearing of this matter and the entire record in this cause. FROM ALL OF WHICH IT APPEARS AS FOLLOWS:

I. PROCEDURAL HISTORY

Petitioner was indicted by the Shelby County Grand Jury on July 11, 2006 for Murder in the First Degree, three counts of Aggravated Assault and one count of Reckless Endangerment. On January 10, 2008 the Petitioner was convicted, as charged, in the first count of the indictment and sentenced to Life imprisonment. The remaining counts of the indictment were dismissed or nolle prosequi.

The Petitioner appealed as of right, and his conviction was affirmed by the Court of Criminal Appeals on October 29, 2009. State of Tennessee vs. Demario Johnson aka Leo Scott, W2008-01665-CCA-R3-CD. (a copy of the Opinion is Exhibit #5 to this hearing.)

Petitioner presents the sole issue of whether or not the Petitioner received effective assistance of counsel at his trial. The State urges the position that this issue is "waived" pursuant to T.C.A. § 40-20-106(f). After the jury trial, the Petitioner retained an attorney to represent him on appeal. His trial attorney was a member of the Public Defender's Office. The newly retained attorney supplemented the Motion for New Trial with allegations that the Petitioner now seeks to rely upon as support for his claim of ineffective assistance of counsel.

The State urges that the appellate attorney could have raised any and all complaints about trial counsel in the Motion for New Trial. The State urges this Court to find that Petitioner has "waived" his claim of ineffective assistance of counsel.

This Court concluded that the factual allegations that were addressed by the Court of Criminal Appeals have, in fact, been "determined". This specifically relates to issue about the introduction of photographs of the deceased. This Court does not agree that the Motion for New Trial was the appropriate venue for all attacks on trial counsel. The Court of Criminal Appeals addressed this issue in Edward Thomas Kendricks, III vs. State of Tennessee, 13 S.W.3d 401 (199 Tenn. Crim. App. LEXIS 881). The Court noted that the issue of ineffective assistance required much more fact-finding than what is generally contemplated at a Motion for New Trial. Edward Thomas kendricks, III vs. State of Tennessee, (supra)at page 2.

Additionally, this Court finds that the matter was not ripe for consideration unless all of the appellate remedies were first exhausted. For these reasons, this Court denied the State's motion to dismiss and proceeded to hear the matter on its merits.

II. FINDINGS OF FACT

The Petitioner testified at the hearing. He outlined a factual scenario that was basically consistent with the statement he gave to the police upon being arrested. He and a group of people were in a dispute each alleging that the others had robbed them. On the day of the shooting, Petitioner went to an apartment occupied by several people. He fired multiple shots into the apartment, wounding four persons, including the victim, who died four months later of complications from the gunshot wound.

Petitioner states that it was "basically self-defense". He testified that he went to the apartment to talk and that he was threatened, so he shot. He still seems to believe that he was justified in his behavior.

At the hearing, Petitioner testified that he told his trial attorney about his mental history, including prior hospitalizations and the medications that he was taking. He maintains that his trial counsel simply ignored it.

He also complains that he does not feel like the victim's death was attributable to him. Petitioner does not believe that the victim's death from pneumonia was related to the paralysis caused by Petitioner's gun shots. Petitioner feels that trial counsel should have counter acted the testimony of the Medical Examiner who testified that the victim's death was a result of the complications from the gun shot wound inflicted by Petitioner.

Petitioner testified that he was not aware that his attorney was going to argue "self-defense" at his trial. He does agree that he acted in self-defense and further, that is what he told the police at the time of his arrest. Petitioner also testified that his true name was Leo Scott, but that he had used the name Demario Johnson and Leo Womack.

At the hearing, Petitioner called Leo Womack, Sr. as a witness. He testified that he was the father of the Petitioner. He testified that Petitioner had mental issues as a child and the Petitioner was treated several times and even hospitalized.

He testified that he attended the trial and talked with trial counsel, but agreed on cross-examination that he never mentioned any mental illness or mental health issues to petitioner's trial attorney. He spoke of photos taken of Petitioner that showed injuries that Petitioner purportedly received the day before this shooting.

Petitioner's trial counsel testified at the hearing. Diane Thackery testified that she has practiced criminal law for twenty-one (21) years, and was a member of the Shelby County Public Defender's Capital Defense Team. The Public Defenders' Office began representing Petitioner in November of 2005 and she was assigned the matter in August of 2006.

As part of the intake, a full interview was conducted with Petitioner. Petitioner denied that he had mental health issues, claimed he was taking no medicine and explained his history as "kid problems" that he "grew out of ".

Ms. Thackery testified that she is always alert to the possibility of competency issues, or any other condition that might give rise to either a defense or some form of mitigation. She stated that Petitioner's cognitive level was much higher than most of her clients. She met with him multiple times over the course of her representation and spoke with his family members during her investigation into and the trial so this matter.

Trial counsel stated that the cause of death was not really an issue. Their strategy was to show the circumstances that led up to the shooting, rather than to argue about whether the gunshot actually lead to the death. She testified that she discussed the Discovery material with Petitioner, including the report of the Medical Examiner.

The defense strategy in this case was to emphasize the fear of the Petitioner as a trigger to his behavior. Counsel had photographs of Petitioner's injury and even a copy of his medical records characterizing the injuries as the result of an "assault".

This strategy was two-edged. Counsel testified that there was risk that the jury might view it as motive or reason rather than using it to justify

or minimize Petitioner's culpability. Counsel testifies that their theory of defense centered on showing Petitioner's fear at the time as a way to counteract premeditation, without proving the State's case for the State.

Trial counsel testified that she discussed defense strategy, lesser included offenses and other concepts with Petitioner. She never had any question whatsoever concerning Petitioner's competency or cognitive functioning.

According to trial counsel, the Petitioner had very clear recall of the events.

Petitioner's trial attorney is very accustomed to looking for evidence that could be used as a defense or even mitigation. This was not a matter of counsel overlooking evidence of mental health issues. There simply were no issues presented.

Petitioner made no mention of previous difficulties, nor did any of his family members.

At the hearing, Petitioner offered records from Whitehaven Southwest Mental Health Center and Lakeside Behavioral Health System. These show evidence that Petitioner was treated for ADHA in 2000 and 2001. Nothing in the record suggests anything that would support an insanity defense or that would indicate that the Petitioner was not competent.

Petitioner further offered the testimony of his mother and his sister. Petitioner's mother described him as suicidal and "constantly into it" with his sisters. She described taking him to Southwest Mental Health where he was placed on mediation. Petitioner's sister also testified that the Petitioner "had psychological problems".

Petitioner's mother stated that she was also present at the trial of the case. She did not describe any interaction with Petitioner's trial attorney.

It appears to this Court that Petitioner did not make his trial attorney aware of the mental health treatments in his past. He described them as

being related to his youth and seemed to think that age, and possibly medication, had alleviated the symptoms.

Petitioner's trial counsel had years of experience in handling criminal matters in general, and murder cases specifically. She was much attuned to signs of difficulty with competence or any issue which could be used for mitigation.

Petitioner felt that his behavior was justified, or at least somewhat lessened in culpability by his fear and by the ongoing conflict between the parties.

It is only after a jury rejected this theory, that he now thinks that a different approach should have been used.

III. CONCLUSIONS OF LAW

The burden of proof is on the Petitioner to show that he received ineffective assistance of counsel. He must show deficient performance and prejudice as a result of that deficiency. Strickland vs. Washington, 466 U.S. 668 (1984)

In this case there is no proof of deficient performance. This Court finds that Petitioner did not informs his trial attorney of what he now maintains are serious mental health matters. The trial strategy was to attack the mens rea issue and to show reasons that this was not a premeditated killing.

The fact that the strategy was not successful does not support a claim for Post-Conviction Relief. Cooper vs. State of Tennessee, 847 S.W. 521, 528 (Tenn. Crim. App. 1992). This is a case where Petitioner and his family minimized any mental health issues until this hearing. After the first strategy was unsuccessful, Petitioner now maintains that his attorney was at fault.

Trial counsel could not have known about any of these matters without Petitioner telling her. Even if counsel had been made aware, a

review of the exhibits to the hearing does not demonstrates any material that would call to question Petitioner's competence or establish an affirmative defense. Since Petitioner was convicted of First Degree Murder, due to his age, a life sentence was automatic. No mitigation would be applicable.

IV. ORDER

The Petitioner has not carried his burden of proof in this matter.

It is therefore ordered that the Petition for Post-Conviction Relief by denied.

This is the _____ day of September, 2011.

____

J. Robert Carter, Jr.
Judge – Division III

WRITING SAMPLE #3

IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION III

Anthony Bond	)	
	)	
VS.	)	**Case Number: 00-03095**
	)	
State of Tennessee	)	

Order Denying Petition for Post-Conviction Relief

This cause came to be heard on the Petition for Post-Conviction Relief and the Amended Petition filed by counsel retained by Petitioner, the testimony of witnesses at the evidentiary hearing and upon the entire record in this cause. From all of which it approves to the court as follows:

I. PROCEDURAL HISTORY

Petitioner and a co-defendant (Andrew Thomas) were indicted by a Shelby County grand jury on March 21, 2000 for the April 21, 1997 shooting of James Day during the robbery of an armored car in which the victim was a guard. Petitioner was convicted of First Degree Murder and sentenced to life without parole. On direct appeal, his convictions were overturned by the Court of Criminal Appeals as a result of an incomplete jury charge. State of Tennessee vs. Andrew Thomas and Anthony Bond, 2004 Tenn. Crim. App. LEXIS 185. (A copy of the opinion is Exhibit #3 to this hearing.)

He was again tried, convicted and sentenced to life without parole. The Court of Criminal Appeals affirmed this second conviction on September 20, 2006. State of Tennessee vs. Anthony Bond, 2006 Tenn. Crim. App. LEXIS 724. (A copy is Exhibit #4 to this hearing.)

Permission to Appeal to the Supreme Court was denied January 29, 2007.

Petitioner, through counsel, filed this timely Petition for Post-Conviction Relief and its subsequent Amendment. The sole ground for relief raised is the allegation that Petitioners trial attorney was ineffective. Petitioner concentrates this claim on the issues surrounding the cause of death of the victim, maintaining that his trial attorney was ineffective in cross-examining the State's expert and deficient in failing to procure a countervailing expert for Petitioner's case. A hearing was conducted in this matter on August 18, 2011.

II. FINDINGS OF FACT

Petitioner was represented at his first trial, on his first appeal and at the second trial by attorney, Howard Manis. Because the State initially sought the death penalty, Petitioner was additionally represented by Lorna McClusky. During the retrial, the death penalty was no longer an option, and Mr. Manis represented Petitioner alone.

The defense in both trials consisted of attacks on the causation issue concerning the death of the victim. The robbery and shooting took place on April 21, 1997. The victim, James Day, was shot in the head and received "devastating injuries". He survived the injuries, but was rendered "disabled" and "physically unable to do anything for himself". Mr. Day succumbed to his injuries an October 2, 1999 after sepsis occurred following a burst bladder. (Exhibit #3 at page 5.)

After an autopsy, the Shelby County Medical Examiner opined that "Mr. Day did, indeed, die as a result of an infection from the ruptured bladder which could be directly related back to his gunshot wound." (Exhibit #3 at page 5.)

During the period between the shooting and the death of Mr. Davis, both Petitioner and his co-defendant were convicted in federal court for the

Aggravated Robbery arising out of these incidents. After the death of Mr. Davis, the State of Tennessee indicted on the Murder charges.

Petitioner's defense involved his allegations that his co-defendant was the shooter and a vigorous attack on the "causation" element. He argued then and still argues that the death of Mr. Davis was too remote in time to be attributed to either his or his co-defendant's actions.

His Post-Conviction Petition is based upon his claim that his attorney was not effective in raising this issue.

Trial counsel, Howard Manis, has been an attorney since 1993. His initial approach was to attempt to attack the causation element. He testified that after researching the common law "year and a day rule" that he knew there could be problems. Counsel discussed with Petitioner the option of trying to cooperate with the prosecution to obtain favorable treatment. Petitioner rejected this option. Counsel stated that he was unhappy with the sentence he received in federal court after "cooperating" there.

Since Petitioner had pled guilty in federal district court to the underlying felony, the only defense available that made sense to his trial attorney was the attack on causation. Trial counsel testified as to his efforts to generate reasonable doubt as to whether the death was caused by Petitioner, or by conduct for which Petitioner was criminally responsible.

Trial counsel testified that he procured the assistance of nurses and other medical professionals to review the "hundreds of pages" of medical records. He argued vigorously against the admission of testimony from a Deputy Medical Examiner, Dr. Cindy Gardner, who expanded upon the testimony of the Chief Medical Examiner, Dr. O. C. Smith.

Trial counsel attempted to obtain independent medical experts for Petitioner. He consulted with a physician in Jackson, Mississippi as well as an urologist in Memphis. Neither of these experts could help with Petitioner's contention.

Petitioner's attorney also consulted with a Dr. Mark Saslawski who helped him develop a theory of defense. The strategy was to suggest that

since the victim initially improved, only to later die, that some interviewing cause must have been responsible. In essence, they would show that the victim did not simply decline after the gunshot wound until he died.

After spending "hours" in consultation with the various experts, trial counsel still did not have a doctor who could testify that such an interviewing cause actually existed. Instead, the strategy was to attempt, through cross-examination, to show reasonable doubt of this causation element.

Petitioner testified at the hearing. He agrees that he spent quite a bit of time with his attorney working on the defense of his case. He still does not understand how he could be handled in federal court and then be charged with a murder "years after the fact". Petitioner testified that his second trial was a "sham" and complains that his attorney did not put any effort into defending him.

Petitioner testified that he now wished he would have testified. Indeed, he blames his attorney for "talking him out of it". He does agree that he had numerous prior robbery convictions which could have been used to impeach him. Petitioner admits that upon questioning in court, he stated that he would not testify.

Petitioner additionally relies upon the proffered testimony of Dr. Steven Horowitz, M.D. (Exhibit #1 to the hearing). Dr. Horowitz testified at the Post-Conviction Petition of Petitioner's co-defendant, Andrew Thomas.

> To succinctly summarize his testimony, Dr. Horowitz opined that the paralysis was caused by medically-induced hypotension as a result of a breach in the standard of medical care by the attending staff at the The Med. Dr. Horowitz concluded that there was no connection between the bullet wound and Mr. Day's subsequent neurological deficits and ultimate death. He added that the cause of Mr. Day's death was "[a]n overwhelming infection, uncontrollable diabetes with the state of diabetic ketoacidosis and an inability to clot because of the Cumadin toxicity." Dr. Horowitz admitted, however, that had Mr. Day not been shot on April 21, 1997, there would have been no reason for him to die on October 2, 1999. Andrew Thomas vs. State of Tennessee, 2011 Tenn. Crim. App. LEXIS 131, at page 21. (Exhibit #5.)

In summary, Petitioner alleges that his trial attorney was ineffective in the cross-examination of the State's experts, and was deficient in failing to procure the services of Dr. Horowitz, or someone similar.

As an aside, the Court of Criminal Appeals rejected the same arguments in the case of the co-defendant Andrew Thomas vs. State of Tennessee, (supra).

III. CONCLUSIONS OF LAW

It is well settled that in order to prevail the Petitioner must offer "clear and convincing" evidence supporting his allegations. T.C.A. § 40-30-110 (f).

He must prove that counsel's performance was deficient and that the deficient performance prejudiced the outcome of the proceedings. Strickland vs. Washington, 466 U.S. 668, 687 (1984), applied in Tennessee by State of Tennessee vs. Taylor, 968 S.W. 2d900, 905 (Tenn. Crim. App. 1997.)

In the case at hand, Petitioner participated in a robbery during which a guard was shot in the head. The victim later died as a result of the shooting. "One who inflicts (or in this case is criminally responsible for the infliction) a dangerous wound upon another is held for the consequences

flowing from such injury". Odneal vs. State of Tennessee, 2011 Tenn. Crim. App. LEXIS 131 (Exhibit #5 at page 21.)

Petitioner's trial counsel consulted numerous experts and attempted, to the best of his ability, to provide a successful defense for Petitioner. The jury chose to believe the State's witnesses in this matter. An unsuccessful result does not automatically indicate deficient performance by the attorney.

The Petitioner has failed to prove that his trial counsel's performance was deficient.

The Petition for Post-Conviction Relief is, therefore, denied.

This is the day of September, 2011.

____
J. Robert Carter, Jr.
Judge Division III