

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 22 December 2011

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(including county)

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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

1. State your present employment.

Assistant District Attorney, District Attorney's Office, Memphis, Tennessee

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

1984; #011107

3. 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.

Tennessee, October 6, 1984; Active License #011107.

4. 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.

5. 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).

I have been an assistant district attorney since October, 1984.

6. 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

7. 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.

I currently serve as Division Leader (Chief Prosecutor) in Division 1 of Criminal Court, Shelby County. I lead a team of three prosecutors in handling a docket of approximately 1200 pending cases, negotiating settlements and trying cases. Most cases tried (90%) are violent felonies such as murder, armed robberies, etc.

8. 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. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

After graduation from Washington and Lee University School of Law, I took a job with the District Attorney's Office in Memphis in August, 1984. After several months as an investigator, I started working as an assistant district attorney in the General Sessions Criminal Courts. My duties in General Sessions included negotiating guilty plea settlements, trying misdemeanors in bench trials, and representing the state in felony preliminary hearings. In the fall of 1986, I was promoted to a position as an assistant district attorney in the Criminal Court of Shelby County, where I am today. Over the years, I have represented the state in approximately 200 jury trials, trying everything from assault to murder in the first degree. I have tried one death penalty case, twice. Each time the defendant was sentenced to death, and he remains on death row.

From 1992 to 1994, I represented the state in Juvenile Court at hearings to determine whether juveniles, charged with exceptionally violent offenses, should stand trial as adults in Criminal Court. From December 2001 to February 2007, I served as Chief Prosecutor, Child Abuse and Neglect, and the leader of the Shelby County Child Protection Investigation Team (CPIT). As Chief Prosecutor, I led a multi-disciplinary team of prosecutors, police officers, and children's services caseworkers in the investigation and prosecution of child abuse and neglect. I made team policy, charging decisions, prepared indictments and tried the most aggravated cases myself, including child abuse homicides.

Upon my return in 2008 from my Army deployment to Afghanistan, I became division leader in Div. 5 of Criminal Court. After three years in Div. 5, the District Attorney assigned me to the

position of division leader in Criminal Court, Div. 1. As division leader, I lead two other prosecutors in managing a docket of about 1200 pending cases, making offers, negotiating settlements, and trying cases. Since becoming division leader, almost all the cases I have tried have been homicides.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

As an Army Reserve/Army National Guard judge advocate (military lawyer) from 1989 to 2010, I represented soldiers accused of misconduct before administrative boards.

10. 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.

As detailed below, I served on active duty with the U.S. Army from October 2007 to October 2008 as Command Judge Advocate for the Afghan Regional Security Integrated Command, South, (ARSIC-S), Kandahar, Afghanistan. Among my duties as the commander's legal advisor, I provided him with advice, as to sufficiency of the evidence and sentencing, when he exercised his quasi-judicial authority to hear disciplinary cases under the Uniform Code of Military Justice.

11. 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.

N/A.

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

N/A.

13. 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.

In 2012, I submitted an application to the Judicial Nominating Commission for the then vacant position of Judge, Criminal Court, Div. 6. The Commission met to consider applications on August, 24, 2012. The Commission did not submit my name to the Governor. I was fourth of seven candidates.

EDUCATION

14. 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.

Washington and Lee University School of Law, 1981-1984, J.D.; University of Mississippi, 1976-1980, B.A., English literature, cum laude.

PERSONAL INFORMATION

15. State your age and date of birth.

53. Born on September 2, 1958.

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

Twenty-eight years.

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

Twenty-eight years.

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

Shelby County

19. 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.

I served twenty-one years in the reserve components of the U.S. Army, Judge Advocate General's Corps. The President commissioned me as a first lieutenant on April 23, 1989. I retired as a lieutenant colonel in June 2010, with an honorable discharge.

During the first Persian Gulf War 1990, I volunteered for active duty, serving in the Staff Judge Advocate's Office at FT Campbell, Kentucky. Over four months of active duty, I provided legal assistance to soldiers and their dependents. The Staff Judge Advocate of the 101st Airborne Division (Air Assault) awarded me the Army Achievement Medal in recognition of my service.

In October 2007, I again volunteered for active service, this time in Afghanistan. As Command Judge Advocate to the U.S. commander of the Afghan Regional Security Integrated Command (ARSIC-S) and legal mentor to my counterparts in the Afghan National Army's 205th Corps, I served 12 months at Kandahar Airfield in southern Afghanistan. Working daily with the Afghans, I monitored courts-martial, inspected conditions in the Afghan military jail, and assisted in training Afghan soldiers in the law of war and non-judicial punishment. On the American side, I was responsible for providing legal counsel on military justice, the law of war, administrative law, legal assistance, and operational law.

Upon completion of my service in Afghanistan, I was awarded the Bronze Star Medal for Meritorious Action in a War Zone. I also received the National Defense Service Medal (2nd Award), the Afghanistan Campaign Medal, the Global War on Terrorism Service Medal, the Army Service Ribbon, the Overseas Service Ribbon, the Armed Forces Reserve Medal with the "M" device (2nd Award), and the NATO Medal.

20. 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.

No.

21. 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.

No.

22. 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

23. 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.

No.

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

No.

25. 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.

No.

26. 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.

In January 2013, I was sworn into the Memphis Flotilla, United States Coast Guard Auxiliary. The Auxiliary, a uniformed civilian organization founded in 1939, provides support to the Coast Guard in its search and rescue, public education, and boating safety missions. I am a member of St. Andrew's Episcopal Church in Collierville, Tennessee, the Veterans of Foreign Wars, and the Military Officers' Association (MOAA) Memphis Chapter. Since January, 2013, I have been First Vice-President of MOAA's Memphis Chapter. I am also a member of the Memphis Chapter of the United States Navy League. I am a recent alumnus of North Carolina Outward Bound (NCOB). In February, 2013, I completed a grueling 50 miles in 5 days Outward Bound canoe trip for Veterans through the Florida Everglades and into the Gulf of Mexico.

27. 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.

a. If so, list such organizations and describe the basis of the membership

limitation.

- b. 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.

No.

ACHIEVEMENTS

28. 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.

I was a member of the Judge Advocate's Association from approximately 1995 to 2007.

29. 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.

Because of my experience as a prosecutor and my knowledge of the Law of Armed Conflict, the American Bar Association's Coalition for International Justice asked me to review un-indicted war crimes cases for a month at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Hague, Netherlands. In 2002, I was nominated for Outstanding Criminal Justice Professional of the Year in Shelby County. In 2008, I received the Bronze Star Medal for Meritorious Actions in a War Zone in recognition of my efforts to strengthen the rule of law in Afghanistan.

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

N/A.

31. 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.

N/A.

32. 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.

I have been an assistant district attorney in Memphis, Tennessee, since 1984. I have been a commissioned officer in the reserve components of the U.S. Army since April 23, 1989.. On June 1, 2010, I moved from the Active Reserve to the Retired Reserve. In January 2013, I received an appointment as Auxiliarist in the Memphis Flotilla, United States Coast Guard Auxiliary.

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

No.

34. 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.

I have attached "ANA 205th CORPS LEGAL MENTOR MONTHLY REPORT" and "STATE'S RESPONSE TO DEFENDANT'S MOTION FOR A 'TAINT' HEARING" in State v. John Lee Hackworth. Each writing reflects my own effort.

ESSAYS/PERSONAL STATEMENTS

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

I have the breadth and depth of experience, the sense of fairness, the temperament, and the fortitude to be a good judge. As a civilian lawyer and an Army Judge Advocate, I have become accustomed to working with people from a wide range of backgrounds. I have been tried and tested in the courtrooms of 201 Poplar and the deserts of Afghanistan.

36. 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)*

From 1994 to 2002, I wrote comments on draft criminal laws for the countries of the former Soviet Union and the former Warsaw Pact as part of the American Bar Association's Central and East European Law Initiative (CEELI). In 2000, I raised money from FedEx to support the donation of thousands of dollars worth of computer equipment to International Criminal Tribunal for the former Yugoslavia (ICTY). In 2008, working in conjunction with the U.S. State Department, I arranged for two Afghan lawyers to attend, on full scholarship, Washington and Lee University School of Law's L.L.M. program in American law for international students. I

also reviewed child protection policies and procedures for the Roman Catholic Diocese of Memphis and the Episcopal Diocese of West Tennessee in 2005. As prosecutor, I am prohibited by law from representing in court anyone other than the State of Tennessee.

37. 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)*

I am ready to take up a judgeship in a division of the Criminal Court of the 30th Judicial District of Tennessee. The district encompasses the city of Memphis, the suburban municipalities, and the unincorporated areas of Shelby County. There are ten divisions of Criminal Court. If appointed, I will be the first veteran to assume the bench in Shelby County Criminal Court in many years.

38. 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)*

For twenty-one years, I served my community, my state, and my country as a member of the Active Reserve components of the U.S. Army. In January, 2013, I joined the Memphis Flotilla of the United States Coast Guard Auxiliary. The Auxiliary is the Coast Guard's uniformed, civilian component; it assists the Coast Guard in saving lives, preventing injuries, and minimizing property damage along our nation's coastlines and on its navigable rivers. As Chief Prosecutor, Child Abuse, I regularly spoke to the media on child abuse. I served on the DCS West Tennessee Regional Commissioner selection committee, and the Child Protective Services reform legislative subcommittee. As judge, I would participate in the activities of the Memphis, Tennessee, and American Bar Associations.

39. 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 believe in the rule of law, and I have put my life on the line to uphold it. In 2007, at age 49, I volunteered for active duty with the Army in southern Afghanistan. I thought about the matter long and hard before I decided to go. I have a family, and I value my life. I had not yet been called upon for active service since 9/11. However, I decided I could not stay at home any longer when there was something that I, as a middle-aged Reserve lawyer, could do.

It seemed to me then, and it seems to me now, that the rule of law is the antithesis of the horror of 9/11. If I could do something to strengthen the rule of law in the land where the 9/11 plot began, then I had to do it. So I went, and yes, it was dangerous. I will bring the same dedication to duty and principle to a Criminal Court judgeship.

40. 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)

Yes. My actions as a prosecutor show that I will uphold the law as judge. I am troubled, at times, that persons who have violate our country's immigration laws are eligible for probation upon conviction of a violation of Tennessee's Criminal Code. The federal government's apparent inability to resolve the immigration issue has compelled our state courts, at least to some extent, to ignore violations of the law. Nevertheless, our state appellate courts have spoken on this issue, and I have followed their direction. As prosecutor, I consider all relevant and lawful factors in determining whether to oppose or support an undocumented immigrants application for probation or diversion.

REFERENCES

41. 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.

A. Colonel Thomas McGrath, U.S. Army (retired). Phone: (703) 943-9358 [REDACTED] Commander during Afghanistan deployment.

B. Ms. Laurie Walpole. [REDACTED] Friend of over 30 years.

C. Mr. James Challen. Phone [REDACTED] Retired Deputy District Attorney, D.A.'s Office, Memphis.

D. Mr. Joseph McDonald, [REDACTED] Neighbor for 19 years.

E. Mr. Mike Palazzolo, Alderman Position 3, Germantown Board of Alderman. (901) 757-7200. Mpalazzolo@germantown-tn.gov [REDACTED]

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] Criminal Court, Div. 6, Thirtieth Judicial District 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

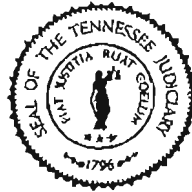
Administrative Office of the Courts for distribution to the Commission members.

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: 7 March, 2013.

Kevin Russell Rardin
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 TENNESSEE BOARD OF JUDICIAL CONDUCT AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and 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, the Tennessee Board of Judicial Conduct and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission.

Kevin Russell Rardin
Type or Printed Name

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Kenneth Russell Renda

Signature

7 March 2013

Date

011107

BPR #

**ANA 205TH CORPS LEGAL MENTOR MONTHLY REPORT FOR
THE PERIOD OF JUNE 16 THROUGH JULY 15TH AND SLIGHTLY
BEYOND**

Corps: 205th Corps

Mentors: LTC Kevin R. Rardin, USA and MAJ Felipe Quiroz-Borrero, Canadian Forces

The past two months have been difficult here in southern Afghanistan. The fight picked up considerably. For about a month, it seemed as if I (LTC Rardin) were going to a ramp ceremony or a memorial ceremony every day. It is very sobering to see the flag-draped coffins pass through our lines on the way to the plane that will carry the fallen back to family and friends.

I. MILITARY JUSTICE MATTERS

Military Justice Overview

There were no new non-judicial punishment cases during the reporting period. Two new cases were referred to the Basic Court for trial by court-martial.

Significant Military Justice Cases (Investigations, Indictments, or Trials):

Comment on any issues arising from particular cases that are of strategic significance or concern, or which raise systemic issues which need to be addressed.

Investigations

Identify numbers of investigations that are currently over the 120 day guideline. Comment on systemic or case-specific issues regarding investigative delay.

General Military Justice Issues

Comment specifically on any systemic or case-specific pre-trial confinement issues.

II. STAFFING, EQUIPMENT, AND FACILITIES ISSUES

I met the new “temporary” 205th Corps SJA, Colonel Mutalib, on July 15th. I am very impressed with this man. He struck me as being a thoughtful, knowledgeable, and deliberate person. He told me that he has eighteen years of experience as a judge. He also strikes me as being someone who will be strong enough to stand up to the 205th Corps Commander.

After MAJ Q-B and I told Colonel Mutalib about the substandard conditions in the jail, he told me he would go with us to the jail. Yesterday, he did. He

talked with the prisoners and took a lot of notes. Today (July 23rd), Colonel Mutalib told me that he talked with BG Niebi, the Corps Commander, about conditions in the jail and other legal issues.

I hope Colonel Mutalib will stay with the 205th Corps for a while.

The 205th Corps military jail is a continuing problem. No one should be held in such conditions. For example, the prisoner's toilet has been clogged with feces and paper for a month and a half. The toilet is clogged because the garrison commander's office let the cleaning contract expire. The jailers have to escort the prisoners over to the medical clinic to use the facilities there. Of course, these nocturnal visits to the toilet put both the jailers and the prisoners at risk.

The jail should have a working toilet. This is not too much to expect. I suspect the cleaning contract would not have been allowed to expire if the toilet had been assigned to the Corps commander or the garrison commander. The men behind the wire are human beings and soldiers. They deserve a working toilet.

MAJ Q-B and I have brought up the issue of the clogged toilet on both the Afghan and coalition side. I had the satisfaction of blasting the deputy RCAC commander, a lieutenant colonel, who did not think the toilet was an emergency. Of course, the toilet remains clogged.

The 205th Corps G-2 continues to put civilian detainees in the Afghan military jail. He has been told that this is contrary to law. However, he says he has nowhere else to put them. To his credit, the G-2 does get the civilian detainees out relatively quickly.

As of July 22, 2008, the two story stone watchtower that serves as the military jail contained eighteen prisoners. Seven of the prisoners, from the 3rd Bde who had asked for help with their drug addiction, were jailed instead. MAJ Q-B and I asked the SJA to talk with the Saranwal about getting these men out of jail and into a rehab facility as soon as possible. One other soldier was accused of fighting with another soldier. A soldier from the 2d Bde told us he had lost his rifle but had found it. After he found it, his unit had him thrown in jail for losing it. These two cases could be handled through the NJP process.

III. SIGNIFICANT MENTORING AND TRAINING ACTIVITY AND ISSUES

On July 14th (Bastille Day), MAJ Q-B and I met with BG Niebi, 205th Corps Commander, to discuss rule of law issues in the 205th Corps. I told the general I was disturbed by the pervasive lack of respect for the rule of law in the 205th Corps. I cited many examples, among them the presence of Syed Mohammed, the failure of the Religious and Cultural Affairs Officer (COL Abdullah) to

appear for trial, and the threats the deputy Corps commander made against the Chief Judge in the Corps Commander's presence. I told BG Niebi no one should ever threaten a judge or a lawyer who is attempting to uphold the law. I also told him that Afghan military judges and lawyers do not need his approval to carry out their duties once a case has been referred to them. BG Niebi was polite but spent most of the conversation bobbing and weaving, dodging and ducking.

The conversation did provide an interesting glimpse into the mind of an Afghan commander. Some might call the general a "warlord." At the beginning of the conversation, he gave the expected statement of his commitment to the rule of law. However, near the end of the conversation, he told us that if he were president of Afghanistan, he would hang murderers. I am reasonably certain he meant he would them without trial.

BG Niebi did tell us he would call BG Shir about Syed Mohammed. He also told us his door would be open to the 205th Corps legal personnel and us. MAJ Q-B and I intend to take BG Niebi up on his generous offer. Every time someone obstructs the administration of justice in the 205th Corps, we will go to the general's office with SJA and/or the Chief Judge to let the general know.

As of July 23, 2008, Syed Mohammed, the hashish-smoking, fist fighting 1st Bde legal advisor is still lurking about the 205th Corps, despite BG Shir's message of July 15th that Syed Mohammed was being "terminated." Yesterday, MAJ Q-B was told that the 1st Bde commander is blocking Syed Mohammed's removal. Today, the 1st Bde commander said the G-1 is blocking Syed Mohammed's removal. Tomorrow, MAJ Q-B and I will go to talk to the 1st Bde commander and the G-1 about their alleged "protection" of Syed Mohammed.

I am very tired of the excuses. Of course, I understand why some Afghan commanders would want to keep Syed Mohammed as a "legal" advisor. He is no threat to those commanders who pay only lip service to the rule of law. However, if the Afghan Army is going to be something more than a Mafia in uniform, then incompetent, lawless thugs who masquerade as legal advisors must go. For as long as I am here, I will continue to press the issue.

I spent Sunday and Monday with Mr. Raymond Micklewright, director of training for the State Department's Justice Sector Support Programs. Raymond stopped over at KAF, at my invitation, on his way back to Kabul from some training in Herat. JSSP is conducting a week's training program for Afghan civilian prosecutors and police investigators, beginning Aug. 2. Raymond offered to give me two slots in the course for the 205th military prosecutor and the CID agent. However, given that we have only one prosecutor and one CID agent, the SJA, Colonel Mutalib, was very reluctant

to give them up for a month. I understand the SJA's reasoning; however, I think the training would have been very helpful. I brought Raymond to the 205th Corps to meet with the SJA and Basic Court judges. We talked about whether it might be possible for JSSP's Afghan instructors to provide training to 205th Corps legal personnel, on site, at Hero Camp. We will continue to talk about this matter.

IV. SIGNIFICANT CJA ACTIVITIES

Although ARSIC-S is generally not in the business of taking detainees, a Taliban suspect fell into our hands during the month of June. He was seriously wounded during an incident at an ANP checkpoint and was turned over to a PMT for medical treatment. During the suspect's stay in the Canadian Hospital, I was able to develop enough evidence to gain the suspect's admission to the Bagram Detention Facility after his release from the Canadian Hospital.

V. 30 DAY OUTLOOK

LTC Rardin will go to Kabul to attend the Counter-Insurgency School. MAJ Q-B will go with Colonel Mutalib, 205th Corps SJA, to deliver NJP training to the 2d Bde in Qalat.

VI. 90 DAY OUTLOOK

Both LTC Rardin and MAJ Q-B expect to reach the end of their Afghan deployments sometime in mid-September.

VII. STRATEGIC CONCERN FOR HEAD OF GS LEGAL

The jails, the jails, and the jails. MAJ Q-B and I see new buildings going up all around at Hero Camp. When we ask why the new jail remains unfinished, we are told there is no money. I consider the jail problem a matter of basic human rights. It is time for the double-talk to end. It is time for MOD to put some money in its budget for decent jails.

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

DIVISION V

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR A "TAINT" HEARING

Procedural Background

The defendant was indicted on August 17, 2004, for two counts of Aggravated Sexual Battery. In indictment 04-05625, it is alleged that the defendant committed Aggravated Sexual Battery upon Jerisha Richards between May 1, 2003, and July 31, 2003. In indictment 04-05626, it is alleged that the defendant committed Aggravated Sexual Battery upon Keyara Richards on July 31, 2003. Both Jerisha Richards and Keyara Richards were persons under the age of 13 at the time these offenses allegedly took place. On November 1, 2005, the defendant filed a motion for a "taint" hearing asking this Court to hold such a hearing to determine whether Jerisha Richards and Keyara Richards are competent to testify from personal knowledge.

STATE'S RESPONSE

COMES NOW the State of Tennessee, by and through the District Attorney General for the Thirtieth Judicial District of Tennessee, and responds to the Defendant's motion as follows:

1. Defendant Hackworth seeks to have this Court rule that Keyara and Jerisha Richard's testimony be ruled inadmissible under Rule 602 of the Tennessee Rules of Evidence. His argument, as the State understands it, is that Keyara and Jerisha Richards, allegedly, have been interviewed so many times and so poorly (in a suggestive and coercive manner) that their testimony should no longer be viewed as from their "own knowledge." Hackworth wants to conduct the taint hearing to determine whether the interview techniques, etc., were unduly suggestive. If the Court were to determine that the girls' testimony was not from their own knowledge, this would make them incompetent witnesses and thus their testimony would be inadmissible. Hackworth also argues that if the girls are not able to testify from own knowledge, then it would be a waste of the court's time and unduly prejudicial to allow Keyara and Jerisha Richards to testify, according to Rule 403 of the Tennessee Rules of Evidence.
2. In paragraphs 1-4 and 7 of "Section II-Law" of his motion, the defendant

makes some general statements from a New Jersey case, *State v. Michaels* (136 N.J.299, 311) (1994), and a case from Idaho, *State v. Wright* (775 P.2d 1224, 1228 (1989), that if a witness's testimony is tainted, then that testimony is unreliable. Interviewing standards from the National Center for the Prosecution of Child Abuse, National District Attorney's Association, and the American Prosecutor's Research Institute that require an interviewer remain "open, neutral, and objective" are also provided. See *Michaels*, at 311.

3. However, the State of Tennessee has found no opinions in which a Tennessee Court granted a defendant's motion for a "taint" hearing. The State of Tennessee has found nothing in Tennessee law that supports defendant's request for a "taint" hearing. Tenn.R.Evid.601 states, "Every person is presumed competent to be a witness except as otherwise provided in these rules or by state." Exactly what this presumed competence means is expanded upon in Rules 602 and 603. Rule 602 states that a person must have "personal knowledge" of that to which he or she testifies. Rule 603 holds: "Before testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." A competent witness, therefore, is one who has personal knowledge of what he or she plans to testify about and who takes an oath or affirmation that he or she will testify truthfully.
4. At times, a judge will conduct a hearing to determine whether a witness is competent. According to the Tennessee Supreme Court, "[t]he purpose of determining competency of the witness in child sexual abuse cases is to allow a victim to testify if it can be determined that the child understands the necessity of telling the truth while on the witness stand." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). In *State v. Miller*, 2002 Tenn. Crim. App. LEXIS 454, at *8-9, a five year old victim was found competent to testify after a competency hearing in which the child "acknowledged that telling the truth was good and not telling the truth was bad," and told the judge she "understood the difference between telling true stories and untrue stories." The *Miller* court explained, "So long as a witness is of sufficient capacity to understand the obligation of an oath, and a rule does not provide otherwise, the witness is competent." *Miller*, at *8 (citing *State v. Jackson*, 52 S.W. 3d 661, 667 (Tenn. Crim. App. 2001). Ultimately, "[t]he question of competency is a matter left to the discretion of the trial court." *Miller*, at *8 (citing *Caughron*, at 538).
5. A few cases hold that there is a *rebuttable* presumption that a child under the age of 14 is presumed competent to testify, *Campbell*, at 612. This "rebuttable presumption" language is not found in the text of Rule 610, however, but rather is found in a comment to a rule and appears to be part of an old common law rule. *State v. Foster*, 2003 Tenn. Crim.App. LEXIS 772, at *9-10. *State v. Howard*, 926 S.W.2d 579, 584 (Tenn. Crim.App. 1996) states,

“The common law rule is that if the child ‘understands the nature and meaning of an oath, is of sufficient intelligence to comprehend the things about which she is called to testify, and is capable of knowing and relating the facts accurately,’ the child is deemed competent to testify.” (quoting *Ballard*, at 560; *State v. Fears*, 659 S.W.2d 370, 375 (Tenn.Crim.App.)). This rule “prevailed prior to the enactment of the Tennessee Rules of Evidence” and “[t]he common law rule [is] much stricter than Tenn.R.Evid.601.” *State v. Campbell*, 904 S.W.2d 608, 612 (Tenn.Crim.App. 1995). Meeting the requirements of the common law rule appears to be now much more than is necessary to overcome the rebuttal in courts that do declare the presumption is still rebuttable. *Id.*

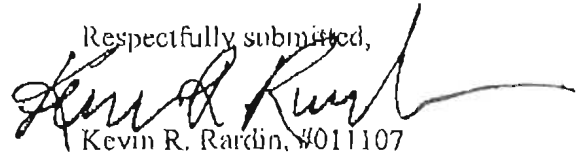
6. Competency in regards to “personal knowledge” must also be determined. “In determining whether a witness is competent for the purposes of Rule 602, the trial court must determine whether a witness had a sufficient opportunity to perceive the subject matter about which he or she is testifying.” *State v. Land*, 34 S.W. 3d 516, 529 (Tenn.Crim.App. 2000) (citing Neil P. Cohen, et al., *Tennessee Law of Evidence*, 602.4, p. 313), “Thus, the party offering the testimony must introduce sufficient evidence to support a jury finding that the witness had personal knowledge of the matter.” *Id.* An Advisory Commission Comment to Rule 602 states that the Rule is “the familiar requirement of first-hand knowledge.” The Rule itself states, “Evidence to prove personal knowledge may, but need not, consist of the witness’s own testimony.” Testimony from Keyara and Jerisha Richards at trial that they were in a house at the same time as Hackworth and they they observed Hackworth touching them would show they “had a sufficient opportunity to perceive the subject matter about which they are testifying and thus should be ‘sufficient evidence to support a jury finding that the [they] have personal knowledge of the matter.’”
7. Other courts have chosen not to adopt the *Michaels* decision when given the opportunity to do so. A defendant in a Texas case filed a motion for an “identification” hearing and asked the court to consider it a “taint” hearing based upon *Michaels* in order to prevent the child victim from testifying. *Johnson v. State*, 2004 Tex. App. LEXIS 10133, *5-6 (Tex. App. 2004). After considering that reasoning of *Michaels* and noting the due process fairness argument within, the court responded, “Texas has not adopted the rationale of *State v. Michaels*, and we decline to do so here. The admissibility of the victim’s testimony and qualification to be a witness is within the discretion of the trial court, Tex. R.Evid. 104(a)” *Johnson*, at 8.
8. *Child Sexual Abuse*, at 5.7 Taint Hearings, p.449 advances persuasive policy arguments against the use of taint hearings, as well. They include: (1) “taint hearings may perpetuate unwarranted skepticism of children as witnesses,” (2) “defense counsel does not need a taint hearing to challenge defective interviewing; because the child can be cross-examined and expert testimony

can be offered to highlight shortcomings in interviews,” and (3) if taint hearings are required because children are suggestible, vulnerable, and impressionable (see *Michaels*, at 307-08), then logic dictates that taint hearings should apply to other witnesses with these traits,” (examples: mentally ill, mentally retarded, senile, etc.) “yet extending taint hearings to other classes of witnesses make it more difficult to protect the most vulnerable members of society.”

9. Finally, even if the Court were to redefine “competency” as it is applied to child witnesses in Tennessee by adopting the *Michaels* case as Tennessee law, the initial burden of proof would rest on the shoulders of the defendant at such a hearing. *Michaels* (emphasis added): “Consonant with the presumption that child victims are to be presumed no more or less reliable than any other class of witnesses, the initial burden to trigger a pretrial taint hearing is on the defendant.” *Michaels* at 320-21. “The defendant must make a showing of ‘some evidence’ that the victim’s statements were the product of suggestive or coercive interview techniques.” *Michaels* at 320-21. (See *Watkins v. Sowder*, 449 U.S. at 350 (Brennan, J., dissenting); *State v. Rodriguez*, 264 N.J. Super 261, 269 (App. Div., 1993); *State v. Ortiz*, 203 N.J. Super 581, 522 (App. Div.), cert. denied, 102 N.J. 335 (1985). Only “[o]nce defendant establishes that sufficient evidence of unreliability exists, the burden shall shift to the State to prove the reliability of the proffered statements and testimony by clear and convincing evidence.” *Michaels* at 321 (see *Hurd*, 86 N.J. at 546).

For the foregoing reasons, this Honorable Court should deny the defendant’s motion.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that a true copy of foregoing response was delivered to the attorney for the defendant on October 12, 2006.

