

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Kenneth F. Irvine Jr.

Office Address: 400 West Main Street, Suite 168, Knoxville, Tennessee 37902
(including county) Knox County

Office Phone: (865) 215-3861 Facsimile: (865) 215-4420

Email Address: ken.irvine@knoxcounty.org

Home Address: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]

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 fourteen (14) 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 General, Sixth Judicial District.

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

1990

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.

I am only licensed in Tennessee. My bar number is 014360. I was licensed in 1990 and my license is currently active.

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).

Law Clerk to the Honorable Joe B. Jones, Tennessee Court of Criminal Appeals, 1990-1991.

Associate, Ritchie, Fels & Dillard, P.C., 1991-1996.

Partner, Eldridge, Irvine & Gaines, PLLC, 1996-2004.

Assistant Public Defender, Sixth Judicial District, 2004-2006.

Assistant District Attorney General, Sixth Judicial District, 2006-2007.

Special Judge, Criminal Court, Division II, Sixth Judicial District, 2007-2008.

Assistant District Attorney General, Sixth Judicial District, 2008-Present.

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.

February 1, 2006 to September 1, 2006: Candidate for Criminal Court Judge, Sixth Judicial District.

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.

My practice is exclusively criminal law as a prosecutor working in the Knox County Criminal Court, Division One.

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.

My entire career has been devoted to criminal law. I started as a paralegal in the United States Army in 1980. While in the Army I spent most of my time working with prosecuting attorneys. After graduation from law school in 1990, I spent one year clerking for the Honorable Joe B. Jones on the Tennessee Court of Criminal Appeals. I then went to work for the law firm of Ritchie, Fels and Dillard. This law firm was primarily a criminal defense firm. We handled complex criminal cases across the United States. In 1996 I opened my own law firm. My practice was almost exclusively criminal defense at this firm. While at Ritchie, Fels and Dillard,

and in my own firm, I had an extensive appellate practice. I regularly appeared before the Tennessee Court of Criminal Appeals and also had cases before the Tennessee Supreme Court and the Sixth Circuit Court of Appeals. In 2004, I accepted a position with the Public Defender's Office in Knox County. I was assigned to Knox County Criminal Court, Division Three. In addition to my normal case load in Division III, I also was regularly assigned to more serious cases in other divisions as part of a team of lawyers. In 2007 and 2008 I spent just over a year as a Criminal Court Judge when one of our local judges became ill and then passed away. I am currently serving as an Assistant District Attorney General and I am assigned full time to Knox County Criminal Court, Division One.

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

A. Trial Court Cases of Note:

State of Tennessee v. Christopher Hendricks, Fall 1991 first degree murder trial. Tried before the Criminal Court of Anderson County. The jury found Mr. Hendricks not guilty of all charges. (Co-counsel with Thomas Dillard).

State of Tennessee v. Robert Holden, May 2005 aggravated assault trial. Tried in Division III, Knox County Criminal Court. The jury found Mr. Holden not guilty in a case involving a victim with serious injuries. (Sole counsel).

Hugh Nicely v. State of Tennessee, Spring 2006, post conviction case. Robertson County Criminal Court. Trial court ordered a new trial for Mr. Nicely based on failure of original trial counsel to get a copy of crucial evidence and have it examined by an expert. (Sole counsel).

- B. Three cases that I have taken to the Tennessee Supreme Court have resulted in significant decisions. I was sole counsel in each of these cases.

In State v. Pearson, 858 S.W.2d 879 (Tenn. 1993), the Court dealt with several difficult issues involving the Criminal Sentencing Reform Act of 1989. One of the key questions that the Court was faced with was what to do with defendants who committed offenses before the effective date of the Act but are sentenced after the effective date. Ultimately, the Court held that, due to ex post facto concerns, trial courts must consider a sentence under the law at the time the offense was committed and also the law at time of sentencing. The trial court was then required to apply the lesser of the two sentences.

In State v. Levandowski, 955 S.W.2d 603 (Tenn. 1997), the Court was faced with a question of first impression dealing with the false reporting statute. Ms. Levandowski had been convicted under the false reporting statute for a response she made to a law enforcement officer's inquiry. After reviewing the history of this statute, and considering the legislative intent, the Court held that the statute did not reach citizens who merely responded to questions posed to them by law

enforcement officers. This was a SCALES case.

In Logan v. Winstead, 23 S.W.3d 297 (Tenn. 2000), the appellant sued his former criminal defense attorney for legal malpractice. The appellant asked that the matter be held in abeyance until he was released from prison. The trial court never ruled on this motion but did grant the attorney's motion for a summary judgment. The Tennessee Supreme Court held that the trial court erred by failing to rule on the appellant's motion to put in abeyance. The case was remanded with guidance on when a motion such as this should be granted.

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.

On August 18, 2007, I was appointed as a Special Criminal Court Judge, Sixth Judicial District. I held this position until the end of August 2008. I took over a court with a significant backlog of cases and within one year was able to eliminate that backlog.

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.

Early in my career I served a number of times as a guardian ad litem in Knox County Juvenile Court.

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

None.

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.

September 1998 – Judge, Tennessee Court of Criminal Appeals – Name submitted to the Governor but not selected by the Governor.

September 2007 – Criminal Court Judge, Sixth Judicial District – Name submitted to the Governor and I was selected for that position.

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.

Florida State University

1975-1979 & 1987

B.S. in Political Science and Social Science

Austin Peay State University - Fort Campbell Branch

1980

Transferred by US Army

Los Angeles Metropolitan College - Camp Howze, Korea Branch

1983

Transferred by US Army

Saint Leo College - Hunter Army Airfield Branch

1984

Transferred by US Army

Troy State University - Fort Benning Branch

1985-1986

Left military service

University of Tennessee College of Law

1987-1990

Doctor of Jurisprudence (with High Honors)

Order of the Coif

Phi Kappa Phi

James L. Powers III Award for Excellence in Criminal Advocacy

Dean's Citation

PERSONAL INFORMATION

15. State your age and date of birth.

55, February 6, 1958.

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

Twenty six years.

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

Twenty two years.

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

Knox County, Tennessee.

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.

a) Branch of Service: United States Army

b) Dates of active duty: 12 Mar 80 to 18 Dec 86

c) Rank/rate at separation: Sergeant

d) Decorations, honors, or achievements: Army Achievement Medal with two oak leaf clusters, Army Commendation Medal, Parachutist Badge, Army Service Ribbon, Overseas Service Ribbon, Good Conduct Medal and Jungle Expert Badge.

I was honorably discharged.

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.

No.

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.

Divorced on February 5, 1984. Chancery Court, Montgomery County, Clarksville, Tennessee.

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.

The American Legion, Life Member

Post 2 Commander, 2009-2011

Post 2 Vice Commander, 2011-Present

Post 2 Judge Advocate, 2013-Present

Department of Tennessee, Legislative Chair, 2011-2013

East Tennessee Veterans Memorial Association

Board Member, 2011-Present

Phi Kappa Phi, Life Member

101st Airborne Association, Life Member

US Army Ranger Association, Life Member

UT Legal Clinic Advisory Board

Knox County Community Alternatives to Prison Program

Board Representative, 2011-Present

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.

Tennessee Bar Association - 1990-2010
Knoxville Bar Association - 1991-2013
CLE Committee – 2007-2008
National Association of Criminal Defense Lawyers - 1991-2006
Tennessee Association of Criminal Defense Lawyers - 1991-2006
President – 2000-2001
Board of Directors - 1993-1994 & 1996-1998
Hamilton Burnett American Inn of Court – 2004-2008
Post Conviction Defender Commission, Board Member, 2002-2006
Federal Community Defender Board
Board Member, 2001-2006
President, 2004-2005
Bench/Bar Committee, Tennessee Judicial Conference, 1996-1998
Indigent Defense Commission, 1999-2001
Secretary, 2001

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.

1994 - Robert W. Ritchie Award, for outstanding service to the Tennessee Association of Criminal Defense Lawyers

1996 - Robert W. Ritchie Award, for outstanding service to the Tennessee Association of Criminal Defense Lawyers

2003 - Pro Bono Award, Legal Aid of East Tennessee, Pro Bono Project

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

Tennessee Judicial Newsletter, 1988
For the Defense, 1992-1993, Series of articles on state sentencing issues
For the Defense, 1995-1996, Series of articles on issues that can win cases (w/
Wade Davies)

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.

Basic Course, Environmental Crime Investigators, Federal Law Enforcement Training Center, Brunswick, Georgia
Discovery, New Prosecutor's Academy, Nashville, Tennessee

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.

Candidate for Knox County Criminal Court Judge, Division II – August 2006
Appointed to the same position, on August 20, 2007, by Governor Bredesen.

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.

Attached to this application are two responses that I have prepared and filed in cases while serving as a prosecutor. The third attachment is a memorandum I did as a private attorney:

- A. State v. Karen Newman, Case No. 90474, Response to Defendant's Motion to Suppress.
- B. Kimberly Evans v. State, Case No. 99872, Response to Defendant's Second Petition for a Writ of Habeas Corpus.
- C. Hugh Nicely v. State, Case No. 8530, Memorandum of Fact and Law – Duty to Find Appropriate Expert.

ESSAYS/PERSONAL STATEMENTS

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

If I were chosen to serve on the Court of Criminal Appeals I believe I could bring a unique perspective to the Court. Few lawyers have been blessed with the opportunity to have served as a prosecutor, a defense attorney and as a trial judge. I have literally seen the criminal justice

system from all sides. With this unique perspective I believe I could fashion opinions that would make the system work more efficiently while still seeking to do justice.

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)*

The following activities demonstrate my commitment to equal justice under the law:

- a. Co-Founder and Past President of the Tennessee Innocence Project
- b. Member of the Indigent Defense Commission
- c. Thousands of hours spent representing people on a pro bono basis
- d. Appearance as guest lecturer at several programs for average citizens where the local bar seeks to educate them about the law.
- e. Guest lecturer at over 30 CLE programs where I have sought to educate fellow lawyers so they could better represent their clients.
- f. The writing of articles which have sought to educate attorneys so they could better represent their clients.
- g. Participant in the Veterans Stand Down Program which works with homeless veterans.
- h. Co-founder and current participant in the Knox County Veterans and Homeless Legal Assistance Initiative.

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)*

The Tennessee Court of Criminal Appeals was created by the Tennessee Legislature in 1967. The Court originally had nine judges but was expanded to twelve judges in 1996. There are currently four judges from each of the three Grand Divisions. The Court of Criminal Appeals hears all trial court appeals in criminal matters. The various judges sit as three judge panels in Knoxville, Nashville and Jackson to hear cases.

I am seeking to fill a future vacancy in the Eastern Grand Division. I know each of the current judges in this division and I believe I could work well with each of them.

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)*

My community involvement over the last ten years has come primarily through my work with the American Legion and other veterans organizations. I would continue this work if I were appointed to the Tennessee Court of Criminal Appeals.

My involvement with the American Legion allows me to work with a variety of groups within the community. I especially enjoy the programs that we sponsor that involve the youth of our community. Our annual oratorical contest, leadership training like Boys State and other programs allow me to see young people that are excelling in their academics and as leaders. Working daily in the criminal justice system brings me into contact with a different group of people. Seeing bright young men and women is refreshing and brings balance to my life.

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 am living the American dream. My father was a mechanic who had to drop out of school in the eighth grade so he could help support his family after his father died in his arms. I was the first person in my family to earn a college degree and the only one that has been able to go on and get an advanced degree.

My parents never had the chance to go to college but they were able to show me through their actions the importance of an education. They also, by their example, taught me the importance of hard work and being fair.

I am grateful for the blessing that I already have in my life. If I can continue as a Judge on the Tennessee Court of Criminal Appeals, I will never forget the importance of working hard and treating each person with respect and dignity.

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)*

The law is written in our state by the Tennessee Legislature. It is the duty of each judge to enforce the law as the Legislature intended. I would always uphold the law whether I agree with it or not. If appointed as a Judge, I would resign my position if I ever felt I could no longer uphold the law because of some personal conviction.

I am currently working on a case where the law, as written by the Legislature, has restricted my ability to prosecute several people. In 2009, the Tennessee Legislature amended the definition of serious bodily injury. This amendment has prevented me from charging three defendants with aggravated assault where the victim suffered several broken ribs. As a result I have charged these people with simple assault because that is the only type of assault available under the amended definition.

However, I have also gone on to draft a legislative proposal which will be presented to the Tennessee Legislature next session. I do not believe that the Legislature intended the consequences that have flowed from the 2009 amendment. The solution I have proposed would fix the problem for future aggravated assault cases.

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. Randall E. Nichols
District Attorney General
Sixth Judicial District
400 West Main, Suite 168
Knoxville, Tennessee 37902
(865) 215-2515
randy.nichols@knoxcounty.org

B. John E. Eldridge, Esq.
800 South Gay St., Suite 2100
Knoxville, Tennessee 37929
(865) 523-7731
[REDACTED]

C. Robert C. DeWald
[REDACTED]
Knoxville, Tennessee 37934
[REDACTED]
[REDACTED]

D. Erin Morrison
Victim/Witness Coordinator
Sixth Judicial District
400 West Main, Suite 168
Knoxville, Tennessee 37902
(865) 215-2515
erin.morrison@knoxcounty.org

E. Jerry "Marty" Everett
[REDACTED]
Knoxville, Tennessee 37918
[REDACTED]
[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 Tennessee Court of Criminal Appeals, 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: June 5, 2013.

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 (previously known as the Court of the Judiciary) 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 and to the office of the Governor.

Kenneth F. Irvine Jr.

Type or Printed Name

Signature

5 Jun 13

Date

014360

BPR #

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

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE

VS.

NO. 90474

KAREN ELAINE NEWMAN, ALIAS

RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

The State of Tennessee, by and through the District Attorney General for the Sixth Judicial District, files the following response to the Defendant's Motion to Suppress. The State would show as follows:

1. Ms. Karen Elaine Newman was arraigned in this case on January 29, 2009. At her arraignment a trial date of May 13, 2009 was set.

2. A discovery motion was filed on February 2, 2009. A written discovery response was filed on March 5, 2009.

3. The trial did not take place on May 13, 2009. A new trial date was set on September 14, 2009.

4. On August 27, 2009, less than three weeks before the second trial setting of this case, the defense filed a motion to suppress.

5. As of September 3, 2009, the defense has made no effort to schedule a hearing on its motion to suppress.

6. The defendant's motion fails to allege any constitutional, statutory or historical precedent that would justify suppression of any evidence, or any statements by the defendant, in this case. The motion also fails to allege facts that would support the suppression of any evidence in this case.

7. The defendant's motion is insufficient under the provisions of Rule 47(c)(1) of the Tennessee Rules of Criminal Procedure. This portion of the rule requires a defendant's motion to state with particularity the grounds on which it is made. The lack of particularity in criminal motions, especially those filed pretrial, has been a source of complaint by Tennessee's appellate courts which have imposed a particular requirement of some specificity. See, State v. Davidson, 606 S.W.2d 293, 296-7 (Tenn.Cr.App. 1980); State v. Howell, 672 S.W.2d 442, 444 (Tenn.Cr.App. 1984); State v. Burton, 751 S.W.2d 440-, 445 (Tenn.Cr.App. 1988); & State v. Bell, 832 S.W.2d 583, 588 (Tenn.Cr.App. 1991).

8. Before a defendant is entitled to an evidentiary hearing, he must file a proper motion that must be sufficiently definite, specific, detailed and non-conjectural. A trial court should be able to review the defendant's motion

to suppress and be able to tell what the defendant seeks to suppress and the specific basis upon which he seeks to suppress each item or statement. The State would respectfully urge this Court to dismiss the defendant's motion, or in the alternative, order the defendant to file a supplemental motion that complies with Rule 47, Tenn.R.Crim.Pro, and the applicable case law.

9. When the allegations contained in a motion to suppress are sufficient, and entitle the defendant to an evidentiary hearing, the accused has the initial burden of proving the following by a preponderance of the evidence:

- (a) she has a legitimate expectation of privacy in the place or property from which the items sought to be suppressed were seized;
- (b) the identity of the items she seeks to suppress as evidence;
- (c) the items were seized without a warrant.

State v. Burton, 751 S.W.2d at 445. The State would request that, once a proper motion is filed, that the defendant be required to prove each of the above items by a preponderance of evidence, before any burden shifts to the State.

10. As part of the motion to suppress, the defense alleges that Ms. Newman was arrested without probable cause and therefore any statements made after her arrest or any evidence seized after her arrest

should be suppressed. The defense fails to offer any specific facts that support their belief that the officers lacked probable cause.

11. Several documents, that demonstrate the basis for probable cause, were provided to defense counsel as part of the discovery provided to the defense on March 5, 2009. One of these documents is the Knoxville Police Department Alcohol/Drug Influence Report which contains the following entries:

a. Ms. Newman called the KPD officers to get her boyfriend thrown out of their apartment. The officers arrived at the apartment complex before Ms. Newman returned. The officers watched Ms. Newman drive up. When she got out of her car the officers observed her staggering. Ms. Newman had a strong odor of alcohol upon her person and her breath. The officers noted that this smell was very strong.

b. The officers noted on this report that Ms. Newman's appearance was disorderly, that she was angry and that her speech was slurred. They also noted that she was crying at times.

c. The officers attempted to give Ms. Newman several field sobriety test. She was given the horizontal gaze nystagmus test which indicated that she had a blood alcohol content in excess of .10%. Ms. Newman was then offered the opportunity to perform the walk and turn test and the one leg stand. Ms. Newman declined to perform these tests citing a bad hip.

d. Ms. Newman was given the opportunity to have a blood test done but she declined to have this done.

12. The defense also asks this Court to suppress the drugs seized from Ms. Newman's constructive possession because the items were not submitted to any laboratory for analysis. Defense counsel does not

submit any authority for the proposition that a lab test of illegal drugs, or controlled substances or legend drugs is a prerequisite to the admission of these items or the officers testifying as to what they found. The drugs found in this case were: marijuana; diazepam and simvastatin.

13. At trial the identity of these substances can be established by several different methods. Certainly, a report from a laboratory would be one of the ways to make this identification. There are other ways to make this identification. For example, Ms. Newman informed the officers that she had marijuana in her purse before they searched her purse. Also, experienced officers have been allowed to testify that a substance is marijuana based on the many times they have seen this illegal drug in the past. See, State of Tennessee v. William Franklin Townsend, CCA No. 01C01-9306-CR-00175, 1994 Tenn.Crim.App. LEXIS 433, copy attached at Appendix A; State of Tennessee v. Gary Harris, CCA No. 03C01-9510-CC-00319, 1996 Tenn.Crim.App. LEXIS 546, copy attached at Appendix B & State of Tennessee v. Mikel Primm, CCA No. 01C01-9712-CC-00571, 1998 Tenn.Crim.App. LEXIS 1271, copy attached at Appendix C.

As can be heard on the cruiser video in this case, the officers were able to identify the other two drugs using a computer program where they input descriptive items from a pill and the program then identifies the drug for them. For example, one of the pills had the following writing on it: "Mylan 345." When the officers entered this information the program identified the pill as a diazepam pill which is made by Mylan

Pharmaceuticals. The other pill had “CO3 LL” on it. The program identified this pill as Simvastatin manufactured by Lupin Pharmaceuticals. It would ultimately be a jury question if this type of identification satisfied the jury, beyond a reasonable doubt, that these items were controlled substances.

14. The defense motion also alleges that “...the search of the defendant’s vehicle was illegal since the defendant was under arrest and cuffed in the back of a patrol car prior to the search.” The officers searched the vehicle incident to Ms. Newman’s arrest and found a marijuana pipe, an empty liquor flask and several unopened 24 oz. cans of beer. Ms. Newman’s vehicle was also being impounded and the officers could have gone through the vehicle pursuant to an inventory search.

15. This last claim of the defense may be a vague reference to the recent U.S. Supreme Court decision dealing with searches incident to arrest. In the case of Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court limited the scope of certain searches incident to an arrest where the suspect has been handcuffed and placed in the back of a police cruiser.

However, the U.S. Supreme Court reaffirmed the constitutionality of a search incident to an arrest if there was a reasonable basis to believe that evidence of the crime, for which the person has been arrested, might

be found in the vehicle. See, Arizona v. Gant, 129 S. Ct. at 1719. When a person is arrested for driving under the influence, it is reasonable to believe that evidence of that crime might be found in the vehicle that the defendant was just driving.

Based on all of the foregoing, the State respectfully asks this Court to dismiss the current Motion to Suppress and to direct the defense to file a motion that complies with Rule 47 of the Tennessee Rules of Criminal Procedure if the defense wants this issue to be heard.

RESPECTFULLY SUBMITTED,

RANDALL E. NICHOLS
DISTRICT ATTORNEY GENERAL

BY: _____
KENNETH F. IRVINE, JR.
ASSISTANT DISTRICT ATTORNEY

CERTIFICATE

I hereby certify that I have delivered a true and exact copy of the captioned Motion to Jim D. Owen, Esq., 1101 Liberty Street, Knoxville, Tennessee 37919 by depositing the same in the United States Mail with sufficient postage thereon to carry same to its destination this the 3rd day of September 2009. A copy of this motion was also sent via email to Mr. Owen on this 3rd day of September 2009.

KENNETH F. IRVINE, JR.
ASSISTANT DISTRICT ATTORNEY

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

KIMBERLY MAE EVANS

V.

CASE NO. 99872

STATE OF TENNESSEE

RESPONSE TO DEFENDANT'S SECOND PETITION FOR A WRIT OF
HABEAS CORPUS

Comes the State of Tennessee, by and through the District Attorney General for the Sixth Judicial District, in response to the defendant's "Petition for Writ of Habeas Corpus" and files the following response:

A. Procedural History.

On May 26, 2004, pursuant to a plea agreement, the defendant pled guilty to vehicular assault and driving under the influence. The defendant received an effective sentence of two years. The vehicular assault was a felony conviction and as a result of this felony conviction, the defendant was rendered infamous. The DUI conviction was a Class A Misdemeanor and did not result in a finding of being infamous.

The effective sentence of two years was suspended, after service of fifty days, and the defendant was placed on supervised state probation for the balance of the sentence. Probation in this case expired on May 25, 2006.

Now, six years after the sentence has expired, the defendant has filed a series of motions attacking the plea agreement from 2004. The defendant has

- filed:
1. A Petition for Writ of Habeas Corpus;
 2. A Petition for Post Conviction Relief;
 3. A Petition for A Writ of Error Coram Nobis
 4. A Motion to Correct Illegal Sentence.
 5. This filing is a second Petition for Writ of Habeas Corpus.

B. Writ of Habeas Corpus.

The appellate courts of this state have directed that attempts to correct an illegal sentence should be done via a petition for a writ of habeas corpus.

In 1978 the Tennessee Supreme Court declared that a trial court has the authority to correct an illegal sentence at any time, even if it has become final. See, State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978). Unfortunately, the Burkhart Court was silent about how this correction of an illegal sentence was to be accomplished.

A year later, the Tennessee Rules of Criminal Procedure became effective, and they too were silent on any procedural mechanism to be used to correct an allegedly illegal sentence.

Finally, in 2005, the Tennessee Supreme Court determined that habeas corpus was the correct procedural mechanism to use for seeking the correction of an illegal sentence. See, Moody v. State, 160 S.W. 3d 512, 516 (Tenn. 2005).

The right to seek habeas corpus relief is guaranteed by Article I, Section 15 of the Tennessee Constitution. The procedures governing habeas corpus petitions are codified at Tennessee Code Annotated sections 29-21-101 through 29-21-130. The appellate courts of this State have repeatedly stated that "the procedural provisions of the habeas corpus statutes are mandatory and must be followed scrupulously." Archer v. State, 851 S.W.2d 157, 165 (Tenn. 1993) (citing Bateman v. Smith, 183 Tenn. 541, 194 S.W.2d 336, 337 (1946)). Although there is no habeas corpus statute of limitations, the grounds upon which habeas corpus relief will be granted are narrow. Dixon v. Holland, 70 S.W.3d 33, 36 (Tenn. 2002); See State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000); Archer, 851 S.W.2d at 164.

A habeas corpus court may properly choose to dismiss a petition for failing to comply with the statutory procedural requirements. Hickman v. State, 153 S.W.3d 16, 10 (Tenn. 2004). The Tennessee Supreme Court, in Moody v. State, affirmed the dismissal of the case because of the petitioner's failure to comply with the procedural requirements for a habeas corpus action. Moody, 160 S.W.3d at 516.

T.C.A. § 29-21-107(b) has the following mandatory language:

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained,

mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

The petition in this case fails to properly address all of the above items that are required by T.C.A, § 29-21-107(b). The petition will never be able to meet these pleading requirements because it has been over six years since the defendant was restrained of her liberty by the case she seeks to attack.

A statutory prerequisite for eligibility to seek habeas corpus relief is that the petitioner must be "imprisoned or restrained of liberty" by the challenged conviction. The phrase "restrained of liberty" has generally been interpreted to include any limitation placed upon a person's freedom of action, including such restraints as conditions of parole or probation, or an order requiring a person to remain in one city. See Hickman v. State, 153 S.W.3d 16 (Tenn. 2004) & Benson v. State, 153 S.W.3d 27 (Tenn. 2004). The sentence challenged by the petitioner in this case has expired and she is no longer imprisoned or restrained of liberty as that phrase is used in this context.

The petitioner still does not allege that she is currently imprisoned because of her 2004 DUI conviction. The petitioner has attempted to allege that she is restrained of liberty because of her 2004 DUI conviction. She alleges:

1. As a result of said convictions, the Petitioner has been denied the rights of citizenship and has had to apply for restoration of her citizenship rights as defined by TCA 40-29-101 et seq. and 40-29-201 et seq.; and
2. In addition, the plea has placed the Petitioner in jeopardy of being deprived of her driving privileges for violation of TCA 55-10-603, commonly known as Habitual Motor Offender Statute, which clearly states that a conviction of three (3) or more listed offenses within a five (5) year period shall be grounds for placement and/or placement of habitual status. The Petitioner would show that she was convicted in the year 2000 of DUI, first offense, and these offenses constituting vehicular assault and DUI, second offense, are covered offenses in said statute and have placed her in immediate peril of loss of her constitutionally protected driving privileges.

See pp 1-2, Petition for Writ of Habeas Corpus.

The petitioner was denied the rights of citizenship based on her felony conviction for vehicular assault. The misdemeanor conviction for DUI does not have the same legal effect. The petitioner cannot attack her misdemeanor conviction, claiming that this misdemeanor conviction has lead to a loss of her citizenship rights, when the misdemeanor conviction has no such legal effect. In addition, the Circuit Court for Knox County, Tennessee restored the petitioner's citizenship rights on May 25, 2012. (See Order attached to petitioner's pleadings).

The petitioner is also legally incorrect when she asserts that she has three qualifying convictions that place her in immediate peril of being declared a habitual motor vehicle offender. T.C.A. § 55-10-604(b) explains the computation of convictions for HMVO purposes. That subsection states as follows:

(b) Where more than one (1) included offense is committed within a one-day period, all such offenses in such one-day period shall be treated for the purposes of this part, as not more than one (1) offense.

Under the controlling statutes, the petitioner had two qualifying convictions since the vehicular assault and the DUI occurred on the same day. The passage of seven (7) years, without any declaration of habitual motor vehicle offender status, underscores the complete lack of any “immediate peril.” In fact, if the petitioner picked up a new DUI tomorrow, she would still not qualify for HMVO status.

On at least two occasions, the Tennessee Court of Criminal Appeals has affirmed dismissals of habeas corpus petitions, where the petitioner was seeking to correct an allegedly illegal sentence, because the petitioner was no longer imprisoned or restrained of liberty. See, State of Tennessee v. Norris Clark, 2011 Tenn.Crim.App. LEXIS 469 (copy attached as Appendix A) and Terry Penny v. State of Tennessee, 2005 Tenn.Crim.App. LEXIS 1255 (copy attached as Appendix B).

The State has responded to each Petition for Writ of Habeas Corpus with a demand that the petitioner comply with the statutory requirements. In this petition the petitioner has attempted to comply with the statute by listing two claims that she contends show how her DUI conviction continues as a restraint on her liberty. As explained above, the State does not believe that either of

these grounds satisfies the statutory requirements listed in T.C.A, § 29-21-107. Absent compliance with the statute, the State believes this Petition for a Writ of Habeas Corpus should again be dismissed.

C. Allegedly Illegal Sentence.

Even if the Court were to reach the merits of this claim, the petitioner would still fail. The State does not concede that the DUI conviction/sentence in this case was illegal. The State contends that the agreed sentence in this case was a legal sentence that could have been imposed.

First, the cases that deal with “illegal” sentences look to see if there was any legal way that sentence could have been imposed. If there is no legal way to impose such a sentence, then it is an illegal sentence. Even if you assume double jeopardy issues in this case, it doesn’t mean that a trial court cannot impose convictions and sentences for both vehicular assault and DUI. Such a sentence can be imposed with the defendant’s approval. Double jeopardy protections, like most constitutional protections, can be waived.

A second reason that this is not an illegal sentence is because of a recent decision of the Tennessee Supreme Court. On March 9, 2012, the Tennessee Supreme Court released a landmark decision in State v. Watkins, 2012 Tenn.

LEXIS 154, where they stated:

Accordingly, we adopt the same elements test enunciated in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) as the test for determining whether multiple convictions under different statutes constitute the same offense for purposes of the Double Jeopardy Clause of the Tennessee Constitution.

(Copy attached as Appendix C).

When you apply the Blockburger test, as explained in Watkins, there is no double jeopardy problem in this case.

D Conclusion.

Based on all of the foregoing, the State respectfully asks that this Court dismiss this pleading for failing to meet the requirements of a petition for a writ of habeas corpus.

RESPECTFULLY SUBMITTED,

KENNETH F. IRVINE, JR.
ASSISTANT DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading has been forward to F.D. Gibson, Esq., 222 Ellis Avenue, Maryville, Tennessee 37804; on this the 11th day of July 2012

KENNETH F. IRVINE, JR.
ASSISTANT DISTRICT ATTORNEY

**IN THE CIRCUIT COURT FOR ROBERTSON COUNTY
AT SPRINGFIELD, TENNESSEE**

HUGH ANDREW NICELY)	
)	
v.)	CASE NO. 8530
)	POST-CONVICTION
STATE OF TENNESSEE)	

**MEMORANDUM OF FACT & LAW:
DUTY TO FIND APPROPRIATE EXPERT**

On May 5 & 6, 2006, an evidentiary hearing was held before this Honorable Court. At the conclusion of that hearing, the Court gave counsel the opportunity to file any post hearing memoranda that counsel felt would be appropriate. This post hearing memorandum is one of two memoranda that petitioner’s counsel is filing. This memorandum will address the facts and law on the issue of a defense counsel’s duty to find an appropriate expert.

A. The Facts.

1. The Second Trial – State v. Niceley.

At Mr. Niceley’s second trial the prosecution called Ms. Rosof, a nurse with Our Kids Clinic. Ms. Rosof testified that she did a physical examination of Crystal Bennett, the alleged victim in this case, and during that examination she observed that Ms. Bennett’s hymen was completely missing at the six o’clock position. Ms. Rosof had taken photographs of Ms. Bennett’s vaginal area to document her findings. A

culposcope had been used to create photographic slides and these slides were presented to the jury during Ms. Rosof's testimony.

Ms. Rosof went on to offer her professional opinion that the absence of the hymen was caused by some type of penetration. She further opined that the absence of the hymen was not the result of some type of accident.

Ms. Rosof had also testified at Mr. Niceley's first trial and offered the same opinions at that trial. She was not able to show the culposcope slides to the jurors in the first trial because they had been excluded by the trial judge. The slides had not been provided to the defense in accordance with the rules of discovery and were therefore excluded at the first trial.

The jury at Mr. Niceley's first trial was unable to reach a verdict and a mistrial was declared.

Defense counsel had viewed the slides before the second trial but had not gotten copies of the slides or made any prints from the slides. Defense counsel secured the services of two expert witnesses, Dr. Steven Miniat and Dr. Eric Engum. Neither of these experts were asked by the defense to review the culposcope slides. Defense counsel did not seek to have any expert review the culposcope slides to see if there was a basis to challenge Ms. Rosof's opinion about the absence of Ms. Bennett's hymen at the six o'clock position.

2. The Post Conviction Hearing.

As this Court will recall, the petitioner presented the testimony of Dr. Matthew Seibel at the evidentiary hearing in this case. Dr. Seibel is a medical doctor with

extensive experience in the area of child sexual abuse. Dr. Seibel had reviewed photographs made from the culposcope slides. Dr. Seibel was able to testify that, in his opinion, the hymen was not missing at the six o'clock position. He was able to mark the photograph showing where the hymen began, at the three o'clock position, and how anyone could see the hymen all the way around to the nine o'clock position.

Mr. Wilks testified at the evidentiary hearing. He acknowledged that he had not requested any copies of the culposcope slides nor did he seek out the services of any expert that would be appropriate to review the slides. Mr. Wilks further acknowledged that having an expert like Dr. Seibel at trial would have been very helpful.

B. The Law.

In Tennessee, the accused has a constitutional right to the **effective** assistance of counsel at all critical stages of a criminal prosecution. See, US. Const., 6th Amendment; Tenn. Const., Article I, § 9; Powell v. Alabama, 287 U.S. 45 (1932); and McKeldin v. State, 516 S.W.2d 82, 86 (Tenn. 1974).

In deciding whether a constitutional deprivation of this right has occurred, there are two leading cases that begin the inquiry. Those cases are Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

“To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel’s performance was deficient and that the deficiency prejudiced the defense.” Strickland, 466 U.S. at 687. In evaluating whether the petitioner has met this burden, the court must determine whether counsel’s

performance was within the range of competence required of attorneys in criminal cases. Baxter, 523 S.W.2d at 936.

To establish that a deficiency resulted in prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694; and Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). It is not necessary that the petitioner prove that, but for the deficiency, an acquittal would have been the result. Brimmer v. State, 29 S.W.3d 497, 508 (Tenn.Cr.App. 1998).

When a petitioner contends that trial counsel failed to discover, interview or present witnesses in support of his defense, the petitioner must present these witnesses at the evidentiary hearing. Failure to present this witness, or witnesses, most often results in the petitioner failing on this issue. See, Black v. State, 794 S.W.2d 752, 757-8 (Tenn.Cr.App. 1990).

The right to effective assistance of counsel contemplates that an attorney who undertakes the representation of an accused will conduct a thorough pretrial investigation into the facts and circumstances surrounding the offenses charged in the Indictment. Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987), cert. denied, 485 U.S. 970 (1988); Williams v. State, 599 S.W.2d 276, 278-9 (Tenn.Cr.App. 1980).

The right to effective assistance is violated if defense counsel deprives a criminal defendant of a substantial defense by his own ineffectiveness. Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. See, Baxter, 523 S.W.2d at 934-5 & Goad,

938 S.W.2d at 369. Defense counsel has a duty to use witnesses who may be of assistance to the defense. State v. Zimmerman, 823 S.W.2d 220, 227 (Tenn.Cr.App. 1991).

In Baxter, the Tennessee Supreme Court quoted with approval the ABA Standards for the Defense Function. The Baxter Court noted that:

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The [U.S.] Supreme Court has noted that the adversary system requires that all available defenses are raised so that the government is put to its proof.

523 S.W.2d at 933. See also, State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999).

In Cooper v. State, 847 S.W.2d 521, 531 (Tenn.Cr.App. 1992), the Tennessee Court of Criminal Appeals held that:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty phase in the event of conviction.

(quoting A.B.A. Standards for Criminal Justice (2d ed.), The Defense Function § 4-4.1), aff'd, 849 S.W.2d 744 (Tenn. 1993).

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Failure to conduct a reasonable investigation constitutes deficient performance. See, Burns, 6 S.W.3d at 462. See also, Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). When counsel's choices are unformed because of inadequate preparation, a

defendant is denied the effective assistance of counsel. See, Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) and United States v. DeCoster, 487 F.2d 1197, 1201 (D.C.Cir. 1973).

In 1994, the Tennessee Code of Professional Responsibility mandated that an attorney must represent his or her client zealously with the bounds of the law. Ethical Consideration 7-1 stated, in part, that:

In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

EC 7-19 goes on to explain:

Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of the facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

Ethical Consideration 7-1 provides that an attorney should look to the disciplinary rules and “enforceable professional regulations” when deciding the bounds of zealous advocacy. The American Bar Association Standards for Criminal Justice and the National Legal Aid and Defender Association’s Performance Guidelines for Criminal Defense Representation, are two such professional regulations.

A.B.A. Standards for Criminal Justice (2d ed.), The Defense Function § 4-4.1 sets out an attorney’s duty to investigate. It states, in part:

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of the facts constituting guilt or the accused's state desire to plead guilty.

NLADA Guideline 4.1(b)(7) deals directly with defense counsel's duty to find appropriate expert witnesses as part of the investigation of a case. It states that counsel should secure the assistance of experts where it is necessary or appropriate to:

- (A) the preparation of the defense;
- (B) adequate understanding of the prosecution's case;
- or (C) rebut the prosecution's case.

C. Conclusion.

Defense counsel had a duty to fully investigate the allegations against Mr. Niceley. That investigation should have included getting a copy of the culposcope slides and showing them to an appropriate expert. Had this been done counsel would have been able to dramatically contest the testimony of Nurse Rosof. Failure to even consider this type of expert is ineffective assistance of counsel that caused substantial prejudice to Mr. Niceley's defense.

It is respectfully requested that this Court find a constitutional violation on this issue and order a new trial.

Respectfully submitted,

KENNETH F. IRVINE, JR. ESQ.
Counsel for Mr. Hugh Nicely
942 Luttrell Street
Knoxville, Tennessee 37917
(865) 523-7731

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and complete copy of this document to:

Dent Morriss, Esq.
Assistant District Attorney General
500 Main Street
Springfield, Tennessee 37172

this 31st day of May, 2006.

KENNETH F. IRVINE, JR.