

**Tennessee Judicial Nominating Commission**  
***Application for Nomination to Judicial Office***

*Rev. 14 September 2011*

Name: Derek Keith Smith

Office Address: Office of the District Attorney General, 21<sup>st</sup> Judicial District,  
(including county) Williamson County, P.O. Box 937, Franklin, TN 37065-0937

Office Phone: 615-794-7275 Facsimile: 615-794-7299

Email Address: dksmith@tndagc.org

Home Address: [REDACTED]  
(including county) Williamson County, TN

Home Phone: [REDACTED] Cellular Phone: [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 seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to [debra.hayes@tncourts.gov](mailto: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.

I am presently employed as the Deputy District Attorney with the Office of the District Attorney General of the 21<sup>st</sup> Judicial District serving Williamson, Hickman, Lewis and Perry Counties.

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

I have been licensed to practice since 1992. My Board of Professional Responsibility number is 015654.

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 licensed to practice in the State of Tennessee. My license was issued in 1992 and is currently active. My license number is 015654.

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 employed by the Office of the District Attorney, 21<sup>st</sup> Judicial District, since the completion of my legal education in 1992.

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.

Not applicable. I have been employed continuously since the completion of my legal education.

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 am responsible for the prosecution of criminal cases on behalf of the citizens that live in the 21<sup>st</sup> Judicial District. Criminal law and trial practice constitute 100% of my practice. A typical work week would include preparing charging instruments (i.e. indictments), which includes having a full understanding of the evidence, both tangible and intangible, needed to prove a case at trial. I have tried hundreds of cases before a jury – rapes, murders, child molestations, burglaries, and complex economic crimes. I prepare from the beginning to end the case for trial. I have prepared thousands of these charging instruments over my career. On a weekly basis, I research issues ranging from motions to suppress, motions to dismiss, and habeas corpus issues. In addition, I advise law enforcement on applicable statutes and current case law.

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.

My legal experience is not merely litigation, but rather, 100% trial work. This demands that I have an acute understanding of the subtleties surrounding trials, the subtleties of the Rules of Procedure, Rules of Evidence, Constitution rules and case law precedents.

Given that the judicial economy dictates that the vast majority of cases cannot proceed to trial, I negotiate with attorneys, public defenders, and victims to the aim of reaching a mutually beneficial settlement and to avoid the unreasonable impasse at all costs. In the course of negotiation, I am keenly aware of the importance of showing courtesy and professionalism to all parties.

I have a strong passion for the law and receive a great deal of satisfaction from my work. My work week is not a typical 9AM to 5PM day or a 40-hour work week. I must make phone calls in the evening and on the weekends to reach victims, police officers, and witnesses. I spend time on Sunday afternoons to prepare for the busy Monday court docket day. Many of my conversations with police officers regarding case law occur in the evenings.

As Deputy District Attorney, I work closely with the District Attorney to manage the office and handle administrative issues that arise in our office. In the past, I have been the acting District Attorney when the previous District Attorney was activated for military duty. I mentor the new employees in the intricacies of the court system and procedural matters. I enjoy working with our college interns during the summer to help them understand the duties and responsibilities of the District Attorney's Office.

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

I would like to briefly describe a few noteworthy cases that I have handled in the 21<sup>st</sup> Judicial District that will help describe the range of experience and types of challenges that I have faced over the years. A brief description of each case is as follows:

State v. Richard C. Taylor. I tried Taylor, a capital murder case, on remand from post-conviction, wherein the Court ruled Taylor incompetent at the time of his original trial. As counsel for the State, I thoroughly reviewed the appellate and post-conviction records to identify errors leading to the re-trial of the case. Recognizing that capital cases differ in nature from every other type of criminal case, I researched all issues present in capital murder cases.

One particular problem present in the Taylor case was that Taylor insisted upon representing himself during trial. Although the trial judge made efforts to persuade Taylor to allow an attorney to represent him, Taylor refused.

Because Taylor represented himself during trial, as the prosecutor, I was in the unique position of not only representing the State but Taylor as well. Not only did I provide Taylor with any potentially exculpatory evidence, but, realizing that Taylor was ignorant of the Rules of Evidence and Procedure, it was incumbent upon me to introduce such evidence on his behalf.

While as a prosecutor, I consistently strive to vindicate the rights of both the accused and victims, in this case that obligation was doubled, as I could not count on a defense attorney to act as a balance. In summary, I was both prosecutor and defense attorney.

State v. Brian Hanley. The defendant committed a murder several years before he was identified as a suspect. As the prosecutor, I addressed the complexities of dealing with stale evidence. I carefully reviewed the aggravating and mitigating factors to determine if the State should seek the death penalty. Despite the fact that members of the community clamored that I seek the death penalty, I was confident that the correct decision was made to seek life. This was a significant case I prosecuted on behalf of the residents of Hickman County. The case taught me much about the providence of prosecutorial restraint.

Domestic Violence Case. The case involved a serious incident of domestic abuse. Prior to trial, the victim expressed a desire not to prosecute. Due to the gravity of the abuse, I refused to concede to the victim's request that the case be dismissed. Despite the hostility of the victim towards me, I continued with the prosecution, finding myself in an adversarial position with both the defendant and the victim. I am confident that the prosecution was appropriate, as testimony was introduced during the sentencing hearing that the defendant had abused the victim and children numerous times in the past. Although I do not like to be at odds with a victim, the higher obligation is to achieve justice for all persons, even those who would reject it.

State v. Jennifer Siliski. The case involved animal cruelty of 250 canines and other animals. In the course of the prosecution, I had to strike a careful balance between several competing interests: the animal rights community and its passions, Williamson County government (which paid for the animals' care) and the defendant's Due Process rights. I believe I struck the appropriate balance and justice was served.

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.

Not applicable.

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.

Not applicable.

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

Not applicable.

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 December 2004 and September 2008, I applied for the position of Circuit/Criminal Court Judge of the 21<sup>st</sup> Judicial District. My name was not submitted to Governor Bredesen.

#### **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.

*David Lipscomb University*, 1985-1986. Transferred to Pepperdine University in 1986.

*Pepperdine University*, 1986-1989. Magna cum laude graduate with a Bachelor of Arts degree with a double major in Humanities and Political Science.

*Vanderbilt University Law School*, 1989-1992. Doctor of Jurisprudence.

#### **PERSONAL INFORMATION**

15. State your age and date of birth.

I am 44 years old. I was born on November 14, 1966.

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

I was born and raised in Tennessee from 1966 to 1986. I left Tennessee for three years (1986-1989) to attend Pepperdine University in Malibu, California. After graduation, I returned to Tennessee and have lived here continuously since 1989.

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

I have lived continuously in Williamson County for 16 years (since 1995).

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

Williamson 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 as a Lieutenant with the United States Naval Reserve from February 2000 to February 2008. I was honorably discharged in February 2008.

During my period of military service, I traveled to Georgia and Illinois to perform my duties, which included preparation of wills and documents for military personnel deploying overseas.

In addition, one of my duties was to study and tender presentations on the political and legal structures of foreign governments to help my fellow reservists understand those regimes and to gain a greater respect for the United States' political and legal systems. Furthermore, I presented a seminar on the elementals of quantum physics to help reservists understand the potential value of quantum computers to be used by the United States military.

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.

I am not aware of any investigations for federal, state or local violations of a criminal statute. On September 8, 2011, I received notice from the Board of Professional Responsibility that a Public Defender from East Tennessee, whom I have never met, filed a complaint against the 21<sup>st</sup> Judicial District Attorney and myself regarding fines assessed against several defendants in the summer of 2010. I believe this complaint to be groundless, and I am in the process of responding.

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.

Not applicable.

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.

Franklin Civitan Club, President, 2010-2011.

Franklin Civitan Club, President Elect, 2009-2010.

Williamson County Task Force Against Domestic Violence, Vice President, 2010.

Franklin High School, Mock Trial Coach, 2009 to present.

Boys and Girls Club, board member, 2007 to present.



Williamson County Bar Association, member, 2000 to present.

Fraternal Order of Police, acting member, 1996 to present.

Williamson County Republican Party, member, 1995 to present.

CPIT (Child Protective Investigation Team), member and legal advisor, 1995-2000.

Williamson County CASA (Court Appointed Special Advocate), founding board member, 1994-1998.

Vanderbilt University Moot Court Judge, periodically from 1992 to 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.

Williamson County (TN) Bar Association, member, 2000 to present.

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.

2009: Lifetime Achievement Award, Williamson County Task Force Against Domestic Violence.

2008: Certificate of Appreciation from The American Legion.

2006: Appreciation Award, Williamson County Sheriff's Office Handgun Shooting and Safety Course.

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

Not applicable.

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.

Not applicable.

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.

Not applicable.

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 three legal filings that reflect 100% of my personal work effort:

- a. A Motion to Dismiss Petition for Writ of Error Coram Nobis,
- b. The State's Memorandum of Law in Opposition to the Defendant's Motion to Suppress, and
- c. A Memorandum of Law.

**ESSAYS/PERSONAL STATEMENTS**

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

For the past 19 years, I have been dedicated to the fair administration of justice. Unlike other members of the executive branch, a prosecutor does not merely give effect to the policies of government, but rather, seeks justice on behalf of all of the people of the State - victims and defendants alike. I plan to use my trial experience and knowledge of the Rules of Evidence and Procedure in the judiciary to the benefit of the victims, plaintiffs and defendants.

I have a strong passion and desire to serve others. I intend to bring the four most important words of the lexicon of the judiciary to the courtroom: independence, impartiality, fairness and competence.

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)*

I have filed motions and orders expunging records and restoring citizenship rights of indigent defendants. This is not necessarily within the purview of an assistant district attorney's responsibilities; nevertheless, I undertook the obligation to help those that could not afford to hire an attorney to navigate the legal process for them.

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 seek the position of Circuit/Criminal Court Judge for the 21<sup>st</sup> Judicial District, comprised of Hickman, Lewis, Perry and Williamson Counties. The district has four (4) Circuit/Criminal Court Judges that adjudicate criminal, civil, chancery and juvenile (on appeal) cases.

I will exact impartiality, fairness, competence and independence. I am committed to the prospect that anxiety and stress in the courtroom should be held at a minimum. I will be punctual and timely in my administration of the courtroom. Rulings and orders will be rendered expeditiously.

I am open to court reform and will support the creation and development of domestic abuse courts, mental health courts and community courts. I have witnessed the benefits of the 21<sup>st</sup> Judicial District's drug court. If the parties are in agreement, it is appropriate for a judge to become a partner in the diagnostic and therapeutic process to ameliorate underlying problems of litigants.

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)*

I will continue to support local historical, charitable and religious organizations in their fundraising efforts.

As I mentioned above, one of the judge's in the 21<sup>st</sup> Judicial District started a drug court program that provides defendants with intensive judicial supervision, treatment, mandatory drug testing and aftercare. The program is designed to achieve recovery, eliminate criminal behavior, decrease the costs to the community and increase public safety. I would support the creation of similar programs for other social ills affecting the communities of the 21<sup>st</sup> Judicial District. I will work with community leaders, fellow judges, the public defenders' office and the district attorney's office to establish these programs.

I will continue to lecture before the Citizens' Police Academies and City Leadership Councils, albeit addressing judicial rather than prosecutorial issues.

I will continue my board membership with the Boys and Girls Club. In particular, I am committed to its Capital Campaign and will seek its success.

For the past three years, I have served as a mock trial coach for the Franklin High School Mock Trial Team. I will continue to serve as a coach and to support the team's efforts at mock trial competitions.

I will continue my membership in the Williamson County Bar Association.

I will continue to be an active member of the Williamson County Republican Party, including membership in the Chairman's Circle.

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)*

A judge should be seen not as a public servant, but as a servant to the public. I have tried to exemplify myself in this fashion. From my military service to my community involvement, I believe that my personal commitment to my country and the 21<sup>st</sup> Judicial District indicates my strong design to serve.

I am acutely aware of the Rules of Evidence and Procedure. In my 19 years of trial practice, I have witnessed the best and worst in the courtroom environment, and I know how to create and develop the best environment to encourage attorneys to function at their best.

One of the first judges that I appeared before, Judge Don Harris, once told me that athletes competed at their best when stress and tension are at their lowest. Judge Harris maintained that mood in his courtroom, and I intend to set the same landscape, a court in which stress and

anxiety are at their lowest.

I have a good professional working relationship with the current judges, District Attorney and Public Defender for the 21<sup>st</sup> Judicial District, as well as the employees of the District Attorney's Office and Public Defender's Office. I believe that I would be an independent, impartial, fair and competent judge for the District and respectfully ask that I be considered for this position.

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, I will uphold the law even if I disagree with it.

On a personal level, I disagree with the exclusionary rule of relevant evidence, particularly where law enforcement officers have acted in good faith. That said, the United States Supreme Court has mandated that evidence obtained by law enforcement in violation of the United States Constitution should be suppressed. As a prosecutor, I have on numerous occasions refused to use evidence so obtained, particularly in drug cases, even where it led to a dismissal of the charges.

#### 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. Ms. Kim Helper, District Attorney of the 21<sup>st</sup> Judicial District  
421 Main Street, P.O. Box 937, Franklin, TN 37064  
Office Phone: 615-794-7275  
Mobile Phone: 615-406-4485

B. Mr. James Lee Elkins III, Public Defender, 21<sup>st</sup> Judicial District  
112 2<sup>nd</sup> Avenue North, Franklin, TN 37065-0068  
Office Phone: 615-790-5519  
Mobile Phone: 615-686-3095

C. Mr. Samuel Dreiling, Attorney  
121 1<sup>st</sup> Avenue, Suite 200  
Franklin, TN 37064-6300  
Mobile Phone: 615-598-3484

D. Ms. Colleen Shipp, Franklin High School, Special Education Teacher  
Home Address: 5045 Penbrook Drive, Franklin, TN 37069  
Home Phone: 615-790-2329  
Work Phone: 615-472-4450  
Mobile Phone: 615-414-1012

E. Mr. David Pratt, Randstad  
2011 Roderick Circle  
Franklin, TN 37064  
Mobile Phone: 615-521-0293

**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 Circuit/Criminal Court of the 21<sup>st</sup> 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: September 20, 2011



Derek Keith Smith

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



## TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600  
NASHVILLE CITY CENTER  
NASHVILLE, TN 37219

### TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

#### WAIVER OF CONFIDENTIALITY

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

Derek Keith Smith

Type or Printed Name

Derek K. Smith

Signature

9/20/11

Date

015654

BPR #

Attachment A

Exhibit for Question #34



IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE

STEVE ALLEN BRADEN,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

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No. CR045607

MOTION TO DISMISS PETITION FOR WRIT OF ERROR CORAM NOBIS

The State of Tennessee, by and through the Office of the District Attorney General, moves this Court to dismiss without a hearing the petition for a writ of error coram nobis of Steve Allen Braden pursuant to Tenn. Code Ann. §40-26-105, because (1) petitioner failed to allege a ground upon which coram nobis relief may be granted, and (2) the petition was untimely filed.

Tenn. Code Ann. §40-26-105 provides that a writ of error coram nobis is confined to errors outside the record and is a mechanism for a defendant to bring “substantially or newly discovered evidence” which a judge determines “may have resulted in a different judgment had it been presented at the trial.” T.C.A. § 40-26-105 (see attached A). As the Tennessee Supreme Court opined, “coram nobis is an extraordinary procedural remedy in this modern regime. It fills only a slight gap into which few cases fall.” *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999) (see attached B). The “purpose of this remedy is to bring to the attention of the court some fact unknown to the court which if known would have resulted in a different judgment.” *Lee v. State*,

W2006-02031-CCA-R3CO, 2007 WL 1575220 (Tenn. Crim. App. May 31, 2007) (quoting *State ex rel. Carlson v. State*, 219 Tenn. 80, 407 S.W.2d 165, 167 (1966)) (see attached C).

The writ of error coram nobis is a narrow and specifically fact-driven petition which may be based solely on newly discovered evidence so long as the petitioner establishes that the petitioner was “without fault” in failing to present the evidence at the proper time. *Harris v. State*, 102 S.W.3d 587, 592-93 (Tenn. 2003) (see attached D). A writ of error coram nobis cannot be used to claim a guilty plea was not knowing, intelligent and voluntary, nor can it be used to assert ineffective assistance of counsel. *Lee v. State*, W2006-02031-CCA-R3CO, 2007 WL 1575220 (Tenn. Crim. App. May 31, 2007) (that guilty plea was not knowing, intelligent, and voluntary is not a ground upon which coram nobis relief may be granted) (see attached C); *State v. Mann*, W200601867CCAR3CO, 2007 WL 2247237 (Tenn. Crim. App. Aug. 6, 2007) (“The petitioner’s claim that his co-counsel operated under a conflict of interest during his trial is not cognizable in a petition for writ of error coram nobis because the petitioner’s allegation, if proved, would constitute ineffective assistance of counsel which the writ of error coram nobis is not designed to remedy.”) (See attached E).

Furthermore, a petition for the writ of error coram nobis should recite: (1) the grounds and the nature of the newly discovered evidence; (2) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial; (3) the petitioner “was without fault in failing to present” the newly discovered evidence at the appropriate time; and (4) the relief sought by the petitioner. *State v. Hart*, 911 S.W.2d 371, 374-75 (Tenn. Crim. App. 1995) (see attached F).

Petitioner alleges ineffective assistance of counsel, and asserts that his plea was not knowing, intelligent, and voluntary, as the grounds for a writ of error coram nobis and does not

assert the existence of newly discovered evidence. For all of the above reasons, petitioner therefore failed to satisfactorily allege a ground upon which coram nobis relief may be granted.

Pursuant to Tenn. Code Ann. § 27-7-103, coram nobis claims are subject to a one-year statute of limitations. Tenn. Code Ann. §27-7-103 (see attached G); see also, *Lee v. State*, W2006-02031-CCA-R3CO, 2007 WL 1575220 (Tenn. Crim. App. May 31, 2007) (“A petition for writ of error coram nobis relief must be filed within one year of the time judgment becomes final in the trial court.”) (see attached C). The statute of limitations is computed from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed, or upon entry of an order disposing of a timely filed, post-trial motion. *Harris*, 301 S.W.3d at 144 (see attached D). However, if a petitioner seeks a writ of error coram nobis based on newly discovered evidence, due process may require tolling of the statute of limitations. *Workman v. State*, 41 S.W.3d 100, 101 (Tenn.2001) (see attached H). To determine whether due process requires tolling, a court must weigh the petitioner's interest in obtaining a hearing to present a later-arising ground for relief against the State's interest in preventing stale and groundless claims. *Workman*, 41 S.W.3d at 103. (see attached H). *Harris* set out a three-step analysis for courts in balancing these interests:

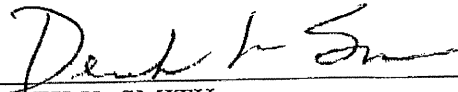
- (1) determine when the limitations period would normally have begun to run;
- (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and
- (3) if the grounds are “later-arising,” determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.”

*Harris v. State*, 301 S.W.3d 141, 145 (Tenn. 2010).

In this case final judgment was entered April 2, 1990, well outside the limitations period. Furthermore, no new grounds for relief have actually arisen after the limitations period. The petition for a writ of error coram nobis was therefore untimely filed.

The State requests that the Court dismiss the petition of Steve Allen Braden for (1) failure to allege a ground upon which coram nobis relief may be granted, and additionally (2) failure to timely file.

Respectfully Submitted,



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DEREK K. SMITH  
Deputy District Attorney  
P.O. Box 937  
Franklin, TN 37065-0937

Attachment B

Exhibit for Question #34

IN THE CIRCUIT COURT OF WILLIAMSON COUNTY, TENNESSEE

STATE OF TENNESSEE                                     )  
   )  
v.    ) Case No. XXXXX  
   )  
DEFENDANT    )

THE STATE’S MEMORANDUM OF LAW IN OPPOSITION TO  
THE DEFENDANT’S MOTION TO SUPPRESS

Comes now, the State of Tennessee, by and through the Office of the District Attorney General, and hereby submits this Memorandum of Law in Opposition to the Defendant’s Motion to Suppress Evidence.

I. Facts.

On September 3, 2000, at 9:45 p.m., Corporal Jamie Ferrell (Ferrell) of the Fairview Police Department observed the defendant, John Doe, traveling west on Interstate 40, less than one car length behind the vehicle in front of him. *(Video Transcript of Suppression Hearing at 9:51:30)*. As the defendant passed Ferrell’s patrol car, Ferrell noticed the defendant slumping down in his seat with his body forward as though he were attempting to hide his face. *(Video tr. at 9:52:30)*. Both Ferrell and the reserve officer traveling with him, Phillip Daugherty, were suspicious. *Id.*

Ferrell activated his blue lights and initiated a traffic stop of the suspect vehicle for following too closely. Upon approaching the car, Ferrell noticed an odor of burnt marijuana and a strong scent of air freshener. *Id.* He also observed three (3) cellular telephones, a global positioning system, and two bottles of air freshener on the floorboard. The defendant had glassy eyes and behaved in

a lethargic manner. (*Video tr. at 9:55:15-9:56:30*). During roadside questioning, the defendant said he had been in Memphis “for a day.” (*Video tr. at 9:58:20-9:59:00*). Later, when asked if he had been drinking, the defendant stated that he had been drinking for “a few days.” *Id.*

Ferrell instructed Daugherty to write the defendant a warning ticket for following too closely. (*Video tr. at 11:20:15*). Because department policy prohibited reserve officers from signing citations, Daugherty filled out a citation that Ferrell had previously signed. (*Video tr. at 11:20:40*). Daugherty executed the citation at 9:50 p.m. according to his watch. *Id.* Daugherty had not synchronized his watch to coincide with the time on the video camera in the patrol car. *Id.*

After sending Daugherty back to the patrol car, Ferrell asked the defendant for consent to search his vehicle. *Id.* While the defendant declined to consent to a full search, he told Ferrell that he could not “stop” him from performing a canine sweep. *Id.* Therefore, Ferrell performed a canine sweep, and K-9 Colt alerted to the car by scratching the trunk and looking back at Ferrell. (*Video tr. at 10:18:00*). According to Ferrell, the dog pawed at the trunk so hard that he actually left scratch marks on the paint. *Id.* Ferrell testified that K-9 Colt’s behavior constituted a clean alert for the presence of drugs. (*Video tr. at 10:20:35*). Afterwards, Ferrell retrieved the defendant’s car keys from the ignition and opened the trunk, where he discovered 150 pounds of marihuana. *Id.*

Ferrell removed the drugs and placed them on the hood of his patrol car. The entire encounter, from the time Ferrell initiated the traffic stop until the time he uncovered the drugs, took less than twelve (12) minutes. *See Exhibit 1.*

Ferrell arrested the defendant for possession of marijuana with the intent to sell or deliver. The defense filed the instant Motion to Suppress the 150 pounds of marijuana.

At the suppression hearing, conducted on February 12, 2001, the State introduced evidence establishing K-9 Colt's reliability. Ferrell testified that both he and the dog had successfully completed an extensive training program conducted by the Tennessee Department of Safety. (*Video tr. at 9:49:50*). During that training course, K-9 Colt had been taught to recognize a number of controlled substances, including marijuana, cocaine, heroine and methamphetamine. *Id.* Ferrell testified that he and K-9 Colt had approximately 120 "contacts" together where Colt found drugs. (*Video tr. at 9:51:15*). K-9 Colt alerted a total of twenty-three (23) times, and each time a subsequent search uncovered illegal drugs. *Id.* According to Ferrell, K-9 Colt had never given a false alert. *Id.* David Frost, a law enforcement officer with thirty-five (35) years experience in the training and handling of canines, testified that both K-9 Colt and Ferrell had successfully completed a certified training course that Frost supervised for the Tennessee Department of Safety. (*Video tr. at 11:40:00–11:41:40*). Frost stated that successful completion of the program required, among other things, that the dog and its handler pass a practical skills test with over a ninety percent (90%) accuracy rate. (*Video tr. at 11:41:10*). Frost testified that he had seen the video of the defendant's arrest, and that, in his expert opinion, Colt positively alerted on the trunk of the defendant's vehicle. (*Video tr. at 11:43:30*).

At the conclusion of the proof, the Court took the matter under advisement. The Court requested that the State submit a brief in response to the defendant's memorandum of law claiming that the search was unconstitutional.



## II. Discussion.

The defendant's Motion to Suppress raises three issues for review: first, whether the police had reasonable suspicion to initiate a traffic stop of the defendant's vehicle; second, whether Ferrell had probable cause to search the defendant's trunk; and finally, whether the detention of the defendant for less than twelve (12) minutes prior to finding one hundred and fifty (150) pounds of marijuana was reasonable. This memorandum will address each of these issues.

### A. The Defendant's Failure to Follow at a Safe Distance Gave the Police Reasonable Suspicion to Initiate a Traffic Stop.

In order to initiate an investigatory stop, law enforcement need only have reasonable suspicion, supported by articulable facts, that criminal activity may be afoot. *Griffin v. State*, 604 S.W.2d 40, 42 (Tenn. 1980). Reasonable suspicion requires a lesser quantum of proof than that necessary to establish probable cause. *Florida v. Rodriguez*, 469 U.S. 4, 5, 105 S.Ct. 308, 310, 83 L.Ed.2d 165 (1984); *Griffin*, 604 S.W.2d. at 42. An officer's reasonable suspicion need not relate to any particular type of criminal activity. *State v. Anderson*, 454 N.W.2d 763, 767 (Wis. 1990)(attached). Police officers must only suspect that some type of criminal activity has occurred or is about to occur. *Id.*

An officer may initiate a traffic stop when he or she has either probable cause or reasonable suspicion to believe that a traffic violation has occurred. *State v. Smith*, 21 S.W.3d 251, 255 (Tenn.Crim.App. 1999). This is true regardless of the subjective motivations of the police officer involved. *State v. Vineyard*, 958 S.W.2d 730, 736 (Tenn. 1997). Therefore, a police officer may

conduct a traffic stop if he observes a violation, even if he intends to conduct an investigation for other crimes. *Id.*

Contrary to the defendant's assertions, no court has held that "minor" violations of the traffic code do not justify a traffic stop. None of the cases cited by the defense stand for this proposition. *See, e.g., State v. Binnette*, \_\_ S.W.3d \_\_ (Tenn. 2000)(attached)(defendant weaving within lane, not outside the lane); *State v. Smith*, 21 S.W.3d 251, 256 (defendant did not violate provision of the traffic code by failing to signal); *State v. Martin*, No. E1999-01361-CCA-R3-CD (Tenn.Crim.App. at Knoxville, Sept. 8, 2000)(attached)(the activity observed by police officer did not "constitute, in and of itself, a traffic violation"). In *Smith*, the Court held that a "police officer may stop...an automobile if the officer has probable cause to believe that...a traffic violation has occurred." *Smith* 21 S.W.3d 251, 255. The assertions in the defendant's brief are not supported by authority.

Tennessee Code Annotated 55-8-124 (b) prohibits a driver from following "another vehicle more closely than is reasonable and prudent, having a due regard for the speed of such vehicle and the traffic upon, and the condition of, the highway.

Ferrell testified that he witnessed the defendant driving less than a car length behind another vehicle in violation of the Code. Consequently, Ferrell was justified in stopping the defendant.

B. Both Ferrell's Detection of an Odor of Burnt Marijuana Coming from the Defendant's Vehicle and the Canine's Alert Independently Justify the Search of the Defendant's Trunk.

Ferrell's search of the defendant's vehicle was constitutional. Probable cause is sufficient to justify the warrantless search of a motor vehicle halted on a public road. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct 280, 285-86, 69 L.Ed. 543 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct 1975, 1979-81, 26 L.Ed.2d 419 (1970); *State v. Hughes*, 544 S.W.2d 99, 102 (Tenn. 1976); *State v. Shaw*, 603 S.W.2d 741, 744 (Tenn.Crim.App. 1980). Ferrell had probable cause to search the defendant's vehicle for two reasons.

First, a police officer, trained in narcotics detection, has probable cause to search a vehicle if he detects an odor of marijuana emanating from that vehicle. *See Hughes*, 544 S.W.2d at 101; *See also Hicks v. State*, 534 S.W.2d 872, 874 (Tenn.Crim.App. 1975). Ferrell testified that he detected the scent of marijuana. He testified that he smelled an odor of marijuana coming from the vehicle when he first approached it. This testimony was uncontested.

Second, the canine's alert on the vehicle also provided probable cause to search the vehicle. In *State v. England*, 19 S.W.3d 762, the Court held that a positive alert by a properly trained, reliable canine provided probable cause for a search. When determining whether a particular canine was sufficiently reliable, courts consider the canine's training and "track record, with emphasis on the amount of false positives and false negatives the dog has furnished." *Id.* at 768. In the instant case, Ferrell testified that, in one hundred and twenty (120) contacts, Colt had never given a false positive. Moreover, Officer Frost testified that the dog successfully completed the practical skills given in order for Ferrell and K-9 Colt to receive certification. Accordingly, a

positive alert from this canine would provide probable cause for a search. Both Ferrell's and K-9 Colt's detection of marijuana provided Ferrell with probable cause to search the defendant's vehicle.

C. A Detention Lasting Less than Twelve Minutes Does Not Warrant Suppression of One Hundred and Fifty Pounds of Marijuana.

For Fourth Amendment purposes, a canine sweep is not a search. *State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000). A police officer may perform such a sweep during a traffic stop, provided the time taken does not extend beyond that necessary to effectuate the purposes of the stop. *State v. England*, 19 S.W.3d 762, 766-67 (Tenn. 2000). The issue is whether the time taken to conduct the sweep exceeded that necessary to issue a warning citation under the circumstances.

Given the defendant's estimated time of six (6) minutes to issue the citation, the length of detention did not exceed that necessary to conduct the stop. Daugherty testified that he was distracted while writing the citation, because of extreme roadway traffic. Under these circumstances, six (6) minutes to write a citation is not extraordinary. Additionally, Ferrell testified that the total period of detention lasted for less than twelve (12) minutes from the time Ferrell initiated the traffic stop until the time he found drugs.

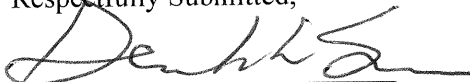
In *State v. England*, a police officer stopped the defendant for a traffic violation and conducted a canine sweep while waiting for the dispatcher to report on the defendant's driver's license status. *Id.* On those facts, the Court held the length of the detention did not exceed the scope of the traffic stop. *Id.* As in *England*, Ferrell waited for another law enforcement officer, Daugherty, to

complete a task necessary to effectuate the purposes of a traffic stop, completion of a warning citation. The length of the defendant's detention did not exceed the scope of the stop.

### III. Summary and Conclusion.

The evidence presented at the suppression hearing firmly established the constitutionality of the search. The defendant's failure to follow the vehicle in front of him at a safe distance provided reasonable suspicion for a traffic stop. Ferrell's detection of an odor of marijuana coming from the vehicle and the canine's positive alert on the vehicle both provided independent probable cause for a search of the vehicle's trunk. Finally, a detention of twelve (12) minutes or less was not an unreasonable length of detention to warrant the suppression of the evidence. Accordingly, the Court should deny the defendant's Motion to Suppress.

Respectfully Submitted,



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Attachment C

Exhibit for Question #34

IN THE CIRCUIT/CRIMINAL COURT OF WILLIAMSON COUNTY,  
TENNESSEE AT FRANKLIN

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STATE OF TENNESSEE                     )  
   )  
v.   )         II-CR05256  
   )  
GENE NEVILS                                     )

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**MEMORANDUM OF LAW**

Comes now the State of Tennessee, represented by Derek K. Smith, Office of the District Attorney General and submits this Memorandum of Law in support of the State's position that the defendant's Motion to Suppress should be denied.

On August 7, 2007, the defendant filed a Motion to Suppress evidence, to-wit: cocaine, alleging that on November 29, 2006, Officer Andre Davis unlawfully stopped, seized and searched the defendant. On August 28, 2007, Honorable Judge Timothy L. Easter conducted a hearing on the Motion to Suppress and ordered both parties to submit a memorandum of law in support of the parties' respective positions.

FACTS

On November 29, 2006, Officer Davis (Davis) was employed by the Franklin Police Department, assigned to the Crime Suppression Unit. (*Transcript of Suppression Hearing, 5*). Davis was on patrol in the area of 1000 Short Court, which is in the Public

Housing area of Franklin. (*Tr. 6*). Other streets that constitute Public Housing include Natchez, Reddick, Carter, Cherokee and Shawnee. (*Tr. 7*). According to Davis, it would take approximately five (5) minutes to transverse all the Public Housing streets in and around Short Court. The houses in the Public Housing area are approximately 25 to 50 feet from the road. (*Tr. 9*).

Davis testified that the Franklin Housing Authority owns Public Housing, where individuals live upon application and with the help of the Federal Government. Franklin Housing Authority limits those who are allowed to live in Public Housing. Individuals who have been arrested for narcotics violations and individuals who cause problems are not allowed to live in Public Housing. (*Tr. 6*).

Davis testified that the Franklin Police Department regularly receives calls complaining of criminal activity in the Public Housing area. *Id.* Davis testified that Public Housing, including Short Court, is a high crime area, evidenced by the number of citizens' complaints and the number of arrests Davis and other Franklin Police officers have made in the area. (*Tr. 10*). Davis testified that in the past, he has used confidential informants to engage in controlled purchases of drugs on Short Court. *Id.* These drug transactions take place inside a house and in the open in the small yards in front. (*Tr. 11*). Davis testified he has personally seen drug transactions take place in the area. (*Tr. 12*).

Davis testified that Franklin Housing Authority has posted no trespassing signs on the houses throughout Public Housing. (*Tr. 16*). Davis testified that he interpreted these signs



to mean that individuals can drive or walk through the streets but cannot “hang...out or anything like that”, including in the roadway. (*Tr. 17*). Davis testified that Franklin Housing Authority and residents contractually agree to these rules as conditions for living in Public Housing. (*Tr. 17, 18*).

Davis testified he was familiar with the defendant, Gene Nevils. Davis arrested the defendant on two (2) occasions for drug possession. (*Tr. 17*). On one occasion, Davis acted in an undercover capacity, and the defendant sold cocaine to Davis. (*Tr. 18*). Davis testified that on the date of the instant arrest, the defendant had a girlfriend who lived on Short Court in Public Housing. *Id.* Because of the defendant’s prior arrests, rules of Franklin Housing Authority dictated that he could not go into Public Housing, notwithstanding the fact that he had a girlfriend who lived there. (*Tr. 20*). Davis testified that he saw the defendant on Short Court on November 29, 2006, at approximately 10:45 p.m. (*Tr. 19*). Davis was on patrol and saw a vehicle parked in the roadway, in front of a driveway that two (2) public housing residences shared. *Id.* Davis stated that the vehicle blocked the driveway completely. (*Tr. 21*). Davis testified that the vehicle was in the middle of the street and caused a traffic hazard. *Id.* Davis testified that at no time did he turn on his blue lights. (*Tr. 22, 23*). Davis exited his patrol car and walked up to the vehicle and recognized the driver as the defendant. *Id.* From prior occasions of dealing with the defendant and conducting a computer check of his driving status, Davis knew that the defendant did not have a valid driver’s license. (*Tr. 22*).

Upon making contact with the defendant, Officer Davis asked him, “What was going on?” *Id.* The defendant gave Officer Davis inconsistent statements. *Id.* On one hand, the defendant told Officer Davis he was on his way home, but then he said he was not driving. (*Tr.* 24) Officer Davis testified that the defendant’s explanations were strange and convoluted. (*Tr.* 24, 25).

Davis testified that he asked the defendant, “if he [would] mind stepping out of the vehicle, and he did.” (*Tr.* 25). Davis testified that he did not order the defendant out of the car, but rather, asked him if he would mind getting out of the car. (*Tr.* 26). Davis testified this was his normal procedure. *Id.* Davis recognized that to order a person out of a vehicle would constitute a seizure of the person. (*Tr.* 26, 27).

When the defendant exited his vehicle, he put his hands in his pockets, and Davis asked him not to do this. Davis asked the defendant for consent to search him, to which the defendant agreed. *Id.* In one of the defendant’s pockets, Davis found a rolled up dollar bill containing what appeared to be cocaine. (*Tr.* 28, 29).

Davis testified that when the defendant exited his car, Officer Davis did nothing to lead the defendant to believe he was under arrest. *Id.* He testified that he did not handcuff the defendant, nor did he tell the defendant he was under arrest. (*Tr.* 31). Davis testified that the time period between the defendant exiting the vehicle and consenting to the search was “20 seconds ...the most.” (*Tr.* 32).

## LAW

In *State v. Shackles and Anderson*, E2005-00510-CCA-R3-CD, Ct.Crim.App., 2006, the Citizen-police encounters do not constitute a seizure of the person and require no objective, constitutional justification. *Id.* at 8. The testimony of Davis established that his initial encounter with the defendant was a police-citizen encounter. Davis testified that he saw the defendant's car in the middle of the roadway, blocking the driveway of two (2) residences and approached the vehicle to enquire why he was there. Davis testified that at no time did he activate his emergency equipment nor did he give the defendant any indication he was not free to leave. Davis's initial approach and innocuous questioning of the defendant was a citizen-police encounter, not a constitutional seizure and therefore was constitutionally permissible.

After approaching the defendant and briefly questioning him, Davis asked the defendant if he would mind getting out of the vehicle. This action was constitutionally permissible. Davis did not order the defendant to exit the vehicle, but rather, asked the defendant if he would mind exiting the car, to which the defendant could have declined. The defendant did not testify at the Motion to Suppress and offered no proof that he felt compelled to exit the vehicle. The defendant offered no proof that refuted Davis's testimony that the defendant voluntarily exited his vehicle. The defendant's voluntary exit of his vehicle was a continuation of a police-citizen encounter.

Alternatively, the State contends that Davis had a constitutional basis to order the defendant from his vehicle. Davis testified that when he approached the vehicle, he saw the defendant in the driver's seat and knew that the defendant did not have a valid driver's license. The defendant gave Davis inconsistent and improbable explanations as to why he was in the driver's seat. Law enforcement officers are permitted to engage in investigations that are reasonably related in scope to the circumstances surrounding a crime. *State v. Hammonds*, M2005-01352-CCA-R3-CD, Ct.Crim.App., 2006. Davis knew the defendant did not have a valid driver's license. He saw the defendant in the driver's seat of a vehicle in the roadway. The defendant gave Davis conflicting answers as to why he was there. Consequently, Davis was justified in ordering the defendant to exit the vehicle to continue his investigation of whether the defendant had been driving without a valid license.

Davis testified that when the defendant exited his vehicle, he kept attempting to put his hands in his pockets. Davis asked the defendant not to do this. Davis asked the defendant for consent to search his person, to which the defendant consented. In *State v. Scarborough and Transou*, 201 S.W.3d 607, 17 (Tenn.2006). the Court held that whether an individual consents voluntarily to a search otherwise proscribed by either the state or federal constitutions is a question of fact to be determined from the totality of the circumstances. The issue is whether the defendant's consent to search is the product of a free and unconstrained choice. *Id.* Davis testified that the time frame between the defendant exiting the vehicle and consenting to the search was 20 seconds at the most. Davis testified that at the time the defendant gave consent, the defendant was not under

arrest. Davis testified that the defendant was not in handcuffs nor did Davis tell the defendant he was not free to leave. Davis testified he asked the defendant for permission to search and the defendant agreed. The defendant did not testify at the Motion to Suppress nor did the defendant offer any proof that the search of his person was anything but consensual. Therefore, Davis's search of the defendant was the result of a voluntary consent and constitutionally permissible.

### CONCLUSION

Based upon the above, the defendant's Motion to Suppress should be denied.

Respectfully submitted,



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