IN THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AT NASHVILLE

STATE OF TENNESSEE,	**)**	
	)	
Appellee,	**)**	
	)	**Appeals Case No. 8.25.06**
Vs.	**)**	
	)	
HARM LESS ERRORS,	**)**	
	)	
Appellant.	**)**	

ON APPEAL AS OF RIGHT FROM THE ANY COUNTY CRIMINAL COURT

APPELLATE ADVOCACY: *LIFE'S A BRIEF*

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ORAL ARGUMENT REQUESTED

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> ‘When **I** use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what **I** choose it to mean--neither more nor less.’
>
> ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’
>
> ‘The question is,’ said Humpty Dumpty, ‘which is to be **master**--that’s all.’

Lewis Carroll, *Alice in Wonderland*

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> “While the writings of Mr. Raybin are respected by the members of this Court, Mr. Raybin’s authorings are not law and are not binding upon any court in this state. We decline the Petitioner’s invitation to elevate Mr. Raybin’s writings to the status of binding legal precedent."

Earnest v. State, 2005 WL 2453951(Tenn.Crim.App. 2005)

1. INTRODUCTION

A. **Why appeal?**

1. Help client – *the most challenging criminal case is where the client has already been convicted and is rotting in some prison*.

2. You get some respect as an attorney.

3. Do better second time around – *Most cases get a better result after the first trial.*

4. Integrity of system – *ours is a system of checks and balances*.

5. Change the law — jury trials have little value as precedent except perhaps in the mind of the public — *appeals do.*

B. YOUR **Attitude.**

1. Spend time looking out windows – get the big picture.

2. Why be a LION in front of the jury and a coward on appeal?

3. **Raybin's Rules of Appellate Advocacy**:

- *You are NOT defending the so-called "rights of the accused*"!

- ***You are prosecuting X County for not abiding by the settled rules of how we adjudicate criminal cases.***

- *Justice is a relative term that means different things to different people. BUT we all can agree that if the settled rules are followed then there is a good chance that justice will be attained. It follows that if the rules were not followed there is a good chance the result was not just. The rules were not followed by X County in this case, so X County gets to try the case again*.

And finally:

- ***When you set about drafting your brief the goal is not mere communication, nor even persuasive enlightenment of the judges and their clerks, but rather that the judges cast aside the clerks and lift wholesale your language to achieve the result you desire!***

C. **Know procedure** – *do not let the procedural problems detract from the merits of your case.*

D. **Know the law**.

- Read the "advance sheets."
- Read the cases as they come out on the net "EVERY DAY."
- Read TACDL case summaries when they come out.

E. **Know developing issues** (*you risk waiver*)

- *Knowing what is "hot" is the mark of a good appellate attorney.*

SIDEBAR: ***Discussion of retroactivity Rules***:

When the Supreme Court releases an opinion involving an entirely new doctrine of law, the Court frequently articulates how that doctrine will impact pending cases and appeals. For example, in *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), the Supreme Court discussed a new jury instruction on witness identification. At page 612, the Court held that "this ruling is applicable to cases now on appeal and those cases tried after the release of this opinion." This meant that the opinion was given "*pipeline*" application.

In *State v. Walker*, 905 S.W.2d 554 (Tenn. 1995), the Court held that persons under criminal sentence who present themselves for incarceration but are turned away by the sheriff, may consider the sentence satisfied under certain circumstances. The Supreme Court held, at page 557, that "*we are also persuaded that the rule announced*

today should be prospective only and should apply only to cases tried or retried after the date of this opinion and in cases on appeal in which the issue has already been raised."

In *State v. Enochs*, 823 S.W.2d 539 (Tenn. 1991), the Court found that the thirteenth juror rule applied to all cases which were pending on direct review at the time the rule was reinstated and became effective. Lawyers who raised the issue prior to the release of *Enochs*, obtained a new trial for their clients after *Enochs* was rendered. See e.g., *State v. Barone*, 852 S.W.2d 216, 218 (Tenn. 1993).

This "pipeline" doctrine is not limited only to criminal cases. In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Supreme Court adopted new rules regarding comparative fault. At page 58, the Court held that the opinion would apply to "all cases tried or retried after the date of this opinion and all cases on appeal in which the comparative fault issue has been raised at an appropriate stage in the litigation." Identical language can be found in *McClung v. Delta Square Partnership*, 937 S.W.2d 891, 905 (Tenn. 1996) (landlord liability for crimes committed against innocent third parties by criminals on the premises); *Broadwell v. Holmes*, 871 S.W.2d 471, 477 (Tenn. 1994) (parental immunity); and *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992) (the "lex loci delicti" choice of law doctrine in a wrongful death action).

On occasion a Court neglects to articulate how a decision will "run" and must resolve the question in a later appeal:

> "We are constrained to note, however, that the absence of language directing the retroactivity of the *Jordan* decision was a product of oversight rather than the result of a judicial decision to limit Jordan to prospective application only. ... We hold that Jordan [loss of consortium damages were recoverable under wrongful death statute] applies retroactively to: (1) all cases tried or retried after the date of our decision in Jordan; and (2) to all cases pending on appeal in which the issue decided in Jordan was raised at an appropriate time. We are aware that our holding will require retrial of some cases and the expenditure of additional judicial resources. Still, we cannot perpetuate denial of retroactive application of Jordan when that result was not our intention."

Hill v. City of Germantown, 31 S.W.3d 234, 240 (Tenn. 2000).

More frequently the appellate courts give a new decision pipeline application even without an express decision articulating retroactivity. For example, *State v. Rickman*, 876 S.W.2d 824 (Tenn. 1994) (limitations on proof-of-other-crimes in child sex abuse cases) did not articulate how it would apply in the future. Yet, the Supreme Court itself applied *Rickman* to pipeline appeals. See e.g. *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996), and *State v. Dutton*, 896 S.W.2d 114 (Tenn. 1995), *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). See also *State v. Stokes*, 24 S.W.3d 303 (Tenn.2000) (*State v. Burns* applied to determine lesser- included offense in case which was in appellate "pipeline" prior to release of Supreme Court's *Burns* opinion).

F. **Knowing how to write well and having a good vocabulary**

The word-of-the-day offerings of Web sites like *Dictionary.com* and the page-a-day calendars are wonderful ways to learn new words!

Word of the Day for Friday August 21, 2006

exculpate \EK-skuhl-payt; ek-SKUHL-payt\, transitive verb:

To clear from alleged fault or guilt; to prove to be guiltless; to relieve of blame; to acquit.

Each member is determined to exculpate himself, to lay the blame elsewhere.-- Joseph Wood Krutch, "*How Will Posterity Rank O'Neill*?", New York Times October 21, 1956

At the same time, they said, representatives of the inspector general's office at the CIA were generally protective of the intelligence agents involved in the matter, highlighting evidence that seemed to exculpate them.-- Tim Golden, "*Guerrilla's Asylum Analyzed Amid Contradictory Claims*", New York Times December 12, 1996

Exculpate is ultimately derived from Latin *ex*-, "without" + *culpare*, "to blame," from *culpa*, "blame, fault."

G. **Fees for appellate work**;

- *Charge enough to make it worthwhile.*
- *What about the transcript: who pays?*
- *Who pays expenses?*
- *Are you going to appeal to the Tennessee Supreme Court?*
- *What happens if the case gets reversed?*
- Draft a CONTRACT so there is no misunderstanding.

***SIDEBAR**: Sample Contract*

RE: *State vs. James Wannabeclient* - Representation Contract

Dear Mr. Wannabeclient:

This letter is in the nature of a contract concerning the engagement of my Firm in the representation of your brother James who has been convicted of numerous felonies in Cocke County, Tennessee. I understand that Mr. Wannabeclient has been convicted on approximately 22 separate counts of offenses including rape of child, rape and incest.

Your brother James is currently being represented by Mr. Jim Formerlawyer. I have conferred with Mr. Formerlawyer extensively about this case and have a general understanding of the situation. I understand further that the matter is pending a sentencing hearing and also an eventual motion for a new trial. In my judgment I believe that it is best to continue on with Mr. Formerlawyer as local counsel for your brother. I will assume primary responsibility for his case and will make all tactical and strategic decisions necessary for his appeal.

Your family is engaging my personal services for representation. I will not delegate any significant activity to any other attorney in this office but I certainly reserve the right to consult with other lawyers in my office for advice

You have deposited with this Firm a non-refundable retainer fee in the amount of $00,000.00. This fee is for my services in representation of your brother with respect to the following proceedings. I will prepare the necessary motions for a new trial. As I have explained, an appeal is only as good as the motion for a new trial. Thus I must give personal attention to that proceeding. I anticipate that the sentencing hearing may well be consolidated for the motion for new trial and of course I will participate in the sentencing hearing.

Unfortunately, the sentencing aspect of this will be drastic. The law here is that the Judge must impose at least a 15 year sentence and, in all likelihood, will probably run several of the sentences consecutively given the time that this alleged offense occurred and, in particular, the youth of the alleged victim. I certainly will do what I can to keep the sentence as low as possible but your family must recognize that convictions of this sort result in huge sentences.

The primary goal in all of this will be to achieve a new trial for your brother. If the Judge denies the motion for new trial then of course I will file the necessary papers to appeal his case to the Court of Criminal Appeals. My retainer fee includes this appeal if necessary and no additional fee will be charged.

If we prevail in the Tennessee Court of Criminal Appeals then the State will undoubtedly appeal to the Supreme Court of Tennessee. In that event, I will defend any victory we have won in the Court of Criminal Appeals. If we are unsuccessful in the Court of Criminal Appeals then I will automatically appeal to the Supreme Court of Tennessee. No additional fee will be charged for any of my activities in the Supreme Court of Tennessee.

In summary, it is my responsibility to represent your brother at the Trial Court level after the conviction, in the Court of Criminal Appeals and in the Tennessee Supreme Court. The retainer fee covers all of this and no additional lawyer fee will be charged to you or your family or Mr. Wannabeclient in any way for my representation in the post-trial proceedings, in the Court of Criminal Appeals and the Supreme Court of Tennessee.

I have explained to you that if we should be successful and get a new trial in the court system a separate retainer arrangement will be required for any new trial. It is premature to discuss this. Indeed, you may wish to select another attorney to actually try the case if we should be so fortunate as to receive a new trial.

I have also explained that there are state post-conviction and federal remedies after the direct appeal in the State Court system has been exhausted. The retainer agreement here does not contemplate my representation in state post-conviction or Federal Court but I normally refer this out to other attorneys. Typically, however, my preservation of the record is such that it is relatively easy for the state post-conviction or federal representation to be continued by separate counsel. However, the chance of success is much less at that point since only constitutional claims can be raised.

I have received from you an additional $5,000.00 which will be used for expenses. This is going to be placed in a trust account and it is your money. I have projected out the expenses in this case for the transcript and my travel and for the preparation of the briefs and such. We anticipate the transcript to cost no more than $3,000.00. The original transcript will cost a great deal less but we will have additional transcripts because of the sentencing hearing and the motion for new trial. In addition, the expense money will include my mileage, and any major out-of-county travel.

As I have noted to you. I have done cases like this before and I think that the $5,000.00 trust fees will probably cover everything. If there are any funds left from this at the conclusion of the proceedings then I will return them to you. If, on the other hand I find that are any other extraordinary expenses I will discuss them with you beyond this figure. I cannot imagine that we will go over this but I want you to understand that litigation does involve extraordinary expense beyond those that are anticipated. These would only be limited to such matters as trial transcripts, unanticipated travel expenses and extraordinary printing expenses beyond the $5,000.00 already placed in the trust account.

I do not need any private investigator at this juncture but it is conceivable that such might be required. In that event I will discuss the propriety of that with you and your family as well as any projected costs that that might involve. Should we decide on a private investigator then of course that would involve a separate expenditure on your part. I will not hire any such private investigator without your specific approval in advance.

I have advised your family that a criminal appeal is a different proceeding than a trial. Your brother now stands convicted of serious felonies. Appeals are difficult and are frequently denied. I have explained to you that approximately 90% of appeals filed in Tennessee are unsuccessful.

You have acknowledged that you understand the difficulties involved and that the probabilities are against us. It is this way in every case. However, simply because other cases have been won or lost on appeal is no measure of the possibility of success or failure here. I only want to put this into the contract so that your family does not have an unreasonable expectation.

I will devote my best energies and skills to representing your brother. I understand that you have hired me specifically because of my experience in doing criminal appeals of this sort.

The law requires that I keep confidential any communication that I have with your brother James. I am sure that you can understand this. However, I anticipate that he will probably allow me to confer with you in a general way as to the scope and conduct of his case. I would also anticipate that he would allow me to have similar communications with his daughter Julie and his son James. Again, of course, all of this is subject to your brother's approval.

I must insist that I have full cooperation of everyone and I know that your family has committed to giving me 100% of your effort to help in this matter. Your brother must also cooperate with me. I plan on meeting with him shortly and I will explain all of this to him.

I have provided you this letter in your personal presence and have allowed you to review this letter. I have given you the opportunity to ask any questions about this letter. If anything in this letter is contrary to your understanding or our agreement I will redraft this letter accordingly. If this letter does meet with your approval I would ask that you sign this letter so as to confirm our contractual agreement.

Very truly yours,

David L. Raybin

APPROVED:_____
DANNY WANNABECLIENT

H. **Are we there yet??** *Client relations*

- Keep in Contact with your client!!! VISIT client !!!!!
- Send the client documents!
- Send them progress letters EVEN IF NOTHING IS HAPPENING!!!!

2. APPELLATE BRIEF (Rule 27, T.R.A.P.)

SIDEBAR ***"The Brandeis brief"***

In the 1905 case of *Lochner v. New York*, a bare majority of the United States Supreme Court ruled that a law limiting working hours for bakery workers to only a ten-hour day was unconstitutional, because such a measure bore no relation to the workers' health or safety. The Court conceded, however, that such measures might be permissible if it could be shown that the law did in fact serve to protect health or safety.

When the state of Oregon established a ten-hour workday for women in laundries and factories, business owners attacked it on the grounds that, like the New York law, it bore no relation to the women's health or safety. To defend the law, Oregon turned to the noted Boston attorney Louis D. Brandeis, who had already won a reputation for defending the public interest. Brandeis seized upon the opening in *Lochner*, namely, that if he could show how the Oregon law related to worker health and safety, then the Court would have to sustain it. He devised a highly unusual brief. He covered the traditional legal precedents in just two pages, and then filled over 100 pages with sociological, economic and physiological data on the effect of long working hours on the health of women.

Justice Brewer's opinion not only acknowledged the brief, a highly unusual step, but conceded that women were in fact different from men, and thus needed this type of factory protection. Brandeis's strategy had worked, but it was a strategy for the times; he himself did not consider women inferior or subservient to men.

The most important result of the Brandeis brief and of the decision in this case is that it set the model for all future reformers attempting to use the law to affect social and political conditions. *Muller* democratized the law, in that it made it more open to

the everyday facts of life; it called upon justices to take into account the effect of their decisions on the real world and on the lives of real people.

Brandeis, a future Supreme Court justice, believed that law should respond to the facts, not just ideals. The same kind of appeal to sociology was used by another future Supreme Court justice 48 years later, when Thurgood Marshall introduced sociological evidence in the school desegregation case *Brown v. Board of Education*.

A. **The Physical Document**

1. The Brief must "look good" – *presentation is just as important as a fine Chef cooking an exquisite meal.*

2. Use a decent binding so the brief does not fall apart.

3. Make sure the copy is nice and **dark**.

4. *Use a font that is easy to read*:

13 point WordPerfect or 14 point Word.

B**. Follows rules as to form**

1. Cover sheet.

- *If you want to argue (and you always should) add:*
  (ORAL ARGUMENT REQUESTED)

2. Table of contents.

- *Let the table of contents "introduce" your case.*

Here is an Example:

TABLE OF CONTENTS

3. TABLE OF AUTHORITIES

The Rules require a table of authorities and Judges are interested in what cases are being cited. Be sure to use PROPER citation format. Avoid Underlining which was a printers mark for italics and is archaic in today's world of word processing.

Here is an example:

~~~~~~~~~~~~~~~~~

TABLE OF AUTHORITIES

FEDERAL CASES:

STATE CASES:

STATE RULES, STATUTES AND CONSTITUTIONS:

OTHER AUTHORITIES:
~~~~~~~~~~~~~~~~~

4. THE INTRODUCTION TO THE BRIEF. Here is an example:

INTRODUCTION

Patrick Kelly Lewis appeals as of right from his Evading Arrest, Simple Possession of Marijuana, and Reckless Endangerment convictions. His parents, Patrick K. Lewis and Donna Lewis, appeal their convictions for Evading Arrest.

In summary, Kelly Lewis was involved in an automobile accident and was taken to the hospital by ambulance. The investigating officer went to the hospital and told Kelly Lewis that he was not under arrest but that the officer was going to the magistrate's office to "attempt to obtain an arrest warrant" against Lewis for possible DUI. Mr. Lewis stayed at the hospital for treatment. Mr. Lewis's parents later came to the hospital to see Lewis because he was injured in the accident. They stayed with Kelly Lewis for several hours. Eventually, Kelly Lewis and his parents left the hospital. **The officer, enraged at Kelly Lewis's temerity in departing the hospital before the officer finally returned, charged Mr.Lewis and his parents with evading arrest and a host of other offenses.**

The primary issue in this appeal is that the evidence was insufficient to establish that Kelly Lewis or his parents "evaded arrest." A companion issue asserts that the facts surrounding the earlier automobile accident do not justify Kelly Lewis's conviction for reckless endangerment.

Here is another example:

INTRODUCTION

George Blake Kelly appeals as of right from his convictions for murder in the second degree, vehicular homicide by intoxication, vehicular homicide by reckless driving, vehicular assault, reckless driving, and driving under the influence. He received an effective sentence of 31 years.

In summary, this case involves a tragic automobile collision. Mr. Kelly was driving on a two-lane road at about 9:30 in the evening. Mr. Kelly passed a vehicle in front of him as he was nearing a turn in the road. While still negotiating the turn in the road, Mr. Kelly's vehicle collided head-on with the victims' automobile, which was traveling in the opposite direction in the other lane, resulting in injury to the driver and the death of the passenger.

The primary issue in this appeal is one of first impression: whether a death resulting from drunk driving can constitute second degree murder under the 1989 Criminal Code. Second degree murder requires a "knowing" killing as opposed to a "reckless" killing which is sufficient for vehicular homicide. While the death here was clearly the result of Mr. Kelly's recklessness, Mr. Kelly did not "knowingly" kill the victim. Accordingly, the conviction for murder in the second degree should be dismissed and the conviction for vehicular homicide affirmed.

Link the introduction to the conclusion at the end of the Brief:

CONCLUSION

This Court should find that a death resulting from drunk driving cannot constitute second degree murder under the 1989 Criminal Code. Second degree murder requires a "knowing" killing as opposed to a "reckless" killing which is sufficient for vehicular homicide. While the death here was clearly the result of Mr. Kelly's recklessness, Mr. Kelly did not "knowingly" kill the victim.

The District Attorney prosecuted this case as second degree murder because he felt that the punishment for vehicular homicide was inadequate. We all believe that the punishment should fit the crime. We have not yet arrived at the place where the crime is made to fit the desired punishment. When *that* happens, as here, we will have a society without laws: where justice is just an illusion.

This Court should dismiss the convictions for second degree murder, driving under the influence, and reckless driving. One of the convictions for vehicular homicide should be reinstated and an appropriate sentence imposed.

5. **STATEMENT OF ISSUES**

- Cut them down to size. (no duty to raise everything v. waiver)
- Be precise.
- Put best issue first.

***Here is an example**:*

STATEMENT OF THE ISSUES

I. Whether the trial judge committed reversible error in failing to properly define "wrongfulness" in the test for insanity.

II. Given an appropriate definition of "wrongfulness," whether the defendant carried his burden of showing insanity by clear and convincing evidence and thus whether the state's evidence was insufficient to support the verdict as a matter of law.

III. Whether the failure to charge voluntary manslaughter as a lesser included offense was reversible error.

IV. Whether this Court should reduce the grade of the conviction to voluntary manslaughter if this Court affirms the rejection of the insanity defense.

6. **STATEMENT OF CASE**

STATEMENT OF THE CASE

Mr. Kelley killed his daughter slightly after midnight on the morning of Sunday, August 15, 1999. (Volume II, page 173). Upon discovering that their child may have died, Mrs. Kelley called 911. (Volume II, page 176). The police arrived shortly after 1:00 a.m. and, after finding the child dead, questioned Mr. Kelley about what had happened. (Volume II, page 100). Mr. Kelley was then arrested and was taken to the Lebanon police station and, at approximately 5:00 a.m. was transported to the Wilson County Jail. (Volume II, page 97).

On August 15, 1999, a warrant was issued for Mr. Kelley charging him with criminal homicide. (T.R., page 1).

On August 16, 1999 the judge issued an order directing a forensic evaluation. (T.R., page 3). After an evaluation at Middle Tennessee Mental Health Institute, the doctors determined on September 20, 1999 that the defense of insanity could be supported and that Mr. Kelley was now competent to stand trial. (T.R., page 6-7).

Mr. Kelley was transported back to the Wilson County Jail where his mental condition deteriorated. On September 22, 1999 the judge ordered that Mr.

Kelley be returned back to the Middle Tennessee Mental Health Institute because he was mentally ill. (T.R., page 8-9). The record reflects that the physicians were of the view that Mr. Kelley "has no insight into his delusional beliefs that God told him to kill his daughter." (T.R., page 10).

Another physician was of the view that "approximately a month ago [Mr. Kelley] killed his daughter in the belief that God wanted him to do it, his delusional system remains largely intact." (T.R., page 12).

On September 11, 1999 Mr. Kelley was indicted for first degree murder and first degree felony-murder. (T.R., page 15-16).

Because the physicians at Middle Tennessee Mental Health Institute were of the opinion that Mr. Kelley was insane, the judge permitted the District Attorney to retain a separate expert to evaluate Mr. Kelley. (T.R., page 17). Eventually the State selected Dr. Martell who evaluated Mr. Kelley on behalf of the prosecution. However, after conducting his evaluation Dr. Martell concluded that Mr. Kelley was insane and thus Dr. Martell testified for the defense. (Volume IV, page 398).

On or about March 23, 2000 the Middle Tennessee Mental Health Institute determined that Mr. Kelley's mental condition had improved to the point where he was now competent to stand trial but that he should still be committed to the mental institution. (T.R., page 30-31).

The defense then submitted a formal notice of insanity defense and gave notice of six experts who were to testify as to insanity. (T.R., page 32). The prosecution had none.

The trial of this matter commenced on September 5, 2000 and continued until September 8, 2000 whereupon the jury found Mr. Kelley guilty of murder in the first degree and felony-murder. (Volume IV, page 483). The judge immediately imposed a sentence of life imprisonment. (Volume IV, page 483).

The undersigned counsel then appeared as counsel of record for Mr. Kelley on February 14, 2001. (T.R., page 83). An extensive amended motion for a new trial was filed on February 15, 2001 along with a companion memorandum of law. (T.R., page 84-110).

The trial judge entered an oral order on February 26, 2001 denying the motion for a new trial. The defense filed a notice of appeal on February 27, 2001. (T.R., page 112).

7. **STATEMENT OF FACTS** - cite to record.

8. **ARGUMENT.**

C. **How to draft a specific issue.**

1. Raybin's Rule: *Citation should have the content or holding of case after the citation unless the case is point of the argument; quote liberally from the case.*

Example:

State v. Thornton, 730 S.W.2d 309 (Tenn. 1987) (reduces conviction from murder in the first degree to voluntary manslaughter where defendant interposed unsuccessful defense of temporary insanity).

2. Division of long arguments within a single issue.

3. Reproduce exhibits in brief v. appendix.

4. Tactics:

(a) State issue again.

(b) How it came up, what are the facts?

(c) Proper objection was made.

(d) What is the law? Do my facts fit the law?

(e) How it hurt client VERY IMPORTANT.

(f) Harmful or harmless error.

(1) Error to judicial process without prejudice: *Claybrook*, 736 S.W.2d 95 (jury selection); *Perry*, 740 S.W.2d 723 (jury misconduct). Otherwise you must show prejudice.

(2) Degree of harm: *Martin*, 702 S.W.2d 560 (closeness of facts, error not harmless).

(3) Harmless error analysis requires an examination of the type of error involved because of the different burden of proof requirements. In *State v. Harris*, 989 S.W.2d 307, 314 -315 (Tenn. 1999) the Court held that:

"To resolve the issue in this appeal we must first determine whether the error complained of is constitutional or statutory. The answer to this question is important because the test for harmlessness of constitutional errors differs from that for non-constitutional errors. First, once a constitutional error is found, the burden shifts to the State to prove harmlessness; the burden does not shift to the state for non-constitutional errors. Second, the standard which applies to assess the harm or prejudice resulting from constitutional errors is more exacting than the standard which applies to non-constitutional errors. ...For example, in Tennessee, non-constitutional errors will not result in reversal unless the error affirmatively appears to have affected the result of the trial on the merits, or considering the whole record, the error involves a substantial right which more probably than not affected the judgment or would result in prejudice to the judicial process. … In contrast, a constitutional error will result in reversal unless the reviewing court is convinced "beyond a reasonable doubt" that the error did not affect the trial outcome."

(g) *State v. Page*, 184 S.W.3d 223 (Tenn.2006)("We now address whether it is appropriate to review the trial court's failure to give a lesser-included offense instruction, even if the issue was not properly preserved for appeal, under the doctrine of **plain error**").

(h) Cumulative errors: Tennessee recognizes the doctrine that while an individual error may be inadequate to grant a new trial, a combination of errors may, in concert, require a different result. See, *State v. Zimmerman*, 823 S.W. 2d 220, 228 (Tenn. Crim. App. 1991) (the cumulative effect of these errors deprived the defendant of a meaningful defense.).

(i) Underline important points.

(j) Use of color; tabs.

Here is an example (*State v. Brenda Burns*)

2. THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FACILITATION TO COMMIT MURDER IN THE FIRST DEGREE.

This Court has also granted review here to address the issue of whether the trial judge should have instructed the jury on the lesser included offense of facilitation to commit murder in the first degree.

A.

At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. But it has long been recognized that it can also be beneficial to

the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. The lesser included offense instruction ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard. *Beck v. Alabama*, 447 U.S. 625, 632, 100 S.Ct. 2382, 2387, 65 L.E.2d 292 (1980).

Given the requirement of a charge to the jury on lesser included offenses, the obvious question arises as to what offenses are lesser included to others and when should they be instructed. This issue has continued to perplex the courts, due in no small measure to the tendency of the legislature to constantly modify the elements of criminal offenses. Judicial precedent is thus not always a reliable guide as to which offense is lesser to another. *See e.g., State v. Boyce*, 920 S.W.2d 224 (Tenn. Crim. App. 1995) (because the definition of criminal trespass now omits any reference to "breach of the peace," criminal trespass can now be a lesser included offense of burglary).

Lesser included offenses are traditionally viewed as a stack of bricks, with the charged offense at the top and the lesser offenses neatly stacked below in a vertical column. While this perception of lesser included offenses may be helpful in determining whether a particular offense need be instructed in a given trial, it is perhaps more useful to think of the universe of potential lesser included offenses as a

pyramid with the charged offense as the cap-stone.

Lesser included offenses differ depending on whether one is dealing with attempts, mental states, degrees of harm, or degrees of responsibility. In short, one can have multiple layers of lesser included offenses "below" the offense charged in the indictment.

On one "face" of the pyramid, we have lesser offenses characterized by the attempt to commit the crime. For example, an attempt is a lesser included offense to the completed crime. *See e.g.*, *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). An "attempt" qualifies under the traditional lesser included offense test because one can only commit the completed offense if there is first the attempt, which matures into the final crime.

Offenses may also be lesser to one another based on the differing harms to the person, property, or public interest proscribed in the statute. For example, sexual contact (sexual battery) always occurs when there is sexual penetration (rape). Thus, sexual battery (which focuses on the type of harm to the victim) is a lesser offense of rape.

Another "face" of the pyramid is the differing mental states. For example, if a person knowingly burns the personal property of another, then this constitutes arson under T.C.A. § 39-14-303. However, if the defendant starts a fire only recklessly,

then it is a misdemeanor under T.C.A. § 39-14-304. The physical fire and the damage to the property of another may be identical, yet what makes one offense the lesser included of the other is only the differing mental state.

Review of the several mental definitions in T.C.A. § 39-11-302, indicates that they have different parts and components, yet "criminal negligence" is clearly lesser to "reckless," as "reckless" is lesser to "knowing," as "knowing" is lesser to "intentional." *See State v. Crowe*, 914 S.W. 2d 933 (Tenn. Crim. App. 1995) (the statutory scheme creates a hierarchy, and while each of the four mental elements are unique, the lesser levels of culpability are included within the greater). One need not have a separate "class or grade" category of lesser crimes. The traditional test of offenses included in the indicted crime is sufficient.

B.

The preceding analysis establishes that lesser included offenses can exist where there are different mental elements but where the physical acts are identical. Crimes can have identical mental elements but have different and correspondingly lesser harms which translate into lesser included offenses. Lesser offenses may also occur where one has an attempt. Lesser included offenses are also characterized by reduced punishment. Thus, second-degree murder is also "lesser" to first-degree murder because first-degree murder carries a higher sanction.

Earlier it was suggested that criminal responsibility is yet another "face" of the lesser included offense pyramid. This deals with the scope of a defendant's participation in a crime. Criminal responsibility can certainly be divided into lesser included offenses where there are greater and lesser elements, and greater and lesser punishments.

In the case at bar, even though Ms. Burns denied committing the offense in her testimony, her statement to the authorities to the effect that she had received a check with her former husband's name already on it - a fact which was clearly at odds with the handwriting expert - could lead a jury to believe that she was knowledgeable about the possibility of the death of her husband but did not necessarily inspire his demise. Indeed, this Court should note that the prosecutor made much of this in his closing argument:

> I want you to consider the things that she had said in her statement because those were things that were said when she talked to Chris Carpenter, and in particular the statement that she made to him that Spadafina brought me the check with Paul's name on it already. Now, Agent Carpenter has testified to you under oath that he questioned her and what she said was on the five thousand dollar check that Paul Burns had already signed it. And it's only after that, only after Agent Carpenter had asked for the assistance of the U.S. Postal Service and they come in and the expert explains to you about the handwriting, that she says no, now that I think about it, it didn't have it on it already, I put it on there at the Bank of Camden when I got there and realized that he hadn't signed it. [R. 484].

The very thing that the government used as corroborative evidence squarely raised the issue of the degree Brenda Burns' complicity in the alleged homicide. In short, was it full? Was it partial? Or did it exist at all? It is no answer to say that the jury was instructed as to the lesser included offense of murder in the second degree. This has to do with the mental state of the killer. There is no question that this homicide was about as cold blooded as one could have and it was clearly murder in the first degree. That was not the issue here. The question before the jury was as to the degree, if any, of Brenda Burns' participation in this alleged crime.

The analysis of our facilitation statute suggested here should be adopted by this Court. It is consistent with the 1973 proposed Tennessee Code, upon which our current law is based. Accordingly, this Court should order a new trial and, at any new trial, Ms. Burns should be entitled to an instruction on the included offense of facilitation.

9. The Argument can be linked to the **REPLY BRIEF**.

REPLY BRIEF

As has been addressed in the primary Brief of the Appellee, some opinions of the intermediate appellate court have crafted a host of complex procedural rules to determine when facilitation need be instructed. This burdensome process is unnecessary and constantly tempts reversal.

The narrow distinctions between "full" liability as a party and "partial" liability as a facilitator are too close for a trial judge to call; rather they must be left to questions of fact to be decided by a jury. This is no different than the razor-thin distinctions between the mental states of knowingly and intentionally.

The distinctions between greater and lesser offenses do not exist in some "bright-line" rule. One does not start where the other leaves off. The overlap is enormous in any rational judicial system particularly given this Court's broad interpretation of accessory liability in *State v. Carson*, 950 S.W.2d 951 (Tenn. 1997).

The distinctions between degrees of responsibility are to be made by a jury between closely related lesser included offenses. Thus, facilitation should always be instructed as a lesser offense whenever a defendant is alleged to be a party by virtue of

vicarious liability. No trial judge could ever be wrong in his or her instructions on this issue since it would always be the prosecutor who made the choice by requesting accessory liability as a jury instruction. The consequence to the prosecutor is that facilitation of the charged offense would always follow as a lesser included offense.

The State forgets why lesser included offenses were first conceived. As noted in Wright, *Federal Practice and Procedure*, Section 515, page 20 (West 1982): the lesser included offense "doctrine developed at common law to aid the prosecution in cases where the proof failed to show some element of the crime charged."

There may be many instances where the State fails to prove everything necessary to convict an accused as a full party. Under prior law, the defendant walked completely free. Under current law, the accused may still be convicted as a facilitator, which is punished but one penalty class beneath that for the full party. This is a significant improvement over prior law since the Government's net is now wider, capturing a host of conduct not previously subject to any criminal sanction. Why the State would argue for such a narrow construction of an important prosecution tool is a mystery. At this level, in this Court, the State should be concerned with the jurisprudence of the facilitation statute as it relates to all current and future prosecutions in our jurisdiction. Instead, the State exhibits nothing but tunnel-vision designed only to sustain the conviction of Brenda Burns.

10. **ORAL ARGUMENT --** Should *be requested when brief filed.*

A. When to argue.

B. Prepare day before - think about your case.

C. Write an outline of argument.

D. Practice it.

E. Time 20 minutes in C.C.A.; 30 in Supreme Court.

F. Reserve 5 for rebuttal.

G. Cut your issues down to 3 or 4.

H. Your Court may be lukewarm.

I. Don't bring your whole file up with you.

J. Introduce self.

K. Brief history of case

L. Tell them what your issues are that you will argue.

M. Start with first issue.

1. What's the problem?

2. What are the facts? know your facts.

3. What's the law?

4. How were you hurt?

5. What do you want?

N. Stay in the record.

O. Don’t read your brief.

P. Questions from the Court; invite questions.

Q. Quote from cases they wrote if possible.

R. Stop when you are ahead.

S. Go on to next issue.

T. Rebuttal: Don’t always use it

11. **TENNESSEE SUPREME COURT**

A. Application for Permission to Appeal.

DO NOT ABANDON YOUR CLIENT!

B. Time limits - 60 days.

NO EXTENSIONS ALLOWED!!!!!

C. Keep it short

D. Tell them why they should take your case:

Here is an Example:

INTRODUCTION

This is an appeal by permission from the intermediate appellate court's opinion which totally prohibits a civil litigant's attorney from pursuing a criminal contempt action to enforce a civil decree or order. This ruling has profound implications throughout our judicial system. The Appellant asserts that there is no due process or ethical prohibition in representation of this sort and that separate lawyers need not be acquired to pursue criminal contempt actions in all cases.

Tennessee contempt procedures are different than traditional criminal prosecutions. There is no right to a grand or petit jury, for example. Contempt, under Tennessee law, is limited to ten days and a fifty dollar ($50) fine. These minimal sanctions and differing procedures distinguish Tennessee contempt proceedings from those in other jurisdictions which allow punishments for as long as five years. Any corresponding limitations on legal representation should thus be different as well.

Requiring separate, "independent" attorneys in every Tennessee criminal contempt action will significantly delay the enforcement of judicial decrees and hamper the administration of justice. Existing ethical constraints and sanctions for abuse of process provide adequate safeguards against unwarranted contempt

proceedings. Accordingly, this Court should permit the Appellant's attorney to pursue the contempt petitions which arise out of this divorce action.

E. Conflicts in C.C.A.

F. Attach copy of opinions

G. Rule 11 allows for a Brief on the Merits to be filed with the application.

H. Narrow issues in the Tennessee Supreme Court. No waiver for later Federal Review

12. **PROTECTED RECORD**

A. Begin at arrest, keep an "appeal" file.

B. Get it in the record!

1. File exhibits (exhibit A, B, etc.), *Cooper*, 735 S.W.2d 125 (no search warrant); *Rhoden*, 739 S.W.2d 6 (tapes).

C. Objection.

1. Object, object, object.

2. How to object: *Hammonds*, 737 S.W.2d 549 (no off-the-record)

3. Contemporaneous objection: *McGee*, 746 S.W.2d 460 (Tenn. 1988) (motion in limine).

4. Offer of proof: *State v. Goad*, 707 S.W.2d 846 (Tenn. 1986) (better practice is to present proof); Tenn. Rule Evid. 103(b) (question and answer).

5. Ground of objection: Tenn. R. Evidence 103(a)(1) (grounds must be stated).

D. Pretrial Litigation

1. Motions must be on time; Rule 12, Tenn. R. Crim. P.

2. Litigate to "finality," : *McGee*, 746 S.W.2d 460 (Tenn. 1988) (motion in limine)

3. Defendant can testify without cross on other issues. Rule 104(d) T. R. Evid.

E. Jury Argument, must object to preserve the issue.

F. Jury Instructions.

1. Object, special requests required for lesser included crimes. *State v. Page*, 184 S.W.3d 223 (Tenn.2006) (failure to give a lesser-included offense instruction when not properly preserved for appeal, is reviewed under the doctrine of plain error.)

2. Possible Exception: Inclusion of bad instruction, *Empire*, 563 S.W.2d 551 (Tenn. 1978)

G. Sentencing.

1. Make Pre-sentence report as an exhibit.

2. Sentencing memo.

H. Motion for a new trial.

1. When to file, *Blunkall*, 731 S.W.2d 72 (30 days).

2. Amendments, *Butler*, 626 S.W.2d 6 (Tenn. 1981) (30 days after

denial).

3. Form of motion for a New Trial: *Frazier*, 683 S.W.2d 346 (motion must state specific grounds).

See ALSO *Fahey v. Eldridge* 46 S.W.3d 138 (Tenn. 2001):

"SPECIFICITY REQUIREMENTS OF RULE OF APPELLATE PROCEDURE 3(e)

It has long been the rule in this state that in order to preserve errors for appeal, the appellant must first bring the alleged errors to the attention of the trial court in a motion for a new trial. ...This requirement was initially imposed by this Court to make more efficient the process of reviewing "the ever increasing number of appeals," and we have recognized that this practice significantly aids the functions of the appellate courts by limiting and defining the issues for review. See *Board of Equalization v. Nashville, C. & St. L. Ry.*, 148 Tenn. 676, 680, 257 S.W. 91, 93 (1923) (noting that this Court "was constrained to exercise its power of prescribing rules of practice, requiring that errors be first assigned in a motion for new trial presented to the trial court, and ... limiting the inquiry on appeal to error assigned in the motion"). Moreover, and perhaps most importantly, motions for a new trial also help to ensure that the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict, such as alleged misconduct of jurors, parties, or counsel which either occurred after the trial or could not reasonably have been discovered until after the verdict. *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn.1983).

In modern appellate practice, the requirement of filing a motion for a new trial to preserve most errors is governed by Rule of Appellate Procedure 3(e), which reads in relevant part,

[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will

be treated as waived.

Although Rule 3(e) requires that the grounds for the motion be "specifically stated," the Rule is silent as to how specific these grounds must be. Decisions from this Court have long stated the standard for specificity as being "as specific and certain as the nature of the error complained of will permit." *Johnson*, 114 Tenn. at 643, 88 S.W. at 170; see also *McCormic*, 659 S.W.2d at 805 (acknowledging that *Johnson* has survived the enactment of the Rules). While this standard says little more than does Rule 3(e) itself, several principles may be determined from the Rules and case law as to the degree of specificity needed in a motion for new trial to properly preserve issues for appeal.

First, the motion should contain a concise factual statement of the error, "sufficient to direct the attention of the court and the prevailing party to it." *Johnson*, 114 Tenn. at 644, 88 S.W. at 170-71. Under this standard, it is clearly improper to simply allege, in general terms, that the trial court committed error, either by taking some action or by admitting or excluding evidence; [FN6] rather, the motion should identify the specific circumstances giving rise to the alleged error so that it may be reasonably identified in the context of the entire trial. See *State v. Ashburn*, 914 S.W.2d 108, 114 (Tenn.Crim.App.1995). Accordingly, a well-drafted motion alleging improper admission or exclusion of testimony, for example, should identify the witness giving the testimony and provide a short and plain summary of the testimony improperly admitted or excluded. Moreover, a well-drafted motion alleging error in the jury instructions should set forth the language of the instruction given by the court and the language of the instruction rejected by the court if an alternative instruction was requested. FN6. See, e.g., *Cloyd v. State*, 202 Tenn. 694, 696, 308 S.W.2d 467, 468 (1957) ("[C]ertain evidence was improperly submitted to the jury."); *Loeffler v. Kjellgren*, 884 S.W.2d 463, 472 (Tenn.Ct.App.1994) ("The trial court erred in jury instructions in the second trial."); *State v. Gauldin*, 737 S.W.2d 795, 798 (Tenn.Crim.App.1987) ("The instructions given by the court to the jury were unclear and confusing.").

Second, as it is well-settled in law that a general objection is usually not sufficient to assign error, Tenn. R. Evid. 103(a)(1); *Jack M.*

Bass & Co. v. Parker, 208 Tenn. 38, 48, 343 S.W.2d 879, 883 (1961), the motion should also contain a specific legal ground alleged for the error. Accordingly, in addition to setting forth a concise statement of the factual grounds, a well-drafted motion for a new trial should also identify, with reasonable clarity, the legal ground upon which the trial court based its actions and contain a concise statement asserting the legal reasons why the court's decision was improper. However, because motions for a new trial should not be expanded "into all the voluminosity of 'briefs' and printed arguments," *National Hosiery & Yarn Co. v. Napper*, 124 Tenn. 155, 171, 135 S.W. 780, 784 (1911), the movant is not required to identify such errors in the motion with the same precision expected in the appellate courts. Therefore, precise citation to a rule, statute, or case as the legal ground for the alleged error is normally not required to preserve the issue for appeal under Rule 3(e), although to the extent that citation to authority aids in fairly bringing the legal nature of the error to the attention of the trial judge, such a practice ought to be encouraged. [FN7] FN7. This is not to say that the trial court cannot require precise citation to authority in considering a motion for a new trial. It is only to say that such precision is not otherwise required to preserve the error for appeal under Rule 3(e), so long as the legal ground for the alleged error is clearly and fairly presented to the trial court. Finally, Rule of Appellate Procedure 1 provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits." Accordingly, when an appellate court reviews a motion for a new trial under Rule 3(e), it should view the motion in the light most favorable to the appellant, and it should resolve any doubt as to whether the issue and its grounds were specifically stated in favor of preserving the issue. Any other method of review would result in needlessly favoring "technicality in form" over substance, a practice specifically discouraged by the comments to Rule 1. Thus, while courts cannot find error where none has actually been alleged, no matter how liberal a construction is given to the motion, *Jacks v. Williams-Robinson Lumber Co*., 125 Tenn. 123, 128-29, 140 S.W. 1066, 1067 (1911) ("But this court will not search the record at large to find errors. The presumption is that the judgment of the lower court is correct. The burden is upon the appellant to specifically point out the errors complained of, and affirmatively show that they exist."), courts may not deem a motion for a new trial insufficient to preserve errors for appeal

merely because it fails to enumerate specific issues. Accordingly, just as parties must endeavor to specifically state the issues raised so as to avoid any potential for future waiver, appellate courts should not lightly dismiss an issue on appeal under a strict or technical application of Rule 3(e)."

4. **Grounds**: (waiver if not raised, except for "plain error").

Discussion. The most frightening example of the consequences of failing to raise what at least one set of state lawyers thought was a "frivolous" issue involved Machetti and Smith. They were husband and wife who were tried together by the same jury and both given death sentences. The upshot of the opinions is that the husband (Smith) was executed and the wife (Machetti) lived due to the preservation of the jury composition issue. *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983) (state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending notice to the jury commissioners deprived petitioner of her right to an impartial jury trial); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), cert. denied, 464 U.S. 1459 (1983) (petitioner waived right to object to jury composition by failing to assert issue at trial).

"Plain error": *State v. Ogle*, 666 S.W.2d 58 (Tenn. 1984). *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994) (plain error requires that the record clearly established what occurred in the trial court, a clear rule of law must have been violated, the substantial right of the defendant must have been adversely affected, the defendant did not waive the issue for technical reasons, and consideration of the error is necessary for substantial justice; extensive discussion of issue); *State v. Page*, 184 S.W.3d 223 (Tenn.2006)("We now address whether it is appropriate to review the trial court's failure to give a lesser-included offense instruction, even if the issue was not properly preserved for appeal, under the doctrine of plain error. When determining whether plain error review is appropriate, the following five factors must be established: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] "necessary to do substantial justice." An error would have to especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error. In the present case, at trial, the defendant failed to request a lesser-included offense instruction on facilitation of second degree murder. The defendant

has failed to show that he did not waive this issue for tactical reasons. Therefore, the trial court's failure to instruct on facilitation of second degree murder does not rise to the level of plain error."); *State v. West*, 19 S.W.3d 753 (Tenn. 2000) (plain error doctrine does not apply to post-conviction relief petitions).

5. Tactics: shotgun it in motion for new trial.

6. Trial brief.

7. Have a hearing, introduce proof, and make a part of record.

I. Motion for judgment of acquittal

1. Sufficient evidence is raised with this motion

13. **RECORD ON APPEAL** (Rules 24, T.R.A.P.)

A. Getting it up. YOUR RESPONSIBILITY !!!

HERE IS AN EXAMPLE:

DESIGNATION OF RECORD
FOR PURPOSES OF APPEAL

Pursuant to Rule 24, Tennessee Rules of Appellate Procedure, the defendant/appellant, Jerome Wray, hereby designates those portions of the record for purposes of his appeal. The defendant/appellant specifically designates the trial transcript contemporaneously filed herewith consisting of the entire trial proceedings as necessary for his appeal. The defendant/appellant also designates all exhibits filed in this matter, whether they were numbered exhibits or merely exhibits marked for identification only, with no distinction to be made as to whether same was considered by the Court or not as evidence in chief for either party. All exhibits introduced by either side, whether for identification purposes or not, shall be included in the record. The defendant/appellant specifically designates copies of all papers filed in the trial

court, including the originals of any exhibits, all motions, pleadings, petitions, answers, and orders of every sort entered by the trial court, along with all appropriate minute entries. All trial briefs or memoranda filed by either side must be included. The defendant/appellant specifically excludes from the appeal any subpoena or summons or any witness as being unnecessary to the issues being contested.

B. Designation of record, Rule 24, T.R.A.P Where less than complete transcript is to be filed, appellant shall file a description of parts of the transcript to include in the record and a declaration of the issues intended to be presented on appeal. . State v. Peak, 823 S.W.2d 228 (Tenn. Crim. App. 1991) (trial judge has authority to require parties to designate portions of the record that will be prepared and submitted to appellate court, but may not dismiss an appeal as means of settling any controversy over designations of portions of the record);

C. Appellee has 15 days after service of the description and declaration to designate additional parts to be included.

D. Order transcript REMEMBER COURT REPORTER DOES NOT TYPE UP THE ENTIRE TRIAL UNLESS YOU SPECIFY WHAT YOU WANT. INCLUDE THE ENTIRE TRIAL INCLUDING ARGUMENTS.

E. Narrative transcript *State v. Marbury*, 908 S.W.2d 405 (Tenn. Crim. App. 1995) (the narrative statement of the evidence instead of a transcript did not contain any statement that the defendant was the person arrested, the failure of the state to file an objection precluded a finding that the evidence was sufficient to sustain the verdict).

F. Make sure the whole thing is there. GO TO THE TRIAL COURT CLERKS'S OFFICE !!!!!!!!!!!! See also *State v. Gourley*, 680 S.W.2d 483 (Tenn. Crim. App. 1984) (remand for further proof where state failed to introduce proof regarding a search question). *State v. Hopper*, 695 S.W.2d 530 (Tenn. Crim. App. 1985) (court refused to consider issues where transcript not prepared relating to search and confession questions; motion to supplement record denied under facts of case); *State v. Meeks*, 779 S.W.2d 394 (Tenn. Crim. App. 1988) (absence of transcript of sentencing hearing precluded criminal appellate court from considering propriety of

sentencing court's decision not to suspend sentence); *State v. Coolidge*, 915 S.W.2d 820 (Tenn. Crim. App. 1995) (in the absence of a record and particularly that portion which relates to the sentence, the appellate court must presume that the sentence imposed by the trial judge was correct).

E. Supplement record, Rule 24, T.R.A.P. *State v. Blevins*, 736 S.W.2d 120 (Tenn. Crim. App. 1987) (the appellate court may permit a late filing of a transcript when it does not prejudice either party to the proceeding and a good faith effort was made to timely file the transcript in the first place).

F. Post Judgment Facts Tenn. R. App. P. 14. See the discussion in *Duncan v. Duncan*, 672 S.W.2d 765 (Tenn.1984). *State v. Branam*, 855 S.W.2d 563 (Tenn. 1993) (evidence that witness told police of direct involvement in murder of person charged as accessory before fact, which evidence defendant contended he did not discover until a year after his trial because prosecution failed to provide it during pretrial discovery, was admissible under rule authorizing Supreme Court to consider post judgment facts on appeal, and remand was required to determine whether violation of due process occurred; alleged facts, if proven correct, concerned matter that could not have been contested at defendant's trial since evidence was unconstitutionally withheld from defense).

G. Filing Of The Transcript (Tenn. R. App. P. 24(b)) Must be filed with the trial court clerk within 90 days after filing the notice of appeal. Appellant must simultaneously file notice of filing on State.

H. Filing Of Record In Appellate Court (Tenn. R. App. P. 25(a).Must be "completed" by trial court clerk within 45 days after filing of transcript or, if no transcript filed, within 45 days after notice that no transcript will be filed. An extension of 15 days may be granted.

APPENDIX ON NEXT PAGE

APPENDIX

11 Tenn. Prac. Crim. Prac. & Procedure § 33.107 (2006)

By David Louis Raybin

§ 33.107. Appellate Advocacy

Appellate procedure is only a vehicle for resolving substantive disputes. Obviously, counsel should follow the procedural rules so that matters of form do not detract from the merits of the appeal. However, one should not lose sight of the fact that the merits or issues must be presented in such a fashion that the appellate court is persuaded to reverse the lower court and grant a new trial. The attorney, if he or she is to be effective, "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."[FN1]

Appellate advocacy involves three related methods of pursuasion: a "protected record," the appellate briefs, and the appellate argument. With regard to the record, previous sections have demonstrated the necessity of timely objections and offers of proof.[FN2] The appellate process begins at least as early as the arrest of the client. Competent counsel will assure at every step of a proceeding, whether in general sessions court or in the trial court, that the case is properly structured and the record properly developed to secure a favorable ruling in the event of an appeal. Cases are legion for the proposition that the complaint is "not supported by the record."[FN3] A silent record may result in a presumption of regularity which works against the client.[FN4] The record below is the essence of the controversy; counsel should be certain that the defendant's position is in the most presentable form possible for effective and successful review. In only rare instances will an appellate court remand for further proof on an issue.[FN5]

Assuming that the record is adequate, the next step in effective advocacy is the appellate brief. What has been said about briefs in the trial court applies with even greater force in the higher courts.[FN6] The briefs are unquestionably the most critical item in the appellate process.

The appellate rules address the mechanical aspects of the brief regarding color, size, and number of pages.[FN7] While these matters are obviously important, of even greater moment is the required content or structure of the brief which must follow a

fairly exact format. This includes a table of contents, table of authorities, jurisdictional statement, a statement of the issues for review, a statement of the case, a statement of the facts, an argument, and a short conclusion.[FN8]

The statement of issues and the supporting argument are the heart of the brief. The defense attorney must be rather specific in framing the issues presented for review as only a general allegation may not be adequate enough to qualify as an "issue."[FN9] Even worse, is failing to present an issue at all. Absent plain error the appellate courts are not going to search the record for incompetent and prejudicial evidence.[FN10] To avoid such pitfalls some lawyers take the "shotgun approach" and pepper the brief with all manner of claims. However, counsel should be guided by the "suggestion" of one court that the "inclusion of so many unsupportable issues on appeal dilutes the strength of arguably meritorious points which deserve full and forceful treatment." [FN11] Nevertheless, an attorney should consider arguing even "settled" propositions "for the purpose of preserving the issue for future appeal." [FN12]

Assuming that counsel has narrowed his issues to a few well chosen points, the argument must first persuade the appellate courts that error has occurred. To this end, care must be exercised to avoid certain pitfalls which could result in a summary treatment of one's appeal. First, an attorney must present some argument regarding an issue or risk waiver of the claim.[FN13] Second, an attorney should specify by page number the exact place in the record where the error took place.[FN14] Lastly, an appellate court will treat as waived any issue which is not supported by some citation of authority.[FN15] A failure to comply with these basic propositions will result in the appellate court declining to rule upon an issue.[FN16]

If an issue is worthy of presentation, the argument should frame the exact issue so that the complaint is clear. For example, an issue might inquire: "Whether the Trial Judge committed error in allowing the District Attorney to state to the jury that the defendant had not testified at the trial." The argument should first specify the pages of the record where the error took place and, in this example, actually quote the statement at issue.[FN17]

The argument should next cite authorities as to why the issue constitutes error. Obviously citation of authorities should conform to the manner required by the appellate rules.[FN18] The author's experience has been that opinions of the Tennessee Supreme Court are perhaps more persuasive than those by the United

States Supreme Court although the latter was certainly controlling in matters of constitutional law.[FN19] In the absence of authority by the Tennessee Supreme Court, opinions of the Tennessee Court of Criminal Appeals should be cited as authority although those cases do occasionally conflict.

Even where these cases are adverse to one's position, further litigation may produce a different result.[FN20] Unpublished opinions are considerably weaker authority,[FN21] although the appellate courts will themselves cite such opinions.[FN22] Where relied on, a copy of an unpublished opinion must be attached to the brief.[FN23]

Where no Tennessee case is directly on point,[FN24] cases from other jurisdictions may be of value and, while not controlling, may aid an attorney's position.[FN25] Lastly, statistical studies in lay publications[FN26] as well as legal treatises,[FN27] may be persuasive authority.

Whatever authority is cited it is important that the facts of the case at bar be addressed in light of the authority to show why the issue violates some rule, statute or court opinion. The argument should be developed point by point in a succinct manner.

Having established that some occurrence at trial violated a certain legal procedure, many lawyers will halt their argument and will conclude that "error is present." This is not enough because the appellate court will respond: "so what?" The defendant must anticipate a finding of harmless error and establish why the error is harmful to the client. Years ago the Tennessee courts stated that the "day is long past for rescuing the guilty by mere technicalities." [FN28] More recently, one finds observations that a defendant is only entitled to a fair trial but not a perfect trial.[FN29]

It is not enough then to only allege and establish error. Error comes in many flavors: plain,[FN30] harmless,[FN31] cumulative[FN32] and various other adjectives.[FN33] Harmless error, under Tennessee law, depends upon the nature of the error. An "evidentiary error" will be deemed harmless in direct proportion to the degree of the margin by which the proof exceeds the standard to convict.[FN34] In other words, "overwhelming evidence of guilt" will usually render the error harmless.[FN35] In a "close case" the error may not be harmless.[FN36] Where the error resulted in "prejudice to the judicial process," the case may be reversed without an "inquiry as to the weight of the evidence."[FN37] The distinction between

"evidentiary errors" and "errors prejudicial to the judicial process" are not clear.[FN38] Indeed, the entire body of "harmless error law" remains murky.[FN39] Perhaps the most that can be said is that each case will be determined in light of the facts and it is the responsibility of counsel to establish how a particular error affected the fairness of the trial.[FN40] This may be the most difficult aspect of the appellate brief.

Once the defendant's brief is filed, the state attorney general's office will respond with its own brief. On rare occasions the state may "confess error." [FN41] In any event, defense counsel may file a reply brief to respond to the state's argument.[FN42]

The final step toward "winning the appeal" is oral argument which must be requested on the face of the brief.[FN43] The appealing party may open and close the argument.[FN44] The time allowed for oral argument is only thirty minutes in the Supreme Court[FN45] and twenty minutes in the Court of Criminal Appeals[FN46] although longer times may be allowed on motion. [FN47]

Despite protestations to the contrary,[FN48] oral argument is an important part of the appellate process.[FN49] The effectiveness of argument will depend to some extent on whether one is arguing to a "hot" or "cold" court which is a function of the degree to which the judges have at least read the briefs prior to argument. In any event, counsel should begin the argument with a very brief statement of the facts and an even briefer outline of the arguments which will be made orally. In no event should an attorney attempt to argue all the issues unless there are only a few presented. If it is important to narrow the grounds in the brief, it is just as important to reduce even these to just a few critical issues in the argument.

Argument is the appropriate time to concentrate on the main strengths of one's own case and the fatal weaknesses of the state's case. While eloquence never hurts, it is not the time to deliver a speech. The appellate judges are not a lay jury and a jury-type argument is inappropriate. Unlike a jury, moreover, the judges will frequently ask questions. Questions from the bench should be appreciated as an indication of the court's interest and as an invitation to elaborate on specific points.

As in the case of the brief, the oral argument should explain the particular issue, develop how the facts raise this issue, cite authority for the legal violation and show

prejudice. Obviously a full citation to an authority is unnecessary since it will, or should, appear in the brief.

While it is important to prepare the argument in advance, an attorney should never have a "canned" argument. Flexibility is the key and a minimum of notes will be helpful. The rules prohibit reading at length from the record, brief or cases.[FN50] Reference a point to its location in the brief, summarize it, and move on to the next issue. The ability to engage in give-and-take colloquy with the court, helping the judges resolve the questions which obviously trouble them, is the part of oral argument which counts the most. A lawyer should be candid with the court and not disrespectful of the judge whose rulings are under review.[FN51]

Appellate advocacy involves a delicate balance between arguing too much and too little. A good brief and an effective oral presentation should convince the appellate court to "discover by the right rule of law what is right, and so do that."[FN52] In the final analysis, the dual goals of criminal law are first, to require the court to recognize and enforce the "barriers erected by the wisdom of our ancestors for the protection of public and private liberty, [which] cannot be maintained with too much vigilance or determination"[FN53] and secondly, the attainment of "the essential requirements of perfect justice."[FN54]

.....

Endnotes

[FN1] *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 835, 83 L. Ed. 2d 821 (1985). *McCoy v. Court of Appeals of Wisconsin*, Dist. 1, 486 U.S. 429, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988) ("Neither paid nor appointed counsel may deliberately mislead the Court with respect to either the facts or the law, or consume the time and the energies of the Court or the opposing party by advancing frivolous arguments. An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal."); *Cooper v. State*, 849 S.W.2d 744 (Tenn. 1993) (appellate counsel did not provide ineffective assistance in raising only two issues on direct appeal); *Weston v. State*, 60 S.W.3d 57 (Tenn. 2001) (Supreme Court order limiting the issue on remand to whether the petitioner was denied a first-tier appeal of his original post-conviction petition as a result of inaction on the part of appointed counsel deprived trial court of the authority on remand to permit an amendment adding ineffective assistance of counsel).

[FN2] See § 27.10.

[FN3] See e.g. *Jett v. State*, 556 S.W.2d 236 (Tenn. Crim. App. 1977).

[FN4] See e.g. *Myers v. State*, 577 S.W.2d 679 (Tenn. Crim. App. 1978).

[FN5] See e.g. *State v. Nance*, 521 S.W.2d 814 (Tenn. 1975); *State v. Gourley*, 680 S.W.2d 483 (Tenn. Crim. App. 1984).

[FN6] See § 12.12.

[FN7] See Tenn. R. App. P. 30.

[FN8] Tenn. R. App. P. 27(a).

[FN9] See *McCollum v. State*, 532 S.W.2d 63 (Tenn. Crim. App. 1975). Compare with *Adams v. State*, 547 S.W.2d 553 (Tenn. 1977). *State v. Draper*, 800 S.W.2d 489 (Tenn. Crim. App. 1990) (the issues framed on appeal must be very specific so the appellate court might know precisely what the question involves; failure to be specific waives the issue); *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994) (a party is bound by the ground asserted when making an objection, the party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court); *State v. Williams*, 914 S.W.2d 940 (Tenn. Crim. App. 1995) (extensive discussion and examples given on how to frame an issue on appeal).

[FN10] *McCracken v. State*, 548 S.W.2d 340 (Tenn. Crim. App. 1976). Compare with *State v. Maynard*, 629 S.W.2d 911 (Tenn. Crim. App. 1981).

[FN11] *State v. Turner*, 675 S.W.2d 199 (Tenn. Crim. App. 1984). See *State v. Swanson*, 680 S.W.2d 487 (Tenn. Crim. App. 1984) ("We conclude that failure to preserve and/or assert all arguable issues on appeal is not per se ineffective assistance of counsel, since the failure to do so may be a part of the counsel's strategy of defense."). *Cooper v. State*, 849 S.W.2d 744 (Tenn. 1993) (appellate counsel did not provide ineffective assistance in raising only two issues on direct appeal); *Rhoden v. State*, 816 S.W.2d 56 (Tenn. Crim. App. 1991) (the failure of an attorney to raise a particular issue does not per se deprive the defendant of his constitutional right to the effective assistance of counsel); *Porterfield v. State*, 897 S.W.2d 672 (Tenn. 1995) (extent of communication between the defendant and his appellate lawyer was not

deficient; the appellate attorney raised all of the appropriate issues; there was no conflict of interest); *Campbell v. State*, 904 S.W.2d 594 (Tenn. 1995) (no showing of deficiency in performance of counsel on direct appeal or prejudice of the defendant's case; the determination of which issues to raise on appeal are tactical or strategic choices).

[FN12] *State v. Caruthers*, 676 S.W.2d 935 (Tenn. 1984) (validity of death penalty). On occasion, an attorney may gain the benefit of a "retroactive" decision only if his appeal alleged the same error prior to the new ruling. See *Sampson v. State*, 553 S.W.2d 345, at 347 (Tenn. 1977) where two such issues were properly preserved. *Meadows v. State*, 849 S.W.2d 748 (Tenn. 1993) (new constitutional rule is to be retroactively applied only if new rule materially enhances the integrity and reliability of the factfinding process at trial); *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995) (new identity instruction applies to future cases and to cases pending on appeal); *State v. Walker*, 905 S.W.2d 554 (Tenn. 1995) (rule regarding delay in execution of sentence applies prospectively and to cases on appeal in which the issue has already been raised); *Barr v. State*, 910 S.W.2d 462 (Tenn. Crim. App. 1995) (defendant does not have constitutional right to retroactive application of subsequent case law once his case becomes final; co-defendant's case resulted in suppression of evidence whereas defendant's case resulted in no suppression and the defendant was convicted; even though the same search was involved, the defendant's case had become final and could not gain the benefit of the ruling in the co-defendant's case); *Adkins v. State*, 911 S.W.2d 334 (Tenn. Crim. App. 1994) (extensive discussion of retroactive application to constitutional issues on post-conviction review); *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003), cert. denied, 540 U.S. 1221, 124 S. Ct. 1511, 158 L. Ed. 2d 158 (2004) (retroactive application of earlier case delineating permissible types of victim impact evidence in capital sentencing did not violate prohibition against ex post facto laws).

[FN13] *State v. Estes*, 655 S.W.2d 179 (Tenn. Crim. App. 1983); *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982).

[FN14] See *Freeman v. State*, 542 S.W.2d 629 (Tenn. Crim. App. 1976).

[FN15] See e.g. *State v. Eberhardt*, 659 S.W.2d 807 (Tenn. Crim. App. 1983). This is, of course, the famous "Rockett Rule" derived from *Rockett v. State*, 475 S.W.2d 561 (Tenn. Crim. App. 1971) which is now part of the appellate rules. See Tenn. R. App. P. 27(a)(7).

[FN16] See *State v. Spears*, 666 S.W.2d 485, 488 (Tenn. Crim. App. 1984).

[FN17] See e.g. *State v. Hale*, 672 S.W.2d 201 (Tenn. 1984).

[FN18] See Tenn. R. App. P. 27(h).

[FN19] However, see § 12.13 (citation of independent state grounds).

[FN20] See e.g. *State v. Simon*, 635 S.W.2d 498 (Tenn. 1982). *Meadows v. State*, 849 S.W.2d 748 (Tenn. 1993) (published opinions of the intermediate appellate courts are opinions which have precedential value and may be relied upon by the bench and bar of this state as representing the present state of the law with the same confidence and reliability as the published opinions of the Tennessee Supreme Court so long as they are not overruled or modified by subsequent decisions).

[FN21] *Ford v. State*, 184 Tenn. 443, 201 S.W.2d 539 (1945).

[FN22] See e.g. *State v. Bouchard*, 563 S.W.2d 561 (Tenn. Crim. App. 1977).

[FN23] See Tenn. R. Sup. Ct. 4(5).

[FN24] Note that adverse authority must be cited. See EC, 7-23, Code of Professional Responsibility ("Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.").

[FN25] See *State v. Jones*, 598 S.W.2d 209, 219 (Tenn. 1980) (abrogated by, *State v. Shropshire*, 874 S.W.2d 634 (Tenn. Crim. App. 1993)). But see *State v. Sheffield*, 676 S.W.2d 542 (Tenn. 1984). *State v. Newsome*, 778 S.W.2d 34 (Tenn. 1989) (while Tennessee courts are not bound by federal rules or the rules of sister states, there is merit in uniformity and courts should consider them for guidance).

[FN26] See the use of statistics in *State v. Garren*, 644 S.W.2d 701 (Tenn. Crim. App. 1982) and *U.S. v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 3413, 82 L. Ed. 2d 677 (1984). *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (statistics based on a legal treatise).

[FN27] See e.g. *State v. Hicks*, 666 S.W.2d 54 (Tenn. 1984).

[FN28] See *Wilson v. State*, 109 Tenn. 167, 70 S.W. 57 (1902).

[FN29] *McGregor v. State*, 491 S.W.2d 619 (Tenn. Crim. App. 1972).

[FN30] *State v. Ogle*, 666 S.W.2d 58 (Tenn. 1984). *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994) (plain error requires that the record clearly established what occurred in the trial court, a clear rule of law must have been violated, the substantial right of the defendant must have been adversely affected, the defendant did not waive the issue for technical reasons, and consideration of the error is necessary for substantial justice; extensive discussion of issue); *State v. Smith*, 24 S.W.3d 274 (Tenn. 2000) (extensive discussion in determining whether an error constitutes 'plain error' in the absence of an objection at trial: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice); *State v. West*, 19 S.W.3d 753 (Tenn. 2000) (plain error doctrine does not apply to post-conviction relief petitions)..

[FN31] *State v. Mabon*, 648 S.W.2d 271 (Tenn. Crim. App. 1982).

[FN32] *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979).

[FN33] See discussion in *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975) of "fundamental reversible error." The author's favorites are errors of the "first magnitude," *Sampson v. State*, 553 S.W.2d 345, at 347 (Tenn. 1977), and "patently invalidating errors," *Hicks v. State*, 533 S.W.2d 330 (Tenn. Crim. App. 1975).

[FN34] *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979).

[FN35] *State v. Shelley*, 628 S.W.2d 436 (Tenn. Crim. App. 1981).

[FN36] *State v. Francis*, 669 S.W.2d 85 (Tenn. 1984). *State v. Martin*, 702 S.W.2d 560 (Tenn. 1985) (overruled on other grounds by, *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992)) (because of "closeness of issues" error was not harmless with respect to jury charge); *State v. Suttles*, 767 S.W.2d 403 (Tenn. 1989) (issues were very close

and thus the procedural errors "assume an importance which they might not have if the proof of the state against the defendant was overwhelming"); *State v. Deuter*, 839 S.W.2d 391 (Tenn. 1992) (admission of video testimony of child victim constituted reversible error which was not harmless).

[FN37] See *State v. Hale*, 672 S.W.2d 201, 203 (Tenn. 1984). *State v. Claybrook*, 736 S.W.2d 95 (Tenn. 1987) (failure to permit individual selection of the jury "amounts to prejudice to the judicial process"); *State v. Perry*, 740 S.W.2d 723 (Tenn. Crim. App. 1987) (juror misconduct resulted in prejudice to the judicial process requiring a new trial even though the misconduct probably did not alter the result of the trial given the overwhelming evidence of the defendant's guilt); *State v. Furlough*, 797 S.W.2d 631 (Tenn. Crim. App. 1990) (the defense did not consent to a jury separation; in the absence of a waiver the error was prejudicial to the judicial process and, thus, prejudice need not be established); *State v. Bobo*, 814 S.W.2d 353 (Tenn. 1991) (replacing a regular juror with an alternate juror during deliberations could never be harmless; discussion of harmless error rule); *State v. Lynn*, 924 S.W.2d 892 (Tenn. 1996) (improper and unnecessary deviations from the statutory selection procedures occurred when the clerk instead of the judge opened the jury box to select the special venire outside of the presence of the judge and failed to publish the jury list; this prejudiced the administration of justice and required a reversal of the conviction).

[FN38] See *State v. Gorman*, 628 S.W.2d 739 (Tenn. 1982).

[FN39] See the excellent treatment of the topic in Wright & Miller,

Federal Practice and Procedure (2d ed.) §§ 851-856. See also LaFave and Israel, Criminal Procedure § 26.6. *State v. Newsome*, 778 S.W.2d 34 (Tenn. 1989) (extensive discussion of harmless error with respect to guilty pleas).

[FN40] Defense counsel should recall the famous words of Justice Henry in *Farris v. State*, 535 S.W.2d 608, 622 (Tenn. 1976) that "every tub must stand on its own bottom." *State v. Jefferson*, 31 S.W.3d 558 (Tenn. 2000) (law of the case doctrine barred trial court from granting relief; appellate court's decision on issue of law is binding if facts on second trial or appeal are substantially the same as facts on first trial or appeal); *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003), cert. denied, 540 U.S. 1221, 124 S. Ct. 1511, 158 L. Ed. 2d 158 (2004) (with respect to the issue of the law of the case, an issue decided in a prior appeal may be reconsidered if: (1) the evidence offered at the hearing on remand was substantially different from the evidence at the

first proceeding, (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand, or (3) the prior decision is contrary to a change in the controlling law occurring between the first and second appeal).

[FN41] See e.g. *State v. O'Brien,* 666 S.W.2d 484, 485 (Tenn. Crim. App. 1984).

[FN42] See Tenn. R. App. P. 29(a).

[FN43] See Tenn. R. App. P. 35(a).

[FN44] Tenn. R. App. P. 34(d).

[FN45] Tenn. R. App. P. 34(c).

[FN46] Tenn. R. Crim. App. 12.

[FN47] Tenn. R. App. P. 34(c).

[FN48] *Hindman v. State,* 672 S.W.2d 223 (Tenn. Crim. App. 1984) ("Whatever contractual agreement the appellate had, notwithstanding, the oral argument of cases in this Court is of minor importance, and the review of cases by this Court is as complete on those cases which are not argued orally as it is on those which are. Certainly, no lawyer's oratorical excellence can enhance the record as it is made at trial, nor can a lawyer's oratorical ineptitude detract therefrom. In short, if the record shows reversal is warranted then such result will come about, if the record does not show reversal is warranted, it will not. Neither argument nor non-argument by counsel will change this. The absence of oral argument on appeal gives no basis for a finding of incompetency of counsel.").

[FN49] Bright and Arnold, *Oral Argument? It May be Crucial!,* 70 A.B.A. Journal 68, 69 (Sept.1984) ("As caseloads increase, oral argument becomes even more important to decision making. All too often, with the time pressures that accompany heavy workloads, essential elements of a case are overlooked in a hurried reading and analysis of the briefs. In many cases, effective oral argument thus lessens the likelihood of an erroneous decision... . Oral argument thus retains its importance in appellate decision making. If anything, it is becoming more important. Oral argument serves a unique, specific and indispensable function in the disposition of appeals--especially when judges have done their homework by preparing adequately

beforehand. And, as the results of our study indicate, oral argument changes judges' minds.").

[FN50] Tenn. R. App. P. 34(d).

[FN51] See Tenn. R. Crim. App. 17.

[FN52] *Bob v. State*, 10 Tenn. 173, 179, 2 Yer. 173, 1826 WL 450 (Ct. Err. & App. 1826).

[FN53] *State v. Green*, 50 Tenn. 131, 135, 3 Heisk. 131, 1871 WL 3569 (1871).

[FN54] *Capri Adult Cinema v. State*, 537 S.W.2d 896, 904 (Tenn. 1976) (Justice Henry dissenting).

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