

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: William Erwin Phillips II

Office Address: Phillips & Hale
(including county) 210 East Main Street
Rogersville, Hawkins County, Tennessee 37857

Office Phone: (423) 272-7633 Facsimile: (423) 272-6233

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council'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 Council 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 www.tncourts.gov). The Council 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 document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and six (6) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Phillips & Hale Attorneys and Counsellors, Attorney

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

2002. BPR# 022234.

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

Tennessee. 2002. BPR# 022234.

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).

Phillips & Hale 2002 – Present

Ball & Scott 2006 (I worked as an independent contractor with the firm Ball & Scott in Knoxville when my wife and I were first married, and before we moved back to Rogersville).

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.

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 practice law in the firm of Phillips & Hale. The Firm currently consists of my father, William E. Phillips; and my uncle, James O. Phillips III. Our firm is a small one, that has consisted entirely of family members, and that has been dedicated to serving the citizens of Hawkins County, the Third Judicial District, and all of Tennessee and beyond since 1916.

My father is the city attorney for Rogersville, and my uncle is the county attorney for Hawkins County. In my 12 plus years of practice I have often been tasked with assisting them with legal research and argument preparation ranging from eminent domain, to zoning, to municipal utilities, and to the boundaries of utility districts.

Each, of course, also maintains a private practice ranging from real estate, banking, transactions, torts, etc. I have had the privilege, and educational opportunity, of assisting them and engaging in each of these legal fields.

With regard to my own practice, it consists of the following:

40% Domestic relations: Divorce, child custody, dependency and neglect actions, delinquency, Department of Children's Services actions, paternity actions, termination of parental rights, adoptions, and appellate work attendant thereto.

30% Criminal defense: Private and appointed clients, hundreds of general sessions and criminal court cases in every county in the Third Judicial District, jury trials, I have practiced criminal law in the United States District Court for the Eastern District of Tennessee.

10% Wills and Estates/Probate: I have served as personal representative and attorney for several estates. I have been appointed Administrator CTA, and have overseen the sale of real property in insolvent estates.

10% I have prosecuted and represented clients in many tort cases from simple dog bites to the cutting edge (and I believe a case of first impression in Tennessee) regarding the anonymous libel of a citizen on a public internet forum. I was able to use developing but prevailing law to identify the anonymous defendant.

10% Business/Contract litigation and creation: I have represented businesses in the development and enforcement of contracts. Including purchasing transactions, independent contracts, and subcontractor contracts and recovery.

I would also like to include civil rights litigation. While my experience in the field probably does not warrant the assignment of a particular percentage, it has been, without question, my most challenging, engaging, and rewarding practice of 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 Council 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 Council. Please provide detailed information that will allow the Council 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.

I have had a breadth of experience in practicing before many tribunals.

Juvenile Court: I have represented and advocated for the best interest of children as Guardian ad Litem; I have represented parents in every possible capacity; I have represented children who have been charged with delinquent acts. I have represented clients in every capacity and in every conceivable matter that can come before the Juvenile Court.

General Session Court: I represent criminal defendants in Sessions Court, appointed and hired, on a weekly basis. I have also represented civil plaintiffs and defendants in Sessions Court ranging from torts, to landlord tenant, to property disputes, to orders of protection.

Circuit Court: I have represented plaintiffs and defendants on a myriad of matters in Circuit Court, including domestic relations, divorce, modification of parenting plans, termination of parental rights, adoptions, torts, civil rights, contract disputes, utility boundaries, partnerships, etc.

Chancery Court: I have served as personal representative and been appointed as Administrator CTA over estates, I have represented personal representatives of estates. I have served as Guardian ad Litem in conservatorship actions for incapacitated adults and youth. I have been appointed to, and otherwise represented, parents in termination of rights and adoption proceedings. I have represented many petitioners in termination and adoption proceedings.

Courts of Appeal: I have personally prepared and argued many cases before the Tennessee Court of Appeals. Over the years, appellate practice has proven to be one of my most fond areas of practice. I appreciate and enjoy the intellectual challenge of assessing legal arguments, deconstructing them, applying the applicable law to each piece, and presenting a coherent and sound argument in the face of pointed and informed inquiry.

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

I have always enjoyed appellate work. One issue I argued on an appeal was whether a court could hold the State of Tennessee in contempt in the context of a Department of Children's Services proceeding in Juvenile Court. The Court of Appeals held that a court had the authority to hold the state in contempt. One of the highlights of my legal career was arguing before the

United States 6th Circuit Court of Appeals in Cincinnati. I was representing an indigent client *pro bono* who, we argued, had a child removed from his custody without due process. The appellate brief is attached hereto as a writing sample.

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.

I have served as Guardian ad Litem in hundreds of Juvenile Court cases, and in several conservatorship and guardianship proceedings in Chancery Court.

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

None.

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

I have not previously submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission.

EDUCATION

14. List each college, law school, and other graduate school that 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.

Sewanee: The University of the South, Bachelor of Arts in Philosophy
and English Literature, 1999

University of Memphis: Cecil C. Humphreys School of Law, Juris Doctorate 2002

PERSONAL INFORMATION

15. State your age and date of birth.

I am 38 years old. November 30, 1976.

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

I have lived continuously in the State of Tennessee for 38 years.

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

Rogersville and Hawkins County have been my principle residence for my entire life. I lived in Chattanooga for four years as a boarding student during high school. I lived in Sewanee, Tennessee for four years as a college student. I lived in Memphis for three years as a law student. I lived in Knoxville for one year during my first year of marriage before returning home to Rogersville with my wife in 2007.

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

Hawkins 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.

Not applicable.

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.

Misdemeanor reckless driving, Shelby County General Sessions, 2000.

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

No.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

I have no history of discipline, nor have I ever had to answer a complaint.

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 that you have held in such organizations.

Holston Presbytery: Member of Permanent Judicial Commission
Board of Directors for Holston Presbytery Camp and Retreat Center
Rogersville Presbyterian Church: Pastor Nominating Committee, Chairman
Elder, 2011 – 2013, 2015 – present
Rogersville Heritage Association: Board of Directors, 2003 – present
Hawkins County Imagination Library: Team Member
Tennessee Achieves: Mentor

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

Kappa Alpha Order, fraternity, limited to male college students
Red Ribbon Society, honor society limited to male students at the University of the South
Keo-Kio, honor society limited to students at The McCallie School (all male school)

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 that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Hawkins County Bar Association, past president

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

None.

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

None.

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.

None.

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.

Board of Education, Rogersville City School, 2007 – 2010.

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 that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

I am seeking the appointment of Circuit Judge for the Third Judicial District of Tennessee because I believe that I can faithfully fulfill the duties of the office with competence and studied reason. It would be my dedicated goal to maintain the intellectual and professional integrity of the office established by those judges who preceded me, and which our community justly deserves. I feel I have the constitution and ability to do justice to the honor of the office and to safeguard the community which it serves.

I have a deep sense of duty to my community, in which my family has practiced law for more than 100 years. I feel I have a very real obligation to live up to the precedent of service to the community and to the law that those attorneys of Phillips & Hale who came before me worked so hard to establish.

36. State any achievements or activities in which you have been involved that 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)*

Access to courts of law and legal representation must be available to all people. No individual's crisis or controversy is more or less important due to the economic or social situation of that individual. If the rule of law is to hold, courts must treat all people the same. It is our obligation as attorneys to safeguard this maxim by making our services available to those not in a position to afford them.

The Third Judicial District of Tennessee remains largely a rural community, and many of our citizens are not in a position to pay for essential legal services. I regularly provide *pro bono* services to indigent clients, typically in juvenile court. Matters of paternity, or access to one's child are not issues of convenience, but are matters of fundamental rights that deserve protection regardless of economic circumstances.

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

I am seeking appointment to Circuit Court Judge for the Third Judicial District of Tennessee. The Third Judicial District consists of Hawkins, Hamblen, Hancock, and Greene counties, all of which are located in Northeast Tennessee. The district has one Chancellor; three Circuit Judges who primarily hear civil causes of action, including appeals of decisions from Juvenile, Municipal, and General Sessions Courts; and one Circuit Judge who presides over criminal court.

At 38 years old, I believe that if appointed to Circuit Judge I would bring with me an appropriately measured and contemporary perspective, such that it would better enable the court to apply the law as it is written to current and evolving issues within our community.

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)*

Being a native of Rogersville and Hawkins County, and having family through both my mother and father that have called this community home for more than 100 years, I have a great passion for preserving our common heritage, and for promoting our future prosperity.

It has been a great privilege to serve on the board of directors of the Rogersville Heritage Association (rogersvilleheritage.org) since 2003. The RHA is "dedicated to the preservation and restoration of historic buildings and historic areas, to the ongoing heritage education of Rogersville's citizens, and to the improvement of the economic structure of Rogersville."

I have also had the pleasure of working with the Heritage Lites Youth Leadership Program. Heritage Lites is a joint venture between the RHA and the Rogersville Hawkins County Chamber of Commerce that strives to build character and leadership qualities in young people by

emphasizing volunteer service, integrity, and pride of accomplishment.

I am extremely excited about volunteering as a Tennessee Achieves mentor for high school seniors seeking post secondary education through the Tennessee Promise program.

I am also actively involved with the Rogersville Presbyterian Church and our regional body, Holston Presbytery. I am currently on the Holston Presbytery Permanent Judicial Commission, and have served on the board of directors for the Holston Presbyter Camp and Retreat Center. I am currently serving my second term as elder at RPC, and I recently chaired the Pastor Nominating Committee, which was tasked with interviewing and recommending a new minister for our congregation.

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

I consider myself to be extremely fortunate to have lived in, and to have been educated in Tennessee's three grand geographic divisions. I was born and reared in East Tennessee where I attended the Rogersville City School, and road the streets of Rogersville on my bicycle with my best friend until dinner time. I attended high school in Chattanooga where I developed a love for learning, and saw a city begin to transform into one of the South's premier destinations before my very eyes. I attended college in Sewanee where I learned to think, and where I witnessed a community that valued tradition. I attended law school in Memphis where thought was put to work, and where I fell in love with a city and her citizens. And then, full circle, I returned home where I became a lawyer, a husband, and a father. While I know the jurisdiction of the position for which I have applied is limited to the Third Judicial District, I feel that my experiences across our State of Tennessee will help inform and guide me as a Judge.

Many friends have asked if I ever felt pressured to become an attorney and to continue the family firm. I never did. From childhood I always felt that I had an opportunity to be a part of an extraordinary history. Phillips & Hale was started by my great grandfather, it has seen a Judge on the Tennessee Court of Criminal Appeals, a Judge at the War Crimes Trials in Nuremburg, Germany, a Chancellor, and several attorneys who have served their community and the law with distinction. I hope to continue their tradition and make them proud.

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

The law should be applied as the General Assembly intended it, and pursuant to well settled rules of statutory construction. It is not the duty of a Circuit Judge to write law, but rather to apply the law as it is written to the facts of the controversy before that judge.

Pursuant to our oath and our rules of professional conduct, I believe most attorneys have zealously advocated for clients with whom they disagreed, or for the enforcement of a particular law with which they disagreed. Some of the most common questions I receive from non-

attorney friends are: How can you represent that criminal defendant? Or, how can you represent that client when you know they are wrong? I tell them that I am there to make sure that my clients are treated fairly and equally under the law. Sometimes that may result in an outcome that some might find contrary to their personal sense of justice, but it ensures that the law will be enforced as it is written and applied equally to the next litigant or defendant.

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 Council or someone on its behalf may contact these persons regarding your application.

A. Hon. Jim Sells, Mayor, Town of Rogersville,
B. Jim Gott, Owner, Coal Energy Resources,
C. Richard Arnold, Partner, Kenny Nachwalter, P.A., 215 West Broadway, Suite D, Rogersville, Tennessee 37857,
D. Larry Elkins, General Manager, Holston Electric Cooperative,
E. Dr. Joe D. Mobley, III, Urologist, Kentucky Lake Urology, 1002 Cornerstone Drive, Paris, Tennessee 38242,

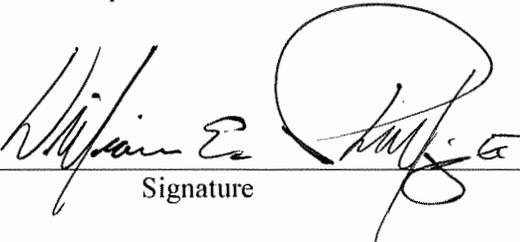
AFFIRMATION CONCERNING APPLICATION

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 Court for the Third Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, 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 Council 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 Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: January 29, 2015.


Signature

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



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

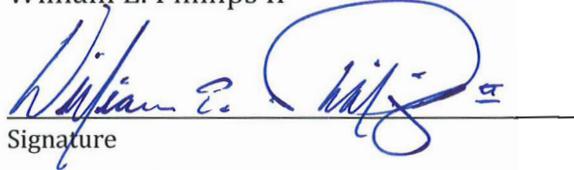
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

William E. Phillips II


Signature

1.29.2015
Date

022234
BPR #

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

No. 07-5406

In the
United States Court of Appeals
for the Sixth Circuit

RONALD EIDSON
Plaintiff-Appellant

v.

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES; CHILD
PROTECTIVE SERVICES; LEILANI MOONEYHAM, Child Protective
Services Investigator; BARBARA BRITTON, CPS Supervisor; LINDA GREER, CPS
Team Leader; ERNIE MURRAY, Department of Children's Services Team Coordinator;
SHERRI HALE, DCS Regional Administrator; VIOLA MILLER, Commissioner of DCS,**
in their individual and official capacities,

Defendants-Appellees

RITA MANIS, DCS Foster Care Supervisor; PAM MAYO, DCS Team Leader,

Defendants

**On Appeal from the United States District Court
for the Eastern District of Tennessee**

PROOF BRIEF OF APPELLANTS

William E. Phillips II
Phillips & Hale
210 East Main Street
Rogersville, Tennessee 37857
(423) 272-7633

Attorney for Appellant

Oral Argument Requested

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This action was brought pursuant to 42 U.S.C. § 1983. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 and by virtue of the federal question presented in this case.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. A final judgment granting Defendants Rule 12(b)(6) Motion to Dismiss Plaintiff's Second Amended Complaint was entered by the District Court on March 3, 2007. (R.22, Memorandum Opinion and Order, Apx ___; R.23, Judgment, Apx ___). Plaintiff timely filed a Notice of Appeal on April 2, 2007, within 30 days of the District Court's final order. (R.25, Notice of Appeal, Apx ___).

STATEMENT OF THE ISSUES FOR REVIEW

1. Did the District Court err in concluding that the statute of limitations had run as to each of Plaintiff's claims, and granting Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Second Amended Complaint?
2. Did the District Court err or abuse its discretion when it ordered that Defendants may recover from Plaintiff their cost of this action?

STATEMENT OF THE CASE

This case arises out of Defendants' unlawful removal of Plaintiff's children from his legal custody and other unlawful acts resulting in violations of Plaintiff's constitutional right to procedural due process and substantive due process, as well as the implementation of Defendants' policies and customs which facially violate one's right to due process.

On October 24, 2005, Plaintiff filed a Complaint against Defendants in the United States District Court for the Eastern District of Tennessee, within one year of the conclusion of the underlying State juvenile proceedings. (R.1, Complaint, Apx ____). Plaintiff filed a Second Amended Complaint on July 6, 2006. (R.15, Second Amended Complaint, Apx ____). Defendants filed a Motion to Dismiss Plaintiff's Second Amended Complaint on July 11, 2006. (R.17, Motion, Apx ____). On March 6, 2007, the District Court entered a Memorandum Opinion and Order granting Defendants' motion, and dismissing Plaintiff's causes of action on the ground that they were time barred. (R.22, Memorandum Opinion and Order, Apx ____). On the same day the District Court entered a Judgment decreeing that Defendants may recover their costs from Plaintiff. (R.23, Judgment, Apx ____).

Plaintiff filed a Notice of Appeal within thirty days of the final judgment, and this matter is now before this Court. (R.25, Notice of Appeal, Apx ____).

STATEMENT OF FACTS

During or about the month of September of 2003, Plaintiff was awarded sole legal custody of his natural children Amanda and Kathryn Eidson by the Chancery Court for Hawkins County, Tennessee. On or about November 17, 2003, after being coerced and forcibly urged by her mother, Amanda levied false allegations of sexual abuse against Plaintiff. On November 18, 2003, Defendant Leilani Mooneyham (“Mooneyham”), an investigator for Child Protective services (“CPS”), interviewed Amanda. Pursuant to Department of Children’s Services’ (“DCS”) and CPS policy and custom, Investigator Mooneyham unilaterally “removed custody” of Amanda and Kathryn from Plaintiff, and “placed custody” of the children with their mother. Investigator Mooneyham removed Plaintiff’s children pursuant to DCS’s “safety plan” policy, which is facially unconstitutional. Investigator Mooneyham advised her supervisor, defendant Barbara Britton (“Britton”), of her plan and Supervisor Britton agreed that custody should be placed with the mother. No home study was performed on mother’s residence even though DCS and CPS knew that the mother had a history of drug abuse. (R.15, Second Amended Complaint, Apx __).

Subsequent to Mooneyham’s interview of Amanda, Mooneyham contacted

Plaintiff, identified herself as an investigator with CPS, displayed her badge, and acting under color of state law, informed Plaintiff that Kathryn and Amanda had been “removed from his custody,” and that he was to have no contact with them. No medical exam was performed on Amanda and no further investigation of any sort was made by DCS, CPS, or the other Defendants named herein regarding the false allegations of sexual abuse. (R.15, Second Amended Complaint, Apx __).

The Legal Division of DCS, the Foster Care Division of DCS, CPS, and the Defendants named herein, knew or should have known that Mooneyham had removed Plaintiff’s children from his custody, and actively prevented him from contacting or visiting his children, over whom he still retained legal custody. November 21, 2003 marked the third day of the removal of the children from Plaintiff’s physical custody. At that time no petition for custody was filed with the appropriate juvenile court, and no hearing was held as required by law. Defendants willful inaction and deliberate indifference to Plaintiff’s rights were in direct contravention of Tennessee law. Specifically, Tenn. Code Ann. §§ 37-1-115(a)(2) (requiring that when a child is removed from her parent’s custody a petition must be filed within two days of the removal), 37-1-116(d) (defining the facilities in which a removed child may be placed), 37-1-117(c) (requiring that a hearing on the petition be held within three days of the child’s removal).

Defendants refused to file a petition for more than six months after the children's removal, and only did so at the express direction of the juvenile court when the removal came to its attention. (R.15, Second Amended Complaint, Apx __).

During that six month period the children remained with their mother, whom Defendants knew to be periodically living with a *convicted rapist*, and without basic necessities. During this same period, Plaintiff tried on multiple occasions to contact his children personally, and to otherwise exercise his lawful control over them. On each occasion, Mooneyham or another agent of DCS or CPS, always acting under color of state law, intervened and actively prevented Plaintiff from contacting or exercising custody over his children through the use of coercion, threats, and intimidation. (R.15, Second Amended Complaint, Apx __).

On May 24, 2004, more than 180 days after the children were taken away from Plaintiff, Defendants finally filed a Petition to Adjudicate Dependency and Neglect after being directed to do so by the juvenile court. During the three-day hearing Mooneyham *falsely testified* and otherwise *perjured herself* in a directed attempt to deny Plaintiff custody of his children. Defendants were made aware of Mooneyham's false statements and failed to immediately make said revelations known to the court. (R.15, Second Amended Complaint, Apx __).

On June 7, 2004, Plaintiff received from Defendants a "standard perpetrator

notification letter” informing him that he had been indicated for sexual abuse. As of June 22, 2004, no discernable investigation had yet been conducted regarding the allegations. (R.15, Second Amended Complaint, Apx __).

On June 22, 2004, Amanda *fully and completely recanted* her allegations of sexual abuse, and revealed that her mother had been the driving force behind the false accusations. Despite Amanda’s recantation, Defendants continued to prosecute their petition against Plaintiff. Plaintiff also believes he is still on an internal registry of sexual offenders used by DCS and the State of Tennessee. (R.15, Second Amended Complaint, Apx __).

On July 22, 2004, the juvenile court placed the children with their father for a 90 day trial home placement. During the 90 trial home placement, Defendants continually threatened and interfered with Plaintiff’s parent-child relationship. Finally, on October 22, 2004, more than eleven months after his children were removed, they were returned to his custody and the juvenile proceedings concluded. (R.15 Second Amended Complaint, Apx __).

SUMMARY OF ARGUMENT

The District Court erred in granting Defendants' Rule 12(b)(6) motion and dismissing Plaintiff's causes of action as untimely filed because Plaintiff filed his complaint within one year of the accrual of his causes of action.

The factual allegations contained in Plaintiff's Second Amended Complaint, which are to be taken as true for Rule 12(b)(6) consideration, specifically aver and establish that Plaintiff was subjected to a continuing violation of his civil rights by Defendants until October 22, 2004. Defendants' wrongful behavior continued after the precipitating event, the unlawful removal of Plaintiff's children; Plaintiff's injury continued to accrue after that event; and further injury to Plaintiff could have been avoided if Defendants had ceased their wrongful conduct prior to October 22, 2004. *See Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999). Accordingly, Plaintiff's causes of action did not accrue until Defendants' series of wrongful conduct ceased on October 22, 2004, rendering Plaintiff's complaint timely filed.

Plaintiff's causes of action did not accrue until October 22, 2004, because the District Court would have been precluded from entertaining his civil § 1983 claims prior to the termination of the quasi-criminal state juvenile court proceedings due to the abstention doctrine pronounced in *Younger v. Harris*, 401

U.S. 37 (1971). Younger counsels federal court abstention when there is a pending state proceeding. The Younger abstention doctrine determines the accrual of a cause of action, and has previously been applied to child abuse proceedings where children had been temporarily taken from their parent's custody. *See Moore v. Simms*, 442 U.S. 415 (1979). Accordingly, Plaintiff's causes of action did not accrue, and he could not have filed a civil § 1983 action in federal court, until the conclusion of the underlying child abuse proceedings in state juvenile court. Therefore, Plaintiff's causes of action were timely filed.

Plaintiff's appeal of the District Court's award of costs to Defendants is now moot, because Defendants did not file a Bill of Costs with the District Court as required by that Court's local rules.

STANDARD OF REVIEW

This Court's review of a district court's dismissal of a cause of action upon a Rule 12(b)(6) Motion to dismiss is *de novo*, and the lower court's ruling is entitled to no presumption of correctness. "We review *de novo* whether a district court properly dismissed a complaint under Federal Rule of Civil Procedure 12(b)(6)." Sagliocco v. Eagle Insurance Company, 112 F.3d 226, 228 (6th Cir. 1997)("Sagliocco").

It is well settled that, "[w]hen considering a motion to dismiss under Rule 12(b)(6), we accept as true the factual allegations in the complaint." Achterhof v. Selvaggio, 886 F.2d 826, 827 (6th Cir. 1989)("Achterhof"). Moreover, when a factual allegation is capable of more than one reasonable inference, it must be construed in the plaintiff's favor. Sagliocco, 112 F.3d at 228. Ultimately, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Sagliocco, 112 F.3d at 228, *quoting* Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The United States Court of Appeals for the Sixth Circuit has further heightened the standard of review for 12(b)(6) motions to dismiss a complaint which alleges § 1983 civil rights violations. This Court has held:

Dismissals of complaints under the civil rights statutes are scrutinized with special care. A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant. Rule 8(a)(2) simply requires a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). All a complaint need do is afford the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. A motion to dismiss under Rule 12(b)(6) should not be granted unless *it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.*

Westlake v. Lucas, 537 F.2d 857, 858-859 (6th Cir. 1976) (internal quotations and citations omitted)(emphasis added). The Sixth Circuit has further advised:

A plaintiff bringing a section 1983 action should, as a matter of course, 'include in the original complaint all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.' If the plaintiff fails to make such allegations, 'the court must accord the plaintiff an opportunity to come forward with such additional facts or allegations . . .'"

Achterhof v. Selvaggio, 886 F.2d 826, 831 (6th Cir. 1989), *quoting* Dominique v. Telb, 831 F.2d 673, 676 (6th Cir. 1987). Accordingly, the Court must accept as true all direct or inferential factual allegations in Plaintiff's Second Amended Complaint, and provide Plaintiff an opportunity to present additional facts which the Court deems are required to state a claim.

ARGUMENT

I. PLAINTIFF FILED SUIT WITHIN THE APPLICABLE STATUTE OF LIMITATION, AND THE DISTRICT COURT ERRED IN DISMISSING HIS CLAIMS AS UNTIMELY.

In § 1983 actions, federal courts apply the state statute of limitations governing actions for personal injury. Wilson v. Garcia, 471 U.S. 261, 276-280 (1985). In the State of Tennessee, such actions must be commenced within one year after the cause of action *accrued*. Tenn. Code Ann. § 28-3-104(a)(3) (2000) (emphasis added). While Tennessee's statutes of limitation and tolling principles determine the timeliness of claims, federal law determines the accrual of those claims. Collyer v. Darling, 98 F.3d 211, 220 (6th Cir. 1996).

In the case at bar, the causes of action asserted by Plaintiff in his Second Amended Complaint did not accrue until October 22, 2004, the first date he regained legal custody of his children and the relevant proceedings in the Juvenile Court for Hawkins County, Tennessee were concluded. Accordingly, Plaintiff timely filed his complaint on October 24, 2005.¹

¹October 22, 2005 fell on a Saturday, rendering Plaintiff's filing of his Complaint on Monday, October 24, 2005, timely pursuant to Fed. R. Civ. P. 6.

A. Plaintiff timely filed suit against Defendants because, under the doctrine of continuing violations, his causes of action did not accrue until October 22, 2004.

The District Court erred when concluding Defendants' continual and unlawful interference with Plaintiff's parent-child relationship did not amount to a continuing violation. (R.22, Memorandum, Apx ____). To the contrary, the factual allegations contained in Plaintiff's Second Amended Complaint, which are to be taken as true for Rule 12(b)(6) consideration, specifically establish that Plaintiff was subjected to continuing violations of his civil rights by Defendants until October 22, 2004. Therefore, under the doctrine of continuing violation, Plaintiff's causes of action did not accrue until October 22, 2004. See Heard v. Sheahan, 253 F.3d 316, 318 (7th Cir. 2001)(“Heard”).

The doctrine of continuing violations does not toll a statute of limitations, as Defendants incorrectly contend, rather, it *delays the accrual* of a plaintiff's cause of action until the violation is complete. The Court of Appeals for the Seventh Circuit has held, “the usual and it seems to us the correct characterization of the doctrine of continuing violation is that it is a doctrine governing accrual, not a tolling doctrine, because we don't want the plaintiff to sue before the violation is complete.” Heard, 253 F.3d at 318. The Heard Court continued to explain the underlying rationale of the doctrine: “A violation is called ‘continuing,’

signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period, when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant's unlawful conduct. Heard 253 F.3d at 319, *citing* Sable v. General Motors Corp., 90 F.3d 171,176 (6th Cir. 1996). To this end, the courts, "push back the accrual date when, quite independently of the plaintiff's wishes, we want to delay the right to bring suit." Heard, 253 F.3d at 318. The doctrine is essentially one of economy. It would be unreasonable to require Plaintiff to have filed a separate suit for *every* violation of his civil rights, especially where each distinct violation was a part of the same nexus of events.

The District Court properly identified the Sixth Circuit's three-part test for determining the existence of a continuing violation as controlling, though it does not accurately apply it to Plaintiff's Second Amended Complaint. The Sixth Circuit held:

This Court conducts a three-part inquiry for determining whether a continuing violation exists, looking first to whether the defendant's wrongful behavior continued after the precipitating event; then to whether the plaintiff's injury continued to accrue after that event; and finally, to whether further injury to the plaintiff could have been avoided if the defendant had ceased its wrongful conduct.

Tolbert v. State of Ohio Dep't of Transp., 172 F.3d 934, 940 (6th Cir. 1999). A

proper application of this test leaves no doubt that Defendants subjected Plaintiff to continued violations of his civil rights protected by the Constitution.

Accordingly, Plaintiff will next address the District Court's analysis and each step of the test in turn.

The first step of the inquiry, when applied in the context of a Rule 12(b)(6) motion to dismiss, requires a court to determine whether a plaintiff has sufficiently alleged that a defendant's wrongful behavior continued after the precipitating event. It is undisputed that Defendants' unlawful removal of Plaintiff's children on November 18, 2003 was the precipitating event in this case, but Defendants' wrongful conduct did not end there. Indeed, the District Court acknowledged that, "[a]s to the first prong of the 'continuing violation' test, the plaintiff does allege wrongful acts on behalf of the defendants which occurred after the initial removal of his children." (R.22, Memorandum Opinion, Apx ____).

Those allegations include: (1) Defendants' complete failure to investigate the allegations of abuse (R.15, 2nd Amended Complaint, Apx ____); (2) Defendants conspired to prevent, and actively prevented Plaintiff from exercising physical custody of his children, even though he retained legal custody (R.15, 2nd Amended Complaint, Apx ____); (3) Defendants conspired with the natural mother in an effort to facilitate her acquisition of custody of the children (R.15, 2nd Amended

Complaint, Apx ____); (4) Defendants clearly demonstrated a deliberate indifference towards Plaintiff's Constitutionally protected civil rights by refusing to file a petition for custody in juvenile court as required by Tenn. Code Ann. Title 37, chapter 1, for more than six months (R.15, 2nd Amended Complaint, Apx ____). Contrary to Defendants' unsupportable argument, their wrongful conduct continued even after the belated filing of their dependency and neglect petition. To the point, (5) Investigator Mooneyham testified falsely at the three-day/probable cause hearing in a continued attempt to deny Plaintiff custody of his children (R.15, 2nd Amended Complaint, Apx ____); (6) Despite Defendants' knowledge of Investigator Mooneyham's false testimony, they did not make the perjury known to the juvenile court, and continued to prosecute their petition to adjudicate dependency and neglect (R.15, 2nd Amended Complaint, Apx ____); (7) *After the three day/probable cause hearing* Defendants reassigned Plaintiff's case to a new CPS investigator, but there was still no investigation into the allegations (R.15, 2nd Amended Complaint, Apx ____); (8) Defendants "indicated" Plaintiff as a sexual offender and placed his name on an intra-department sex offender registry without conducting an investigation, or meeting any discernable standard of proof (R.15, 2nd Amended Complaint, Apx ____); (9) Despite the child's complete recantation of her allegations of sexual abuse (the only basis for Defendants

petition to adjudicate dependency and neglect), Defendants continued to blindly prosecute their petition to adjudicate dependency and neglect (R.15, 2nd Amended Complaint, Apx ___); (10) Even after the juvenile court place the children with Plaintiff for a “trial home placement,” Defendants continued to interfere with and threaten Plaintiff’s parent-child relationship (R.15, 2nd Amended Complaint, Apx ___).

Inexplicably, the District Court chose to focus its analysis on only one of Plaintiff’s many post-removal allegations – the false testimony of Investigator Mooneyham – although numerous allegations were specifically made by him. With regard to that allegation the District Court concluded that, “a reasonable person would have been put on notice of this alleged violation on the date of Mooneyham’s testimony, which testimony occurred more than one year prior to the filing of the plaintiff’s complaint.” (R.22, Memorandum Opinion, Apx ___). This conclusion ignores the very purpose of the continuing violation doctrine, “a series of wrongful acts creates a series of claims.” Heard, 253 F.3d at 318. Mooneyham’s perjury is but *one in a series of wrongful acts* stemming from a nucleus of common facts. Even the lower court acknowledged that, “the Plaintiff has succeeded in identifying *several discrete acts* of which the plaintiff would have been ‘immediately aware when they occurred,’ and not a continuing

violation.” (R.22, Memorandum Opinion, Apx ____)(emphasis added). The Court’s reasoning would require Plaintiff to have filed a separate suit for each and every discrete act that arose out of this nexus of related wrongs. This is exactly what the continuing violation doctrine is designed to prevent; why it delays the accrual of a cause of action until the series of wrongful acts are concluded. Again, “it would be unreasonable to require or even permit [a plaintiff] to sue separately over every incident of the defendant’s unlawful conduct. The injuries about which the plaintiff is complaining in this case are the consequence of a numerous and continuous series of events.” Heard, 253 F.3d at 319, *citing* Sable v. General Motors Corp., 90 F.3d 171, 176 (6th Cir. 1996). Accordingly, Plaintiff’s cause of action did not accrue until October 22, 2004, the date Defendants’ numerous and continuous series of wrongful acts finally ended.

The District Court continued to note that, “[f]ollowing [the three day] hearing, the only allegations the plaintiff makes which would amount to a violation, as opposed to simple inaction on the part of the defendants, is his very vague and general allegation that ‘during the 90 day trial home placement, the plaintiff and his family were subject to continual interference by DCS.’” (R.22, Memorandum Opinion, Apx ____). The Court concluded that the allegation was “vague” and insufficient to extend the date of accrual. (R.22, Memorandum

Opinion, Apx. ____).

First, Plaintiff's Second Amended Complaint asserts several post-hearing allegations that constitute a violation. Defendants actively placed Plaintiff's name on a sex offender registry without meeting any discernable standard of proof, and without conducting an investigation. (R.15, 2nd Amended Complaint, Apx ____). Defendants continued to maliciously prosecute their petition to adjudicate dependency and neglect even after the child disavowed the sole basis for the petition, in an attempt to justify their prior unlawful conduct. (R.15, 2nd Amended Complaint, Apx ____). Defendants continued to interfere with, and threaten, Plaintiff's parent-child relationship.

Second, Plaintiff submits that, when taken as true and viewed in a light most favorable to him, his allegations of continued interference withstand a Rule 12(b)(6) inquiry. This Court of Appeals has held that where a complainant has alleged facts that would delay the accrual of a § 1983 action, "the dismissal of the complaint without evidentiary hearing or appropriate factual finding [would be] inappropriate." Winters v. Voinovich, 802 F.2d 461, 461 (6th Cir. 1986). Certainly it cannot reasonably be disputed that Plaintiff has alleged facts that would delay the accrual of his cause of action. Specifically, Plaintiff alleged that "[d]uring the 90 day trial home placement, Plaintiff and his family were subject to continual

interference by DCS.” (R.15, 2nd Amended Complaint, Apx ____). Plaintiff also alleged, “that he was subject to the same pattern of malicious and/or deliberately indifferent conduct from November 17, 2003 until October 22, 2004. Said conduct represented a continuing violation of Plaintiff’s civil rights, and resulted in a continuing injury to Plaintiff until legal custody of his children were returned.” (R.15, 2nd Amended Complaint, Apx ____). While Plaintiff submits that these allegations are sufficient of themselves to defeat dismissal at the pleadings stage when taken as true, the District Court, at the very least, should have conducted an evidentiary hearing or appropriate factual finding.

Returning to the three-part Tolbert inquiry, the District Court failed altogether to address the second and third prongs of the test. The second prong requires a court to determine whether a plaintiff’s injury continued to accrue after the precipitating event. Plaintiff’s injury continued to accrue *for more than eleven months*. Certainly, Plaintiff’s injury did not cease on November 18, 2003, when the children were unlawfully removed. Rather, his injury *was* the continued deprivation of the physical custody of his children, which was continually perpetuated by Defendants’ series of wrongful conduct. Plaintiff’s injury continued to accrue until October 22, 2004.

To address the third and final prong of the Tolbert inquiry, the continuing

injury to Plaintiff could have been avoided if Defendants had ceased their wrongful conduct. Defendants argued that the sustained deprivation of Plaintiff's children from his custody was but the lingering effect of the initial removal. (R.18, Memorandum, Apx ____). This argument is patently absurd. Every day Plaintiff went without the legal custody of his children, it was within Defendants' power to remedy the situation. Yet despite the unlawful removal of Plaintiff's children, despite Mooneyham's false testimony at the probable cause hearing, despite Plaintiff's repeated request for the return of his children, despite the complete lack of any discernable investigation, and despite the total recantation of the allegations, Defendants continued to prosecute their petition, and refused to dismiss it.

Defendants had several opportunities to end Plaintiff's injury, yet every opportunity was met only with more wrongful conduct. Plaintiff's continued injury could have been avoided had Defendants immediately brought the children before the juvenile court after removal as required by Tennessee law. They did not. Defendants could have avoided further injury to Plaintiff had they investigated the allegations of abuse. They did not. Once Defendants learned of Mooneyham's false testimony, or after the child's recantation of her allegations of abuse, Defendants could have dismissed their petition to adjudicate dependency

and neglect. They did not. Rather, they chose to continue to focus their awesome powers to prohibit the return of Plaintiff's children. Defendants could have ceased their continued interference with Plaintiff's parent-child relationship before October 22, 2004. They chose not to do so.

Plaintiff has met every facet of the three-part test established by this Court to determine the existence of a continuing violation. The allegations of Plaintiff's complaint, taken as true and viewed in the most favorable light, clearly demonstrate that Defendants subjected Plaintiff to a continuing violation of his well established constitutional rights. Accordingly, Plaintiff's causes of action did not accrue until Defendants' wrongful conduct ceased on October 22, 2004.

B. Plaintiff's causes of action did not accrue until the state juvenile proceedings were concluded on October 22, 2004, because the District Court was precluded from entertaining Plaintiff's civil § 1983 claim until the conclusion of the state proceedings under the Younger abstention doctrine.

The District Court erred in dismissing Plaintiff's causes of action as untimely filed, because Plaintiff timely filed his complaint within one year of the date his causes of action accrued. Plaintiff's causes of action did not accrue until October 22, 2004, because the District Court would have been precluded from entertaining his § 1983 claims prior to the termination of the state juvenile court proceedings due to the abstention doctrine pronounced in Younger v. Harris, 401

U.S. 37 (1971). The lower Court's rationale in dismissing Plaintiff's causes of action is flawed because (1) it erroneously distinguishes the application of the Younger abstention doctrine between state criminal proceedings versus quasi-criminal juvenile proceedings initiated by a state to remove the custody of one's children based upon allegations of abuse; and (2) it mistakenly characterizes the Younger abstention doctrine as one which *tolls* a statute of limitations rather than one which, accurately, dictates the *accrual* of a cause of action.

The Supreme Court for the United States has established that, “[t]he Younger doctrine, which counsels federal court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff.” Moore v. Simms, 442 U.S. 415 (1979). This Court of Appeals has applied the abstention doctrine to § 1983 civil rights claims. This Court has noted, “[w]e have previously held that when the outcome of a § 1983 action would conflict with the verdict in an underlying state criminal proceeding, the *accrual* of the statute of limitations will be delayed beyond the time when a plaintiff has notice that his rights have been violated.” Trzebuckowski v. City of Cleveland, 319 F.3d 853, 856 (6th Cir. 2003), *citing* Shamaeizadeh v. Cunigan, 182 F.2d 391 (6th Cir. 1999) (“Shamaeizadeh”)(emphasis added). Indicating that a § 1983 cause

of action that is related to a pending state proceeding will not accrue *until the conclusion of the state proceeding*.

Admittedly, the abstention doctrine is most often applied in the context of state criminal proceedings, yet it is well established that the doctrine extends to civil proceedings where the state is a party, and has a deep interest in the proceeding. *See generally* Parker v. Turner, 626 F.2d 1 (6th Cir. 1980) (“Parker”). Specifically, the abstention doctrine has been extended to state juvenile court proceedings involving alleged child abuse, and the removal of children. The Parker Court noted that:

[I]n Moore v. Simms, 442 U.S. 415 (1979), the Court applied Younger to prevent interference with pending child abuse proceedings where children had been temporarily taken from their parents. The state was a party to the child abuse proceedings and had an obvious important interest in them.

Parker, 626 F.2d at 3. This is precisely analogous to the situation presently before the Court, and as such, the abstention doctrine would have applied to Plaintiff’s § 1983 claims prior to the termination of the state juvenile court proceedings.

Shamaeizadeh illustrates the Sixth Circuit’s practical application of the abstention doctrine, and its underlying rationale. There, the Court wrote:

We further conclude that holding that the statute of limitations begins to run at the time of the search, and requiring that a federal court stay any § 1983 action brought during, and related to, criminal proceedings would not adequately deal with this issue. To require a defendant in a criminal proceeding to file a civil action raising any potential § 1983 claims within one year of any alleged illegal search *or other alleged violations of constitutional rights*, claims which the federal court must then abstain from resolving until the disposition of the criminal proceedings, would misdirect the criminal defendant. Surely, just as a convicted prisoner must first seek relief through habeas corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief – mounting a viable defense to the charges against him – before turning to a civil claim under § 1983.

Shamaeizadeh, 182 F.3d at 399 (emphasis added). The reasoning employed by the Sixth Circuit in Shamaeizadeh is certainly applicable to the case at bar.

The District Court erroneously concluded that the rationale in “Shamaeizadeh deals with a § 1983 claim in the context of an underlying criminal case and has no application to the circumstances of this case.” (R.22, Memorandum Opinion, Apx ____). However, when applied to the case at bar, the Shamaeizadeh rationale demands the same outcome.

Preliminarily, it is well acknowledged that child abuse/dependency and neglect proceedings in state juvenile court are quasi-criminal. The Supreme Court has held, “that temporary removal of a child in a child abuse context is . . . in aid of and closely related to criminal statutes.” Moore v. Simms, 442 U.S. 415 (1979).

Moreover, this Court has established that, “if criminal prosecution is threatened there exists the requisite controversy [to apply the Younger abstention doctrine].” Parker, 626 F.2d at 5.

In the underlying state juvenile case of the instant controversy, the State of Tennessee, through its Department of Children’s Services, prosecuted a petition to remove Plaintiff’s children from his custody on the grounds of sexual abuse. Certainly, criminal prosecution was more than just a threat to Plaintiff. In fact, when Plaintiff tried to exercise physical custody of his children after their unlawful removal, Defendants rebuffed him with threats of criminal prosecution. Ultimately, the underlying state proceedings of the case at bar more closely resemble a criminal proceeding than the sole case upon which the District Court establishes its reasoning, which is exclusively civil in nature. *See* Coles v. Granville, 448 F.3d 853 (6th Cir. 2006). (R.22, Memorandum Opinion, Apx ____).

Applying this Court’s reasoning in Shamaeizadeh to the case at bar, the rationale for delaying the accrual of a plaintiff’s § 1983 action until the end of state criminal proceedings requires the same outcome in the instant action. As already noted, the State had brought child abuse proceedings against Plaintiff in juvenile court. To have required Plaintiff during those child abuse proceedings to file a civil action raising his § 1983 claims within one year of the initial violation

of his civil rights, claims which the District court must then have abstained from resolving until the disposition of the child abuse proceedings, would have misdirected Plaintiff. Shamaeizadeh, 182 F.3d at 399. Surely Plaintiff, a defendant to dependency and neglect proceedings in juvenile court, must have focused on his primary mode of relief – mounting a viable defense to the allegations made against him, and to Defendants’ efforts to remove his children – before turning to a civil claim under § 1983. Shamaeizadeh, 182 F.3d at 399. In other words, Plaintiff was required to initially focus his efforts on what was most important, *regaining custody of his children and defeating the State’s petition to adjudicate dependency and neglect*, before turning to his civil claims against Defendants for their violation of his well established constitutional right to, and his liberty interest in, the care and custody of his children.

The District Court conspicuously cited no authority distinguishing the application of the Younger abstention doctrine between state criminal proceedings and juvenile proceedings initiated by the state to remove custody of one’s children upon allegations of abuse. To the contrary, Plaintiff has established that the State was a party to, and had a deep interest in, the juvenile proceedings; that there was a clear threat of criminal prosecution; that removal of one’s child in a child abuse context is quasi-criminal; and that Younger has previously been applied to child

abuse proceedings where children had been temporarily taken from their parent's custody. Parker, 626 F.2d at 3, *citing* Moore v. Simms, 442 U.S. 415 (1979).

Accordingly, the Younger abstention doctrine applies to the case at bar, and should have delayed the accrual of Plaintiff's § 1983 causes of action until the conclusion of the juvenile court proceedings on October 22, 2004.

Furthermore, the District Court misapplied Younger to the instant action, because it mistakenly characterized the doctrine as one that *tolls* the running of a statute of limitations, rather than one which determines the *accrual* of a cause of action. The District Court held that Plaintiff should have filed his complaint within one year of an unspecified date, presumably the date of the three-day hearing, and that it would then have stayed Plaintiff's civil action until the conclusion of the state proceedings. The lower Court concluded:

Thus, while a timely filed § 1983 action filed by this plaintiff would likely have been stayed, rather than dismissed, by this Court pending the conclusion of the juvenile court proceedings because of concern about the *Younger* doctrine foreclosing the plaintiff's cause of action, . . . there is no basis for concluding that the juvenile court proceedings *tolled* the limitations period for the filing of a § 1983 action.

(R.22, Memorandum Opinion, Apx ____). However, if the Younger doctrine does apply here, Plaintiff could not have filed a complaint which the District Court would have stayed prior to the conclusion of the state juvenile proceedings

because his causes of action had not yet accrued. As this Court is well aware:

The statute of limitations for suits under section 1983 is supplied by state law – not only the limitations period but also the tolling rules. Tolling interrupts the statute of limitations after it has begun to run, but does not determine when it begins to run; that question is the question of accrual, and in section 1983 suits as in other suits under federal law the answer is furnished by federal common law rather than by state law.

Heard, 253 F.3d at 317-318. If Younger abstention was a tolling principle, as the lower Court seems to conclude, then it would not be an issue here because federal courts apply state tolling principles. However, Younger does apply.

The Younger abstention doctrine is not one that tolls a statute of limitations, but rather dictates when a cause of action accrues. *See Shamaeizadeh*, 182 F.3d 391. As the Court well knows, a Plaintiff cannot bring suit before his cause of action has accrued. Therefore, the District Court’s conclusion that Plaintiff should have filed his complaint prior to conclusion of the state juvenile proceedings, which it “would likely have . . . stayed,” is incoherent. Plaintiff was categorically precluded from filing a complaint which the lower Court might have stayed because his causes of action had not yet accrued. Furthermore, this Court has expressly rejected staying a civil § 1983 action during the pendency of an underlying state proceeding. This Court has held:

We further conclude that holding that the statute of limitations begins to run at the time of the [violation of constitutional rights], and requiring that a federal court stay any § 1983 action brought during, and related to, criminal proceedings would not adequately deal with this issue.

Shamaeizadeh, 182 F.3d at 399. Rather, because federal courts must abstain from entertaining § 1983 actions when there is a requisite pending state proceeding under Younger, a plaintiff's cause of action does not accrue until the conclusion of that state proceeding. Plaintiff has already demonstrated that child abuse proceedings where children have been temporarily taken from their parent's custody is a requisite pending state proceeding. Accordingly, Plaintiff's causes of action did not accrue until the conclusion of the juvenile court proceedings on October 22, 2004, and his complaint against Defendants was timely filed.

II. THE DISTRICT COURT ERRED OR ABUSED ITS DISCRETION WHEN IT ORDERED THAT DEFENDANTS MAY RECOVER FROM PLAINTIFF THEIR COST OF THIS ACTION.

Defendants failed to file their Bill of Costs with the District Court within thirty days of the final judgment as required by the Local Rules for the District Court for the Eastern District of Tennessee. Therefore, there is no harm to Plaintiff and this issue is moot.

CONCLUSION AND REQUEST FOR RELIEF

The District Court's Memorandum Opinion and Order granting Defendants'

Rule 12(b)(6) motion to dismiss should be reversed, and this matter should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), the undersigned counsel certifies that this brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,406 words. The brief was prepared in Microsoft WordPerfect 12, using Times New Roman 14 point font.

William E. Phillips II

CERTIFICATION OF SERVICE

I hereby certify that one copy of the foregoing Proof Brief has been served via First Class Mail to the parties listed below on the ____ day of May, 2007.

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William E. Phillips II

APPELLANTS' DESIGNATION OF JOINT APPENDIX CONTENTS

<u>Description of Item</u>	<u>Record No.</u>	<u>File Date</u>
Complaint	1	10/24/05
Second Amended Complaint	15	07/06/06
Defendants' Motion to Dismiss Second Amended Complaint	17	07/11/06
Defendants' Memorandum in Support of Motion to Dismiss	18	07/11/06
Plaintiff's Response in Opposition to Motion to Dismiss	19	07/31/06
Memorandum Opinion and Order	22	03/06/07
Judgment	23	03/06/07
Plaintiff's Motion for Leave to Appeal In Forma Pauperis	24	04/02/07
Plaintiff's Notice of Appeal	25	04/02/07
Order Granting Leave to Appeal In Forma Pauperis	27	04/18/07

IN THE COURT OF APPEALS FOR TENNESSEE
AT KNOXVILLE

IN RE: LILLIAN M.
 B. 08/08/2006

STATE OF TENNESSEE DEPARTMENT)
OF CHILDREN'S SERVICES,)
)
 Appellant/Petitioner,)
)
vs.)
)
TREY MURRELL, and)
COURTNEY MURRELL,)
)
 Appellees/Respondents.)

No. E2010-00749-COA-R3-VJ
Hawkins Co. Juv. No. HJ-08-673

BRIEF OF APPELLEES / RESPONDENTS

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ORAL ARGUMENT REQUESTED

FILED UNDER SEAL PURSUANT TO TENN. CT. APP. R. 14

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIESiii

QUESTIONS PRESENTED1

STATEMENT OF FACTS2

ARGUMENT4

I. THE JUVENILE COURT’S DISMISSAL OF THE DEPARTMENT’S PETITION
AND AWARD OF ATTORNEY’S FEES ARE NOT PROPERLY BEFORE THIS
COURT FOR REVIEW4

II. JUVENILE COURT’S HAVE THE AUTHORITY TO ORDER DISCOVERY
AND TO IMPOSE SANCTIONS PROVIDED BY THE RULES OF CIVIL
PROCEDURE TO ENFORCE THOSE ORDERS7

III. THE JUVENILE COURT HAD THE AUTHORITY TO HOLD THE
DEPARTMENT IN CONTEMPT, AND SAID FINDING WAS PROPER10

IV. DISMISSAL OF THE DEPARTMENT’S PETITION WAS AN AVAILABLE
SANCTION UNDER THE TENNESSEE RULES OF CIVIL PROCEDURE,
AND WAS NOT AN ABUSE OF DISCRETION14

V. THE AWARD OF ATTORNEY’S FEES AGAINST THE DEPARTMENT
WAS AN APPROPRIATE SANCTION REQUIRED BY TENN. R. CIV.
P. 37.0218

VI. IN THIS ACTION, THE DISMISSAL OF THE DEPARTMENT’S PETITION
WAS NOT AGAINST PUBLIC POLICY, AND WAS IN THE BEST INTEREST
OF THE CHILD22

CONCLUSION23

CERTIFICATE OF SERVICE24

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Fourteenth Amendment 22, 23

TENNESSEE CONSTITUTION

Article I, Section 8 22, 23

UNITED STATES SUPREME COURT CASES

Brady v. Maryland, 373 U.S. 83 (1963) 23

TENNESSEE SUPREME COURT CASES

Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) 22

Lyle v. Exon Corp., 746 S.W.2d 694 (Tenn. 1988) 14

Mercer v. Vanderbilt Univ., Inc., 134 S.W.2d 121 (Tenn. 1994) 9, 14

TENNESSEE APPELLATE CASES

Holt v. Webster, 638 S.W.2d 391 (Tenn. Ct. App. 1982) 14, 15, 16

In the Matter of J.R.L.-D., 2009 Tenn. App. LEXIS 417 (Tenn. Ct. App. 2009)..... 9, 10, 20, 21

Johnson v. Wade, 2000 Tenn. App. LEXIS 609 (Tenn. Ct. App. 2000) 14

Overstreet v. Shoney’s, Inc., 4 S.W.2d 694 (Tenn. Ct. App. 1999) 15

State v. Jones, 1997 Tenn. App. LEXIS 248 (Tenn. Ct. App. 1997)..... 12

TENNESSEE STATUTES AND RULES OF COURT

Tenn. R. Civ. P. 11 10, 21

Tenn. R. Civ. P. 37.024, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21

Tenn. R. Juv. P. 1 7, 8, 9, 10

Tenn. R. Juv. P. 25 8, 10, 21

Tenn. Code Ann. § 36-5-101 21

QUESTIONS PRESENTED

1. **DID THE JUVENILE COURT HAVE THE AUTHORITY TO ORDER DISCOVERY PURSUANT TO THE TENNESSEE RULES OF CIVIL PROCEDURE AND TO IMPOSE SANCTIONS FOR THE VIOLATIONS THEREOF?**

2. **DID THE COURT ERR IN IMPOSING THE DISTINCT SANCTIONS OF DISMISSAL OF THE DEPARTMENTS PETITION, AWARDED ATTORNEY'S FEES AGAINST THE DEPARTMENT, AND FINDING THE DEPARTMENT IN CONTEMPT, ALL OF WHICH ARE EXPRESSLY PROVIDED FOR UNDER TENN. R. CIV. P. 37.02?**

STATEMENT OF FACTS

On May 9, 2008 the Department of Children's Services ("Department") filed a Petition for Temporary Custody of L.M. T.R. Vol., p. 4. On July 10, 2008, Respondents made an oral motion for discovery in which they detailed the Department's attempts to hinder their discovery. In its July 29, 2009 order the juvenile court found the Department's actions to be inappropriate. T.R. Vol. II, p. 20-21. Respondents subsequently learned at a doctor's deposition that they had been secretly videotaped with their daughter in the privacy of their own hospital room with the knowledge of the Department. Trans., p. 9-10. At the same deposition Respondents learned that the surveillance videos were consistent with their innocence. T.R. Vol. II, p. 279. Accordingly, Respondents filed a motion seeking production of the surveillance tapes.¹ The court granted Respondents' motion, and very clearly detailed the efforts the Department was to make to acquire the surveillance videos. T.R. Vol. II, p. 275, *see also* Trans., p. 24. The Department did not comply with the court's order. When queried about the production of the videos, counsel for the Department remarked to counsel for Respondents and the Guardian ad Litem that he did not have a duty to produce the videos, and that it was not his obligation. Trans., pp. 11, 20, *see also* T.R. Vol II, p. 291.

In light of the declaration, and more than 150 days after the court ordered production of the surveillance video, Respondents filed a motion seeking contempt and sanctions pursuant to Tenn. R. Civ. P. 37, on December 9, 2009. T.R. Vol. II, p. 278. A hearing was held on Respondents' motion on December 17, 2009. Trans., p. 1.

¹The motion for discovery was not included in the technical record pursuant to Tenn. R. App. P. 24(a), but is plainly referenced in the juvenile court's November 24, 2009 order directing production of the surveillance tapes. T.R. Vol. II, p. 275.

At the conclusion of the hearing the court acknowledged that there had been several issues involving discovery throughout the pendency of the case, and found that the Department had willfully failed to obey the court's discovery order. Trans., pp. 24, 25. Accordingly, and expressly pursuant to Tenn. R. Civ. P. 37.02, the juvenile court dismissed the Department's petition, awarded attorney's fees against the Department incurred as a result of its willful failure to obey the court's order, and found the Department to be in contempt. T.R. Vol. II, p. 290, Trans., pp. 24-26

ARGUMENT

I. THE JUVENILE COURT'S DISMISSAL OF THE DEPARTMENT'S PETITION, AND AWARD OF ATTORNEY'S FEES ARE NOT PROPERLY BEFORE THIS COURT FOR REVIEW

By order entered December 30, 2009, the Juvenile Court (1) found the Department to be in contempt, (2) dismissed the Department's Petition for Temporary Custody pursuant to Tenn. R. Civ. P. 37.02, and (3) ordered the Department to pay the reasonable expenses, including attorney's fees pursuant to Tenn R. Civ. P. 37.02, due to its willful refusal to obey the Juvenile Court's order compelling discovery, among other administrative rulings. T.R. Vol. II, p. 290. Prior to the entry of said order, the Department filed a Notice of Appeal to the Circuit Court on December 17, 2009. T.R. Vol. II, p. 283. The Department filed a Motion to Alter or Amend the Judgment on January 29, 2010, which was denied on March 5, 2010. T.R. Vol. II, pp. 301, 309. The Department filed an Order of Dismissal on February 17, 2010, dismissing the de novo appeal to the Circuit Court. T.R. Vol. II, p. 308. The Department then filed a Notice of Appeal to this Court of Appeals on April 1, 2010. T.R. Vol. II, p. 313.

By order entered June 14, 2010, this Court *sua sponte* transferred the Department's appeal to the Circuit Court, noting that "[a]n appeal from a final order or judgment in a dependent and neglect proceeding is made to the circuit court and not this court." The Department filed a Petition for Rehearing with this Court on or about June 18, 2010. In its Petition for Rehearing, the Department submitted that, "the dismissal of the petition for dependency and neglect is not at issue. DCS is seeking redress of the finding of contempt." Based upon the Department's representation to this Court that the only issue for which they sought review was the finding of contempt, Respondent's filed a response taking no position on

the appropriate forum for the Department's appeal, leaving it to the sound discretion of this Court. In this Court's August 11, 2010 Order reinstating the appeal, the Court noted, "DCS seeks reinstatement of the appeal in this court on grounds that the only matter at issue in this appeal is the juvenile court's finding of contempt. DCS asserts that the dismissal of the petition for dependency and neglect is not at issue in this appeal." This Court further noted, "[a] review of the record reveals that, on February 17, 2010, prior to the date of entry of the March 5, 2010 order on review [transferring the appeal to circuit court], DCS's *de novo* appeal to the circuit court from the dismissal of the dependency and neglect proceeding was itself dismissed. Thus, DCS is correct that *the only matter at issue in this appeal is the juvenile court's finding of contempt.*" (Emphasis added). Disregarding the clear language of this Court's Order, and disavowing its own representations to this Court made in its Petition for Rehearing, the Department's Appellate brief seeks review not only of the finding of contempt, but also the dismissal of their petition and the award of attorney's fees. Obviously, had the Department not represented that it only sought appeal from the finding of contempt, Respondents response to its Petition for Rehearing would have been vastly different.

The Department apparently continues to incorrectly suggest that the dismissal and award of attorney's fees were dependent upon the finding of contempt. They were not. The Juvenile Court's dismissal of the Department's petition and award of attorney's fees were accomplished pursuant to Tenn. R. Civ. P. 37.02, and were not contingent upon or attendant to the wholly separate finding of contempt. In fact, under Rule 37.02 the dismissal of a proceeding, the mandatory award of attorney's fees, and a finding of contempt are separate and distinct remedies available to the court; none contingent upon an assessment of the other. In other words, the

dismissal of the petition and award of fees were not predicated upon the finding of contempt, and could have been awarded absent any such finding. This fact is plainly established by the unambiguous wording of Tenn. R. Civ. R. 37.02(D).

Rule 37.02 provides in pertinent part:

If a deponent; *party*; an officer, director, managing agent of a party; or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

Tenn. R. Civ. P. 37.02 (emphasis added). The language of section (D) clearly indicates that courts are authorized to find a party in contempt in “lieu” of, or in “addition” to the other sanctions available under Rule 37.02. In this action, the Juvenile Court’s final order identified the specific and separate sections of Rule 37.02 under which it dismissed the Department’s petition and awarded attorney’s fees. T.R. Vol. II, pp. 290-292. This indicates that the order of contempt was in “addition” to the other orders, and not a necessary prerequisite to them. As such, the Department’s apparent argument that the Juvenile Court exceeded its authority under contempt statutes is misplaced, as the Court did not employ said statutes and no punishment or sanction was issued based upon the finding of contempt. The Juvenile Court’s finding of contempt was an innocuous one, and amounted to nothing more than a verbal censure. Even if the Department’s inclusion of the dismissal and award of attorney’s fees for review is the result of its misunderstanding of the Juvenile Court’s order, Respondent’s should not now be made to suffer, having rightfully believed that the dismissal of the case against them has been final for

these many months.

By its own declaration the Department seeks review only of the finding of contempt. The finding of contempt was distinct from, and not a predicate to the separate sanctions of dismissal and the mandatory award of attorney's fees. The Department has not appealed the Juvenile Court's distinct dismissal of the petition or the award of attorney's fees. In fact, the Department has declared the dismissal to not be an issue in this appeal. Accordingly, neither the dismissal of the petition, nor the award of attorney's fees are properly before this Court for review.

Respondents, therefore, request that those portions of the Department's brief regarding the dismissal of its petition and the award of attorney's fees be stricken from consideration, and the appeal thereof to be declared frivolous. Nevertheless, Respondents are now compelled to brief those issues in this response.

II. JUVENILE COURT'S HAVE THE AUTHORITY TO ORDER DISCOVERY, AND TO IMPOSE SANCTIONS PROVIDED BY THE RULES OF CIVIL PROCEDURE TO ENFORCE THOSE ORDERS

The Tennessee Rules of Civil Procedure, and their available remedies, are applicable to juvenile court cases in which the Department of Children's Services seeks to remove custody of a child from its parents. Rule 1 of the Tennessee Rules of Juvenile Procedure provides in pertinent part:

The procedures employed in general sessions court under the Tennessee Rules of Criminal Procedure shall govern all cases in which children are alleged to have committed juvenile traffic offenses as defined in T.C.A. § 37-1-146 and all cases heard in juvenile court involving child abuse prosecutions under T.C.A. §§ 37-1-412 and 39-15-401, nonsupport of children, or contributing to the delinquency or unruly behavior or dependency and neglect of children. The Tennessee Rules of Civil Procedure shall govern all cases involving the termination of parental rights, paternity cases, guardianship and mental health commitment cases involving children, and child custody proceedings under T.C.A. §§ 36-6-101, et seq., 36-6-

201, et seq., and 37-1-104(a)(2) and (f); however discovery in such cases in juvenile court shall be governed by Rule 25 of these rules.

Tenn. R. Juv. P. 1. The first sentence of the quoted rule governs cases in which an individual is being prosecuted for a crime. In the instant action Respondents were neither charged with, nor prosecuted for committing a crime or misdemeanor. Rather, this action was commenced by the Department's filing of a Petition for Temporary Custody.² While not specifically referenced by statute citation, proceedings involving the legal custody of a child fit more logically with those types of cases identified in the second sentence which are governed by the Rules of Civil Procedure. This position is supported by the concluding language of the sentence which provides that discovery in said cases shall be governed by Rule 25 of the Rules of Juvenile Procedure.

Rule 25 provides that juvenile courts shall ensure, "that parties in delinquent and unruly proceedings in juvenile court have access to information which would be available in criminal court, and that parties in other cases, including dependent, neglect and abuse cases have access to information which would be available in the circuit court." Tenn. R. Juv. P. 25. The scope, means, and remedies of discovery available to parties in circuit court are governed by the Rules of Civil Procedure. Tenn. R. Juv. P. 25 continues to provide that, "[l]eave to obtain discovery shall be freely given when justice so requires." The Committee Comment to Rule 25 advises that juvenile courts are not precluded from adopting the discovery mechanisms found in the Tennessee Rules of Civil Procedure. Accordingly, the juvenile court was free to employ the

²While the Department's Petition for Temporary Custody was based upon an allegation of dependency and neglect, it is distinct from being charged with and prosecuted for contributing to the dependency and neglect of a child as provided for by T.C.A. § 37-1-159. Here, Respondents were not charged with a crime.

discovery mechanisms provided by the Rules of Civil Procedure. Surely where a juvenile court has the authority to order discovery provided by the Rules of Civil Procedure, it equally has the authority to enforce said orders under the same Rules.

The Juvenile Court was well within its authority when, on July 9, 2009, it granted Respondents' Second Motion for Discovery and to Disclose Exculpatory Evidence. T.R. Vol. II, p. 275. The order specifically set forth a number of unambiguous steps the Department was to take to comply with the discovery order. The trial court subsequently found the Department's refusal to comply with the order to be willful. T.R. Vol II, p. 290. Trial courts of Tennessee have, "wide discretion to determine the appropriate sanctions to be imposed for abuses of the discovery process." Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121 (Tenn. 1994)("Mercer"). When that abuse involves a party's failure to obey a court order to provide discovery, the sanctions provided by Tenn. R. Civ. P. 37.02 apply.

The Court of Appeals has held that juvenile courts can have the authority to impose sanctions provided by the Rules of Civil Procedure. In the Matter of: J.R.L.-D, (Tenn. App. 2009)("J.R.L."), involved the termination of parental rights, which is governed by the Rules of Civil Procedure. In J.R.L., the juvenile court assessed sanctions in the form of an award of attorney's fees against the Department for failing to have scheduled a court reporter. The Department appealed, arguing in part that the juvenile court lacked authority to impose sanctions provided under the Rules of Civil Procedure. The Court of Appeals disagreed. The Court held that, "[t]he Tennessee Rules of Civil Procedure govern cases involving the termination of parental rights. Tenn. R. Juv. P. 1(b)(2008). Accordingly, we must disagree with DCS's assertion that, in this case, the juvenile court would be without authority to impose sanctions

authorized by the statutes or the Rules of Civil Procedure.³⁹ J.R.L., at 3. Here, the Juvenile Court was free to avail itself of the discovery mechanisms provided by the Rules of Civil Procedure. It follows then, and is consistent with J.R.L., that the same court have the authority to impose sanctions authorized by those very Rules.

To conclude otherwise would allow the Department to openly flout every discovery order issued by juvenile courts. If such were the case, parties would have to bear the additional financial burden of taking a de novo appeal to circuit court in order to gain access to information necessary to prepare a meaningful defense to the Department's allegations. It is doubtless that judicial economy would also suffer a heavy blow. Accordingly, juvenile courts must have the authority to enforce their discovery orders. That authority is housed in Tenn. R. Civ. P. 37, and is made available to juvenile courts via Tenn. R. Juv. P. 1 and 25. The Juvenile Court, therefore, was well within its authority to order the discovery requested by Respondents, and to impose sanctions provided by the Rules of Civil Procedure when the Department willfully failed to comply with said order.

III. THE JUVENILE COURT HAD THE AUTHORITY TO HOLD THE DEPARTMENT IN CONTEMPT, AND SAID FINDING WAS PROPER.

As previously noted, the Juvenile Court's finding of contempt in this matter amounts to no more than a verbal censure. No other sanction was predicated upon the finding of contempt, and no other attendant punishment was to be served as a result thereof. Nevertheless, the Juvenile Court had the authority to hold the Department in contempt.

³⁹Ultimately, the sanction was overturned because the juvenile court did not properly adhere to the procedures provided by Tenn. R. Civ. P. 11, which makes it distinguishable from the instant controversy as Respondents will demonstrate in section V of this brief.

Rule 37.02 plainly states that its sanctions are available against a “*party . . . [that] fails to obey an order to provide or permit discovery . . .*” Tenn. R. Civ. P. 37.02. It is beyond dispute that the Department was a party to this action, and, therefore, equally subject to the Juvenile Court’s orders as Respondents. Nevertheless, the Department argues that, “the juvenile court lacked the authority to hold the State in contempt,” or, presumably, to enforce discovery sanctions provided by the Rules of Civil Procedure. The Department’s argument misses the mark.

As addressed in section I of this brief, the Department hinges its entire argument upon a misunderstanding or mischaracterization of the Juvenile Court’s ruling. None of the imposed sanctions, including the toothless finding of contempt, were accomplished via the contempt statutes which appear to be the exclusive focus of the Department’s brief. The sanctions were, instead, separately provided by, and imposed exclusively through, Tenn. R. Civ. P. 37.02.

The Department, however, appears to be setting up a straw man argument by attempting to wedge the basis of the Juvenile Court’s ruling into a hole of a different shape, namely the contempt statutes. The Department argues in section I of its brief that it, “is not subject to the sanctions available under the various contempt statutes.” Department’s Brief, p. 6. Simply put, the Department has not been subjected to any sanction available under any contempt statute. It is apparent that the true focus of the Department’s end-around attack is not the finding of contempt, but is the dismissal of its petition and the award of attorney’s fees. In section I of this brief, Respondents demonstrated that the dismissal and award of fees were not contingent upon the finding of contempt, but were distinct sanctions available under Tenn. R. Civ. P. 37.02. The fact is no sanction was levied against the Department due to, or based upon, a finding of contempt.

Nonetheless, the Department next contends that the dismissal and award of fees, which are expressly authorized by the Rules of *Civil* Procedure, are, in fact, criminal convictions for contempt. Completely discounting the existence of Tenn. R. Civ. P. 37.02, the Department submits that, “the punishment [presumably the dismissal and award of fees] was clearly for criminal contempt.” Department’s Brief, p. 9. In support of its argument the Department cites State v. Jones, 1997 Tenn. App. LEXIS 248 (Tenn. Ct. App. 1997)(“Jones”). Of course, Jones bears little similarity to this case. In Jones, the trial court found a non-party to be in contempt for her failure to place a child as directed by the court – an order which was outside the court’s authority. The court found the non-party in contempt and sentenced her to eight hours community service. The appellate court concluded that the “punishment” was for criminal contempt, and that the non-party had not been afforded the requisite notice. Jones is easily distinguishable in that it did not involve the imposition of sanctions expressly provided by the Rules of Civil Procedure. Also, in the instant action there was no “punishment” based upon a finding of contempt. The Department’s argument would lead this Court to conclude that any court’s exercise of its authority under Tenn. R. Civ. P. 37.02 would amount to a criminal conviction for contempt. Such a conclusion is inconsistent with the Tennessee Rules of Civil Procedure, and would hinder Tennessee trial courts’ authority to enforce its orders of discovery.

In the instant action, the Juvenile Court granted Respondents’ Second Motion for Discovery and to Disclose Exculpatory Evidence on July 9, 2009. The Court ordered the Department to produce surveillance tapes that secretly recorded Respondents and their child in the privacy of their hospital room. T.R. Vol., p. 275. The Order provided simple and specific steps the Department was to take. The Department failed to comply with the Court’s Order, and

on December 9, 2009, Respondents filed a Motion for Contempt seeking, among other remedies, relief pursuant to Tenn. R. Civ. P. 37.02. A hearing was held on said Motion on December 17, 2009, in which it was revealed that counsel for the Department represented to counsel for Respondents and the Guardian ad Litem that it was not his obligation to produce the video tapes. Trans., p. 20. In its brief, the Department inexplicably submits that, “[t]he juvenile court never even found any contempt was willful.” Department’s Brief, p. 9. The transcript of the hearing, however, reveals said representation to be flatly untrue. The transcript provides in pertinent part:

THE COURT: . . .

The Court was very clear in July about the efforts the Department was to make, you know, the argument was advanced at that time, you know, whether the Department should have the obligation to produce the tape or whether it should just be simply left to counsel for the parents. That was the core of the argument at that Hearing relative to the tape. . . . The Court did order very detailed the efforts the Department was to make.

The Court finds the Department has failed to comply with that Court Order. That its [failure] to do so is willful. The Court does find the Department of Children’s Services in contempt of Court based upon their willful failure to abide that Court’s Order.⁴

The Juvenile Court plainly found the Department to be in contempt due to its willful failure to abide by its order of discovery. This fact is further reflected in the Court’s written Order. T.R. Vol. II, p. 291. As previously noted, Tenn. R. Civ. P. 37.02(D) provides: “In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders [to provide discovery]. . .” Accordingly, and in light of the Department’s willful failure to obey the Court’s discovery order, the Court properly found the Department to be in contempt. It is, however, equally important to note that no “punishment” was attached to the

⁴The Court continues to separately address the distinct sanctions available under Tenn. R. Civ. P. 37.02, which Respondents will address in sections IV and V of this brief.

finding of contempt, and that no sanction was predicated upon the finding of contempt. Rather, the Court continues to specifically and separately identify the grounds upon which it dismissed the Department's petition for temporary custody, and awarded attorney's fees incurred as a result of the Department's failure to obey the court's discovery order..

IV. DISMISSAL OF THE DEPARTMENT'S PETITION WAS AN AVAILABLE SANCTION UNDER THE TENNESSEE RULES OF CIVIL PROCEDURE, AND WAS NOT AN ABUSE OF DISCRETION

Despite the Department's repeated attempts to incorrectly describe the dismissal of its petition as a remedy for contempt, the juvenile court explicitly states, both in the transcript of the hearing and in its written order, that the dismissal was ordered pursuant to Tenn. R. Civ. P. 37.02(c). Tenn. R. Civ. P. 37 expressly authorizes the trial court to dismiss a party's action as a sanction for that party's violation of the court's discovery order. Holt v. Webster, 638 S.W.2d 391, 394 (Tenn. App. 1982)(“Holt”). Tenn. R. Civ. P. 37(c) provides that where a party fails to obey an order to provide discovery, a court may enter an order “dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.”

As previously noted, our Supreme Court has held that, “[t]rial courts have wide discretion to determine the appropriate sanctions to be imposed for abuses of the discovery process.” Mercer, 134 S.W.3d 121 (Tenn. 1994). Additionally, Tennessee trial courts have “the discretion to impose sanctions such as dismissal in order to penalize those who fail to comply with the Rules and to deter others from flouting or disregarding discovery orders.” Johnson v. Wade, 2000 Tenn. App. LEXIS 609 (Tenn. Ct. App. 2000). Appellate courts review a trial court's decision to impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard. Lyle v. Exxon Corp., 746 S.W.2d 694, 699 (Tenn. 1988). When reviewing

a trial court's discretionary decision, appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision. Appellate courts should permit a trial court's discretionary decision to stand if reasonable judicial minds can differ concerning its propriety. Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999)(internal citations omitted). When the trial court exercises its discretion in imposing the sanction of dismissal, the exercise of its discretion will not be disturbed on appeal in the absence of an affirmative showing that the trial judge abused his discretion. Holt, 638 S.W.2d at 394. In the instant action, the Department has not argued that the juvenile judged abused his discretion, much less made an "affirmative showing" of any alleged abuse. Nevertheless, out of an abundance of caution, Respondents are compelled to address the matter.

In Holt, the sole issue on appeal was whether the trial court abused its discretion in dismissing plaintiff's suit for failing to comply with the court's discovery orders. In the suit, plaintiffs failed to answer interrogatories submitted to them by defendant. Defendant accordingly sought relief from the court. The court ordered plaintiffs to answer the interrogatories and serve them on defendant within seven days. Plaintiffs' answers were not filed until 6 days after the allotted time had expired, and not served upon defendant until 10 days after the time had expired. Plaintiffs also failed to answer one of the interrogatories. Defendant filed a motion seeking dismissal of the action pursuant to Tenn. R. Civ. P. 37. The court entered an order dismissing plaintiffs' cause of action. In its decision, the appellate court noted that plaintiffs were given considerable opportunity to comply with the discovery order, and that there was no reason for their failure to timely comply with the order. Holt, 638 S.W.2d at 394.

In its opinion, the Court of Appeals noted that, "[d]ismissal is a harsh sanction. However,

it is specifically authorized by the Rules, and cogent reasons exist for its imposition.” Holt, 638 S.W.2d at 394. The court recited those reasons as set forth by the Supreme Court of the United States:

. . . the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent . . . other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

Holt, 638 S.W.2d at 394. The Court of Appeals concluded that, “trial courts of Tennessee must and do have the discretion to impose sanction such as dismissal in order to penalize those who fail to comply with the Rules and, further, to deter others from flouting or disregarding discovery orders.” Holt, 639 S.W.2d at 394. Respondents submit that, in the instant action, dismissal was an appropriate sanction considering the exculpatory nature of the evidence at the center of the discovery order, and the liberties at stake. For the same reasons, the dismissal is an appropriate deterrent designed to prevent the Department from cavalierly flaunting the discovery orders of the juvenile court where the evidence sought is critical to one’s continued custody of her child.

Respondents learned at a doctor’s deposition that they had been secretly videotaped with their daughter in the privacy of their own hospital room with the knowledge of the Department. Trans., p. 9-10. At the same deposition Respondents learned that the surveillance videos were consistent with their innocence. T.R. Vol. II, p. 279. Accordingly, Respondents filed a motion seeking production of the surveillance tapes. Said motion was argued before the juvenile court on July 9, 2009. At said hearing, the court granted Respondents’ motion, and very clearly detailed the efforts the Department was to make to acquire the surveillance videos. T.R. Vol. II,

p. 275, *see also* Trans., p. 24. The Department did not comply with the court's order. When queried about the production of the videos, counsel for the Department remarked to counsel for Respondents and the Guardian ad Litem that he did not have a duty to produce the videos, and that it was not his obligation. Trans., pp. 11, 20, *see also* T.R. Vol II, p. 291. The declaration blatantly demonstrates the Departments willful refusal to comply with the court's discovery order.

In light of the declaration, and more than 150 days after the court ordered production of the surveillance video, Respondents filed a motion seeking contempt and sanction pursuant to Tenn. R. Civ. P. 37, on December 9, 2009. T.R. Vol. II, p. 278. A hearing was held on Respondents' motion on December 17, 2009. At the hearing the Department readily admitted that it had not complied with the court's order. Trans., p. 18. In an effort to explain away its failure to comply the Department offered the testimony of Child Protective Services Investigator Donna Spencer. Ms. Spencer testified that she had contacted Children's Hospital in July of 2009, and as evidence produced an original letter addressed to Children's Hospital. Trans., p. 20. When queried about the letter being an original, she testified that it had been faxed. Trans., p. 21. Ms. Spencer, however, was unable to produce a fax confirmation or a cover sheet. Trans., p. 21-22. Ms. Spencer further testified that she was informed that the surveillance tapes had been destroyed.⁵ When asked if the Department had put that in writing and filed it with the court, as required by the court's order, Ms. Spencer acknowledged that it had not. Trans., p. 21.

At the conclusion of the hearing the court acknowledged that there had been several

⁵Once legal custody of L.M. was returned to Respondents upon the dismissal of the petition, they executed a patient authorization form and were able to obtain from Children's Hospital all of the surveillance recordings.

issues involving discovery throughout the pendency of the case, and found that the Department had willfully failed to obey the court's discovery order. Trans., p. 24, 25. The court also acknowledged that dismissal, "is the most extreme remedy for this particular case that could be requested. It is one that in the Court's discretion would be allowed as a remedy, but it is by far the most extreme remedy." Trans., p. 25. Even in light of this acknowledgment the court held: "The Court finds that that request is proper. The Court does, pursuant to Rule 37-02-C [sic] render Judgment by default against the Department of Children's services and dismisses their Petition for Custody." Trans., p. 25. In the December 30, 2009 order commemorating its decision the court found that the Department failed to comply with its discovery order, and that said failure was willful. T.R. Vol. II, p. 291. The court also specifically found that the dismissal was just, and in the best interest of the child. T.R. Vol. II, p. 292.

Respondents submit that the court properly employed its discretion pursuant to Tenn. R. Civ. P. 37.02(c). Even though an arm of the State, the Department cannot feel free to flout the discovery orders of juvenile courts, especially where the evidence sought tends to disprove the allegations upon which a petition to remove legal custody of a child from a parent is based. The sanction of dismissal in the instant action will surely deter the Department from simply dismissing the discovery orders of juvenile courts in the future.

V. THE AWARD OF ATTORNEY'S FEES AGAINST THE DEPARTMENT WAS AN APPROPRIATE SANCTION REQUIRED BY TENN. R. CIV. P. 37.02

Tenn. R. Civ. P. 37.02 provides:

In lieu of any of the foregoing orders or in addition thereto, the court *shall* require the *party* failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other

circumstances make an award of expenses unjust.

Tenn. R. Civ. P. 37.02 (emphasis added). The plain and unambiguous language of Tenn. R. Civ. P. 37.02 does not leave to the discretion of the courts the award of expenses incurred as a result of a party's failure to comply with a discovery order, but, rather, mandates it. Here, the trial court found the Department willfully failed to obey an order to provide discovery. T.R. Vol., p. 291. Accordingly, the court was required to enter an award of attorney's fees incurred by Respondents due to that failure. In its order of December 30, 2009, the court held:

Pursuant to Tennessee Rules of Civil Procedure, Rule 37.02(e), the Department is ordered to pay the reasonable expenses, including attorney's fees, caused by their failure to obey the Court's order. To that end, within 30 days of this date [counsel for Respondents] shall file an affidavit stating his sum of time, and a specific fee amount being requested. The Department shall have 30 days after the filing of said affidavit to file any objection or other response. The Court will review those filings ex parte to determine the appropriateness and, if necessary, reasonableness of the fee.

T.R. Vol. II, p. 292.

The Department once again in its brief incorrectly attributes the court's award of attorney's fees to the separate finding of contempt. The Department contends that, "[a]s a result of finding DCS in contempt, the juvenile court awarded attorney's fees and costs to the parents." Department's Brief, p. 10. The assertion willfully ignores the plainly stated foundation of the court's ruling, namely Tenn. R. Civ. P. 37.02. Contrary to the Department's inaccurate representation, Respondents have repeatedly shown that none of the assessed sanctions are contingent upon the finding of the other. Rather, the plain language of Tenn. R. Civ. P. 37.02 invests courts with the discretionary authority to impose any of the allotted sanctions (and any other which the courts find to be just) collectively or individually; none dependent upon the

assessment of another. Respondents fully addressed this issue in sections I and II of this brief, and, in the interest of economy, will not further restate the argument here.

The Department next argues that the court's award of attorney's fees was improper because the State has not waived its sovereign immunity to permit the assessment of attorney's fees against the Department, and that there is no express authority to assess attorney's fees against the Department. Department's Brief, p. 10-11. The Department also argues, by implication, that even if there were general authority allowing the assessment of attorney's fees against the Department, the general assembly has not conferred the authority upon the juvenile courts. Department's Brief, section I. The State put forth an identical argument in J.R.L.. In J.R.L., the juvenile court ordered the Department to pay the attorney's fees of mother's counsel and the Guardian ad Litem as a sanction for the Department's failure to secure a court reporter. The court noted that, "this case does not present a question of whether attorney's fees may be assessed against the State as damages or costs. Rather, in this case, the trial court awarded attorney's fees as sanctions . . . Thus, the issue presented by this case, as we perceive it, is whether the juvenile court erred by imposing sanctions against DCS in this case." J.R.L., 2009 Tenn. App. LEXIS 417, *5-6. The appellate court held that a juvenile court has the authority to impose sanctions provided under the Rules of Civil Procedure when those Rules govern the proceedings before it: "Accordingly, we must disagree with DCS's assertion that, in this case, the juvenile court would be without authority to impose sanctions authorized by the statutes or the Rules of Civil Procedure." J.R.L., 2009 Tenn. App. LEXIS 417, *6, *see also* State of Tennessee ex rel P.A.S. v. L.B., et al., 2009 Tenn. App. LEXIS 640, *16-17 (holding sovereign immunity does not bar an award of attorney's fees in all circumstances). The appellate court continued to

note that, “[t]o the extent that DCS asserts the State has not consented to the imposition of attorney’s fees against DCS as sanctions under Tennessee Rule of Civil Procedure 11, we must also disagree.” J.R.L., 2009 Tenn. App. LEXIS 417, *6. In support thereof, the court refers to Tenn. Code. Ann. § 36-5-101(1)(2), which provides: “The court shall not award attorney fees against the department . . . unless there is a clearly established violation of Rule 11 of the Tennessee Rules of Civil Procedure or for other contemptuous *or other sanctionable conduct.*” Tenn. Code Ann. § 36-5-101(1)(2)(emphasis added). Ultimately, the appellate court overturned the award because, “the trial court recited no authority for its award of attorney’s fees as sanctions,” and because the sanctioned conduct and the procedure followed did not comport with Tenn. R. Civ. P. 11. J.R.L., 2009 Tenn. App. LEXIS 417, *7-8. The court also noted that, “Rule 11 is the only authority which we find for awarding attorney’s fees as a sanction for attorney conduct intended to ‘cause unnecessary delay.’” J.R.L., 2009 Tenn. App. LEXIS 417, *8. However, in a footnote attendant to that quote the court acknowledged that Tenn. R. Civ. P. 37 allows sanctions for abuse of discovery.

Accordingly, Respondents submit that those sanctions explicitly provided by Tenn. R. Civ. P. 37 for failure to obey an order to provide discovery qualify as “other sanctionable conduct” contemplated by Tenn. Code Ann. § 36-5-101(1)(2). Additionally, Respondents again submit that pursuant to Tenn. R. Juv. P. 25 juvenile courts have the authority to order discovery pursuant to the Rules of Civil Procedure, and are, therefore, entitled to enforce their discovery orders, or to assess sanctions for a party’s failure to comply therewith, under the same Rules. Therefore, the juvenile court was within its authority to award attorney’s fees against the Department as a distinct sanction mandated by Tenn. R. Civ. P. 37.02.

VI. IN THIS ACTION, THE DISMISSAL OF THE DEPARTMENT'S PETITION WAS NOT AGAINST PUBLIC POLICY, AND WAS IN THE BEST INTEREST OF THE CHILD

In its order of December 30, 2009, the juvenile court specifically found that the dismissal of the Department's petition was in the best interest of the child. T.R. Vol. II, p. 292. Of course said finding was specific to the facts of this case. There is nothing in the record before this Court to preponderate against the juvenile court's finding. In fact, the juvenile court had been intimately familiar with this case, and the facts attendant thereto, for nearly two years. Certainly this Court will not substitute the trial court's judgment with its own when it is devoid of the facts essential to a determination of best interest.

Additionally, the juvenile court's order does not prejudice the Department in any way. If the Department believes the child is currently dependent and neglected, or is otherwise subject to some risk, there is absolutely nothing preventing it from filing a new petition for temporary custody. However, and rather tellingly, the Department has declined to do so.

Contrary to the Department's position, Respondents submit that the dismissal of the petition was mandated by public policy, fundamental notions of fairness, and due process. Our Supreme Court has held that parental rights are a fundamental liberty interest protected under Article I, Section 8 of the Tennessee Constitution. Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993). The Supreme Court further noted that, "the right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution." Hawk, 855 S.W.2d at 578, *citing* Meyer v. Nebraska, 262 U.S. 390, 399 (1923). As such, when the Department invokes the power conferred upon it by the State to disrupt a parent's liberty interest

in the custody of her child, it must afford that parent due process as required by the 14th Amendment to the United States Constitution, and Article I, Section 8 of the Tennessee Constitution.

Here, the Department had knowledge of, and access to, empirical evidence that tended to disprove its allegations against Respondents. Considering the substantial deprivation of liberty involved in the removal of one's child from her custody, Respondents submit that the Department was required by due process to disclose the existence of the exculpatory evidence — akin to the rule in criminal proceedings established by the seminal case Brady v. Maryland, 373 U.S. 83 (1963). At the very least, the Department's willful refusal to comply with the juvenile court's order directing the production of the surveillance tapes, or to file a written response as to why the production was impossible, warrants the dismissal of the Department's petition as a deterrent to the Department's future flouting of discovery orders issued by juvenile courts regarding evidence fundamental to a fair determination of the matter at hand.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the juvenile court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Phillips II, do hereby certify that a true and exact copy of the foregoing Appellees' Response to Appellant's Petition for Rehearing was served upon the following via U.S. Mail with sufficient postage affixed thereto:

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This 28th day of October, 2010.

William E. Phillips II