

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Chadwick R. Wood

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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 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.

I am presently self-employed as an attorney with the Law Office of Chadwick R. Wood. I serve as County Attorney for Henderson County, Tennessee. I am an adjunct professor at the University of Tennessee at Martin Parsons Campus. I am a member of the Lexington City School Board.

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

2001 #021766

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 #021766 2001 - Present

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).

Waldrop & Hall, P.A., Jackson, TN – Associate Attorney August 2001 – January 2003

Smith Law Firm, Lexington, TN – Attorney January 2003 – February 2012

Law Office of Chadwick R. Wood, - Attorney February 2012 – Present

County Attorney, Henderson County – July 2003 – Present

Lexington, City School Board – Member October 2013 – Present

The University of Tennessee at Martin, Parsons Campus, Adjunct Professor – January 2016 - Present

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

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 currently maintain a general practice with the major areas of law consisting of criminal defense work and domestic litigation. I also work in other areas of law that are common in a small town practice such as wills and estates, draft some deeds and minor business affairs. In addition, I serve as County Attorney for Henderson County advising all elected officials in their official duties.

Criminal Defense – 40%

Domestic Relations – 35%

County Government – 10%

Civil/Tort – 5%

Estate Planning/Wills/Probate – 5%

Business Transactions/Advice – 5%

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 practiced in a courtroom since literally the second day I was employed as an attorney. While that first case involved a debtor's exam (my second case involved an SUV hitting a pig in the road), my practice since has been wildly varied but primarily spent in litigation. I have practiced and appeared in the General, Sessions, Juvenile, Circuit and Chancery courts of Thirty Counties as well as the Bankruptcy Court and United States District Courts of West Tennessee. I have represented individuals involved in every type of criminal case from C Misdemeanors up to an including charges of first degree murder. The criminal cases I have handled have required an extensive knowledge of the applicable statutory and common law provisions relating to the crimes, procedure and evidentiary questions raised in order to effectively represent and protect the rights of my clients. The most voluminous criminal case I handled involved the representation of an individual charged and indicted on 151 counts of rape of a child. As one might imagine, the defense of that matter required considerable time and investigation. The cases involving "offenses against the person" are obviously more involved than property crimes or crimes against the administration of government in that there is a victim and a personal element on the other side of the equation. By seeing this duality of criminal representation, I feel that I am in a good position to serve as Court of Criminal Appeals Judge to effectively weigh the rights of all parties involved both defendant and victim.

Along with the criminal part of my practice, I have represented hundreds of clients in various civil matters ranging from simple debt collection to multi-state corporate litigation to divorces with martial assets in excess of one million dollars. As with any attorney who spent his entire practice in litigation I have become familiar with the inner workings of the court room and the entire Justice system.

In addition to the trial court practice, I have represented my clients on appeal to the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals. While I have filed applications for Permission to Appeal to the Tennessee Supreme Court I have not been successful on an application as of yet so I have not had the opportunity to appear before the Supreme Court.

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

IN RE: ADISON P., WILLIAM RHEA FAIN v. HON. ROBERT STEVIE BEAL, JUDGE, JUVENILE COURT FOR HENDERSON COUNTY, TENNESSEE W2014-01901-COA-R3-CV

While serving as County Attorney our local Juvenile Court Judge was served with a Complaint for Writ of Mandamus in the local Circuit Court. I had the unique experience of representing a Juvenile Court Judge in front of a Circuit Court Judge in the same county where they both served. At trial I raised what I believed to be valid questions as to the jurisdiction of the Circuit Court to have mandamus authority over a Juvenile Court Judge who essentially shared concurrent jurisdiction over the pending family law question. The Circuit Judge disagreed with my premise and ultimately found that he had jurisdiction. I appealed the matter to the Court of Appeals and presented the admittedly unique question of Mandamus authority over and "equal" trial level judge. The questions revolved around the statute which gave origin to the case

overseen by the Juvenile Judge (not the case appealed) to determine the correct method of appeal in the underlying case to determine if the Circuit Court would ever have any appellate jurisdiction over the case in questions. Unfortunately, due to circumstances in another pending appellate action this case was declared moot and no opinion rendered.

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.

I attended the training to be a listed Rule 31 mediator however I never practiced as a Rule 31 mediator or sought the continuing education to remain listed.

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.

In my early years of practice I served as Guardian Ad Litem in multiple cases for children in Juvenile Court matters of Dependency and Neglect. I consider the role of Guardian Ad Litem to be some of my most important work as an attorney. This role allowed me to help those that could not help themselves and in one notable case I was able to facilitate the placement (and adoption) of two young children with a loving family removing them from a horrible home environment. In so doing, I was often the only advocate in the courtroom fighting for that outcome of the children but they are still thriving today.

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

I have had the opportunity in my years of practice to represent individuals in a wide variety of types of cases in all aspects of representation. By having such a wide area of practice I am definitely no stranger to research which would serve me well as a Judge on the Court of Criminal Appeals.

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.

None.

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.

The University of Tennessee at Martin, August 1994 – May 1998, Bachelors of Science in Business Administration, Major – Accounting, Summa Cum Laude
Cecil C. Humphreys School of Law, The University of Memphis, August 1998 – May 2001, Juris Doctor

PERSONAL INFORMATION

15. State your age and date of birth.

40 years old, January 27, 1976

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

40 years, continuously since birth

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

7 years 5 months

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

Henderson 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.

None

20. Have you ever pled guilty or been convicted or are now on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

None

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.

None

22. Please identify the number of formal complaints you have responded to that were 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. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None

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.

None

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

None

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.

None

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.

Sand Ridge Baptist Church, Board of Directors Exchange Club/Carl Perkins Center for the Prevention of Child Abuse – Lexington, Constantine Masonic Lodge

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.

The Fraternity of freemasonry has all male members as is the case with most if not all fraternities. There is a corresponding Order of the Eastern Star open to female members along with other organizations for children and families under the same “umbrella” organization. I currently hold no office in this organization and am not involved in the day to day activities of the organization.

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.

Tennessee Bar Association, House of Delegates – Tennessee Bar Association 2012-Present
Tennessee Association of Criminal Defense Lawyers – 2012 – Present

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.

Rising Star in the area of Criminal Defense as awarded by Super Lawyers Magazine for 2012-2016.

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.

Political Science 220 – The University of Tennessee at Martin, Parsons Campus

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I was elected to be a member of the Lexington City School Board in September 2013 to a four year term which I still hold.

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.

Please see attached two separate appellate briefs one criminal and one civil. All works submitted are my own entirely.

ESSAYS/PERSONAL STATEMENTS

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

Since my entry into the practice of law I have viewed the proper application of the law as the central tenet to the Justice system. While I believe that we have an excellent trial court system, the Court of Criminal Appeals serves an additional measure to protect those rights in primarily their application. While the Court of Criminal Appeal is occasionally called upon to make findings of fact, a large percentage of the job of this Court is to ensure proper application of the law to the case at hand. I feel that my experience in the court room as well as my analytical nature lends itself well to this position and feel that I can be a great asset to the Court to ensure proper application of the laws of this state.

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)*

Throughout my career I have represented many indigent parties in criminal and juvenile Court actions when they could not afford an attorney. There are times when I have taken on a criminal case when no one would. I handled a case involving 151 counts of child rape when asked to by the local Court system. Obviously this representation was not popular in the community but I zealously represented the interests of my client to protect his rights. I have continually volunteered services to local charitable institutions and youth organizations when paying for legal services was prohibitive. I have defended the local Exchange Club/Carl Perkins Center for the prevention of Child Abuse from over reaching subpoenas to protect their confidential information. I assist local youth sports league and support organizations with their business corporation and non profit status issues. I have assisted local churches in real estate transactions and cemetery issues.

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

I seek appointment to the Tennessee Court of Criminal Appeals. The Court of Criminal Appeals consists of 12 judges with the judges divided with no more than four from each grand division of the state. With the appointment of Judge Page to the Tennessee Supreme Court there is now a vacancy in the West Tennessee Grand Division. My selection would impact the court in allowing an attorney who has extensive experience in the criminal justice system to serve on the Tennessee Court of Criminal Appeals. Furthermore, as a resident of rural West Tennessee my appointment would allow for Judge to sit in the Jackson, TN office as his primary office and to have a Judge present in the Jackson, TN at all times to handle any exigent issues that may arise.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

I have been extensively involved in youth sports while raising my children as coach, volunteer, board member and most importantly supportive parent. In addition I have donated time and money and served as a member of the local Exchange Club/Carl Perkins Center for the Prevention of Child Abuse. When appointed to this position, I intend to remain true to my public involvement in these issues. I have always been supportive of youth programs and believe that we need to continue to support our youth more especially in the current culture. Not to be clichéd, but our children are the future of this Country and will be the parents of our grandchildren. I will continue to do all I can to continue this support.

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)*

In my life, order has always been a presiding theme even going back to my childhood. My brother and cousins still make fun of me today for being a “rule follower” when we were younger. I believe that without rules society will crumble. The even and consistent application of these rules is a key to the proper functioning of our society. While I have never personally been a victim of a crime, I have seen the impact that crimes have on our society and the necessity of the system to prevent future occurrences. To ensure that society functions as it should, the people need to know that the laws will be applied fairly and consistently so that they feel that the institutions that are in place are for the benefit of all people. The core of my nature is the proper application of the rules and the rule of law. I will not be persuaded or unduly influenced by the emotional nuances of a certain case but will apply the law fairly and consistently to further uphold the gains in society and function in the history of this State and Country.

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

Yes, no question. As a defense attorney it is hard to come up with a specific example of upholding a law that I may disagree with. In representing my clients, I am typically at odds with the application of the law as to their current situation. The best example I can give relates to a criminal case in which a client was charged with stomach turning crimes and the discovery on the case was equally as reprehensible. However, a review of the statutes revealed an exception in the code that resulting in the maximum penalty against my client to be much lower than that originally charged. While, I realize that my job in that situation was to completely parse and review the applicable code sections, the interpretation I presented and argued was not popular in the courtroom but I felt I had to do what was right.

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. Jason Bates, Insurance Agent,

B. Dan Hughes, Henderson County Mayor,

C. Kurt Holbert, Business Owner,

D. Beverly Dunaway, Henderson County Circuit Court Clerk,

E. Michael Thorne, Attorney.

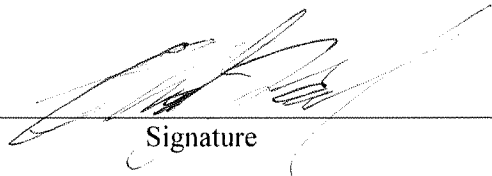
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Criminal Appeals 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: February 24, 2016.



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.

Chadwick R. Wood

Type or Print Name

[Signature]

Signature

2/24/2016

Date

21766

BPR #

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

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE
WESTERN DIVISION AT JACKSON**

MICHAEL V. RICCO

Plaintiff/Appellee,

v.

STATE OF TENNESSEE

Defendant/Appellant

Case Number

W2010-02626-CCA -R3-PC

HENDERSON COUNTY CIRCUIT

Trial Court No. 07-013-2

Honorable Donald Allen

BRIEF OF APPELLANT, MICHAEL V. RICCO

CHADWICK R. WOOD (#021766)
Attorney for Michael v. Ricco
85 E. Church St.
Lexington, TN 38351
(731) 968-2561

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STATUTES

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**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE
WESTERN DIVISION AT JACKSON**

MICHAEL V. RICCO

Plaintiff/Appellee,

v.

STATE OF TENNESSEE

Defendant/Appellant

Case Number

W2010-02626-CCA -R3-PC

HENDERSON COUNTY CIRCUIT

Trial Court No. 07-013-2

Honorable Donald Allen

MAY IT PLEASE THE COURT

For the sake of convenience, the Appellant, Michael V. Ricco, shall be referred to as "Appellant". The Appellee, The State of Tennessee, shall be referred to as "Appellee." The Department of Children's Service of the State of Tennessee shall be referred to as "DCS." The technical record of the case will be referred to as "Vol. 1", the transcript of Post-Conviction proceedings will be referred to as " Vol. 2" and Exhibit A of the Post Conviction proceedings (the original trial transcript) will be referred to as "Vol. 3."

ISSUES PRESENTED ON APPEAL

The Post Conviction Court was in error in denying the Appellant's Petition for Post Conviction Relief relying upon the legal and factual conclusion that the actions of the Trial Counsel were trial strategy.

- i. The Court was in error in its finding and ruling that any error or shortcoming in representation were trial strategy in that the actions of the counsel in preparing for trial did not meet the minimum standards set out for "reasonably competent" representation.
- ii. The Post Conviction Court erred in applying an incorrect standard as to the likely difference in outcome of trial given the errors of trial counsel and difficulty of trial jury in reaching a verdict.
- iii. Even with the presumption given to the correctness of the ruling by the Post Conviction Court the preponderance of the evidence shows that the ruling by the Court in denying the Petition for Post Conviction Relief was plain error and should be reversed.

I. STATEMENT OF THE CASE

After a jury trial and sentencing in the Circuit Court of Henderson County, Tennessee and an unsuccessful appeal to the Court of Criminal Appeals, the Appellant filed a pro se Petition seeking post conviction relief from his prior conviction. (Vol. 1 pp. 1-28). After hearing on the Post Conviction Petition, the relief sought by the Appellant was denied and an Order denying the same was entered on November 30, 2010. (Vol. 1 pp. 47-48). Counsel for Appellant timely filed a Notice of Appeal and this matter is currently before the Court. (Vol. 1 pp. 49-50).

II. STATEMENT OF THE FACTS

Upon being indicted for multiple counts of Rape of a Child, the Appellant was appointed Counsel for representation at the trial level from the office of the Public Defender. (Vol 1. pp.2-3) The appellant was represented during jury trial, sentencing and through appeal by Counsel from the Office of the Public Defender. (Vol. 1 p. 3). At the hearing upon the Petition for Post Conviction relief, there were two witnesses presented along with the presentation of the underlying trial transcript. (Vol 2.). Investigator Anthony Woodfin did admit during the post conviction hearing that his testimony during the jury trial was testimony not given from his firsthand information but from the information and records gathered by the previous investigator. (Vol 2. pp.9-12). Furthermore, investigator Woodfin testified that his prior testimony that he was present for the forensic interview performed in this case was false. (Vol. 2 p. 10).

The other witness called by the appellant was trial counsel, attorney Hewitt Chatman. Attorney Chatman testified that he did not know who had performed the investigation relied upon by Investigator Woodfin during his testimony but knew that investigator Woodfin was not present for the forensic interview. (Vol 2. pp. 19-22). Furthermore, Attorney Chatman testified that he did not speak to Alita Tucker or Michelle Valdez nor did he attempt to subpoena or review the records of the Department of Children's Services worker in this matter. (Vol. 2 pp. 17, 22-23). Attorney Chatman admitted that even though he didn't speak to these witnesses or know what they would testify to, he chose to call them anyway. (Vol. 3 pp. 15-31). After hearing on this matter, the court issued a written ruling denying the Petition for Post Conviction Relief.

III. ARGUMENT ON THE ISSUES PRESENTED ON APPEAL

I. The Court was in error in its finding and ruling that any error or shortcoming in representation were trial strategy in that the actions of the counsel in preparing for trial did not meet the minimum standards set out for “reasonably competent” representation.

After hearing on the Petition for Post Conviction relief, the Post Conviction Court denied the Petition stating, “(T)he petitioner’s trial counsel’s decisions were the result of *trial strategy*, but certainly did not rise to a level as to effect the outcome of trial in this case.” (Vol 1, p. 46)(emphasis added). It is the position of the appellant that this conclusion by the post conviction court is in error and is not consistent with the current laws and standards of the state of Tennessee. In the changing history of the determination of the standards for performance by trial counsel, the Tennessee courts have firmly established a three prong test for determination of “reasonably competent” assistance of counsel. Baxter v. Rose, 523 S.W. 930 (Tenn. 1975), State v. Burns, 6 S.W.3d 453 (Tenn. 1999). In quoting the case of United States v. DeCoster, the Baxter court relied upon the guidance given by the American Bar Association Standards for the Defense Function for a recitation of the guidelines for defense counsel. (Baxter. Quoting United States v. DeCoster, 487 F.2d 1997 (Ct. App. DC 1973)). As a result, the Tennessee Courts have utilized this guidance to refine the three pre-requisites for reasonable competent assistance of counsel:

(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them.... Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that “all available defenses are raised” so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Burns at 656.

The error in the case at hand relates to the application of the Burns pre-requisites by the Court. As stated earlier, in its ruling, the post conviction court held that any deficiencies in the representation of the appellant by appointed counsel were a calculated part of trial strategy. (Vol 1, p. 46). While it is undisputed that questions of trial strategy are left to the decision of trial counsel and are presumed correct, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Hellard v. State, 629 S.W.2d 4 at 9 (Tenn. 1982) and Cooper v. State, 847 S.W.2d 521, 528 (Tenn.Crim.App.1992)). In the present case, the failure of appointed trial counsel to properly investigate and prepare for trial rendered any strategy derived as ineffective.

The Third prong stated in Burns specifically identifies the duty of trial counsel to properly investigate a case for any possible defenses including the statement that trial counsel

“should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities”

Burns at 656. During examination at the post conviction hearing, appointed trial counsel Hewitt Chatman testified that he did not speak to Alita Tucker (the mother of the alleged victim) and

Michelle Valdez (DCS worker) prior to the trial in this matter to determine the content and information to be obtained from their testimony. (Vol. 2 pp. 17, 22). By his own admission, trial counsel did not speak to the DCS worker in regards to the subject of her testimony nor did he attempt to obtain discovery of any records from the department of children's services other than that he "sent letters to them." (Id. at 22). Admittedly, obtaining these records can present quite a few procedural hurdles but trial counsel did not even attempt to subpoena the records prior to trial to preserve some glimmer of possibility to address at further appellate review.

Even without speaking to these witnesses or knowing the content of their testimony, trial counsel proceeded to call these witnesses and ultimately elicit testimony harmful to the defense of the Appellant. (Vol 3. pp. 77-112). If trial counsel had properly and thoroughly investigated these witnesses and then still chose to present them at trial, the ruling by the post conviction court that any errors of counsel had been that of "trial strategy" would be correct. However, as established in Goad, this deference to "trial strategy" would apply only to strategy based upon adequate preparation. Goad at 368. The admitted actions of trial counsel are deficient and establish that he did not perform as "reasonably competent" counsel should in adequate preparation of a case. This failure to even prepare for this case at rudimentary level does not allow for "trial strategy" to even be developed. If a trial strategy was developed, it was deficient trial strategy that was detrimental to the rights of the appellant but the failure of counsel to even take the basic steps to prepare.

The post conviction court was in error in finding that any shortcomings of trial counsel were the results of trial strategy. The ruling and accompanying order do not provide any factual basis for a determination of trial strategy but reference the same as the reason for the denial of the Petition. The failure of trial counsel to even attempt to gather information about witnesses to be called at

trial, is on its face deficient representation by trial counsel. In this case, the failure of counsel to adequately prepare for trial rendered the legal assistance given to the appellant ineffective and in violation of his 6th amendment right to counsel. Said failure was not a failure of trial strategy but a failure to prepare in such a way to provide reasonably competent representation and resulted in ineffective assistance of counsel.

II. The Post Conviction Court erred in applying an incorrect standard as to the likely difference in outcome of trial given the errors of trial counsel and difficulty of trial jury in reaching a verdict.

In its ruling on the underlying petition, the post conviction Court held that even if the mistakes made by trial counsel had not occurred there would have been no difference in the outcome of this case. However, in making this ruling the trial court gave no basis for the finding that there would have been no difference in the outcome at trial. The United States Supreme Court has held that in matters of post conviction relief, the petitioner does not have to show that they would have been acquitted of the crimes charged but only that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would have been different*. Strickland v. Washington, 466 U.S. 668, 694 (1984)(emphasis added).

In order to prevail on his Petition for Post Conviction Relief, the appellant is not required to show that absent mistakes of counsel that the outcome of his trial would have been acquittal but merely that the outcome would have been different. In this case, the appellant was charged with six counts of Rape of a Child and convicted on one count of Rape of a Child and one count of a lesser included Offense of Aggravated Sexual Battery. Given the range and seriousness of that charge the appellant would suggest that the outcome to be looked at to determine if a

difference at trial is not limited to acquittal of the rape charges but a possibility of conviction of a lesser included offense. Both statutorily and judicially, the state of Tennessee has recognized Aggravated Sexual Battery as a lesser included offense to rape of a child and has even gone so far as to recognize Attempted Aggravated Sexual Battery as a lesser included offense to this charge. Tenn. Code Ann. § 39-13-504 (2010), State v. Biggs, 218 S.W.3d 643, 656 (Tn. Ct. Crim. App. 2006) (citing State v. Elkins, 83 S.W.3d 706 (Tenn. 2002)). The jury took this avenue in one of the Counts convicting the Appellant of the lesser included offense.

In regards to post conviction matters, the Court of appeals has ruled that there is a fine line between the indicted charge and certain lesser included offenses notwithstanding the chances of acquittal and that given a reasonable probability that the results of trial could have been different between the charged act and the lesser included offenses the conviction should be set aside. State v. Zimmerman, 823 S.W.2d 220 (Tn. Ct. Crim. App. 1992). The present case is similar to the Zimmerman matter in that there were obvious errors made by trial counsel in the presentation of a defense and the jury had a stated difficult time in reaching a unanimous verdict. It is the argument of the appellant that the blanket statement that there would have been no difference in the outcome of the trial is in error given the nature of the original trial proceedings over which the Post Conviction Court presided and would have reviewed again upon its stated review of the entire record. (Vol 2. pp. 44-46). At the time of trial, the jury had deadlocked after many hours of negotiations and presented a question to the Court in regards to lesser included offenses. (Vol. 3 pp. 195-200). After instruction, the jury returned the verdicts as outlined above including acquittal on two charges and mistrial on two others. The post conviction Court is in error in a cursory dismissal of the Petition for Post Conviction relief stating that the

outcome of the case was not affected. The errors of trial counsel show a reasonable probability that notwithstanding those errors, the conviction of the A felony rape of a child would likely have been a conviction of the lesser crime of Aggravated sexual battery. For those reasons, the denial of the Petition for Post Conviction Relief should be reversed and these convictions of the Appellant overturned.

III. Even with the presumption given to the correctness of the ruling by the Post Conviction Court the preponderance of the evidence shows that the ruling by the Court in denying the Petition for Post Conviction Relief was plain error and should be reversed.

In appellate matters seeking relief from a denial of a Petition for Post conviction Relief there is a presumption of correctness given to the factual ruling of the post conviction Court and the burden is upon the appellant to show that the evidence preponderates against the ruling of the Post conviction Court. Clenney v. State, 576 S.W.2d 12 (Tenn. Ct. Crim App. 1978), Graves v. State, 512 S.W.2d 603 (Tenn. Ct. Crim. App. 1973). The factual ruling of the Post Conviction Court in this matter was in error and the facts presented establish beyond a preponderance of the evidence that assistance rendered by trial counsel was ineffective. As stated above, the pre-requisites for “reasonably competent” have been set out by the Courts of this state and were not adequately followed by appointed trial counsel.

The Appellant would present that Trial counsel of the Petitioner failed to properly investigate the Sheriff’s department investigation of this matter and such failure to investigate renders ineffective his ability to defend the petitioner. Deputy Anthony Woodfin testified in this matter as if he had first person knowledge of the facts of this case going so far as to indicate he attended a forensic interview. (Vol 2. p. 10). The facts would show that all investigation in this matter was undertaken by Deputy David Dowdy with whom Trial Counsel never spoke with or

interviewed. (Vol. 2. pp. 18). If Trial Counsel performed the minimum investigation he would have had the knowledge and facts to raise certain objections to the testimony of Deputy Woodfin. All of the information testified to by Deputy Woodfin was inadmissible hearsay based upon the notes and investigation of Deputy Dowdy and by his own admission, trial Counsel admits that he should have at least attempted to object to the entry of the same and did not do so. (Vol. 2 p. 21). The testimony of Deputy Woodfin was the primary credible proof presented by the State in this cause and was prejudicial to the Defense. In his handling of the trial testimony of Investigator Woodfin, trial counsel was deficient in 2 of the three prongs of examination set forth in Baxter. Trial counsel did not take necessary steps for the suppression of evidence and did not adequately prepare or interview adverse witnesses to allow proper defense at trial and was therefore ineffective.

In addition, Trial Counsel was in error in his preparation and handling of the testimony of Michelle Valdez. The first witness presented the case in chief of the Defense was Michelle Valdez, a DCS employee who investigated the allegations against the defendant. Even though Tennessee law does not allow disclosure of the party making the initial report and trial counsel admittedly had no idea to the answer of the question solicited, trial counsel asked the DCS worker for the identity of the person making the initial DCS report. (Vol 2. p. 23). The witness was asked and identified Dr. Robert Lentz as the party making the initial report. (Id.) By asking this question, the Trial Counsel added another independent name to the record and facts of the case indicating that abuse had occurred even after close of the State's proof.

Furthermore, by presenting the DCS employee as a witness she was subject to cross examination by the State which was used very effectively by the State to introduce the forensic interview and its results which had not been introduced by the State during its case in chief. (Id. at

24). Trial counsel was well aware that the state had rested without introduction of the forensic interview and knew the forensic interview to be harmful. (Id.). Even though the defense had effectively “dodged a bullet” as to the introduction of the forensic interview, the actions of trial counsel allowed the same to be introduced. As stated in section I above, Counsel for the Appellant did not interview nor substantially review the investigation files of Ms. Valdez prior to calling her as his own witness at trial. (Id. at 22). As the Goad case established, poor preparation cannot be later cured by claiming that “trial strategy” backfired and resulted in an unfavorable outcome. Goad at 368.

Even though, trial strategy is left to the discretion of defense counsel, said counsel is under a duty to properly investigate and responsibly choose the methods by which this strategy is undertaken. The presentation of the DCS employee as a witness in this matter was flawed in its inception. Proper investigation would have revealed that she could provide neither exculpatory evidence nor helpful evidence of any kind. The information sought by counsel was wrong and inadmissible by law both of which would have been discovered with basic investigation. Furthermore, a review of the forensic interview contained in the files of the witness would have revealed that it contained information detrimental to the cause of the Defendant. A cursory review of the knowledge of the witness in conjunction with the applicable laws would have indicated that this witness could have offered no helpful testimony in any way.

In conclusion, the error of Trial Counsel in handling the two witnesses above was extremely prejudicial to the Defendant rising to the level of ineffective assistance of counsel. The State of Tennessee presented only three witnesses in its case in chief. (Vol 3. p. 3). Dr. Lisa Piercey provided no testimony as to the perpetration of the alleged offenses contained in the

indictment. Dr. Piercey testified only that there had been traumatic injury to the hymen of the victim at some point in her life. The testimony of Dr. Piercey was in no way accusatory of the Defendant and offered no opinion or proof that he had committed the crime. (Vol. 3 pp. 37-53). That leaves the two remaining witnesses for the State to use to prove the guilt of the Defendant. As presented above, Deputy Woodfin had no personal knowledge of the case and only relied upon the work of Deputy Dowdy. Complete investigation would have revealed this fact and allowed trial counsel to have the testimony of Deputy Woodfin either excluded or extremely discounted in the eyes of the jury. The remaining witness presented by the State, the alleged victim, presented multiple conflicting statements and a timeline of events that was all but impossible.

If not for the actions of trial counsel, the testimony of the victim would have been the only testimony upon which the jury could render a verdict finding that the Defendant had committed the alleged crimes. It was through the action and inaction of the trial counsel that the testimony of Deputy Woodfin and the testimony of Michelle Valdez and the forensic interview was admitted. In short, the actions of the trial counsel for the Defendant established more of a prima facie case for convictions than those of the Attorney General. The alleged “defense” of the defendant was more harmful to his cause and led to the conviction more so than the case in chief of the State. Therefore, as the preponderance of this evidence shows, the ruling of the Post Conviction court is not borne out by the evidence presented and should be reversed.

IV. Conclusion

Michael V. Ricco respectfully requests this Honorable Court to reverse the ruling of the Circuit Court and grant the Petition for Post Conviction Relief. The record has shown that appointed counsel did not meet the minimum standard for representation to ensure that the constitutional rights of the defendant were protected.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Chadwick R. Wood, certify that I have forwarded a true and exact copy of this Notice of Appeal by First Class, United States Mail, postage prepaid, to Robert E. Cooper, Jr., Attorney General, P.O. Box 20207, Nashville, TN 37202-0207 and Angela Scott, Assistant District Attorney, 514 S. Broad St., Suite B, Lexington, TN 38351 in accordance with Rule 20 of the Tennessee Rules of Appellate Procedure on this the _____ day of September 2010.

APPENDIX A

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DIVISION AT JACKSON**

IN RE: ADISON P.

**WILLIAM RHEA FAIN
PLAINTIFF/APPELLEE**

v.

**Case Number:
W2014-01901-COA-R3-CV**

**Hon. ROBERT STEVIE BEAL
JUDGE, JUVENILE COURT
FOR HENDERSON COUNTY,
TENNESSEE
DEFENDANT/APPELLANT**

**APPEAL FROM THE FINAL JUDGMENT OF THE
CIRCUIT COURT OF HENDERSON COUNTY, TENNESSEE
HON. ROY B. MORGAN, PRESIDING**

BRIEF OF APPELLANT, HON. ROBERT STEVIE BEAL

ORAL ARGUMENT REQUESTED

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**IN THE COURT OF APPEALS OF THE STATE OF TENNESSEE
WESTERN DIVISION AT JACKSON**

IN RE: ADISON P.

**WILLIAM RHEA FAIN
Plaintiffs/Appellee,**

v.

**Hon. ROBERT STEVIE BEAL
JUDGE, JUVENILE COURT
FOR HENDERSON COUNTY,
TENNESSEE**

**Case Number
W2014-01901-COA-R3-CV
HENDERSON COUNTY CIRCUIT**

Defendant/Appellant

**Trial Court No. 14-088-1
Honorable Roy Morgan**

STATEMENT TO THE COURT

MAY IT PLEASE THE COURT:

For the sake of convenience, the Appellant, Hon. Robert Stevie Beal, shall be referred to as "Appellant". The Appellee, William Rhea Fain, shall be referred to as "Appellee." The technical record of the case will be referred to as "Vol. 1", the transcript of the Motion to Dismiss on July 10, 2014 will be referred to as "Vol. 2" and the transcript of the hearing of July 28, 2014 will be referred to as " Vol. 3."

ISSUES PRESENTED ON APPEAL

Whether the Trial Court lacked the requisite jurisdictional authority to hear or rule on this matter.

Whether the trial court erred in not granting Appellants Motion to Dismiss at the close of the proof of this case in that the evidence presented was not sufficient to support the ruling given in that the appellant called no witnesses and did not present any proof at trial upon which a decision could be made.

Whether the trial court erred in its ruling by making legal findings in the underlying case that are not allowed in a mandamus action.

I. STATEMENT OF THE CASE

During the pendency of a paternity, visitation and support matter in the Juvenile Court of Henderson County, Tennessee the Appellee filed a Complaint for Mandamus Relief in the Circuit Court of Henderson County, Tennessee. (Vol. 1 pp. 1-50). In response, the Appellant filed a Motion to Dismiss pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure. (Vol. 1 pp 51-58). A hearing was held on the Motion to Dismiss on July 10, 2014 at which time said motion was denied. (Vol. 2 and Vol. 1 pp. 85-87) The appellant then filed an Answer to the complaint for mandamus. (Vol. 1 pp. 78-84) After hearing on the Complaint for Mandamus Relief, a Writ of Mandamus was granted by the Circuit Court and the same was entered on August 27, 2014. (Vol. 1 pp. 88-91). Counsel for Appellant timely filed a Notice of Appeal and this matter is currently before the Court. (Vol. 1 pp. 92-93).

II. STATEMENT OF THE FACTS

The Appellee was involved with the mother of his child in an ongoing custody battle in the Juvenile Court of Henderson County, Tennessee. The underlying Juvenile Court matter arose out of a paternity and custody action initially filed in the Juvenile Court of Henderson County, Tennessee in 2003. (Vol. 1 p. 2 Complaint ¶10). Apparently a dispute has arisen over parenting time and enforcement of the prior Orders of the Juvenile Court resulting in the filing of the Complaint for Mandamus Relief at question in this appeal. (Vol. 1. Complaint). At trial in this matter, the Appellee offered no witnesses to testify and presented no testimony in support of his complaint. (Vol. 3 pp. 1-29). During the final hearing on this matter counsel for the Appellee stated to the Court “(W)e won’t be attempting to present any proof today.” (Vol. 3 p.6 lines 1-2). As such, there was no proof presented to the Court upon which a factual ruling could be made. While counsel and the Court did reference the juvenile Court record at the hearing, the same was never made an exhibit at trial and not tendered to the Court for evidence leaving the court with no basis other than arguments of counsel upon which to make its decision. However, the trial Court did make certain findings as set out in the Writ of Mandamus entered by the Court. (Vol. 3 pp. 92-95).

III. ARGUMENT ON THE ISSUES PRESENTED ON APPEAL

I. The Trial Court did not have the requisite jurisdictional authority to hear or rule on this matter.

As was raised in pre-trial motion and again at hearing in this matter, it is the position of the Appellant that the Circuit Court of Henderson County, Tennessee did not have mandamus jurisdiction over the Juvenile Court judge presiding over a paternity and custody matter. The underlying litigation this cause was a Complaint for Mandamus Relief against the Juvenile Court Judge of Henderson County, Tennessee. The Appellee alleged as a basis for his complaint his reliance upon Tenn. Code Ann. §16-10-112 which allows the Circuit Court appellate jurisdiction over suits and actions “instituted before any inferior jurisdiction.” The “inferiority” or lack thereof of the Juvenile Court in paternity and custody actions is addressed by Tennessee Code Annotated §37-1-104(f) which states

(f) Notwithstanding any provision of law to the contrary, the juvenile court has **concurrent jurisdiction with the circuit and chancery court of proceedings to establish the paternity of children born out of lawful wedlock and to determine any custody, visitation, support,** education or other issues regarding the care and control of children born out of wedlock. The court further has the power to enforce its orders. Nothing in this subsection (f) shall be construed as vesting the circuit and chancery court with jurisdiction over matters that are in the exclusive jurisdiction of the juvenile court under § 37-1-103.
Tenn. Code Ann. §37-1-104 (West) (emphasis added)

Based upon the application of this statute, when deciding matters arising out of a paternity action including custody, visitation and support, the Juvenile Court is not inferior to the Circuit Court but shares concurrent jurisdiction with the Circuit and Chancery Courts. Furthermore, Tennessee Code Annotated §37-1-159 governs the appeal and review of matters from Juvenile court directing the appeal of *juvenile delinquent, unruly and dependent and neglect* matters to the

Circuit Court. Tenn. Code Ann. §37-1-159 (a)(2014 West). However the circuit court appellate jurisdiction from Juvenile Court is limited only to those three listed areas as set out in the statute. The limited inclusive effect of subpart (a) is reinforced by the later text of subpart (g) of the same statute which states:

(g) Appeals in all other civil matters heard by the juvenile court shall be governed by the Tennessee Rules of Appellate Procedure.

Tenn. Code Ann. §37-1-159(g)(2014 West)

Given the broad expanse of the language of paragraph (g) compared to the limiting language of paragraph (a) the application of this statute would confirm the appellate jurisdiction for cases involving paternity and custody (such as that involving the parties and child in this case) to be in the Tennessee Court of Appeals. The Tennessee Supreme Court in the case of In re: D.Y.H. confirmed this position in its ruling when it stated

It is clear from the statute that appeals from a juvenile court's final order or judgment in a unruly child or dependency and neglect proceeding are to be made to circuit court. Tenn.Code Ann. § 37-1-159(a). ***Appeals in all other civil matters heard by a juvenile court are governed by the Tennessee Rules of Appellate Procedure, which provide that civil appeals are to be made to the Court of Appeals.*** Tenn. R.App. P. 3; *see, e.g., Tenn. Dep't of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn.Ct.App.2006) (providing that appeals in termination cases are appealed directly to the Court of Appeals). In re D.Y.H., 226 S.W.3d 327, 329 (Tenn. 2007) (emphasis added)

Even notwithstanding the later findings and machinations of the litigation, the original jurisdiction and appellate jurisdiction are not changed once the case has been originated. Id.

While mandamus actions against judges are “drastic and extraordinary remedies” such mandamus authority does exist. Ex Parte Fahey, 332 U.S. 258, (1947). Mandamus authority over the “inferior” courts arises out of the inherent appellate authority of the higher courts as a “check” on the lower courts. When asked to opine on the authority of mandamus over a Court of

Record, the Tennessee Attorney General referenced the mandamus authority to that of an exercise of its appellate authority to Order the entry of an appealable order. Tenn. Op. Att'y Gen. No. 83-81 (Feb. 18, 1983)(copy attached). As such, based upon the stated reliance of the Appellee on Tenn. Code Ann. §16-10-112 (Circuit Court appellate authority over certain Juvenile Court actions) the Circuit Court would not have the Jurisdiction or authority to entertain or issue a writ of Mandamus against a Juvenile Court acting as a Court of record over which it has no appellate jurisdiction. The Tennessee Attorney General cited 52 Am.Jur.2d, Mandamus §304 in rendering the opinion on this issue quoting, “It seems clear ... that mandamus will not issue from one court to another of equal dignity or jurisdiction.” Id.

It is the position of the Appellant that the jurisdiction exercised by the Juvenile Court in the underlying action arose from Tenn. Code Ann. §37-1-104(f) regarding a Paternity action and the subsequent custody and support rulings that naturally follow a paternity action. As has been set out above, the appellate jurisdiction of such a matter would not lie with the Circuit court but with the Tennessee Court of Appeals. In his opinion, the Tennessee Attorney General stated:

“Thus, it would seem that a chancery judge is without power to issue a writ of mandamus against a circuit court judge, or vice versa.” Id.

Giving the status of the Juvenile Court of as a court of record in the underlying case with an appeal as of right to the Tennessee Court of Appeals, the Circuit court would not have the authority to order a Writ of Mandamus against the Juvenile Court Judge in this matter anymore than it could order a writ of mandamus against the Chancery Court Judge of the same district. Therefore, with the lack of authority and jurisdiction, the decision by the trial court in this matter should be reversed and the case dismissed.

II. The trial court erred in not granting Appellants Motion to Dismiss and Motion for Directed Verdict at the close of the proof of this case in that the evidence presented was not sufficient to support the ruling given in that the appellant called no witnesses and did not present any proof at trial upon which a decision could be made.

At the close of proof in the trial Court, the Appellant moved the Court to dismiss the complaint of the Appellee in that no evidence had been presented in support of the Complaint for Mandamus. (Vol. 3. p. 18 lines 16-22, p. 20 lines 3-4). As was reflected in the oral ruling, the Court denied said motions and continued to render a decision in this cause. It is the position of the Appellant that the rulings by the court to Deny the Motion to Dismiss and for Directed Verdict were in error due to their being no facts in evidence to support the claims of the Appellee.

In Appellate review of the factual findings of the lower court the review by the Court of Appeals is a de novo review with a presumption of correctness given to the factual findings of the trial court unless the preponderance of the evidence is otherwise and the appellate courts are to rely upon the record which sets for the facts established as evidence. Tenn. R. App. P. 13. Kendrick v. Shoemaker, 90 S.W.3d 566, 569–70 (Tenn.2002); Marlow v. Parkinson, 236 S.W.3d 744, 748 (Tenn.Ct.App.2007). The Appellate Court “ ‘is a court of appeals and errors, and we are limited in authority to the adjudication of issues that are *presented and decided* in the trial courts, and a record thereof preserved as prescribed in the statutes and Rules of this Court.’ ” In re Adoption of E.N.R., 42 S.W.3d 26, 31–32 (Tenn.2001) (quoting Dorrier v. Dark, 537 S.W.2d 888, 890 (Tenn.1976)) (emphasis added). State Dep't of Children's Servs. v. Owens, 129 S.W.3d 50, 56 (Tenn. 2004).

A review of the record of the trial Court hearing shows that there was no lawful evidence presented to the Court upon which the Court could make its ruling. Counsel for the Appellee stated as much in his opening statement when he said “(W)e won’t be attempting to present any proof today.” (Vol. 3 p.6 lines 1-2). At the final hearing on this matter, there was no witness testimony offered nor any witnesses sworn. The appellee referenced the trial record of the Juvenile Court but offered no sworn testimony in support of his position to explain why a writ of mandamus was necessary. It is the position of the appellant there was no evidence before the Trial Court upon which a ruling could be made. Although the presumption of correctness does apply, the presumption is just that, a presumption. The factual ruling of the Trial Court cannot withstand the necessary review when weighed against the lack of evidence presented.

In short, there was no legal evidence presented to the Court upon which the decision given in this case could be based. There was no testimony or evidence presented to the Court only arguments from counsel. As there was no factual basis for the ruling of the Court, the decision of the trial court should be reversed and a dismissal ordered.

III. The trial court erred in its ruling by making legal findings in the underlying case that are not allowed in a mandamus action.

Even if the trial court does have the jurisdiction to issue a Writ of Mandamus to the Juvenile court, the trial court exceeded its authority in ruling on the case sub judice. In the writ of Mandamus granted by the Court the court made the following findings (among others)

9. With regard to Mr. Fain’s Motion for Entry of Show Cause Order, the record in the Underlying Action reflects that Mr. Fain, acting through counsel, made proper service upon Ms. Parker by serving upon Ms. Karnes a copy of the motion by electronic mail to LanisKarnes@KarnesLegal.com on April 8, 2014 at 2:46 p.m. (CDT) followed by a “Petitioner’s Notice of Service of Pursuant

to Tenn. R. Civ. Pro. 5.02” sent by facsimile to Ms. Karnes’ office on April 8, 2014 at 2:54 p.m. (CDT), pursuant to Tenn. R. Civ. Pro. 5.02.

10. Because Mr. Fain’s Motion for Entry of Show Cause Order was properly served upon Ms. Parker through her attorney of record pursuant to Tenn. R. Civ. Pro. 5.02, service of process is unnecessary and he is entitled to have his motion heard.

(Vol. 1 pp. 93-94 Writ of Mandamus pp. 9-10). In making the findings and rulings as set out above, the Trial Court exceeded the authority granted to it in a mandamus action by directing the lower Court on how to rule in regards to service on one of the parties.

In discussing the rare occurrence of mandamus against a sitting Judge the Tennessee Supreme Court stated:

But the law makes a distinction between ministerial and judicial duties. In the former case, the particular duty imposed may be compelled; while in the latter, a judicial officer, when he fails or refuses to act, can be compelled to proceed and render some judgment in the case before him. ***But the Court issuing the writ will not direct him how to proceed, or what judgment to render***--that is left to his own high sense of duty as a judicial officer. He will be compelled to act--to discharge his duty, otherwise there would be a failure of justice.

Williams v. Saunders, 45 Tenn. 60, 81 (1867)(emphasis added). The trial court, in making the findings and rulings of paragraphs 9 and 10, exceeded the bounds of the authority of mandamus as contemplated in the Williams decision. The Trial Court made legal findings in the Juvenile Court case below in regards of service of process and in so doing essentially ordered the Juvenile Court to find that proper service had been made on one of the parties and to issue a ruling limited by the findings of the Trial Court that service had been made. As such, those rulings and findings exceed any scope of mandamus that may exist and are in error and should be reversed.

IV. Conclusion

Hon. Robert Stevie Beal respectfully requests this Honorable Court to reverse ruling of the Trial Court and dismiss the Complaint for Writ of Mandamus. Based upon the application of the law, the Circuit Court did not have mandamus authority over the Juvenile Court in this matter. Furthermore, It is clearly shown through the record that no legal evidence was offered in support of the Complaint. For all the reasons stated above, the decision of the Trial Court should be reversed and the Complaint of the Plaintiff dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I served a copy of the foregoing pleading via hand delivery or first class mail upon: Brian Schuette, Attorney at Law, 719 A Dishman Ln., Bowling Green, KY 42104
