

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) 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. 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.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally, you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to laura.blount@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Self- Employed, Attorney-at-Law, 2001 till present time

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

2001, TN BPR 021716

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, BPR #021716, Eastern District of Tennessee, United States District Court, Sixth Circuit, United States Court of Appeals, United States Supreme Court

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).

Prior to law school, I worked from 1982 till 1985 (while undergraduate school for mining engineering technology) for A.T. Massey Coal Company as underground coal miner, and section foreman. Then worked from 1986 till 1998 for Consolidation Coal Company as a underground coal miner, section foreman, and shift mine foreman. Left employment to go to law school. Worked in the mines as I was going to law school for Burton Hurley and for Consolidation Coal Company.

August 2001 through February 2002, clerk for the Honorable Judge Booker Stephens, McDowell County, WV after law school completion. From around Febuary 2002 till around August 2002 I

worked for Consol energy as deed researcher for coalfield degasification. From August 2002 till around March 2002, worked for David Dunaway and Associates as an attorney in LaFollette, TN. From March 2002 till present, I have been a solo practitioner (associating with the late Benjamin Pressnell, Esq. from 2003 till 2004).

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.

None

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.

Criminal Law, 30%, Divorce Law, 35%, Probate Law, 20%, and Property Line Disputes, etc., 15%. All of which is this is rough estimation.

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.

As far as criminal practice, I have been in criminal court either in general sessions court or circuit court, since I began the practice of law. I have taken court appointed and retained criminal cases during the entire length of time in both courts. On occasion, I have filed the appeals that my client's wished to file with the Criminal Court of Appeals Court of Appeals.

Be advised that I have just an extensive civil court experience in trial court and appellate work.

I have been a solo practitioner most of my career as a lawyer since 2003 and I have represented persons to best of my ability in State and Federal Court either civil or criminal cases for the last

25 years.

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

Attorney Ad Litem for possible juvenile defendant in the "Baby Haley" case in Campbell County, TN, 2005

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 am a Tennessee Supreme Court Rule 31 Listed Family Mediator since 2002 in which I have mediated several cases during that time.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have been appointed as GAL on several cases in Juvenile Court, Chancery Court and Circuit Court. I also have been appointed administrator to several estates and served in that capacity.

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 or similar 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.

Chancellor's position in the Claiborne County, Tennessee Chancery Court upon the death of

Chancellor Billy Joe White on or around date of his death of November 20, 2012. I do not recall the date of the meeting that my application was considered but it was before this same committee. I did not get enough votes to be submitted for consideration for appointment.

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.

Bluefield State College (University), A.S. Mining Engineering Technology, 1984

Bluefield State College (University), B.S. Mining Engineering Technology, 1984

Virginia Tech, working toward Masters, Mining Engineering, 1985, Quit due to lack of funds and needed to go to work.

Appalachian School of Law, J.D. 2001

PERSONAL INFORMATION

15. State your age and date of birth.

64 years of age [REDACTED] 1962

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

25 plus years

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

24 years in Claiborne Co., TN

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

Claiborne Co., TN

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 placed 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.

No.

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

No.

22. 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.

To my remembrance and my computer records for the past 25 years, there were three (3) formal complaints which were filed and all dismissed. There were also a few informal complaints years ago which were filed, and also dismissed.

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)?

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.

Yes, Plaintiff in fee dispute argument. Thomas J. Tabor Jr., Esq v. Gloria Milton, Claiborne County, Tennessee Generals Sessions Court No. 2021CV13250, judgment for the Plaintiff. The General Session case was appealed by defendant. Then same style, for circuit court 2021CV2259 in which judgment was overturned in favor of Defendant. That case was appealed to the Court of Appeals by the Plaintiff under case No. 7CH1-2017 CV-11, which was affirmed for the Defendant. Case is closed.

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.

NO.

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.

NO.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association, on and off from 2001 through 2026, a member of the association.
Claiborne County, Tennessee Bar from 2003 till present time.

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.

August 8, 2022 election, Ran unsuccessfully for Criminal Court Judge.

August 2006 election, Ran unsuccessfully for General Session Judge.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application 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.

See attached examples.

ESSAYS/PERSONAL STATEMENTS

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

I believe that I have the background, experience, practice experience and the grit to become a good appellate criminal court justice, if given the chance, and possibly a Supreme Court Justice, if given the chance. I will pursue the truth and the work the problem of the case with all diligence. I further believe that I can be a difference maker on the Eastern division of the Criminal Court of Appeals.

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)*

I served my pro bono time either in community legal aid workshops in this county or pro bono time in court on cases in which I did not get full pay or cases which I got underpaid.

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 think that I am a practical person and I look at things differently since this is my second career. I think that should be some common sense used with the application of the law which I believe that is what is intended by the drafters of the laws which I would be applying as a justice.

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)*

Did participate in contributions to food bank at my former church, Upper Room Ministries, New Tazewell, TN and missionary contributions to Philippines through my present church House of God, New Tazewell, TN. I gave contributions to KARM during the holidays for the feeding of the needy.

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)*

Work Ethic. I have always worked for what I have obtained by the help and grace of God.

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

Yes. I don't really have an example of this due to the fact I have agreed with the laws in the cases I have done.

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. Judge John McAfee	[REDACTED]
B. Judge Elizabeth Asbury,	[REDACTED] [REDACTED]
C. Judge Robert Estep,	[REDACTED] [REDACTED]
D. TN Senator Jessie Seal, TN Capitol Nashville,	[REDACTED]
E. Pastor Bill Chapman, House of God,	[REDACTED] [REDACTED]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Tennessee Criminal Court of Appeal 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 application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application 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 13, 2026.



Signature

When completed, return this application to Laura Blount at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

IN THE CRIMINAL COURT OF CAMPBELL COUNTY, TENNESSEE
AT JACKSBORO

STATE OF TENNESSEE)
Plaintiff,)

v.)

LINDSAY J. CRAW,)
Defendant.)

Case No. 18,137

FILED
CRIMINAL COURT - CAMPBELL COUNTY, TN
DATE 3.28.19 TIME 9:30 AM
BOBBY W. VANN CLERK
S. Monday
DEPUTY CLERK

MOTION FOR CHANGE OF VENUE

COMES NOW the Defendant, Lindsay J. Craw, by and through counsel pursuant to Rule 21 of the *Tennessee Rules of Criminal Procedure*, to move this Honorable Court for an Order granting changing the venue of the trial in this matter. As grounds for this motion, the Defendant Lindsay J. Craw would show to this Court that due to the undue excitement in the Campbell County, Tennessee community which may influence possible jurors from Campbell County, Tennessee, the Defendant Lindsay J. Craw cannot get an impartial jury for a fair trial as guaranteed by the Tennessee Constitution and the United States Constitution. The Defendant Lindsay J. Craw would show the following to this Honorable Court:

1. The trial in this case has not been set on the court's trial docket. However a status hearing has been scheduled by this Honorable Court on Monday, April 29, 2019 at 9:00 a.m.
2. The Defendant Lindsay J. Craw has been indicted by the Campbell County, Tennessee Grand Jury during the January 2019 term for Count One – First Degree Murder under T.C.A 39-13-202, a Class A Felony.
3. Undue excitement exists in the Campbell County, Tennessee Community due to media coverage on local television station websites and in local newspaper websites of the Defendants

case since the occurrence of the events which caused the death of Billy Ray Partin, Jr. on December 08, 2018. (SEE: Attached printed newspaper website account – Exhibits “A”). Upon her arrest the Defendant Lindsay J. Craw was housed in the Campbell County Jail in Jacksboro, Tennessee and subsequently released on \$100,000.00 secured bond.

4. Due to the fact that the Campbell County, Tennessee jury pool has been tainted by prejudicial media coverage, the Defendant would aver that she is entitled to protection under the Fourteenth Amendment of the United States Constitution, better known as the Equal Protection Clause, the Sixth Amendment of the United States Constitution, and under Article 1, §9 of the Tennessee Constitution which both guarantee the accused of an “impartial jury.” U.S. CONSTIT., 6th Amend. (Lexis 2018), TENN. CONST., Art. I, §9 (Lexis 2018).

5. Pursuant to Rule 21 of the *Tennessee Rules of Criminal Procedure*, this Court will have to consider if a fair trial with an impartial jury can be held in Campbell County, Tennessee. Rule 21 states: “(a) *Grounds for Change*. The court may change venue of a criminal case on the defendant’s motion or on its own initiative with the defendant’s consent. The court should order a venue change when a **fair trial is unlikely because of undue excitement against the defendant in the county where the offence was committed or for any other cause.**” TENN. R. Crim. Pro., Rule 21 (a) (Lexis 2018).

6. Furthermore, if this Court grants Defendant Lindsay J. Craw’s motion for change of venue, this Court will need to consider if a fair trial with an impartial jury can be held in the 8th Judicial District of the State of Tennessee. “(1) *Multi-County Circuit*. In a multi-county judicial circuit, **the court shall change the venue to the nearest county in the judicial circuit in which the prosecution is pending where the cause of changes of venue does not exist.** If the same cause for change of venue exists in all other counties in the judicial circuit, the court shall change

the venue to the nearest county where the same cause for change of venue does not exist. TENN. R. Crim. Pro., Rule 21 (d) (1) (Lexis 2018).

7. The Court needs to consider the standard in which a change of venue is to be granted. “Relevant factors to be considered in determining whether to grant a change of venue are (1) the nature, extent and timing of pretrial publicity, (2) the nature of publicity as fair or inflammatory, (3) the particular content of publicity, (4) the degree to which the publicity complained of has permeated the area from which the venire is drawn (5) the degree to which the publicity circulated outside the area from which the venire is drawn, (6) the time elapsed from the release of the publicity until the trial, (7) the degree of care exercised in selection of the jury, (8) the ease or difficulty in selecting the jury, (9) the veniremen’s familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire, (10) the defendant’s utilization of his peremptory challenges, (11) the defendant’s utilization of challenges for cause, (12) the participation by police or by the prosecution in the release of publicity, (13) the severity of the offense charged, (14) the absence or presence of threats, demonstrations or other hostility against the defendant, (15) the size of the area from which the venire is drawn, (16) affidavits, hearsay, or opinion testimony of witnesses, and (17) the nature of the verdict return by the jury trial. Tennessee Jurisprudence, Vol. 24, § 10, p. 534 (Lexis 2018).

8. The Defendant Lindsay J. Craw would aver that this Court should strongly consider the prejudicial media coverage that has created undue excitement in the Campbell County, Tennessee community in which she is to defend herself and consider the above stated relevant factors which allow this Court to consider the Defendant’s issue in having a fair trial with an impartial jury under the above-stated constitutional law. Under Rule 21 of the *Tennessee Rules of Criminal Procedure*, the Court may change venue, “when a **fair trial is unlikely because of**

undue excitement against the defendant in the county where the offence was committed or for any other cause. TENN. R. Crim. Pro., Rule 21 (Lexis 2018).

9. Due to the nature of this case, the Defendant Lindsay J. Craw would **reserve** the right to amend this Motion for change of Venue at any time prior to either the scheduled hearing or jury trial on this matter upon discovery of any further authorities, witnesses, affidavits, and evidence to support her motion.

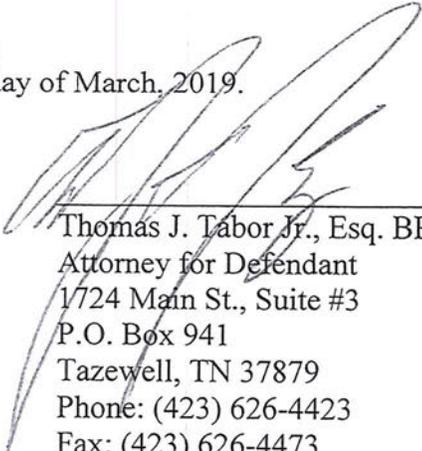
WHEREFORE PREMISES CONSIDERED; the Defendant Lindsay J. Craw hereby requests that this Honorable Court would:

A. **ORDER and DECLARE** that due to aforementioned reasons given by the Defendant Lindsay J. Craw, a change of venue is necessary to ensure the Defendant gets a fair trial by an impartial jury as guaranteed by the United States Constitution and the Tennessee Constitution.

B. **ORDER** that the change of venue be implemented pursuant to Rule 21 of the *Tennessee Rules of Criminal Procedure* from Campbell County, Tennessee to the new venue, as determined by the Court.

C. **ORDER** any further and general relief as foreseen by this Court for the Defendant Lindsay J. Craw.

Respectfully submitted this 27th day of March, 2019.



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Strickland v. Washington, 466 U.S. 668, 104 S. CT. 2052 (1984) 30, 32, 34

TREASTIES:

Criminal Procedure, Whitebread et. al., 3rd Ed. 1993, p. 873, § 32.03 30, 32, 34

Tennessee Criminal Trial Practice, 2006 Ed., Ward, Mark W. 28

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INTRODUCTION AND STATEMENT OF CASE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the Appellant/Defendant Gary Ray Weldon (herein known as “Appellant”), also being the same Defendant named in Campbell County, Criminal Court Case No. 18,059. The Appellant asks this Honorable Court to set aside the June 10, 2021 (*Order* filed on July 15, 2021) ruling of the Criminal Court of Campbell County, Tennessee, which denied his *Amended Petition for Relief from Conviction or Sentence* specifically stating “the claims made by the petitioner are not credibly supported and that the petitioner has not established that trial counsel’s ineffective assistance, if any, prejudiced the proceedings in such a way to change the outcome of the trial.” (SEE: T.R., Vol. 1, p. 45) ¹. The Appellant asserts that the claims are credibly supported by the evidence at trial, and that the Appellant did establish that trial counsel’s ineffective assistance prejudiced the proceeding in such a way as to change the outcome of the trial.

The Appellant requested relief from his conviction of solicitation of a minor to commit aggravated statutory rape in Case No. 16,812 entered before the same court by judgement via jury conviction on October 19, 2016. The State of Tennessee by the 8th Judicial District, Assistant District Attorney General’s Office (collectively herein known as either “Prosecution”, “State” or “A.D.A.G.”) argued against the Appellant’s *Amended Petition for Relief from Conviction or Sentence* in which Appellant alleged trial counsel did not provide effective assistance of counsel as guaranteed under the Sixth Amendment of the *United States Constitution*, and Article 1, § 9 of the *Tennessee Constitution*.

¹ Abbreviations used: T.R.=Technical Record (Vol. 1), T.T. Trial Transcript (Vol. 2), E.L.=Exhibit List (Vol. 3)

The Appellant exercises his appeal as of right, and asks this Honorable Court to reverse the trial court's denial of his *Petition for Post-Conviction Relief and Amended Petition for Relief from Conviction or Sentence* and to remand the case back to the Campbell County, Tennessee Criminal Court with this Court's order to set aside her jury conviction in Case No. 16,812, and order a new trial. The Appellant asserts that he was denied his right to effective assistance of counsel in his criminal case. The Appellant would show the following issue for appeal.

STATEMENT OF THE ISSUE

1. **WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S *PETITION FOR POST CONVICTION RELIEF AND AMENDED PETITION FOR RELIEF FROM CONVICTION* WHEN THE APPELLANT SHOWED EVIDENCE THAT (1) COUNSEL WAS INEFFECTIVE PURSUANT TO THE U.S. CONSTITUTION, AND (2) THE INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED HIS CASE?**

STATEMENT OF THE FACTS

During the January 2015 term, the Campbell County, Tennessee Grand Jury returned a one (1) count indictment against the Appellant Gary Ray Weldon. The indictment alleged that the Appellant committed solicitation of a minor to commit aggravated statutory rape, under Tennessee Code Annotated § 39-13-528, between November 1, 2014 and January 8, 2015.

The Appellant Gary Ray Weldon plead **not guilty** at his arraignment and at trial of the above-mentioned offense, (SEE: T.R., Vol. 1, p. 12, ¶ 5). The Appellant further demanded a jury trial of the matter, (SEE: T.R., Vol. 1, p. 12, ¶ 6).

On October 18-19, 2016, the Defendant was tried and convicted by a jury of one (1) count of solicitation of a minor to commit statutory rape, (SEE: T.R., Vol. 1, p. 12, ¶ 8). The Court record of the jury trial shows the following facts pertaining to trial counsel's failure to participate in reciprocal discovery:

"MR. KORTH: I have copies of various Facebook pages from her that have not been authenticated but could be authenticated by him. I thought that I had provided this to the State, I mean, way back before any -- you know, the discovery a year or year and a half ago. They don't have it. That's neither here nor there but --

THE COURT: Is there a notice of any sort of reciprocal discovery?

MS. SLEMP: Yes, your Honor.

MS. CADLE: We filed the typical notice for reciprocal discovery when he filed his motion for discovery. We provided discovery. We have not -- this is the first we've known about it.

MR. KORTH: Well, I -- and I'm not -- I'm not seeking to introduce these pages. I am seeking simply to let the defendant testify as to his frame of mind.

THE COURT: Well, I'm not going to allow the introduction of these documents, and to the extent -- I mean, would this fall under Rule 26 as a statement of a witness that must be provided when -- after testimony?

MS. CADLE: Yes, your Honor. I believe it's 26.3, if I'm going off the top of my head.

THE COURT: I mean -- and if that were the case, then the State would be permitted access to these statements and can cross-examine.

MS. CADLE: Well -- and I think that applies if you're using the statements of a witness to the same witness. My understanding is this is the victim's texts.

THE COURT: Well, right, but there's also statements of the defendant on there. I mean, we're talking about back and forth, are we not?

MS. CADLE: And I don't know because we've not seen it.

MR. KORTH: No, no. These are simply her posts.

THE COURT: Are you -- okay. The posts --okay. Then they do not fall under 26. I was thinking it was a --

MS. CADLE: Right.

THE COURT: -- something that we had just seen, a dialogue.

MR. KORTH: No. This is simply --

WITNESS: They were posts.

THE COURT: What were the posts -- I mean, what do you intend to get from this witness concerning --

MR. KORTH: Well, he was -- he was just about to testify that she posted things about being suicidal, she had posted things about drugs and alcohol, she had posted several things, some of them more striking than others, but again, your Honor, I wish to allow him to testify as to the things he found out, not necessarily that they're true but just the basis for his concern." (SEE: E.L., Vol. 3, Jury Trial Transcript, Vol. 2, p. 193-196); (also SEE: T.R., Vol. 1, pp. 17-18).

The trial Court did not allow any evidence into the record due to trial counsel's lack of notice. Furthermore, during the jury trial, the Court observed former counsel Dan Korth's failure to argue hearsay objections as to the thirty-eight (38) pages of photo text messages that were not authenticated pursuant to the rules of evidence. The Court record shows the following facts:

"MS. SLEMP: Your Honor, the State would move to admit these as State's collective Exhibit 1.

THE COURT: How many do you have?

MS. SLEMP: I think we have 38.

THE COURT: Let me see the format. Okay. Objections?

MR. KORTH: Yes, your Honor. I don't know if they are all relevant. There's a lot of conversation in these 38 pages and --

THE COURT: When you say you don't know that they are relevant, are they irrelevant?

MR. KORTH: Well, they may be. I mean, the State's already admitted there's a lot of stuff that's mundane.

THE COURT: Well, overrule the objection. I need more than that. I mean, if there is something specifically that you are objecting to and if you want to go through as they are published --

MR. KORTH: Yes.

THE COURT: -- you may object at that time but I haven't seen them in substance so I'll need to rule on them as we go.

MS. SLEMP: Thank you, your Honor.

THE COURT: Be received as Exhibit 1 consisting of 38 different – what appears to be photographic paper documents; is that right?

MS. SLEMP: Yes.

THE COURT: Ladies and Gentleman, you'll receive these exhibits. Are you publishing on the overhead?

MS. SLEMP: Yes, your Honor.

THE COURT: All right. Publication means how we show them in the Courtroom but when you deliberate the case, you'll have the actual exhibits in the room with you, so it's not the last time that you will see them, but the method we're using in Court today is the overhead. So go ahead.

(Exhibit 1 – filed and published to the Jury.)” (SEE: E.L., Vol. 3, Collective Exhibit 1, Jury Trial Transcript, Vol. 1, p. 125, Line 8 – p. 126, Line 21); (also SEE: T.R., Vol. 1, pp. 18-20).

The Court also saw during the jury trial that former counsel Dan Korth further failed to object to entrance of State's Exhibit 2, which was a handwritten statement. The Court record shows the following facts:

“CROSS-EXAMINATION

BY MS. CADLE:

Q. Mr. Weldon, what blame do you take in this whole thing? You seem to blame the victim. You blame Detective Jeffers. You tried to squeeze in - even blaming his son. Do you accept any blame in this situation?

A. Yes. Yes, ma'am, I do.

Q. What is it?

A. I handled the situation wrongly, I did.

Q. You did wrongly, that what you're saying?

A. I handled the situation wrongly.

Q. Okay. Now you stated in your statement to detective Jeffers that you had sexual conversations and that you had let them go too far; is that correct?

A. That's what that says. That is not what I stated. That is what the report says. That is not what I said.

MS. CADLE: Let me retrieve this.

Q: And I'm looking at now what is Exhibit 2. Follow my line if you look there. Is this your initial?

Yes, ma'am, it is.

Q. Okay. And this one may be a little more difficult. Is this one up here your initial?

A. It sure is.

Q. And when detective Jeffers talked to you, he had you write your initial where your statement began; is that correct?

A. He did, yes, sir (sic).

Q. And you're saying you did not read any of that paragraph except the first two lines?

A. I'm saying that I read the first part of that, and that is whenever that I seen that this was not going right.

Q. Okay. But, knowing that, you still initialed down here?

A. I -- yes, ma'am.

Q. At the end of this paragraph?

A. Can I tell you why I did that?

Q. I'm just asking you a question. You still initialed down here at the end of this paragraph, correct?

A. Yes.

Q. Okay. And you --

MR. KORTH: Your Honor, I'd ask that the witness be given a --

THE COURT: Overrule the objection. This is cross-examination. You can redirect.

Q. And in an effort to not have anything added after the fact is why all this scribble is down, and that goes through your initials, "X", all the way to the bottom so nothing else is written there, correct?

A. Yes, ma'am.

Q. Adopting this statement. That's what your signature means, isn't it?

A. It doesn't mean that I agree with that statement, no, ma'am.

Q. Okay. So you are telling the truth in this statement, or are you telling the truth today? Because you've got your John Hancock there.

A. Ma'am, I didn't write that statement.

Q. I'm asking you. Are you telling the truth in that statement, or are you telling the truth today?

A. I'm telling you the truth today, and I'm also telling you I did not write that statement.

Q. So, what's in there is not truthful. You weren't being truthful in that statement, is that what you're saying?

A. I didn't write that statement.

Q. Okay.

Q. Detective Jeffers wrote that statement." (SEE: E.L., Vol. 3, Collective Exhibit 1, Jury Trial Transcript, Vol. 2, p. 217, Line 2 – p. 220, Line 3, emphasis added); (also SEE: T.R., Vol. 1, pp. 22-25)

Additionally, the trial Court witnessed former counsel Dan Korth's failure to subpoena necessary witnesses for the defense in preparation for the trial. The Court record shows the following facts:

"THE COURT: Your next witness.

MR. KORTH: Joseph Weldon.

BAILIFF: Witness did not answer.

THE COURT: Call for him. If he's not here, he is passed. Has this witness been released?

MS. CADLE: Yes, your Honor.

DEFENDANT: His brother may have come and picked him up. I didn't know he was gonna be called.

MR. KORTH: He's under a subpoena.

THE COURT: Is he under subpoena by the Defense?

DEFENDANT: No, sir.

MR. KORTH: No.

DEFENDANT: Right there is the only subpoena my son --

THE COURT: Mr. Weldon, you've got a good lawyer.

DEFENDANT: I'm sorry.

THE COURT: He needs to address me. Has he been released by the State?

MS. CADLE: Yes, your Honor.

THE COURT: **Did the defense have him under subpoena?**

MR. KORTH: **No, your Honor.**

THE COURT: All right. Your next witness.

MR. KORTH: Defense rests.

THE COURT: Rebuttal?

MS. SLEMP: No rebuttal, your Honor.” (SEE: E.L., Vol. 3, Collective Exhibit 1, Jury Trial Transcript, Vol 2, p. 265, Line 21 – p. 266, Line 24, emphasis added); (also SEE: T.R., Vol. 1, pp. 28-29).

Prior to sentencing and upon request of the Appellant, the trial court allowed Appellant's former retained counsel (Dan Korth) to withdraw and counsel, (Matthew G. Roberts) was subsequently appointed to Appellant for the purpose of sentencing, (SEE: T.R., Vol. 1, p. 12, ¶ 9). The sentencing hearing was heard by the Honorable E. Shayne Sexton on April 17, 2017, (SEE: T.R., Vol. 1, p. 12, ¶ 10). The Appellant was sentenced to one (1) year at thirty percent (30%) as a Range I offender, to be served incarcerated with the Tennessee Department of Corrections, (SEE: T.R., Vol. 1, pp. 11-12, ¶ 4). A *Motion for New Trial* pursuant to Tenn. R. Crim. P. 33 was heard and denied on June 26, 2017, (SEE: T.R., Vol. 1, pp. 12-13, ¶ 11-12). During the hearing on Petitioner's *Motion for New Trial*, the Court record shows the following additional facts pertaining to former counsel Dan Korth's failure to argue hearsay objections to the entrance of State's collective Exhibit 1:

“MR. ROBERTS: Your Honor, the second ground for - on behalf of the motion would be that the trial court erred in overruling the defendant's objection to the admission of State's collective Exhibit 1 of -- I believe it was 38 pages of -- it was

pictures of text messages, and the Defense would argue that these were hearsay and they were not properly authenticated.

THE COURT: Was there a contemporaneous objection made at the time?

MR. ROBERTS: There was, your Honor. The previous attorney had objected on the grounds that they were irrelevant. The Court overruled that objection.

THE COURT: There was no hearsay objection made?

MR. ROBERTS: There was not, your Honor.

THE COURT: Now, what are these text messages of?

MR. ROBERTS: They were conversations between -- they were alleged to be conversations between the victim and Mr. Weldon. However, the victim could only testify that she recognized the number to be him, that there was no evidence produced stating that this number belonged to Mr. Weldon short of Mr. Weldon later giving testimony. Once -- at the time the exhibit was introduced, there was no authentication that these messages were from Mr. Weldon.

THE COURT: How did -- how did the State get them in? Who was the proponent of the -- the victim?

MR. ROBERTS: Yes, your Honor.

THE COURT: All right. I'm looking at these exhibits. Looks like there's quite a large number of photographs of text messages. There is a number at the top of page one, 423-494-0608. Did the witness contend that was the Defendant's phone number?

MR. ROBERTS: She did, your Honor.

THE COURT: Okay. And did Mr. Korth -- he object to relevance?

MR. ROBERTS: He objected on the grounds of relevance.

THE COURT: Not hearsay?

MR. ROBERTS: Yes.

THE COURT: Is that correct?

MR. ROBERTS: Yes.

THE COURT: Ms. Slemp?

MS. SLEMP: Yes, your Honor. The State would add that first of all, the State's position that the hearsay objection was waived because Mr. Korth only objected on the grounds of relevancy. The alternative, the defendant himself testified if the Court will recall and admitted that he sent those messages. He said that he was the person that sent them and that he, in fact, did send those to this victim, he corroborated her testimony. And lastly, that even if it wasn't waived, these messages aren't hearsay because they are opposing party admissions.

MR. ROBERTS: And your Honor, the Defense would submit that the victim has no way of knowing that Mr. Weldon was the person who sent these messages. She stated that she identified the number as his, but that doesn't mean he's the one who sent them.

THE COURT: It sounds as if --

MR. ROBERTS: It was only later that Mr. Weldon took the stand. At the time that this evidence was introduced, there was no way the State -- the State had not produced any evidence that these were sent by Mr. Weldon.

THE COURT: All right. I'm gonna find that the hearsay objection, even if it were valid, was waived because it was not contemporaneously made. The -- so I never get to the issue of the validity of it, although I think it -- had it been raised, I probably would have allowed it with proper authentication by the proponent. There are ways around that. I understand what you're saying Mr. Roberts. Had he not -- his testimony doesn't clean it up if it's a problem. It should never have been entered according to you, however I'm finding that the lack of -- the lack of objection at the time constitutes a waiver of this issues and the Court's gonna overrule that basis for a motion for new trial." (SEE: E.L., Vol. 3, Sentencing Hearing, Motion for New Trial & Motion to Reduce Sentence Transcript, p. 21, Line 23 – p. 25, Line 2, emphasis added); (also SEE: T.R., Vol. 1, pp. 20-22).

The court further saw that former counsel Dan Korth failed to argue reasonable doubt at any time during the Appellant's jury trial. The trial court record shows the following facts:

"MR. ROBERTS: Your Honor, the third ground would be that there was insufficient evidence to support a verdict of guilt beyond a reasonable doubt as to

count one. Mr. Weldon was convicted of solicitation of a minor to engage in aggravated statutory rape.

The Defense would submit that there was no evidence presented to establish that the act solicited, if it had been completed, would have constituted aggravated statutory rape. And aggravated statutory rape or any rape, there has to be some showing of penetration. Other than the victim's testimony of what she thought Mr. Weldon was referring to, Mr. Weldon -- the only evidence that was introduced through texts only showed that Mr. Weldon was talking about hugging and making out. And at one point, she had asked -- or Mr. Weldon had asked if the victim would touch it, referring to his penis. We would submit that at most, the evidence would be sufficient to sustain a conviction of solicitation of a minor to engage in sexual battery, not statutory rape.

THE COURT: Ms. Slemper or Ms. Cadle.

MS. CADLE: Your Honor, if the Court recalls, there was a number of text messages that talked -- that where Mr. Weldon sent this victim messages about them being in the shower and her touching him. And also, if the court recalls specifically, he said he would, "take it slow with the victim, intercourse slow." So we think that's enough to show that his intent was to have sexual intercourse with this juvenile, and that's why the conviction should stand.

THE COURT: Has a transcript of the trial been filed at any point?

MS. SLEMP: Yes, your Honor.

MR. ROBERTS: Yes, your Honor.

THE COURT: Okay. Was it filed at a previous proceeding?

COURT REPORTER: After the sentencing.

THE COURT: It was filed after sentencing?

COURT REPORTER: Yes, your Honor.

THE COURT: Okay, we need to make reference to that filing for purposes of this hearing, that the transcript of the pretrial, trial, and sentencing portions have been referred to in this hearing. What was he convicted of?

MR. ROBERTS: Solicitation of a minor to engage in aggravated statutory rape. It's an "E" felony.

THE COURT: Solicitation of a minor in the commission of certain offenses. And this particular one was aggravated statutory rape.

MR. ROBERTS: Yes, your Honor.

THE COURT: And you're saying that there is no evidence that the defendant moved toward a penetration type offense?

MR. ROBERTS: Yes, your Honor.

THE COURT: Ms. Cadle, you referred to a portion of the trial where the defendant alluded to taking it slow?

MS. CADLE: Yes, intercourse slow, your Honor. It was in the text messages as filed as Exhibit 1, I believe toward the end of that exhibit. It's a multipage exhibit.

THE COURT: Did we have this discussion at trial?

MS. CADLE: No, and it wasn't raised --

THE COURT: This was never raised at trial?

MS. CADLE: It was never raised in an objection or an issue.

THE COURT: I'm -- did I give lesser included -- did I charge any lessers?

MS. CADLE: I don't believe so.

MR. ROBERTS: No, your Honor.

THE COURT: Let me look this case over a little bit on that ground. I want to make sure we got that right. I'll make a ruling on that today, but I need to -- Shasta, can you -- I want the trial transcript.

CLERK: Okay.

THE COURT: Now, this last basis or this last motion -- anything else that you want to raise in your motion for new trial?

MR. ROBERTS: Your Honor, the -- lastly, just that the defendant was denied a fair trial by a combination of all of the foregoing errors.

THE COURT: Okay. I'll group that in with my other announcements. Now this second motion for reduction or modification of the sentence." (SEE: E.L., Vol. 3, Collective Exhibit 1, Sentencing Hearing, Motion for New Trial, & Motion to Reduce Sentence Transcript, p. 25, Line 3 – p. 28, Line 13, emphasis added); (also SEE: T.R., Vol. 1, pp. 25-28).

The Appellant exercised his right to appeal the conviction to this Tennessee Court of Criminal Appeals on the ground that the evidence was insufficient to support the conviction by jury for Solicitation of a Minor to Commit Aggravated Statutory Rape on or around July 21, 2017, in Case No. E2017-01474-CCA-R3-CD. The Appellant's appeal was denied by this Tennessee Court of Criminal Appeals on July 9, 2018. The Appellant did not appeal to the Supreme Court, (SEE: T.R., Vol. 1, p. 13, ¶ 13).

On or around November 27, 2018, the Appellant filed his *Petition for Post-Conviction Relief* in the Criminal Court for Campbell County, Tennessee sitting at Jacksboro under Case No. 16,812, (SEE: T.R., Vol. 1, pp. 1-2). On or around March 19, 2019, a *Preliminary Order (Colorable Claim)* was issued under Case No. 18,059, in which the court found the Appellant's petition presented a colorable claim, (SEE: T.R., Vol. 1, p. 10), and appointed present counsel to represent Appellant in the Post-Conviction Relief proceeding, (SEE: T.R., Vol. 1, pp. 34-35).

On or around April 11, 2019, Appellant filed his *Amended Petition for Relief from Conviction or Sentence* with the Campbell County, TN Criminal Court in Case No. 18,059, (SEE: T.R., Vol. 1, pp. 11-33).

On June 10, 2021, the trial on the *Petition for Post-Conviction Relief and Amended Petition for Relief from Conviction or Sentence* was held. The trial court issued an *Order* on that date denying Appellant's petition, (SEE: T.R., Vol. 1, p. 45).

During the trial on the Appellant's *Petition for Post-Conviction Relief and Amended Petition for Relief from Conviction or Sentence*, Matthew Roberts, Esq. gave the following testimony regarding deficiency of trial counsel's performance:

“Q. Tell me your relationship with Mr. Gary Weldon.

A. I was appointed to represent Mr. Weldon after he was convicted on this case and prior to his sentencing hearing.

Q. And can you tell the Court exactly what was the situation that you got appointed to him?

A. My understanding, Mr. Weldon was unsatisfied with Mr. Korth's representation. After his trial and his conviction, he asked the Court for permission to discharge Mr. Korth.

Q. And when you picked up the case, what did you do as his attorney in investigating the case?

A. So, when I was appointed, the first thing that we had to – the first thing that I had to do is prepare for the sentencing hearing.

Q. Uh-huh (yes).

A. I received some of Mr. Korth's file, was able to go through and, of course, I discussed the case with Mr. Weldon, and we – I believe the Court Reporter also prepared the transcript from the trial so I could go through that. And I – we had the sentencing hearing not long after that, so I'm not sure –

Q. And you filed motions with the Court?

A. After the sentencing hearing, yes.

Q. Okay. So the sentencing hearing was completed and then you filed motion for new trial?

A. That's correct.

Q. And you also filed some other motions, didn't you?

A. I did. I filed a motion under Rule 35 asking to reduce or modify Mr. Weldon's sentence.

Q. All right. Can you please tell the Court the grounds that you put forth for the motion for new trial?

A. So in reviewing the transcript of the trial, there were only a few objections raised at trial that I was able to see, so in my motion for new trial, I raised those same objections and then also the – you know, the catchall provision that Mr. Weldon was denied a fair trial.

Q. The one particular motion that you had filed about an objection, I think Mr. Korth raised the objection of its relevance or irrelevant evidence.

A. Yes.

Q. And the -- could you tell the Court more about that?

A. So at trial, the State introduced a -- I believe it was a collective exhibit of various photographs of text messages that were alleged to be between the victim and Mr. Weldon, and Mr. Korth objected on the grounds of relevance.

Q. Okay.

MR. TABOR: And Judge, may I approach the witness?

THE COURT: Yes.

MR. TABOR: Judge, let the record reflect I'm showing the State the exhibit that was sent to me from the Court of Appeals.

THE COURT: Now, has this previously been admitted at some point?

MR. TABOR: Yes.

THE COURT: What is it?

MR. TABOR: It's Exhibit 1 from the jury trial.

THE COURT: Okay.

MR. TABOR: May I approach, Judge?

THE COURT: Yes. Move about the Courtroom as you need to.

Q. Is that the exhibit that you are talking about?

A. Yes, it is.

Q. And what did you raise to the Court in your motion about that exhibit?

A. In my motion for new trial, I attempted to raise the objection that this -- the exhibits were hearsay and were not properly authenticated.

Q. And what do you mean by not properly authenticated?

A. When the State offered the exhibit, the witness just testified that, these are text messages that I received from Mr. Weldon.

Q. And the witness you're talking about?

A. I believe her name is Carrie Ferra.

Q. Was that the victim in the case?

A. That was the victim in the case.

Q. Go ahead.

A. She just -- her knowledge was that these were messages from Mr. Weldon. That's what her testimony was.

Q. And did you find in your research for this case in your motion – did you find where Mr. Korth found any documentation from the telephone company on this phone number?

A. No, there was nothing in the record establishing that that number was Mr. Weldon.

Q. Was there anything in the record that showed that the prosecution subpoenaed the phone records?

A. No.

Q. So the only link between Mr. Weldon and these text messages is the victim's testimony?

A. At the time the State offered this exhibit, yes.

Q. What did Mr. Korth object to at that time?

A. Mr. Korth objected on the grounds of relevance, and I believe that was it.

Q. And that was your review of the record?

A. Yes.

Q. And what happened to his objection?

A. It was overruled.

Q. All right. Now, let's go to your motion of (sic) new trial. You raised that – the objection of hearsay?

A. That's correct.

Q. And what was the findings of that?

A. I believe the finding was that because the hearsay objection and the authentication objections was not raised at trial, it was waived. Mr. Korth had only raised the objection that it was irrelevant and because the objection to hearsay was not contemporaneous, then it was waived, and I was barred from raising it at the motion for new trial.

Q. Was there an ADAG officer, Ms. Slemph, in the fray of this motion – was she in that motion for new trial?

A. Yes.

Q. Did she also say something else about the reason that they thing that objection was waived by the Defense that you can remember?

A. From what I can recall, Ms. Slemp simply stated that because the objection was not raised it was waived, and Mr. Korth had only objected on the grounds of relevance.

Q. Okay. Now, when you raised it at the motion for new trial, what was the ruling against you on the new trial?

A. It was overruled.

Q. All right. What else did you find during your investigation for your motion for new trial that stood out to you?

A. I believe in reading through the transcript of the trial there was a portion where Mr. Weldon was on the stand testifying, the jury was sent out, and there was some discussion about things that Mr. Weldon wanted Mr. Korth to introduce that had not been submitted to the State in reciprocal discovery.

Q. And that reciprocal discovery, did you find evidence of the reciprocal discovery when you were getting ready for your representation of Mr. Weldon?

A. Mr. Weldon did provide me with the items that he wanted Mr. Korth to raise or to at least give to the State in reciprocal, and they were various items, screen shots from Facebook, I believe newspaper clippings, things of that nature.

Q. But you – did you see any evidence under Rule 26 of the Tennessee Rules of Criminal Procedure of transmission to the State?

A. I did not, no. And in fact, I believe the State on the record stated that they had not received anything and – from Mr. Korth.

Q. And they said that actually in both hearings, am I correct, the motion for new trial and –

A. I believe that is correct.

Q. And of course, since you were talking over post-trial, there was nothing you could do to correct that, correct?

A. That's correct.

Q. Was there another instance that a subpoena was involved or questions were brought up about a subpoena of Gary Weldon's son that you remember from the record?

A. I remember some discussion of that, I do not remember the specifics of it. I seem to recall Mr. Weldon indicating that his son was subpoenaed given – having been given a – just a business card, and it was not an actual subpoena.

Q. Did the State actually have Gary Weldon's son subpoenaed to your knowledge?

A. Not that I can recall.

Q. Was there any subpoena from the Defense counsel asking for Gary Weldon's son to be available?

A. Not that I can recall?

Q. Did you file an appeal in this case?

A. I did.

Q. And that appeal went up to the Criminal Court of Appeals?

A. It did.

Q. And you prosecuted it?

A. Yes.

Q. Or I mean you defended it?

A. I did.

Q. And then you went up, and what was the decision of the Court of Appeals?

A. The Court of Criminal Appeals upheld the decision of the trial Court and upheld the verdict.

Q. During the time that you were representing Mr. Weldon, how many times did you meet with him?

A. We met – I do not recall the exact number. We spoke multiple times.

Q. Personal meetings, telephone calls?

A. Both.

Q. There was something else I was specifically wanting to ask you.

MR. TABOR: Can I retrieve the motion exhibit – or the motion for a new trial? Just a few seconds, Judge. May I approach, Judge?

THE COURT: Yes.

Q. This is your transcript of the motion for new trial. Do you remember that exchange with the Court?

MS. CADLE: What page are you on?

MR. TABOR: It's on page 21.

A. Yes, I do." (SEE: T.T., Vol. 2, p. 12, Line 20 to p. 21, Line 9)

...

"Q. And it would be page 125, line 8 – and this was what the Judge was asking for before – through 126, line 21. Do you remember reading that in your preparation for the defense of Mr. Weldon?

A. Yes, I do.

Q. Okay. Now, that's an exchange in the transcript between Mr. Korth, Ms. Slemp and the Court?

A. Yes.

Q. Would you please read that? Starting on page 125, line 8.

A. Line 8.

Q. Stopping at page 126, line 21.

A. Ms. Slemp: Your Honor, the state would move to admit these as State's collective Exhibit 1. The Court: How many do you have? Ms. Slemp: I think we have 38. The Court: Let me see the format. Okay. Objection? Mr. Korth: Yes, your Honor. I don't know if they are at all relevant. There is a lot of conversation in these 38 pages. And the Court: When you say you don't know that they are relevant, are they irrelevant? Mr. Korth: Well, they may be. I mean, the State's already admitted there's a lot of stuff that's mundane. The Court: Well, overrule the objection. I need more than that. I mean, if there is something specifically that you're objecting to, and if you want to go through as they are published – Mr. Korth: Yes. The Court: -- you may object at that time, but I haven't seen them in substance so I'll need to rule on them as we go. Ms. Slemp: Thank you, your Honor (reading). Keep going?

Q. Now, did that prompt you in your motion for new trial to go for the hearsay objection?

A. It did, however, because Mr. Korth had only objected on the grounds of relevance, I could not raise that objection, it had been waived.

Q. It actually boxed you in, you couldn't do anything – you couldn't bring up nothing there?

A. That's correct.

Q. So, your hands were tied at that point?

A. That's correct.

Q. In your interview with Mr. Weldon when you took on his representation, do you get a feel of how much time that Mr. Weldon has spent with Mr. Korth?

A. It didn't appear to be a lot. Mr. Weldon did not seem to understand much of what was going on or had occurred. He – there were numerous things that Mr. Weldon said to me that he – that Mr. Korth did not do. He did not feel like he investigated the case.

Q. Well, could you please tell me what that is?

A. One would be the file of – the file that Mr. Weldon had put together that he wanted Mr. Korth to raise at trial, and that he did not give that to the State. He did not, you know, submit anything in reciprocal discovery.

Q. Do you know what happened at trial that – when they were at trial, do you know anything about a file?

A. There was simply – there was an exchange outside the jury's presence where the state said that they had not received anything that –

Q. No reciprocal discovery?

A. No reciprocal discovery.

Q. Okay. And if I'm not mistaken, Ms. Cadle and Ms. Slemp both informed the court that they had gave their notices like they're supposed to do?

A. I believe so.

Q. And they didn't receive anything from Mr. Korth?

A. That's correct, they did not.

Q. And you knew based on your conversation once you were appointed with Mr. Weldon there was other stuff that needed to – that might needed to have come in to the Court?

A. That is what he indicated to me, yes.

Q. Did you actually – well, you couldn't have done anything at that point in time anyway?

A. No, I couldn't." (SEE: T.T., Vol. 2, p. 29, Line 21 – p. 32, Line 22)(emphasis added).

Additionally, the Appellant Gary Weldon was called as a witness to give proof. On direct examination, Appellant Gary Weldon gave the following testimony regarding deficiency of trial counsel's performance:

"DIRECT EXAMINATION

BY MR. TABOR:

Q. Could you please state your name for the Court?

A. Gary Weldon.

Q. And Mr. Weldon, there was some controversy about the spelling of your last name. Would you please spell it – in your other proceedings?

A. W-e-l-d-o-n.

Q. And where do you live at, Mr. Weldon?

A. (redacted)

Q. How long have you lived there?

A. Approximately seven years.

Q. And Mr. Weldon, you were represented at one time by Mr. Dan Korth?

A. Yes, sir.

Q. And Mr. Korth, if I'm not mistaken, was retained by you, am I correct?

A. Yes.

Q. Could you please tell the Court why – or let me put it this way. Could you please tell the Court the reason that you secured Dan Korth's employment?

A. I hired Dan to represent me in the legal matter through –

Q. What legal matter is that?

A. The charge of solicitation with the intent to rape.

Q. Okay.

A. I hired him because he was referred by a family member and –

Q. Okay.

A. – because he was representing a family member.

Q. Okay. And with Mr. Korth did you – you met with him to secure his representation?

A. Yes, I did.

Q. Do you remember what day that was?

A. I recall the month, I do not remember the day.

Q. What month and what year?

A. That was March in 2016.

Q. Did you come to Court with Mr. Korth thereafter?

A. I did for the arraignment.

Q. For the arraignment?

A. Uh-huh (yes).

Q. Now, if I'm not mistaken you correct me if I'm wrong, you were indicted when in 2016?

A. January

Q. When was your trial?

A. The – 2016, November – November of 2016.

Q. Okay. First of November, end of October?

A. I'm not for sure about the exact date.

Q. During that period of time and all issues that you've had with Mr. Korth, how many times did you actually meet with him in an office setting?

A. One.

Q. Did you do any trial preparation whatsoever?

A. None.

Q. Did you talk to Mr. Korth on the telephone?

A. I did about three times.

Q. And how long were these telephone conversations?

A. Anywhere from five minutes, no longer than ten.

Q. Did you supply information to Mr. Korth – and I'm talking about in paper, electronic, phone messages – anything to him that you provided to him in your defense?

A. Yes, I did. My girlfriend at the time had actually prepared a file and she presented it to him. There's three copies. Dan had one, I had one, and she has one. She prepared a small file just on information that she had gotten, and we turned to Dan, a copy over, the day that we met with him, also the day that I paid him.

Q. Uh-huh (yes).

A. He was given names that was supposed to be talked to. He was given information.

Q. When you say names, are you talking about witnesses in your behalf?

A. Just character witnesses, yes.

Q. How many names did you give him?

A. There were 13 all together.

Q. Okay. And this is a portion of the files that you gave him?

A. It is.

Q. Did he use that – any of that information that you gave him at all?

A. During the day of the trial, he brought up the file, it was discussed, he had never presented it to the DA, he did not even have his copy. He turned around and borrowed my copy the day of the trial. There was nothing, no defense that was presented on my behalf. That's –

Q. Did he give you your file back?

A. He did give my file back, yes.

Q. Did he explain – or let me – did you find any reason out why he didn't have the file?

A. No. No, I do not know.

Q. Did you receive any written correspondence from Mr. Korth?

A. You know, I actually pulled my papers out yesterday getting ready for Court, and they are there on the table, Judge, if you would like to see. Those

are letters that I got from you and that I've gotten from Matthew Rogers (sic). I got zero from Dan Korth.

Q. From January of 2016, up through your trial, you got nothing?

A. Nothing.

Q. Anything after you fired him?

A. No.

Q. Did you receive any Court filings from Mr. Korth that he had filed in your behalf with the Criminal Court or sent anything to the State that – did you receive anything?

A. No. I received no written literature from Dan Korth.

Q. Did you see any subpoenas to subpoena your witness, particularly your son, to Court by Mr. Korth?

A. Not by Mr. Korth, no.

Q. And did Mr. Korth say at Court that he had subpoenaed witnesses?

A. Dan knew that my son had been subpoenaed by a business card, and that was the only reference that it came down to having to be a subpoena, was a business card with the Court time and date on the back.

Q. Did Dan Korth call your son to testify at trial?

A. He did.

Q. And what happened?

A. My son had been released by the DA.

Q. And the reason that he was released by the DA, she had a subpoena, right?

A. (Indicating yes).

Q. Okay.

THE COURT: Answer out loud, please, so the Court Reporter can pick up your response.

A. Yes.

Q. What was your reason for firing Mr. Korth?

A. The – I had – I had not trust in Mr. Korth after I seen how the trial went. And the agreement that Dan and I had was – was that he would represent me to the best of his ability throughout this. And I actually told Mr. Korth, if you do that, I

will shake your hand, win or lose. I did that here in Court, but I was very let down by his representation, by the lack of even showing the Court what that I had prepared. It ended up causing issues during my testimony, the trial was stopped three different times and sent out, and the ruling was that I was not allowed to talk about anything in that file. There was no objections, no – so the reason that I let Dan go was lack of trust as his representing me.

Q. Did you write a statement out through Detective Jeffers?

A. I did not.

Q. And you adamantly denied that at trial, didn't you?

A. I did not write the statement that was read.

MR. TABOR: Can I approach, your Honor?

THE COURT: Yes.

Q. This statement was submitted at trial against your interest. Did you write that statement?

A. I did not.” (SEE: T.T., p. 41, Line 5 – p. 48, Line 2).

On July 12, 2021, Appellant filed his *Notice of Appeal* with the Tennessee Court of Criminal Appeals, sitting at Knoxville in Case No. E2021-00772-CCA-R3-PC, (SEE: T.R., Vol. 1, pp. 43-44).

ARGUMENT

STANDARD OF REVIEW

“On appeal, a trial court findings of fact are reviewed under a *de novo* standard accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. A trial court’s conclusions of law – such as whether counsel’s performance was deficient or whether the deficiency are prejudicial – are reviewed under a purely *de novo* standard with no presumption of correctness.” Tennessee Criminal Trial Practice, Sec. 32.4, p. 862, 2006 Ed., Ward, Mark W., (quoting Field v. State, 40 S.W.2d 450 (Tenn. 2001)).

ISSUE

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S PETITION FOR POST CONVICTION RELIEF AND AMENDED PETITION FOR RELIEF FROM CONVICTION WHEN THE APPELLANT SHOWED EVIDENCE THAT (1) COUNSEL WAS INEFFECTIVE PURSUANT TO THE U.S. CONSTITUTION, AND (2) THE INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED HIS CASE?

The Appellant Gary Weldon alleges that his former retained counsel, Dan Korth, did not provide effective assistance of counsel as guaranteed under the Sixth Amendment of the *United States Constitution*, and Article 1, § 9 of the *Tennessee Constitution*. The Petitioner would assert that his former retained counsel did not act as effective counsel as to making adequate preparations for trial, did not maintain or keep the Appellant's file in preparation for jury trial, did not disclose reciprocal discovery with the State of Tennessee and did not subpoena necessary witnesses for trial. The Appellant would show that his former trial counsel's performance was clearly deficient since he did not argue hearsay objections as to the thirty-eight (38) pages of photo text messages that were not authenticated pursuant to the rules of evidence. Additionally, his former trial counsel failed to participate in reciprocal discovery when he failed to submit printouts of Facebook pages to the State during the discovery phase of trial preparation which could have influenced the jury. Furthermore, Appellant's former trial counsel failed to object to entrance of State's Exhibit 2, the Petitioner's alleged confession. Such deficient performance by his former counsel did prejudice his case due to the fact that he may have been acquitted or convicted of a lesser included crime by a reasonable jury if trial counsel had argued reasonable doubt as to the above mentioned failures of counsel to constitutionally represent the Appellant.

FEDERAL CONSTITUTIONAL LAW & CASE LAW

The United States Supreme Court specified the standard of review for ineffective assistance of counsel. The Sixth Amendment right to counsel is applicable to all state felony prosecutions as

found in the case of Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). The applicable standard for determining the ineffective assistance of counsel is found in the United States Supreme Court case of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Justice O'Connor, in her majority opinion, set forth a test with two components:

“First the Defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.” Criminal Procedure, Whitebread et. 3rd Ed. 1993 Section 32.03, p. 873 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The professional norms as specified by Justice O’ Connor in Strickland are as follows:

[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Criminal Procedure, Whitebread et.al. 3rd Ed. 1993, Section 32.02, p. 873 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). Such norms would be “(1) a duty to avoid conflict of interests; (2) a duty to ‘advocate the defendant’s cause.’ Which includes the duties to ‘consult with the defendant on important decisions and to keep the defendant informed of important developments’, and (3) a duty to bear such skill and knowledge as to render the trial a reliable adversarial process.” Id., (emphasis added).

TENNESSEE CONSTITUTIONAL LAW & CASE LAW

Article 1, § 9 of the Tennessee Constitution states, “**Right of the accused in Criminal Prosecution.** – That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel...” Tenn. Const., Art. 1, § 9 (West 2020)

“A trial court’s findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise; however a trial conclusions of

law, such as whether counsel's performance was deficient or whether that deficiency was prejudicial are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Fields v. State, 40 S.W.2d 450, 2001 Tenn. LEXIS 110 (Tenn. 2001)

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components: (1) The defendant must show that counsel's performance was deficient; and (2) The defendant must show that the deficient performance prejudiced the defense. Specifically it must be shown that the errors made were so serious that counsel was not functioning in accordance with the guarantee of the U.S. Constitution, Amendment 6, and that any errors made by counsel were so serious as to deprive the defendant of a fair trial which concluded with a reliable result." State v. Mackey, 687 S.W.2d 289. 1984 Tenn. Crim. App. LEXIS 3007 (Tenn. Crim. App. 1984). (ALSO SEE: State v. Bishop, 731 S.W.2d 552, 1986 Tenn. Crim. App. LEXIS 2867 (Tenn. Crim. App. 1986), Bacon v. State, 967 S.W.2d 345, 1998 Tenn. Crim. App. LEXIS 484 (Tenn. Crim. App. 1998).

FIRST PRONG: COUNSEL'S PERFORMANCE WAS DEFICIENT

The Appellant/Defendant Gary Ray Weldon has shown the foregoing facts that support his grounds to show that Mr. Dan Korth was ineffective as counsel and his performance was deficient pursuant to the Sixth Amendment of the United States Constitution, and Article 1, § 9 of the Tennessee Constitution, (SEE: T.R. Vol. 1, p. 16), (SEE: Brief of the Appellant, pp. 5 – 28).

The Appellant would assert that the record, which has been previously cited above clearly shows that leading up to and during the jury trial, former counsel Dan Korth failed to communicate with the Appellant, failed to maintain or keep the Appellant's file in preparation for trial, failed to participate in reciprocal discovery during the discovery phase of trial preparation for evidence

necessary for trial, failed to argue hearsay objection to the unauthenticated Exhibit 1, and failed to object to entrance of Exhibit 2 at trial as shown in the foregoing facts. (SEE: Brief of the Appellant, pp. 5 – 28)

CONCLUSION AS TO FIRST PRONG

The Appellant would assert that contrary to what Justice Sandra Day O'Connor set forth in her majority opinion in Strickland v. Washington, former counsel Dan Korth failed to perform his duties to his client with “reasonableness under prevailing professional norms” whereas he failed in his “duty to advocate the defendant’s cause” including the duties to “consult with the defendant on important decisions, and to keep the defendant informed of important developments” and his “duty to bear such skill and knowledge as to render the trial a reliable adversarial process.” Criminal Procedure, Whitebread et. 3rd Ed. 1993 Section 32.03, p. 873 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). (Emphasis added).

The Appellant would further assert that the facts previously detailed clearly show deficiency in former counsel Dan Korth’s performance leading up to and during the jury trial whereas Mr. Korth failed to act within the aforementioned professional norms during his representation of the Appellant, (SEE: Brief of the Appellant, pp. 5 – 28). As a result of former counsel Dan Korth’s deficient performance at trial, the Appellant was convicted of the offence of solicitation of a minor to commit aggravated statutory rape and is now, by statute, viewed as a sex offender, from which he seeks relief.

SECOND PRONG: DEFECTIVE PERFORMANCE WAS PREJUDICIAL TO APPELLANT’S CASE

Former appointed counsel Matthew Roberts informed the trial court during the Post-Conviction Relief trial that former trial counsel Dan Korth’s performance at trial “boxed” him in on appeal and resulted in the Court waiving objections that should have been raised at trial. Former

counsel Dan Korth's defective performance certainly prejudiced the Appellant's case. (SEE: Brief of the Appellant, pp. 23-24).

Tennessee case law shows that the above-mentioned defective performance could be caused to show prejudice against the Defendant. "To establish prejudice as the result of ineffective assistance of counsel, the evidence stemming from the failure to prepare a sound defense or present witnesses must be significant but it does not necessarily follow that the trial would have otherwise resulted in acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the requirement that the result of the proceeding would have been different." State v. Zimmerman, 823 S.W.2d 220, 1991 Tenn. Crim. App. LEXIS 786 (Tenn. Crim. App. 1991).

Hypothetically, the Appellant would assert that had former counsel Dan Korth raised the proper objection of hearsay, rather than irrelevance, to the admission of the thirty-eight (38) pages of unauthenticated text messages, Exhibit 1 likely would not have been admitted. (SEE: E.L., Vol. 3, Jury Trial Transcript, Vol. 1, p. 125, Line 8 – p. 126, Line 21); (also SEE: T.R., Vol. 1, pp. 18-20); (SEE: E.L., Vol. 3, Sentencing Hearing, Motion for New Trial & Motion to Reduce Sentence Transcript, p. 21, Line 23 – p. 25, Line 2, emphasis added); (also SEE: T.R., Vol. 1, pp. 20-22). The record clearly shows that the prosecution did not subpoena telephone records or telephone company witnesses to authenticate the number as belonging to the Appellant. (SEE: T.T., p. 16, Lines 10-18). Furthermore, at the time Exhibit 1 was offered into the record the only evidence linking said text messages to the Appellant was the testimony of the alleged victim. (SEE: T.T., p. 15, Line 19 – p. 16, Line 9; p. 16, Line 19-22). The prosecution's case heavily relied upon Exhibit 1 as their primary source of proof in convicting the Appellant. The result of entry of said

Exhibit 1 due to former counsel's failure to argue hearsay objection surely prejudiced Appellant's case which resulted in the conviction of the Appellant.

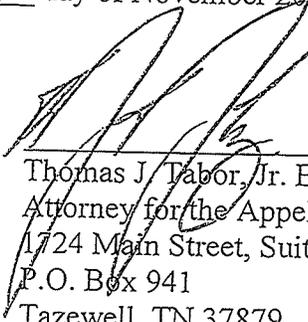
CONCLUSION AS TO SECOND PRONG

The Appellant would assert that former counsel Dan Korth's defective performance was so significant as to prejudice the outcome of the jury trial due to the aforementioned cumulative failures of former counsel. The Appellant would further assert that, pursuant to State v. Zimmerman, there is a "reasonable probability of [the Appellant] being found guilty of a lesser charge, or a shorter sentence," or possibly even being acquitted, had former counsel Dan Korth performed with "reasonableness under prevailing professional norms" (Id.) as specified by Justice O'Connor in Strickland v. Washington. Criminal Procedure, Whitebread et. 3rd Ed. 1993 Section 32.03, p. 873 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). Former appointed counsel Matthew Roberts' assertions that former counsel Dan Korth's performance and the Court waiving objections that should have been raised at trial as a result certainly prejudiced the Appellant's case. (SEE: Brief of the Appellant, pp. 23-24)

OVERALL CONCLUSION

For all of the forgoing reasons, your Appellant Gary Ray Weldon respectfully requests this Honorable Court to reverse the trial court's ruling denying his *Petition for Post-Conviction Relief* and *Amended Petition for Relief from Conviction or Sentence*, and order that this case be remanded to the Campbell County Criminal Court for relief to which the Appellant may be entitled in this proceeding under the law, including, but not limited to, a Judicial Declaration of a void or voidable Judgment due to the violation of the above-mentioned constitutional standards, and for a new trial in this case.

RESPECTFULLY SUBMITTED this 11th day of November 2021.

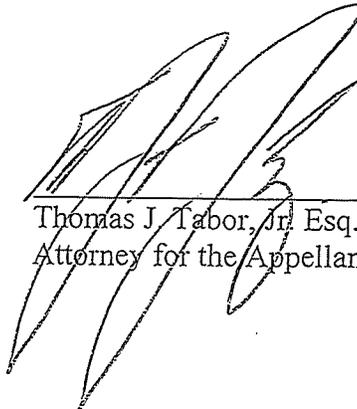


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CERTIFICATE OF SERVICE

I, Thomas J. Tabor, Jr., Esq., Attorney for the Appellant, do hereby certify that the original of the foregoing Brief of the Appellant Gary Ray Weldon and the Appendix thereto, together with three (3) copies has been served upon the Chief Deputy Clerk, Eastern Division, Tennessee Court of Criminal Appeals, Supreme Court Building, P.O. Box 444, Knoxville, TN 37901, with the court record, by HAND-DELIVERY, one (1) copy to Courtney Nicole Orr, Assistant Attorney General, P.O. Box 20207, Nashville, TN 37202, via U.S. Certified Mail Article No. 7016 0600 0000 8816 6784, return receipt requested, and one (1) copy to Appellant Gary Ray Weldon, 707 W. Walden Street, Lafollette, TN 37766, via U.S. Certified Mail Article No. 7016 0600 0000 8816 6050, return receipt requested.

This 11th day of November 2021.



Thomas J. Tabor, Jr. Esq. BPR#021716
Attorney for the Appellant

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

EASTERN SECTION AT KNOXVILLE

GARY RAY WELDON
Appellant/Defendant,

vs.

STATE OF TENNESSEE,
Appellee/Plaintiff.

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CASE NO. E2021-00772-CCA-R3-PC

APPENDIX TO BRIEF OF THE APPELLANT GARY RAY WELDON

State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991)
