

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: William Thomas McFarland

Office Address: 100 East Race Street
(including county) Kingston, TN 37763
Roane County

Office Phone: (865) 376-5344 Facsimile: (865) 376-2635

Email Address: [REDACTED]

Home Address: [REDACTED]
(including county) Kingston, TN 37763
Roane County

Home Phone: [REDACTED] Cellular Phone: [REDACTED]

INTRODUCTION

The State of Tennessee Executive Order No. 54 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.

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 your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, 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 hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am in private practice of law in Roane and surrounding counties in East Tennessee.

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

1990, BPR #14406

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.

Licensed to practice in Tennessee
BPR #14406
Licensed November 1, 1990
License status- Active

Licensed to practice in Florida
BPR #1011720
Licensed 2018
License status-Active

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).

1988-1989- Clerk, Donati Law, Memphis, TN

1989-1990 -Clerk, Honorable George Brown, Shelby County Circuit Court Judge
1990-Present- Private Practice of Law
1991-1993- Assistant Public Defender
1998-2014- Elected Roane County Attorney
2019-Present-City Attorney, Oliver Springs, Tennessee
2018-2019-Partner, Justin Clark & Associates, Maitland, Florida
2019-2020- Jordon Law, Orlando, Florida

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.

Personal Injury- 20%
Domestic/Juvenile-20%
Probate/Wills/Estates- 20%
Criminal- 10%
Municipal Law- 5%
Business- 10%
Civil Litigation-15%

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 appeared before the Tennessee Court of Appeals, Eastern Section over the last thirty (30) years on at least fifteen (15) occasions. I have personally written briefs and argued cases regarding issues such as whether oral pleadings are acceptable in probate court, factors to consider when awarding rehabilitative alimony, the pleading requirements for a valid condemnation petition, the constitutionality of the Tennessee Industrial Park Act, the issue of enforcing a child support order against a mentally ill obligor, the enforcement of subdivision regulations by a county, whether an ambiguity in a marital dissolution agreement will allow the court to admit parol evidence, the issue of proper division of Railroad Retirement benefits pursuant to relevant federal regulations, the factors required to award alimony in futuro, the issue of computing the income of a self-employed person for the computation of child support pursuant to the child support guidelines, the question of whether a road is a public or private road, the issue of whether boat house owners are required to pay rent to a marina owner after TVA has granted such power to the marina and the issue of defining the powers of local election commissions. In five (5) of the cases that I have argued before this Court, Judge Susano delivered the opinion of the Court.

I have practiced before various courts and tribunals. I have been admitted to the Eastern District of Tennessee in Federal Court since 1997. I have appeared in both Federal Court and Federal Bankruptcy Court. I have appeared before the Appellate Courts on at least seventeen (17) occasions. I have argued cases before the Tennessee Supreme Court and the Supreme Court of Tennessee Special Workers Compensation Appeals Panel. I have represented clients before Legislative bodies such as city councils and county commissions. I have tried many cases before administrative law judges both from the Social Security Administration and the Tennessee Secretary of State. I have also tried cases by arbitration. I have appeared before the Tennessee Claims Commission and various trial Courts in many counties throughout the State of Tennessee. I have settled many cases through mediation.

I have handled both civil and criminal matters. In the early 90's, I was offered a part time position as Assistant Public Defender and handled many criminal cases. I have continued to practice criminal law for thirty (30) years. However, the vast majority of my practice is in the realm of civil law.

I prepare my own cases. I do not have an associate or anyone sitting second chair. I have always been first chair. I have tried jury trials and bench trials of practically every nature in the Tennessee state courts. I prepare each case from the initial client meeting to pleadings, motion practice, discovery and trial.

I have also conducted trial work in Florida. I took the Florida bar exam in 2018 and was admitted to the Florida bar. I won my first jury trial in Florida in November of 2019. I am currently not working in Florida, however my Florida license is active and in good standing.

I have represented clients in various civil causes of action. I was elected county attorney for Roane County and served four (4) consecutive four (4) year terms. I represented the county in all legal matters. This included various transactional matters such as reviewing large contracts and interlocal government agreements. I represented the county in litigation in several state and federal courts. I argued cases involving public roads, contracts, ouster and various other issues

faced by county government. I successfully tried a condemnation suit to condemn land for a large industrial park for Roane County which was tried in circuit court, appealed to the Tennessee Court of Appeals, Eastern Section and remanded back to the trial court where it was finally settled after several years of litigation and negotiation. I am currently the city attorney for Oliver Springs, Tennessee.

In other parts of my practice I have created corporations and conservatorships and prepared and executed many deeds and wills. I have handled cases regarding the granting of injunctive relief, contracts, personal injury, boundary line disputes, fraud, probate, divorce, termination of parental rights and adoption, custody and child support, dependent and neglected custody cases, several cases pursuant to the Tennessee Consumer Protection Act and many clients in the federal court litigation resulting from the Kingston coal ash spill of 2009. I have challenged the constitutionality of a city ordinance that was struck down by the court as an unconstitutional violation of free speech.

In short, I have represented thousands of clients in many different forums over a broad spectrum of legal issues.

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

I am the only county attorney in the history of our county to successfully oust a public official. Roane County v. Patton, Roane County Circuit Court (2010).

In 2004, I became aware of unethical and illegal conduct on the part of a sitting judge. I filed a complaint, in spite of threats of retaliation, with the Tennessee Court of the Judiciary. My complaint resulted in the initiation of a TBI investigation. This led to an FBI investigation which resulted in the judge's arrest, removal from office, felony conviction and incarceration in federal prison.

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.

None

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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.

As a young attorney, I served as guardian ad litem on several dependency and neglect cases in juvenile court and conservatorship cases. I am currently the trustee of a testamentary trust valued at over \$500,000.00. Pursuant to the decedent's will, I am holding the money in trust for the benefit of his grandchildren.

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

Please refer to my answer to question number 9. I took and passed the Florida Bar exam in 2018. I took the multi-state/ Florida exam in February of 2018 and the ethics portion of the exam in August of 2018.

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.

I applied for a seat on the Tennessee Court of Appeals in 2004. My name was not submitted to the governor.

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.

Roane State Community College-1981-1982-transferred to University of Tennessee
University of Tennessee 1982-1985-BA in Political Science with Honors.
Memphis State University, Cecil C. Humphries School of Law-JD-1987-1990
Received the American Jurisprudence Award for Corporate Law-1988
President, Student Bar Association- 1989-1990

PERSONAL INFORMATION

15. State your age and date of birth.

57 years of age. [REDACTED] 1962

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

57 years

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

57 years

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

Roane County, Tennessee

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.

I am not.

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.

I have responded to approximately sixteen (16) complaints over my thirty (30) years of practice, which has included thousands of clients. Each and every complaint was summarily dismissed. I have never been reprimanded or the subject of any discipline by the Board of Professional Responsibility.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

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

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

My divorce in 2005- McFarland v. McFarland, Roane County Chancery Court, Docket Number 15322

2010- McFarland v. McFarland, Roane county Chancery Court- a suit to prohibit exposure of my children to the toxic coal ash spill.

McFarland v. Pemberton, Roane County Chancery Court, Docket Number 2014-CV-105-election contest.

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.

Rockwood Masonic Lodge #403
Shriners, Alhambra Temple, Chattanooga, Tennessee
Morrison Hill Christian Church-2005-present
Roane County Chamber of Commerce

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 County Attorney Association-1999-present
Board of Directors-2002-present
President-2011

Florida Bar Association- 2018-present
Roane County Bar Association-1990-present
Tennessee Bar Association
National Association of Criminal Defense Lawyers-2018-2019
American Bar Association- 2018-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.

I was elected President of the Tennessee County Attorney's Association in 2011. I currently remain on the board of directors.

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.

I have taught courses approved for CLE credit related to attorney ethics and Tennessee Ouster Law at meetings conducted by the Tennessee County Attorney's Association, but I do not remember the dates of the classes.

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.

1994-State Representative (elective)
1998-2014-Roane County Attorney (elective)
2014- Circuit Court Judge, 9th Judicial District (elective)

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.

Each example is solely my work without aide or input from any other person.

ESSAYS/PERSONAL STATEMENTS

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

I believe that my record of public service and the breadth and diversity of my experience uniquely qualifies me for this position. With my work ethic, I can assist in managing the courts docket and case load from the beginning.

I stand firmly committed to exhibiting exemplary judicial temperament. I would expect the rules of court decorum to be followed, but attorneys and litigants alike, should be treated with the utmost respect.

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)*

Once again, I would specifically reference my answer to question number 9. Over the years, I volunteered my services to churches and various civic groups without charge. Over the last fifteen (15) years I have declined to petition for fees in appointed cases in child support and criminal court cases.

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 have actively and continually practiced law for thirty (30) years. I am applying for a seat on the Tennessee Court of Appeals sitting in the Eastern District of Tennessee. The Tennessee Court of Appeals was not created by the Tennessee constitution. However, the constitution provided that the general assembly may create such courts. In 1925, the general assembly created the Tennessee Court of Appeals. There are currently twelve (12) judges that serve on the Tennessee Court of Appeals. Currently, four (4) members serve on the Eastern Section.

The Tennessee Court of Appeals hears all appeals from trial level courts that are not criminal cases. The court of appeals may occasionally hear cases from certain boards or commissions.

I believe that, if I was selected to serve in this position, the depth and diversity of my experience, my work ethic and respect for this court would result in a seamless transition.

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 very active in serving my community in various organizations. I am a past member and president of Continuing Kingston, a group that works toward preserving our history and showcasing our home town. I am also a former member of the Rockwood Civitan Club and

current member of the Rockwood Masonic Lodge, the Alhambra Shrine, and the Kingston Eastern Star. I am also a former member of the Board of Directors of the Roane County Chamber of Commerce. In 1993, I served as a member of the Roane County News Editorial Board.

Much of my community service has involved raising my children. I taught the Junior Achievement class for the second grade at Kingston Elementary School in 2004. I became a certified AYSO soccer coach and coached my daughter's soccer team and softball team. I also volunteered as a cub scout leader for my son's cub scout pack and coached his little league basketball team.

I formerly served on the Rockwood Nursing Home ethics committee and the Roane County Child Abuse Review team.

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)*

The most defining life experience for me has been becoming a single parent. I raised my two (2) children by myself. I have developed a great respect and admiration for all single parents. At the same time, I worked with many people going through the divorce process in my law practice. My personal experience as a single father helped me to better understand the issues facing clients going through a divorce, custody or adoption situation.

I learned that doing the right thing is not always the easiest thing. The defining moment in my career came when I concluded that I had no choice but to file a complaint against a corrupt judge. I was warned by the sheriff that my family and I may be in danger. We were told not to stand in front of our windows at night-time. A patrol car often sat outside my house. The sheriff recommended I add security lights, shutters for my windows, a fence and have a dog in my yard. I complied. It was a very difficult time. However, justice was served. Although I suffered great hardship, I had the courage to do the right thing and persevered.

I have never felt like I had a job. I get up every morning and try to help people. I have enjoyed my life in public service, especially my sixteen (16) years serving as the elected attorney for Roane County. My experience as a single parent, as a lawyer with a focus on community service, and as a public servant is the foundation of my candidacy for this position.

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

I believe in the rule of law. I would enforce the law as written regardless of my personal opinions. I am a strict constructionist in regard to constitutional and statutory interpretation. I believe the constitution and our statutes mean what they say. I do not think the judicial branch should attempt to expand the meaning of a phrase to satisfy a particular policy. I do not think the

judicial branch should make law. I believe that task to be exclusively reserved for the legislative branch.

In many criminal cases, I suspected my client was guilty. However, I did not let that interfere with their defense. I believe that if the prosecution and defense do their job without regard to personal opinion, then justice will prevail. If our society gets to the point that we let the lawyers decide innocence or guilt, then our system will be doomed to failure.

As county attorney, I gave direct and impartial opinions to the office holder. On one occasion, a citizen requested cell phone records from an office holder. The office holder paid a portion of the phone bill, however the majority of the payment was made by the county. The office holder had personal information on the phone, as well as information related to the duties of her office. Although I sympathized with the office holder and believed it unfair, my opinion was that the contents were public record under Tennessee law, and I directed her to honor the request.

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. Jim Henry- Former Deputy Governor-	[REDACTED]
B. Senator Ken Yager -	[REDACTED]
C. Katherine Parks- Assistant District Attorney-	[REDACTED]
D. Lisa Hill- Business Owner-	[REDACTED]
E. Judge Jeff Wicks-	[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] Court of Appeals, Eastern Section 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: January 31, 2020.



Signature

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



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

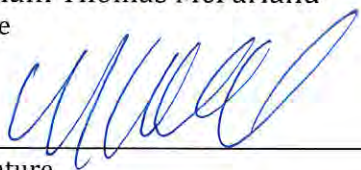
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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

WAIVER OF CONFIDENTIALITY

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

William Thomas McFarland
Name


Signature

January 31, 2020
Date

#14406
BPR #

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

**TO THE TENNESSEE SUPREME COURT
AT KNOXVILLE**

WILLIAM THOMAS McFARLAND

Plaintiff/Appellant

v.

Chancery Court Docket No. 2014-105

Court of Appeals Docket No. E2014-02176-COA-R3-CV

MICHAEL S. PEMBERTON, et al.

Defendant/Appellee

**APPLICATION FOR APPEAL BY PERMISSION
TO THE TENNESSEE SUPREME COURT**

Comes now the Appellant and hereby requests permission to appeal the above styled matter to the Tennessee Supreme Court. In support of this application, it is affirmatively averred as follows:

Judgment was entered by the Tennessee Court of Appeals, Eastern Section, on the 16th day of November, 2015. A petition for re-hearing was not filed. The Appellant presents the following questions for review:

I.

SHOULD THE TENNESSEE SUPREME COURT ACCEPT THIS APPEAL TO SETTLE THE CONFLICTS IN THE OPINIONS AND RULINGS OF THE LOWER COURTS?

II.

DID THE APPELLANT HAVE AN ELECTION OF REMEDIES WHEREIN HE COULD PURSUE AN ADMINISTRATIVE REMEDY OR OTHERWISE PETITION THE COURTS?

The Appellant and the Appellee were opponents in the August 7, 2014, election for the position of Circuit Court Judge for the Ninth Judicial District. During the course of the election, a citizen filed a complaint with the local Election Commission challenging the qualifications of the Appellee's eligibility to run. Specifically, the citizen alleged that Appellee did not live in the district as required by the state constitution. The Roane County Election Commission held a public hearing and ruled that Appellee was eligible. The Appellant did not participate in the hearing and did not receive notice of the ruling of the Roane County Election Commission. After the election, Appellant filed suit to challenge the election by alleging Appellee did not satisfy the residency requirement of the Tennessee Constitution pursuant to the election contest statute at T.C.A. 2-17-101. The Trial Court dismissed the petition on summary judgment by holding the election commission's ruling on the complaint filed by the citizen constituted a quasi-judicial act. The Trial Court held that Appellant, although he wasn't a party to the action in the election commission, would have standing and be able to appeal the actions of the election commission pursuant to T.C.A. 27-9-102. The Court held that Appellant would meet the definition of an aggrieved party under the statute. The Appellant did not pursue the administrative appeal, and as such, the case was dismissed. The Court of Appeals, Eastern Section, affirmed the decision of the Trial Court.

The Appellant asserts that nothing in T.C.A.27-9-102 should prevent him from filing an election contest pursuant to T.C.A. 2-17-101. The administrative record was limited to the record of the hearing before the Roane County Election Commission. The citizen making the allegation had no access to discovery, had no subpoena power, or no

other mechanism in which to secure the proof needed to prove his case. Appellant believed that the record upon appeal would not have been sufficient to prosecute the claim. However, Appellant elected to file a lawsuit to contest the election. In that suit, the Appellant was able to secure the discovery needed to prosecute the action. The Appellant was able to discover proof that was not in the record before the Roane County Election Commission and was not accessible to the complainant before the election commission. For example, upon filing the underlying suit, the Appellant secured through discovery a document submitted by the Appellee to the Tennessee Supreme Court wherein he acknowledged and certified to this Court that he was not a resident of the Ninth Judicial District. The discovery conducted by Appellant also revealed other evidence such as documents that were submitted by Appellee to the election commission that were incomplete, and additional evidence that Appellee withheld documents that would indicate that he did not live in the district. Documents were discovered that showed the Appellee received discounts on his insurance policy for the property he owned inside the district because he represented to the insurance company that he did not live in that house as his primary residence. The Appellant believes the proof he secured through discovery is significant. The administrative process is not sufficient to properly address such claims.

There is currently an application pending before this Honourable Court to hear the matter of *Randy R. Moss, Jr. v. Dan P. Evans, et al.* (No. E2014-02277-COA-R3-CV). The *Moss* case involved an election contest in the race for McMinn County Highway Commissioner. *Evans* won the race. *Moss* filed an election contest suit alleging *Evans* lacked the qualifications which were required by statute for that particular office. The Trial

Court held that *Moss* was required to go through the administrative board to determine his qualifications and consequently, could not now pursue an election contest lawsuit. The Trial Court decision was appealed to the Tennessee Court of Appeals, Eastern Section. The Eastern Section held that the McMinn County Election Commission acted only in a ministerial capacity but that the Trial Court was in error for not allowing *Moss* the right to go to trial on his election contest case.

T.C.A. 54-7-104 (g) sets out the requirements one must meet in order to be a candidate for highway commissioner. The statute created the Tennessee Highway Officials Certification Board (THOCB) as an administrative tribunal that determines whether candidates for the position of highway commissioner meet the statutory qualifications. The statute also provides for the promulgation of rules and guidelines to set procedures for a candidate to follow to appeal on the administrative decisions regarding the qualifications of candidates for highway commissioner.

The Trial Court dismissed the case and held that the THOCB had exclusive authority to decide the issue of candidate qualifications and as such, the Trial Court had no subject matter jurisdiction to hear the case. The Trial Court held that the challenge could only have been an administrative challenge in the THOCB, and precluded *Moss* from proceeding with his election contest case.

On appeal, *Evans* argued *Moss* could not bring an election contest suit because he failed to exhaust his administrative remedies. However, the doctrine of exhaustion of

administrative remedies may be either mandatory, if specifically designated so by statutory language, or discretionary. If the requisite statutory language provided that an appeal “shall” be by administrative remedy, then the administrative appeal is mandatory.

This Court decided the case of *Reeves v. Olsen*, 691 S.W. 2d 527 (Tenn. 1985), which arose from a dispute between a taxpayer and the Department of Revenue over the taxpayer’s gift tax obligation. The taxpayer paid the tax under protest and sued the Department of Revenue in Chancery Court. The Department of Revenue moved the Trial Court to dismiss the case for lack of subject matter jurisdiction because the taxpayer did not exhaust her administrative remedies pursuant to T.C.A. 67-8-116. The Motion was denied. The Chancellor heard the case and entered judgment in favor of the Plaintiff taxpayer. T.C.A. 67-8-116 reads as follows:

Taxpayer’s remedies. --- (a) If, in the determination of the existence of a deficiency, the commissioner appraises property at a value higher than that thought by the donor shall have a right to file with the commissioner, within thirty (30) days from the date of the receipt of the notice of deficiency, an appeal from such appraisal, addressed to a board composed of the governor, the treasurer, the secretary of state, the comptroller and the commissioner of revenue, which board shall have authority to consider the exceptions filed, hear proof and determine the valuations in dispute, and the findings by a majority vote of the board shall be conclusive as to all parties in interest, subject only to the constitutional right of review in the courts.

(b) Except as provided in subsection (a), the sole remedy of any person from whom the commissioner demands a tax claimed under the authority of this part shall be a payment of the tax under protest and a suit for the recovery thereof, which proceedings shall be in accordance with the provisions of part 9 of Chapter 1 of this title.

The Supreme Court reviewed this case and opined that “our reading of T.C.A. 67-8-116 in its entirety leads us to the conclusion that the legislature intended that an election

exists between the administrative remedy and immediate resort to the Courts.” The Court concluded its opinion by affirming the Trial Court.

Appellant asserts that T.C.A 27-9-101 was not the only available remedy available to him. The same reasoning from *Reeves* should be applied to this case and require the Trial Court to recognize that Appellate could elect to pursue an administrative remedy or immediately resort to the courts.

In the *Moss* case, the statute did not make an administrative appeal a condition precedent to filing suit. In the *Tyson Foods ex rel. v. Gibson v. Tennessee Department of Labor and Workforce Development, Worker's Comp. Div. (No. M2010-02277-COA-R3CV, 2011)* case, the Court dealt with a statute that provided an aggrieved person “may” be heard on administrative appeal by a written request and if not satisfied “may” be appealed to the Commissioner. The Court found the administrative appeal was discretionary. The questions created by the differences in the *Moss* case and the instant case is whether the administrative appeal was mandatory or discretionary. To determine this issue the Court should look to the language of the statute. In the *Moss* case, the statute simply provided that one “may” pursue an administrative appeal and the statute did not make such administrative appeal precedence to filing suit. As such, the Court of appeals reversed the Trial Court on this issue and remanded the case to allow the contest suit to be heard. In the instance case, T.C.A. 29-9-101 has similar language in that it provides that anyone who “may” be an aggrieved party to an order of an entity such as the Roane County Election Commission “may” have the order reviewed by the Courts. Nothing in this statute

makes such an administrative appeal a condition precedent to filing a lawsuit pursuant to the election contest statute. *Moss, Tyson Foods* and the case at bar are in direct contradiction of each other.

In *Moss v. Evans, et al.*, the Eastern Section held that cases similar to the case at bar must be observed in light of the doctrine of exhaustion of administrative remedies. The opinion held that the Appellant was statutorily mandated to exhaust the administrative remedy set forth in T.C.A 27-9-101. The *Moss case* seems to be in direct conflict with the *McFarland* case in that the Eastern Section held that the *Moss* case involves statutory language that was permissive in nature in that the statute simply authorized alternate avenues for relief in which the plaintiff “may” choose to pursue. The Court held that the Defendant in *Moss* should be able to have his case heard by the Trial Court even though he elected not to pursue a final administrative appeal. The Eastern Section acknowledged in the *McFarland* opinion that T.C.A 27-9-102 includes the same type of permissive language in that the Election Commission decision “may” be reviewed by a Trial Court by certiorari on appeal by anyone who “may” be aggrieved by an order of the Election Commission. T.C.A. 27-9-101. The *Moss* case and the *McFarland* case were both decided by the Eastern Section and both are in direct conflict with the other.

The Tennessee Court of Appeals Eastern Section issued a ruling on September 16, 2015, on a similar election contest case in the matter of *Bivens v. White, et al.* (E2014-02251-COA-R3-CV) wherein the election was challenged based on the winner’s lack of

statutorily required qualifications. The Trial Court ruled in favor of the plaintiff and voided the election. The Eastern Section confirmed the actions of the Trial Court.

The *Bivens* case involved a contest over the election for the Sheriff of Monroe County. Candidate White originally received his certification to run as a qualified candidate for Sheriff by the POST Commission pursuant to T.C.A. 8-8-102 and was placed on the ballot. At some point, the other candidate (Bivens) sent information to the POST Commission indicating that *White* may not be qualified under the statute and the POST Commission then initiated an investigation. After investigation, the POST Commission found that candidate White did not meet the qualifications of the statute and withdrew his certification as a qualified candidate. The POST Commission notified the Monroe County Election Commission that candidate *White* was not a qualified candidate. The Monroe County Election Commission decided to leave *White* on the ballot even though it had knowledge that *White* was not qualified to be a candidate. The Monroe County Election Commission ruled that its decision to leave candidate *White* on the ballot, even though it had knowledge that *White* was no longer qualified to run, was a ministerial decision. The Monroe County Election Commission issued a press release in regard to their ruling that, despite the ruling that *White* was not a qualified candidate, that he “will remain on the ballot as a candidate for Sheriff of Monroe County and if elected to this office by the voters of Monroe County, can serve as Sheriff.” (see *Bivens* at page 5).

The Appellant herein asserts that the *Bivens* case, which arose from the same election cycle, was argued in the same session before the Tennessee Court of Appeals,

Eastern Section, and involved the same issues, are diametrically opposed to each other. In *Bivens*, the Eastern Section held that the Monroe County Election Commission's decision and ruling as set forth above was ministerial in nature, however, in the case at bar the Eastern Section ruled that the decision of the Roane County Election Commission was quasi-judicial.

The POST Commission decision to decertify White was not appealed through the administrative process. However, the election contest was allowed to proceed. White was a similarly aggrieved party to McFarland under T.C.A. 27-9-102. However, the Appellant herein was denied his day in court.

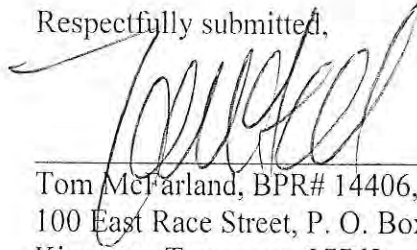
The Appellant asserts that the Supreme Court should be the final arbiter as to interpretation of the Constitution. If the opinion of the Eastern Section is allowed to stand, it would allow constitutionally unqualified candidates to circumvent the Constitution by restricting the effectiveness of challenges to a candidate's qualifications. Unqualified candidates can take advantage of a forum where his opponent has no discovery, rules of evidence or any semblance of a legitimate hearing. Appellant asserts that the Appellee did not meet the basic requirements set forth in the Tennessee Constitution. A hearing was held without the benefit of the legal mechanisms that justice requires to allow such complaints to be prosecuted. The Roane County Election Commission did not take sworn testimony, did not have subpoena power, did not allow cross-examination, did not have the rules of evidence or procedure and most importantly did not have rules of discovery. The Appellant asserts that he had the alternative remedy of an election contest wherein he

would have the ability to discover the pertinent evidence and allow the case to proceed on its merits.

The Appellant properly pursued an election contest pursuant to the same logic as this Court found in *Hatcher v. Bell*, 521 SW 2d 799 (Tenn. 1974).

In conclusion, the Appellant respectfully asserts that the legislature provided an election of remedies to him that allowed him to pursue an election contest suit. Furthermore, the disparities and conflicts between the *Bivens*, *Evans*, and *McFarland* case demonstrate a definite need for action by the Tennessee Supreme Court.

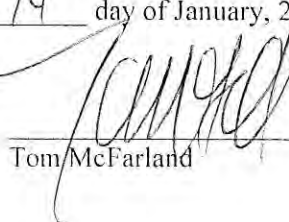
Respectfully submitted,



Tom McFarland, BPR# 14406, Pro Se
100 East Race Street, P. O. Box 12
Kingston, Tennessee 37763
(865) 376-5344

CERTIFICATE OF SERVICE

I hereby certify that a true and perfect copy of the foregoing Plaintiff/Appellant's APPLICATION FOR APPEAL BY PERMISSION TO THE TENNESSEE SUPREME COURT has been served upon the Defendant/Appellee, by and through his attorneys, Jennifer Raby, Polk Cooley, and Pat Cooley, 1021 Waterford Place, Kingston, TN 37763 and to Ryan A. Lee, Assistant Attorney General, Public Interest Division, Office of Attorney General, P. O. Box 20207, Nashville, TN 37202, by placing the same in the United States First Class Mail postage, prepaid this the 19 day of January, 2016.



Tom McFarland

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

WILLIAM THOMAS McFARLAND

vs.

No. E2014-02176-SC-R11-CV
Roane County Chancery
No. 2014105

MICHAEL S. PEMBERTON, et al.

BRIEF OF APPELLANT

Tom McFarland
P.O. Box 12
100 East Race Street
Kingston, TN 37763

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STATEMENT OF THE ISSUES

1. Did the county election commission have the authority to convene a hearing in response to a citizen's complaint and determine whether a candidate for the position of Circuit Court Judge for the Ninth Judicial District satisfied the constitutional residency requirement set out in Article VI, Section 4 of the Tennessee Constitution?
2. Is the county election commission's determination that the candidate for Circuit Court Judge for the Ninth Judicial District satisfied the constitutional residency requirement a quasi-judicial act that is subject to review pursuant to Tennessee Code Annotated section 27-9-101?
3. Did the Court of Appeals err in holding that the plaintiff, although not a party to the petition seeking review pursuant to section 27-9-101, nevertheless qualifies as an aggrieved party for purposes of seeking review pursuant to section 27-9-101?
4. Did the Court of Appeals err in holding that the plaintiff's failure to seek review of the county election commission's determination pursuant to section 27-9-101 now bars the plaintiff from filing an election contest pursuant to Tennessee Code Annotated section 2-17-101?

STATEMENT OF THE CASE

This is an appeal of the trial court's dismissal of the Appellant's election contest claim. The trial court dismissed the claim based on a determination from the pleadings that the case is time barred by the Statute of Limitations imposed is T.C.A. § 27-9-102.

This is an election contest concerning the election of the Circuit Court Judge for the Ninth Judicial District. The Appellant and the Appellee were both candidates for this Judgeship.

The Appellee filed his petition to run for Circuit Court Judge on February 3, 2014, and on March 31, 2014, Willis Hall, a registered voter residing within Roane County, Tennessee, filed a complaint with the Roane County Election Commission (the "Commission") contesting that Appellee was not a resident of Roane County on or before August 8, 2013, and therefore did not satisfy the residency requirement to hold office in Roane County under Article VI, Section 4 of the Tennessee Constitution.

On April 28, 2014, the Commission held a public hearing regarding Mr. Hall's challenge to whether Appellee met the residency requirements pursuant to Article VI, Section 4 of the Tennessee Constitution. The Commission decided to place Appellee's name on the ballot as a candidate for Circuit Court Judge.

On May 16, 2014, Willis Hall filed a complaint in Roane County Chancery Court for Quo Warranto and for Declaratory Judgment, then filed an amended complaint adding a claim for writ of certiorari of the Commission's decision on the issue of Appellee's qualifications based on residency. On July 21, 2014, that complaint was dismissed in its entirety based on the finding that Mr. Hall lacked standing to bring a claim challenging the Commission's April 28, 2014, ruling.

The election for the Ninth Judicial District was held on August 7, 2014, and the Appellee won by a slim margin. Appellant filed his complaint in the Chancery Court for Roane County on August 20, 2014, attacking the qualifications of Appellee on the grounds that he did not satisfy the residency requirements because he was not a resident of Roane County, Tennessee, for one year prior to his election as required by Article VI, Section 4 of the Tennessee Constitution.

On September 30, 2014, the trial court heard the Appellee's motion to dismiss and on October 7, 2014, entered an Order dismissing the Appellant's complaint based on a determination from the pleadings that the case is time barred by the Statute of Limitations imposed in T.C.A. § 27-9-102.

On November 5, 2014, the Appellant filed a Notice of Appeal. The Tennessee Court of Appeals, Eastern Section, issued its opinion upholding the trial court on the 16th day of November, 2015.

The Tennessee Supreme Court granted Appellants Application to Appeal by Order entered March 24, 2016.

STATEMENT OF THE FACTS

The Plaintiff, William Thomas McFarland, is an individual and resident of Roane County, Tennessee (TR. Cpl. p. 1). The Defendant, Michael S. Pemberton, is an individual and resident of the State of Tennessee, with a home located in Knox County, Tennessee (TR. Cpl. p. 1). On February 3, 2013, Michael S. Pemberton filed his petition for candidacy for Circuit Court Judge with the Election Commission for Roane County, Tennessee (TR. pp. 75-78 Aff. Charles Holloway). Plaintiff, Thomas McFarland, was also a candidate for Circuit Court Judge for Roane County (TR. pp. 75-78 Aff. Charles Holloway). Subsequent to Michael Pemberton filing his petition for candidacy for Circuit Court Judge, Willis Hall, a voter in Roane County, filed a complaint with the Roane County Election Commission alleging that Mr. Pemberton failed to meet the one year district residency requirement for office of Circuit Court Judge set forth in Article VI, Section 4 of the Tennessee Constitution (TR. pp. 75-78 Aff. Charles Holloway). The Roane County Election Commission does not have subpoena power or the power to force individuals to testify (TR. pp. 46-58 Trans. Election Commission Hearing). The Roane County Election Commission, after hearing statements of the individuals and the Defendant, Michael Pemberton, found that the Defendant, Michael Pemberton, met the requirements of Article VI, Section IV of the Tennessee Constitution, certified the ballot and allowed the Defendant to be listed as a candidate for Circuit Court Judge for the August 7, 2014, election (TR. pp. 46-58 Trans. Election Commission Hearing). On or about May 16, 2014 Willis Hall filed an amended complaint in the Chancery Court for Roane County, Tennessee seeking declaratory relief, or in the alternative a writ of certiorari pursuant to Tennessee Code Annotated 27-9-101 et seq. alleging that the Roane County Election Commission finding Michael Pemberton met the one

year district requirement pursuant to Article VI, Section 4 of the Tennessee Constitution was incorrect. (TR. pp. 95-106 Cpl.) Thereafter, motions to dismiss the case filed by Willis Hall were filed before the Honorable Ben H. Cantrell, sitting specially, dismissed the case orally on June 12, 2014, finding that Willis Hall did not have standing because he did not have a special interest in the Commission's decision and the Order of Dismissal was entered on July 23, 2014 (TR. pp. 256-267 Opinion). Thereafter, on August 7, 2014, the general election for Circuit Court Judge for the district in which Roane County sits was held (TR. pp. 75-78 Aff. Charles Holloway). The Defendant, Michael Pemberton, received the majority votes and was elected as the new Circuit Court Judge. On August 20, 2014, the Plaintiff, William Thomas McFarland, filed a Complaint to Contest Election in the Chancery Court for Roane County, Tennessee, against the Defendant, Michael Pemberton, the Roane County Election Commission, and Mark Goins, Tennessee Coordinator of Elections (TR. pp. 1-9 Complaint). The complaint was brought pursuant to Tennessee Election Code, T.C.A. § 2-2-122, and alleged the Defendant, Michael Pemberton, was not a resident of the district in which he ran for Circuit Judge for one year prior to the election being held (TR. pp. 1-9 Complaint). Thereafter, the Defendants filed motions to dismiss or motions for summary judgment alleging the Plaintiff was estopped from filing the complaint based upon the statute of limitations. The Defendants alleged the Plaintiff was required to file a writ of certiorari within sixty days of the Roane County Election Commission's decision in the case Willis Hall v. Michael S. Pemberton, et al.; Docket No. 2014-67. Thereafter, a hearing was held before the Honorable Jon Kerry Blackwood, Senior Judge, sitting by designation of the Supreme Court on September 30, 2014, (TR. pp. 356-360 Findings & Conclusion). The Honorable Jon Kerry Blackwood, Senior Judge, after reviewing all the facts and law found that

Roane County Election Commission's duties were quasi-judicial and dismissed the complaint finding that the Plaintiff, Thomas McFarland, was time barred since he did not file a writ of certiorari within sixty days of the Election Commission's decision. In Hall v. Pemberton, et al; Docket No. 2014-67 (TR. pp. 356-360 Findings & Conclusion) the Plaintiff, Thomas McFarland, was not a party or involved in the case of Hall v. Pemberton, et al. (TR. pp. 95-106)

ARGUMENT

1. **Did the county election commission have the authority to convene a hearing in response to a citizen's complaint and determine whether a candidate for the position of Circuit Court Judge for the Ninth Judicial District satisfied the constitutional residency requirement set out in Article VI, Section 4 of the Tennessee Constitution?**

The Tennessee General Assembly controls both the state and county election commissions. The various statutes set out the procedure which places the power of administering elections in the State of Tennessee within the legislative branch. The General Assembly has placed the administration of elections under the control of the office of the Secretary of State. The General Assembly elects the Tennessee Secretary of State to serve four year terms pursuant to T.C.A. 8-3-101. In turn, the Secretary of State appoints a Coordinator of Elections pursuant to T.C.A. 2-11-201 and any rules made by the Coordinator of Elections are under the auspices of the Secretary of State. The General Assembly also elects state election commission members pursuant to T.C.A. 2-11-104. The makeup of the state election commission is inherently political. The legislature has determined, that pursuant to T.C.A. 2-11-103, politics shall determine a person's eligibility to serve as a member of the Tennessee State Election Commission. The Legislature has determined the State Election Commission shall be composed of three members of the majority party and two members of the minority party of the legislative branch.

In turn, the State Election Commission appoints the county election members pursuant to T.C.A. 2-12-101. The County Election Commission is also inherently political in nature in that T.C.A. 2-12-103 requires county election commissions to also be composed of three members

from the majority party and two members from the minority party of the legislative branch, and each shall only be appointed after recommendation by local state legislators.

Consequently, the state and county election commissions are inherently political extensions of the legislative branch and possess only the powers they are specifically given by statute and within the limits of the state constitution.

Article II, Section 1 of the Constitution of the State of Tennessee divides the powers of government “into three distinct departments: the legislative, the executive and judicial.” Article II, Section 2 prohibits one department from infringing on the powers of another department. The case at bar is in violation of Article II, Sections 1 and 2 of the Constitution of the State of Tennessee in that the county election commission held the public hearing and issued a ruling on a constitutional question of law. Such a hearing is an unconstitutional intrusion by the legislative branch upon the duties and inherent powers of the judicial branch.

Indeed, any statute purporting to grant the Coordinator or the Commission such broad interpretive authority would run afoul of the principle of separation of powers embodied in the Tennessee Constitution, Article II, sections 1 and 2. This Court has explained:

The powers of government, divided into the legislative, executive, and judicial branches, are separate and divisible. The legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law. Since the United States Supreme Court decision in *Marbury v. Madison*, it has been the sole obligation of the judiciary to interpret the law and determine the constitutionality of actions taken by the other two branches of government. The Tennessee Constitution [Art. II §2] forbids an encroachment by one department upon the powers or functions of another. *Thus, a legislative action vesting executive branch agencies with the authority to determine the constitutionality of statutes would violate the separation of powers doctrine. City of Memphis v. Shelby County Election Commission, 146 S.W.3d 531, (Tenn. 2004).*

Upon review of the election statutes, Appellant can find no grant of specific authority which allows a county election commission to determine a constitutional question of law.

There is a long and consistent stream of case law wherein this Court has prevented legislative encroachment into the judicial department. This Court began considering such statutes as early as review of a statute passed by the legislature in 1831 which specifically directed judges to dismiss certain causes of actions filed by a certain group of people. *Fisher's Negroes v. Dabbs et al.*, 14 Tenn. 119 (1834). However, the Court held that such a statute is unconstitutional and void in that the legislature was substituting its interpretation of the law for the Court's discretion and found that such discretion conferred upon the judge was "a legal discretion, subject to the control of the supreme court when improperly exercised." *Fisher's Negroes v. Dabbs et al.*, 14 Tenn. 119 (1834), page 142. The Supreme Court went on to say "that it is the duty of this court to denounce as unconstitutional all laws which come directly and obviously in conflict with the constitution . . ." *Fisher's Negroes v. Dabbs et al. supra*, page 142.

The Court has been consistent in its opinions since the *Fisher's* case. The coordinator of elections in the election commission in Shelby County refused to place a referendum ordinance on the ballot because the local election commission determined that the ordinance was substantively unconstitutional. However, this Court in *City of Memphis v. Shelby County Election Commission et al.*, 146 S.W.3d 531, 535 (2004), reversed the trial court's order upholding the actions of the local election commission. The Court specifically held that the local election commission "exceeded its statutory and constitutional authority by excluding the ordinance from the November 2, 2004 ballot." *City of Memphis v. Shelby County Election Commission et al.*, *supra* at page 540.

This Court held that neither the Election Commission nor the Election Coordinator had authority to pass judgment on constitutional questions and that they were indeed purely ministerial officers. The Chief Justice wrote as follows:

Without question, the Commission and the Coordinator have certain statutorily prescribed ministerial duties that allow – indeed require – them to do such things as examine ballot initiatives to determine whether signature requirements are met, determine whether submissions are timely and determine whether candidates have properly qualified to be placed on the ballot. See Tenn. Code Ann. §2-1-101 through – 216 (2003) et seq. However, these statutes do not require or even permit the Commission to refuse to include a referendum question on the ballot because the Commission believes the question to be substantively unconstitutional. See *536 Tenn. Code Ann. §§2-12-101 through 2-12-216 (delineating the duties of the Commission). The Commission contends that it has the power and duty to make an “initial determination” whether the law authorizes the acts it is required to perform. This contention is true with respect to the Commission’s performance of its ministerial duties. However, it is inaccurate to say that the Commission has the power and duty to perform an initial or cursory review of the *substantive* constitutionality of measures to be placed on the ballot for referendum. Determining the substantive constitutionality of such measures is a function reserved for the judicial branch of government.

Furthermore, the Coordinator, an appointed, ministerial official, also lacks the statutory authority to forbid the inclusion of a referendum question based upon the Coordinator’s opinion that the measure is substantively unconstitutional. The Coordinator’s statutory duty to approve the “form of the ballot” does not provide authority to determine the substantive constitutionality of referendum questions, like the Ordinance at issue in this case. The “forms of ballots on voting machines” and the “form of paper ballots” are prescribed by statute. See Tenn. Code Ann. §§2-5-206-207. These statutes describe the proper “form” of the ballot in detail, including, for example, the color of ink and the proper placement of certain titles and candidate names. See *id.* at §§-206-207. However, these statutes do not address the substance of ballot measures. *City of Memphis v. Shelby County Election Commission, supra* at page 535.

The Roane County Election Commission did not have authority to convene a hearing to determine whether a candidate for Circuit Court Judge satisfied the residency requirement pursuant to Article VI, Section 4 of the Tennessee Constitution.

2. Is the county election commission's determination that the candidate for Circuit Court Judge for the Ninth Judicial District satisfied the constitutional residency requirement a quasi-judicial act that is subject to review pursuant to Tennessee Code Annotated section 27-9-101?

Black's law dictionary defines quasi-judicial act as "a judicial act performed by one not a judge." Black's Law Dictionary, Fifth Edition, page 1121.

In the matter at hand, the Roane County Election Commission placed itself in a position to interpret constitutional questions regarding the constitutional residency requirement for the position of Circuit Court Judge for the Ninth Judicial District. The Court of Appeals, Eastern Section, concluded that the Roane County Election Commission's actions were indeed a quasi-judicial act. The Eastern Section relied on cases such as *State ex rel. Moore and Associates, Inc. v. West*, 246 S.W.3d 569 (2005), *Walker v. Metro Board Parks and Recreation*, 2009 WL5178435 and *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338 (1983). The test to determine whether an act by an administrative entity is a quasi-judicial act is simply whether the act "makes new law or executes one already in existence. *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (1990). The test in the aforementioned cases, which were relied upon by the Eastern Section, were applied to situations wherein the governmental entity had ruled on matters pursuant to specific authority given to the administrative entity by the General Assembly. The cases cited were matters regarding zoning decisions, for the most part. The legislative branch has delegated authority for zoning and land use decisions to local government officials. These cases can be easily distinguished from the case at bar in that the Roane County Election Commission had no specific authority to determine constitutional issues. In fact, the legislative branch does not have

such authority under the constitution to convey to local election commissions. The issues of constitutional interpretation are in the exclusive purview of the judicial branch. The Roane County Election Commission made new law rather than execute one already in existence. It was without authority to make new law. Consequently, the decision of the Roane County Election Commission, as an extension of the legislative branch, ruled on substantive issues of constitutional law and as such violated the constitutional principle of separation of powers.

There were no laws or procedures in effect that were given to the Roane County Election Commission which would authorize it to do anything other than a ministerial act. In other words, if the actions of the Roane County Election Commission were quasi-judicial in nature, then it was without authority to act. In fact, this Court has ruled that the duties of county election commissions and the county coordinator are strictly ministerial duties. Chief Justice Drowota, writing for the court held,:

Black's law dictionary defines a ministerial officer as one who performs specified legal duties when the appropriate conditions have been met, but who does not exercise personal judgment or discretion in performing those duties." Black's Law Dictionary 1113 (7th Ed 1999).

A duty that is absolute and imperative, requiring neither the exercise of official discretion or judgment" Id. at 522.

These definitions illustrate how, as ministerial officers performing ministerial acts, the commission and the coordinator must implement the election laws, not determine the substantive constitutionality of ballot measures."

City of Memphis v. Shelby County Election Commission, et al. supra, at page 535.

Pursuant to the previous directions of this Court, a county election commission is only authorized to perform ministerial duties and is not authorized to perform quasi-judicial functions.

The county election commission may only perform duties given it by statute or by the Constitution. The legislature has passed statutes covering the extensive area of administrative law. The General Assembly enacted T.C.A. 4-5-101, et seq. as the Tennessee Administrative Procedures Act. This act sets forth specific powers of governmental agencies to conduct hearings and sets forth the appeal process for an aggrieved party as a result of such hearings. However, T.C.A. 4-5-102 defines a governmental "agency" as "a state board, committee, department, officer, or any other unit authorized or required by any statute or constitutional provision to make rules or to determine contested cases ..." T. C.A. 4-5-102(2). Local election commissions do not qualify as an "agency" under the definitions of the administrative procedures act because it is not "authorized or required by any statute or constitutional provision to make rules or to determine contested cases". The Roane County Election Commission did not have authority to act in the matter at hand and the legislative intent seems to be clear that the General Assembly never intended for a local election commission to have such power.

This Court has further held in the matter of *Hatcher v. Bell*, 521 S.W.2d 799 (1974) that it is ultimately this Court that determines constitutional provisions regarding the issue of judicial qualifications. This Court held that "the fundamental purpose in construing a constitutional provision is to ascertain and to give effect to the intent and purpose of those who have adopted it. And if the language used is clear and unambiguous, the meaning and intent of the provision is to be ascertained from the instrument itself by construing the language as it is written". *Hatcher v. Bell, supra* at page 803. Consequently, to interpret and decide constitutional questions should remain within the strict purview of the judicial branch. Any act of the Roane County Election

Commission, whether quasi-judicial or ministerial, should not be allowed to infringe upon the power of the judicial department.

There was an appeal to this Court involving similar issues to the case at bar wherein local officials (a city council) attempted to determine the merits of an election contest. However, this Court held in *Taylor v. Carr, Adams v. McDonald*, 125 Tenn. 235, 141 S.W.745, (1911) that the city council, which attempted to decide the issue, was not a judicial tribunal and as such the issues to be determined from the election contest rested with the judicial branch.

This Court addressed the issue of an administrative agency attempting to determine constitutional issues in the matter of *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446 (1995) wherein a dentist raised constitutional issues before the Board of Dentistry. This Court held that

“the general rule is that an administrative agency may not determine constitutional issues. An agency is not authorized to consider or question the constitutionality of a legislative act; nor may it declare unconstitutional the statute which it was created to administer or enforce. This recognition of the limited authority of agencies to resolve constitutional issues has been widely recognized.” *Richardson, v. Tennessee Board of Dentistry, supra*, page 452.

In the *Richardson* case, the Court goes on to point out “these limits on the authority of administrative agencies to resolve constitutional questions are based upon the fundamental constitutional principle of separation of powers.” *Richardson, v. Tennessee Board of Dentistry, supra*, at page 453.

3. Did the Court of Appeals err in holding that the plaintiff, although not a party to the petition seeking review pursuant to section 27-9-101, nevertheless qualifies as an aggrieved party for purposes of seeking review pursuant to section 27-9-101?

The Appellant asserts that he was not an aggrieved party as that term is contemplated by T.C.A. 27-9-101. The Appellant was not a party to the proceeding and did not attend the hearing. This Court, as the highest court in the state, sets forth the Tennessee Rules of Civil Procedure which must be followed in all Tennessee courts. This Court saw fit to include Rule 58 within the Tennessee Rules of Civil Procedure. The rule requires that each party shall receive a copy of the entered judgment. If a party does not receive a copy of the judgment and the party feels that he was prejudiced by not receiving a copy, then this Court provides relief under Rule 60 to such party. See *Tennessee Rules of Civil Procedure*, Rule 58 (3). The purpose of Rule 58 is to ensure that a party is aware of the existence of an appealable final judgment of a lawsuit in which he is involved. *Masters v. Richston*, 863 S.W.2d 702 (Tenn. App. 1992). The Appellant was not a party to the proceeding in the Roane County Election Commission and as such, was not mailed a copy of the ruling and/or judgment of the election commission. Therefore, Appellant was not a party to the action, aggrieved or otherwise.

The Roane County Election Commission held a hearing to determine a candidate's qualifications under the Tennessee Constitution. Appellant is not aware of an appeal process through the State Election Commission or the office of the Secretary of State's office. With no such process having been set forth, we are only assuming that the action of the election commission was a "final order or judgment".

At the time the election commission made the decision, there had not been an election. The Appellant would not have been “aggrieved” until after the election was held if at all. The Appellant had not lost any rights or interests at the time the decision of the election commission was made. Indeed, had the Appellant attempted to appeal the decision of the Election Commission by standing in the shoes of the citizen that filed the complaint in the Election Commission, Appellant would have undoubtedly been met by motions to dismiss his appeal on the grounds he was not an aggrieved party.

The Michigan Court of Appeals dealt with similar issues in the case of *Martin v. Secretary of State*, 760 N.W.2d 726 (2008), wherein a candidate for Circuit Court Judge missed the filing deadline to file his petition to run for the office with the requisite number of signatures. The local election commission refused to let the plaintiff put his name on the ballot because of the passing of the statutory deadline. The plaintiff sued the Michigan Secretary of State, the Director of Bureau of Elections, and the Board of State Canvassers asking for relief from the decision of the local election commission and to allow his name to be placed on the ballot. The incumbent Circuit Court Judges filed an intervening petition, attempting to intervene in the matter as aggrieved parties. Consequently, the Michigan Court conducted an analysis regarding the definition of “aggrieved party”. The Michigan Court surmised that the appellants (the incumbent judges) had an interest in the subject matter litigation because it would determine whether or not they would have an opponent in the November, 2008 election. But the Court held that “we are unwilling to conclude that as a matter of law that a candidate for an elective office is an aggrieved party solely by virtue of being required to run for office in a contested election.” *Martin v. Secretary of State*, *supra* at page 425.

The Court further concluded that “a party who is merely disappointed over a result is not an aggrieved party.” *Martin v. Tennessee Board of Dentistry, supra*, at page 426.

Michigan law requires that a person show a concrete and particularized injury before qualifying as an aggrieved party. The Court recognized the Appellants established a possibility of incurring significant expenses but they failed to show that it constituted a concrete and particularized injury. The Court further noted that “Appellants have not cited any case law from Michigan or another jurisdiction which a Court has held that being a candidate for election for public office renders an individual an aggrieved party. *Martin v. Tennessee Board of Dentistry, supra*, at page 427.

In the instant case, the Appellant herein did not suffer a legally cognizable injury simply because he was required to run as candidate in a contested election for Circuit Court Judge. The Appellant was not an aggrieved party at the time the election commission issued their ruling. Appellant was a candidate before, during and after the election commission made its ruling. Consequently, the Appellant was not entitled to relief pursuant to T.C.A. 27-9-101

4. Did the Court of Appeals err in holding that the plaintiff's failure to seek review of the county election commission's determination pursuant to section 27-9-101 now bars the plaintiff from filing an election contest pursuant to Tennessee Code Annotated section 2-17-101?

The Appellant asserts that nothing in T.C.A.27-9-102 should prevent him from filing an election contest pursuant to T.C.A. 2-17-101. The administrative record was limited to the record of the hearing before the Roane County Election Commission. The Appellant was not a party to the proceedings and did not participate. The citizen making the allegation had no access to discovery, no testimony under oath, had no subpoena power, or no other mechanism in which to secure the proof needed to prove his case. Appellant believed that the record upon appeal would not have been sufficient to prosecute the claim. In fact, Appellant could have possibly been subject to Rule 11 sanctions had he based his claim solely on an appeal of the record before the election commission. However, Appellant elected to file a lawsuit to contest the election. In that suit, the Appellant was able to secure the discovery needed to prosecute the action. The Appellant was able to discover proof that was not in the record before the Roane County Election Commission and was not accessible to the complainant before the election commission. For example, upon filing the underlying suit, the Appellant secured through discovery a document submitted by the Appellee to the Tennessee Supreme Court wherein he acknowledged and certified to this Court that he was not a resident of the Ninth Judicial District. The discovery conducted by Appellant also revealed other evidence such as documents that were submitted by Appellee to the election commission that were incomplete, and additional evidence that Appellee withheld documents that would indicate that he did not live in the district. Documents were discovered that showed the

Appellee received discounts on his insurance policy for the property he owned inside the district because he represented to the insurance company that he did not live in that house as his primary residence. The Appellant believes the proof he secured through discovery is significant. An administrative process before the election commission is not sufficient to properly address such claims.

This Court decided the case of *Reeves v. Olsen*, 691 S.W.2d 527 (Tenn. 1985), which arose from a dispute between a taxpayer and the Department of Revenue over the taxpayer's gift tax obligation. The taxpayer paid the tax under protest and sued the Department of Revenue in Chancery Court. The Department of Revenue moved the Trial Court to dismiss the case for lack of subject matter jurisdiction because the taxpayer did not exhaust her administrative remedies pursuant to T.C.A. 67-8-116. The Motion was denied. The Chancellor heard the case and entered judgment in favor of the Plaintiff taxpayer. T.C.A. 67-8-116 reads as follows:

Taxpayer's remedies. --- (a) If, in the determination of the existence of a deficiency, the commissioner appraises property at a value higher than that thought by the donor shall have a right to file with the commissioner, within thirty (30) days from the date of the receipt of the notice of deficiency, an appeal from such appraisal, addressed to a board composed of the governor, the treasurer, the secretary of state, the comptroller and the commissioner of revenue, which board shall have authority to consider the exceptions filed, hear proof and determine the valuations in dispute, and the findings by a majority vote of the board shall be conclusive as to all parties in interest, subject only to the constitutional right of review in the courts.

(b) Except as provided in subsection (a), the sole remedy of any person from whom the commissioner demands a tax claimed under the authority of this part shall be a payment of the tax under protest and a suit for the recovery thereof, which proceedings shall be in accordance with the provisions of part 9 of Chapter 1 of this title.

The Supreme Court reviewed this case and opined that “our reading of T.C.A. 67-8-116 in its entirety leads us to the conclusion that the legislature intended that an election exists between the administrative remedy and immediate resort to the Courts.” The Court concluded its opinion by affirming the Trial Court.

Appellant asserts that T.C.A 27-9-101 was not the only available remedy available to him, if it was available at all. The same reasoning from *Reeves* should be applied to this case and require the Trial Court to recognize that Appellate could elect to pursue an administrative remedy or immediately resort to the courts.

CONCLUSION

The Roane County Election Commission did not have authority to convene a hearing in response to a citizen's complaint to determine whether a candidate for the position of Circuit Court Judge met the qualifications of residency as set forth in Article VI, Section 4, of the Tennessee Constitution. The County Election Commission is an inherently political creature which is a direct extension and under the complete control of the legislative branch. If the Roane County Election Commission's action is allowed to stand, then it would be a direct violation of the separation of powers doctrine.

The case law as set forth by the Tennessee Supreme Court has stated time and time again that local election commission duties are completely and solely ministerial. Local election commissions may only perform actions that are authorized by statute. The statutes delineate only ministerial powers to local election commissions. The Roane County Election Commission did not have authority to perform a quasi-judicial act and any attempt on their part to do so would be outside of their grant of statutory authority.


The Appellant herein was not a party to the petition and did not participate in the hearing before the county election commission. The Appellant was not sent a copy of an appealable order by the county election commission. Furthermore, the Appellant was not aggrieved simply because he was a candidate in a contested election for Circuit Court Judge. The Appellant was a candidate before, during and after the hearing had by the county election commission. The decision rendered by the county election commission did not change the Appellant's status at the time the decision was rendered. Therefore, the Appellant was not an aggrieved party for purposes of seeking review

pursuant to T.C.A. 27-9-101, and was not entitled to relief therefrom.

The Appellant should not be barred from filing an election contest pursuant to T.C.A. 2-17-101 because he did not seek review of the county election commission's decision pursuant to T.C.A. 27-9-101. The Appellant, as a practicing attorney, was aware that the record before the county election commission would not be sufficient to meet his burden of proof which would prohibit him from filing such an appeal due to ethical considerations and Rule 11 of the Tennessee Rules of Civil Procedure. The Appellant was allowed to conduct discovery through his election contest cause of action which was not allowed in the citizen's dispute before the election commission. Appellant asserts that T.C.A. 2-17-101 gave him the absolute right to file the election contest matter.

Consequently, the Appellant urges the Court to reverse the decisions of the lower courts and allow him to proceed with his election contest suit.

Respectfully submitted,



Tom McFarland, BPR #14406

P.O. Box 12, 100 East Race Street

Kingston, Tennessee 37763

(865) 376-5344

ADDENDUM

Constitution of the State of Tennessee

Article II, Sections 1 and 2

Article VI, Section 4

part of the soil which is recognized to them by the aforesaid cession act; And provided also, that the limits and jurisdiction of this state shall extend to any other land and territory now acquired, or that may hereafter be acquired, by compact or agreement with other states, or otherwise, although such land and territory are not included within the boundaries herein before designated.

Section 32. That the erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for.

Section 33. That slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this state.

Section 34. The General Assembly shall make no law recognizing the right of property in man.

Section 35. To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:

Section 35a. The right to confer with the prosecution.

Section 35b. The right to be free from intimidation, harassment and abuse throughout the criminal justice system.

Section 35c. The right to be present at all proceedings where the defendant has the right to be present.

Section 35d. The right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.

Section 35e. The right to be informed of all proceedings, and of the release, transfer or escape of the accused or convicted person.

Section 35f. The right to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction or sentence.

Section 35g. The right to restitution from the offender.

Section 35h. The right to be informed of each of the rights established for victims.

The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

Article II.

Distribution of Powers.

Section 1. The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.

Section 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Legislative Department.

Section 3. The legislative authority of this state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people. Representatives shall hold office for two years and senators for four years from the day of the general election, except that the speaker of the Senate and the speaker of the House of Representatives each shall hold his office as speaker for two years or until his successor is elected and qualified provided however, that in the first general election after adoption of this amendment senators elected in districts designated by even numbers shall be elected for four years and those elected in districts



The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this state shall be subject to the performance of military duty, as may be prescribed by law.

Section 2. Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.

Section 3. Electors shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest or summons, during their attendance at elections and in going to and returning from them.

Section 4. In all elections to be made by the General Assembly, the members thereof shall vote viva voce, and their votes shall be entered on the journal. All other elections shall be by ballot.

Article V.

Impeachments.

Section 1. The House of Representatives shall have the sole power of impeachment.

Section 2. All impeachments shall be tried by the Senate. When sitting for that purpose the senators shall be upon oath or affirmation, and the chief justice of the Supreme Court, or if he be on trial, the senior associate judge, shall preside over them. No person shall be convicted without the concurrence of two-thirds of the senators sworn to try the officer impeached.

Section 3. The House of Representatives shall elect from their own body three members, whose duty it shall be to prosecute impeachments. No impeachment shall be tried until the Legislature shall have adjourned sine die, when the Senate shall proceed to try such impeachment.

Section 4. The governor, judges of the Supreme Court, judges of the inferior courts, chancellors, attorneys for the state, treasurer, comptroller, and secretary of state, shall be liable to impeachment, whenever they may, in the opinion of the House of Representatives, commit any crime in their official capacity which may require disqualification but judgment shall only extend to removal from office, and disqualification to fill any office thereafter. The party shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law. The Legislature now has, and shall continue to have, power to relieve from the penalties imposed, any person disqualified from holding office by the judgment of a Court of Impeachment.

Section 5. Justices of the peace, and other civil officers not herein before mentioned, for crimes or misdemeanors in office, shall be liable to indictment in such courts as the Legislature may direct; and upon conviction, shall be removed from office by said court, as if found guilty on impeachment; and shall be subject to such other punishment as may be prescribed by law.

Article VI.

Judicial Department.

Section 1. The judicial power of this state shall be vested in one Supreme Court and in such Circuit, Chancery and other Inferior Courts as the Legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.

Section 2. The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the state. The judges shall designate one of their own number who shall preside as chief justice. The concurrence of three of the judges shall in every case be necessary to a decision. The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. Said court shall be held at Knoxville, Nashville and Jackson.

Section 3. The judges of the Supreme Court shall be elected by the qualified voters of the state. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every judge of the Supreme Court shall be thirty five years of age, and shall before his election have been a resident of the state for five years. His term of service shall be eight years.

Section 4. The Judges of the Circuit and Chancery Courts, and of other Inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every judge of such courts shall be thirty years of age, and shall before his election, have been a resident of the state for five years, and of the circuit or district one year. His term of service shall be eight years.

Section 5. An attorney general and reporter for the state, shall be appointed by the judges of the Supreme Court and shall hold his office for a term of eight years. An attorney for the state for any circuit or district, for which a judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the state five years, and of the circuit or district one year. In all cases where the attorney for any district fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney pro tempore.

Section 6. Judges and attorneys for the state may be removed from office by a concurrent vote of both Houses of the General Assembly, each House voting separately; but two-thirds of the members to which each House may be entitled must concur in such vote. The vote shall be determined by ayes and noes, and the names of the members voting for or against the judge or attorney for the state together with the cause or causes of removal, shall be entered on the journals of each House respectively. The judge or attorney for the state, against whom the Legislature may be about to proceed, shall receive notice thereof accompanied with a copy of the causes alleged for his removal, at least ten days before the day on which either House of the General Assembly shall act thereupon.

Section 7. The judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any other office of trust or profit under this state or the United States.

Section 8. The jurisdiction of the Circuit, Chancery and other Inferior Courts, shall be as now established by law, until changed by the Legislature.

Section 9. The judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

Section 10. The judges or justices of the Inferior Courts of Law and Equity, shall have power in all civil cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Section 11. No judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document has been served upon all counsel of interest in this case, by United States First Class Mail, with adequate postage thereon to carry it to its destination on this the 22nd day of April, 2016.



Thomas McFarland, Appellant